Rulings

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July–December 1985

1986

STATE ETHICS

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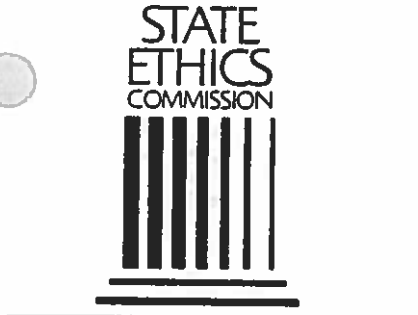

Room 619
One Ashburton Place
Boston, MA 02108
(617) 727-0060

Published by The Massachusetts State Ethics Commission

Included are:

1. Summaries of Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued July 1985 to December 1985.

2. Summaries of all Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1986.

Summaries of 1986 Enforcement Actions

In the Matter of John J. Hanlon, Louis H. Sakin, Raymond Sestini
(February 7, 1986)

The State Ethics Commission fined three Department of Public Safety employees between $250 and $500 each for playing substantial roles in the testing and demonstration of a LoJack anti-theft device being considered for purchase by the state while owning Lo-Jack stock at the same time.

The Commission found these employees to have violated Section 6 of the conflict of interest law, which prohibits a state employee from participating in a particular matter in which he has a financial interest.

The three individuals who admitted violating the conflict law in Disposition Agreements with the Commission are:

* State Police Captain John J. Hanlon, the liaison between the State Police and Lo-Jack, oversaw all aspects of the Department of Public Safety's role in the demonstration of the Lo-Jack device. Fined $500.

* Louis Sakin, the executive director of the state's Criminal History Systems Board, was the liaison for this agency for the demonstration project. Fined $250.

* Raymond Sestini, a civilian communications coordinator assigned to the State Police, met with Lo-Jack officials to discuss and resolve technical issues involving the installation of the anti-theft system while owning Lo-Jack stock. Fined $250.

According to the Disposition Agreements signed by these individuals in February, the Commission did not have any evidence that the ownership of the Lo-Jack stock adversely affected the performance of their state jobs. In addition, all three demonstrated some sensitivity to the conflict law by either disclosing their stock ownership to their appointing authority (the Executive Director of Public Safety) or by receiving, directly or indirectly, legal advice that the stock ownership did not present a problem. The Commission took these mitigating factors into account in levying relatively small fines. A $2,000 fine could have been imposed for each violation.

In the Matter of Donald Hatch
(February 20, 1986)

Donald Hatch, of West Springfield, an inspector for the Department of Public Utilities, was fined $2,000 by th Ethics Commission for violating Section 6 of the conflic of interest law.

In a signed Disposition Agreement, Hatch admitted h violated the law by participating in six official DPU in spections of a Holyoke bus company at the same time h had a private business arrangement with the compan to conduct bus inspections.

Section 6 of the conflict law prohibits a state employe from participating in a matter in which, to his knowl edge, a business organization by which he is employed has a financial interest.

In the Matter of Mary V. Kurkjian
(March 26, 1986)

Mary V. Kurkjian, former Deputy Director with the Divi sion of Employment Security (DES), violated the conflic of interest law by participating in state contract negotia tions with a company, while, at the same time, discussing future employment with the company.

Kurkjian, in a signed Disposition Agreement, agreed to pay a civil fine of $1,000 for violating Section 6 of the conflict of interest law which prohibits a state employee from participating in a particular matter in which to her knowledge a business organization with which she is negotiating or has a prospective arrangement for employment has a financial interest.

In the Matter of Ralph Antonelli
(April 29, 1986)

The State Ethics Commission fined a former Depart ment of Revenue (DOR) official $500 for representing a taxpayer before DOR on a matter in which he had participated as a state worker.

Ralph Antonelli of Somerville, while employed by DOR, approved a payment agreement with a Hyannis-based company which was delinquent in paying state taxes. After he left the state, Antonelli assisted the same company in its negotiations with DOR to prevent a seizure. (The company failed to meet the terms of the payment schedule Antonelli had approved.)

In a signed Disposition Agreement with the Commission, Anotonelli admitted to having violated Section 5 of the conflict of interest law which regulates what state employees may do after they leave state government. In part, Section 5 bars a person who worked on a matter while a state employee from ever working on that same matter for a private party when he leaves state service, whether or not he is compensated.

In the Matter of George W. Ripley, Jr.
(April 30, 1986)

George W. Ripley, Jr., former Commissioner of the Department of Labor and Industries (DLI), was fined $2,000 for hiring his two daughters in violation of the conflict of interest law.

Ripley, in a Disposition Agreement signed with the Commission, admitted to having violated Section 6 of the conflict law which prohibits a state employee from participating in the hiring, promotion, performance review or salary recommendation of an immediate family member.

In the Matter of Robert J. Quinn
(May 6, 1986)

In a Decision and Order, the State Ethics Commission ruled that a full-time state employee may not serve as a bail commissioner.

The Commission decision involved Robert Quinn of Norwood, acting comptroller for the Massachusetts Water Resources Authority, who served as bail commissioner in Norfolk County.

In its decision, the Commission stated that setting bail in exchange for fees constitutes a contract with the state under the conflict law. This is so, the Commission stated, despite the fact that the bail commissioner's compensation comes from the person whose bail is being determined by the bail commissioner, rather than directly from the Court. Section 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency.

Both Quinn, individually, and the Bail Committee of the Superior Court, have filed appeals of the Commission's decision. The Bail Committee's appeal has been reported to the Massachusetts Appeals Court. (As this publication went to press the case had not yet been heard.)

In the Matter of Frederick B. Cronin, Jr.
(August 27, 1986)

The Commission issued a Public Enforcement Letter concluding that Frederick B. Cronin, Lynn city tax collector, violated the conflict law by hiring his brother as his assistant.

Section 19 of the conflict law prohibits a municipal employee from participating in a particular matter which affects an immediate family member's financial interest.

Because Cronin did receive informal permission from the city council and the mayor to hire his brother, the Commission did not levy a fine in this case.

In the Matters of Carl D. Pitaro, Francis M. Magliano, and James C. Mihos
(October 29, 1986)

In separate Disposition Agreements with the Commission, Brockton Mayor Carl Pitaro, Brockton Building Superintendent Francis Magliano and private Brockton resident James Mihos admitted to violating the "gift" prohibition of the conflict of interest law.

The officials violated Section 3 of the conflict law by accepting a weekend trip to Florida paid for by Mihos and a developer. The officials had taken the trip, with their wives, to look at hotel projects built by a company which was proposing a project for Brockton.

Section 3 of the conflict law prohibits public officials from accepting gifts of substantial value (over $50) from anyone with whom they have official dealings. It is also illegal for anyone to offer or give such a gift.

Pitaro, Magliano and Mihos each paid a $1,000 civil penalty for the violations. In addition, the city officials paid $668 each (the cost of the Florida trip) as forfeiture of the economic advantage gained.

In the Matter of Erland S. Townsend, Jr.
(November 13, 1986)

In a Disposition Agreement with the Commission, former Conservation Commissioner Erland Townsend admitted to having violated Section 17 of the conflict of interest law by representing a development company before various town boards, including his own.

The conflict law prohibits municipal employees from acting as agent or attorney for a private party in relation to a particular matter in which the town has a direct and substantial interest.

Townsend was fined $1,000 for this violation.

In the Matter of Eugene LeBlanc
(December 30, 1986)

The Commission issued a Public Enforcement Letter concluding that Eugene LeBlanc, Nahant Building Inspector may have violated the conflict law by issuing permits for and inspecting the work of the construction company he owns and operates.

Section 19 prohibits a municipal employee from participating in a particular matter which affects his own financial interest.

Because the board of selectmen was aware at all times that LeBlanc was issuing permits for and inspecting work done by his construction company, the Commission did not levy a fine in this case.

In the Matter of Thomas Newcomb
(July 16, 1985)

Thomas Newcomb, the former director of security at the Hynes Auditorium and a Boston Police officer assigned to the Hynes, violated Section 4 of the conflict of interest law by having his state salary supplemented by the Boston Police Department.

In a Decision and Order the Commission concluded that Newcomb violated Section 4 by receiving compensation for the work he performed as director of security (a state position) from the Boston Police Department; the Commission ordered Newcomb to pay a $1,000 civil penalty.

Section 4 prohibits a state employee from receiving compensation from anyone other than the commonwealth in connection with a particular matter of direct and substantial interest to the state.

In the Matter of William A. Burke, Jr.
(October 15, 1985)

William A. Burke, Jr., a former member of the Massachusetts Public Health Council, violated Section 3 of the conflict of interest law. In a Decision and Order the Commission assessed a $1,000 civil penalty.

Section 3(b) prohibits a public official from soliciting for himself anything of substantial value from a private party for or because of official acts performed or to be performed by him.

Burke, who in his private capacity was working as a paid consultant selling life insurance to hospitals, received access to the chief executive officer of a hospital while that hospital had matters pending before the Health Council. As Burke needed to make additional contacts to keep his consulting job, the meeting was of substantial value to him.

Included are:

1. Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued July 1985 to December 1985, page 246.

2. All Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1986, page 253.

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

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

TABLE OF CASES

(By Subject or Respondent from 1979 through 1986)

1985 TABLE OF CASES

(By Subject or Respondent)

*Cases are listed consecutively from 1979. Cases from 1979-1984 appear in prior volumes.

1986 TABLE OF CASES

(By Subject or Respondent)

*Cases are listed consecutively from 1979. Cases from 1979-1985 appear in prior volumes.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 281

IN THE MATTER
OF
THOMAS NEWCOMB

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

Lawrence J. Ball, Esq.:
Counsel for Respondent Thomas Newcomb

Commissioners:
Diver, Ch., Brickman, Burns, Sweeney

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner initiated these adjudicatory proceedings on February 25, 1985 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 Respondent, Thomas Newcomb, director of security for the Massachusetts Convention Center Authority (MCCA) and Boston Police officer assigned to the MCCA, had violated G.L. c. 268A, §4(a)[1]/ by receiving compensation as a state employee from the Boston Police Department (BPD) in connection with decisions and determinations regarding security at the Hynes Auditorium.

The Respondent's answers denied the material allegations and raised certain affirmative defenses asserting the Commission's lack of jurisdiction over the MCCA and the protection of a "grandfather clause" contained in the MCCA's enabling legislation. St. 1982, c. 190, §38D.

An adjudicatory hearing was held on May 7 and 8, 1985 before Commissioner Frances Burns, a duly designated presiding officer. See G.L. c. 268B, §4(c). The parties filed post-hearing briefs and presented oral argument before the Commission on June 18, 1985. In rendering this Decision and Order, the Commission has considered the testimony, evidence and arguments of the parties.

II. FINDINGS OF FACTS

1. The Respondent, Thomas Newcomb was at all times relevant to the violations alleged in the Order to Show Cause, employed by the MCCA as director of security at the Hynes Auditorium.

2. Mr. Newcomb worked weekdays from 7 a.m. to 3 p.m. as director of security.

3. Mr. Newcomb worked nights and weekends as director of security prior to his suspension from the MCCA payroll.

4. Mr. Newcomb has been employed by the BPD since 1960.

5. Mr. Newcomb receives $25,000.00 as a BPD officer.

6. Prior to January, 1982, Mr. Newcomb was assigned by the BPD to Boston City Hall.

7. In December, 1981, then Mayor Kevin H. White requested that the City Auditorium Commission appoint Mr. Newcomb director of security for the Hynes Auditorium.

8. The Auditorium Commission voted that Mr. Newcomb be appointed director of security at the Hynes Auditorium at a sum of $8,000.00 a year, subject to the approval of the City Law Department.

9. The corporation counsel approved the $8,000.00 compensation strictly from the viewpoint that the amount of compensation was not excessive.

10. During 1982, the state legislature created the MCCA, St. 1982, c. 190. The statute provided for the conveyance of the Hynes Auditorium and the Boston Common Garage to the MCCA, and further provided that all employees holding full-time, permanent positions at those two facilities would become employees of the MCCA "without impairment of their civil service status, seniority, retirement and other rights. . . provided that nothing in this section shall be construed to confer upon any employee any rights not held prior to the transfer."

11. In January, 1983, Mr. Newcomb became director of security for the MCCA and received $8,000.00 per year for that employment.

12. Mr. Newcomb continued to be paid $25,000.00 by the BPD for his assignment at the Hynes Auditorium.

13. In April, 1983, at the direction of the deputy director of the MCCA, Mr. Newcomb sought an advisory opinion from the Commission concerning whether or not his continued assignment by the BPD to MCCA while also being employed as director of security by the MCCA violated G.L. c. 268A.

14. The Commission issued an advisory opinion, EC-COI-83-108[2]/ to Mr. Newcomb regarding his dual employment on July 19, 1983. The opinion stated that Mr. Newcomb's compensation by BPD for his services during his assignment to the Hynes Auditorium, while he was employed by the MCCA at the same site, violated §4 of G.L. c. 268A.

15. Mr. Newcomb received notice of the advisory opinion in November, 1983, but continued to accept compensation from both the MCCA and the BPD until suspended by the MCCA.

16. Mr. Newcomb was suspended on February 21, 1984 from the MCCA payroll. Following his suspension Mr. Newcomb continued to work at the MCCA from 7 to 3, but no longer agreed to work nights and weekends.

III. DECISION

For the reasons stated below, the Commission concludes that Mr. Newcomb, in his capacity as a state employee, is in violation of G.L. c. 268A, §4(a) by receiving compensation from the Boston Police Department in relation to particular matters in which the state is a party and has a direct and substantial interest.

A. The MCCA as a state agency

Mr. Newcomb contended that the MCCA is an independent authority which is not subject to the jurisdiction of G.L. c. 268A. The MCCA's enabling legislation, St. 1982, c. 190, §33 provides

> 'There is hereby established and placed in the executive office for administration and finance a body politic and corporate to be known as the Massachusetts Convention Center Authority, which shall not be subject to the supervision or control of the executive office for administration and finance or any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act." (emphasis added)

Thus Mr. Newcomb argues that the enabling statute exempts the MCCA from supervision or control by the State Ethics Commission.

The MCCA, however, was established in 1982 as an independent state authority and a public instrumentality. See c. 190, §33. For the purposes of G.L. c. 268A, "state agency" is defined as

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

The Commission has issued several advisory opinions to members of the MCCA, and has consistently considered the MCCA to be a state agency. See EC-COI-82-150; 83-19. In its enforcement of the conflict of interest law, the Commission is not exercising supervision or control over the MCCA but is merely enforcing the conflict of interest law with regard to the activities of public employees. The language of chapter 190, §33 clearly establishes the MCCA as an "independent state authority" and as such, it is within the aforementioned definition of state agency.

B. The "grandfather clause" in St. 1982, c. 190, §38D, as a bar to enforcement of G.L. c. 268A, §4(a)

The MCCA's enabling legislation provides that all employees at the Hynes Auditorium would become employees of the MCCA "without impairment of their civil service status, seniority, retirement and other rights . . . providing, however, that nothing in this section shall be construed to confer upon any employee any rights not held prior to the transfer." St. 1980, c. 190, §38D. Mr. Newcomb maintains that since he was receiving two salaries prior to the transfer of the Hynes Auditorium to the MCCA, §38D permits him to continue the dual compensation arrangement.

In its Advisory Opinion addressed to Mr. Newcomb, however, the Commission held that Mr. Newcomb's dual compensation was in violation of §20 prior to the MCCA takeover in 1983, and that the transfer of the Hynes Auditorium to the MCCA could not create a job right which he did not previously have. Since no right to that dual compensation arrangement existed prior to the creation of the MCCA, in other words, and the enabling statute specifically precludes conferring "any rights not held prior to the transfer," St. 1982, c. 190, §38D does not bar the enforcement of §4 against Mr. Newcomb.

Mr. Newcomb further claims as a defense under §38D of chapter 190 that he has received prior approval from the City of Boston corporation counsel before accepting the director of security position at the MCCA, and therefore any violation of §4 was not a knowing violation. The evidence shows, however, that the corporation counsel approved that arrangement strictly from the viewpoint of compensation, i.e., that the total amount of compensation was not excessive, and his memorandum fails to consider the dual compensation with regard to G.L. c. 268A. Furthermore, Mr. Newcomb's status has changed since the corporation counsel's opinion was issued because he is now considered a state employee as director of security, and as a state employee, he cannot use a corporation counsel's opinion, regarding municipal employment as a defense to his receipt of compensation from someone other than the state.[3/]

C. The Section 4 Violation

Mr. Newcomb was a state employee[4/] as director of security at the MCCA and received $8,000.00 in yearly compensation from the MCCA. Mr. Newcomb also received $25,000.00 annual salary from the BPD, and the factual issue in this matter is whether the BPD salary constituted compensation from someone other than the commonwealth in relation to particular matters in which the state was a party or had a direct and substantial interest.

Prior to January of 1982, Mr. Newcomb was a Boston police officer assigned to the Hynes Auditorium as director of security. He received $8,000.00 in annual compensation from the Auditorium Commission in addition to his regular BPD salary. Following the takeover of the Hynes Auditorium by the MCCA, Mr. Newcomb

became a state employee as director of security. There is no evidence that his assignment by the BPD was changed. Rather the evidence in the record demonstrates that Mr. Newcomb's compensation from the BPD was for his performance of duties as director of security at the Hynes Auditorium. When Mr. Newcomb was suspended on February 21, 1984 from the MCCA payroll, he continued to report to the Hynes Auditorium from 7 to 3 as director of security. Mr. Newcomb's responsibilities remained the same after his suspension, except that he no longer agreed to work nights and weekends. Therefore, the logical and uncontested inference to be drawn is that Mr. Newcomb's 7 to 3 workday at the Hynes Auditorium constituted his assignment by the BPD.

The Commission has held that the supplementation of a state employee's salary by a non-state party violated §4(a). In the Commission Compliance Letter, **Department of Mental Health 1981** State Ethics Commission 50, the Commission addressed an issue of employees who were receiving additional compensation from non-state parties for services which were a part of their state duties. The Commission stated that since the duties of the individuals involved particular matters in which the state was a party or had a direct and substantial interest, such salary supplementation violated §4(a).

The petitioner presented through exhibits and testimony facts to substantiate that Mr. Newcomb's state employee salary was supplemented by the BPD. Testimony indicated that in the course of Mr. Newcomb's duties, he made decisions and determinations as to the nature of security at the Hynes Auditorium. On two occasions he performed internal investigations of crimes committed in the Auditorium. He acted as the Hynes Auditorium liaison with the BPD in arranging BPD details hired for MCCA special events. Therefore, as a state employee, Mr. Newcomb received compensation from the BPD in relation to these particular matters that the MCCA, a state agency, had a direct and substantial interest.

IV. CONCLUSION AND ORDER

Mr. Newcomb was directed to request an advisory opinion by the deputy director of the MCCA in the spring of 1983. The Commission issued its opinion on July 19, 1983 indicating that his continued assignment by the BPD to the MCCA while he was director of security at the MCCA was in violation of G.L. c. 268A, §4(a). Mr. Newcomb had notice of the advisory opinion in November, 1983. Mr. Newcomb ignored the advisory opinion and continued to receive his BPD salary in relation to services performed for the state. The argument that Mr. Newcomb sought legal advice does not mitigate his lack of compliance with the Commission's advisory opinion.

Based upon the foregoing, the Commission concludes that Thomas Newcomb violated G.L. c. 268A, §4(a) by receiving compensation as a state employee from the Boston Police Department in relation to particular matters in which the state has a direct and substantial interest.

Pursuant to its authority under G.L. c. 268B, §4(d) the Commission orders Thomas Newcomb to:

1. Cease and desist from violating §4(a) by discontinuing his receipt of compensation from the Boston Police Department in relation to services he performs for the state; and
2. pay one thousand dollars ($1,000.00) to the Commission as a civil penalty for violating G.L. c. 268A, §4(a) within thirty (30) days of receipt of this Decision and Order.

DATE: July 16, 1985

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

[2]This citation refers to a prior Commission conflict of interest opinion including the year it was issued and its identifying number. Copies of these and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[3]There is nothing in the record to indicate that Mr. Newcomb knew about the corporation counsel's memorandum, which was actually issued to the chairman of the Auditorium Commission, before this Commission adjudication commenced.

[4]Newcomb claims that he was a special state employee at the MCCA. He did not present any evidence in the record to prove this claim. Assuming he did hold the status of special state employee, §4(a)(¶7) would preclude him from receiving compensation from the BPD because he would be receiving compensation from a non-state party on a particular matter pending in his state agency

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 282

IN THE MATTER
OF
WILLIAM A. BURKE, JR.

Appearances:

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

Edward F.McDermott, Esq.:
Counsel for Respondent William A.Burke Jr.

Commissioners:

Diver, Ch., Brickman, Burns, Sweeney

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner initiated these adjudicatory proceedings on March 26, 1985 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, William A.Burke, Jr., a Public Health Council (Council) member, had violated G.L. c. 268A, §3(b),[1]/ §23(¶2)(2)[2]/ and §23(¶2)(3)[3]/ in pursuing his duties as a consultant for J. Peter Lyons, Inc. (the Lyons Company). Specifically, Mr. Burke was alleged to have violated §3(b) in six instances by soliciting or receiving something of substantial value ("entree into the executive offices and the time and attention these [hospital] chief executives devoted to listening to information about an insurance package") from Brockton Hospital, Cardinal Cushing Hospital, Melrose-Wakefield Hospital, Salem Hospital, South Shore Hospital, and University Hospital for or because of official acts performed or to be performed by him as a member of the Council. The eleven §23(¶2)(2) allegations were premised on Mr.Burke's alleged use or attempted use of his official position to secure an unwarranted privilege for the Lyons Company, namely "a personal meeting with the hospital official," with respect to eleven separate hospitals.[4]/ The Order also alleged that Mr.Burke violated §23(¶2)(3) by using his position as a member of the Council in contacting executive officers of twenty-seven hospitals in the commonwealth to promote a life insurance program on behalf of a company for which he was a paid consultant, during the time that all but one of these hospitals had important matters pending before the Council.[5]/

Mr.Burke filed an answer in which he admitted that he had served as a Council member and as a paid consultant for the J.Peter Lyons company during the period in question, and that he had met with several officers of various hospitals during the period of his consultant arrangement. Mr.Burke also admitted in his answer that he became involved in promoting the Company's supplemental life insurance program. Mr.Burke denied all other material allegations contained in the Order.

Prior to the commencement of the hearings, the Respondent moved for Decision on the Pleadings or in the alternative for Summary Decision. The motion was denied by Commission Chairman Colin Diver,[6]/ who was designated as the Presiding Officer. See G.L. c. 268B, §4(c).

Adjudicatory hearings were held on June 11 and 12, July 17 and August 16, 1985. The parties thereafter filed posthearing briefs and presented oral arguments before the Commission on September 11, 1985. In rendering this Decision and Order, each participating member of the Commission has considered the testimony, evidence and arguments of the parties.

II. FINDINGS OF FACT

1. The Respondent William A.Burke, Jr.was, at all times relevant to the violations alleged in the Order to Show Cause, a member of the Council.

2. The Council is responsible for the review and final approval of all hospital determination of need applications (DONs) required by law for substantial capital expenditures, acquisitions of equipment and changes in services by the hospitals in the commonwealth.

3. Mr.Burke provided consultant services for the Lyons Company from January 1983 to October 1984 at a rate of $4,000 a month.

4. Mr. Lyons hired Mr. Burke as a consultant to introduce him to people and businesses in need of the financial services which the Lyons Company could provide. Between January 1983 and October 1984, Mr. Burke introduced him to fifteen or twenty companies, excluding hospital introductions. Mr. Burke also engaged in venture capital work and the analysis of the financial needs of companies and businesses which were of interest to the Lyons Company.

5. In June or July of 1983, Mr. Lyons decided to pursue a supplemental life payroll deduction program with hospitals. Mr. Lyons asked Mr. Burke to become involved because he knew (1) Mr. Burke was on the Council, (2) Mr. Burke was personally acquainted with a number of hospital administrators and (3) Mr. Burke would know people in hospitals such as St.Elizabeth's due to his involvement in the Catholic Church in Boston. Mr. Burke initially questioned the propriety of working in the hospital field, but was given assurances by the enrolling agent for the Lyons Company that it would be no problem.

The six hospitals listed in the §3 allegations

6. Mr. Burke placed a call to the chief executive officer (CEO) of each of the six hospitals on the following dates:

South Shore Hospital	— sometime in January or February of 1984
University Hospital	— sometime between February 28, 1984 and March 12, 1984
Brockton Hospital	— sometime in July of 1984
Cardinal Cushing Hospital	— July 19, 1984
Salem Hospital	— August 20, 1984[7]/
Melrose-Wakefield Hospital	— during the week of September 10, 1984

7. Each of the six hospitals had a DON pending before the Council at the time Mr. Burke made contact. The documentary evidence as well as the testimony of individual hospital CEOs in the record indicates that the DON process is a difficult and often lengthy process, which can become quite costly to the hospitals. Substan-

tial capital outlays depend on the approval of a hospital's DON. In particular, MelroseWakefield Hospital's DON, which was filed in January 1983 and was still pending as of October 1984, involved the new construction and renovation of an ancillary services building and a parking garage for a proposed capital cost of $25,875,000. Salem Hospital's DON, filed in September 1983 and still pending as of October 1984, involved general expansion and renovation as well as the expansion of radiation therapy, for a proposed capital cost of $21,900,000.

8. In his call to five of the hospitals, including Melrose-Wakefield Hospital and Salem Hospital, Mr. Burke identified himself as a Council member.

9. In the calls to both Melrose-Wakefield Hospital and Salem Hospital, Mr. Burke stated at the outset that he was calling with regard to something other than the hospital's pending DON.

10. Five of the hospital CEOs, including the CEO of Melrose-Wakefield Hospital, agreed to meet with Mr. Burke.

11. Five of the hospital CEOs, including the CEOs of Melrose-Wakefield Hospital and Salem Hospital, stated that they would not normally meet with an individual selling insurance and that such a call would be transferred to the personnel or benefits director of the hospital.

12. Mr. Burke attended meetings with the CEOs of four hospitals on the following dates:

South Shore Hospital	— February 10, 1984
University Hospital	— March 12, 1984
Brockton Hospital	— August 1, 1984
Cardinal Cushing Hospital	— August 1, 1984

Joanne Costello, a Lyons Company representative, gave the presentation on the insurance package at these meetings. As to the two remaining hospitals, (1) all three appointments with the CEO of Melrose-Wakefield Hospital, scheduled for September 20, 1984, September 28, 1984 and October 12, 1984, were cancelled by Mr. Burke and (2) the CEO of Salem Hospital never agreed to meet with Mr. Burke.

13. As of August 1984, Mr. Burke was making two to three introductions a month. This number was unsatisfactory to Mr. Lyons, who expected eight to ten introductions per consultant per month.

14. Mr. Lyons communicated his dissatisfaction to Mr. Burke in early September 1984,[8/] informing Mr. Burke that he did not see the consultant status as continuing because it was not leading anywhere.

15. In response to Mr. Lyons' request for a status report from him, Mr. Burke submitted a memorandum dated September 14, 1984 listing six hospital cases he had opened that week, including Melrose-Wakefield Hospital, and one hospital case he had closed.

16. In late September or early October 1984, Mr. Lyons and Mr. Burke had another discussion concerning the fact that the consultant relationship was not working, and Mr. Burke indicated that someone was questioning what he was doing in connection with the hospitals. Mr. Lyons stated that he was willing to keep Mr. Burke on to make nonhospital contacts.

17. By mutual agreement, Mr. Burke's consultant relationship was terminated in October of 1984.

III. DECISION

For the reasons stated below, the Commission concludes that Mr. Burke violated G.L. c. 268A, §3(b) with respect to one of the six hospitals, namely Melrose-Wakefield Hospital.

A. Section 3

Section 3(b) prohibits a public employee from soliciting or receiving anything of substantial value for himself for or because of an official act performed or to be performed by him. Its counterpart, §3(a), prohibits anyone from offering or giving anything of substantial value to a public employee for or because of any official act performed or to be performed by such an employee. Unlike §2, which is the bribery section of the conflict law, §3 does not require a showing of corrupt intent. See, e.g. **Commonwealth v. Dutney**, 4 Mass. App. 363 (1976). Rather, the basis for a §3 violation is the existence of a nexus between the employee's public duties and the motivation behind the solicitation, offer or receipt of something of substantial value. **In the Matter of George Michael**, 1981 Ethics Commission 59, 68. If such a connection exists, even in the absence of a corrupt intent, there remains a tendency to provide conscious or unconscious preferential treatment to the giver of something of value by the recipient. Section 3, like its federal counterpart 18 U.S.C. §201(f) and (g), constitutes a legislative effort to eliminate the temptation inherent in such a situation. See **United States v. Evans**, 572 F.2d 455, **rehearing denied** 576 F.2d 931 (5th Cir.), **cert denied**, 439 U.S.870 (1978).

The actual performance of some identifiable official act as quid pro quo is not necessary for a violation of §3. See Commission Advisory No.8; accord, **United States v. Evans, supra** [addressing §3's federal counterpart 18 U.S.C. §201 (f) and (g)]. To require such a quid pro quo would subject public employees to a host of temptations which would undermine the impartial performance of their duties. As the Commission stated **In the Matter of George Michael, supra** at 68:

> Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. If public credibility in govern-

ment institutions is to be fostered, constraints which are conducive to reasoned, impartial performance of public functions are necessary, and it is in this context that Section 3 operates.

B. Elements of a §3(b) violation

The three elements necessary to establish a §3(b) violation on Mr. Burke's part are that he:[9]/

1. solicited or received something of substantial value
2. for himself
3. for or because of an official act performed or to be performed by him.

1. Solicitation or receipt of something of substantial value

The term "substantial value" is not defined in the conflict of interest statute. The vast majority of cases the Commission has decided containing alleged §3 violations have involved items of tangible value, such as cash discounts (**In the Matter of George A.Michael**, 1981 Ethics Commission 59), private loans (**In the Matter of Rocco J. Antonelli, Sr.**, 1982 Ethics Commission 101), and cash payments (**In the Matter of Frank Wallen and John Cardelli**, 1984 Ethics Commission 197). However, the Commission has also held that the scope of §3 includes items which lack an immediately ascertainable cash value but which nonetheless possess substantial prospective worth and utility value. See, e.g. EC-COI-83-70 and 81-136 (both cases held that unpaid faculty appointments constituted something of substantial value which could not be accepted by state employees). In its decisions and orders and disposition agreements in cases alleging violations of §3, the Commission has recognized that "substantial value" is a standard "to be dealt with by judicial interpretation in relation to the facts of the particular case and [is] more desirable than the imposition of a fixed valuation formula." See e.g., **In the Matter of Rocco J. Antonelli, Sr.**, 1982 Ethics Commission 101, 109 n. 19 **citing** 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.

In the Order to Show Cause, the Petitioner characterized the "entree into the executive offices and the time and attention these [hospital] chief executives devoted to listening to information about the substance package" as having substantial value. The CEOs in five of the six hospitals listed in the §3 allegations testified that they would not normally meet with an individual selling insurance, that such a call would be transferred to the personnel or benefits director of the hospital. Based on this testimony of the hospital CEOs regarding the standard operating procedure, the Commission finds that the access Mr. Burke obtained by virtue of his Council membership to the limited time of the CEOs for his company's presentation of its insurance package was of substantial value in this case. First, it enabled the Lyons Company to bypass competition with other insurance agents before subordinate hospital personnel. The logical inference to be drawn is that the opportunity afforded to the Lyons Company to make its insurance presentation directly to a hospital CEO greatly enhanced the chance of a sale. Second, based on Mr. Lyons' testimony,[10]/ each contact Mr. Burke made was worth approximately $400 to the Lyons Company. Mr. Lyons testified that (1) he hired Mr. Burke primarily to make introductions, (2) he paid Mr. Burke $4,000/month as a consultant and (3) he would consider eight to ten introductions per month to be satisfactory. On a strict calculation basis, that would equal approximately $400 per introduction, well above the $50 benchmark the court established as constituting "substantial value" in **Commonwealth v. Famigletti**, 4 Mass.App.584, 587 (1976).[11]/ Under these facts, the Commission concludes that the access to hospital CEOs which Mr. Burke solicited was of substantial value.[12]/

2. For himself

The issue here is whether Mr. Burke's solicitation of something of substantial value was for himself or merely for the Lyons Company. The evidence established that Mr. Burke's sole compensation from the Lyons Company was his $4,000/month consultant fee: i.e., he would not receive any commission for the consummation of an insurance contract with a hospital. The question, then, focuses on the connection between the access to hospital CEOs Mr. Burke solicited and his retention as a $4,000/month consultant.

The record is clear that by September 1984, Mr. Burke was under pressure to make more contacts in order to retain his position. There is no evidence in the record of Mr. Burke's involvement in business acquisition/entreprenurial projects or non-hospital contacts made during September of that year. On the contrary, all seven contacts Mr. Burke reported in his September 14, 1984 status report to Mr. Lyons were hospitals. While Mr. Lyons testified that he would have kept Mr. Burke on as a consultant making solely non-hospital contacts, Mr. Burke chose to trade on his Council membership to gain access to hospital CEOs to make sufficient contacts during this period to reduce the risk of losing his consultant arrangement. The contact with the CEO of Melrose-Wakefield Hospital, listed as one of the seven hospital contacts in Mr. Burke's September 14, 1984 status report, constituted a part of Mr. Burke's insurance against losing his consultant position. The Commission therefore finds that the access Mr. Burke obtained to the CEO of Melrose-Wakefield hospital was of substantial value to himself as well as to the Lyons Company.

On the other hand, the evidence does not support the conclusion that the contact Mr. Burke made with Salem Hospital on August 20, 1984 was of substantial

value to him personally. Mr. Lyons testified that by late summer of 1984, he was unsatisfied with the general direction the Lyons Company was taking. In particular, Mr. Lyons testified that as of August 1984, Mr. Burke was making two to three introductions a month, which was unsatisfactory. While Mr. Lyons' testimony is that he communicated this dissatisfaction to Mr. Burke in "September, maybe August," the record as a whole supports the inference that the discussion took place in early September, as discussed above. Mr. Burke's contact with Salem Hospital would therefore have predated this discussion. Without the dependency relationship between the Salem Hospital contact and Mr. Burke's retention as a consultant, the Commission finds that the "for himself" element has not been met with respect to that hospital.

Likewise, the Commission finds that the evidence does not sufficiently establish the dependency relationship between Mr. Burke's contacts with the four hospitals prior to August 1, 1984 and his retention as a consultant. Mr. Burke was not initially hired by Mr. Lyons to work in the hospital field. Mr. Burke called and met with the CEOs of South Shore Hospital, University Hospital, Brockton Hospital and Cardinal Cushing Hospital between January 1984 and August 1, 1984. These contacts therefore predated Mr. Lyons' communication with Mr. Burke that his position was in jeopardy if the number of introductions he made did not increase. Moreover, the testimony of John McInerney, a fellow Lyons Company consultant, indicated that between January and June of 1984, Mr. Burke and he worked on a number of business acquisition projects for the Lyons Company. In light of Mr. Burke's business analysis duties and non-hospital introductions prior to August 1984, the Commission finds that Mr. Burke's consultant relationship did not depend on the hospital introductions he made during that period.

In summary, the Commission concludes that the "for himself" element of a §3(b) violation was met only with respect to the Melrose-Wakefield Hospital.

3. For or because of an official act performed or to be performed by him

The Commission finds that there is ample evidence in the record that the access Mr. Burke solicited from Melrose Wakefield Hospital was for or because of an official act performed or to be performed by him. Mr. Burke placed the contact call directly to the CEO of Melrose-Wakefield Hospital (Richard Quinlan), instead of the Hospital's personnel director, thus bypassing the normal channels required of insurance salesmen seeking accounts with that Hospital.[13]/ That call was made by Mr. Burke at a time when Melrose-Wakefield Hospital's DON, which carried a proposed capital cost of over $25 million, was pending before Mr. Burke's Council. Mr. Quinlan testified that the DON was "very" important to Melrose-Wakefield Hospital: it involved a needed parking garage and the construction of an ancillary services building to replace the aging buildings currently in use.

In making contact, Mr. Burke identified himself as a Council member even though he was contacting the hospital in his private capacity to sell an insurance package. Mr. Quinlan did testify that Mr. Burke indicated during the call that the call was not related to Council business. However, Mr. Quinlan nonetheless testified that he thought it would be "inappropriate" to cancel the appointment his secretary had scheduled "because Mr. Burke was a member of the Public Health Council and I had a DON pending." The Commission finds that Mr. Burke's disclaimer was ineffective under the circumstances. A true disclaimer would have been not to mention his Council membership at all in making contact with the hospitals in his private capacity. Once Mr. Burke identified himself as a Council member, the connection between a hospital's public dealings with the Council and Mr. Burke's private solicitation of a hospital was forged. Any subsequent disclaimer would prove insufficient due to the importance of a pending DON to a hospital, as evidenced by Mr. Quinlan's testimony.

The Commission concludes that the facts surrounding the Melrose-Wakefield Hospital contact go beyond a mere coincidence of overlapping private and public dealings with that Hospital. Mr. Burke placed his insurance sales call directly to CEO Quinlan (1) at a time when Melrose-Wakefield Hospital had a very important DON pending before the Council and (2) identified himself as a Council member even though the call was not related to Council business. The Commission finds that solicitation under those conditions is "for or because of official acts."

IV. ORDER

On the basis of the foregoing, the Commission concludes that William A.Burke Jr.violated G.L. c. 268A, §3(b) in connection with the Melrose-Wakefield Hospital. Pursuant to its authority under G.L. c. 268B, §4(d), the Commission orders Mr. Burke to pay one thousand dollars ($1,000) to the Commission as a civil penalty for such violation.

DATE: October 15, 1985

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[1]/G.L. c. 268A, §3(b) states that "whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him" violates that section.

[2]/G.L. c. 268A, §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."

[6]G.L. c. 268A, §23(¶2)(3) provides that no state employee shall "by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person."

[7]Following the Court's ruling in **Saccone v. State Ethics Commission**, 395 Mass.326 (1985) that the Commission does not possess the statutory authority to enforce the provisions of G.L. c. 268A, §23, the Respondent moved to dismiss the §23(¶2)(2) and §23(¶2)(3) allegations of the Order to Show Cause. The Commission has granted the Respondent's Motion to Dismiss without prejudice.

[8]This allegation was likewise dismissed without prejudice. See footnote 4.

[9]To the extent that the Respondent has renewed the substantive arguments of his motion before the full Commission in the closing arguments and briefs in the case, they are discussed infra.

[10]During the direct examination of the Salem Hospital CEO, the following exchange took place:

Q: Did you receive a telephone call from William A. Burke, Jr.in September of 1984?

A: I did.

However, his more specific testimony on cross examination regarding the date of the call placed it on August 20, 1984.

[11]Mr. Lyons testified that this first conversation took place in "September, during the month of September, maybe August, September, something like that." While this testimony does not unequivocally establish that the conversation took place in September, we reasonably infer that the date of the conversation was in September shortly before Mr. Burke's submission of the September 14, 1984 status report.

[12]As a Council member, Mr. Burke was a state employee and was therefore subject to the provisions of the conflict of interest law, G.L. c. 268A. The fact that Mr. Burke also qualified as a "special state employee" (see G.L. c. 268A, §1(o)) is irrelevant to this case, inasmuch as §3 is not one of the conflict law provisions which applies less restrictively to special state employees.

[13]The Commission found Mr. Lyons to be a credible witness.

[14]While a "fixed valuation formula" is not the sole means for determining substantial value under §3, the Court's bottom line figure is a factor that the Commission will consider in assessing substantial value.

[15]That is not to say that access in all contexts will be considered of substantial value for §3 purposes. In many instances, the seeking of such access will be more appropriately regulated as an unwarranted privilege under §23(¶2)(2), which prohibits a public employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. Here, however, Mr. Burke's conduct raises problems under §3 as well.

[16]Mr. Quinlan testified that he would normally refer such solicitations regarding insurance to a subordinate, namely the hospital's personnel director.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 299

IN THE MATTER
OF
JOHN J. HANLON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John J. Hanlon (Mr. Hanlon) 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 June 18, 1985, 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, by Mr. Hanlon, a captain in the Massachusetts State Police, and head of the Communications Section of the State Police. The Commission concluded the preliminary inquiry and, on October 8, 1985, found reasonable cause to believe that Mr. Hanlon had violated c. 268A.

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

1. Mr. Hanlon is a captain in the Massachusetts State Police. Since September, 1982 he has been in charge of the Communications Section.

2. In October, 1983 representatives of Lo-Jack Corporation (Lo-Jack) met with Mr. Hanlon and other Executive Office of Public Safety (EOPS) officials to discuss the possibility of the state cooperating in the testing and demonstration of an anti-auto-theft device Lo-Jack had developed.

3. From October, 1983 to June, 1984, Lo-Jack officials met with Mr. Hanlon and other EOPS officials on several occasions to discuss what role each party would play in the testing and demonstration of the product. Many technical issues were also addressed.

4. These discussions culminated in an agreement on June 19, 1984, publicly announced on June 20, 1984, between the commonwealth and Lo-Jack whereby Lo-Jack would supply the necessary computer equipment, tracking devices, receivers and technical expertise in return for the commonwealth's installation and demonstration of the product.

5. The state's responsibilities were divided between the Criminal History Systems Board (CHSB) and the State Police. The CHSB was responsible for providing technical support for Lo-Jack regarding the installation of the primary computer network which controls the Lo-Jack tracking system, for writing the software and for maintaining this computer system. The State Police were responsible for providing technical support to Lo-Jack for installing a radio transmitter network (including five transmitters and antennas). The purpose of this technical support was to assure that the Lo-Jack installations were compatible with but did not interfere with the existing State Police communications system. The State Police were also responsible for managing this network once installed, and for conducting the operations test of the tracking device with State Police cruisers in cooperation with Lo-Jack. While Lo-Jack had previously performed tests of the tracking device on a small scale to confirm initial operation, the Lo-Jack proposal acknowledged that these tests must be repeated "on a larger scale".

6. On June 27, 1984, Mr. Hanlon purchased 4800 shares of Lo-Jack stock at $.50 per share. A week later, a real estate corporation in which Mr. Hanlon is a one-

third owner purchased an additional 2500 units of stock at 1-7/8 per unit (one unit equals 2 shares plus a warrant [or option] to purchase an additional share at $1.50 per share).

Just prior to purchasing the stock, Mr. Hanlon asked CHSB Executive Director Louis Sakin whether the purchase would create a conflict. Mr. Sakin informed Mr. Hanlon that the CHSB's counsel had orally stated there would be no conflict of interest. The CHSB counsel confirms he gave advice to Mr. Sakin to that effect, but stated it was "off-the-top-of-his-head" advice requested and given while standing in a hallway.

7. In late July or early August, 1984, the Commissioner of the Department of Public Safety (DPS), Frank Trabucco, instructed Mr. Hanlon to oversee the DPS' role in the demonstration of the Lo-Jack device, i.e., to be the "liaison" person from the State Police. At that time Mr. Hanlon disclosed to Commissioner Trabucco that he owned stock in Lo-Jack. Commissioner Trabucco did not consider Mr. Hanlon's ownership of Lo-Jack stock as presenting a conflict. Accordingly, he instructed Mr. Hanlon to oversee the Lo-Jack project despite his stock ownership.

8. From August, 1984 to April, 1985, Mr. Hanlon attended several meetings with Lo-Jack officials to coordinate activities involved in installing the Lo-Jack system. He reported on these meetings to his DPS superiors in his monthly activity summaries. He oversaw the installation of the receivers on the State Police signal towers and the tracking units into the cruisers of 16 state troopers who were selected to learn how to use and demonstrate the device and oversaw the training of those troopers. He also worked with EOPS, the CHSB, and Lo-Jack personnel to organize two fullscale demonstrations -- one for EOPS staffers on March 22, 1985 and the other for the press and the Governor on April 12, 1985.

9. On April 8, 1985, Hanlon sold his personal shares at 2-31/32.

10. On April 12, 1985, in response to Lo-Jack's demand to shareholders to exercise their warrants, Mr. Hanlon's real estate corporation exercised its option and purchased an additional 2500 shares at $1.50 per share.

11. The corporation sold its shares on April 30, 1985 and May 1, 1985 at 3-7/8 per share.

12. Mr. Hanlon and his corporation thus realized a total profit on Lo-Jack stock of approximately $30,000.00

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

14. The contractual agreement between Lo-Jack and CHSB to install and demonstrate the Lo-Jack anti-theft device is a "particular matter" as defined in G.L. c. 268A, §1(k).

15. Mr. Hanlon participated in the contract when, after the contract was executed, he met with Lo-Jack officials, discussed the technical issues involving the delivery and installation of the systems, gave progress reports to his superiors, oversaw the training of the 16 troopers, and coordinated the in-house and public demonstrations.

16. Mr. Hanlon's participation in these contract-related matters occurred at a time when he and his real estate company owned stock in Lo-Jack.

17. By participating in the installation and demonstration of the Lo-Jack device at a time when he owned individually 4800 shares and through a corporation 1/3 of 5000 shares of Lo-Jack stock, Mr. Hanlon violated G.L. c. 268A, §6.

18. The Commission is aware of no evidence that Mr. Hanlon's performance of his official duties was influenced by his owning Lo-Jack stock. Indeed, he showed at least some sensitivity to the potential conflict by (1) seeking advice as to the legality of his activities, and (2) disclosing his stock ownership to his appointing authority and receiving his permission to participate.[1/]

On these facts, however, the Commission will not give deference to Mr. Hanlon seeking legal advice. The advice was sought and received orally and through an intermediary. It does not appear to have been based on a detailed submission of facts. Indeed, inasmuch as it was sought immediately prior to Mr. Hanlon purchasing his stock but before he knew he would have a significant role in the demonstration, the advice sought and received appears to deal more with his ability to buy the stock than with the issue of his later participating while a stockholder.

As the Commission made clear in recent Disposition Agreements involving certain City of Revere officials,[2/] if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. Of paramount importance is that the opinion be in writing and be made a matter of public record. See G.L. c. 268A, §22. And as to state and county employees, the only opinion which will be a complete defense is one obtained from the Commission itself. G.L. c. 268B, §3(g).

As to Mr. Hanlon's disclosure to and receipt of permission from his appointing authority, G.L. c. 268A, §6 does contain a mechanism by which a state employee can participate in a particular matter notwithstanding a prohibited financial interest in that matter so long as he makes an appropriate disclosure to his appointing authority, receives permission in writing, and both the disclosure and the permission are filed with the Commission.[3/] Here, however, neither the disclosure nor the authorization was put into writing or filed with the Commission. Given the clear problem Mr. Hanlon's conduct

created under §6 of the conflict law, it might well have been that had Mr. Hanlon and Commissioner Trabucco followed the proper procedure, it would have become clear to them that Mr. Hanlon's participation was unwise, and therefore either someone else would have been selected or Mr. Hanlon would have been required to sell his stock before he participated.

Thus, while an argument could be made that a state employee who discloses a §6 conflict to his appointing authority and is told to participate ought to be able to rely on the appointing authority's familiarity with the conflict law, especially where the appointing authority is a high-ranking state official such as the head of the state police, strict compliance with the written disclosure and authorization provisions of §6 is necessary to ensure that all due consideration is given to issues with potential controversy and the potential for abuse, as, for example, in this case where the question was whether a state employee may play a key role in the state's installation and demonstration of an experimental device while owning substantial stock in the company selling the device and where a purportedly successful demonstration means a higher market price for the stock.

Nonetheless, the Commission has given consideration to Mr. Hanlon's having disclosed to and received permission from Commissioner Trabucco, and to the fact that Mr. Hanlon had some reason to expect that the Commissioner would know and follow the law. Accordingly, while the Commission can impose up to a $2,000 fine for each violation of §6, it has determined that a relatively small fine here properly reflects those mitigating factors. That it has insisted on a public resolution and a fine reflects the importance the Commission places on proper compliance with §6's disclosure and exemption provisions. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure — particularly that the determination be in writing and a copy filed with the Commission — are designed to prevent an appointing authority from making an uninformed, illadvised or badly motivated decision. Imposing a fine also should act as a deterrent in making clear that ultimately the primary responsibility for compliance with these provisions rests on the public employee seeking the exemption.

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. Hanlon has agreed:

1. that he pay the Commission the sum of two hundred and fifty dollars ($250.00) forthwith as a civil penalty for violating G.L. c. 268A, §6; and
2. that he waive all rights to contest these findings of fact and conclusions of law and conditions contained in this Agreement in this or any related administrative or judicial proceedings in which the Commission is a party.

DATE: FEBRUARY 6, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 300

IN THE MATTER
OF
RAYMOND SESTINI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Raymond Sestini (Mr. Sestini) 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 June 18, 1985, 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, by Mr. Sestini, a communications coordinator for the Department of Public Safety (DPS) assigned to the State Police. The Commission concluded the preliminary inquiry and, on October 8, 1985, found reasonable cause to believe that Mr. Sestini had violated c. 268A, §6.

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

1. Mr. Sestini is the civilian communications coordinator for DPS assigned to the Massachusetts State Police.

2. In October 1983, representatives of Lo-Jack Corporation (Lo-Jack) met with Executive Office of Public Safety (EOPS) officials to discuss the possibility of the state cooperating in the testing and demonstration of an anti-auto-theft device Lo-Jack had developed. Shortly thereafter, Mr. Sestini was requested by Captain Hanlon of the DPS to attend meetings involving these discussions because of his expertise in communications and his unique knowledge of the State Police communications system.

3. The purpose of these several meetings which were held from October, 1983 to June, 1984, was to discuss what role each party would play in the testing and demonstration of the product. Many technical issues were also addressed.

4. Mr. Sestini's primary role at these meetings was to ensure that the Lo-Jack system would not interfere with the State Police microwave communication system.

5. These discussions culminated in an agreement on June 19, 1984, between the commonwealth and Lo-Jack whereby Lo-Jack would supply the necessary computer equipment, tracking devices, receivers and technical expertise in return for the commonwealth's installation and demonstration of the product.

6. The state's responsibilities were divided between the Criminal History Systems Board (CHSB) and the State Police. The CHSB was responsible for providing technical support for Lo-Jack regarding the installation of the primary computer network which controls the Lo-Jack tracking system, for writing the software and for maintaining this computer system. The State Police were responsible for providing technical support to Lo-Jack for installing a radio transmitter network (including five transmitters and antennas). The purpose of this technical support was to assure that the Lo-Jack installations were compatible with and did not interfere with the existing State Police communications system. The State Police were also responsible for managing this network once installed and accepted, and for conducting the operations test of the tracking device with State Police cruisers in cooperation with Lo-Jack. While Lo-Jack had previously performed tests of the tracking device on a small scale to confirm initial operation, the Lo-Jack proposal acknowledged that these tests must be repeated "on a larger scale".

7. On June 25, 1984 (the settlement date was July 2, 1984), Mr. Sestini purchased 1100 shares of Lo-Jack stock at 87.5 cents per share.

Just prior to purchasing the stock, Mr. Sestini indirectly learned that the CHSB general counsel had orally advised another CHSB employee that there would be no conflict of interest for DPS employees to purchase the stock so long as the purchase was made after the state entered its agreement with Lo-Jack. The CHSB counsel confirms that he gave such advice.

8. In late June, 1984 at a retirement party, Mr. Sestini states that he told Frank Trabucco, Commissioner of Public Safety, that he had purchased Lo-Jack stock. Commissioner Trabucco does not recall the conversation but does not deny that the conversation took place.

9. In late July or early August, 1984, Commissioner Trabucco instructed State Police Captain Hanlon, the head of the communication section of the State Police, to oversee DPS's role in the demonstration of the Lo-Jack device, i.e. to be the "liaison" person from the State Police. At that time Mr. Hanlon disclosed to Commissioner Trabucco that he owned stock in Lo-Jack. Commissioner Trabucco did not consider Mr. Hanlon's ownership of Lo-Jack stock as presenting a conflict. Accordingly, he instructed Mr. Hanlon to oversee the Lo-Jack project despite his stock ownership.

10. Commissioner Trabucco's reaction to Mr. Hanlon's stock ownership was conveyed to Mr. Sestini by Mr. Hanlon.

11. From August, 1984 to April, 1985, Mr. Sestini attended several meetings with Lo-Jack officials to work out the technical issues involved in installing the Lo-Jack system. He oversaw the installation of the receivers on the State Police signal towers and the tracking units into the cruisers of 16 state troopers who were selected to learn how to use and demonstrate the device. He took whatever steps were necessary to ensure that the Lo-Jack system did not interfere with the State Police's communication system and that the equipment was installed by factory-trained personnel.

12. On June 13, 1985, Mr. Sestini sold his stock for $3.56 per share.

13. Mr. Sestini realized a total profit of approximately $2,700.

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

15. The contractual agreement between Lo-Jack and CHSB to install and demonstrate the Lo-Jack anti-theft device is a "particular matter" as defined in G.L. c. 268A, §1(k).

16. Mr. Sestini participated in the contract when, after the contract was executed, he met with Lo-Jack officials, discussed the technical issues involving the delivery and installation of the system, oversaw the installation of the receivers on the State Police signal towers and the tracking units into the cruisers of 16 state troopers, and ensured that the Lo-Jack system did not interfere with the State Police's communication system and that the equipment was installed by factory-trained personnel.

17. Mr. Sestini's participation in these contract-related matters occurred at a time when he owned stock in Lo-Jack.

18. By participating in the installation and demonstration of the Lo-Jack device at a time when he owned 1100 shares of LoJack stock, Mr. Sestini violated G.L. c. 268A, §6.

19. The Commission is aware of no evidence that Mr. Sestini's performance of his official duties was influenced by his owning Lo-Jack stock. Indeed, Mr. Sestini asserts that he showed appropriate sensitivity to the potential conflict by: (1) relying indirectly on the CHSB general counsel's advice to a CHSB employee that owning Lo-Jack stock was not a problem; (2) disclosing his stock ownership to Commissioner Trabucco; and (3) relying on the fact that his superior, Captain Hanlon, had been permitted by Commissioner Trabucco to be the State Police's key person in the demonstration notwithstanding his disclosure of owning a significant amount of Lo-Jack stock.[1/]

On these facts, however, the Commission will not give deference to Mr. Sestini relying on legal advice. The advice was sought and received by another CHSB employee, and dealt with his circumstances, not Mr. Sestini's. The advice was not in writing. It does not appear to have been based on a detailed submission of facts.

As the Commission made clear in recent Disposition Agreements involving certain City of Revere officials,[2]/ if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. Of paramount importance is that the opinion be in writing and be made a matter of public record. See G.L. c. 268A, §22. And as to state and county employees, the only opinion which will be a complete defense is one obtained from the Commission itself. G.L. c. 268B, §3(g).

As to Mr.Sestini's disclosure to his appointing authority, G.L. c. 268A, §6 does contain a mechanism by which a state employee can participate in a particular matter notwithstanding a prohibited financial interest in that matter so long as he makes an appropriate disclosure to his appointing authority, receives permission in writing, and both the disclosure and the permission are filed with the Commission.[3]/

Here, however, neither the disclosure nor any authorization was put into writing or filed with the Commission. A retirement party "disclosure" which the appointing authority does not deny, but cannot remember, hardly satisfies the important disclosure and authorization provisions of §6.

Finally, Mr. Sestini's reliance on Captain Hanlon having received permission from Commissioner Trabucco to participate notwithstanding his ownership of a significant amount of Lo-Jack stock is not a defense. As was the case with reliance on legal advice above-discussed, the disclosure and permission involved Captain Hanlon and his circumstances, not Mr. Sestini. Thus, for example, Commissioner Trabucco may have known Captain Hanlon professionally much better then Mr. Sestini; or alternatively, based on his knowledge of different subordinates, he might have been willing to allow one but not another to participate notwithstanding an otherwise prohibited financial interest.[4]/

In any event, Captain Hanlon's disclosure and authorization were seriously inadequate. Consequently, the Commission has rejected his disclosure and permission defense.[5]/ If Commissioner Trabucco's permission does not completely protect Captain Hanlon, it certainly does not absolve Mr. Sestini who was indirectly relying on that permission.

While the Commission can impose up to a $2,000 fine for each violation of §6, it has determined that a relatively small fine here is appropriate.[6]/ That it has insisted on a public resolution and a fine reflects the importance the Commission places on proper compliance with §6 disclosure and exemption provisions. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure — particularly that the determination be in writing and a copy filed with the Commission — are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision. Imposing a civil penalty also should act as a deterrent in making clear that ultimately the primary responsibility for compliance with these provisions rests on the public employee seeking the exemption.

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. Sestini has agreed:

1. that he pay the Commission the sum of two hundred and fifty dollars ($250.00) forthwith as a civil penalty for violating G.L. c. 268A, §6; and
2. that he waive all rights to contest these findings of fact and conclusions of law and conditions contained in this Agreement in this or any related administrative or judicial proceedings;
3. the Commission accepts this agreement and the imposition of this civil penalty as a final disposition of this matter.

Date: February 6, 1986

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[1]/In addition, Mr. Sestini fully cooperated with the Commission's staff in investigating this matter.

[2]/**In the Matter of John A. Deleire** (Dkt. No. 289); and **In the Matter of James F. Connery** (Dkt. No. 285).

[3]/Section 6 provides an exemption for a state employee whose duties require him to participate in a particular matter in which he has a financial interest: (1) he must advise his appointing official and this Commission of the nature and circumstances of the particular matter and make full disclosure of his financial interest; and (2) the appointing official shall then assign the matter to another employee, assume responsibility for it himself, or make a written determination (and file it with this Commission) that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services.

[4]/It is difficult to understand why any high-ranking public official would allow a subordinate to participate in a demonstration of a device while the subordinate owned stock in the device. The alternatives of either having someone else participate or having the subordinates sell the stock are clearly more appropriate.

[5]/See, **In the Matter of John J. Hanlon** (Dkt. No. 299)

Thus, while an argument could be made that a state employee who discloses a §6 conflict to his appointing authority and is told to participate ought to be able to rely on the appointing authority's familiarity with the conflict law, especially where the appointing authority is a high-ranking state official such as the head of the state police, strict compliance with the written disclosure and authorization provisions of §6 is necessary to ensure that all due consideration is given to issues with potential controversy and the potential for abuse, as, for example, in this case where the question was whether a state employee may play a key role in the state's installation and demonstration of an experimental device while owning substantial stock in the company selling the device and where a purportedly successful demonstration means a higher market price for the stock.

*While for the reasons discussed above, Mr. Sestini's disclosure to Commissioner Trabucco was wholly inadequate under §6, his role in the demonstration and the amount of his financial interest were much less than, for example, Captain Hanlon's. In addition, while not a defense, fairness dictates that some mitigating role be given to the fact that Commissioner Trabucco's oral permission to Captain Hanlon could have easily misled Mr. Sestini as to what the law required, and, where Mr. Sestini did inform Commissioner Trabucco of his stock ownership, the Commissioner could have and should have insisted on strict compliance with §6 which would have kept Mr. Sestini from violating the law.

DATE: February 6, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 301

IN THE MATTER
OF
LOUIS H. SAKIN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Louis H. Sakin (Mr. Sakin) 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 8, 1985, 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, by Mr. Sakin, Executive Director of the Criminal History Systems Board (CHSB). The Commission concluded the preliminary inquiry and, on December 17, 1985, found reasonable cause to believe that Mr. Sakin had violated c. 268A, §6.

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

1. At all relevant times, Mr. Sakin has been the CHSB executive director, responsible for all of CHSB's activities. The CHSB operates the states's computerized criminal justice information system. This computer system allows the various local, state and federal law enforcement agencies to report, store and exchange information regarding criminal activity.

2. From January, 1984 to June, 1984, Lo-Jack Corporation (Lo-Jack) officials met with Mr. Sakin and other Executive Office of Public Safety (EOPS) employees on several occasions to develop a proposal by which the state would agree to test and demonstrate an anti-auto-theft device developed by Lo-Jack.

3. These discussions culminated in a gift agreement on June 19, 1984, between the commonwealth and Lo-Jack whereby Lo-Jack would provide the necessary computer equipment, tracking devices, receivers and technical expertise in return for the commonwealth's installation and demonstration of the product. Mr. Sakin signed the agreement on behalf of the CHSB, the agreement later being accepted by Department of Public Safety Commissioner Trabucco and approved by EOPS Secretary Barry.

4. The agreement provided that the state's responsibilities would be divided between the CHSB and the State Police. The CHSB would be responsible for providing technical support for Lo-Jack regarding the installation of the primary computer network which controls the Lo-Jack tracking system, for writing the software and for maintaining this computer system. The State Police responsibilities were also identified. The agreement went on to provide that both the CHSB and the State Police would designate a liaison person to represent the interests of each respective agency vis-a-vis the other parties involved.

5. Shortly before signing the agreement, Mr. Sakin asked CHSB's general counsel if it would be a violation of the state conflict of interest law if he purchased Lo-Jack stock. The general counsel states that he told Mr. Sakin there would be no problem in his purchasing Lo-Jack stock if he waited until a public announcement of the agreement was made. The general counsel describes his advice as being an informal opinion.

6. A press release was issued on or about June 20, 1984 announcing the agreement between the commonwealth and Lo-Jack. The agreement was reported in the media on June 25 and 27, 1985.

7. On June 27, 1984, Mr. Sakin purchased 300 units of LoJack stock at .97 cents per unit (this amounts to 600 shares at 48.5 cents per share or $291.00). He later sold these units on April 8, 1985 at $10 per unit, making a net profit before taxes of approximately $2,700.00

8. Mr. Sakin was the liaison person for the CHSB for the purposes of implementing the Lo-Jack agreement.

9. Mr. Sakin acted as the CHSB liaison from the time he signed the agreement through at least the demonstration of the device for the Governor on April 12, 1985. In the late summer or early fall of 1985, he selected the CHSB staff people to develop the necessary software to make the system work. In February, 1985, he designated responsibility for moving the system out of the developmental stage and into the demonstration stage to other staff members.

10. In or about December of 1984, the "key players" involved in the testing/demonstration of the Lo-Jack device began to discuss progress and problems. This group involved representatives from the CHSB, the State Police, Lo-Jack and LoJack's consultant, Micro-

logic. Meetings occurred approximately bi-weekly between December of 1984 and April of 1985 as preparations quickened for the Governor's demonstration. Mr. Sakin attended most of these meetings. Although no minutes were kept of who said what at these meetings, Mr. Sakin generally gave a brief progress report regarding the CHSB's role. At one meeting Mr. Sakin spoke at some length on how the Lo-Jack system's software would have to be designed in order to meet the CHSB computer standards.

11. Between December 1984 and February 1985, a disagreement occurred between a CHSB person and a Micrologic person as to a hardware issue. Mr. Sakin became personally involved and called Micrologic's president into his office for a meeting at which the issue in question was resolved.

12. In each of his monthly reports to EOPS Secretary Barry from August 1984 through May 1985, Mr. Sakin briefly reported on Lo-Jack.

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

14. The contractual agreement between Lo-Jack and CHSB to install and demonstrate the Lo-Jack anti-auto-theft device is a "particular matter" as defined in G.L. c. 268A, §1(k).

15. Mr. Sakin participated in the contract when, after the contract was executed, he acted as CHSB's liaison person, selected the CHSB staff to work on the project, attended the progress meetings, personally intervened in resolving issues as they arose, and provided monthly status reports to EOPS Secretary Barry.

16. Mr. Sakin's participation in these contract-related matters occurred at a time when he owned stock in Lo-Jack.

17. By participating in the testing/demonstrating of the LoJack device at a time when he owned 600 shares of Lo-Jack stock, Mr. Sakin violated G.L. c. 268A, §6.

18. The Commission is aware of no evidence that Mr. Sakin's performance of his official duties was influenced by his owning Lo-Jack stock. Indeed he showed sensitivity to the potential conflict by seeking advice as to the legality of his activities.[1]/

On these facts, however, the Commission will not give deference to Mr. Sakin's seeking and obtaining legal advice. The advice was sought and received orally. According to CHSB's general counsel, the advice was i n f o r m a l.

As the Commission made clear in recent Disposition Agreements involving certain City of Revere officials,[2]/ if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. Of critical importance is that the opinion be in writing and be made a matter of public record. See G.L. c. 268A, §22. And as to state and county employees, the only opinion which will be a complete defense is one obtained from the Commission itself. G.L. c. 268B, §3(g). Had CHSB's general counsel provided a formal written opinion, his research may have been more thorough and/or may have included contacting the Commission, either of which should have resulted in the conclusion that Mr. Sakin's duties were such that absent an exemption from his appointing authority, he could not participate in the testing/demonstration while owning stock.[3]/

Nonetheless, the Commission has given consideration to Mr. Sakin's having obtained legal advice from his general counsel. Accordingly, while the Commission can impose up to a $2,000 fine for each violation of §6, it has determined that a relatively small fine here properly reflects this mitigating factor. That it has insisted on a public resolution and a fine reflects the importance the Commission places on proper compliance with §6 and the manner by which one may obtain and rely on a conflict of interest opinion. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm.

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. Sakin has agreed:

1. that he pay the Commission the sum of two hundred and fifty dollars ($250.00) forthwith as a civil penalty for violating G.L. c. 268A, §6; and
2. that he waive all rights to contest these findings of fact and conclusions of law and conditions contained in this Agreement in this or any related administrative or judicial proceedings in which the Commission is a party.

Date: February 6, 1986

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[1]/He also disclosed the fact that he owned Lo-Jack stock in his 1984 Statement of Financial Interests which was filed with the Commission on April 9, 1985. In addition, Mr. Sakin fully cooperated with the Commission's staff in investigating this matter.

[2]/**In the Matter of John A. Deleire** (Dkt. No. 289); and **In the Matter of James F. Connery** (Dkt. No. 285).

[3]/Section 6 provides an exemption for a state employee whose duties require him to participate in a particular matter in which he has a financial interest; (1) he must advise his appointing official and this Commission of the nature and circumstances of the particular matter and make full disclosure of his financial interest; and (2) the appointing official shall then assign the matter to another employee, assume responsibility for it himself, or make a written determination (and file it with this Commission) that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services.

The requirements of this exemption must be followed to the letter. See, e.g., **In the Matter of John J. Hanlon** (Dkt. No. 299) ($500 fine imposed on a state police captain for participating in the Lo-Jack testing/demonstration while he owned Lo-Jack stock notwithstanding his having received his appointing authority's oral permission to do so, the Commission emphasizing the importance of the permission being in writing and filed with the Commission).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 302

IN THE MATTER
OF
DONALD HATCH

DISPOSITION AGREEMENT

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

On September 11, 1985, the Commission initiated a preliminary inquiry, pursuant to c. 268B, §4, into allegations that Mr. Hatch, an inspector for the Department of Public Utilities, had violated the conflict of interest law, G.L. c. 268A. The Commission concluded its inquiry on January 14, 1986, finding reasonable cause to believe that Mr. Hatch had violated c. 268A, §6.

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

1. Mr. Hatch has been an inspector for the Department of Public Utilities (DPU) since 1977. As such, he is a state employee within the meaning of G.L. c. 268A, §1(q).

2. As a DPU inspector, Mr. Hatch conducts railroad and bus safety inspections in western Massachusetts. Beginning in 1977 and continuing through the spring of 1985, Mr. Hatch conducted DPU inspections of vehicles (approximately 100 on each inspection) owned by Holyoke Street Railway Company (HSRC) as part of his official responsibilities. (The HSRC vehicles which Mr. Hatch inspected included school buses used by HSRC to transport students in the Holyoke public school system.) Mr. Hatch conducted a DPU inspection of HSRC's vehicles in approximately February and November or December of each year. Accordingly, for the fall 1982 to spring 1985 period, he conducted a total of six DPU inspections of HSRC's buses.

3. At the time Mr. Hatch conducted each of the above described DPU inspections, he was aware that he would shortly thereafter be conducting a private inspection for HSRC.

4. In the fall of 1982, the president of HSRC asked Mr. Hatch if he would conduct private inspections of HSRC vehicles. (HSRC was required by their agreement with the Holyoke school department to conduct two private inspections each year of the school buses. These private inspections were to be at HSRC's expense (approximately $7.00 per bus inspected) and were in addition to the two DPU inspections conducted annually. The two private inspections were to be completed by approximately December and March of each school year.)

5. Mr. Hatch orally agreed to conduct the private inspections for HSRC and in approximately December, 1982, shortly after conducting his DPU inspections of HSRC's buses, he conducted his first private inspection for the company. Similarly, he thereafter conducted additional private inspections for HSRC in approximately February, 1983; December, 1983; February, 1984; December, 1984; and February, 1985, each occurring shortly after or during his DPU inspection of those buses.

6. General Laws c. 268A, §6 prohibits a state employee from participating as such in a particular matter in which to his knowledge, a business organization by which he is employed or with which he has any arrangement concerning prospective employment, has a financial interest.

7. By participating in official DPU inspections of HSRC vehicles on six occasions from November, 1982 through February, 1985, while on each occasion having an arrangement with HSRC to perform the upcoming private inspections for that same company, Mr. Hatch violated §6.

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:

1. Mr. Hatch will cease and desist from participating as a state employee in any particular matter in which a business organization by which he is employed or with which he has any arrangement concerning prospective employment has a financial interest; and

2. Mr. Hatch will pay to the State Ethics Commission the amount of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §6.

DATE: February 20, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 303

IN THE MATTER
OF
MARY V. KURKJIAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commis-

sion) and Mary V. Kurkjian (Ms. Kurkjian) 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 8, 1985, the Commission instituted a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Ms. Kurkjian, former Deputy Director for Administration and Finance at the Division of Employment Security (DES). The Commission has concluded that preliminary inquiry and, on January 14, 1986, found reasonable cause to believe that Ms. Kurkjian violated G.L. c. 268A, §6.

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

1. Ms. Kurkjian was the Deputy Director for Administration and Finance at DES from March, 1983 until October 19, 1984. As such, she was a state employee as defined in G.L. c. 268A, §1(g).

2. Purchasing a mainframe computer and ensuring that it was ready for use by January 1, 1985 in order to institute a new unemployment insurance claim program was one of DES' highest priorities during 1984. Because Ms. Kurkjian supervised both the DES Electronic Data Processing (EDP) and Facilities Management departments, this computer concern was her single highest priority.

3. DES decided to purchase a Sperry mainframe computer in April, 1984 for $7,100,000. Shortly thereafter, Ms. Kurkjian learned that DES' existing computer room would need to be substantially modified to accommodate the new computer.

Because the original mainframe contract contained a standard Sperry clause stating that Sperry would not be responsible for computer site room preparation, Ms. Kurkjian and her EDP and Facilities managers sought to amend the contract to have Sperry make the renovations as part of Sperry's responsibility to make the computer room "ready for use."

4. Amending the contract was a difficult process involving Ms. Kurkjian, her Facilities and EDP managers, as well as Bureau of Systems Policy and Planning (BSPP), Office of Management Information Systems (OMIS) and Division of Capital Planning and Operations (DCPO) representatives. A major issue was which organization, Sperry or DCPO, would be responsible for which renovations.

After several weeks of negotiations, DES and DCPO on August 27, 1984 agreed as to their appropriate responsibilities for the renovations. It was also agreed that renovations for which Sperry was responsible would be done by Sperry through an amendment to the original contract. The agreement, however, was not reduced to writing.

Despite the lack of a signed document, in the minds of at least Ms. Kurkjian and her EDP and Facilities managers the only question to be resolved was the amendment's maximum dollar amount. Between August 28 and early October, DES' EDP manager worked with DCPO and Sperry to arrive at a figure for the amendment.

5. Sperry signed the amendment on October 11, after DES, DCPO, BSPP and Sperry agreed to $257,894 as the maximum dollar amount for the renovations. This figure reflected the work to be done by Sperry subcontractors at cost and included a flat $5,000 management fee to be retained by Sperry. The amendment's significance went beyond its amount, however, because it enabled the commonwealth to have a much needed computer on-line in a timely fashion, and it benefitted Sperry because DES would not pay Sperry the $7,100,000 until the computer was installed and ready for use (i.e., until after the site preparation work contemplated by the amendment was completed).

6. Ms. Kurkjian announced her resignation from DES on September 17, 1984.

7. On Tuesday or Wednesday, September 18 or 19, Sperry's Boston branch manager called Ms. Kurkjian as he had heard she was resigning. He expressed his best wishes and asked about her future plans. When she replied that she had no plans, he suggested that they have lunch. Ms. Kurkjian told him that she thought it would be interesting to speak with him about the high technology industry. They agreed to have lunch on September 24.

8. At lunch on September 24, Ms. Kurkjian and Sperry's branch manager spoke about the hi-technology industry generally and the types of positions for which she would be suited. He then spoke about Sperry, and an opening which he knew about in public sector marketing. He did not go into any detail about the position, but simply stated that if Ms. Kurkjian was interested, he would contact a Sperry vice-president. Ms. Kurkjian stated that she was interested.

9. On or about October 1, a Sperry vice-president and Ms. Kurkjian spoke on the telephone about the position in public sector marketing. Ms. Kurkjian indicated her interest in further exploring the possibility, and they agreed to have lunch on October 17.

10. After receiving the signed amendment on or about October 11 from Sperry, Ms. Kurkjian recognized that DCPO, OMIS and BSPP had never indicated their approval in writing. Consequently, on Tuesday, October 16, Ms. Kurkjian sent a memo to DCPO and BSPP confirming an October 23 meeting to have all parties agree in writing as to the scope of the amendment.

11. On October 17, Ms. Kurkjian met with the Sperry vice president for lunch for just over an hour. He spoke about the computer industry generally, where Sperry fell within that industry, and then asked if Ms. Kurkjian was interested in the public sector marketing

position. Ms. Kurkjian indicated her interest, but indicated she was close to an agreement with the Department of Revenue about a position there.[1] The Sperry vice president said he would contact Sperry's Director of Marketing, who was responsible for filling the position.

12. During Ms. Kurkjian's last two weeks at DES (October 8 19, 1984), DES' director was out of the country. Because DES, DCPO, BSPP and OMIS were all in oral agreement about the Sperry amendment, in the beginning of her last week at work, Ms. Kurkjian sought to have the amendment signed by the acting director.

13. The acting director declined to sign the amendment because of its amount, his unfamiliarity with the issues involved, and Ms. Kurkjian's statement to him that the only negative impact of his refusal to sign was a six-day delay.

14. In a final memo written to DES' director on October 19 discussing various pending projects, Ms. Kurkjian advised that the acting director chose not to sign the amendment due to its controversial nature, and that it required the director's immediate action. Ms. Kurkjian explained that the contract amount was within budget and was for work within the scope agreed upon with DCPO.

15. On October 22, 1984, Ms. Kurkjian had lunch with DES' director, and discussed, among other matters, the October 19 memo, including the Sperry amendment.

16. Both the scope and cost of the Sperry amendment were finalized in writing on October 30, 1984.

17. On November 1, 1984, Ms. Kurkjian interviewed at Sperry in New York.

18. On November 9, 1984, Sperry offered Ms. Kurkjian a job and she accepted. She began working as Sperry's Manager of Public Sector Marketing on November 26, 1984.

19. General Laws c. 268A, §6 prohibits a state employee from participating in a particular matter in which to her knowledge a business organization with which she is negotiating or has a prospective arrangement for employment has a financial interest.

20. When Ms. Kurkjian had lunch with the Sperry vicepresident on October 17, she was negotiating for employment with Sperry within the meaning of c. 268A, §6. The lunch meeting was specifically arranged for the purpose of discussing the possibility of Ms. Kurkjian going to work for Sperry. Ms. Kurkjian and the Sperry vice-president met for lunch and discussed the job, and Ms. Kurkjian further affirmatively indicated her interest in pursuing the opportunity by telling the Sperry vice-president he could have Sperry's marketing director contact her.

21. Ms. Kurkjian was also negotiating with Sperry when she earlier spoke with the Sperry vice-president on the telephone on or about October 1.[2]

22. The computer room site preparation amendment is a "particular matter" within the meaning of G.L. c. 268A, §1(k).

23. As a DES employee, Ms. Kurkjian participated in the computer room amendment on three occasions after she began negotiating employment with Sperry on or about October 1 by: (1) issuing her October 16 memo, and having the discussions with her staff which prefaced it, directed towards obtaining written approvals from BSPP and DCPO regarding the amendment; (2) attempting to have the DES acting director sign the amendment during the week of October 15; (3) writing and submitting her October 19 memo to the DES director and by meeting with the director on October 22. In both the memo and the meeting, she advised the DES director that the amendment was ready for her signature, and should be signed immediately.

24. Sperry had a financial interest in the amendment not only that Sperry would receive $257,894 (regardless of whether it was limited to a set administrative fee of $5,000); but more importantly, it would not receive its $7.1 million until the computer room had been properly prepared by either the commonwealth (DCPO) or Sperry.

25. Therefore, Ms. Kurkjian violated G.L. c. 268A, §6 when she participated in the computer room site preparation amendment after beginning negotiating for employment with Sperry.

26. The Commission has found no evidence to suggest that in her capacity as a DES employee, Ms. Kurkjian acted to provide any special or favorable treatment to Sperry while she was negotiating for employment with Sperry.[3] No such evidence, however, is necessary to establish a §6 violation. Section 6, like many of the other sections of G.L. c. 268A, is intended to prevent any questions arising as to whether the public interest has been served with the single minded devotion required of public employees.

In view of the foregoing violation 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 Ms. Kurkjian:

1. that she pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A, §6; and

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

DATE: March 26, 1986

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[1]/During most of the time that Ms. Kurkjian was negotiating for employment with Sperry, she was even more interested in an opportunity with the Department of Revenue ("DOR"). Ms. Kurkjian and DOR failed to agree on contract terms however, and she decided not to accept their offer sometime between October 26 — November 1,1984.

[3]On September 24, Sperry's branch manager had raised the possibility of employment to Ms. Kurkjian and she responded affirmatively by having the early October telephone conversation with the Sperry vice-president regarding that job. Whether the September 24th lunch involved negotiating for employment need not be resolved for the purposes of this Disposition Agreement.

[4]The evidence indicates that Ms. Kurkjian's actions with respect to the contract amendment were performed in the course of her official duties, and in fact benefitted the commonwealth by allowing the computer to be installed and on line in a timely fashion.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 307

IN THE MATTER
OF
GEORGE W. RIPLEY, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and George W. Ripley, Jr. (Mr. Ripley) 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 November 29, 1985, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, by Mr. Ripley, Commissioner of the Department of Labor and Industries (DLI). The Commission has concluded that preliminary inquiry and, on March 25, 1986, found reasonable cause to believe that Mr. Ripley violated G.L. c. 268A, §6.

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

1. Mr. Ripley was sworn in as DLI Commissioner on July 15, 1983 and began work on August 1, 1983. Mr. Ripley is therefore a state employee as defined in §1(q) of G.L. c. 268A.

2. Mr. Ripley has supervisory responsibilities over the six divisions within DLI: industrial safety, occupational hygiene, apprenticeship and training, employee services, administration (including legal) and minimum wage. Mr. Ripley reports to the secretary of labor.

3. The DLI head administrative assistant, Richard Hartigan, has the initial responsibility for hiring and personnel decisions for all DLI's divisions. He makes recommendations to Commissioner Ripley about whom should be hired.

4. In or about December of 1983, DLI was trying to fill the assistant administrative assistant position.

5. Mr. Hartigan spoke with Mr. Ripley on several occasions about the need to fill the assistant's position. On one such occasion, Mr. Ripley told Mr. Hartigan that he had a daughter with private and public sector employment experience who might be interested in the position.

6. When Mr. Hartigan was receptive to this suggestion, Mr. Ripley asked Mr. Hartigan if hiring his daughter would present a conflict of interest problem, and Mr. Hartigan told Mr. Ripley that it would not. Mr. Hartigan did not seek legal advice in rendering this opinion. Mr. Ripley did not consult with the DLI general counsel, the department's two other senior counsels, the secretary of labor, or the Commission.

7. Mr. Ripley told his daughter about the position in mid-December, 1983, and she submitted her resume via Mr. Ripley.

8. In late December, after receiving the resume, Mr. Hartigan reported to Mr. Ripley that he wanted to hire Mr. Ripley's daughter and prepared the papers for her appointment. Mr. Ripley signed the form appointing his daughter, as did the affirmative action officer and the secretary of labor. Mr. Ripley did not advise the official responsible for appointment to his position (the governor) or the Commission that the person being hired was his daughter.

9. Mr. Ripley's daughter began work on January 2, 1984 at a weekly salary of $319.39. In December, 1984, she received a step raise which brought her weekly salary to $330.51. In practice, step raises are virtually automatic. Under G.L. c. 30, §46, step raises are given annually to state employees unless an appointing authority objects. The same statutory provision requires the appointing authority to certify step-raise schedules for his employees before those raises may become effective. Under this statutory scheme, Mr. Ripley approved the step raise for his daughter.

10. Mr. Ripley's daughter resigned from her position as assistant administrative assistant on December 16, 1985.

11. Sometime before April, 1984, Mr. Hartigan told Mr. Ripley that there were no interested applicants for the clerk/typist opening in DLI's Fall River/New Bedford office, and that the director of industrial safety had told Mr. Hartigan that they had to hire someone soon. Mr. Ripley told Mr. Hartigan that his older daughter, who had secretarial experience, was looking for a job.

12. This older daughter came into the office, and Mr. Hartigan gave her a typing test. Mr. Hartigan found her to be competent for the position. There were still no other applicants, and he offered her the job.

13. Mr. Hartigan completed the documents for the appointment of Mr. Ripley's older daughter. Mr. Ripley approved the appointment, as did the affirmative action office and secretary of labor. Mr. Ripley did not advise the governor or the Commission that the person being

hired for the Fall River/New Bedford position was his daughter.

14. Mr. Ripley's older daughter accepted the position at a weekly salary of $228.06 and began work on April 15, 1984.

15. This daughter resigned her Fall River/New Bedford position on December 23, 1985.

16. General Laws c. 268A, §6 prohibits a state employee from participating as such in a matter in which a member of his immediate family, such as a daughter, has a financial interest. Any state employee whose duties require him to participate in such a particular matter is required to advise the official responsible for appointment to his position and the Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest. The appointing official must then either assign the particular matter to another employee, assume responsibility for the particular matter himself, or make a written determination, with copies forwarded to the employee and the Commission, that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee.

17. Mr. Ripley violated G.L. c. 268A, §6 when he participated in the January 1, 1984 hiring of and the December 29, 1984 raise for one of his daughters, and when he participated in the April 15, 1984 hiring of another daughter. In none of these instances did Mr. Ripley advise his appointing official (the governor) or the Commission of the hiring of either daughter or of the step raise he approved for one of them. The Commission found no evidence that Mr. Ripley intentionally violated §6.

In view of the foregoing 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. Ripley:

1. that he pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating §6 by participating in the hiring of and step raise for one of his daughters; and

2. that he pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating §6 by authorizing the hiring of another of his daughters; and

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

DATE: April 30, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 308

IN THE MATTER
OF
RALPH ANTONELLI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Ralph Antonelli (Mr. Antonelli) 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 8, 1985, 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. Antonelli, former assistant chief of the Compliance Bureau of the Massachusetts Department of Revenue (DOR). The Commission has concluded that preliminary inquiry and, on March 25, 1986, found reasonable cause to believe that Mr. Antonelli violated G.L. c. 268A, §5(a).

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

1. Mr. Antonelli worked for the DOR for approximately 20 years. For most of his career he served as assistant chief of the DOR's Compliance Bureau, which handled delinquent tax liability cases. As assistant chief, Mr. Antonelli supervised compliance activity of various DOR offices including Hyannis.

2. On February 7, 1984, a Hyannis businessman (hereafter referred to as "taxpayer") entered into a "payment agreement" with DOR under which he agreed his company would pay its delinquent sales and withholding tax liability in installments. Pursuant to DOR approval procedures, Mr. Antonelli, as the assistant chief, approved the agreement.

3. Effective June 27, 1984, Mr. Antonelli retired from his position as an assistant chief of the DOR's Compliance Bureau. His last day of work was April 3, 1984.

4. The taxpayer's company failed to meet its obligation under the payment agreement, and pursuant to DOR procedures, the case was referred to DOR's Seizure Unit in early 1985.

5. On March 15, 1985, the Seizure Unit sent the taxpayer a Notice of Intent to Seize, giving him ten days to resolve his liability.

6. A mutual friend of Mr. Antonelli and the taxpayer learned of the taxpayer's problems with DOR and arranged for Mr. Antonelli to assist the taxpayer in his negotiations with DOR to stop the seizure.

7. Not long thereafter, Mr. Antonelli called a former associate at DOR, he explained he was having difficulty reaching the supervisor of the tax examiner handling the case. He then discussed a proposal he wanted to make on behalf of the taxpayer. Mr. Antonelli asked this DOR employee to speak to the supervisor about the proposal. The former associate spoke with the supervisor and was told that Mr. Antonelli would have to deal directly with the tax examiner. Mr. Antonelli was so informed.

8. Thereafter, Mr. Antonelli contacted the tax examiner and began negotiations for a new payment agreement to avoid seizure. Mr. Antonelli filed a "power of attorney" form with DOR in which the taxpayer formally appointed Mr. Antonelli as his agent in this tax matter.

9. On March 25, 1985, Mr. Antonelli met with the taxpayer and a DOR employee at DOR's Cambridge office and worked out a new payment agreement.

10. According to Mr. Antonelli, he performed these services as a favor to a friend and he did not receive compensation for his efforts.

11. Section 5(a) of G.L. c. 268A prohibits, in part, a former employee from acting as agent for anyone other than the commonwealth in connection with a 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. One purpose of Section 5 is to ensure that former employees do not use their past friendships and associations within government to derive unfair advantage for themselves or others. See **In the Matter of Thomas W. Wharton, 1984, Ethics Commission,** 182.

12. The February 7, 1984 payment agreement was a particular matter as that term is defined in G.L. c. 268A, §1(k).

13. Mr. Antonelli participated as a state employee in that payment agreement by approving it on or about February 7, 1984.

14. Mr. Antonelli acted as the taxpayer's agent in connection with the payment agreement when he first attempted to negotiate a new payment agreement with DOR employees, when he submitted a power of attorney, and when he subsequently accompanied the taxpayer to DOR and negotiated a new payment agreement.

15. By so acting as the taxpayer's agent in connection with the payment agreement, Mr. Antonelli violated G.L. c. 268A, §5(a).

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. Antonelli has agreed:

1. that he pay the Commission the sum of five hundred dollars ($500) forthwith as a civil penalty for violating G.L. c. 268A, §5(a); and
2. that he waive all rights to contest these findings of fact and conclusions of law and conditions contained in the agreement in this or related administrative or judicial proceedings in which the Commission is a party.

DATE: May 1, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 294

IN THE MATTER
OF
ROBERT J. QUINN

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

David D. Kenefick, Counsel for Respondent
Robert J. Quinn

Commissioners:
Diver, Ch., Burns, Gargiulo, Mulligan, Sweeney

DECISION AND ORDER

I. Procedural History

On October 23, 1983 the Commission advised the Respondent, Robert J. Quinn, that G.L. c. 268A, §4 prohibited his dual employment as a full time state employee while at the same time serving as a bail commissioner. EC-COI-83-143. Following Quinn's failure to comply with the advice, the Commission voted on December 20, 1984 to initiate a preliminary inquiry into whether Quinn violated section 4 relating to his acceptance of compensation as a bail commissioner while employed by the Metropolitan District Commission (MDC), a state agency. Although, on March 12, 1985 the Commission found that there was no reasonable cause to believe that respondent's actions violated section 4, on April 23, 1985 the Commission subsequently voted to initiate a preliminary inquiry into whether Quinn violated section 7, and other related sections of the conflict of interest law. On May 28, 1985 the Commission found sufficient facts to find reasonable cause of violation of section 7, but in lieu of finding reasonable cause authorized the staff to send a compliance letter.[1]/ Quinn did not comply with the terms of the letter; therefore, on August 13, 1985, the Commission again voted to initiate a preliminary inquiry, and on October 8, 1985 found reasonable cause to find that Quinn was in violation of section 7. On October 23,

1985 an Order to Show Cause was issued. The Order to Show Cause alleged that by holding two state positions, one with the MDC and one as a bail commissioner, Quinn violated §7. Quinn filed an Answer on December 6, 1985, in which he admitted that he served in the two positions until 1985. He also answered that he terminated his MDC position and commenced employment with the Massachusetts Water Resource Authority. (MWRA). In addition to raising three affirmative defenses, Quinn asserted that bail commissioners are not state employees and that his appointment is not a contract made by a state agency. Based on Quinn's responses in his Answer, the Petitioner sought leave to amend the Order to Show Cause, which leave was granted by Commissioner Constance Sweeney on January 29, 1986. An adjudicatory hearing was held on February 24, 1986. Thereafter the parties submitted briefs, and orally argued before the full Commission on April 8, 1986. In rendering this Decision and Order, each member of the Commission has reviewed the evidence and arguments presented by the parties.

II. Findings of Fact

1. Quinn was executive assistant to the Massachusetts District Commission from July 1977 until approximately 1985. As such, he was a state employee within the meaning of G.L. c. 268A, §1(q).

2. Quinn admits that his position as executive assistant to the MDC commissioner was a contract made by a state agency in which he had a direct financial interest. In this position, Quinn rendered services to the MDC and, in return, was paid by the commonwealth.

3. In 1985, Quinn became acting comptroller of the Massachusetts Water Resource Authority. (MWRA). As such, he is a state employee within the meaning of G.L. c. 268A, §1(q).

4. Quinn admits that his position as MWRA acting comptroller is a contract made by a state agency in which he has a direct financial interest. In this position, Quinn renders services to the MWRA, and in return, the commonwealth pays him.

5. In 1972, Quinn was appointed as a bail commissioner by the justices of the Massachusetts Superior Court serving as the Court's Bail Committee. His appointment covered the judicial district of the Northern Norfolk Division of the District Court Department of the Trial Court. Quinn continues to serve as a bail commissioner, his most recent reappointment date being January 18, 1985.

6. When Quinn executes his duties as bail commissioner, he receives compensation in the form of fees paid by the subjects of the bail hearings he conducts.

7. The bail commissioner position is created by statute, G.L. c. 276, §57. Pursuant to that statute the Superior Court Department appoints bail commissioners to conduct bail hearings outside of normal court hours.

8. Bail commissioners, clerks and assistant clerks perform the same functions in making bail determinations. They are entitled by G.L. C. 262, § 24 to receive fees for making bail determinations. These fees are paid to them by the defendants whose bail hearings they conduct. In ninety-nine percent of the cases the maximum fee authorized by statute is charged.

9. The bail commissioner position is regulated by statute. G.L. c. 276, §§57, 58, 60-61, 62-65, 82; G.L. c. 262, §24. In addition, the Superior Court has established rules regulating the conduct of bail commissioners. **(Rules Governing Persons Authorized to Take Bail**, hereinafter cited as "**Rule[s]**").

10. The statute and the rules prescribe particular steps that a bail commissioner must take in conducting his inquiry to determine whether a defendant should be released on bail or on personal recognizance. G.L. c. 276, §§57, 58, 60, 62; Rules 19, 38. The statute and rules also prescribe the information the bail commissioner should obtain in making his inquiry and the factors he should weigh in making his decision. G.L. c. 276, §§57, 58, 61; Rules 2, 22, 24, 26-28, 40.

11. Under G.L. c. 276, §42, the state has an obligation to make bail determinations. During court hours, judges (and district court clerks, when available) conduct bail hearings. Outside of normal court hours, these hearings are conducted by clerks, assistant clerks and bail commissioners. The Court makes such an appointment when the volume in a jurisdiction warrants a bail commissioner in addition to the district court clerks and assistant clerks. The primary purpose of the bail determination is to assure the presence at court of any defendant who is released. Rule 2. The hearings conducted are essentially the same, whether a judge, clerk or bail commissioner presides. See G.L. c. 276, §§57, 58; Rules 2, 18, 19, 24, 26-28.

12. The Court rules characterize the bail commissioner's duties as quasi-judicial, and those rules direct bail commissioners to perform their duties with the impartiality and dignity befitting "the performance of a judicial act." Rules 2, 18, 19.

13. A bail commissioner's jurisdiction is confined strictly to the geographical area specified in his appointment papers from the Court. See Rules 10, 11. Under the Court's rules, a bail commissioner may respond to requests that he perform his duties only when those requests come from certain people, Rule 15, and he must respond "with all reasonable promptness" to every such call, Rule 14.

14. Both statute and rules require that a bail commissioner perform particular, formal steps in making his inquiry into what assurances may be necessary to secure a prisoner's appearance before the court at a later hearing. G.L. c. 276, §58. He takes testimony sworn under an oath which he is authorized to administer. Rule 19. He may exercise discretion in determining whether release on personal recognizance reasonably

assures the prisoner's appearance or, if not, how much bail should be required. Id. His decision must take into account the factors outlined in the statute and the Superior Court rules. See G.L. c. 276, §58; Rule 2. Among other things, he must obtain any probation information available before making the bail determination. G.L. c. 276, §57. The bail commissioner must tell the released prisoner of the penalties if he fails to appear for his hearing, G.L. c. 276, §58; Rule 38, and that his bail may be revoked if he is arrested while out on bail, G.L. c. 276, §58. The bail commissioner must examine any person offered as a surety to determine his sufficiency; the statute and Superior Court rules specify the information the bail commissioner must obtain in this connection. G.L. c. 276, §61; Rules 22, 24, 26-28, 40. The contents of the recognizance, affidavits, and certifications that a bail commissioner must complete or obtain in the bail hearing are regulated by statute and rule. G.L. C. 276, §65, Rule 40. The bail commissioner must certify his recognizance and examination from each bail hearing he conducts and return it to the court clerk "seasonably," which the Court has decided may not be any later than 72 hours after the hearing, and which in practice generally means the next day. See G.L. c. 276, §66; Rule 39. The bail commissioner must further file detailed monthly reports with the Superior Court by the second Monday of each month, itemizing each of his bail decisions. See G.L. c. 276, §61; Rule 41. He must certify the truth and accuracy of these reports under the pains and penalties of perjury. Rule 41.

15. The Office of Bail Administrator selects the bail commissioners. There is no public notice or competitive bidding. The opportunity for appointment is not advertised.

III. Discussion

The Commission concludes that, by maintaining his appointive position and serving as bail commissioner with the Superior Court Department while also employed full time by a state agency, Quinn has violated, and continues to violate, G.L. c. 268A, §7.

A state employee,[2]/ may not have a direct or indirect financial interest in a contract made by a state agency in which the commonwealth or a state agency is an interested party. G.L. c. 268A, §7.[3]/ When a state employee is appointed to another state employee position and receives compensation for that second state position, the appointment violates §7 unless an exemption applies. See e.g., EC-COI-85-7; 84-108.

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; Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law Rev. 299, 368, 372 (1965). See also Stat. 1980, c. 303.

While it may be true, as Quinn suggests, that a purpose of §7 was to prevent employees from abusing their public positions to secure multiple state contracts, the plain language establishes a preventative 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. Therefore, the fact there was no evidence that Quinn is actually able to realize more bail appointment opportunities as bail commissioner because he is a full time state employee is irrelevant.

Quinn does not dispute that he was and is a state employee in his former MDC and MWRA positions, nor does he dispute that he has a direct financial interest in his bail commissioner appointment since he receives fees for performing his bail commissioner duties. Quinn has not claimed any exemption under §7 in his Answer, at the adjudicatory hearing, or in argument. The principle issue remaining in this proceeding is whether serving as a bail commissioner results in a contract between the appointee and the Superior Court within the meaning of G.L. c. 268A, §7.

The word contract is not defined in G.L. c. 268A. The term "contract" is extremely broad and can differ widely in meaning depending upon the context in which the term is used. Therefore, it is incumbent upon the Commission to interpret the term in light of the overall purposes and intent of G.L. c. 268A.[4]/ In view of the broad language used in §7, and of the preventative purposes of the conflict of interest statute, the Commission concludes that serving as a bail commissioner in exchange for fees results in a contract within the meaning of G.L. c. 268A, §7 between the Superior Court Department and the bail commissioner. A contract results on each occasion that the bail commissioner accepts the opportunity of his appointment and performs his duties and service pursuant to statutory requirements.[5]/ The Commission reaches this conclusion because:

1. the appointment confers upon the appointee the powers normally associated with public office such as quasi-judicial functions;

2. the duties are similar or identical to the duties performed by public employees;

3. the appointee does not determine who will be present to receive the service and conversely, the recipient has no choice as to the provision of the service;

4. the place for provision of the services is on public property or is designated or required by public authority;

5. the procedures and work product of the appointee are substantially regulated by a public agency; and

6. compensation for providing the services is specifically and substantially regulated by a public agency.

The duties of a bail commissioner are quasi-judicial. In conducting bail hearings, a bail commissioner performs a governmental function ordinarily expected of a governmental employee. The statutory section establishing the right to a bail determination assigns the responsibility to "the court or justice." G.L. c. 276, §42. Section 57 of c. 276 then enlarges the class of "magistrates" who may admit persons to bail to include judges, court clerks, appointed bail commissioners, masters in chancery and justices of the peace appointed under G.L. c. 218, §36. Bail commissioners are thus appointed to fulfill the state's statutory obligation to make bail determinations. There is no voluntariness on the part of a bail commissioner in his selection of persons from whom he will collect fees. The prisoner has no practical choice as to who will conduct his bail hearing. A bail commissioner works exclusively on state property. How a bail commissioner conducts a bail hearing is substantially regulated and specified formality is required in the bail commissioner's written work product. There are specified formal steps required of a bail commissioner in discharging his official duties which allow for little discretion normally associated with a licensee. The amount a bail commissioner may receive as a fee is regulated in detail. For example, the maximum fee will differ depending on the time of day. In addition, although the statute prescribes only the "maximum" that he actually receives, in most cases the maximum is in fact collected.

All of these factors lead to an inevitable conclusion that a bail commissioner performs services for the Superior Court. It is inconsistent with common sense and reasonable public perception to conclude that a bail commissioner is serving the prisoner's interest or works on behalf of the prisoner. It is more likely, in keeping with the quasi-judicial nature of the position, that a bail commissioner's loyalty must be to the state and not to any private individual.

That the fees Quinn receives come from someone other than the commonwealth is irrelevant. Section 7 prohibits a financial interest in a contract made by a state agency, not in one funded by the state. It is the existence of compensation, not the identity of its source, that is the issue. A contrary construction would thwart one of §7's underlying policies: preventing people who are already state employees from having an inside track on additional, lucrative state appointments. See **Buss**, p. 368.

In summary, the Commission concludes that because Quinn performs public services for the Superior Court, in exchange for the right to earn compensation, he has a contract with the state each time he performs the services of a bail commissioner at the request of the Superior Court, within the meaning of §7 of G.L. c. 268A.[8]/

Although Quinn argues that the appointment as a bail commissioner merely confers a license to exercise a business privilege which is commonly regulated and which without the license would be unlawful, the Commission concludes that an official appointment as a bail commissioner is not a license.

The appointment here has some of the characteristics of a license; it is unassignable and revocable. On the other hand, a license to a person to follow any particular trade or business is distinguishable from an appointment to office because a license does not confer any of the powers or privileges of a public officer, the duties to be performed are not public duties, and the public has no interest in their performance or omission. Unlike a doctor or broker who is expected to serve his clients first, the duties of a bail commissioner are explicitly quasi-judicial and in fact duplicate the public functions required to be performed by public officials, including judges. Further, a licensee is not typically provided access to and exclusive use of state facilities. There is no voluntariness which is common to the relationship of a client and licensee. There is no need for a bail commissioner, unlike a licensee, to secure his own clients; a bail commissioner has no choice as to the persons from whom he takes fees. The prisoner has practically no choice as to the bail commissioner to whom he pays his fee. Unlike a licensee, a bail commissioner has practically no discretion in the contracting of fees or discretion in the scope and type of services provided. By common sense understanding, given the above factors, state prisoners cannot fairly be said to be clients of a bail commissioner.[7]/ Therefore, the relationship between the bail commissioner and the Superior Court cannot fairly be characterized as a license to conduct business with prisoners.

Quinn raises three affirmative defenses: statute of limitations, selective prosecution, and double jeopardy. The Commission concludes these defenses are without merit. Selective prosecution and double jeopardy have no application to a civil proceeding which has a civil remedial purpose and where the result is not "punitive in nature".[9]/ The statute of limitations defense is no bar, nor relevant with respect to the continuing and present violation allegations.[9]/

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.

The Commission concludes that no fine is warranted for violations which predate this Decision and Order because the result in this case was not obvious, the case is one of first impression, and this is the first occasion

which the Commission has applied G.L. c. 268A, §7 to the exercise of an appointment as a bail commissioner. Quinn, and the public, are hereby made aware of the consequences under §7 of retaining employment with the state while also serving as a bail commissioner. Accordingly, and in recognition of the seriousness with which the Commission views continuing prospective violations in disregard of this Decision and Order, the Commission issues the following prospective order.

V. Order

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

1. Cease and desist from violating G.L. c. 268A, §7 by either, refusing to accept fees in exchange for serving as a bail commissioner, or by terminating his contract of employment with the commonwealth within thirty (30) days of the date of this Decision and Order,

2. If after thirty (30) days of notice of this Decision and Order Quinn continues to receive or request fees in exchange for serving as bail commissioner while also employed by the commonwealth and fails to comply with paragraph one of this order, he is further ordered to pay a daily civil penalty of fifty dollars ($50.00) for each day that he sets bail for compensation, up to a maximum fine of two thousand dollars ($2,000).

DATE: May 6, 1986

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[1]/The Commission may issue compliance letters in those cases which do not involve willful misconduct in an effort to resolve the matter confidentially. These letters outline the relevant facts, point out actual and potential violations of the law, and serve the purpose of notifying the individual that any further acts by him in violation of the law may be pursued in the context of a public enforcement proceeding. See, Commission's **Procedures Covering the Initiation and Conduct of Preliminary Inquiries and Investigations**, §12.

[2]/Section 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".

[3]/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.

[4]/**Massachusetts Organization of State Engineers & Scientists v. Labor Relations Commission**, 389 Mass. 920, 924 (1985).

[5]/Although unnecessary to its decision, the Commission also concludes that serving as bail commissioner results in a contract between the state and the bail commissioner as the word "contract" is used in traditional contract law of offer, acceptance, and consideration. The state offers the opportunity to be appointed and to serve as bail commissioner subject to regulation and supervision by the Superior Court. Acceptance occurs on each occasion a bail commissioner agrees to perform those services subject to applicable regulation.

In this case the promissor is the bail commissioner who promises to perform defined services. The beneficiary of the promise is the state which receives bail taking services after normal working hours or on weekends when a judge or clerk may not be available. The appointment is different than typical service contracts only in that the source of the compensation is not the employer or appointing entity. However, the cases hold that it is not necessary that the consideration move from the promisee to the promisor. **Marine Contractors Co. v. Hurley**, 365 Mass. 280 (1974), Restatement: Contracts 2d, §71(4) and comment c (1979), and Corbin Contracts, §124 (1963). Thus, the opportunity to earn compensation from third persons is sufficient consideration to support a contract. The fact that the bail commissioner is under no obligation to accept the offer to perform bail commissioner duties does not mean that there is no contract if the offer is in fact accepted. Further, the fact that the appointment may be terminated at the will of either party does not mean absence of a contract prior to termination.

[6]/There are no exemptions to §7 for which Quinn currently qualifies. Should the availability of bail commissioner appointments be publicly advertised, however, Quinn would appear to be eligible for an exemption under G.L. c. 268A, §7(b).

It also follows that a person who performs services for a state agency under a bail commissioner appointment is a state employee under G.L. c. 268A, §1(q) which defines a "state employee", in relevant part, as "a person performing services for a state agency [defined to include the judicial department of state government, G.L. c. 268A, §1(p)] . . . whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis. . . ." As a state employee in his bail commissioner position, Quinn is prohibited from having a second employment contract with the state, absent an exemption. One exemption that would apply to the facts of this case is §7(d).

[7]/The Superior Court has implicitly recognized that its appointment of bail commissioners is not an award of a license. In its **Rules Governing Professional Bondsmen**, established under the same statutory sections as its bail commissioner rules, Tr. 23-24, the Superior Court states

> 6. Bail bondsmen are licensed by the Court. They are granted a power by the court to guarantee a person's reappearance in Court. Under this license they are allowed to charge a fee. Any impropriety not covered by these rules inconsistent with the honest and efficient administration of justice may result in suspension or revocation of the license.

Ex. A, Subex. 16, p. 4 (emphasis added). In contrast the rules governing bail commissioners nowhere refer to that appointment as a "license".

[8]/See **Commonwealth v. Dias**, 385 Mass. 455 (1982); **Craven v. State Ethics Commission**, 390 Mass. 191 (1984).

[9]/**Mamos v. School Comm. of Town of Wakefield**, 553 F. Supp. 996, 1006 (D. Mass. 1942), **United States v. Hare**, 618 F. 2d 1085 (4th cir., 1980).

Frederick B. Cronin, Jr.
c/o James Carrigan, Esq.
15 Johnson Street
Lynn, MA 01902

RE: PUBLIC ENFORCEMENT LETTER 87-1

Dear Mr. Cronin:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as a tax collector for the city of Lynn, you appointed your brother Ralph as a deputy tax collector. The results of our investigation (discussed below) indicate that the conflict of interest law was violated in this case. In view of certain mitigating circumstances and action you have agreed to take (also discussed below), the Commission has determined that adjudicatory proceedings are not warranted. Rather, the Commission has concluded that the public interest would better be served by disclosing 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, and compliance with, the conflict 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.

A. THE FACTS

1. You have been the Lynn tax collector since the city council appointed you in 1978. As such, you are a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. As tax collector, you may appoint deputies pursuant to G.L. c. 60, §92. Your deputy appointments must be approved by the Department of Revenue before they become effective. Your office includes an assistant tax collector and three deputies.

3. Deputy tax collectors pursue collection of local taxes after a taxpayer has failed to respond to the collector's demand letter, which is sent once the tax liability has been delinquent for 30 days. The deputy sends the delinquent taxpayer a notice that a warrant has been issued and may go to the taxpayer's home (or place of business) with the warrant to collect the delinquent taxes.

A deputy tax collector does not receive a salary but receives statutory fees that vary depending on what he has to do to collect the delinquency. For example, a deputy is entitled to $7 for sending out the notice of warrant and $12 for serving it on the taxpayer in person. These fees are included in the money collected from the delinquent taxpayer (as are interest and demand fees owed the city.)

4. According to you and your assistant, the deputies turn over the money they have collected to the chief deputy, who turns it over to your assistant. (The chief deputy does not inform your assistant how much each deputy has collected or earned in fees; he gives her the money as a total of what the three deputies have collected.) Taxpayers often come in to the office to pay the taxes, interest and fees that they owe as well. Your assistant turns over everything but the deputies' fees — i.e., tax receipts, interest and fees to which the city is entitled — to the city treasurer. She keeps the deputies' fees and, at the end of each week, gives the chief deputy all the fees the deputies have earned during the week. The chief deputy must sign that the amount your assistant is giving him is the correct amount owed the deputies. He then makes the distribution among the deputies. At the end of each month, your assistant reports to the city treasurer on all the money (including deputy tax collector fees) the tax collector's office has received.

5. According to you and your assistant, you do not have to sign off on anything to approve payment to the deputies (nor do you sign off on the monthly report to the treasurer).[1/]

6. When you were appointed in 1978, you inherited the previous tax collector's five deputies. Three of these have left (one died, the other two resigned). You have appointed three deputies, two of whom have since left (one voluntarily, the other when you declined to renew his appointment after the first year).

7. In early 1984, the chief deputy whom you had inherited decided to resign. You testified that you used your usual word-of-mouth method to conduct your hiring search. City councilors submitted names of possible candidates, and your brother Ralph indicated his interest in the position. You chose your brother because, you stated, you could count on his honesty, sobriety and levelheadedness. You testified that you told the mayor, city solicitor and all the city councilors that you had decided to appoint your brother and they thought it was a good idea; you stated that you did not explicitly seek their permission to hire your brother because they have no role in the process. You completed the Department of Revenue forms on the appointment and obtained that department's approval of the appointment as required by G.L. c. 60, §92.

8. When we interviewed people to whom, you testified, you had "disclosed" your intention to appoint your brother, a number specifically recalled that you had told them of this intention before you made the appointment. (Others had no specific recollection of such a "disclosure" but said it could well have occurred; still others recalled that they only learned of the appointment after you had made it.)

9. Ralph Cronin officially became chief deputy tax collector in March 1984. You have reappointed him twice. It is Ralph's full-time job. He has netted approximately $35,000 from fees annually (after his mailing expenses are deducted) both years he has served.

B. The Conflict Law

Section 19 prohibits a municipal employee from participating as such in a matter in which a member of his immediate family has a financial interest. This section thus would prohibit you, as Lynn Tax Collector, from appointing your brother to a position like deputy tax collector, in which he has a financial interest because of the fees he will have the opportunity to earn. The facts as set forth in this letter, if proven, would establish violations of §19 because they would indicate that you have appointed and reappointed your brother as chief deputy tax collector for the city of Lynn.

Section 19 does, however, include a procedure involving disclosure to an official's appointing authority by which the official may avoid violating §19. That procedure requires that before the official takes the action with respect to an immediate family member, the official make a full disclosure to his appointing authority of his proposed action and the immediate family member's financial interest in it; the appointing authority may then, in writing, authorize the official to take the action because 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 official.

You have asserted that you, in effect, conformed with the spirit (although not the letter) of this disclosure procedure. Our inquiry indicated that you did inform, albeit informally, many (perhaps a majority) of the city councilors, your appointing authority, and the mayor before you appointed your brother Ralph initially. Because of this, the Commision has decided that this case does not warrant the initiation of formal adjudicatory proceedings. Rather, the Commission has determined that a public enforcement letter is appropriate and that your brother should resign as chief deputy tax collector. Further, you have agreed that you will follow the proper §19(b) disclosure procedure (discussed above) should you decide you want to appoint him again. Before you appoint him, then, you must formally inform the Lynn City Council that you propose appointing your brother as chief deputy and you must disclose to the council that he will earn fees in the position and thus has a financial interest in it. Only if a majority of the city council determines and notifies you, in writing, that your brother's financial interest in his position is not so substantial as to be deemed likely to affect the integrity of the services which the city may expect from you, may you make the appointment.[2/] Should the council make such a determination, you will need to follow this procedure each year when you resubmit your brother's bond to the Department of Revenue and thereby, in effect, reappoint him.[3/]

You and the city council should also be aware that §19 applies not only to appointments but would apply to any matter in which you, as tax collector, participate and in which your brother has a financial interest. For example, absent an exemption from the city council, you would violate §19 if you were involved in assigning collection cases to your brother or in approving payment of fees to your deputies.

C. 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, and your future compliance with, the conflict law. This matter will be closed once we have received evidence of your brother's resignation. Thank you very much for your cooperation. If you have any questions, please contact me at (617) 727-0060.

DATE: August 27, 1986

[2/]Whether this procedure comports with the reporting responsibilities of the tax collector set out in G.L. c. 60, §§2, 16 is beyond the scope of this letter.

[3/]The Commission is aware that, pursuant to §5 of the Overlay Deficit Act of 1985, it is the municipality's Chief Financial Officer who now appoints the tax collector. Since your appointing authority was the city council, however, and since you became tenured prior to enactment of the 1985 law, it is the city council which should make the determination pursuant to §19(b).

[1/]In addition, §23, the standards of conduct section of c. 268A, prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that he is likely to act or fail to act as a result of someone's kinship. See §23(b)(3). You may run afoul of this prohibition where your brother is chief deputy by virtue of your general responsibilities to oversee and supervise the conduct of the people in your office. The exemption procedure authorized under §19, however, would also serve to resolve any questions under §23(b)(3).

If you do reappoint your brother after receiving city council approval, you should bear in mind that §23 also prohibits a public official from using or attempting to use his official position to secure for himself or someone else unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. You must therefore take care not to treat your brother any better than any other of your deputy tax collectors.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 312

IN THE MATTER
OF
CARL D. PITARO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Carl D. Pitaro (Mr. Pitaro), 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(j).

On May 20, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Pitaro, the Mayor of the city of Brockton. The Commission concluded its inquiry and, on July 29, 1986, found reasonable cause to believe that Mr. Pitaro violated G.L. c. 268A, §3(b). Pursuant to G.L. c. 268B §4(c), the Commission also authorized the initiation of an adjudicatory proceeding to determine whether there has been a violation. An Order to Show Cause issued on August 25, 1986, initiating such a proceeding.

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

1. From January, 1984 to the present, Carl D. Pitaro has been the elected Mayor of Brockton. As Mayor of the city of Brockton, Mr. Pitaro is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. From January, 1984 to the present, Francis M. Magliano has been the building superintendent for the city of Brockton. As building superintendent, Mr. Magliano is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. James C. Mihos is a resident of Brockton, Massachusetts. Since 1979, his family has owned a parcel of land on Pleasant Street in Brockton which is the proposed site of a new hotel project. (The land is owned by James and Peter Mihos, Trustees of the 167 Pleasant Street Trust.)

4. In the fall of 1984, Mr. Mihos entered into an agreement with Ocean Properties Limited, a Florida development company, to sell 7.3 acres of the 36 acre parcel on Pleasant Street to Ocean Properties Limited for development as a hotel project. Under the city of Brockton's zoning ordinances, the parcel was zoned for "Office Commercial" use, which did not allow for a hotel. The Mihos agreement with Ocean Properties Limited was contingent on Ocean Properties obtaining all the necessary permits, including a permit to allow a hotel to be built on the parcel.

5. In late March, 1985, Mr. Mihos met with Mr. Magliano in city hall to discuss the possibility of a hotel on this site. At this meeting, Mr. Magliano advised Mr. Mihos of the zoning issues and explained two possible options: a special permit or a zoning change by the city council. As a developer and citizen of Brockton, Mr. Mihos was aware of a prior proposed hotel project which failed to win support in the city partly because the project did not include a "name" hotel or conference facilities and a question had been raised concerning the quality of the construction. Consequently, Mr. Mihos requested Mr. Magliano to set up a meeting for him with Mayor Pitaro to discuss the city's concerns regarding the quality of the construction and nature of facilities being proposed.

6. Shortly after the initial meeting between Mr. Mihos and Mr. Magliano, Mr. Magliano and Mr. Mihos met with Mr. Pitaro in city hall to discuss the proposed hotel project. In the course of this discussion, Mr. Mihos invited Mr. Pitaro and Mr. Magliano to accompany him to Florida to see other hotels developed by Ocean Properties Limited in order to observe the quality of construction and the type of facilities that this company developed, as well as to meet the personnel who would be involved in the Brockton project. Mihos also invited Mr. Pitaro and Mr. Magliano to bring their spouses on the trip. While Mihos intended to pay for the costs of the trip, Mr. Pitaro and Mr. Magliano originally intended to pay their own costs.

7. Mr. Mihos obtained airline tickets through a Canton travel agency and paid $238.00 for each of the six round-trip coach fare tickets on April 3, 1985. Mr. Pitaro and Mr. Magliano previously had attempted to buy their own tickets through a different agency.

8. On Friday, April 12, 1985, the Pitaros, Maglianos, and Mihoses flew from Boston to Miami, Florida, arriving in Miami at approximately 1:30 p.m. Mr. Mihos rented one car at a cost of $149.00 and the six drove to Delray Beach, arriving at their hotel at approximately 6 p.m.

9. Mr. Mihos had also arranged to have all six members in the party stay at the Holiday Inn at Delray Beach in Florida, a hotel developed by Ocean Properties. The hotel accommodations (at a cost of $192.00 per couple for three nights) were paid for by Ocean Properties. While in Florida, the three couples shared the cost of their meals.

10. On Saturday, the Pitaros, Maglianos and Mihoses, driven and escorted by a representative of Ocean Properties, Ltd., examined several hotels, an office complex and a construction site all developed or being developed by Ocean Properties. On Sunday, after attending church, the six again joined one of the principals of Ocean Properties, Ltd. on his boat. On Monday, April 15, 1985, Patriots Day and a legal holiday, the six drove back to Miami in the vehicle rented by Mr. Mihos and took a 12:20 p.m. flight back to Boston arriving at approximately 3:30 p.m.

11. Prior to the Florida trip, Mr. Pitaro had publicly supported the construction in Brockton of a quality "name" hotel complex which would include conference facilities. Upon his return from Florida, Mr. Pitaro spoke publicly in support of the proposed hotel project on the Mihos parcel of land at public meetings, monthly press conferences and before various service groups.

12. The proposal to rezone part of the Mihos' property to "General Commercial" was submitted to the City Council June 17, 1985. It passed the Finance Committee and was the subject of public hearings before the Planning Board and Council Ordinance Committee before being passed by a 2/3 vote of the full City Council on October 15, 1985.

13. The ordinance was presented to Mayor Pitaro on October 18, 1985. Pursuant to the Brockton city charter the Mayor has the authority to: (1) sign the amendment into law; (2) veto the amendment and return it to the Council with his objections, at which time it can still become law upon another 2/3 vote of the Council; or (3) take no action on the amendment, at which point the amendment becomes law within 10 days of it being presented to the Mayor. The Mayor signed the ordinance rezoning part of Mihos' land on October 18, 1985, the same day it was presented to him.

14. As building superintendent, Mr. Magliano would be responsible for issuing building permit(s) for the hotel complex after reviewing the plans and specifications submitted by the developer and for ensuring the project was in compliance with the state building code and the local zoning ordinances.

15. General Laws chapter 268A, §3(b) prohibits a municipal employee from directly or indirectly receiving for himself anything of substantial value, otherwise than as provided by law for the proper discharge of offical duty, for or because of any official act performed or to be performed by him.

16. Based upon the facts and conduct set forth in paragraphs 1 through 14, above, Mr. Pitaro violated §3(b).

17. The Commission has found no evidence suggesting corrupt intent or an intentional or knowing violation of the law by Mr. Pitaro.

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. Pitaro:

1. that he pay to the Commission the amount of one thousand dollars ($1,000) as a civil penalty for his violation of §3(b);

2. that he pay to the Commission the amount of $668.00 as forfeiture of the economic advantage gained; and

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

DATE: October 29, 1986

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 312

IN THE MATTER
OF
FRANCIS M. MAGLIANO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Francis M. Magliano (Mr. Magliano), 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(j).

On May 20, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Magliano, the building superintendent for the city of Brockton. The Commission concluded its inquiry and, on July 29, 1986, found reasonable cause to believe that Mr. Magliano violated G.L. c. 268A, §3(b). Pursuant to G.L. c. 268B §4(c), the Commission also authorized the initiation of an adjudicatory proceeding to determine whether there has been a violation. An Order to Show Cause issued on August 25, 1986, initiating such a proceeding.

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

1. From January, 1984 to the present, Carl D. Pitaro has been the elected Mayor of Brockton. As Mayor of the city of Brockton, Mr. Pitaro is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. From January, 1984 to the present, Francis M. Magliano has been the building superintendent for the city of Brockton. As building superintendent, Mr. Magliano is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. James C. Mihos is a resident of Brockton, Massachusetts. Since 1979, his family has owned a parcel of land on Pleasant Street in Brockton which is the proposed site of a new hotel project. (The land is owned by James and Peter Mihos, Trustees of the 167 Pleasant Street Trust.)

4. In the fall of 1984, Mr. Mihos entered into an agreement with Ocean Properties Limited, a Florida development company, to sell 7.3 acres of the 36 acre parcel on Pleasant Street to Ocean Properties Limited for development as a hotel project. Under the city of Brockton's zoning ordinances, the parcel was zoned for "Office Commercial" use, which did not allow for a hotel. The Mihos agreement with Ocean Properties Limited was contingent on Ocean Properties obtaining all the necessary permits, including a permit to allow a hotel to be built on the parcel.

5. In late March, 1985, Mr. Mihos met with Mr. Magliano in city hall to discuss the possibility of a hotel on this site. At this meeting, Mr. Magliano advised Mr. Mihos of the zoning issues and explained two possible options: a special permit or a zoning change by the city council. As a developer and citizen of Brockton, Mr. Mihos was aware of a prior proposed hotel project which failed to win support in the city partly because the project did not include a "name" hotel or conference facilities and a question had been raised concerning the quality of the construction. Consequently, Mr. Mihos requested Mr. Magliano to set up a meeting for him with Mayor Pitaro to discuss the city's concerns regarding the quality of the construction and nature of facilities being proposed.

6. Shortly after the initial meeting between Mr. Mihos and Mr. Magliano, Mr. Magliano and Mr. Mihos met with Mr. Pitaro in city hall to discuss the proposed hotel project. In the course of this discussion, Mr. Mihos invited Mr. Pitaro and Mr. Magliano to accompany him to Florida to see other hotels developed by Ocean Properties Limited in order to observe the quality of construction and the type of facilities that this company developed, as well as to meet the personnel who would be involved in the Brockton project. Mihos also invited Mr. Pitaro and Mr. Magliano to bring their spouses on the trip. While Mihos intended to pay for the costs of the trip, Mr. Pitaro and Mr. Magliano originally intended to pay their own costs.

7. Mr. Mihos obtained airline tickets through a Canton travel agency and paid $238.00 for each of the six round-trip coach fare tickets on April 3, 1985. Mr. Pitaro and Mr. Magliano previously had attempted to buy their own tickets through a different agency.

8. On Friday, April 12, 1985, the Pitaros, Maglianos, and Mihoses flew from Boston to Miami, Florida, arriving in Miami at approximately 1:30 p.m. Mr. Mihos rented one car at a cost of $149.00 and the six drove to Delray Beach, arriving at their hotel at approximately 6 p.m.

9. Mr. Mihos had also arranged to have all six members in the party stay at the Holiday Inn at Delray Beach in Florida, a hotel developed by Ocean Properties. The hotel accommodations (at a cost of $192.00 per couple for three nights) were paid for by Ocean Properties. While in Florida, the three couples shared the cost of their meals.

10. On Saturday, the Pitaros, Maglianos and Mihoses, driven and escorted by a representative of Ocean Properties, Ltd., examined several hotels, an office complex and a construction site all developed or being developed by Ocean Properties. On Sunday, after attending church, the six again joined one of the principals of Ocean Properties, Ltd. on his boat. On Monday, April 15, 1985, Patriots Day and a legal holiday, the six drove back to Miami in the vehicle rented by Mr. Mihos and took a 12:20 p.m. flight back to Boston arriving at approximately 3:30 p.m.

11. Prior to the Florida trip, Mr. Pitaro had publicly supported the construction in Brockton of a quality "name" hotel complex which would include conference facilities. Upon his return from Florida, Mr. Pitaro spoke publicly in support of the proposed hotel project on the Mihos parcel of land at public meetings, monthly press conferences and before various service groups.

12. The proposal to rezone part of the Mihos' property to "General Commercial" was submitted to the City Council June 17, 1985. It passed the Finance Committee and was the subject of public hearings before the Planning Board and Council Ordinance Committee before being passed by a 2/3 vote of the full City Council on October 15, 1985.

13. The ordinance was presented to Mayor Pitaro on October 18, 1985. Pursuant to the Brockton city charter the Mayor has the authority to: (1) sign the amendment into law; (2) veto the amendment and return it to the Council with his objections, at which time it can still become law upon another 2/3 vote of the Council; or (3) take no action on the amendment, at which point the amendment becomes law within 10 days of it being presented to the Mayor. The Mayor signed the ordinance rezoning part of Mihos' land on October 18, 1985, the same day it was presented to him.

14. As building superintendent, Mr. Magliano would be responsible for issuing building permit(s) for the hotel complex after reviewing the plans and specifications submitted by the developer and for ensuring the project was in compliance with the state building code and the local zoning ordinances.

15. General Laws chapter 268A, §3(b) prohibits a municipal employee from directly or indirectly receiving for himself anything of substantial value, otherwise than as provided by law for the proper discharge of offical duty, for or because of any official act performed or to be performed by him.

16. Based upon the facts and conduct set forth in paragraphs 1 through 14, above, Mr. Magliano violated §3(b).

17. The Commission has found no evidence suggesting corrupt intent or an intentional or knowing violation of the law by Mr. Magliano.

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. Magliano:

1. that he pay to the Commission the amount of one thousand dollars ($1,000) as a civil penalty for his violation of §3(b);

2. that he pay to the Commission the amount of $668.00 as forfeiture of the economic advantage gained; and

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

DATE: October 29, 1986

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 312

IN THE MATTER
OF
JAMES C. MIHOS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and James C. Mihos (Mr. Mihos), 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(j).

On May 20, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Mihos, a private developer in the city of Brockton. The Commission concluded its inquiry and, on July 29, 1986, found reasonable cause to believe that Mr. Mihos violated G.L. c. 268A, §3(a). Pursuant to G.L. c. 268B §4(c), the Commission also authorized the initiation of an adjudicatory proceeding to determine whether there has been a violation. An Order to Show Cause issued on August 25, 1986, initiating such a proceeding.

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

1. From January, 1984 to the present, Carl D. Pitaro has been the elected Mayor of Brockton. As Mayor of the city of Brockton, Mr. Pitaro is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. From January, 1984 to the present, Francis M. Magliano has been the building superintendent for the city of Brockton. As building superintendent, Mr. Magliano is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. James C. Mihos is a resident of Brockton, Massachusetts. Since 1979, his family has owned a parcel of land on Pleasant Street in Brockton which is the proposed site of a new hotel project. (The land is owned by James and Peter Mihos, Trustees of the 167 Pleasant Street Trust.)

4. In the fall of 1984, Mr. Mihos entered into an agreement with Ocean Properties Limited, a Florida development company, to sell 7.3 acres of the 36 acre parcel on Pleasant Street to Ocean Properties Limited for development as a hotel project. Under the city of Brockton's zoning ordinances, the parcel was zoned for "Office Commercial" use, which did not allow for a hotel. The Mihos agreement with Ocean Properties Limited was contingent on Ocean Properties obtaining all the necessary permits, including a permit to allow a hotel to be built on the parcel.

5. In late March, 1985, Mr. Mihos met with Mr. Magliano in city hall to discuss the possibility of a hotel on this site. At this meeting, Mr. Magliano advised Mr. Mihos of the zoning issues and explained two possible options: a special permit or a zoning change by the city council. As a developer and citizen of Brockton, Mr. Mihos was aware of a prior proposed hotel project which failed to win support in the city partly because the project did not include a "name" hotel or conference facilities and a question had been raised concerning the quality of the construction. Consequently, Mr. Mihos requested Mr. Magliano to set up a meeting for him with Mayor Pitaro to discuss the city's concerns regarding the quality of the construction and nature of facilities being proposed.

6. Shortly after the initial meeting between Mr. Mihos and Mr. Magliano, Mr. Magliano and Mr. Mihos met with Mr. Pitaro in city hall to discuss the proposed hotel project. In the course of this discussion, Mr. Mihos invited Mr. Pitaro and Mr. Magliano to accompany him to Florida to see other hotels developed by Ocean Properties Limited in order to observe the quality of construction and the type of facilities that this company developed, as well as to meet the personnel who would be involved in the Brockton project. Mihos also invited Mr. Pitaro and Mr. Magliano to bring their spouses on the trip. While Mihos intended to pay for the costs of the trip, Mr. Pitaro and Mr. Magliano originally intended to pay their own costs.

7. Mr. Mihos obtained airline tickets through a Canton travel agency and paid $238.00 for each of the six round-trip coach fare tickets on April 3, 1985. Mr. Pitaro and Mr. Magliano previously had attempted to buy their own tickets through a different agency.

8. On Friday, April 12, 1985, the Pitaros, Maglianos, and Mihoses flew from Boston to Miami, Florida, arriving in Miami at approximately 1:30 p.m. Mr. Mihos rented one car at a cost of $149.00 and the six drove to Delray Beach, arriving at their hotel at approximately 6 p.m.

9. Mr. Mihos had also arranged to have all six members in the party stay at the Holiday Inn at Delray Beach in Florida, a hotel developed by Ocean Properties. The hotel accommodations (at a cost of $192.00 per couple for three nights) were paid for by Ocean Properties. While in Florida, the three couples shared the cost of their meals.

10. On Saturday, the Pitaros, Maglianos and Mihoses, driven and escorted by a representative of Ocean Properties, Ltd., examined several hotels, an office complex and a construction site all developed or being developed by Ocean Properties. On Sunday, after attending church, the six again joined one of the principals of Ocean Properties, Ltd. on his boat. On Monday, April 15, 1985, Patriots Day and a legal holiday, the six drove back to Miami in the vehicle rented by Mr. Mihos and took a 12:20 p.m. flight back to Boston arriving at approximately 3:30 p.m.

11. Prior to the Florida trip, Mr. Pitaro had publicly supported the construction in Brockton of a quality "name" hotel complex which would include conference facilities. Upon his return from Florida, Mr. Pitaro spoke publicly in support of the proposed hotel project on the Mihos parcel of land at public meetings, monthly press conferences and before various service groups.

12. The proposal to rezone part of the Mihos' property to "General Commercial" was submitted to the City Council June 17, 1985. It passed the Finance Committee and was the subject of public hearings before the Planning Board and Council Ordinance Committee before being passed by a 2/3 vote of the full City Council on October 15, 1985.

13. The ordinance was presented to Mayor Pitaro on October 18, 1985. Pursuant to the Brockton city charter the Mayor has the authority to: (1) sign the amendment into law; (2) veto the amendment and return it to the Council with his objections, at which time it can still become law upon another 2/3 vote of the Council; or (3) take no action on the amendment, at which point the amendment becomes law within 10 days of it being presented to the Mayor. The Mayor signed the ordinance rezoning part of Mihos' land on October 18, 1985, the same day it was presented to him.

14. As building superintendent, Mr. Magliano would be responsible for issuing building permit(s) for the hotel complex after reviewing the plans and specifications submitted by the developer and for ensuring the project was in compliance with the state building code and the local zoning ordinances.

15. General Laws chapter 268A, §3(a) prohibits the offering or giving of anything of substantial value, otherwise than as provided by law for the proper discharge of offical duty, to a municipal employee for or because of any official act performed or to be performed by such an employee.

16. Based upon the facts and conduct set forth in paragraphs 1 through 14, above, Mr. Mihos violated §3(a).

17. The Commission has found no evidence suggesting corrupt intent or an intentional or knowing violation of the law by Mr. Mihos.

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. Mihos:

1. that he pay to the Commission the amount of one thousand dollars ($1,000) as a civil penalty for his violation of §3(a); and

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

DATE: October 29, 1986

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 314

IN THE MATTER
OF
ERLAND S. TOWNSEND, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Erland S. Townsend, Jr. (Mr. Townsend) 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(j).

On April 2, 1985, 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. Townsend, the co-chairman of the Swampscott Conservation Commission. The Commission concluded that preliminary inquiry, and, on May 14, 1985, found reasonable cause to believe that Mr. Townsend violated G.L. c. 268A.

This matter was suspended by the Commission as a result of the July 9, 1985 decision of the Supreme Judicial Court in **Saccone v. State Ethics Commission**, 395 Mass. 326. Legislation restoring the Commission's full enforcement powers over all violations of G.L. c. 268A went into effect on April 8, 1986.

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

1. Mr. Townsend became a member of the Swampscott Conservation Commission on October 17, 1983. All members of the Conservation Commission were previously classified as special municipal employees pursuant to G.L. c. 268A, §1(n).

2. The chairman of the Conservation Commission, Esther Ewing, now deceased, had requested Mr. Townsend to become a member because of his expertise. On March 27, 1985, when first contacted by the Commission, Mr. Townsend resigned as a member of the Conservation Commission.

3. At all times relevant hereto, Mr. Townsend was also an engineer engaged in a private consulting engineer practice with T&M Engineering, Inc. in Salem.

4. On October 18, 1983, T&M Engineering, Inc., through Mr. Townsend's partner, submitted a proposal to Charing Cross Corporation, which was accepted on October 28, 1983, whereby T&M Engineering, Inc. was to be site engineer for a condominium project to be developed by Charing Cross in Swampscott called "The Glen."

5. In April, 1984, Mr. Townsend, as the site engineer, prepared an environmental impact statement (EIS) for Charing Cross for "The Glen." As required by local rules, Mr. Townsend, as site engineer, co-signed the cover letter submitting the EIS to the Swampscott Zoning Board of Appeals, with informational copies to the Conservation Commission, the Board of Health and other boards and commissions in the town of Swampscott.

6. Mr. Townsend was elected co-chairman of the Swampscott Conservation Commission on May 22, 1984. The minutes of that meeting indicate that Mr. Townsend agreed to serve "as long as it was understood that he would step down when his firm, T&M Engineering Assoc., Inc., has work before the Commission."

7. At a meeting on June 28, 1984, the Conservation Commission discussed the EIS regarding "The Glen." The minutes of this meeting state that Mr. Townsend did not enter into the discussion because he was the site engineer for the project. He disqualified himself and left the table. Mr. Townsend's co-chairman objected to parts of the proposed plans for "The Glen," and it was decided that she would write to the Board of Appeals on behalf of the Conservation Commission to voice the objections. This letter is dated July 10, 1984 and raises three areas of concern: (1) drainage problems; (2) landscaping; and (3) the sewage system. The Conservation Commission sent a copy of the July 10, 1984 letter to the Board of Health.

8. On July 12, 1984, Mr. Townsend wrote as site engineer for "The Glen" to the Swampscott Board of Public Works, regarding the concerns raised in the Conservation Commission's July 10, 1984 letter to the Board of Appeals as to the capacity of the town's sewer system and waste water treatment facility to handle the proposed new construction. He sent a copy of his July 12, 1984 letter to the Conservation Commission as well as to the Board of Appeals and the Board of Health. In this letter Mr. Townsend gave his professional opinion that the 60 new units would have "minimal" impact on the town's systems. At the Board of Public Works meeting in late July, the Board considered Mr. Townsend's letter and decided that estimated maximum daily sewage flow from the project would not unduly impact the system.

9. At a July 17, 1984 Board of Health meeting, at which Martin Goldman, attorney for "The Glen" developers, made a presentation, Mr. Townsend answered questions as site engineer for "The Glen," assuring the Board of Health that the drainage system (one of the items questioned in the Conservation Commission's July 10, 1984 letter) would be installed to the satisfaction of the Board of Health. By letter dated the same day, the Board of Health withdrew its objections to "The Glen," which had been raised in a July 5, 1984 letter to the Board of Appeals.

10. At the July 24, 1984 Conservation Commission meeting, in response to a question from co-chairman Ewing, Mr. Townsend spoke (as the site engineer for "The Glen," according to the minutes), expressing his displeasure with the Commission's July 10, 1984 "emotional" letter to the Board of Appeals, especially the objections regarding increase in sewage.

11. Mr. Townsend as site engineer prepared and signed (as required by local rules) a Request for Determination of Applicability of the Massachusetts Wetlands Protection Act ("Request for Determination") regarding a proposal to store fill and set a trailer on the site of "The Glen" project. On November 6, 1984, he filed this request with the Conservation Commission and with the Commonwealth's Department of Environmental Quality Engineering, as required.

12. The Conservation Commission's hearing on the Request for Determination took place on November 20, 1984. The minutes read: "Erland Townsend stepped off the Commission because of the conflict of interest." The Commission unanimously voted that the Wetlands Protection Act did not apply to the proposal to store fill and set a trailer on the land.

13. Mr. Townsend prepared a Notice of Intent under the Massachusetts Wetlands Protection Act ("Notice of Intent") to begin the new construction, prepared the various site plans and layouts submitted with the Notice of Intent and filed this Notice of Intent with the Conservation Commission on November 9, 1984. On November 29, 1984, the Conservation Commission held a hearing on this Notice of Intent. At this meeting, Mr. Townsend disqualified himself from the Conservation Commission and spoke from the audience in response to questions from co-chairman Ewing regarding the project. Townsend did not participate in the Conservation Commission's deliberations or in the writing of the Order of Conditions issued December 6, 1984 in response to the Notice of Intent. The Order of Conditions refers to plans for "The Glen" signed and stamped by Mr. Townsend as site engineer.

14. Mr. Townsend received compensation, through his salary from T&M Engineering, Inc., from Charing Cross for his work on "The Glen" project, including: (1) the preparation and filing of the EIS in April, 1984; (2) his defense of the proposed project (against concerns raised by the Conservation Commission's letter of July 10, 1984) before the Board of Public Works, the Board of Health and the Conservation Commission itself in July, 1984; (3) the preparation and filing on November 9, 1984 of the Request for Determination; and (4) the preparation of the Notice of Intent (and supporting documents) and responding to questions regarding this Notice of Intent at the November 29, 1984 Conservation Commission hearing (speaking as site engineer, not as a board member).

15. General Laws c. 268A, §17 prohibits a special municipal employee, otherwise than in the proper discharge of his official duties, from directly or indirectly receiving compensation from a private party (§17(a)) or acting as agent for a private party (§17(c)) in connection with any particular matter in which his town has a direct and substantial interest, and in which he has participated, or which is or within one year has been the subject of his official responsibility, or, if he serves more than 60 days per year, which is pending in the municipal agency in which he is now serving.

16. The EIS, the Conservation Commission's July 10, 1984 letter to the Board of Appeals, the Request for Determination and the Notice of Intent were particular matters, as defined by G.L. c. 268A, §1(k), which were the subjects of Mr. Townsend's official responsibilities as a member of the Conservation Commission. By receiving compensation from a private party in connection with these particular matters, Mr. Townsend violated §17(a).[1/]

17. By acting as agent for Charing Cross, the developers of "The Glen" in connection with (a) preparing and filing the EIS; (b) writing to the Board of Public Works and answering questions at Board of Health and the Conservation Commission meetings regarding the Conservation Commission's July 10, 1984 letter; (c) preparing and filing the Request for Determination; (d) preparing and filing the Notice of Intent and plans in support of this Notice of Intent; and (e) speaking as site engineer in response to questions regarding the Notice of Intent at the November 29, 1984 Conservation Commission meeting, Mr. Townsend thereby violated §17(c)[2/].

18. There is no evidence to suggest that Mr. Townsend knowingly or intentionally violated G.L. c. 268A. When he accepted his position as a co-chairman of the Conservation Commission, he made it clear that he would disqualify himself from participating in any matter in which his firm was involved, and the evidence indicates that he did so disqualify himself. In each of the matters involving "The Glen" he abstained from participation as a member of the Commission, and made it known that he was speaking only as the site engineer.

WHEREFORE, 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. Townsend has agreed:

(1) that he pay to the Commission a civil penalty in the amount of $1,000 for violating G.L. c. 268A, §§17(a) and 17(c); and

(2) 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 proceedings in which the Commission is a party.

DATE: November 13, 1986

[1/]As detailed in paragraphs 7, 12 and 15, Mr. Townsend did not participate as a member of the Conservation Commission in the particular matters regarding "The Glen," and therefore did not violate §19(a) of G.L. c. 268A. As explained herein, even though he properly abstained from participation as a municipal employee, he still violated the conflict of interest law by receiving compensation from a private party and acting as agent for the private party in connection with the particular matters regarding "The Glen."

[2/]Even if Mr. Townsend had not filed any documents with or made any appearances before the Conservation Commission, his preparation of the EIS, the Request for Determination and the Notice of Intent and the plans relied upon in the Notice of Intent, knowing that these were particular matters in which the town would have a direct and substantial interest and were within his official responsibility at the Conservation Commission, would have been sufficient to establish a violation of §17(c).

Mr. Eugene LeBlanc
9 Karolyn Circle
Nahant, Massachusetts 01908

RE: Public Enforcement Letter 87-2

Dear Mr. LeBlanc:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that as the Nahant building inspector, you inspected your own private construction work. The results of our investigation, which are discussed below, indicate that you may have violated the conflict of interest law. However, in view of certain mitigating factors, also discussed below, the Commission does not feel that further proceedings are warranted.

Rather, the Commission has concluded that the public interest would better be served by disclosing 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, and compliance with, the conflict 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. Facts

1. You have been the part-time building inspector for the town of Nahant for twenty-eight years. As such, you are a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. You own and operate the E. J. LeBlanc Construction Company, which builds, sells and rehabilitates homes in Nahant.

3. As building inspector, for many years you have performed inspections of, and signed the necessary permits for, building construction performed by the E. J. LeBlanc Construction Company in Nahant.

4. During the years 1980 through May, 1986, you issued permits for, and performed inspections on, property in Nahant being rehabilitated or constructed by E. J. LeBlanc Construction Company. One such permit, which you issued, dated October, 1984, was for property located at 74 Wilson Road, which is owned by you and your wife.

II. The Conflict Law

As building inspector you are a municipal employee for purposes of applying the conflict of interest law, G.L. c. 268A. Section 19 of that law generally prohibits a municipal employee from participating as such in a particular matter in which he knowingly has a financial interest. The facts set forth in this letter, if proven,

would support a violation of §19 because they suggest that by inspecting your own company's work and by issuing the necessary building permits, you participated as a municipal employee in particular matters in which you had a financial interest.

The Commission takes a very serious approach to conflicts of interest which involve public safety. The public has a right to be absolutely confident in the integrity and thoroughness of public safety inspections, including building code enforcement inspections.

Where a public inspector inspects his own work, two problems arise: (1) were the inspections honestly performed, given the inspector's private interest in the outcome? And, (2) even if the inspector honestly and conscientiously inspects his own work, as a practical matter, that work is not being reviewed by a second set of "eyes" which might catch mistakes the person who did the work would not see, even when he inspects it.

Thus, the Commission wants to make clear to you and any other inspectors similarly situated that the public's interest in safety ordinarily mandates that the inspector not have a private financial interest in his inspections.[1]/

Our inquiry indicated that the Nahant Board of Selectmen was aware at all times that you were issuing permits for and inspecting work done by your construction company. Because of this, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings. Rather, the Commission has determined that a public enforcement letter is appropriate. In choosing this public enforcement letter as an appropriate resolution of this §19 issue, the Commission was additionally mindful of the following mitigating factors:

1. our investigation found no evidence of preferential treatment of your own company in your inspections;

2. our investigation indicated that you properly issued permits to your company and assessed the appropriate filing fees;

3. you immediately ceased to perform inspections on your own work once the issue of conflict arose; and

4. you have cooperated fully throughout our investigation and have provided all of the information requested.

You and the Board of Selectmen should also be aware that §19 applies not only to issuance of permits for an inspection of your own company's work but would also apply to any matter in which you, as building inspector, participate and in which an immediate family member has a financial interest.

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, and your future compliance with, the conflict law. This matter is now closed.

Thank you very much for your cooperation throughout this inquiry. If you have any questions, please contact me at 727-0060.

DATE: December 30, 1986

[1]/General Laws c. 268A, §19 does contain a mechanism by which a municipal employee can participate in a particular matter notwithstanding a prohibited financial interest in that matter so long as he makes an appropriate disclosure to the official responsible for appointment to his position and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. The written determination should be filed with the town clerk. Mere awareness by the appointing authority does not excuse the violation. See **In the Matter of John J. Hanlon** (Dkt. No. 229).

Included are:

1. Summaries of Advisory Opinions issued July 1985 to December 1985 and Commission Advisories No's. 7 and 8 issued in 1985.

2. Summaries of all Advisory Opinions and Commission Advisories No's. 9, 10 and 11 issued in 1986.

EC-COI-85-53 — A full-time state employee may serve on the board of directors of a non-profit corporation. She may not act as the agent or attorney for the corporation before any state agency nor may she participate as a state employee in matters affecting the corporation. Since her spouse, the director of a state agency, may have subsequent official dealings with the corporation, his future decisions should be based on objective standards and should not create the impression of being unduly affected by her position on the board.

EC-COI-85-54 — A president of a state educational institution may also serve as director of a bank. However, he may not receive compensation from or act as agent of the bank in matters such as bank audits and bank applications to state agencies, nor can he participate as president of the educational institution in matters in which the bank has a financial interest.

EC-COI-85-55 — A full-time state employee who changes her employment status to contractor with the same agency would remain a state employee because she would continue to perform services for the state agency. She may submit a bid to her agency to provide services under a contract provided that in her state capacity she does not participate in her agency's decision to contract out such services.

EC-COI-85-56 — A physician for the commonwealth may maintain a part-time private medical practice and participate in a health maintenance organization administered by the state. She may only accept private patients who are not state employees. However, she must continue to accept only private patients who are not state employees.

EC-COI-85-57 — A full-time employee of a state educational institution may consult to a firm to perform private consulting work for private colleges and out-of-state universities. He is also prohibited from participating as a state employee with respect to any contracts the educational institution has with the firm.

EC-COI-85-58 — An executive director of a municipal housing authority who is also the incorporator and officer of a corporation may not receive compensation from the corporation or act as the corporation's agent in matters in which the municipality or its agencies are parties or have a direct and substantial interest.

EC-COI-85-59 — Two members of a city's sports facility commission were advised that they could not participate in negotiations to lease the facility to a private management company where the two members were involved in a management group which was a potential lessee. Further the members were advised that they could not act as the group's agent or otherwise appear on the group's behalf before any city body in connection with the proposal. The commission restated the rule that "acting as agent includes not only personal participation in negotiations but also making any sort of contact, on behalf of the outside entity, with the city."

EC-COI-85-60 — A county commissioner may also accept a marketing position with a management consulting firm. He is prohibited from soliciting county business on behalf of the firm, from acting as county commissioner in any matter in which the firm has a financial interest and from being paid by the firm with funds derived from any county contracts it may have.

EC-COI-85-61 — A former director of a state agency may provide consultant services to private companies as long as she did not participate in the same particular matters as a state employee. She is prohibited from appearing before any court or agency of the commonwealth for a one year period on matters that were under her official responsibility.

EC-COI-85-62 — The chairman of a county board who is also president of a real estate agency may officially participate in a proposal before the board involving a parcel of land owned by a different real estate agency with which the board member has a business relationship.

EC-COI-85-63 — A full-time state employee may, while on leave of absence from his position, enter into a lease agreement with a state agency.

EC-COI-85-64 — A municipal fire chief who is responsible for enforcing town fire ordinances, may not be paid for working private details in the town, because his detail compensation would be received for performing acts which are the subject of his offical responsiblity.

EC-COI-85-65 — For the reasons described in EC-COI-85-64 a chief of a municipal police department is prohibited from working private details in the town.

EC-COI-85-66 — A city councillor may not also serve as the paid executive director of a municipal community development corporation, because he would have a financial interest in an employment contract with a municipal agency.

EC-COI-85-67 — A member of a state board, who is also a trustee of a local board which receive state board funds may not act as agent for his local board in connection with funding applications to the state board. He is

further prohibited from taking actions as a state board member in connection with any matters in which his local board has a financial interest.

EC-COI-85-68 — A member of a city council who is also county treasurer may not participate in city council advisory votes concerning the use of surplus county funds because he would be participating in matters within the purview of the county.

EC-COI-85-69 — An individual is a state employee when a state contract specifically contemplates his services. As a state employee, he may participate in drafting and lobbying for general legislation even though it may financially benefit his private employer. However, he must abstain from participating in the enactment of special legistlation in which his private employer has a financial interest unless his state duties require his participation, he discloses this information and his state appointing official gives written permission for the state employee to participate.

EC-COI-85-70 — The sole proprietor of a company may contract with a state agency which employs his wife because she has no financial interest in the company and does not participate in the management or control of the company.She may not participate as a state employee in the contract because her husband has a financial interest in the contract. She must also avoid using her state agency resources such as copy machines, telephones and automobiles to further her husband's business. Additionally she may not act as the agent or representative of her husband's company in its dealings with state agencies.

EC-COI-85-71 — The head of a state agency may hire an employee who is married to a unit manager within the same state agency, as long as he complies with his customary agency hiring procedures and does not otherwise grant undue preferential treatment.

Once the employee is hired, the unit manager will be subject to several restrictions in his official dealing with his wife. He may not participate as unit manager in any matters affecting his wife's financial interest, including salary and promotional determinations and other terms and conditions of employment. Because he will make job assignments to his wife and participate in strategic decisions regarding her handling of cases, there is a risk that he may create the impression of undue favoritism to her because of their marital relationship. To dispel any impression of favoritism, his deputy should oversee his exercise of these responsibilities to insure that the assignments and decisions are based on objective criteria.

EC-COI-85-72 — Subject to certain conditions, an employee of the Commission for the Blind (MCB) may be a member of the board of directors of a private company. Section 4 prohibits him from representing the company in connection with a grant proposal to any state agency or otherwise acting as agent for the company in any particular matter in which the commonwealth is a party or has a direct and substantial interest. Section 6 prohibits the employee from taking any official MCB action which would affect the financial interest of the company. Section 23 would prohibit the employee from using his contacts with the state to obtain favoritism or privileges in the awarding of contracts which may indirectly affect the company.

EC-COI-85-73 — A lawyer hired by the Attorney General to represent the commonwealth in connection with property damage claims against the Manville corporation is a state employee for the purposes of G.L. c. 268A. He may also assist a multi-state committee comprised of the Attorney General and attorneys general from twenty five other states to deal with Manville litigation issues common to other states because his assistance would be in the proper discharge of his official duties.

EC-COI-85-74 — A former municipal employee who previously worked for a municipality on the first phase of a reconstruction project may now consult for a company over the reconstruction of other buildings. Because the proposed consultation would involve a new design and construction bid for a different set of buildings, the employee would be working on new particular matters in which she did not previously participate as a municipal employee.

EC-COI-85-75 — Subject to certain limitations, the director of procurement for a state agency may serve as an unpaid member of the board of directors of a buying consortium which contracts with his agency.Section 6 would prohibit his participation as the director of procurement in any informal or formal decision-making concerning bids or contracts between the consortium and the agency, and also in bids of any organization competing with the consortium for the same contract. In performing periodic job performance evaluations of employees who will participate in the award or monitoring of contracts with the consortium, he must avoid using his official position to secure unwarranted privileges for the consortium and from conduct which creates the impression that the consortium will unduly enjoy his official favor.

EC-COI-85-76 — A clerk/magistrate for the district court department is a state employee for the purposes of G.L. c. 268A. He may purchase surplus property offered by a municipality because the commonwealth lacks a direct and substantial interest in the transaction. Should a matter come before him as clerk/magistrate during this period which involves the municipality's public facilities department, he must avoid creating the impression of undue favoritism. This can be achieved by either his refraining from participating in the case or by his disclosure of the facts to his appointing official and discussing safeguards which can dispel any improper impression.

EC-COI-85-77 — An individual who serves for two hours per month on an unpaid basis for a municipal community development corporation business committee is subject to G.L. c. 268A as a "municipal employee" because he provides services to a municipal agency. In view of his unpaid status, his position qualifies for designation by the city council as a "special municipal employee" and makes him eligible for several exemptions under the conflict of interest law. He is not required to file an annual statement of financial interests because G.L. c. 268B does not cover municipal employees.

EC-COI-85-78 — Members of the board of directors of the Western Massachusetts Health Planning Council, Inc., a nonprofit corporation, are not state employees for the purposes of G.L. C. 268A, because: 1. the Council was created by and is regulated by federal, as opposed to state guidelines; 2. the Council is expected to advise the federal government concerning the nature of health care; 3. the major funding source for the Council is the federal government; and 4. the state has no authority to control any Council actions.

EC-COI-85-79 — A conventional industrial development bond issuance of the Massachusetts Industrial Finance Agency (MIFA) is not a contract made by a state agency for the purposes of G.L. c. 268A, §7 because: 1. conventional MIFA bonds are not secured by the full faith and credit of MIFA or by any pledge of MIFA revenues or receipts; and 2. MIFA undertakes no obligations with respect to the bond issuance. A member of the General Court could therefore have a financial interest in a conventional industrial development bond of MIFA. On the other hand, a bond issued by MIFA through its Guaranteed Loan Program is a contract for §7 purposes because MIFA guarantees the payment of the principal and interest, and state funds are used to support the insurance fund backing the bonds. A member of the General Court would therefore violate §7 by borrowing funds pursuant to the program because he would have a financial interest in a contract made by a state agency.

EC-COI-85-80 — An unpaid member of a state agency is a "special state employee". Following disclosure, G.L. c. 268A, §7(d) permits him to have a financial interest in an employment contract with a second state agency because, in his unpaid member capacity, he neither participates in nor has official responsibility for any of the activities of the second agency. Although the two agencies share some common subject matters, his involvement does not rise to the level of personal and substantial participation or official responsibility for activities of the second agency. To avoid creating the appearance of undue favoritism whenever matters involving the two agencies arise, he should abstain from involvement in any common matter.

EC-COI-85-81 — A full-time state employee may not work for a private company after hours under a contract made by his own state agency. If he leaves his full-time position to work for the company under the contract, he will remain a state employee if the contract contemplates that he will perform certain specialized functions.

EC-COI-85-82 — A member of the General Court may represent, for compensation, a client in an adjudicatory proceeding before the Industrial Accident Board (IAB) because the IAB proceeding is a quasi-judicial proceeding and therefore qualifies the legislator for an exemption, under G.L. c. 268A, §4.

EC-COI-85-83 — A police chief may generally not be paid for performing private detail work because the chief has official responsibility over subordinate officers who customarily perform private detail work. An exception to this general principle applies, however, when the chief is the only fulltime officer on the force and 1. no other town reserve officer, officer in a neighboring community, state police officer or constable is available to work the detail; 2. the chief has made a good faith effort to determine that none of these officiers is available; 3. the chief is paid at the same hourly rate as reserve officers and is paid pursuant to statutory detail requirements, and 4. no other town reserve officer is working another detail at the same time.

EC-COI-85-84 — An independent special state commission comprised of legislative and gubernatorial appointees is a state agency for the purposes of G.L. c. 268A, and a consultant who left the special commission is a former state employee. The lobbying ban of §5(e) will therefore prohibit his acting as legislative agent before the special commission for one year following his termination of employment. Because the special commission is a governmental body independent of the General Court, §5(e) will not restrict his acting as legislative agent before the General Court.

EC-COI-85-85 — A lawyer designated to represent a public instrumentality of the commonwealth as its general counsel is a state employee for the purposes of G.L. c. 268A. He may also represent two communities in matters in which the state is neither a party nor has a direct and substantial interest. Because the state will not be affected by his advice to the communities, the state will not have a direct and substantial interest in these matters.

COMMISSION ADVISORY NO. 7 — Multiple Office Holding at the Local Level. This advisory clarified the application of Section 20 of the conflict law to municipal employees and officials holding more than one municipal position. Authorized January 8, 1985.

COMMISSION ADVISORY NO. 8 — Free Passes. This advisory alerted the entertainment industry and public officials that the longstanding practice of providing free passes to public officials for entertainment events often involves a violation of Section 3 of the conflict law. Authorized May 14, 1985.

SUMMARY OF ADVISORY OPINIONS (1986)

EC-COI-86-1 — A part-time Department of Social Services foster care parent recruiter may also enter into a second contract with DSS to assist homeless families on public assistance because she satisfies the "welfare exemption" standards of G.L. c. 268A §7.

EC-COI-86-2 — A Department of Environmental Quality Engineering employee may run for and hold the position of local health agent, provided that he does not act as the health agent in the several matters which fall within DEQE's jurisdiction.

EC-COI-86-3 — An employee in the Office of the Secretary of State may become a partner in a real estate partnership. Because the employee's office reviews certain filings by the partnerships, the employee must abstain from official participation in the review of filings by his partnership. He must also avoid acting as his partnership's agent in connection with the submission of proposals, applications, and reports with his own or other state agencies.

EC-COI-86-4 — Members of an advisory committee to a state agency are considered state employees for the purposes of G.L. c. 268A, based on the permanence of the committee and the substantive role it plays in the agency's work.

EC-COI-86-5 — Members of an advisory committee to a state agency are not considered state employees under G.L. c. 268A where the committee's status is temporary, the committee members are selected to present outside viewpoints and there is a lack of formality in the committee's work product.

EC-COI-86-6 — A member of a state board will be subject to certain conflict law restrictions where his public and private activities overlap. For example, he will be prohibited from signing a contract with the Board on behalf of his private company or sharing in the company's receipt of compensation for services from a company venture funded by the Board. He will also be required to abstain from participating as a Board member in any joint venture with his company, and disclose the company's financial interest in the matter to his appointing authority.

EC-COI-86-7 — Members of the Designer Selection Board are considered special state employees for c. 268A purposes. As such, they are prohibited from having a financial interest in contracts subject to the designer selection jurisdiction of DSB, including contracts with state agencies, state building authorities and EOCD housing projects. Because cities and towns are specifically exempted from DSB jurisdiction, DSB members would not violate §7 by contracting with municipalities. DSB members are also subject to restrictions under §§ 4, 5, 6, and 23.

EC-COI-86-8 — An elected constable is considered a municipal employee under the conflict law. A full-time municipal employee may not serve as an elected constable in the same town unless the Board of Selectmen has classified the position of constable as a special municipal employee position. Such special status would make the employee eligible for either of two exemptions from the prohibition against a municipal employee having a financial interest in a municipal contract.

EC-COI-86-9 — An individual who has ongoing business relationships with a municipal airport may not serve as manager for the airport, because he would have a financial interest in contracts with that entity.

EC-COI-86-10 — A full-time police chief may not also serve as an appointed constable in the same town. His receipt of compensation as an appointed constable constitutes a financial interest in a contract made by the town, based on the standards outlined in the Commission's ruling **In The Matter of Robert J. Quinn**. The police chief is ineligible for any exemptions to the §20 prohibition against having a financial interest in a second municipal contract, due to the twenty-four hour a day nature of his position.

EC-COI-86-11 — A judge would receive an unwarranted privilege of substantial value if he accepted a honorarium from the sponsor of a seminar in which he participated on an "education day" while also receiving his regular judicial compensation for the same day.

EC-COI-86-12 — A member of the General Court may not make a paid personal appearance on behalf of a client before the state Parole Board because the proceedings are neither ministerial nor quasi-judicial. His associates, however, would not share this prohibition.

EC-COI-86-13 — A police chief may not investigate a complaint against an establishment in which an immediate member of his family has an ownership interest, or assign police officers to that establishment. His participation in matters involving the competitors of that establishment will be permitted only if he has disclosed the situation to his appointing authority and has received written permission to participate.

EC-COI-86-14 — Local housing authority officials responsible for the Authority's participation in a car purchasing program may not accept a personal discount from that car dealership because they would be in receipt of an item of substantial value for or because of their official actions. Other Authority officials who are not involved with the car dealership in their official positions may not accept the discount because they would be in receipt of an unwarranted privilege of substantial value not properly available to similarly situated individuals.

EC-COI-86-15 — A member of the General Court may conduct private business with county and municipal agencies because the conflict law only prohibits his paid appearances before state agencies. As a legislator, he will be required to abstain from participating in any legislative review of a county account in which he has a financial interest.

EC-COI-86-16 — A municipal employee may act both as attorney for his municipal employer in one lawsuit, and as attorney for parties other than his municipal employer in two other lawsuits, because the latter actions are separate particular matters from the first. Different parties, facts and legal issues are indicia of separate particular matters. The lawsuits retain their status as separate particular matters even when the court clerk, for reasons of judicial economy, assigns them a common docket number and requires the municipal employee to file a single appellate brief.

EC-COI-86-17 — A state agency may provide free unlimited transportation passes to its employees and their spouses as part of an employee benefit package. Members of the state agency may not provide free passes to themselves, their own spouses, county officials or retired employees for personal, non-job-related uses, however, as this constitutes use of their official position to secure an unwarranted privilege of substantial value for themselves and others.

EC-COI-86-18 — A county employee may not also serve civil process as an appointed, paid deputy sheriff. By acting as deputy sheriff, the employee would have a financial interest in a contract made by the county in violation of §14.

EC-COI-86-19 — A city council member may vote on a home rule petition which affects the financial interest of an immediate family member if she publicly discloses this information pursuant to G.L. c. 268A, §23(b)(3). The city council member is not required by §19 to abstain from voting because she is not participating in a "particular matter" which affects the family member's financial interest; a city's petition to the state legislature for a special law is excluded from the definition of "particular matter."

EC-COI-86-20 — A state employee may serve on the board of directors of a non-profit organization which has a contractual relationship with his state agency provided: (1) the employee refrains from acting while on the board in connection with any particular matter in which the commonwealth or any state agency has a direct and substantial interest and (2) the employee does not participate, while at the agency, in any particular matter in which the non-profit organization has a financial interest.

EC-COI-86-21 — An artwork designer whose services have been expressly contracted for by a state agency is a state employee for the purposes of the conflict of interest law. The fact that his company is under contract with the state agency does not place the employee in violation of §7 because his professional design services were authorized by the same contract which made him a state employee.

EC-COI-86-22 — The spouse of a state employee will also be considered a state employee because he provides certain services customarily performed by state employees. He is prohibited by §6 from participating as a state employee in any particular matter which affects the financial interest of a business organization for which he holds an uncompensated position as director. Section 23 prohibits his use of state resources for activities related to the business or his use of his state position to advance or endorse the business. To the extent he also chairs a group comprised of representatives of state agencies, he may not represent the business in connection with matters within his responsibility as chair of that group.

EC-COI-86-23 — A former state employee may represent a corporate founder in a sale of stock to another corporate founder because the former employee will not be acting as agent or attorney for or be receiving compensation from a non-state party in connection with a particular matter in which he previously participated as a state employee.

EC-COI-86-24 — A member of the General Court may appear on an uncompensated basis before the Department of Food and Agriculture (DFA) on behalf of a family trust. He may not receive from the family trust profits which are attributable to a DFA contract, nor may he participate, as a member of the General Court, in any matter which affects his, his immediate family's or the family trust's financial interests.

EC-COI-86-25 — A city council member who is employed by a teachers' organization which has a reasonably foreseeable financial interest in the selection of a school committee member may not participate in the appointment.

COMMISSION ADVISORY NO. 9 — State Employee Stock Ownership. This advisory reviewed the principles of the conflict law which apply to state employees who own stock in corporations which contract with state agencies. Authorized February 25, 1986.

COMMISSION ADVISORY NO. 10 — Chiefs of Police Doing Privately Paid Details. This advisory provided guidelines to Boards of Selectmen and City Councils to aid them in restructuring a police chief's employment arrangement so as to permit paid detail work without violating the conflict law. Issued June 26, 1986.

COMMISSION ADVISORY NO. 11 — Nepotism. This advisory explains to public officials and employees exactly what constitutes a "nepotism" violation and what the Commission's enforcement policy is regarding these violations. Issued December 15, 1986.

Included are:

1. All Advisory Opinions issued July 1985 to December 1985, page 43.

2. All Advisory Opinions issued in 1986, page 86.

3. Commission Advisories No's. 9, 10, 11 issued in 1986, page 121.

Cite Advisory Opinions as follows:
EC-COI-86-(number)

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

CONFLICT OF INTEREST OPINION NO. EC-COI-85-53

FACTS:

You are an employee of state agency ABC and have been invited to serve as a member of the board of directors of XYZ. XYZ is a non-profit corporation which receives a portion of its funding from the Bay State Skills Corporation and local organizations funded under the Job Training and Partnership Act (JTPA). ABC does not provide funding to XYZ but does have official dealings with XYZ. You also state that XYZ may be receiving funding from a state agency in which a member of your immediate family is an employee.

QUESTION:

Does G.L. c. 268A permit you to serve on the XYZ board of directors while you remain employed by ABC?

ANSWER:

Yes, although you will be subject to certain restrictions in both your ABC and XYZ positions.

DISCUSSION:

As an ABC employee, you are a state employee for the purposes of G.L. c. 268A. Three sections of that law are relevant to your situation.

1. Section 4(c)

This section limits your activities as an XYZ director. Under §4(c), you may not act as the agent or attorney for XYZ 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. For example, you could not act as XYZ's spokesperson in connection with its funding applications to or contracts with state agencies such as the Bay State Skills Corporation, or agencies funded under JTPA. The prohibition would also require that you not sign the funding applications or contracts. On the other hand, you could participate in internal XYZ board discussions concerning such matters as long as you did not take any action which might be perceived by outsiders as your acting on behalf of XYZ.

2. Section 6

This section prohibits you from participating[2] in your ABC capacity in any particular matter in which XYZ has a financial interest. For example, you may not approve the referral to XYZ of an individual who receives unemployment compensation. Although you indicate that this scenario does not occur frequently, §6 places certain disclosure requirements on you. In addition to abstaining from the referral, you must notify your appointing official and the Commission of the nature of your relationship to XYZ and XYZ's financial interest. Your appointing official may then 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 you, in which case you may participate in the particular matter. Copies of such written determination shall be forwarded to you and filed with the Commission.

3. Section 23[3]

This section applies to both you and your family member. As applied to you, §23 prohibits you from using your official ABC position to secure unwarranted privileges or exemptions for XYZ, or from disclosing to XYZ confidential information which you have acquired at ABC. Your family member must abide by §23(¶2)(3) in her official dealings with XYZ. Although there is nothing in §23 that inherently prohibits your family member's participation, to avoid raising such issues, her decisions with regard to XYZ must be based on objective standards. Specifically, she must avoid conduct which gives the reasonable impression that her funding decisions will be unduly affected by your affiliation with XYZ.[4]

DATE AUTHORIZED: July 16, 1985

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

[3] On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

[4] If this situation should arise, your family member may seek guidance from the Commission.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-54

FACTS:

You are the president of a state educational institution (ABC). Your responsibilities do not include decisions concerning where to deposit ABC funds. These

decisions, which are based on a highest bidder process, are handled by the ABC Comptroller and Director of Auxiliary Services.

You were recently elected as one of the twenty-five directors of a (Bank) and will receive compensation of fifty dollars per meeting. The Bank currently holds approximately $40,000 out of the two to three million dollars in accounts which ABC currently has on deposit with banks.

QUESTION:

Does G.L. c. 268A permit you to serve as a Bank director while you maintain your ABC presidency?

ANSWER:

Yes, provided that you comply with the restrictions described below.

DISCUSSION:

In your capacity as ABC president, you are a state employee for the purposes of G.L. c. 268A. Three sections of the law are relevant to your situation.

1. Section 4

This section limits your activities as a Bank director. Under §4(a) and (c), you may not receive compensation from or act as agent for the Bank 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. For example, if the State Banking Division were conducting an audit of the Bank, you could neither act as the Bank's representative in relation to the audit, nor receive compensation from the Bank in relation to that audit. Similarly, you may not act as the Bank's representative in connection with Bank applications to state agencies, including state colleges, because the commonwealth would clearly have a direct and substantial interest in those applications. On the other hand, many matters will come before you at Bank director meetings in which the commonwealth will not be a party or have a direct and substantial interest, and §4 does not limit your Bank activities with respect to those matters. You should therefore monitor the agenda of Bank director meetings and comply with the §4 guidelines whenever matters come before you in which the commonwealth has a stake. You may contact the Commission staff if §4 issues subsequently arise about which you are unsure.

2. Section 6

This section applies to your activities as ABC president. Because you are a Bank director and have loyalties to the Bank which may potentially conflict with your loyalty to the commonwealth, §6 places certain limits on your official actions. Specifically, while you remain as a Bank director, you may not participate[2] in any particular matter in which the Bank has a financial interest. Based on the facts as you have described them, it is unlikely that §6 issues will be raised because you have no official dealings as ABC president with either the Bank or the deposit process. Should your responsibilities change to include involvement with that process, §6 will apply.[3]

3. Section 23(¶2)(3)[4]

This section prohibits you from, by your conduct, giving reasonable basis for the impression that any person can unduly enjoy your favor in the performance of your official duties, or that you are unduly affected by the position of any person. Issues under this section may arise because you have authority over those individuals who have official dealings with banks. You should therefore be aware of the §23 provisions whenever you evaluate these employees' job performance or otherwise participate in any personnel decision including those individuals. In particular, your decisions should not be affected by the amount of deposits which the Bank receives. While this restriction may be self-explanatory, and the process by which ABC deposits are made is based on a standardized procedure, you should remain aware of the §23 standards in your official dealings with these employees.[5]

DATE AUTHORIZED: July 16, 1985

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

[3] If this hypothetical situation should occur, you would be required to abstain from participation if the Bank were an applicant unless you received from your appointing official a written determination that the Bank's financial interest was not so substantial as to affect the integrity of your ABC services. See, G.L. c. 268A, §6.

[4] On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

[5] One other section of G.L. c. 268A, §7, should be noted briefly. This section prohibits a state employee from having a financial interest in a second contract made by a state agency. Issues under §7 would be raised if your Bank director compensation were attributable to contracts with state agencies, or if the Bank held such a large percentage of state deposits that your compensation were unavoidably tied to contracts made by the state. Your current situation does not raise such issues. However, should the Bank's state deposits substantially increase, you should renew your opinion request with the Commission.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-55

FACTS:

You are employed on a full-time basis as a director for state agency ABC. In that capacity, you administer and supervise the provision of certain services to individuals. ABC is considering gradually terminating the employment of its in-house staff, including your position, and contracting out for the provision of these services. You state that you have not had input or discussions with ABC officials involving the advisability of engaging the services of independent contractors, or in the guidelines or specifications for such contractors.

You are interested in submitting a bid for a service contract in the event that ABC decides to contract out for services. If selected, you would leave your position as a director.

QUESTION:

Does G.L. c. 268A permit you to submit a bid to ABC and work under contract with ABC to provide services?

ANSWER:

Yes, although you will be subject to certain restrictions described below.

DISCUSSION:

In your current capacity as a ABC director, you are a state employee for the purposes of G.L. c. 268A. Should you leave your current position to become a contractor to ABC, you would retain your state employee status because the definition of state employee includes "persons performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement." G.L. c. 268A, §1(q). Nothing in G.L. c. 268A inherently prohibits a state employee from changing employment status from a full-time employee to consultant with the same state agency. See, EC-COI-83-41. However, you will be subject to certain restrictions both during and after the application process.

1. Section 6

This section prohibits you from participating[1] as an ABC director in any particular matter[2] in which you have a financial interest. Inasmuch as you plan to submit a bid to ABC to provide services, you have a financial interest in ABC's decision to contract out as well as in ABC's appointment of contractors. As long as you continue to avoid having any input or discussion with ABC officials involving these particular matters, you will be in compliance with §6.[3]

2. Section 23[4]

This section prohibits you from using your official position to secure unwarranted privileges or exemptions for yourself or others, and, by your conduct, from giving reasonable basis for the impression that you are unduly affected by the position of any person. G.L. c. 268A, §23(¶2)(2, 3). Because of your insider status at ABC, you are in a position to influence the contracting out decision, and you must therefore take steps to assure that you will not be using your position to secure an unwarranted privilege for yourself. You should continue to refrain from discussing the contracting out decision or the process with ABC officials. Further, you should be aware that the provisions of §23 apply to your current supervisory role over those individuals who may be competing with you for the service contracts.[5]

3. Section 4(c)

This section prohibits a state employee from acting as the agent of someone 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 will apply if you are planning to submit to ABC a contract bid on behalf of a partnership of other individuals or a corporation. On the other hand, if you make your submission solely on your own behalf, you will not violate §4(c) because you will not be acting as the agent for someone else. See, EC-COI-85-18, 85-12.

DATE AUTHORIZED: July 16, 1985

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[1] 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."

[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] The second paragraph of §6 contains an exemption procedure which would permit your participation in such matters if your appointing official determines in writing that your financial interest is not so substantial as to be deemed likely to affect the integrity of the services which ABC expects from you. A copy of this determination must be forwarded to the Commission.

[4] On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

[5] The standards of conduct described above apply equally to ABC officials who will be making the contracting out and hiring decisions. They should be made aware that they may not grant to you unwarranted privileges or exemptions in the application or selection process. For example, they may not waive for you the principle eligibility requirements for bidding on a service consultant contract.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-56

FACTS:

You are a physician for the commonwealth and you report to a committee from the Group Insurance Commission (GIC), which is responsible for the administration of health maintenance organization plans for state employees. You also have a part-time medical practice several evenings during the week. All of your private patients are from your community, and none are state employees. In your private practice you are a primary care physician for the Plan, a health maintenance organization which is available to state employees. In this capacity, you accept as patients only employees of private corporations.

QUESTION:

Does G.L. c. 268A permit you to maintain a private practice?

ANSWER:

Yes, subject to the following conditions.

DISCUSSION:

As a physician for the commonwealth, you are a state employee for the purposes of G.L. c. 268A, §1(q). The sections of the conflict of interest law applicable to your situation are §§4 and 23.

1. Section 4

Under this section, you are prohibited from receiving compensation from 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. Prior opinions issued by the Commission have stated that the referral and treatment of patients are "particular matters" within the scope of the statute. See EC-COI-84-112. Whether the state has a direct and substantial interest in the matter is determined by the state's involvement or responsibility for the referral or treatment. You indicate that your private patients are not state employees, and the private patients you accept from the Plan are employees of private corporations. Since you do not accept referrals or treat state employees in your private practice, §4 would not apply to your situation.

2. Section 23[1]

Section 23 contains general standards of conduct applicable to all state, county and municipal employees. These provisions address courses of conduct raising conflict questions as well as the appearance of conflict. Section 23(¶2) prohibits the use or attempted use of your official position to secure unwarranted privileges or exemptions for yourself or others. It also prohibits you from, by your conduct, giving a 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). Since you report directly to a GIC committee, you should avoid using your official position to secure preferential treatment for the Plan with the GIC. In other words, your position and loyalty to the Plan should not influence your work as a state employee.

DATE AUTHORIZED: July 16, 1985

[1]On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-57

FACTS:

You are the full-time comptroller for a state educational institution (ABC). You are also employed as a consultant by DEF. DEF has developed a product which is used widely by private colleges and universities in other parts of the country. ABC implemented the system in 1983, and six months after, you began your consulting relationship with DEF. ABC continues to have service maintenance contracts with DEF and may in the future purchase new systems from them. The service contracts are maintained by DEF personnel. If new systems are purchased, ABC will have outside consultants train its personnel on the use of those systems. As a consultant, you provide DEF with advice regarding the use and development of DEF's financial software System. You also assist DEF client colleges and universities during the various phases of implementation of the system. You state that your consulting activities involve private colleges and public universities outside of Massachusetts. In the future, DEF may want you to consult with public universities in Massachusetts.

QUESTION:

Does G.L. c. 268A permit you to work for DEF while you remain a state employee?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

As comptroller of ABC, you are a state employee and therefore are subject to the provisions of the conflict of interest law, G.L. c. 268A. The sections of that law relevant to the issue you have raised are §§4, 6, and 23.

1. Section 4

Section 4 provides in relevant part that no state employee may accept compensation from or act as agent or attorney for anyone other than the commonwealth or a state agency in connection with a particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Any contract that DEF has with public universities in Massachusetts would be considered a particular matter in which the commonwealth or a state agency would have a direct and substantial interest. See, G.L. c. 15A, §1 et.seq. At the present time, because the work you perform is with private colleges and out-of-state universities, §4 does not prohibit you from providing consulting services to DEF clients. On the other hand, you would be prohibited by §4 from receiving compensation on any DEF contracts with public universities in the state because a state agency would be a party to such contract.

2. Section 6

Section 6 provides that no state employee shall participate as such an employee in any particular matter in which he or a business organization in which he is serving as an employee has a financial interest. If the state employee's duties would otherwise require him to participate in such a particular matter, he must advise his appointing official and the Commission of the nature and circumstances of the particular matter and of his financial interest in it. The appointing official shall then 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.

DEF is a business organization with which you have an employment arrangement. A contract between ABC and DEF would constitute a particular matter in which DEF has a financial interest. Section 6 therefore prohibits you from participating[1]/ as ABC comptroller in any decision, determination or recommendation relating to any contracts DEF has with ABC. This provision applies to the renewal of ABC's contracts with DEF as well as new contracts. You must abstain from participation unless your appointing official makes a written determination that your interest in DEF contracts is not so substantial as to be deemed likely to affect the integrity of your services to the commonwealth. Copies of that determination must be forwarded to the Commission.

3. Section 23[2]/

You should also be aware that §23(¶3)(l) prohibits you from accepting employment in any business in which will require you to disclose confidential information which you have gained by reason of your position at ABC. You should keep this provision in mind whenever discussing ABC matters with DEF.

DATE AUTHORIZED: July 16, 1985

[1]/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."

[2]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-58

FACTS:

You are the Executive Director of a Housing Authority (Authority) in ABC municipality. You are also an incorporator and an officer of the Corporation (Corporation), a non-profit corporation established by the Authority. Likewise, every other incorporator, director and officer of the Corporation is also a member and/or officer of the Authority. However, you state that the two entities are separate and distinct organizations, i.e., the Corporation is not an arm of the Authority. You further state that the motivation behind establishing the Corporation was to create an entity which could reach beyond the boundaries of the Authority's jurisdiction, as regulated by HUD and EOCD, to manage properties and provide technical assistance to developers/owners in producing housing in ABC through programs other than public housing programs.

QUESTION:

As Executive Director of the Authority, what limitations does the conflict of interest law place on your ability to work for or hold an office in the Corporation?

ANSWER:

You will be subject to the following restrictions.[1]/

DISCUSSION:

"Municipal employee" is defined in G.L. c. 268A, §1(g) 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. . . " Section 7 of G.L. c. 121B states that "[f]or the purposes of chapter two hundred and sixty-eight A, each housing and redevelopment authority shall be considered a municipal agency. . . " As Executive Director of the Housing Authority, you are therefore a municipal employee subject to the provisions of the conflict of interest law.

Section 17(a) of the conflict law prohibits you from being compensated by anyone other than the ABC or one of its agencies in connection with any particular matter[2]/ in which ABC is a party or has a direct and substantial interest. This provision does not preclude you from being an officer of the Corporation, since you state that such positions are unpaid. On the other hand, §17(a) would prohibit you from being paid by the Corporation for rendering technical assistance to individual owners and developers on matters of direct and substantial interest to ABC. Such particular matters would include not only applications being submitted to the Authority (i.e., the municipal agency which employs you), but also any matters of direct and substantial interest to any other ABC agencies (e.g., applications for financing or licensing).

Section 17(c) prohibits you from acting as agent or attorney for anyone other than the ABC or one of its agencies in connection with any particular matter in which ABC is a party or has a direct and substantial interest. Thus, §17(c) would prohibit you from representing a developer or owner before a municipal agency or regulatory board, e.g., before the planning board or zoning board of appeals in ABC. Acting as agent or attorney for the Corporation before any ABC agency in connection with a proceeding, application or contract, would also violate §17(c). For the purposes of the conflict law, acting as agent for either the Corporation or the individuals it assists means signing their contracts, acting as their advocate in application processes, submitting their applications, presenting supporting information on their behalf to the Authority or any other municipal agency in ABC, or representing them in any way before such a municipal agency. See EC-COI-84-6; 83-78.[3]/

Stated differently, §17 reflects the maxim that a person cannot serve two masters, by restricting what you as a municipal employee may do "on the side." Its broad prohibition acknowledges that whenever an employee works for private interests in matters in which the ABC also has an interest, there is a potential for divided loyalties, influence peddling, the use of insider information and favoritism - all at the expense of the ABC.

To summarize, §17 would prohibit your proposed technical assistance to developers/owners on housing issues, whether paid or unpaid. Because this section's restrictions are limited to "particular matters," however, your involvement as a Corporation officer in the formulation of general issues of policy would not be precluded. EC-COI-83-18; **Graham v. McGrail**, 370 Mass. 133, 139-140 (1976).

You should also be aware of the standards of conduct guidelines contained in §23[4]/ of the conflict law. Section 23 provides that no municipal employee shall:

(1) accept other employment which will impair his independence of judgment in the exercise of his official duties [G.L. c. 268A, §23(¶2)(1)];

(2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others [G.L. c. 268A, §23(¶2)(2)];

(3) by his conduct give a 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)(3)];

(4) accept employment or engage in business activity which will require him to disclose confidential information which he has gained by reason of his official position, nor use such information or materials[5]/ to further his personal interest [G.L. c. 268A, §23(¶3)].

For example, you would violate §23(¶2)(2) by using municipal space, supplies, time or personnel for Corporation business. Similarly, you would violate §23(¶2)(1) if your service as an officer in the Corporation unduly influenced your decision-making processes as Executive Director of the Authority. You should bear these §23 guidelines in mind in pursuing your duties as Executive Director to avoid even the appearance of a conflict.

DATE AUTHORIZED: July 16, 1985

[1]/The scope of this advisory opinion is limited solely to giving you advice concerning your own prospective conduct. Whether your actions in the past violated the conflict law cannot be addressed in an advisory opinion.

[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 . . ." G.L. c. 268A, §1(k).

[2]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[3]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

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

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-59

FACTS:

Two of you are members on the City of A's (City) Sports Facility Commission (Commission). A third member of your group, Mr. A., is a resident of the City. The Commission is a municipal body which oversees the general operation and maintenance of the City's sports facility. Recently, in response to the increasing financial strain the facility puts on the City's budget, the three of you began to have informal discussions about the possibility of having the City lease the facility to a private entity which would handle its operation. An informal opinion was sought from the city solicitor as to whether the Commission was the appropriate body to pursue a leasing arrangement. The city solicitor informed you that the Commission did not have that authority, and that the only way such an arrangement could be entered into would be if the city council were to approve it and then undertake the appropriate steps. As a group you then put together a proposal which was presented to the council by Mr. A. For purposes of the proposal you called the private entity the Management Group (MG). The proposal contemplated that the three of you, possibly along with others, would form the private entity which would lease the facility. When the council received the proposal it was aware of the two Commission members' involvement in it. The council ultimately voted not to proceed with negotiations in part because of their involvement. However, the two Commission members have stated that they never took any actions as Commissioners in connection with the proposal. It has been further stated that the proposal was not a matter that would come before the Commission unless the council were to seek advice from the Commission. Subsequent to the council's action, the two Commission members ceased all involvement with the proposal.

Recently, the city's finance committee contacted Mr. A. and indicated that it would like to pursue discussions about the proposal with him. In this regard, the council sent a memo to the Commission asking it to participate in a joint meeting with the finance committee to discuss the proposal because of the Commission's familiarity with the operation of the sports facility. To date this meeting has not occurred, and you have stated that when it does occur all interested city residents, and not merely Commission members, will be invited to participate. Should the finance committee decide that it is in the interest of the City to have a private entity operate the sports facility, it would submit a proposal to that effect to the council which would then vote on the matter.

In the event that the City decides to lease the sports facility there would no longer be any need for a Commission, and it is likely it would be abolished. The two Commission members would like to become reinvolved with the proposal either at this time, or with the MG should the City decide to lease the sports facility to it.

QUESTIONS:

1. May the two of you participate while you are Commission members in negotiations regarding the proposal with the City?
2. If the two of you resign from the Commission prior to the commencement of negotiations, can you participate in negotiations on behalf of MG?
3. If the MG proposal is accepted by the City and the Commission is abolished, can the two former Commission members then join MG?

ANSWERS:

1. No, unless they have been designated as special municipal employees by the city council.
2. Yes.
3. Yes.

DISCUSSION:

As members of the Commission, the two of you are municipal employees within the meaning of G.L. c. 268A. You therefore are subject to the provisions of that law. Mr. A., as your partner for a time in a joint business venture, is also subject to certain provisions of that law.

1. Application of G.L. c. 268A to the Two Commission Members

The sections of the law applicable to the two Commission §§17, 18, 19 and 23. Section 17 provides in relevant 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 City is a party or has a direct and substantial interest.[2]/ Any proposal made to

the City regarding the operation of the sports facility would constitute a particular matter subject to the §17 prohibition. Thus they may not act as MG's agent or otherwise appear on MG's behalf before any City body in connection with the proposal. Acting as agent includes not only personal participation in negotiations but also making any sort of contact, on behalf of an outside entity, with the City.[3] See e.g. EC-COI-85-21; 85-2.

Section 19 prohibits a municipal employee from participating[4] as such an employee in connection with any matter in which he or a partner or a business organization in which he is serving as officer, director, trustee, partner or employee, has a financial interest. This provision restricts the two Commission members' activities as Commissioners. They may not take any action as Commissioners which would affect either their own or MG's financial interest. It has been stated that the Commission has had no involvement with the proposal, and that any decision to lease the sports facility is not one that would be made by the Commission but rather by the city council. However, should the city council seek a recommendation or any other assistance from the Commission, the two Commission members would have to abstain from participation.

Section 18 places restrictions on the activities of former municipal employees. Section 18(a) prohibits a former municipal employee from acting as agent for 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 the municipal employee participated as a municipal employee. If the two Commissions were to participate as Commissioners in anything having to do with the proposal, for example making a recommendation to the City council they could not then become involved with the proposal with MG after they left the Commission. See e.g. EC-COI-82-130; 81-114. Section 18(b) prohibits a former municipal employee for one year after his employment has ceased from appearing personally before any agency of the city 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 which was the subject of his official responsibility[5] as a municipal employee. This section focuses on official responsibility rather than participation. It would apply to the two Commission members, if, for example, the Commission had official responsibility for participating in a decision about the proposal even though they had abstained from any participation. Since it has been stated that acting on the proposal is not within the responsibility of the Commission, then the provisions of §18(b) would not be applicable.

Finally, the two Commission members should be aware of §23 which contains general standards of conduct applicable to all state, county and municipal employees. It provides in relevant part that a public employee may not use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. This section would be implicated if, for example, the two Commission member were to use any sort of confidential information about the sports facility gained in the course of their service as Commission members to enhance the MG proposal or otherwise benefit MG in obtaining a lease from the City.[6]

2. Application of G.L. c. 268A to Mr. A.

Section 18 of G.L. c. 268A also places restrictions on the activities of the partners of present and former municipal employees. To further the purposes of G.L. c. 268A, the term "partner" is not restricted to those who enter into formal partnership arrangements. Rather, partner means any person who joins with the municipal employee or former municipal employee either formally or informally in a common business venture. See e.g. EC-COI-84-78; 82-68. Thus, Mr. A. and the two Commission members were joined in a partnership up to the point when the council decided not to pursue the proposal and the two Commission members withdrew their involvement. Should the City enter into a lease with MG, the three of you contemplate reestablishing the partnership. Section 18(d) prohibits the partner of a municipal employee from acting 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 and in which the municipal employee participates or has participated as a municipal employee, or which is the subject of the municipal employee's official responsibility. This section would have prohibited Mr. A. from acting as MG's agent before the council in connection with the proposal if the two Commission members had participated in the matter as Commissioners or if participating in the decision on the proposal was a subject of their official responsibility. Since it has been stated that neither of these was the case, §18(d) would not place limits on Mr. A.'s activities. Section 18(c) prohibits the partner of a former municipal employee from engaging in any activity in which the former municipal employee is himself engaging in. Since there would be no limitations on the two Commission members activities pursuant to §18(a) and (b) on the given facts, §18(c) would place no restrictions on Mr. A.'s activities.

DATE AUTHORIZED July 16, 1985

[5]/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."

[1]/This restriction only applies to a special municipal employee in relation to particular matters (1) in which he has at any time participated as a municipal employee, or (2) which are or within one year have been the subject of his official responsibility, or (3) which are pending in the municipal agency in which he is serving.

[2]/The two Commission members could participate in internal MG discussions or recommendations related to the proposal as long as they are not perceived by the public to be taking any actions on MG's behalf. See e.g. EC-COI-83-145. (This citation refers to a previous advisory opinion issued by the Commission including the year it was issued and its identifying number. Copies of these and all other opinions are available for public inspection, with identifying information deleted, at the Commission offices.)

[3]/G.L. c. 268A, §1(j) defines, "to 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]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §25. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-60

FACTS:

You presently serve as an ABC County Commissioner. You are considering accepting a senior position in sales and marketing with a professional group benefits management and consulting firm (Firm). The Firm offers cost containment services in the specific areas of Group Life and Accident and Health Coverages, its services interfacing between the employer and the insurance carrier. Currently, the Firm represents several Massachusetts municipalities including a few located within ABC County. You also state that a principal in the Firm, but not the Firm, has a contractual relationship with ABC County for other unrelated services concerning workers compensation.

QUESTION:

What limitations does G.L. c. 268A place on your proposed sales and marketing activities for the Firm while you serve as a County Commissioner?

ANSWER:

You will be subject to the limitations set forth below.

DISCUSSION:

As a County Commissioner, you are a county 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 11 of the conflict law prohibits a county employee from being compensated by, or acting as agent or attorney for, anyone other than the county by which he is employed in connection with any particular matter[1]/ in which that county is a party or has a direct and substantial interest. For example, §11 would prohibit you from soliciting County business for the Firm. On the other hand, this section would not limit your activities on behalf of the Firm dealing with municipalities because the County would not have a direct and substantial interest in the contracts between the Firm and such municipalities regarding cost containment services.

Section 13 prohibits a county employee from participating[2]/ as such an employee in a particular matter in which to his knowledge he, a partner, or a business organization in which he is serving as officer, director, trustee, partner or employee has a financial interest. Accordingly, you would have to abstain from any discussion or vote concerning a proposal submitted by the Firm to the County Commissioners. If you became a partner in the Firm, Section 13 would also prohibit your participation as a County Commissioner in matters in which your fellow partners had a financial interest, including the workers compensation contract one Firm principal currently has with the County. Section 13 further provides that any county employee whose duties would otherwise require him to participate in a prohibited matter must disclose to the Commission the nature and circumstances of the matter and the financial interest involved. Although certain exemptions are provided when county employees have appointing officials, you, as an elected official, cannot obtain such an exemption.

Section 14 of G.L. c. 268A prohibits a county employee from having a financial interest in a contract made by an agency of the county which employs him. For example, you would violate this section if any of your salary from the Firm derived from the Firm's contracts with the County. Because this section's prohibition only applies to contracts made by agencies of the County, it would not apply to Firm contracts with municipalities, even if you were considered to have a financial interest in such contracts. However, if the principal in the Firm who has contracted individually with the County shares his profits with the Firm, you would be deemed to have an indirect financial interest in a County contract in violation of §14. You should therefore take steps to ensure that you do not share in such profits.

Finally, §23 of the conflict law contains certain standards of conduct which apply to all state, county and municipal employees. That section provides that no county employee shall:

(1) accept other employment which will impair his independence of judgment in the exercise of his official duties [G.L. c. 268A, §23(¶2)(1)];

(2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others [G.L. c. 268A, §23(¶2)(2)];

(3) by his conduct give a 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)(3)];

(4) 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 or materials[3]/ to further his personal interests [G.L. c. 268A, §23(¶3).

To avoid violating §23, you should not exploit or otherwise utilize your position as County Commissioner to assist your efforts on behalf of the Firm. If you deal privately with municipalities within ABC County, the tenor and result of your private dealings may affect your recommendations and advice concerning County matters which uniquely impact those specific municipalities, in violation of §23(¶2)(1). See, e.g. EC-COI-82-124.[4]/ Likewise, the overlap of public and private dealings with such municipalities may give the impression that you may be influenced in the performance of your official duties by virtue of your private business dealings, in violation of §23(¶2)(3). See, e.g. **In the Matter of John J.Rosario**, 1984 Ethics Commission 205. To avoid such violations, you should refrain from participating as County Commissioner in any determination which would affect a municipality you are dealing with privately.[5]/ By virtue of §23(¶2)(2), prohibiting your using your official position to gain unwarranted privileges for yourself or others, you also should not use County office supplies, space, or personnel for non-County purposes.[6]/

DATE AUTHORIZED: July 16, 1985

[1]/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 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]/Participation is defined in §1(j) as "personal and substantial participation "through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."

[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.

[4]/This citation refers to a prior 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 offices.

[5]/You may, however, participate in County decisions involving determinations of general policy which would affect the majority of municipalities within ABC in a similar fashion.

[6]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-61

FACTS:

You were employed by state agency ABC until July, 1985 as its director. In your capacity, you were responsible for directing ABC's research activities. You indicate that you not only supervised staff in these policy issues but also participated in their formulation. You also provided expert testimony on related matters in administrative and judicial litigation.

Starting in September you will be an associate professor at a private university. You expect to have the opportunity to consult in the area of your expertise.

QUESTION:

What restrictions does G.L. c. 268A place on your providing consultant services as a former state employee?

ANSWER:

You are subject to the limitations discussed below.[1]/

DISCUSSION:

1. Section 5

During the period in which you served as director, 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 "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 §1(k) as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, 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).

Applying this provision to your duties and responsibilities at ABC you would, for example, be prohibited from working for a private company that had matters pending before your agency in which you made decisions or determinations affecting that company's pro-

posal. The Commission has held that a former state employee is prohibited from working on an appeal or subsequent review of a determination they made while a state employee. See EC-COI-84-31.[2]/ In this regard you would be prohibited from consulting to a private firm on a subsequent challenge to the validity of regulations which you participated in drafting. Although a regulation in and of itself is not considered a particular matter, the process by which it is adopted and the determination that was initially made as to its validity is considered a particular matter. See EC-COI-81-34, 82-78. Thus, if you advised the commissioner as to the validity of proposed regulations, you would be prohibited from assisting a private party in challenging those regulations.

You should also be aware that §5(b) imposes additional restrictions on your consulting activities on behalf of private parties. Under §5(b), you are prohibited until August 2, 1986 from appearing personally before any court or agency of the commonwealth in connection with any particular matter which was under your official responsibility during the last two years of your state employment. This section goes beyond those matters in which you participated and turns on your authority in connection with any matter. Accordingly, §5(b) will prohibit your appearances before ABC, and any other state agency, the General Court, or a state court regarding matters which were under your official responsibility dating back to two years before your resignation.

2. Section 23

As a former state employee, you are also subject to two provisions of the standards of conduct under G.L. c. 268A, §23.[3]/ 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 director, must not be disclosed to any private companies to which you provide consultant services.

DATE AUTHORIZED August 13, 1985

[1]/At this time the Commission can provide you with general guidelines. Once you have a specific contract you may contact the Commission for further guidance.

[2]/This citation refers to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[3]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-62

FACTS:

You are the chairman of a County Board (Board). You are also president of a real estate agency. A Corporation (Corp.) has a proposal before the Board involving a parcel of land owned by the county. In order for the Corp. to conform with the City's zoning requirements, they need the county land for additional parking. The Corp. will also develop a "Park and Ride" as part of their parking area for the benefit of the county. The land on which the Corp. is to build their restaurant is owned by the XYZ Agency. Your agency uses XYZ as a rental referral agency to handle all requests which you receive for rentals. XYZ pays you a referral fee if they rent an apartment to a referred customer. XYZ has a desk and telephone in your office which they staff three hours a day. The telephone is owned and paid for by XYZ and is answered "XYZ Agency." Neither your company nor XYZ is formally associated with the other nor do you have any ownership interest in XYZ. You have no joint stationery or business cards that list your affiliation. However, you and XYZ indicate in your real estate listings in the newspaper that you are an affiliate of each other. You indicate that the reason for advertising this affiliation is because your firm only handles commercial and residential real estate sales.

QUESTION:

What limitations, if any, does G.L. c. 268A place on your participation as a county board member in the Corp's proposal?

ANSWER:

You may participate in the Corp's proposal.

DISCUSSION:

As a board member of the County you are a county employee and therefore are subject to the conflict of interest law, G.L. c. 268A and, in particular, §§13 and 23.

Section 13 prohibits in pertinent part a county employee from participating as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization which he is serving as officer, director, trustee or partner has a financial interest. Whether you may participate as county board member in discussions or the vote on the Corp.'s proposal is determined by the nature of your business relationship with XYZ. If you were considered

a partner of XYZ you would be prohibited by §13 from participating in the Corp. proposal. 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. See EC-COI-84-78.[1]/ 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. The substance of your arrangement with XYZ does not constitute a partnership. You do not share letterhead or business cards. Your only public affiliation is through a real estate listing which indicates that your firms are affiliated. The only reason you advertise such affiliation is because your firm only handles commercial and residential real estate sales whereas XYZ complements your business by providing rental services.

Further, previous Commission opinions have held that an occasional payment constitutes a fee for services arrangement rather than a sharing of profits. Here, the referral fee you receive from XYZ is more akin to a fee for services. XYZ maintains its own telephone line in your office and identifies itself to callers as "XYZ Agency." For these reasons, the affiliation you have described 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.

You should also be aware that §23,[2]/ which contains general standards of conduct applicable to all public employees, is relevant to your situation. Section 23(¶2)(3) prohibits one from by his conduct giving a reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person. In order to dispel any improper impression by your conduct as a county board member in the Corp.'s proposal, you should disclose to the Board your relationship with XYZ before participating in the matter.

DATE AUTHORIZED August 13, 1985

[1]/This citation refers to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[2]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-63

FACTS:

You are currently a full-time employee of state agency ABC. You are considering entering into a lease arrangement for space in a state office building for the purpose of running a cafe restaurant open to the general public. Your brother, who is not a state employee, would be your business partner in this venture. Once a lease arrangement is entered into you will either resign your position or take a leave of absence.

QUESTION:

What limitations does G.L. c. 268A place on your having a contract with another state agency?

ANSWER:

You are subject to the restrictions discussed below.

DISCUSSION:

As a full-time employee of ABC you are considered a "state employee" for the purposes of G.L. c. 268A, §1(q). According to §7 of G.L. c. 268A a state employee is prohibited 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." The lease you would have with the state would be considered a contract. Therefore, in order to enter into this contract you would have to either take a leave of absence or become a part-time employee.

1. Leave of Absence

The Commission has held in previous opinions that a state employee on leave of absence who is not receiving compensation, fringe benefits or retirement credit would not be subject to the prohibitions of G.L. c. 268A, §7. See EC-COI-84-17[1]/ During the period of a leave of absence, you would not, strictly speaking, hold employment with ABC if you suspended your right to receive benefits attributable to that position. Therefore, during your leave of absence, your financial interest in the lease with the Division of Capital Planning and Operations (DCPO) is not subject to §7. This conclusion will apply as long as you are on a bona fide unpaid leave of absence from your ABC 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.

2. Special state employee status

You should also be aware that a state employee who works part-time may under certain circumstances have a contract with another state agency. Section 1(o) defines in pertinent part a special state employee as one who 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 personal employment. In this regard, §7(d) states that the prohibition in §7 shall not apply to a special state employee who does not participate[2]/ in or have official responsibility[3]/ for any other activities of the contracting agency. Section 7(d) also requires you to file a disclosure of your financial interest in the contract you would have with DCPO. Inasmuch as your work with ABC does not place you in a position of participating or having official responsibility for matters in DCPO, you would be eligible for the exemption in §7(d) were you to obtain special state employee status.

DATE AUTHORIZED: August 13, 1985

[1]/This citation refers to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[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).

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-64

FACTS:

You are chief of the Town of ABC's fire department and as such have responsibility for enforcing Town fire ordinances. DEF stadium is located in the Town, and when events are held there they can attract several thousand people. As fire chief you assign paid details of firefighters to stadium events. A fire department officer also works these details for the purpose of supervising the firefighters. The officer in charge uses a Town vehicle when he works these details. Firefighters are paid for their private detail services at a rate established in their collective bargaining agreement with the Town. The stadium pays the Town for the firefighters' services. The Town deposits that money in a special account separate from other Town monies and then pays the firefighters out of that account. The Town charges the stadium a 10 percent administration fee pursuant to G.L. c. 44, §53C. As fire chief you would be paid in the same manner as the firefighters for working a detail but would receive a higher rate of compensation based on your annual salary broken down into an hourly wage. This figure is approximately twenty dollars an hour, and you state that you would earn at least one hundred dollars for each detail.

QUESTION:

Does G.L. c. 268A permit you as fire chief to be paid for working details at the stadium?

ANSWER:

No.

DISCUSSION:

As fire chief for ABC you are a municipal employee and therefore are subject to the provisions of G.L. c. 268A, the conflict of interest law. The section of the law that is applicable to your question is §3.

Section 3(b) prohibits a municipal employee, other than as provided by law for the proper discharge of official duties, from directly or indirectly receiving anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by him. You have stated that your general supervisory responsibilities require you to be on call twenty-four hours a day. You have responsibility for enforcing fire and safety codes within the Town. You have responsibility for the activities of firefighters who are working paid details. When you work a stadium detail you use a Town vehicle. Thus the money you receive for working stadium details is being paid to you for your performing acts which are the subject of your official responsibilities as chief. See, e.g. **In the Matter of James F.Connery**, 1985 Ethics Commission 233; **In the Matter of John A.Deleire**, 1985 Ethics Commission 236. Furthermore, the payment you receive is something of substantial value.[1]/ While your situation is distinguishable from those in **Connery** and **Deliere** in that you are not paid directly by the stadium management, this does not alter the result. Section 3(b) prohibits both the direct and indirect receipt of items of substantial value (emphasis supplied). Under the G.L. c. 44, §53C payment procedure, the Town merely serves as a conduit between the private entity and the public employee, presumably to ensure the efficiency and integrity of the off-duty detail work system. The money

you receive from the Town is the money paid to the Town by the stadium, specifically earmarked as payment for detail work and segregated from all other Town funds. Thus you are being indirectly compensated by the stadium for services you are already being paid by the Town to provide. In summary, §3(b) prohibits the arrangement you have asked about.[2]

DATE AUTHORIZED: August 13, 1985

[1]See **Commonwealth v. Famigletti**, 4 Mass.App.584 (1976) (A fifty dollar payment constitutes something of substantial value within the meaning of G.L. c. 268A, §3(b)).

[2]The advice contained in this advisory opinion is prospective only and cannot address the propriety of conduct that has already occurred.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-65

FACTS:

You are the chief of police for the Town of ABC (ABC). Your police force has more than ten permanent officers and reserve officers. On occasion police officers and patrolmen work paid details for private entities. Compensation for both officers and patrolmen who work such details is at a rate established in the Town's collective bargaining agreement with the patrolmen. Payment is made pursuant to G.L. c. 44, §53C whereby the factory pays the Town for the detail services, the Town puts that money in a special account separate from other Town funds, and the Town then pays the police officers. You state that you have delegated the task of assigning and supervising all details to the sergeant on each shift. Two days a week when there is not a sergeant on a shift you perform that function yourself.

QUESTION:

Does G.L. c. 268A permit you, as chief of police, to be paid for working a private detail?

ANSWER:

No.

DISCUSSION:

As chief of police for ABC you are a municipal employee and therefore are subject to the provisions of G.L. c. 268A, the conflict of interest law. The section of that law applicable to the question you have asked is §3.

Section 3(b) prohibits a municipal employee, other than as provided by law for the proper discharge of official duties, from directly or indirectly receiving anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by him. As chief of police you have overall supervisory responsibility for the operation and activities of the police department. The task of the department is to ensure the safety and security of the Town's citizens and businesses. Your job by its nature is a 24-hour-a-day job. Although you are able to delegate some of the tasks associated with this responsibility to subordinate officers, the fact remains that as chief you retain official responsibility for the operation of the police department. See, e.g. EC-COI-85-22.[1] This ultimate responsibility means that a police chief cannot perform private details himself for payment.

While your situation is distinguishable from that in **In the Matter of John A. Deleire**, 1985 Ethics Commission 236 in that you are not paid directly by the private entity, this does not alter the result. Section 3(b) prohibits both the direct and indirect receipt of items of substantial value (emphasis supplied). Under the G.L. c. 44, §53C payment procedure, the Town merely serves as a conduit between the private entity and the public employee, presumably to ensure the efficiency and integrity of the off-duty detail work system. The money you receive from the Town is the money paid to the Town by the private party specifically earmarked as payment for detail work and segregated from all other Town funds. Thus you are being indirectly compensated by a private party for services which are already subject to your supervisory responsibility as chief. In summary, §3(b) prohibits the arrangement you have asked about.[2]

DATE AUTHORIZED: August 13, 1985

[1]This citation refers to an advisory opinion previously issued by the Commission. Copies of this and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission offices.

[2]The advice contained in this advisory opinion is prospective only and cannot address the propriety of conduct that has already occurred.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-66

FACTS:

You are planning to run for a position on the ABC City Council in the fall.[1] Currently, you serve as the Executive Director of a Community Development Corporation (CDC) in the same community. By statutory definition, a CDC is "a quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes.." G.L. c.40F, §1. The CDC was, accordingly, established under Chapter 180 and in conformance with the guidelines set forth in Chapter 40F to promote economic and community development in ABC.

The funding for CDC projects appears to originate from the federal and state level, including HUD Community Development Block Grants (CDBG) and funds from the State Offices of Labor and Economic Affairs, Executive Office of Communities and Development and Community Development Finance Corporation. You state that there is only one area in which the City has anything to do with the CDC funding sources: the line item for the CDC in the City's application for a Community Development Block Grant. The money from the CDC line item ($100,000 for CDC's revolving loan fund and $15,000 for rent and a part-time administrative aid's salary) passes directly to CDC as the sub-grantee. Before the City's overall CDBG proposal is submitted, it goes before the City Council. You state, however, that the City Council has traditionally approved the bottom line grant figure only, without discussion of the program makeup of the application.

QUESTION:

Does G.L. c. 268A permit you to hold the office of City Councillor in light of your employment as the Executive Director of the CDC?

ANSWER:

No.

DISCUSSION:

As a City Councillor, you would be a municipal employee within the meaning of G.L. c. 268A, §1(g), and so would be subject to the provisions of the conflict of interest law. The sections of the conflict of interest law relevant to your situation would be §§19, 20 and 23. However, the initial inquiry is whether the CDC is considered a municipal agency for Chapter 268A purposes.

1. Status of the CDC

Prior opinions of the Commission have identified several criteria useful to an analysis of what constitutes a public entity under the conflict law. See, e.g. EC-COI-84-66; 84-65. Among those criteria are:

1. the existence of a statutory or regulatory impetus for the creation of the entity;
2. whether the entity performs an 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-83-74. 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]. Analyzing the CDC under the four factors listed above, the Commission concludes that the CDC has all the indicia of a public entity.

First, there is the statutory impetus for the creation of the CDC. While a community is not required to establish a CDC, if it chooses to do so, it must follow the guidelines set forth in the enabling statute of the Massachusetts Community Development Finance Corporation (CDFC). See G.L. c. 40F, §1. A CDC is statutorily defined as:

> "a quasi public non-profit corporation organized under the General Laws to carry out certain public purposes and with by-laws providing that:
> 1. it is organized to operate within a specified geographic area coincident with existing political boundaries;
> 2. that membership in the corporation shall be open to all residents of said area who are eighteen years or older;
> 3. that at least a majority of its board of directors shall be elected by the full membership with each member having an equal vote;
> 4. that the by-laws of the Community Development Corporation shall provide that any other directors be either appointees of elected state or local government officials or appointees of other non-profit organizations having as a purpose the promotion of development in the designated geographic area;
> 5. that said elections shall be held annually for at least one-third of the members of the board of directors so that each elected director shall serve for a term of at least three years;
> 6. that the designated geographic area shall be consistent with some existing, or combination of existing, political district, provided that the aggregate population of such geographic area shall not exceed one hundred and fifteen thousand people based on the most recent appropriate census.G.L. c. 40F, §1.

The fact the statute itself refers to a CDC as a "quasi public" body created to "carry out public purposes" indicates the legislative intent that CDCs be treated as public entities. Moreover, the by-laws of the CDC contain all the required elements enumerated above. The creation of the CDC pursuant to the statutory set-up provided in CDFC's enabling statute distinguishes it from other local development corporations, which were not so created and are not eligible for the same financing arrangements with CDFC. See, e.g. EC-COI-84-76 (a municipality's "business development corporation," while chartered by an Act of the General Court, must raise its own revenues to further its purposes, which were not defined as public purposes: thus, the Commission held that such an entity did not have public status).

Similarly, the CDC has indicia of public status under the remaining three criteria. The CDC is designed to "carry out certain public purposes," including projects in partnership with CDFC, which is specifically stated to be performing "an essential governmental function." G.L. c. 40F, §2. The materials you have provided concerning the operations of the CDC clearly indicate that the CDC receives and expends public funds, primarily from the state and federal level. Finally, the control and supervision exercisable by government officials or agencies over the CDC is evidenced by:

1. the CDC's by-laws providing elected officials as a category of appointing authorities for those CDC Directors who are appointed;

2. the CDC's financial data reporting requirements to the state agencies it is in partnership with (see, e.g. G.L. c. 40F, §4).

In light of the above, it is the Commission's determination that the CDC is a municipal agency for Chapter 268A purposes.

2. Application of G.L. c. 268A to you

Section 20 of the conflict law prohibits a municipal employee from having a financial interest in a municipal contract. This section is intended to prevent municipal employees from using their positions to obtain contractual benefits from the city and to avoid any public perception that municipal employees have an "inside track" on such opportunities. In §20, the term "contract" refers not only to a formal, written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other constitutes a contract. Thus, the Commission has previously held that the term "contract" includes employment arrangements. See, e.g. EC-COI- 84-91; 83-38; **In the Matter of Henry M.Doherty**, 1982 Ethics Commission 115.[3/]

Based on this precedent, your employment contract as Executive Director of the CDC would constitute a financial interest in a municipal contract within the meaning of §20. Accordingly, you would be prohibited from maintaining your employment arrangement with the CDC if elected to the City Council, unless you were able to comply with one of the exemptions in §20. Although there are two exemptions which are potentially relevant to your situation, the Commission advises you that you would be eligible for neither exemption.

a. Under G.L. c. 268A, §20(b), a municipal employee may have a financial interest in a municipal contract if the employee

> . . . 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 and . . . does not participate in or have official responsibility for any 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.

You would not be eligible for this exemption because your full-time position as Executive Director of the CDC exceeds five hundred hours annually.

b. Section 20 also contains the following exemption, inserted by St.1982, c. 107:

> This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which com-

pensation he shall receive; and provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and provided, further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties may require. No such selectman shall receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive.

The Commission has previously concluded that the intent of the General Court in enacting c. 107 was to create an exemption limited solely to members of boards of selectmen, reflecting the reasonable legislative judgement that City Councillors and other elected municipal officials who exercise comparable legislative powers should remain subject to the provisions of §20. EC-COI-83-38.

In summary, because you would not qualify under any §20 exemptions, you would be subject to the §20 prohibition against a municipal employee having a financial interest in a municipal contract.[3]/ In light of this prohibition, it is unnecessary for the Commission to address the applicability of §§19 and 23 to your situation.

DATE AUTHORIZED: August 13, 1985

[1]/The Commission's advisory opinion process addresses a public employee's prospective conduct only, and thus is not the appropriate medium for the Commission to be passing on whether current or past conduct violated the conflict law.

[2]/These citations refer to prior Commission conflict of interest opinions and Commission Decisions and Orders. Copies of all advisory opinions (with identifying information deleted) and Commission Decisions and Orders are available for public inspection at the Commission offices.

[3]/Again, this advisory opinion addresses the conflict law provisions as they apply to your prospective conduct, i.e. to running for City Council while serving as the Executive Director of CDC. For your information only, §20 allows a municipal employee to remedy an ongoing violation of that section if it is done in good faith and within 30 days of learning of such a conflict.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-67

FACTS:

You are the chairperson of a state Board (Board). The Board has nine members, all of whom are appointed by the governor. Board members do not receive compensation for their services but they are reimbursed for their expenses. The Board is responsible for administering state and federal monies which are allocated for library services. The funds are used for direct aid. Local entities compete among each other for many of these funds.

Three of the Board members have affiliations with entities or institutions that receive funding from the Board. One of these members is president of the board of trustees of a municipal entity and another is a member of the board of trustees of a municipal entity. The third member is an officer in a state agency.

QUESTION:

What limitations does G.L. c. 268A place on Board members who are trustees or employees of institutions that receive funding from the Board?

ANSWER:

Those members are subject to the following limitations.

DISCUSSION:

The Board is a state agency as that term is defined in G.L. c. 268A, and its members are state employees. Because the members serve on a part-time, uncompensated basis they are considered special state employees. While Board members are subject to the provisions of the conflict of interest law, certain sections of that law apply less restrictively to special state employees.

The sections of the law applicable to the question you have asked are §§4, 6, 7 and 23. Section 4 prohibits a state employee from receiving compensation from or 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. Grant applications and budget allocation decisions are examples of particular matters.Thus a Board members who is a trustee for a local library may not act as agent for his institution before the Board in connection with such matters. Acting as agent includes not only personal appearances on someone else's behalf but also such activities as making telephone calls and signing correspondence on behalf of a person or institution. See e.g. EC-COI-84-28.[2]/

Section 6 in relevant part prohibits a state employee from participating as such an employee in a particular matter in which he or a business organization in which he is serving as trustee has a financial interest. Should the employee's duties otherwise require him to participate[3]/ in the particular matter he must advise his

appointing official and the State Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of the financial interest. The appointing official shall then 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.

Section 6 would prohibit the Board member who is a local library trustee from participating in matters in which his library has a financial interest unless his appointing official permits it. For example, a public library trustee could not participate in any vote or discussion leading up to a vote on any decision to award a grant to the library. This prohibition on participation would extend to matters involving libraries which are in direct competition with the public library for funds. See e.g. EC-COI-84-1; 82-95. It should be noted that when one is required to refrain from participating in a matter the proper course is for that person to leave the room altogether. **Graham v.McGrail**, 370 Mass.133, 138 (1976).

Section 7 of the statute prohibits a state employee from having a financial interest, directly or indirectly, in a contract[4]/ made by state agency in which the commonwealth or a state agency is an interested party. This section does not place any restrictions on the members who are local library trustees because it is their institutions and not themselves who have a financial interest in any award of state money. Section 7 would, however, be applicable to the Board member who is also a state employee. Generally a person is prohibited by §7 from holding more than one state position. There are exemptions to this prohibition, one of which appears to be applicable to the Board member. The prohibition does not apply to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency. As long as the Board member does not participate as a Board member in any of the activities of his state agency, there is no problem under §7. Thus when matters come before the Board involving the state agency, the Board member must refrain from participating. He must also file a statement with the State Ethics Commission making full disclosure of his interest in his employment contract with his agency.

Finally, §23 contains certain standards of conduct which are applicable to all state, county and municipal employees.[5]/ It provides in part that no public employee shall use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits an employee from, by his conduct, giving a reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person. Under these provisions Board members with institutional affiliations should take care to avoid using their Board membership to secure for their institutions unwarranted privileges such as extensions of application deadlines or relaxed monitoring of contract performance.[6]/

DATE AUTHORIZED: August 13, 1985

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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. . ." G.L. c. 268A, §1(k).

[2]/This citation refers to a previous advisory opinion issued by the Commission. Copies of this and all other opinions are available for public inspection, with identifying information deleted, at the Commission offices.

[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).

[4]/The term "contract" is interpreted broadly to include such things as grants awarded by the state to individuals or institutions. EC-COI-81-64.

[5]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

[6]/The advice contained in this advisory opinion is prospective only and cannot address the propriety of conduct that has already occurred.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-68

FACTS:

You are a member of a City Council. You are also the ABC County Treasurer, and as such, serve as chairman of the County Retirement Board.

The City Council was asked by one of its members to recommend that any surplus county funds that may become available be returned to the cities and towns. You state that such votes are merely advisory, and that at present, there are no surplus funds. You further state that the decision as to the use of any surplus county funds lies with the County Commission and the County Advisory Board (made up of representatives of the cities and towns) rather than the County Treasurer.

QUESTION:

Does G.L. c. 268A permit you to participate in such advisory votes before the City Council, in light of your positions as County Treasurer and chair of the County Retirement Board?

ANSWER:

No.

DISCUSSION:

The conflict law defines county employee as "a person performing services for or holding an office, position, employment, or membership in a county agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." G.L. c. 268A, §1(d). As County Treasurer, you are a county employee within the meaning of this section and are therefore subject to the provisions of Chapter 268A.

Section 11 prohibits a county employee from receiving compensation, or acting as agent or attorney for anyone other than the county by which he is employed, in connection with any particular matter in which that county is a party or has a direct and substantial interest. However, Section 11 contains the following exemption:

> This section shall not prohibit a county employee from holding an elective or appointive office in a city, town or district nor in any way prohibit such an employee from performing the duties or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter[1]/ which is within the purview of the agency by which he is employed or over which such employee has official responsibility.[2]/

Since the passage of the "municipal exemption" in 1980, the Commission has examined, in reference to the comparable exemption at the state level, whether a state employee's duties as a municipal employee come within the purview of his state agency on several occasions. The Commission has limited, and in some cases prohibited, proposed municipal employment in light of the "purview" language. See EC-COI-84-120, 84-103; 83-26; 82-89; 82-39.

The same rationale is applicable in analyzing the municipal exemption at the county level. For example, the Commission has held that a County Commissioner and selectman may not also serve as the town's representative to the advisory board to the County Commissioners because it would necessitate his voting or acting on matters within the purview of the County. EC-COI-84-35. That advisory opinion further stated that the selectman "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." Id. Likewise, City Council advisory votes concerning the use of surplus County funds would be matters within the purview of the County; thus, your participating in such votes would violate §11. The §11 conflict is underscored by the fact that if the surplus funds do not revert to the cities and towns, it might go into the county pension fund, over which you have official responsibility as chairman of the County Retirement Board.[3]/

DATE AUTHORIZED: August 13, 1985

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

[3]/The advice contained in this advisory opinion is prospective only and cannot address the propriety of conduct that has already occurred.

CONFLICT OF INTEREST OPINION
EC-COI-85-69

FACTS:

You are a former employee of state agency ABC and currently serve as an officer of a Firm. Your current responsibilities include servicing public sector clients. You are not a partner in the Firm and have no ownership interest in the Firm.

The Firm has several potential opportunities to provide contractual services to commonwealth agencies and authorities; you anticipate that these opportunities will involve your specialized services. The first is a contract with state agency ABC to work on general legislation. ABC would expressly seek your services in research, drafting, financial preparation and in negotiating with the General Court.

The second is a contract with state agency DEF to lobby the General Court for passage of special legislation. Additionally, the Firm may perform services for other state agencies.

QUESTIONS:

1. Does G.L. c. 268A permit you to work under the Firm contract with ABC in relation to the general legislation?
2. Assuming that the general legislation becomes law, would G.L. c. 268A permit you or the Firm to respond to a request for services from an entity created by the proposed legislation?
3. Does G.L. c. 268A permit you, as a Firm representative, to lobby the General Court on behalf of SCBA in view of the Firm's relationship with DEF?

4. Does G.L. c. 268A permit you to serve as a member of a Firm team which responds to requests for underwriting or financial advisory services from state agencies?

ANSWERS:

1. Yes.
2. Yes.
3. No, unless you receive an exemption from your appointing official pursuant to G.L. c. 268A, §6.
4. Yes, as long as ABC is not a party to the service contracts with the Firm.

DISCUSSION:

1. Initially, you will be treated as a "state employee"[1/] for G.L. c. 268A purposes during the period in which you perform work for ABC in relation to the general legislation. The definition of state employee has been applied by both the Commission and Attorney General to cover employees of corporations which contract with the state if the terms of the contract contemplate a specific individual's services. For example, in Commission advisory opinion EC-COI-80-84, the Commission concluded that the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state. More recently, in EC-COI-83-129, the Commission reached this same conclusion with respect to an individual whose services were specifically contemplated, reviewed and approved by the state. See, also EC-COI-83-165; Attorney General Conflict Opinion No.854.

Based upon the information you have provided, the Commission similarly concludes that your specialized research, drafting, financial preparation and negotiation services have been sought out by ABC, and that you would therefore be a state employee for the purposes of G.L. c. 268A. In view of the part-time nature of your consultant arrangement for ABC, you would also be a special state employee within the meaning of G.L. c. 268A, §1(o). As a special state employee, you are subject to fewer restrictions under certain sections of G.L. c. 268A.

Nothing in G.L. c. 268A inherently prohibits you from serving as a consultant to ABC after having previously worked for ABC as a deputy secretary. In effect, you are continuing your status as a state employee for G.L. c. 268A purposes by changing from a full-time to a consultant relationship with ABC. See, EC-COI-83-41. However, as will be seen in the latter part of this opinion, your status as a special state employee will be relevant to your proposed underwriting or financial advisory services for state authorities.

The fact that you are employed by the Firm will not disqualify you from working for ABC in connection with the general legislation. Under G.L. c. 268A, §6, a state employee may not participate[2/] in any particular matter[3/] in which a business organization for which she serves as an employee has a financial interest. The Firm is a business organization which may have a financial interest in the enactment of the general legislation because it may respond to increased underwriting and advisory services which would become available should the legislation become law. However, even assuming the Firm has a foreseeable financial interest in the legislation, that interest is not in relation to a "particular matter." The definition of particular matter excludes the enactment of general legislation, and the legislation is general as opposed to special, in nature.

In light of the generality and permanance of the scope and purposes of the acts provisions, the legislation is general and its enactment would not constitute a particular matter. See, Sands, 2 Sutherland Statutory Construction §40.01 et seq.(4th ed., 1973); EC-COI-82-169.

2. Assuming that the general legislation becomes law, nothing in G.L. c. 268A prohibits you from subsequently working for a newly created agency pursuant to a Firm request for underwriting or financial advisory services. As drafted in the legislation, the agency would be a state agency for the purposes of G.L. c. 268A, id., §4; §5(k), and you would become a state employee by providing your specialized services to the agency; you would again continue your status as special state employee under G.L. c. 268A, §1(o).

3. If, through the Firm, you were hired by DEF to perform its lobbying activities in connection with the special legislation, you would be a state employee for G.L. c. 268A purposes. Two potential problems under G.L. c. 268A are raised by your proposed lobbying activities. The first, under G.L. c. 268A, §7, can be relative easily addressed by your filing a financial disclosure statement pursuant to §7(d). As a special state employee for DEF, you may have a financial interest in another contract made by a state agency (such as ABC) if you do not participate in or have official responsibility for the activities of the contracting agency. In view of the relative independence of ABC and DEF, you would qualify for an exemption to §7 by filing the disclosure statement.

A more difficult problem is raised under G.L. c. 268A, §6. As a state employee, you may not participate in the enactment of special legislation or any other particular matter in which the Firm has a financial interest. In view of the Firm's current role with DEF's, the Firm would have a foreseeable financial interest in the enactment of the special legislation. In contrast to the general legislation, this legislation is special legislation and a particular matter within the meaning of §1(k). You should be aware, however, that §6 contains an exemp-

tion which would permit you to participate notwithstanding the Firm's financial interest.[4]/ Absent compliance with these exemption requirements by both you and the head of DEF, you must continue refrain from participating in the legislation.

4. As a special state employee, you may have a financial interest in contracts made by state agencies in whose activities you neither participate nor have official responsibility for as a special state employee. See, G.L. c. 268A, §7(d). In your ABC consultant capacity, you may therefore contract with state agencies which are independent of your work with ABC, provided that you file an appropriate financial disclosure with the Commission. Based upon the information which you have provided, it would appear that you could have a concurrent financial interest in service contracts made by state agencies since you do not participate in or have official responsibility for the activities of those authorities in your lobbying work. This result would apply as long as the scope of your services for ABC remains subject to the limitations you have described. Should your responsibilities change, then the Commission would review the propriety of your financial interests in light of those changes.

DATE AUTHORIZED: September 11, 1985

[1]/For the 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).

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

[4]/Section 6(¶2) provides as follows: Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for his appointment to his position and the State Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

(1) assign the particular matter to another employee; or

(2) assume the 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.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-70

FACTS:

You are employed on a full-time basis as a secretary by state agency ABC. Your responsibilities are secretarial and do not include making purchasing decisions, nor is your department involved in making purchasing decisions.

Your spouse is the sole proprietor of DEF, a recently formed printing company. Your spouse makes all decisions regarding the company and you have no role in the company's management. Further, you state that you have no financial interest in the company.

QUESTION:

Does G.L.c.268A permit DEF to contract with ABC for printing services?

ANSWER:

Yes, although you will be subject to certain limitations discussed below.

DISCUSSION:

As a secretary with ABC, you are considered a "state employee" for the purposes of G.L. c. 268A, the conflict of interest law. See, EC-COI-82-60.[1]/ At the outset, nothing in G.L. c. 268A will inherently prohibit DEF from contracting with ABC due to your employee status with ABC. Section 7 generally prohibits you from having a financial interest in a contract made by a state agency. While it is true that your spouse would have a financial interest in a contract made by a state agency if DEF were to contract with ABC for printing services, his financial interest will not be imputed to you for the purposes of §7. This result will continue to apply as long as you do not have a financial interest in DEF and do not participate in the management or control of the company. Compare, EC-COI-83-111; 83-37.

Although DEF may contract with ABC and other state agencies without placing you in violating of G.L. c. 268A, §7, you are subject to certain restrictions in both your public and private capacity.

1. Limitations as ABC employee

Two provisions of G.L. c. 268A are relevant to you. The first, G.L. c. 268A, §6, prohibits your official participation[2]/ in any contract or other "particular matter"[3]/ in which your spouse has a financial interest. Because such matters do not currently come before you, it is unlikely that your official abstention will be necessary. However, you should keep the limitations of §6 in mind if your ABC job responsibilities change and you are in a position to participate in matters affecting your spouse's financial interest. The second provision, §23(¶2)(2),[4]/ prohibits you from using your official position to secure unwarranted privileges for DEF. For example, you may

not use ABC resources such as copy machines, telephones, or automobiles for your spouse's business. You must also refrain from discussing the merits of DEF's application with or otherwise attempting to influence the individuals within ABC who will be deciding which vendor should be awarded a printing contract.

2. Limitations on your private activities

Section 4 prohibits you from receiving compensation from DEF or acting as DEF's agent in relation to any contract or other particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, you may not act as DEF's representative in seeking printing contracts with state agencies. As the Commission recently stated **In the Matter of James Collins**, 1985 Ethics Commission 228 (April 2, 1985) "[m]erely speaking or writing on behalf of a nonstate party would be acting as 'agent' . . . [A]bsent some clearly applicable exemption, state employees would be well-advised to avoid doing any 'favors' which involve intervening in any sort of state matter." You should also be aware that if DEF offers you an opportunity to perform clerical services for compensation, you may not be paid in relation to any printing contracts made with state agencies.

DATE AUTHORIZED: September 11, 1985

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[1]/This citation refers to a prior 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 offices.

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

[4]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-71

FACTS:

You are an appointing official for state agency ABC. Employee DEF manages a unit within ABC. You recently initiated an application and interview process to fill an employee vacancy within the unit managed by DEF. Among the candidates whom you are considering is the wife of DEF. You have concluded that she is the most qualified candidate and are interested in hiring her. DEF has played no role in helping you reach this decision.

If you were to hire her, she would be assigned to the unit headed by her husband. The unit also employs a deputy chief to whom she would directly report. The deputy chief would be solely responsible for performing her biannual performance review and making any recommendations regarding her salary or job status. The ultimate decision for salary reviews, hiring, firing or discipline would rest with you. Her job assignments would be made by her husband who would also periodically be involved in decisions regarding the handling of her cases.

QUESTIONS:

1. Would you violate G.L. c. 268A by hiring the wife of DEF?
2. Assuming that you may hire her, what limitations will G.L. c. 268A place on DEF's official dealings with his wife?

ANSWERS:

1. No.
2. He will be subject to the limitations of §6 and §23, as discussed below.

DISCUSSION:

1. Application of the law to you

You are a "state employee" for the purposes of the conflict of interest law, G.L. c. 268A. Section 23(¶2)(2) of G.L. c. 268A prohibits a state employee from using his official position to secure an unwarranted privilege for anyone. For example, a state employee could be subject to scrutiny under this section if he granted undue preferential treatment to an individual by disregarding normal agency hiring procedures. See, **In the Matter of James Craven**, 1980 Ethics Commission 17, aff'd 390 Mass. 191 (1983). To be sure, appointing officials are granted substantial flexibility in making personnel decisions, and the Commission will not customarily apply §23 to "second-guess" justifiable personnel decisions. Given your selection criteria, including white collar crime investigative experience and favorable job references, you would not be granting an unwarranted privilege to Mr. and/or Ms. DEF if you hired her.

2. Application of the law to DEF

DEF is also a "state employee" for G.L. c. 268A purposes. Two sections of the law are relevant to his situation. The first, G.L. c. 268A, §6, prohibits his official participation[1]/ in any "particular matter"[2]/ in which his wife has a financial interest. Should such a matter come before him, absent receipt of an exemption under

§6(¶b)(3),[3]/ he must abstain from participation in the matter and disclose to you and the Commission the financial interest which his wife has in the matter. Examples of matters requiring his absention include recommending her appointment or promotion, determining her salary and other terms and conditions of employment, and evaluating her job performance. See, EC-COI-83-174.[4]/ As long as he is insulated from participation in those matters, he will be in compliance with §6.

The second section of G.L. c. 268A relevant to his situation is §23(¶2)(2, 3). As a state employee, he is prohibited from using his position as unit head to secure unwarranted privileges for his wife and from engaging in conduct which creates a reasonable impression that his wife is unduly enjoying his favor in the performance of his official duties. Whenever an employee is in a position to review the merits of a family member's work, issues under §23 inevitably arise, and it is the responsibility of the appointing official to establish safeguards to dispel any impression of favoritism. See, EC-COI-85-34. To the extent that DEF will not be reviewing the merits of his wife's work or otherwise evaluating her work and that those responsibilities will be delegated to the deputy chief to whom she would directly report, you have initiated appropriate safeguards. There is a risk, however, that DEF's making job assignments to his wife and his participating in strategic decisions regarding the handling of her cases may pose problems under §23. At a minimum, you or your deputy should oversee his exercise of these responsibilities to insure that these assignments and decisions are made based on objective criteria, as opposed to his marital relationship.[5]/ To avoid the impression of favoritism altogether, the safest avenue, of course, would be to remove DEF from any official responsibilities over his wife's work.[6]/

DATE AUTHORIZED: SEPTEMBER 11, 1985

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

[3]/Following disclosure, an employee may participate in the matter only if his appointing official makes a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the employee's services.

[4]/This citation refers to a prior 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 offices.

[5]/The problems associated with the impression of favoritism are not limited to case assignments and can arise in many other contexts. For example, the complexity of her cases, her office location, her secretarial assignments, her attendance eligibility for skills workshops and other desirable staff benefits may not be unduly influenced by the fact that she is married to DEF.

[6]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-72

FACTS:

You are employed by the Massachusetts Commission for the Blind (MCB). You do not have any authority to award MCB funds or enter into contracts on behalf of MCB. In addition to your MCB employment, you are an unpaid member of the board of directors of ABC Company. Although ABC does not receive funds directly from MCB, it does receive money from a related company, DEF which receives MCB funds. DEF gives a portion of its MCB money to ABC to provide certain services. The ABC staff deals directly with DEF and not with MCB in matters related to the funding.

QUESTION:

Does G.L. c. 268A permit you to serve as a member of the board of directors?

ANSWER:

Yes, subject to the following limitations.

DISCUSSION:

As a state employee you are subject to the provisions of G.L. c. 268A, the conflict of interest law. The sections of that law that are relevant to the question you have asked are §§4, 6 and 23. Section 4 provides that a state employee may not act as agent for anyone other than the commonwealth or a state agency in relation to any particular matter[1]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. Section 4 would prohibit you, for example, from representing the board in connection with a grant proposal to any state agency. Acting as an agent would include such activities as making telephone calls or signing correspondence on the board's behalf. See e.g. EC-COI-85-58; 84-73.[2]/ However you would be permitted to participate in internal board discussions regarding such matters. See e.g. EC-COI-85-21.

Section 6 prohibits a state employee from officially participating in a particular matter in which she or a business organization in which she is serving as a director has a financial interest. Thus you could not take any action as an MCB employee which would affect the financial interest of ABC. Since you have stated that you have no involvement in your counseling job with either DEF or ABC, §6 should not limit your present activities.

Finally, you should be aware of the provisions of §23.[3]/ It prohibits a state employee from using or attempting to use her official position to obtain unwarranted privileges for herself or others. In this regard you should be careful, for example, in your contacts with MCB staff who might be involved in the awarding of contracts to ABC or DEF so as not to influence their decisions.

DATE AUTHORIZED: September 11, 1985

[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. . . " G.L. c. 268A, §1(k).

[2]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[3]/On July 9, 1985 the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended only to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-73

FACTS:

You are a partner in the law firm of Goldstein and Manello and are also a consultant to the Attorney General on matters relating to your expertise in bankruptcy law.[1]/ Specifically, you are assisting the Attorney General on behalf of the commonwealth and political subdivisions in connection with the chapter 11 proceedings of the Manville Corporation (Manville). The Attorney General has prepared and filed a proof of claim for property damages incurred and to be incurred by the commonwealth and various subdivisions correcting problems created by the presence in public buildings of asbestos products allegedly supplied by Manville. The Attorney General has requested and received your assistance in connection with the preparation and submission of this claim. Several related claims against Manville have also been filed by other states.

Manville has filed objections to certain weaker claims filed by other states; you believe that the objections are intended to establish precedent on issues which may be detrimental to the commonwealth's claims. To pursue effectively the commonwealth's property damage claims, the Attorney General has joined with other states to pursue and defend common procedural and substantive issues. To deal with the objections filed by Manville, the Attorney General has joined with twenty-five other attorneys general in the formation of the State Government Creditors Committee for Property Damage Claims (Committee). The Attorney General as part of the Committee, and on behalf of the commonwealth, has been dealing with issues common to it and other Committee members, and specifically has prevented Manville from impeding or defeating its claim by overpowering weaker claimants on common issues.

The Attorney General has determined that the commonwealth's interest in the Manville proceedings requires that you furnish assistance to the Committee. You state that you could not properly assist the Attorney General or pursue the Attorney General's claims unless you could do so through the Committee. The Attorney General and Committee have engaged you to assist them in dealing with common issues and have agreed to share responsibility for compensating you.

QUESTION:

Does G.L. c. 268A permit you to assist the Committee while you also serve as a consultant to the Attorney general in the Manville proceedings?

ANSWER:

Yes.

DISCUSSION:

As a consultant to the Attorney General, you are a "state employee" for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q).2/ Under G.L. c. 268A, §4(c), a state employee may not, otherwise than in the proper discharge of his official duties, act as attorney for anyone (other than the 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. Section 4(a) proscribes the receipt of compensation from anyone other than the commonwealth under similar conditions. The chapter ll Manville proceedings constitute a particular matter under G.L. c. 268A, §1(k) in which the commonwealth is a party and has a direct and substantial interest. Therefore, the propriety of your representation of the Committee depends on whether the representation is in the proper discharge of your official duties as a consultant to the Attorney General. Based upon the information you have provided, the Commission concludes that it is.

General Laws, c. 268A provides latitude to an employee's appointing official to determine what will constitute the proper discharge of official duties, and the Commission will customarily defer to the appointing official's discretion. See, Commission Advisory No.6 (the proper discharge of a municipal attorney's duties reasonably extends to representing a municipal employee in a lawsuit based on the employee's official acts). See, also, EC-COI-80-96; 83-20.[3]/ However, an

appointing official's discretion under §4 is not unlimited. See, for example, EC-COI-83-137 (the proper discharge of official duties does not extend to representing individuals in a private lawsuit against the state). Whether any particular determination by an appointing official would so far exceed the customary job requirements for an employee as to frustrate the purposes of the statute is a judgment which ultimately rests with the Commission as the primary civil enforcement agency under G.L. c. 268A. See, G.L. c. 268B, §3(i).

As applied to you, the exemption is appropriate. The Attorney General has determined that the interests of the commonwealth in the Manville proceedings requires your assistance to the Committee. Given the litigation strategy which you have described, it appears that the purpose of your employment by the Attorney General cannot be achieved without your concurrent representation of the Committee. Your representation of the Committee would therefore be in the proper discharge of your official duties and exempt from G.L. c. 268A, §4.

DATE AUTHORIZED: September 11, 1985

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

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[1]/The advice in this opinion applies equally to your partner Robert Somma.

[2]/In view of your part-time employment status, you are also a "special state employee" under G.L. c. 268A, §1(o). Given the Commission's conclusion regarding your advocacy for the Committee, your status as a "special state employee" is not a relevant factor.

[3]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-74

FACTS:

You were employed full-time by the ABC Housing Authority (ABC) from July 1979 to December 1983. During that time, you worked as a design specialist for the XYZ housing project. The ABC had contracted with the Associates to provide the design services. As a design specialist you provided design review of the Associate's work for the first phase of the XYZ project. The first phase consisted of the rehabilitation of twenty-five of the existing fifty buildings. You state that the project was divided into two phases because there was a limited amount of money available at that time. The completion of the remainder of the twenty-five buildings was not contemplated when the Associates did the first phase. It was not until this year that money became available to begin the second phase of rehabilitation.

Since 1983 you have been employed part-time at the Associate's which has recently signed a contract with the ABC for the planning, design and construction supervision for the second phase of reconstruction at XYZ project. The second phase required that a new construction bid and design contract be submitted for the remaining buildings.

QUESTION:

Does G.L. c. 268A permit you to consult with the Associates on the second phase of construction of XYZ project?

ANSWER:

Yes.

DISCUSSION:

1. Section 18(a)

Upon leaving municipal employment, you became a former municipal employee for the purposes of the conflict of interest law. G.L. c. 268A, §1 et seq. The applicable provision to your situation is §18. Section 18(a) permanently prohibits a former municipal employee from acting as agent for, or receiving compensation from, anyone other than the same city in connection with any particular matter[1]/ in which the city is a party or has a direct and substantial interest and in which she participated[2]/ as a municipal employee while so employed.

The current contract which the Associate has with the ABC constitutes a particular matter. Based on the information you have provided, the Commission concludes that the current contract with ABC is a different particular matter from the first contract in which you participated as an ABC employee. While previously employed by the ABC from 1979 through 1983, you worked on the first phase of reconstruction. The first phase included the rebuilding of a specified number of buildings. The second phase of the housing project involves a different particular matter because a new design bid and construction bid have been submitted for a different set of buildings. There will be a separate contract for this second phase. In addition, the plans for the second phase have been altered and do not reflect the same plans you worked on during the first phase. Therefore, because the second phase is a different particular matter you would not be prohibited by §18(a) from consulting for the Associates.[3]/

2. Section 18(b)

Section 18(b) establishes an independent limitation on your post-employment appearances before municipal agencies. This provision relates to those particular

matters in which you did not personally participate but which were nonetheless under your "official responsibility"[4/] as an ABC consultant. Under §18(b) for a one-year period following the completion of your ABC services, you may not personally appear on behalf of the Associates before any municipal agency in connection with particular matters which were under your official responsibility during the previous two-year period. Included within the §18(b) prohibition would be decisions or determinations made by other ABC employees, and which were under your official responsibility. Based on the facts you present, your duties involved decisions and recommendations on specific applications and contracts before the ABC rather than the authority to direct the actions of other individuals. Therefore, §18(b) would not be applicable since you did not have official responsibility as an ABC consultant.[5/]

DATE AUTHORIZED: September 11, 1985

[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 . . ." 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/]If the plan which was used for the first phase had been merely a resubmission of the original contract, the second phase contract would be considered the same particular matter and your consulting work would be prohibited by §18(a). See EC-COI-84-31.

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

[5/]Section 23 of G.L. c. 268A contains standards of conduct applicable to former public employees. You should be careful not to disclose confidential information which you gained by reason of your ABC employment to the Associates.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-75

FACTS:

You are the director of procurement for state agency ABC. In that capacity you are responsible for the process by which ABC seeks competitive bids for the sale of products to and makes selections of vendors. Under the "best bid" procedure, you select the lowest bidder meeting your contract specifications. The process is not automatic but involves your exercise of discretion to determine whether the lowest bidder actually meets the contract specifications.

XYZ, a non-profit corporation, is a national educational buying consortium. XYZ bids competitively to sell products to institutions, and currently has substantial contracts with ABC. ABC is an eligible institution for the receipt of XYZ bids and for annual patronage refunds from XYZ.

XYZ has recently invited you to serve as an unpaid member of the XYZ board of directors for a three-year term. As a director, you would oversee a general manager and full-time paid staff who carry out the day-to-day operation of XYZ.

QUESTION:

Does G.L. c. 268A permit you to become a member of the XYZ board of directors while you also serve as ABC director of procurement?

ANSWER:

Yes, although you will be subject to limitations on your activities both as director of procurement and as an XYZ director.

DISCUSSION:

As ABC director of procurement, you are a state employee for the purposes of G.L. c. 268A.

1. Limitation on Official Actions

Under §6 of G.L. c. 268A, you are prohibited from participating[1/] in any particular matter[2/] in which a business organization in which you serve as director has a financial interest. The purpose of this restriction is to remove state employees from situations in which their loyalty to the state may be clouded by competing private loyalties.

If you accept the XYZ directorship, limitations under §6 will come into play whenever XYZ applies for or is awarded a contract by ABC. Because XYZ is a business organization which has an obvious financial interest in the awarding of contracts for which it has bid, you must refrain from participating in any XYZ bids or contracts. The prohibition applies not only to formal decision making, but also to your reviewing and recommending decisions to others. Further, the §6 prohibition extends to any particular matter in which XYZ has a financial interest. For example, if XYZ is one of several organizations which has submitted a bid, you are disqualified from participating not only on the XYZ bid but also on the bids of organization which are competing with XYZ for the same contract. See EC-COI-81-118.

Should matters affecting the financial interest of XYZ come before you, you must not only refrain from participation, but also notify your appointing official in writing about the financial interest. Your appointing official thereafter may 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 you, in which case it shall not be a violation for you to participate in the particular matter. Copies of such written determination shall be forwarded to you and filed with the Commission by the person who made the determination.

Unless you have received a written determination from your appointing official expressly permitting your participation in matters in which XYZ has a financial interest, you must continue to refrain from any participation in such matters.

You should also be aware that G.L. c. 268A, §23 applies to your official actions. Under §23(¶2), you may neither use your official ABC position to secure unwarranted privileges for XYZ, nor engage in conduct which gives reasonable basis for the impression that XYZ will unduly enjoy your favor in the performance of official duties. You should keep these principles in mind whenever you perform periodic job performance evaluations of ABC procurement department employees who participate in the award or monitoring of XYZ contracts.[3/]

2. Limitation on XYZ activities

Section 4(c) of G.L. c. 268A governs your activities as a XYZ director while you also serve as ABC director of procurement. Under §4(c) you may not act as the agent or spokesperson for XYZ in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, you may not appear on behalf of XYZ before any state institution in connection with a contract bid which XYZ has made. On the other hand, your periodic participation in XYZ board of director meetings will not, by itself, constitute acting as the agent of XYZ.

DATE AUTHORIZED: October 8, 1985

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

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

[3/]On July 9, 1985 the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-76

FACTS:

You currently serve as the clerk/magistrate for the District Court Department and are interested in developing property owned by a City in which your court is located. Specifically, you have become aware that the property is considered surplus property by the City's public facilities department and will be sold at a public auction to the highest bidder. To your knowledge, the property is unencumbered.

QUESTIONS:

1. Does G.L. c. 268A permit you to submit a bid to purchase the property?
2. Assuming your bid is accepted, does G.L. c. 268A permit you to develop the property?

ANSWERS:

1. Yes.
2. Yes, subject to certain conditions.

DISCUSSION:

As the clerk/magistrate for District Court Department, you are a state employee for the purposes of G.L. c. 268A. The principal limitations on your activities outside of your clerk duties are contained in G.L. c. 268A, §4. This section prohibits you from either receiving compensation from a non-state party or acting as the agent or attorney for a non-state party in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, §4 would prohibit you from representing a private party in a licensing proceeding before a state agency. However, in order for §4 to apply, the commonwealth must have a stake in the particular matter for which you are receiving compensation or acting as representative.

Based on the information you have provided, nothing in §4 would prohibit your submission of a bid or your purchase of the surplus property from the City. The commonwealth is neither a party to nor has a direct and substantial interest in the transaction, which will be handled entirely at the municipal level. While local housing transactions may occasionally involve matters of direct and substantial interest to the state (for example if the state has a lien on the property for unpaid taxes, or if the transaction involves a housing subsidy administered by state housing agencies) none of these exceptions will apply to you.[1/]

You should also be aware that the restrictions of G.L. c. 268A, §23 may be relevant to your situation. Under §23(¶2), you may not use your official clerk position to secure unwarranted privileges for yourself or others or, by your conduct, give a reasonable basis for the impression that any party can unduly enjoy your favor in the performance of your official duties.[3]/ Issues under §23 may come into play, for example, if you are called upon to participate as clerk in cases in which the City public facilities department is a party during the same period in which you are privately dealing with that same agency for the surplus property. Should such a situation arise, you should either refrain from participating in the matter, or discuss the matter with your appointing official to determine what safeguards can be established to dispel any impression of undue favoritism.[3]/

DATE AUTHORIZED: October 8, 1985

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[1]/Under G.L. c. 268A, §7, a state employee may not have a financial interest in a second contract made by a state agency. Inasmuch as the contract for the property purchase will be made by a city, as opposed to a state agency, §7 will not apply.

[2]/"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 insure 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 a court clerk is "a public officer clothed with official functions of a highly important nature." **Massachusetts Bar Association v. Cronin**, 351 Mass.321 (1966), and that conforming court clerks to essential standards will "ensure the integrity of the judicial system, which must not only be beyond suspicion but must appear to be soon." Id." EC-COI-84-53.

[3]/On July 9, 1985 the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §25. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-77

FACTS:

You are an independent certified public accountant in municipality ABC. You are also a member of the business committee of the Community Development Corporation (ACDC) in that same municipality.

A Community Development Corporation (CDC) is defined in G.L. c. 40F, §1 as "a quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes...", namely investing monies in community development projects in substandard or blighted areas in the CDC's designated area. One of the principal ways ACDC helps finance the development of certain areas within ABC is through participation in the Small Loan Guarantee Program. Under this program, ACDC receives a loan from the Massachusetts Community Development Finance Corporation (CDFC). ACDC uses the proceeds of that loan to provide a cash collateral guarantee to a lender on behalf of a borrower for up to one-half the amount of the borrower's loan.

The business committee of ACDC reviews financial information submitted by parties seeking loan guarantees from ACDC and recommends to the ACDC board of directors whether a guarantee should issue. The six members presently on the business committee are being requested to serve two unpaid hours per month at business committee tasks.

QUESTIONS:

1. Are ACDC business committee members municipal employees for the purposes of G.L. c. 268A?
2. If so, what restrictions will G.L. c. 268A place on you?
3. Are members of the ACDC business committee subject to the financial disclosure requirements of G.L. c. 268B?

ANSWERS:

1. Yes.
2. You will be subject to the limited restrictions discussed below.
3. No.

DISCUSSION:

1. Status of ACDC Business Committee Members as Municipal Employees

Municipal employee is defined in the conflict law 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).

Whether you will be considered a municipal employee by serving on the ACDC business committee therefore depends on (1) whether ACDC is a municipal agency and (2) whether your limited service on the ACDC business committee qualifies as municipal employment.

The Commission has previously found that a city's CDC is a municipal agency for Chapter 268A purposes. See EC-COI-83-74.[1]/ That opinion rested on the decision-making function the CDC performed in the

expenditure of public funds in "carry[ing] out certain public purposes," including projects in partnership with CDFC, which is specifically stated to be performing "an essential governmental function." G.L. c. 40F, §2. These indicia of public status, together with the fact that the CDC's operating area coincided with the city's political boundaries, resulted in the CDC's municipal status for Chapter 268A purposes. For similar reasons, the Commission concludes that ACDC is a municipal agency. See also G.L. c. 121B, §7 (housing and redevelopment authorities, which are also quasi-public entities, are treated as municipal agencies for Chapter 268A purposes).

The second part of the jurisdictional question is whether your two hours per month unpaid service on the ACDC business committee rises to the level of municipal employment. The breadth of the municipal employee definition clearly includes uncompensated, part-time service. G.L. c. 268A, §1(g). The Commission does recognize 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. EC-COI-82-54. For example, individuals merely rendering informal, temporary and general advice to state officials (EC-COI-79-12), or presenting the views of individuals or groups affected by some state action (EC-COI-80-49), have not been deemed state employees. However, such is not the case here. The advice given by business committee members is neither informal nor general. It is anticipated that the business committee will meet once a month to review the credit information submitted by applicants seeking ACDC loan guarantees and will make specific recommendations to the ACDC board of directors as to which applications warrant the issuance of a guarantee. Thus, the business committee will be operating as more than an ad hoc advisory committee and will be substantively involved in the ACDC decision-making process concerning the issuance of loan guarantees. Generally, someone in the private sector who is performing services for state government and "actually performing the tasks and functions that might ordinarily be expected to government employees" will be deemed a state employee. EC-COI-80-49. The Commission follows that precedent here, and finds that ACDC business committee members are municipal employees for the reasons discussed above.

2. Application of G.L. c. 268A provisions to you

Traditionally, city employee positions for which no compensation is provided are designated as "special municipal employee" positions by the city council. This designation means that the conflict law applies less restrictively to such individuals under certain circumstances, to enable government to attract qualified people in part-time capacities without unduly restricting the outside activities of such individuals. Because ACDC business committee members are unpaid, that position is eligible for "special" status.[3/]

The four sections of the conflict law relevant to your situation are §§17, 19, 20 and 23. Section 17 prohibits a municipal employee from acting as agent or attorney for, or receiving compensation from anyone other than the same city in relation to any particular matter in which the same city is a party or has a direct and substantial interest. However, a special municipal employee in your situation[3/] is only subject to these prohibitions in relation to a particular matter (a) in which he has participated as a municipal employee or (b) which within the past year has been a subject of his official responsibility. This section does not appear to restrict you in any significant way. What it would prohibit you from doing is working for a business on a loan application to ACDC.

Section 19 prohibits a municipal employee from officially participating in a particular matter 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 19(b) provides an exemption from this section if the municipal employee first advises his appointing official of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the employee's municipal services. Thus, §19 would require you to abstain from participating as a business committee member in the consideration of a loan application from any of the above listed parties, unless you received a prior §19(b) exemption from the ACDC Executive Director.

Section 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. Because of the breadth of this prohibition, there are a number of exemptions. For example, if the business committee position were designated "special" as described above, you would be eligible for a §20(c) exemption if you filed a statement with the city clerk disclosing your financial interest in the other municipal contract and the contract was with a municipal agency whose activities you neither participated in nor had official responsibility for. Section 20(d) allows a special municipal employee to have a financial interest in an additional contract with his very own agency if he files the requisite disclosure statement with the city clerk and the city council approves the exemption. Alternatively, absent "special" status, you may still be eligible for the §20(b) exemption if you meet the listed criteria. If and

when you are confronted with a potential financial interest in a municipal contract, you should raise the issue with your municipal counsel pursuant to G.L. c. 268A §22.

Finally, §23[4] states that no municipal employee shall:

1. accept other employment which will impair his independence of judgment in the exercise of his official duties [§23(¶2)(1)];

2. use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others [§23(¶2)(2)];

3. by his conduct give a 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 [§23(¶2)(3)]; or

4. 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 [§23(¶3)].

For example, you would violate §23(¶3) by using the financial information you have access to as a business committee member in order to benefit a business' competitor or yourself. Similarly, you would violate §23(¶2)(3) if your prior relationship with a business unduly influenced your decisionmaking processes as a business committee member. You should bear these §23 guidelines in mind in pursuing your duties as a business committee member to avoid even the appearance of a conflict.

3. Status of ACDC Business Committee Members under G.L. c. 268B

There are two reasons why ACDC business committee members are not subject to the G.L. c. 268B filing requirements. First, they are unpaid. G.L. c. 268B requires all individuals who qualify as "public employees" under G.L. c. 268B, §1(o), to file a statement of financial interests with the Commission. Excluded from the definition of "public employee" is "any person who receives no compensation other than reimbursements for expenses." G.L. c.268B §1(o). 930 CMR 2.02(15). Accordingly, as long as members of the ACDC business committee remain unpaid (other than for expense reimbursement), the financial disclosure requirements of G.L. c. 268B will not be applicable to them. EC-FD-80-2; EC-COI-83-30.

Secondly, G.L. c. 268B currently requires only state and county officials/employees who qualify as public employees to file. Because ACDC business committee members are municipal employees, they would not be required to file statement of financial interest even if they were paid.[5]

DATE AUTHORIZED: October 8, 1985

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[1]This citation refers to a prior Commission conflict of interest opinion including the year it was issued and its identifying number. Copies of this and all other advisory opinions are available (with identifying information deleted) for public inspection at the Commission offices.

[2]It should be noted that special municipal employee status is not automatic. The City Council must specifically designate the position of ACDC business committee member (i.e., not the individual) as a special municipal employee position pursuant to G.L. c. 268A, §1(n).

[3]This assumes that you do not serve as a ACDC business committee member for more than 60 days in a 365-day period. See §17(¶5) clause c.

[4]On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

[5]By special act, the City of Marlborough is also subject to the disclosure requirements of G.L. c. 268B, St.1983, c.102. ABC has not sought similar coverage.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-78

FACTS:

You are the president of the board of directors of the Western Massachusetts Health Planning Council, Inc. (Council). The Council is a health systems agency (HSA) established under the National Health Planning and Resources Development Act, 42 U.S.C. §300K et seq. (Act). Specifically, the Act mandates that HSAs are to be non-profit private corporations ". . . which [are] not a subsidiary of, or otherwise controlled by, any other private or public corporation or other legal entity. . ." 42 U.S.C. §3001-1(b)(1). The sole function of HSAs is to engage in health planning and development. There are thirty-one members of the Council board who serve in a volunteer unpaid capacity. The Act provides that each HSA establish its own process for the selection of its board members providing it meets certain statutory requirements for broad representation of the population. 42 U.S.C. §3001-1 (3)(D). The board members are not appointed by state or local officials. As an HSA organized under federal law, the Council is required to comply with the conflict of interest standards prescribed at 42 U.S.C. §3001-1(b)(3)F. Meetings of the board are required to be public in accordance with the Act. The Council's major source of funding is through the federal government. You also have a contract with the Executive Office of Human Services to do health planning for your area. This contract amounts to twenty percent of your total budget.

Under the federal statutory scheme and complementary state law, any institutional provider of health care that wishes to offer new services must apply to the Department of Public Health (DPH) for a determination of need (DON). The prospective DON applicants are required to seek advice from the appropriate HSA. See G.L. c. 111, §25B and 25C. The HSA may comment on the DON and forward its recommendation to DPH. 105 CMR 100.530. DPH then decides whether to make a positive finding of need.

QUESTION:

Are the members of the Council's board "state employees" within the meaning of G.L. c. 268A §1(q)?

ANSWER:

No.

DISCUSSION:

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..." G.L. c. 268A, §1(q). (emphasis added). The issue of whether board members are considered state employees therefore depends upon whether the Council is a state agency, which is defined by the conflict of interest law 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..." G.L. c. 268A, §1(p).

In its previous determinations concerning the public agency 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. state legislative or administrative action);

(2) The entity's performance of some essential state governmental function;

(3) whether the entity receives and/or expends state funds; and

(4) the extent of control and supervision exercised by state 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 in EC-COI-84-55[1]/ concluded that the Statewide Health Coordinating Council is a state agency because it was established by a Massachusetts Executive Order and its members are appointed by the governor. In EC-COI-84-65, however, a fund privately established as a charitable trust for the benefit of the City of Boston was found not to be a municipal agency.

Based on the foregoing factors, the establishment, funding and functions of the Council can be distinguished from those entities deemed to be public agencies by the Commission.

1. Creation

The Council was not created by state legislation or administrative action, but rather was established solely by the federal Act which required the Secretary o Health, Education and Welfare (renamed Health an Human Services) to create health service areas in th country. The Act mandates that HSAs are to be nor profit corporations which are not controlled by an other private or public corporation or other legal entity The Council is established as a non-profit corporation There are no indicia of state involvement in the creatio of the Council. HEW has the obligation to designat HSAs for all health service areas.

The selection of its board members is guided b requirements of the Act 42 U.S.C. §3001-1(3)(D). Th board members are not appointed by state or local offi cials. The Council acts purely as a private vendor in it relationship to the the state.

2. State Governmental Functions

The functions of a HSA include compiling anc analyzing data, 42 U.S.C. §3001.2(b)(1); establishing anc reviewing a comprehensive "health systems-plan," 4 U.S.C. §3001.2(b)(2); making grants to public and non profit entities in furtherance of the health systems plan 42 U.S.C. §3001.2(c)(3); and reviewing and approving o disapproving certain proposed uses of federal funds within the areas for which they have responsibility, 4 U.S.C. §3001.2(c)(l). The HSAs were established by Con gress to advise the federal government as to the nature of health care in the particular area. See **Tex. Acorn v Tex. Area 5 Health Systems Agency**, 559 F.2d 1019 (5t Cir. 1977). Although your role in health care benefits the state, your relationship with the state is more akin to a vendor than as part of a state agency. Furthermore, it is evident that the Act's own conflict of interest provision focuses on HSAs' loyalty to the federal government's scheme of health planning rather than the state.

3. Funding

The Council's source of funding is also relevant as to whether it is considered a state agency. Because its money from the state is received through a contract with EOHS to conduct health planning for your area, the Council is at most a vendor corporation in its relationship to the state.[2]/ The Council receives the bulk of its funds directly from the federal government. Accordingly, as long as the major funding source remains the federal government, the Council would not be considered a state agency based on this factor.

4. State Control over the Council

The Council is a non-profit corporation designated as a health systems agency pursuant to 42 U.S.C. 3001-1(b)(l). The Act mandates that HSAs are not to be controlled by any other public or private entity. The Council's input on determination of need applications is provided for under G.L. c. lll, §§25B and 25C which indicates that the appropriate "regional comprehensive

health planning agency" as designated by the Act shall be a party to the DON procedure. However, the Council has authority only to make recommendations to DPH regarding a DON. The state has no authority to control the actions of the Council through the DON procedure nor is it authorized by any state statute to exercise control over HSAs.

Based on the foregoing, the Commission concludes that the Council is not a state agency for the purposes of Chapter 268A, and therefore Board members are not considered state employees. The Commission has no jurisdiction to render an opinion on the applicability of other state or federal statutes; thus the scope of this opinion is limited to the Commission's construction of G.L. c. 268A.

DATE AUTHORIZED: October 8, 1985

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

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[1]/This citation refers to prior Commission conflict of interest opinion including the year it was issued and its identifying number. Copies of advisory opinion (with identifying information deleted unless the requestor waives confidentiality) are available for public inspection at the Commission offices.

[2]/The definition of state employee has not been extended to an employee of a corporation or a vendor which contracts with the state unless the commonwealth intends to contract for the services of a specific individual. See EC-COI-83-94.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-79

FACTS:

You are a member of the General Court. You and a business partner would like to obtain financing through the Massachusetts Industrial Finance Agency (MIFA) for a project which will involve renovating an office building. You would like the financing to come either from a conventional issuance by MIFA of industrial development bonds or from a MIFA bond issuance through its Guaranteed Loan Program (Program).

The general purpose behind the issuance of industrial development bonds is to "stimulate industrial growth and expansion by encouraging a larger flow of private investment funds from banks, investment houses, insurance companies and other financial institutions..." This is accomplished through the use of a federal tax incentive whereby the state "lends" its tax-exempt status to an eligible conventional loan or mortgage arrangement between a private borrower and a private lender by issuing industrial development bonds. The benefit to the lender is a tax-free investment which is passed on to the borrower in the form of a loan at a lower interest rate than would be available without the state's intervention.[1]/ Because the underlying arrangement is really a conventional loan, the acceptability and terms of the arrangement rest entirely on the creditworthiness of the borrower in the first instance. The state agency responsible for the processing, approval and issuance of industrial development bonds is MIFA. MIFA's duties, powers and authority are set out in G.L. c. 23A, §29 et seq. and G.L. c. 40D.

When a developer applies to MIFA for an issuance of industrial development bonds to finance a project, he must meet a variety of criteria and agree to a number of conditions, some required by statute and some imposed by MIFA. The most important criterion is that the project must comply with the purposes of G.L. c. 23A and G.L. c. 40D. Specifically, the project must be one which will either create jobs or revitalize a commercial urban area. MIFA is also required by G.L. c. 40D, §12 to make certain findings including findings that the borrower is a responsible party, that the financing documents comply with the provisions of c. 40D, and that financing arrangements are adequate. In the various documents that are a part of the bond issuance, the borrower, who is the developer, and the lender, which generally is a financial institution, make various covenants and representations required by MIFA. For example, the borrower must agree to indemnify MIFA for any claims that might arise either out of the bond issuance or out of the project itself. The lender must agree that it is not relying on MIFA as to the reliability of any credit analysis or information on the borrower or the bond. Once the statutory criteria and MIFA's requirements have been met, MIFA issues the necessary certificates and then issues the bonds. MIFA makes no representation or finding as to the tax exempt status of the bonds. That is the responsibility of bond counsel who reviews the entire arrangement and issues an opinion to the borrower and lender. Any developer who meets the criteria and conditions established by MIFA and by statute may participate in the industrial development bond program.[2]/ The bond itself is issued in the name of MIFA, but it carries the following statement on its face:

> This bond (and any coupon appertaining hereto) does not constitute a general obligation of the Massachusetts Industrial Finance Agency nor a debt or pledge of the faith and credit of the Commonwealth of Massachusetts except to the extent paid from bond proceeds. The principal of and interest and premium, if any, on this bond are payable solely from the revenues and funds pledged for their payment in accordance with the loan agreement and the trust agreement. (emphasis added)

The pledged receipts are defined in the accompanying financing documents as the loan payments received from the borrower. MIFA itself does not provide any money in connection with the bond issuance, take title

to any property or collateral, or incur any liability. No party or any other person has recourse against MIFA in connection with the bond issuance. Throughout the process MIFA's representations and covenants are limited to the following:

(a) that it is a body politic and corporate and a political instrumentality of the commonwealth established under G.L. c. 23A, with the power pursuant to G.L. c. 23A and c.40D to execute and deliver a bond purchase agreement and a trust agreement and to perform its obligations under each thereof and to issue and sell the bond pursuant to the bond purchase agreement and trust agreement;

(b) that it has taken all necessary action and has complied with all provisions of the Constitution of the Commonwealth and its enabling act, including but not limited to the making of the findings required by G.L. c. 40D, §12, in order to make the bond purchase agreement, the trust agreement and the bond the valid obligations they purport to be; and when executed and delivered by the parties, the trust agreement will constitute a valid and binding agreement of MIFA and be enforceable in accordance with its terms; and

(c) when delivered to and paid for by the purchaser in accordance with the terms of the bond purchase agreement and trust agreement, the bond will constitute a valid and binding special obligation of MIFA. (emphasis added)

The term "special obligation" utilized in this last covenant means that the principal, interest and premium on the bond are payable only from the pledge receipts and not from any assets of MIFA.

Simultaneously with the issuance of the bonds, MIFA irrevocably assigns any further interest it may have in the issuance and in the bond payments to a trustee. Assignment of the borrower's payments on the loans to a trust is required by G.L. c. 40D, §13. Any other rights or responsibilities MIFA may have after the issuance of the bond are also assigned to the trust. This is in accordance with MIFA's own policy of undertaking minimal obligations which might require staff time or attention. Such obligations would involve such things as maintaining a bond register or notifying the bond holder(s) of certain events or information relative to the bond issuance. The trustee is then completely responsible for overseeing and administering the proceeds from the bond sale throughout the lifetime of the issuance.

The Guaranteed Loan Program, which is not yet totally operative, will work differently from the conventional bond issuance. The purpose of the Program is to bring the benefits of fixed-rate, long-term public financing to small businesses and developers. Conventional MIFA bonds carry no credit rating other than that of the individual borrowers. While the borrower may be viewed as creditworthy to its own commercial bank which buys the bonds, the bank buys the bonds on a short-term, floating-interest rate basis. In contras bonds that are sufficiently "ratable" to be sold on th public market are eligible for long-term, fixed intere rates. To make such financing available, since it lacl sufficient assets in its own name and since it cannot us the commonwealth's name or credit rating, MIFA ha decided to use a $10 million pool of money under i control called the Industrial Mortgage Insurance Fun (the Fund). The Fund will be used to insure/guarantee portion of any bond issuance. That is, in the event of default MIFA will guarantee to the bond purchaser 2 percent of the payment, when due, of the principa premium and interest on the bonds. Prudential Rei surance has contracted with MIFA to guarantee th other 75 percent.

The Program will work in the following way. A interested small business or developer goes first to commercial bank with the proposed project. The ban makes an initial credit determination, and if that dete mination is favorable, the bank issues the developer letter of credit securing the maximum annual amount c principal and interest that would be due on the loar The developer takes this letter of credit to MIFA whic hires an outside independent appraiser, at the deve oper's expense, to evaluate the collateral. The MIFA stal also reviews the proposal, utilizing the same criteria uses in evaluating conventional bond issuance request If the staff finds the project to be sound it recommend the project to the full MIFA board which then commit itself to make the guarantee. Bonds will not be sold ur til a pool of projects has accumulated in the amount o $15 to $20 million. It could take up to a year to accumu late a pool of sufficient size since each project is limite to $2.5 million. Once there is a pool, the bonds are sol by an underwriter. Simultaneously, MIFA will transfe any remaining interest it might have in the bond to trust. In the event that one of the projects in the poo defaults, MIFA is notified by the trustee and, if neces sary, it makes available its 25 percent of the guarantee t reimburse the bond purchaser. Prudential Reinsuranc does the same with its 75 percent. In the event of default the trust document is not cancelled or revoked The defaulting party is treated like any other party wh defaults on a loan in that the collateral is subject t foreclosure and sale. If foreclosure and sale are going t result in large scale unemployment, however, MIFA i permitted under the terms of its agreement to try to fin an acceptable alternative within an agreed-upon perio of time.

In summary, under the Program MIFA plays tw roles: that of bond issuer, and that of insurer. Unlike th conventional MIFA bonds, a bond issued under the Pro gram will be a limited obligation of MIFA — limited t a guarantee of a 25 percent reimbursement from th Fund in the event of a default.

QUESTIONS:

1. Would G.L. c. 268A permit you to obtain project financing through a conventional MIFA industrial development bond issuance?
2. Would G.L. c. 268A permit you to obtain project financing through the MIFA Guaranteed Loan Program?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

1. The conventional MIFA industrial development bond issuance

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 that law relevant to your first question are §§7, 4 and 23. Section 7 provides that no state employee shall 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. Finding a violation of §7 requires that three conditions be met concurrently. First, there must be a contract made by a state agency. MIFA is a state agency as that term is defined at §1(p).[3]/ Second, either the commonwealth or a state agency must be an interested party to the contract. Third, the state employee must have a financial interest in the contract. Thus the first inquiry is whether a conventional MIFA bond issuance, or any aspect of it, can be characterized as a contract made by a state agency. For purposes of G.L. c. 268A the term "contract" refers not only to a formal written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of promises made by the other(s) constitutes a contract. See e.g. **Conley v. Town of Ipswich**, 352 Mass. 201 (1967); EC-COI-84-51; 81-64.[4]/ It is in light of this definition that the various aspects of a bond issuance must be examined.

In a conventional MIFA bond issuance there are four basic documents: a bond purchase agreement between MIFA, the borrower and the purchaser; a loan agreement between MIFA and the borrower; the bond itself issued in MIFA's name to the purchaser; and a trust agreement between MIFA, the borrower and the trustee. The bond purchase agreement and the loan agreement contain the borrower's and lender's concurrence with the conditions imposed by MIFA. Additionally, the borrower covenants that it will indemnify MIFA as to any claims arising out of the bond issuance. The agreement further states that all proceeds from the bond sale will be used for construction of the project. The lender/bond purchaser for its part agrees that it will not rely on any of MIFA's findings under G.L. c. 40D with respect to the borrower or the bond itself or the security provided by the borrower. This means, among other things, that the lender is not relying an MIFA's information as to the creditworthiness of the borrower or the tax-exempt status of the bond issuance. It is clear from these two documents that the promises and obligations are one-sided: the borrower and the lender are making them, and MIFA is undertaking no obligations and making no promises in return.

The bond itself on its face is issued by MIFA to the bond purchaser with MIFA promising to pay to the purchaser the principal amount of the loan plus interest. Previous advisory opinions have held that a bond issued by a state agency is a contract because it creates a contractual obligation between the state and holders of the bond. See EC-COI-83-147 (and cases cited therein); 83-113. The bonds addressed in those two opinions are distinguishable from the bonds issued by MIFA, however, in that they were secured by the full faith and credit of the issuing agency or by a pledge of the revenues and receipts of the agency. In contrast, a MIFA bond must, by statute, clearly indicate that it is not a general obligation of MIFA or a pledge of the faith and credit of MIFA or of the commonwealth. See G.L. c. 268A, §35(d). Rather the bonds are payable solely from the revenue and funds pledged for their payment which are payments from the borrower. Although MIFA's name is on the bond, the real obligor is the borrower, and the obligee the bond purchaser. While the MIFA imprimatur is necessary before an industrial development bond is issued, none of the underlying obligations or liabilities are MIFA's.

The final document to be considered is the trust agreement, also called the mortgage, security and trust agreement, between MIFA, the borrower and the trustee. General Law c.40D, §13 requires that the proceeds from the sale of industrial development bonds be deposited with a trustee and are to be used solely for the payment of the cost of the project and the expenses of the issuing agency. In addition, MIFA has established an internal policy to undertake only minimal obligations which might require staff time or attention during the lifetime of a MIFA bond issue, whether before or after a default. It therefore also assigns irrevocably to the trust any other rights or interests or duties it may have with respect to the bond issuance. The agreement sets out with specificity the duties of the trustee in handling the bond proceeds. It reiterates the borrower's covenant and MIFA's limited representation contained in the loan agreements and bond purchase agreement. MIFA requires that it include at the outset the same limited

covenant by MIFA to make payments on the bond solely from the pledged receipts. The agreement also sets out the powers of the trustee upon the occurrence of any default, including the power of sale. In the event of a default, the trust agreement provides that any money received shall first be applied to any costs or expenses incurred by MIFA.

Although the trust agreement introduces a new person or entity into the bond issuance process in the form of a trustee, it is essentially a restatement of all the conditions required by MIFA of the borrower. To that extent it is an appendage to the other documents that are a part of the issuance. Even if the agreement or some aspect of it were to be viewed as a contract made by MIFA, it would not be one in which you, as a state employee, have a financial interest. The substance of your obligations to the lender and to MIFA are set out in the bond purchase agreement and the loan agreement. You are not assuming any additional obligations in the trust agreement. Instead, MIFA is simply appointing someone else to act in its interest. An analogy might be made to a bank which sells a home mortgage it holds to another entity. The original obligations of the homeowner/borrower do not change, but the payee does. The homeowner's financial interest is not affected by the sale, either to his advantage or his detriment.

The recurring theme running through these four documents is that MIFA is undertaking no obligations of any substance. It is undertaking no financial responsibility, nor is it liable for any claim against the borrower, nor does the bond purchaser have any recourse against MIFA with respect to any aspect of the bond issuance. In short, all that MIFA is undertaking is to certify that it is a duly constituted state agency, that it has made the findings required of it by G.L. c. 40D, and that it has issued the bond as a special MIFA obligation, payable only with revenues from the borrower. MIFA's limited role is consistent with the real nature of the arrangement: a conventional loan between a borrower and a lender. While it is true that without MIFA's intervention the borrower would not be able to get such favorable financing, this does not necessarily mean the bond or any accompanying document constitutes a contract made by a state agency. It is instructive to note that none of the substantive conditions required by MIFA of the participants is negotiable. Even when applying the broad construction of the term "contract" to the substance of the arrangement, no contract results. The borrower and the lender are both undertaking certain obligations, but MIFA is merely certifying that it has performed its duties under the statute. In fact it takes great pains throughout the application process to make clear that it is assuming no obligations. Although the bond itself and the accompanying documents may appear to be contracts to which MIFA is a party, a close examination of them shows that they are not, in substance, contracts made by a state agency. Rather, MIFA's involvement is similar to the involvement of any state licensing or certificate granting authority: that is, it is permitting private parties who have met certain state-imposed requirements to engage in a specific type of activity or obtain a certain type of benefit from the state. Your participation in project financing through a conventional MIFA bond issuance, therefore, would not constitute a violation of §7.

You should also be aware of the provisions of §4 which limit the activities you may understake on the partnership's behalf in connection with the bond issuance. Section 4 prohibits a member of the General Court from personally appearing 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.

Ministerial functions include, but are not limited to, filing or amendment of tax returns, applications for permits or licenses, incorporation papers, or other documents.

Finally you should be aware of the provisions of §23 which contain general standards of conduct applicable to all state, county and municipal employees.[3/] It provides in pertinent part that a state employee shall not use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits a state employee from by his conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person. In this regard you should be careful that you do not use your position as a legislator to influence MIFA's actions with regard to your application. Nor should you let your official actions with regard to MIFA be influenced by any action they take on your application.

2. The Guaranteed Loan Program

MIFA will be playing two roles with regard to the Program. First, it will be the issuer of the bond pools, performing the same approval and public purpose determination tasks it does in conventional bond issuances. To that extent the bonds will be no different from those considered above. Bonds issued as a part of the Program, however, will be accompanied by a guarantee that is absent in conventional bonds. That is, MIFA will guarantee to the bond purchasers the payment, when due, of the principal of, premium if any, and interest on the bonds. The existence of the guarantee converts the bond into a contract made by a state agency. Further-

more, it is a contract in which the state is an interested party because state money is being used as part of the insurance fund backing the bonds. The guarantee remains MIFA's guarantee even after it assigns the rest of its interest to the trust.

While the bond purchaser has a clear financial interest in the guarantee, the remaining issue is whether the borrower also has a financial interest. The Commission concludes that it does. Without the MIFA guarantee the borrower would not not have access to the public financing market. Without that access the bonds issued on the borrower's behalf would be sold on a short term, floating interest rate basis. In contrast, the public market would yield longer loan terms and fixed interest rates. Since the amount of the borrower's obligation is directly linked to the bond term and interest rate, it obviously is financially advantageous to the borrower to obtain financing through the public market. Therefore the borrower does have a financial interest in the guarantee.

Although §7 contains several exemptions, none of these is available to you. The exemption that is closest to your situation is one which exempts from the §7 prohibition

> 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 interests 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 the interests of his immediate family.

That exemption clearly refers to corporations and commercial entities in which a member of the General Court has a financial interest. A bond pool cannot be considered a commercial entity. Therefore, the fact that your financing request might comprise less than 10 percent of the total amount of the bond pool does not bring you within this exemption. If your ownership interest in the development project itself did not exceed 10 percent, you would be eligible for this exemption since the partnership would be considered a commercial entity.

DATE AUTHORIZED: October 8, 1985

[1]/See Lancome, "State Development Finance Program," 25 Boston Bar J.No.6.p.25 (1981).

[2]/The only limitation would be a cap placed by Congress on the total amount of bonds a state agency like MIFA can issue. Thus a developer/borrower who meets the necessary conditions and criteria can obtain a bond issuance as long as the cap has not been reached.

[3]/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."

[4]/These citations refer to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

[5]/On July 9, 1985 the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended only to provide guidance to you.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-80

FACTS:

You are an unpaid member of state agency ABC. As an ABC member, you occasionally have been called upon to consider matters affecting state agency DEF although you understand that transactions between the two agencies are relatively infrequent.

You are a candidate for a full-time position with state agency DEF. You are not aware of any matters for which you would be responsible at the DEF involving issues which you would be called upon to consider as an ABC member.

QUESTION:

Does G.L. c. 268A permit you to serve as a DEF employee while you remain a member of ABC?

ANSWER:

Yes, although you will be subject to certain restrictions in each position.

DISCUSSION:

As a member of ABC, you are a state employee for the purposes of G.L. c. 268A. EC-COI-81-153.[4]/ In view of your unpaid status in that position, you are also a " special state employee" pursuant to G.L. c. 268A, §1(o). As a special state employee you remain subject to most of the restrictions of G.L. c. 268A.

1. Section 7

This section generally prohibits state employees from having a financial interest in a contract made by a state agency. Included within the scope of the §7 prohibition are employment contracts made by authorities. See, **In the Matter of Henry M. Doherty** 85, 1982 Ethics Commission 115. Therefore, absent eligibility for an exemption, a state employee may not have a financial

interest in an employment contract with DEF. Special state employees who wish to have a financial interest in a DEF contract are exempt from §7 if, as special state employees, they neither participate[2]/ in nor have official responsibility[3]/ for any activities of DEF and they file with the Commission an appropriate disclosure of their financial interest. G.L. c. 268A, §7(d).

Because you are a special state employee, your eligibility for the §7(d) exemption depends on whether you participate in or have official responsibility as an ABC member for any of the activities of DEF. Based upon the information which you have provided, the Commission concludes that, upon your compliance with the disclosure procedure, you will be eligible for an exemption under §7(d) because your ABC involvement with DEF activities does not rise to the level of participation or official responsibility.

The §7(d) exemption is not available to special state employees who exercise jurisdiction over or manage the activities of the contracting agency. See, EC-COI-85-5 (contract with employee's own agency prohibited); 84-87 (contract with agency over which employee exercises broad powers prohibited.) On the other hand, the mere fact that there is an interrelation between the employee and the contracting agency will not, without more, disqualify the employee from the §7(d) exemption. Where the agencies are operationally independent, EC-COI-84-86, or where the connection between the agencies is remote, EC-COI-84-67, §7(d) is available, even when the agencies share a common subject matter. EC-COI-84-59; 83-77. The Commission distinguishes those state agency relationships which have an indirect, incidental affect on the contracting state agency's activities from those relationships where one agency has determinative or regulatory authority over the other. EC-COI-84-68.

Your occasional involvement as an ABC member in the DEF activities which you have described would not disqualify you from the §7(d) exemption. The definition of official responsibility requires the existence of direct administrative or operating authority to direct agency action. DEF is an independent state agency over which ABC does not exercise administrative or operating authority, jurisdiction or management. Although the two agencies share some common subject matters, your involvement in ABC votes concerning these issues does not rise to the level of personal and substantial participation in the activities of the DEF. EC-COI-84-68. Therefore, upon your compliance with the §7(d) disclosure requirement, you will be eligible for an exemption which will permit you to accept the DEF position.

2. Section 23[4]/

As a state employee in both your ABC and DEF positions, you are also subject to the standards of conduct contained in G.L. c. 268A, §23[5]/ Although nothing in §23 inherently prohibits your serving both as an ABC member and as a DEF employee, you must take steps to avoid violating these standards whenever matters involving ABC and the DEF overlap. Compliance with these standards requires that you not only refrain from "playing both sides of the same fence" EC-COI-84-93 but that you avoid conduct which creates the reasonable impression that your ABC or DEF decisions are unduly influenced by your dual position. The Commission recently addressed in EC-COI-84-40 a similar situation involving one of its members who had been appointed to City Corporation Counsel of Boston. In that opinion, the member was advised to insulate himself as both a Commission member and City Corporatation Counsel from participating in any matters which the agency had in common. A similar abstention would also be appropriate in your case. You should therefore review the agenda prior to each ABC meeting and refrain from participating in any matter in which DEF is also involved. You should also follow a similar abstention procedure if your official DEF duties involve your dealing with ABC employees or officials.

DATE AUTHORIZED: October 29, 1985

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[1]/This citation refers to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission offices.

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

[3]/"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. G.L. c. 268A §1(i).

[4]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you.

[5]/G.L. c. 268A, §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 interests.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-81

FACTS:

You are currently employed full-time by the state agency ABC. Approximately one-third to one-half of your present job duties involve defining and coding parameters to be entered into the control files of the reporting subsystem unit of the management information and claims processing system (system). XYZ, the firm which ABC has contracted with to run the system, has recently submitted a proposal to form a unit. You would like to contract with or be hired by XYZ to perform the unit functions you presently perform for ABC, if and when the running of the unit is transferred to XYZ.

QUESTIONS:

1. Would G.L. c. 268A permit you, as a full-time ABC employee, to contract with XYZ on a part-time basis to perform these control-file maintenance functions?
2. Would G.L. c. 268A permit you to work full-time for XYZ under the state contract?

ANSWER:

1. No.
2. Yes, subject to the restrictions of §§4, 7 and 23 discussed below.

DISCUSSION:

1. Limitations on you while you remain ABC employee

The sections of G.L. c. 268A, the conflict of interest law, that are applicable to your situation are §§4, 6, 7 and 23. Section 4 regulates what state employees may do "on the side." It provides in relevant part that no state employee may receive compensation from or act as agent for anyone other than the commonwealth or a state agency in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. The term "particular matter" includes, among other things, an application, submission, contract, decision or determination. G.L. c. 268A, §1(k). The proposed contract between XYZ and ABC for XYZ to run a unit would constitute a particular matter. Because the state would be a party to that contract, you would violate §4 by receiving compensation from XYZ private funds or a federal funding source for services rendered pursuant to that contract. It is the fact that your control-file maintenance duties for XYZ would be connected to the ABC-XYZ contract, not that the contract would necessarily call for your services, which calls the §4 prohibition into play. Similarly, you would violate §4 by representing XYZ in any capacity before a state agency, including signing its contracts or appearing on XYZ's behalf before a state agency.

In addition, G.L. c. 268A §7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party. This section would prohibit you from working for any company on a state contract as long as you remain a state employee, or from being paid for your XYZ services with state funds. There is only one exception to this broad prohibition potentially available to you. The §7(b) exemption states that §7 does not apply to a state 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 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 part of their regular duties." If you remained a ABC employee while contracting part-time with XYZ, you would be "employed by the contracting agency" and accordingly would be ineligible for the §7(b) exemption.[1]

2. Application of the conflict law to you as a full-time XYZ employee working on the state contract

If you relinquish your ABC position in order to perform the unit work for XYZ on a full-time basis under the state contract, the conflict law will apply to you less restrictively. You are currently the sole person at ABC defining and coding parameters to be entered into the control files of the unit. You state that this is a "very specialized function" which requires knowledge of the control files and their limitations, the system and regulations. If and when XYZ enters into a contract with ABC to assume responsibility for the unit, and you are contemplated as the individual who will perform the control file maintenance duties for XYZ, you will remain a state employee for Chapter 268A purposes. The Commission has held in prior conflict opinions that a

private firm employee, who is contemplated as the one who will provide services under a state contract and who will be paid with state funds from that contract, is to be considered a state employee under the conflict law. See e.g. EC-COI-85-45; 80-84[2]/.

Because of your continuing status as a state employee, you would not be subject to the §5 restrictions on former state employees. Instead, you would remain subject to the §4 and §7 prohibitions discussed above. For example, you would be prohibited from performing services and being paid under a second state contract (e.g. the XYZ contract with ABC for XYZ to run the system) unless you qualified for one of the §7 exemptions. Section 4 would prohibit you from being paid by XYZ or any other non-state party in connection with a contract or other particular matter in which the state is a party or has a direct and substantial interest. Additionally, you would be subject to the general standards of conduct set forth in Section 23. That section provides in relevant part that no state employee shall use or attempt to use her official position to secure unwarranted privileges for herself or others, or by her conduct give a reasonable basis for the impression that any person can improperly influence or unduly enjoy her favor in the performance of her official duties.[3]/

In summary, the conflict law prohibits you as a full-time ABC employee from performing services on a part-time basis for XYZ under its state contract, regardless of whether such services are financed with state or private funds. The conflict law would not prohibit you from working full-time on unit duties for XYZ under its state contract and being paid with state funds, subject to the §4, 7 and 23 restrictions on any work you might assume in addition to that position.

DATE AUTHORIZED: October 29, 1985

[1]/Because §4 and §7 prohibit your proposed XYZ employment while you remain a full-time ABC employee, it is unnecessary to discuss the §6 restrictions and the §23 standards of conduct which are also applicable.

[2]/If you were not named or specifically contemplated in the contract or if you were hired by XYZ to perform tasks unrelated to the state contract, you would not be considered a state employee. For Chapter 268A purposes, you would then be a former state employee subject to the restrictions of §5. In such an event, you should renew your advisory opinion request with the Commission.

[3]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission ruling and is intended to provide guidance to you and your appointing official.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-82

FACTS:

You are a member of the General Court and also have a private law practice. You are interested in representing private clients for compensation in proceedings before the Industrial Accident Board (IAB). The IAB is a state agency which administers the workmen's compensation statute, G.L. c.152. Proceedings under G.L. c. 152 are initiated by an injured employee against an employer or insurer, and are presided over by a member of the IAB. See, G.L. c. 152, §§7C, 8. Each side is entitled to representation by counsel; the IAB does not represent the injured employee or otherwise serve as a petitioner or interested party in the proceedings. The role of the IAB member is to conduct investigations and hearings and to decide cases after making findings of fact and conclusions of law. Id. Within thirty days after the filing of a decision, either party may seek a claim for review by a board of review comprised of three IAB members. Id., §10. Decisions of the IAB and IAB review board are appealable to superior court. Id. §11.

QUESTION:

Does G.L. c. 268A permit you to appear for compensation representing private clients before the IAB.

ANSWER:

Yes.

DISCUSSION:

As a member of the General Court, you are a state employee within the meaning of G.L. c. 268A. Section 4 of G.L. c. 268A establishes several limitations on the outside activities of state employees and generally prohibits state employees from representing private clients in proceedings before state agencies. See, **Commonwealth v Cola**, 18 Mass. App. 598.(1984) EC-COI-85-40.[1]/ However, as a member ofthe General Court, you are subject to §4 only in certain limited circumstances. Under §4, no 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 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 purpose 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 this proceeding.

Based upon a review of the IAB's statutory powers in administering the workmen's compensation statute, the Commission concludes that your appearance before the IAB on behalf of private clients would be "in a quasi-judicial proceeding".

1. The proceedings of the IAB, whether before a member or review board, are adjudicatory in nature because the legal rights and duties of specifically named persons are determined after an opportunity for an agency hearing. See, G.L. c. 30A, §1(l); See, **Borden, Inc. v Commissioner of Public Health**, 388 Mass. 707, app. dism. 104 S.Ct. 323, cert. den. 104 S.Ct. 345 (1983); Compare, **Labor Relations Commission Fall River Educators Association**, 382 Mass.465 (1981) [agency investigation is not an adjudicatory proceeding for the purposes of G.L. c. 30A].

2. Decisions of the IAB are appealable to court pursuant to G.L. c. 152, §11.

3. In cases initiated by injured employees against employers other than the commonwealth or a state agency, the parties are entitled to be represented by counsel, and neither the attorney general nor an IAB counsel may represent either party.[2]/ Your appearance would be in a quasi-judicial proceeding and would therefore be exempt from §4.[3]/

DATE AUTHORIZED: October 29, 1985

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[1]/This citation refers to prior Commission conflict of interest opinions including the year they were issued and their identifying numbers. Copies of advisory opinions with identifying information deleted are available for public inspection at the Commission offices.

[2]/The Attorney General will appear in cases brought against the commonwealth or a state agency. You understand that §4 will not permit your representation in such cases, and your question is addressed solely to your appearance in non-state cases.

[3]/The Commission is aware that comprehensive legislation amending the workers compensation law and procedure is pending in the General Court. See, **1985 House Doc. 6776**. If amending legislation is enacted, you may wish to contact the Commission to ascertain whether IAB proceedings remain "quasi-judicial" for the purposes of the §4 exemption.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-83

FACTS:

You are the chief of police for a Town (Town) which has a population of less than 2000. The police force consists of seven part-time reserve officers, all of whom have either full-time jobs or other commitments which make them unavailable during the week. You work an eight-hour shift each day, Monday through Friday, and you vary your hours from day to day for tactical reasons. On occasion, private businesses doing work or organizations sponsoring functions in the Town seek a police officer to work a private detail, usually directing traffic or providing security. You often are the only police officer available to work these details. On the occasions when you work a private detail, the private business or organization is billed by the town for your services, and the town then pays you pursuant to the provisions of G.L. c. 44, §53C. You are paid at the same rate a reserve police officer would be paid for working a private detail. When you work a detail it is done outside of your normal shift. In the event that police business arises while you are working a detail you do one of two things: you either request that the police department for one of the neighboring towns or the state police cover the matter, or you make an arrangement with the entity for which you are working the detail which permits you to leave if you are needed elsewhere. In the event you are required to leave, and if your leaving creates a hazard such as a traffic hazard, the work crew must stop the work until you return.

QUESTION:

Does G.L. c. 268A permit you, as chief of police, to be paid for working private details?

ANSWER:

Yes, subject to the following restrictions.

DISCUSSION:

As police chief for the Town, you are a municipal employee and, therefore, are subject to the provisions of G.L. c. 268A, the conflict of interest law. The sections of the law that are applicable to your question are §§3 and 23.

Section 3(b) prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by him. In previous opinions, the Commission has held that a fire or police chief may not be paid for performing private detail work. See e.g. EC-COI-85-65; 85-64.[1]/ The opinions were based on the fact that fire and police chiefs' responsibilities require them to be on call twenty-four hours a day and include ultimate supervisory authority over subordinate officers who are working private details. Thus paying them for working details was tantamount to paying them for performing supervisory work which was already required of them by their jobs. Another factor in the Commission's prior decisions was the fact that the police and fire forces were of sufficient size that other officers were always available to work the details.

Your situation is distinguishable from those previously addressed by the Commission in that you are the only fulltime officer on the force and, therefore, the only one who is available at times to work details. Thus the flexibility that is possible with a larger police force is not possible in your situation. In addition, when you are the only police officer available to work details, you are not performing acts which are the subject of your official responsibility since you are not supervising any subordinate officers. The Commission has the responsibility of interpreting the conflict of interest law, and in doing so it is required to give it a workable meaning. See EC-COI-84-98; 83-114. Bearing this requirement in mind, the Commission concludes that you may be paid for working private details provided that all of the following requirements are met:

1. You may only work a private detail when no other Town reserve officer, officer in a neighboring community, state police officer or constable is available to work the available detail.

2. You must have made a good faith effort to determine that none of these officers is available for the detail.

3. You must continue to be paid at the same hourly rate as the reserve officers, and you must continue to be paid pursuant to the provisions of G.L. c. 44, §53C.

4. You may not be paid for working any private detail when any of the reserve officers are also working details because at those times you would also be performing your supervisory function as chief of police.

To reach a different conclusion and prohibit you altogether from being paid for working details would be unreasonable. It would effectively prevent events which are required to have police details from being held, such as events which have been issued permits by the Town's licensing board conditioned on the presence of a police detail. It would also result in delaying the work of various utility and road repair companies because no one would be available to provide traffic control.

You should also be aware of the provisions of §23 of the law which are applicable to all state, county and municipal employees.[3]/ Section 23 prohibits a municipal employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. It also prohibits the 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. In this regard you should be careful that you do not orchestrate your police force's duty assignments so that you are the only one available to perform detail work. Nor should you arrange your own work hours expressly for the purpose of making yourself available to work details. You should also be careful that your official actions are not influenced by the fact that you may also have a non-official working relationship with the people for whom you perform detail work.[3]/

DATE AUTHORIZED: October 29, 1985

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[1]/These citations refer to prior Commission conflict of interest opinions including the year it was issued and its identifying number. Copies of advisory opinion (with identifying information deleted unless the requestor waives confidentiality) are available for public inspection at the Commission offices.

[2]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended to provide guidance to you and your appointing official.

[3]/In reaching its conclusion, the Commission is creating a very narrow exemption to the holding in EC-COI-85-65. The exception is available only to those police forces and fire departments which are comparable in size and composition to the Town's.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-84

FACTS:

You formerly served on a full-time basis as a consultant to a Special Commission created by statute. The Special Commission is composed of gubernatorial and legislative appointees, and is chaired by two members of the General Court. The Special Commission is funded under a line item within the budget of the General Court, and its offices are located outside of the State House. Your work for the Special Commission involved primarily background research.

You are currently employed by a private employer (ABC) and are interested in lobbying on behalf of ABC before the General Court.

QUESTION:

Does G.L. c. 268A, §5(e) permit you to act as the legislative agent of ABC before the General Court during the one year period following the completion of your services for the Special Commission?

ANSWER:

Yes.

DISCUSSION:

1. Jurisdiction

Initially, the Commission advises you that the Special Commission is a "state agency" for the purposes of G.L. c. 268A[1]/ and, as a consultant to the Special Commission, you were therefore a state employee.[2]/ EC-COI-84-18. 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

pecial Commission's entity status is distinguishable om the temporary, ad hoc advisory groups which the ommission has regarded as outside of G.L. c. 268A. Compare, EC-COI-82-157, 82-139, 82-81. Moreover, rior opinions of the Attorney General have concluded nat other special commissions with enabling statutes similar to the Special Commission are state agencies for ne purposes of G.L. c. 268A. See, Attorney General Conflict Opinion Nos. 633, 843. Upon the completion of your services for the Special Commission, you became a former state employee and are now subject to the restrictions of G.L. c. 268A, §5.

2. Substantive Limitations

The principal restriction raised by your opinion request is G.L. c. 268A, §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 §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.

As a former state employee who wishes to act as an ABC legislative agent, you will be subject to a one-year lobbying ban before the governmental body with which you have previously been associated.

In EC-COI-84-146, the Commission noted that the term "governmental body" was not defined in either G.L. c. 268A, §5(e) or in the definitional sections of G.L. c. 268A, §1, but concluded that the General Court intended he definition of "governmental body" contained in G.L. . 268B, §1(h)[3] to apply to G.L. c. 268A, §5(e). Id. pp. 4-5.

The Special Commission is a "governmental body" within the meaning of G.L. c. 268B, §1(h) because it is an ndependent state commission. Therefore, the §5(e) ban would clearly prohibit you from acting as ABC legislative agent before the Special Commission. On the other hand, you would not be prohibited by §5(e) from lobbying before the General Court, its committees or staff, because the General Court was not a governmental body with which you were formerly associated.

This conclusion is based on the independence of the Special Commission from the organization and operation of the General Court. See, EC-COI-84-146, compare EC-COI-82-52. Unlike the standing legislative committees of the General Court, the Special Commission has no operational accountability to the General Court and exists as an independent entity comprised of legislators and non-legislators intended for the purpose of investigation and research. Therefore, the one-year lobbying ban wil' apply only to your acting as ABC legislative agent before the Special Commission and will not apply to lobbying before the General Court.[4]

DATE AUTHORIZED: November 19, 1985

[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."

[2]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, parttime, intermittent or consultant basis, including members of the general court and executive council."

[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]The other two paragraphs of §5 relevant to former state employees will not limit your ABC activities, since the legislation for which you would lobby would not be in relation to any "particular matter" in which you previously participated or had official responsibility while employed at the Special Commission.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-85

FACTS:

You are a partner in the law firm ("Firm") which serves as general counsel to state agency ABC. The Board of Directors of ABC has specifically designated you as the member of the Firm to serve in the uncompensated position of General Counsel. ABC, represented by its staff and the Firm, has been negotiating contracts for services from private entities on behalf of communities within the commonwealth. The private entities have offered three contracting alternatives to the communities: (1) the communities may contract through ABC ("Communities DEF"); (2) the communities may contract independently ("Communities UVW"); or (3) the communities may contract independently as equity owners ("Communities XYZ").

Several of the communities have decided to contract with the private entities under either option 2 or 3. These communities (Communities UVW and XYZ) have approached the Firm seeking its representation in rendering the necessary opinions and documents for such contracting. You state that these communities are aware that the Firm serves as general counsel to ABC. You further state that the ABC Board of Directors has voted to authorize the joint representation of ABC and Communities UVW and XYZ by the Firm in order to obtain the benefits of shared legal fees and expenses.

QUESTION:

Does G.L. c. 268A permit you to represent Communities UVW and XYZ in furnishing the necessary opinions and documents while simultaneously serving as General Counsel to ABC?[1]

ANSWER:

Yes, as described below.[2]/

DISCUSSION:

ABC is a public instrumentality of the commonwealth and is therefore a state agency for the purposes of G.L. c. 268A. [Citations omitted]. As the partner in the Firm designated to serve as the General Counsel of ABC, "you [perform] services for . . . a state agency . . . on an intermittent or consultant basis," making you a state employee under section 1(q) of the conflict statute.

Section 4 of Chapter 268A provides that no state employee shall otherwise than as provided by law for the proper discharge of official duties, receive compensation from or act 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. As counsel to Communities UVW and XYZ, you would be receiving compensation from and acting as attorney for someone other than the commonwealth or a state agency. The issue, then, is whether such representation would be in connection with a particular matter in which the state or one of its agencies is a party or has a direct and substantial interest.

You state that Communities UVW and XYZ would enter into separate Agreements with the private entities, totally independent of ABC. Accordingly, neither the state nor a state agency would appear to be a party to such Agreements.[4]/ You further state that ABC will be neither advantaged nor disadvantaged by the participation or lack of participation by the Communities under any of the three options. In other words, the independent Communities' decisions to participate through options 2 or 3 has no impact on ABC's contract with the private entities under option utilities under option 1. Based on these representations, the Commission concludes that neither the state nor a state agency (e.g. ABC) has a direct and substantial interest in any contract Communities UVW and XYZ would execute under options 2 or 3. Section 4 would therefore not prohibit you from rendering the required opinions and documents for Communities UVW and XYZ, despite your continuing representation of ABC under option 1.

You should also be aware that you are subject to the general standards of conduct set forth in §23.[5]/ Section 23 provides that no state or municipal employee shall:

(1) accept other employment which will impair his independence of judgment in the exercise of his official duties [G.L. c. 268A, §23(¶2)(1)];

(2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others [G.L. c. 268A, §23(¶2)(2)];

(3) by his conduct give a reasonable basis for th impression that any person can improperly influence unduly enjoy his favor in the performance of his offici duties, or that he is unduly affected by the kinship, ran position or influence of any party or person (G.L. 268A, §23(¶2)(3)];

(4) accept employment or engage in business activ ty which will require him to disclose confidential info mation which he has gained by reason of his offici position, nor use such information or materials[6]/ further his personal interests.(G.L. c. 268A, §23(¶3)].

For example, you would violate §23(¶2)(3) if your servic as General Counsel for ABC unduly influenced you decision-making processes in rendering opinions fc Communities UVW and XYZ. In your situation, it ap pears that sufficient disclosure to all concerned partie has taken place to avoid violations of these standards c conduct. Moreover, you state that the ABC Board c Directors has voted to authorize the joint represent tion, and that the appointing official official in Com munities UVW and XYZ will make a determination tha joint representation is in the best interests of the Com munity, which provide further §23 safeguards.

DATE AUTHORIZED: November 19, 1985

[1]/While this opinion addresses your involvement in the dual capacities light of G.L. c. 268A, §4, the rationale of the opinion is equally applicable to you Firm partners who are subject to comparable restrictions under G.L. c.268A §5(d).

[2]/This opinion deals only with the applicability of G.L. c. 268A restrictior to your situation. Provisions of the Code of Professional Responsibility ar outside the jurisdiction of the Commission and therefore are not addresse here.

[3]/The term "particular matter" is defined in the conflict law as "an judicial or other proceeding, application, submission, request for a ruling c other determination, contract, claim, controversy, charge, accusation, arres decision, determination, finding, but excluding enactment of general legislatio by the general court." G.L. c. 268A, §1(k).

[4]/By comparison, ABC would be a party to any community's contrac under option 1. Section 4 would prohibit your performance of any work fo independent Communities under option 1 while simultaneously serving a ABC's General Counsel.

[5]/On July 9, 1985, the Supreme Judicial Court ruled that the Commissio does not possess the jurisdiction to enforce G.L. c. 268A, §25. The discussio contained above is based on prior Commission rulings and is intended t provide guidance to you.

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

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-1

FACTS:

You are currently employed part-time by the Department of Social Services (DSS). You would like to enter into a part-time 03 contract with DSS as a homeless specialist. While your 03 contract would be with DSS, the funding for the position would originate in the Department of Public Welfare (DPW), via an interagency agreement between DSS and DPW to increase the number of DSS staff out in the field. You state that the homeless specialist position involves working almost exclusively with homeless families on public assistance, either DPW emergency funds or Aid for Families with Dependent Children.

Referrals are made to the DSS homeless program in three ways. First, when homeless individuals or families apply to DPW for emergency assistance (including placement in local hotels/motels or shelters by DPW), they are advised by welfare workers that the DSS homeless program is available to help them find permanent housing. A client's acceptance of the referral is entirely voluntary; the client's receipt of DPW emergency assistance is not in any way contingent upon their agreement to seek services under the DSS program. The remaining two methods are self-referrals into the DSS program: (1) individuals walking into DSS offices seeking assistance in locating housing or (2) individuals who originally refused the DPW referral into the DSS program approaching the DSS homeless specialist on their own at the hotel or shelter, after seeing positive results experienced by neighbors in the program.

QUESTION:

Does G.L. c. 268A, the state's conflict of interest law, permit you to hold both part-time positions with DSS?

ANSWER:

Yes, provided that the exemption standards described below continue to be satisfied.

DISCUSSION:

As a DSS employee, you are subject to the provisions of the conflict law. Because of your part-time status, you are considered a special state employee, which means that the conflict law will apply less restrictively to you under certain circumstances.

Section 7 of Chapter 268A prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency. This section is intended to prevent state employees from using their positions to obtain contractual benefits from the state and to avoid any public perception that state employees have an "inside track" on such opportunities. See Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L.Rev. 299 (1965). The term "contract" in section 7 refers to any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other(s), and thus includes employment arrangements. As a DSS employee, you would be a state employee with a financial interest in a state 03 contract, and therefore fall within the §7 prohibition.

Due to the breadth of the section 7 prohibition, a number of exemptions have been included in this section. The public assistance exemption provides that the section 7 prohibition 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.

You appear to currently qualify for this exemption. Because virtually all of the individuals and families you work with as a homeless specialist are recipients of public assistance, the Commission concludes that you meet the first criterion of this exemption. EC-COI-84-46.[1] However, should a smaller proportion of clients on public assistance participate in the homeless program, then your compliance with this criterion would have to be reexamined in light of these new facts. Id., EC-COI-83-98. It also appears that the services are provided to clients in accordance with a schedule established by DPW, which satisfies the second criterion. Because the clients avail themselves of the services you provide voluntarily, you likewise meet the final criterion of the public assistance exemption. EC-COI-84-46; 83-98. If receipt of your services was a condition of a client's continued receipt of DPW emergency assistance, then this clause would not be satisfied. There is no such connection in the facts you present. As long as the clients are free to accept or reject the housing services offered under the DSS homeless program, the final criterion is satisfied.

The three requirements of the public assistance exemption serve a dual purpose. First, the exemption seeks to ease the strict application of §7 when dealing with recipients of public assistance who might otherwise be precluded from receiving certain services. You have indicated that DSS has a shortage of qualified staff to perform services as homeless specialists on a part-time

basis. The exemption requirements also establish safeguards to insure that state employees will not misuse their insider status to take advantage of a vulnerable constituency. In view of the institutional DSS safeguards which you have described, there does not appear to be any such potential for misuse of your position. Based on the above, the Commission concludes that both policy considerations are met in your case.

It does not appear that you qualify under any of the remaining exemptions.[2]/ Two of the exemptions, specifically §7(b) and §7(d), require that you not be employed by the contracting agency. Inasmuch as DSS is the contracting agency for the homeless specialist position, and you are employed by DSS in your initial state position, you are ineligible for these exemptions. Likewise, the final two exemptions listed in section 7 contain criteria which are not met by the facts of your situation.

DATE AUTHORIZED: February 4, 1986

[1]/This citation refers to a previous Commission conflict of interest opinion including the year it was issued and its identifying number. Copies of this and all other advisory opinions are available for public inspection at the Commission's office.

[2]/ You do qualify for a §7(e) exemption as a special state employee, provided that you file with the State Ethics Commission a statement making full disclosure of your financial interest in the two positions, andthe governor with the advice and consent of the executive council exempts you. We note, however, that the gubernatorial exemption has rarely been granted.

CONFLICT OF INTEREST OPINION
EC-COI-86-2

FACTS:

You are currently employed by the Department of Environmental Quality Engineering (DEQE) as the supervising sanitary engineer for the technical assistance and training section of DEQE's Division of Water Pollution Control. Among its other duties, your section provides training to DEQE personnel, Boards of Health and their agents, and other municipal officials as to their responsibilities under 310 (MR 15.00) the state regulations concerning minimum requirements for the subsurface disposal of sanitary sewage.

You have recently taken out nomination papers for the Board of Health (Board) in your town. The Board is responsible for carrying out the public health laws as defined through the Department of Public Health (DPH). It is also the Board's responsibility to enforce the state's sanitary code for subsurface disposal systems up to 15,000 gallons per day. You state that systems in excess of 15,000 gallons per day are regulated directly by DEQE, and that the Board may on its own refer a matter within its jurisdiction (i.e. involving systems dealing with up to 15,000 gallons of waste per day) to DEQE.

QUESTION:

Does G.L. c. 268A permit you to run for and serve as a local Board of Health member while you are employed by DEQE?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

As a full-time employee of DEQE, you are a state employee covered by the conflict of interest law, G.L. c. 268A. Section 4 of the conflict law prohibits a state employee from receiving any compensation from, or acting as 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.

Determinations regarding the current operations of subsurface disposal systems are "particular matters" within the meaning of §1(k). Board decisions or findings concerning the compliance of restaurants and retail food markets with state and local sanitary code standards are similarly considered "particular matters". The state has a direct and substantial interest in these particular matters in view of the extensive state regulation of municipal sewage activities and sanitary code compliance. See EC-COI-84-103; 82-120.[3]/ Your duties as a local Board of Health member would therefore fall within the §4 prohibition.

There is an exemption in §4 which allows a state employee to hold an elective or appointive position in a town under certain conditions. In order to comply with this exemption, matters which you would vote or act on as a Board of Health member must not be matters which are "within the purview of the agency by which you are employed". As a Board of Health member, you would have to refrain from discussing or voting on sewage matters that DEQE regulates.[3]/ This restriction would apply to subsurface disposal systems of any size which come before the Board for action. Because systems of up to 15,000 gallons may be referred to DEQE by the Board, the Commission concludes that those systems as well as the larger systems are "within the purview" of DEQE. However, the exemption would not prohibit you from acting on public health matters in which the Board shares concurrent powers with DPH. Nor would the exemption prohibit you from participating in matters of a distinctly local nature. For example, permits to disposal companies or sewer hook-up requests by individuals would be considered local matters outside of the purview of DEQE.[4]/

DATE AUTHORIZED: February 25, 1986

[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]/These citations refer to previous Commission conflict of interest opinions, including the year they were written and their identifying numbers. Copies of advisory opinions (with identifying information deleted) are available for public inspection at the Commission office.

[3]/The application of the so-called "municipal exemption" is not dependent on which position you hold with DEQE. As an employee of DEQE in any capacity, you may not vote or act on DEQE matters as a local Board member.

[4]/Once elected, you may also seek the opinion of your town counsel on whether an issue before you as a Board of Health member is a local matter. See G.L. c. 268A, §22.

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-3

FACTS:

You are an employee in the office of the Secretary of State. You and your spouse, jointly and/or separately, are considering becoming general partners in a real estate venture. The partnership may solicit limited partners. Massachusetts has adopted the Uniform Limited Partnership Act, G.L. c. 109, which requires certain filings with the Secretary of State. These filings include, for example, certificate of limited partnership, an amendment to the certificate, and cancellation of the certification. Certain partnerships which make public offerings are subject to the Uniform Securities Act, G.L. c. 110A. Under G.L. c. 9, §10A the Secretary of State is responsible for the administration and enforcement of the sale of securities. These responsibilities include, for example, the authority to conduct investigations and issue subpoenas to determine violations of the Act and the authority to seek injunctions in court.

QUESTIONS:

1. Does G.L. c. 268A prohibit the proposed real estate venture? If the answer to question 1 is no:
2. Will you be subject to limitations on your private activities?
3. Will you be subject to limitations on your official duties?
4. Will your partners be subject to restrictions on their activities?

ANSWERS:

You may proceed with your proposed venture, but you will be subject to the following limitations on your official and private activities. Your partners will also be subject to restrictions.

DISCUSSION:

As an employee in the office of the Secretary of State you are a state employee as defined in the conflict of interest law, G.L. c. 268A, §1 et. seq,. The sections of that law which are applicable to your question are §§4, 5(d), 6, and 23.

Section 4(c) prohibits you 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 restriction would prohibit you, for example, from acting as the partnership's attorney in connection with any funding application, grant proposal, the filing of a financial report, or generally any submission, application, or filing with any state agency. For example, a submission by a partnership to the MHFA in response to a request for proposals is a particular matter, and therefore you would be prohibited from acting as agent or attorney in such a matter.

The limitation of the §4(c) restrictions reflects a concern over potential influence which a state employee could exercise in personal or face-to-face dealings with state agencies. The potential for such influence is avoided, however, if the partnership were to have an independent attorney or representative to deal with any particular matter before other agencies; in the case of a paid independent attorney, there would be no violation of §4(c).

Section 4(a) of the conflict of interest law 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 party or has a direct and substantial interest. As a general partner in the real estate venture, you may contemplate being paid for your time and services in connection with the activities of the real estate venture. Receipt of income for services rendered in connection with a real estate investment venture is compensation within the meaning of the conflict of interest law.[2]/ On the other hand, if you do not perform any services, the mere receipt of investment income or reimbursement for out of pocket expenses will not be deemed to be receipt of "compensation".

In general the commonwealth would not have a direct and substantial interest in a privately funded project. EC-COI-81-11.[3]/ The commonwealth would have a direct and substantial interest in the real estate, however, if it were owned by, or under the jurisdiction of, any state agency. EC-COI-80-73. This means, based on the assumption the state does not own or have jurisdiction of the property in question, you and your family may purchase the parcel in question.

Whereas §4 may limit your outside activities, §6 restricts what you may do on the job. It recognizes a basic principle of the conflict of interest law — that public employees must not act in their official capacities in matters in which they have a personal financial stake. Section 6 provides in pertinent part that no state employee may participate[4] as such an employee in any particular matter in which he or . . . a business organization in which he is serving as officer, director, trustee, partner, or employee has a financial interest. In terms of the practical application to your situation, a limited partnership is likely to have matters before the Secretary of State's office. For example, a certificate of amendment may be filed in the office of the Secretary of State, G. L. c. 109, §9, or a certificate of cancellation, §10, or, in the case of a public offering by the partnership, an application for registration, G. L. c. 110A, §202. Whenever any such particular matter comes before your agency, you must abstain from participation.

Section 5(d) places restrictions on partners of state employees. These restrictions apply equally to limited and general partners. A partner of a state employee may not act as agent or attorney for anyone other than the commonwealth in connection with any particular matter in which the commonwealth is a party or has a direct and substantial interest andin which the state employee has participated as a state employee or which is the subject of his official responsibility.[5] On the other hand a partner, such as your wife, could appear before state agencies other than the Secretary of State's office because you have no official responsibility over the activities of other state agencies. The hiring of an independent representative to act as agent or attorney before the Secretary of State's office will avoid problems under this section.

Finally, you should be aware of the provisions of §23.[6] In general, this section prohibits a state employee from using or attempting to use his official position to obtain unwarranted privileges for himself or engaging in conduct which gives a reasonable basis for the impression that the partnership in which you are associated will unduly enjoy your agency's favor. You should keep these principles in mind whenever any discussion of policy or procedure comes up in your office which may specifically impact upon the partnership. Further it is important to take steps to assure that there is no basis for the impression that any application, submission, or filing on behalf of the partnership is given favorable treatment. The person in your office who makes decisions regarding any partnership submissions should be free to base those decisions on objective criteria. For example, a decision whether to deny, suspend, or revoke registration of the partnership's securities under G. L. c. 110A, §305, must be based on objective criteria without regard to the fact that you are employed in the the same office.[7]

DATE AUTHORIZED: March 25, 1986

[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."

[2] Commonwealth v. Cannon, 373 Mass. 494 (1977).

[3] These citations refer to previous advisory opinions issued by the Commission. Copies of these and all other advisory opinions may be obtained at the Commission's office.

[4] "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.

[5] "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] On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G. L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended only to provide guidance to you.

[7] Issues under section 7 of G.L. c. 268A would also come into play if your partnership received funding from state agencies such as MHFA. EC-COI-85-79. Because your partnership is in its initial stages and its funding plans have not been determined, it would be premature to anticipate hypothetical issues under §7. If your partnership does choose to seek funding from state agencies you should renew your advisory opinion request. Additionally, this opinion is limited to a discussion of G. L. c. 268A. There may be additional statutory restrictions outside of the Commission's jurisdiction. You should consult with your general counsel regarding any additional restrictions.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-4

FACTS:

The Administrative Penalties Advisory Committee (Committee) of the Department of the Environmental Quality Engineering (DEQE) was established by St. 1985 c. 95, §4 "to provide advice and consultation to the department (DEQE) concerning civil administrative penalties."[1] DEQE was given the authority to assess civil administrative penalties for violations of environmental laws enforced by DEQE, e.g. air pollution, water pollution, hazardous waste, wetlands protection.

Six Committee members are appointed by the Governor. Each Committee member represents one of the following: one is a representative of the Massachusetts Health Officers Association and a full-time Health Agent for the Town of ABC Board of Health. One, a representative of a small business association is an architectural consultant who, from time to time, does consulting work for clients on particular matters pending before the Department. One, a representative of the Associated Industries of Massachusetts, is a full-time employee of an organization that lobbies for legislation and regulation to promote the growth of industry and commerce in Massachusetts. One, a representative of a statewide environmental protection organization, is a full-time employee of an organization that lobbies for legislation and regulation to promote the protection of

the environment. The Committee also includes the designee of the Attorney General. Members of the committe serve without compensation.

Chapter 95 of the acts of 1985, (c.95) provides that DEQE may assess a civil administrative penalty after written notice. The notice must take a particular form. In defined circumstances a penalty may be assessed without prior written notice. A respondent has the right to an adjudicatory hearing under the administrative procedures act but may be deemed to have waived such a right under certain circumstances.

The statute provides general guidelines in consideration of the amount of civil penalties. There are specified minimum and maximum fines established depending on the type of failure to comply, in general ranging from $100-$1000, but in certain failures up to $25,000. Procedures are set up for judicial review. An escrow interest bearing account is generally required as a jurisdictional prerequisite to review and provisions are made for additional damages and attorney fees if collection efforts are required.

Section 2 of c. 95 provides no civil administrative penalty shall may be assessed until the commissioner has promulgated regulations as required by c. 30A. Section 3 sets a deadline (June 30, 1986) for the promulgation of regulations for assessing fines in particular subject areas. Sections 2 and 3 establish mandatory requirements which are not subject to discretion.

QUESTION:

Are the members of the Committee "state employees" within the meaning of G.L. c. 268A, §1(q)?

ANSWER:

Yes.

DISCUSSION:

> 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".[2/] 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.

Generally, the Commission has found that advisory committees created by statute are state agencies and its members state employees. EC-COI-82-157 (Capital Planning and Operations Advisory Council), EC-COI-82-139 (Employee Advisory committee to the court). The first factor, however, standing alone, should not be 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.[3/] Keeping these precedents in mind the commission concludes that members of the Committee will be performing services for a state agency within the meaning of Chapter 268A, §1(q).

The Committee is a mandatory and permanent component to the implementation of c. 95, which distinguishes it from temporary ad hoc advisory committees which the Commission has regarded in other cases as exempt from the definition of state agency. See e.g. EC-COI-80-49, and cases cited therein. As a practical matter, the bulk of the Committee's time and effort may be devoted to the initial adoption of regulations. This is likely because fines cannot be assessed until regulations are in place, regulations are mandatory, and certain timetables are established. The functions of the Committee, however, appear to be permanent. Reasonably interpreted, Section 4 envisions an ongoing committee which will continue to review the development of civil administrative penalties on a continuing basis. This recognizes that the regulation promulgation process will be subject to periodic review in light of experience.

The Commission is aware of the lack of organizational formality specified in c. 95.[4/] On balance, however, the resolution of your question turns on whether the Committee is performing essentially governmental functions. In this regard, the Committee is more than merely a forum for public comment but rather an entity which is assisting in the work product of the state agency. See, e.g. EC-COI-84-147. Although the commissioner of DEQE may ultimately disapprove or ignore a specific regulation, the statute envisions the regulation drafting to begin at the Committee level. Thus the Committee is contemplated as a working committee with a substantive role in the regulation process and not simply as a sounding board for constituent groups. The theoretical possibility that the commissioner could ignore the Committee's work altogether and begin the drafting process anew with in-house staff does not alter the conclusion that the Committee is performing a public function. Regulation drafting is a governmental function custo-

marily initiated by agency staff for the purpose of making recommendations to agency heads, boards, or commissions. See G.L. c. 30A, §§2 et. seq.

Therefore the Commission concludes that members of the Committee are state employees within the meaning of G.L. c. 268A, §1 et. seq., and therefore subject to the restrictions set forth therein.[3]/

DATE AUTHORIZED: March 25, 1986

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[1]/St. 1985 c. 95 §4 provides as follows:

Section 4. There is hereby established within the department an administrative penalties advisory committee, hereinafter called the committee, to provide advice and consultation to the department concerning civil administrative penalties. Said committee shall review the development and implementation of regulations for civil administrative penalties, and shall make recommendations for regulations establishing the manner in which the amount of civil administrative penalties shall be assessed.

[2]/See EC-COI-84-55; EC-COI-83-30; EC-COI-83-21; EC-COI82-81; EC-COI 80-49; EC-COI-79-12.

[3]/EC-COI84-147

[4]/Certain formalities have been voluntarily implemented by the committee including regular meetings, written agendas, and memoranda summarizing decisions. These formalities have obviously been introduced solely for the purpose of allowing the committee members to complete their tasks in a timely and organized manner.

[5]/In view of their unpaid status, Committee members are "special state employees" which means they are exempt from several restrictions under the conflict of interest law and other sections apply less restrictively. To the extent that several committee members represent non-state parties with respect to their dealings with state agencies, issues under G.L. c. 268A, §4 come into play. Given their status as special state employees, however, committee members who serve less than sixty days annually will be subject to restrictions under §4 only with respect to matters within their official responsibility as Committee members. Aside from this restriction, §4 does not prohibit Committee members from working for clients on matters pending before DEQE or other state agencies.

Section 6 of the conflict law prohibits state employees from participating in particular matters in which they, or certain designated persons, have a financial interest. Committee members, however, would not be prohibited by this section from participating in the drafting of regulations of general applicability irrespective of their financial connection to regulated entities. This is because regulation drafting is not deemed to be a particular matter where a substantial segment of the regulated public is affected in a uniform way or the regulation addresses general issues or subject areas. Committee members who have specific questions about their situations should seek further guidance from the Commission staff.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-5

FACTS:

The Office of Real Property within the Division of Capital Planning and Operations (DCPO) is charged with disposing of surplus state property, pursuant to the procedures described in G.L. Chapter 7. Among the commonwealth's surplus or soon-to-be surplus property, are a number of very large "campuses," including the former Boston State Hospital and the Northampton State Hospital. DCPO wishes to dispose of these properties according to a comprehensive plan for the re-use of each campus. In order to assist DCPO in creating the comprehensive plan for reusers, the deputy commissioner has appointed an advisory committee to conduct a study and to make recommendations to DCPO. The committee is established pursuant to G.L. c. 7, §40F which provides in relevant part:

> The deputy commissioner may convene an advisory committee to advise him on re-uses and to recommend re-use restrictions for property declared surplus.

The only required membership is an invitation to the representatives to the general court from the city or town in which the property is located. The deputy commissioner must prepare a preliminary report which includes his recommendation and those of the advisory committee, if established.

You indicate that committees have been and will be established only in the cases of large parcels of property where disposition would have a significant impact on the community. Committee composition is intended to ensure that DCPO receives the informed opinions of a broad spectrum of the local population and that these opinions find voice in DCPO's plan for re-use of the property in question. Committee members are not compensated for their services.

QUESTION:

Are members of the various committees established under G.L. c. 7, §40F, state employees or special state employees for the purpose of the conflict of interest law?

ANSWER:

No.

DISCUSSION:

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(1). The issue of whether advisory committee members are considered state employees therefore depends upon whether the committee 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 deciding factors in this case 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.

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. In considering each of these factors, the Commission concludes that advisory committee members established under G.L. c. 7, §40F are not state employees or special state employees.

Unlike the advisory council on capital planning and operations established under §40M, the advisory committees in question here are not established as a mandatory, permanent component to the implementation of G.L. c. 7. The existence of the committees is discretionary with the Deputy Commissioner. The committees have little specified organizational formality. Membership can be fluid and is generally open. There is no legal requirement of a certain number of meetings a year. There are no provisions for removal of members, for the conduct of committee meetings (e.g. whether the meetings must be open to the public), or for the agenda or procedures to be followed during the course of meetings. Any formality to the committee's process appears solely for the purpose of allowing the committee members to complete their tasks in timely and organized manner.

Most importantly, the committee members are selected as representatives of constituency groups for the purpose of representing outside private view points, and, as you have stated, for the purposes of receiving the viewpoints of a broad spectrum of the local community involved. Each committee is ad hoc in the sense that membership in any given committee will necessarily be different depending on the locale of the property subject to disposal.

Finally, the committee's work product can be very flexible, ranging from the most preliminary formulations to the most detailed lists. There is no legal requirement that a final report take any specific form. The committee's recommendations, if any, are considered only advisory to DPCO; the deputy commissioner of DPCO is not required to accept the recommendation in whole or in part. The fact that he cannot lawfully disregard the existence of the recommendations does not introduce a degree of formality into the work product sufficient to give state-employee status to Committee members.[1]/

DATE AUTHORIZED: March 25, 1986

[1]/To the extent that you indicate a possibility that committee members may be expected to lobby for passage of legislation consistent with their recommendations, our opinions expressed herein may change. Lobbying for, or on behalf of, a state agency would ordinarily be viewed as "performing functions or tasks ordinarily expected of employees" of the agency concerned. Such lobbying would be distinguishable from committee members appearing on their own behalf, or on behalf of the private outside groups they represent. You may wish to re-evaluate the prospective lobbying role of committee members in this light.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-6

FACTS:

You are one of nine members of a state board (Board).

Your principal occupation is President of the ABC Company (Company), which is involved in real estate development, general contracting and property management. As a result, the Company maintains a variety of relationships with real estate partnerships and financial institutions, which in turn may have a direct or indirect relationship with the Board.

QUESTION:

What limitations does G.L. c. 268A, the state's conflict of interest law, place on your serving as Board member and Company president?

ANSWER:

You will be subject to the limitations set forth below.

DISCUSSION:

As a Board member, you are considered a state employee for the purposes of G.L. c. 268A. In view of your unpaid status, you are also a "special state employee", which means that the conflict law will apply to you less restrictively under certain circumstances. See G.L. c. 268A, §1(o).The sections of the conflict law relevant to your situation are sections 4, 6, 7 and 23.

1. Section 4

This section prohibits you from acting as agent or attorney for, or receiving compensation from, ABC

Company or anyone else other than the state in relation to any particular matter[1] in which the state is a party or has a direct and substantial interest. Acting as an agent for ABC Company includes signing its contracts, acting as its advocate in application processes, submitting its applications, presenting support information on its behalf to any state agency or representing it in any way before a state agency. As a special state employee, these restrictions only apply to you in relation to particular matters which within one year have been a subject of your official responsibility,[2] or in which you have participated as a Board member.[3] For example, section 4 would prohibit you from signing a contract with the Board on behalf of ABC Company, or sharing in ABC Company's receipt of compensation for services from an ABC Company venture funded by the Board. Because in your case the §4 restriction only applies to Board matters, you would not be prohibited from acting as ABC Company's agent before any other state agencies. Likewise, the fact that the Board has invested funds in an entity which has a joint venture with ABC Company does not, in and of itself, prohibit your involvement in the joint venture as ABC Company's representative. The §4 restriction would apply to you if the Board specifically invested funds in the entity's joint venture with your Company, or the joint venture constitutes a majority of that entity's business (making the Board's investment with the entity rise to the level of a direct and substantial interest in the joint venture). Because the application of §4 in your case includes matters within your official responsibility as well as matters in which you participate on the Board, your abstentation in a matter as a Board member would not exempt you from the provisions of §4.

2. Section 6:

This section prohibits your participation as a Board member in any particular matter in which, in relevant part, you or an organization in which you serve as an officer has a financial interest. The purpose 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 personal considerations.[4] The Commission has previously held that any financial interest, no matter how small, is enough to trigger §19 (the municipal equivalent to §6). See EC-COI-84-98.[5] However, that financial interest must be direct and immediate, or at least reasonably foreseeable. Id. Obviously, if the Board were to consider making an investment through ABC Company, you would be disqualified by §6 from participating in the decision or vote.[6] This restriction on your participation would also extend to any Board investment decision in a group trust or partnership which involves a reasonably foreseeable financial interest on the part of ABC Company. Thus, if ABC Company is contemplating or actually negotiating a joint real estate venture with an entity in which the Board is considering investing funds, you would be precluded from participating as a Board member in that matter. Participation includes not only voting but also involvement in discussions relating to the decision or vote. When such matters arise, the safest course would be for you to leave the room. See **Graham v. McGrail**, 370 Mass. 133, 138 (1976).

In addition to your disqualification from participating in the matter, you are subject to further requirements under G.L. c. 268A, §6. Section 6 requires you to disclose in writing to your appointing authority and the Commission the nature of the matter before the Board and ABC Company's financial interest in the matter.[7]

3. Section 7

Section 7 prohibits state employees from having a financial interest, directly or indirectly, in a contract made by a state agency. Investments of the Board constitute contracts within the meaning of §7. See EC-COI-84-58; 83-113. Notwithstanding these restrictions, however, the enabling statute creating the Board expressly allows the board to make investments in which you have an interest or involvement. Therefore, the Board's investment of funds with an entity with which ABC Company has a relationship would not place you in violation of §7.

4. Section 23[8]

Finally, section 23 contains standards of conduct applicable to all state employees. This section provides that a state employee shall 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.

For example, you would violate this section if you used to your personal advantage confidential information submitted to the Board. In borrowing from, depositing funds in, or maintaining investment relationships with banks, financial institutions or insurance companies, either personally or on behalf of ABC Company, you must take great care to abide by these standards whenever the Board has a relationship with such an entity. Any use of your Board membership to gain preferential treatment on ABC Company's or your own behalf, from such an institution would constitute a violation of §23.[9]/

The standards of conduct enunciated in §23 extend beyond single actions which constitute conflicts and address both courses of conduct raising conflict questions and appearances of conflicts. Issues arising under §23 normally involve a balancing of concerns and are fact specific.

A number of your questions raised potential §23 issues on which the Commission finds it cannot advise you without specific facts before it. You are therefore encouraged to renew your opinion request at a later time when faced with a specific situation.

DATE AUTHORIZED: March 25, 1986

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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, or finding.

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

[3]/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 and municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[4]/See Buss, The Massachusetts Conflict of Interest Statute: an Analysis, 45 B.U.L. Rev. 299,301 (1965).

[5]/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.

[6]/See also the discussion of §7, infra.

[7]/A copy of the disclosure form is enclosed. By virtue of the restrictions in G.L. c. 32, §23(2A)(b), no further action would be required by your appointing official.

[8]/On July 9, 1985, the Supreme Judicial Court ruled that the Commission does not possess the jurisdiction to enforce G.L. c. 268A, §23. The discussion contained above is based on prior Commission rulings and is intended solely to provide guidance to you. You should also be aware that §23 is enforceable at the agency level. The PRIM Board is currently drafting its own Code of Conduct pursuant to §23. You should consult that Code once it is promulgated to identify any further restrictions applicable to your activities.

[9]/If such preferential treatment was received because of official actions you had taken or might take as a Board member, you would also violate G.L. c. 268A, §3, which prohibits a public employee from receiving or requesting an item of substantial value for himself for or because of his official actions. See In the Matter of William A. Burke, Jr., 1985 Ethics Commission ___ (October 15, 1985)

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-7

FACTS:

You are a member of the Designer Selection Board (DSB) within the Executive Office of Administration and Finance. On behalf of the eleven member DSB, you are requesting a comprehensive opinion regarding the applicability of the conflict of interest law to DSB members.

The appointment of members of the DSB is governed by G.L. c. 7, §38B(a). By statute, the DSB consists of four registered architects, four registered engineers, one general contractor and two public members. Id. Members of the DSB are reimbursed for all necessary expenses incurred in the discharge of their official duties. G.L. c. 7, §38B(b). The jurisdiction of the DSB is set forth in G.L. c. 7, §38C(a), which provides:

> (a) The board shall have jurisdiction over the selection of all designers, programmers, and construction managers performing design services in connection with any building project for all public agencies within the provisions of paragraphs (1), (2), and (4) of section forty-A, except those public agencies within the provision of section thirtyeight K, and the procedures promulgated by any agency of the commonwealth for such selection by any housing authority subject to paragraph (3) of said section, unless a specific exemption from the board's jurisdiction is provided under this section.

Section 40A of c. 7, referred to in the quoted section of §38C, brings the following within DSB jurisdiction:

(1) All building projects undertaken by any state agency. G.L. c. 7, §40A(1). "Building project" and "state agency" are defined in G.L. c. 39A(g1/2) and (v), respectively.[1]/ The DSB is responsible for the actual selection of design finalists and semi-finalists for building projects of state agencies.

(2) All building projects undertaken by any building authority. G.L. c. 7, §40A(2). See G.L. c. 7, §39A(e) for the definition of "building authority."[1]/ The DSB is responsible for the actual selection of design finalists and semi-finalists for building projects of building authorities unless such building authorities fall within the provisions of G.L. c. 38K, which exempts from DSB jurisdiction design contracts of cities and towns.

(3) Housing projects within the jurisdiction of the department of community affairs. G.L. c. 7, §40A(3). The DSB is responsible for reviewing selection procedures promulgated for housing projects, but does not select designers for such projects. See G.L. c. 7, §38C(a). Temporary exemptions from DSB jurisdiction are available under G.L. c. 7, §38C(b).

(4) All capital facility projects of cities and towns for which specific approval or authorization by the general court or a state agency is otherwise required and for all capital facility projects of all other public agencies not included within the scope of paragraphs (1), (2) and (3). G.L. c. 7, §40A(4). See G.L. c. 7, §39A(g) and (r) for definitions of "capital facility project" and "public agency". The DSB is responsible for the actual selection of design finalists and semifinalists for such capital facility projects. Temporary exemptions from DSB jurisdiction are available under G.L. c. 7, §38C(b). Capital facility projects of cities and towns are generally exempt from DSB jurisdiction under G.L. c. 7, §38K.[2]

In addition, the DSB is charged with publishing guidelines to assist public agencies (e.g. cities and towns) not otherwise subject to its jurisdiction in carrying out their responsibilities, and such agencies may request the DSB to exercise jurisdiction over the selection of designers for a specified period of time or a specified project. G.L. c. 7, §38K(b) and (c).[2]

In summary, the DSB, in fulfillment of the purpose of G.L. c. 7, §38A 1/2 through §38 O to improve and maintain "the integrity of the system for procurement of designers' services within the commonwealth," is charged with three different levels of responsibility for and involvement in public construction:

(a) actual selection of finalists and semifinalists for design contracts for state agencies and building authorities;
(b) review of designer selection procedures for housing projects; and
(c) publication of guidelines to assist agencies outside DSB jurisdiction (cities and towns and agencies thereof).

By statute, the DSB shall grant an exemption for two years from its jurisdiction to each public agency in categories (3) and (4) listed above, provided they have filed the required application and meet the standards set out in the statute. See G.L. c. 7, §38C(b) and (c).

QUESTION:

How do the provisions of the conflict of interest law, G.L. c. 268A, apply to DSB members?

ANSWER:

DSB members are considered special state employees for the purposes of the conflict law, and are subject to the restrictions discussed below.

DISCUSSION:

I. Jurisdiction

Members of the DSB are state employees 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-84-87; 81-75. Because DSB members are part-time state employees, they qualify for special state employee status under G.L. c. 268A, §1(o), meaning that the conflict law will apply less restrictively to them under certain circumstances.

Section 38F(e) of c. 7 also contains limitations on the activities of DSB members, providing as follows:

(e) For the purposes of chapter two hundred and sixty-eight A and subject to the penalties therein, no member of the board shall participate in the selection of a designer as a finalist or semifinalist for any project if the member or any member of his immediate family:
(i) has a direct or indirect financial interest in the award of the design contract to any applicant;
(ii) is currently employed by, or is a consultant to or under contract to, any applicant;
(iii) is negotiating or has an arrangement concerning future employment or contracting with any applicant; or
(iv) has an ownership interest in, or is an officer or director of, any applicant.

The Commission has previously concluded, on the basis of a review of this section's legislative history, that the Legislature intended both to emphasize certain principles contained in G.L. c. 268A and to require stricter standards in some cases for participation in the DSB selection process. EC-COI-81-75. Any interpretation which negates either of these statutory provisions would be inconsistent with the clear legislative purpose of dealing effectively with conflicts of interest in the selection of designers. See, Final Report to the General Court of the Special Commission Concerning State and County Buildings, v. 7, pp. 188-283 (1980).

II. Application of the Conflict Law Provisions to DSB Members

A. 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. For this prohibition to apply, there must be a statecontract involved. Thus, if a DSB member's firm has a contract with a municipality, which involves no state funding, §7 would not apply even if the municipality had requested the DSB to exercise jurisdiction pursuant to G.L. c. 7, §38K(c). Alternatively, once a financial interest, either directly or indirectly, in a state contract

is identified, a DSB member becomes subject to the §7 prohibition. Whether such a financial interest violates the conflict law depends upon whether the DSB member qualifies for an exemption to §7 given the particular facts of the situation. The potential exemptions to §7 available to DSB members as special state employees are G.L. c. 268A, §7(d) and §7(e), which provide that the §7 prohibition shall not apply

> (d) to a special state employee who does not participate in or have official responsibility for 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 (disclosure form enclosed), 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. (disclosure form enclosed)

1. Building Projects Undertaken By a State Agency or a Building Authority

The DSB clearly "participates in or has official responsibility for" the activities of such a state agency (namely DCPO) or such building authorities because the DSB is responsible for the actual selection of design finalists and semifinalists for the building projects of such entities. A DSB member who is a prime designer or a consultant to the prime designer on such a project would, therefore, not qualify for the §7(d) exemption, and could only perform such work if he files the required disclosure and receives a governor's exemption under §7(e). Where it is the DSB member's firm[3] which has the contract subject to the DSB process, and the member is not personally performing services under that contract, he must insulate himself from any share of the firm's proceeds[4] which are attributable to that contract if he has not received a governor's exemption. If a DSB member's interest in the contract pre-dates his appointment to the Board, the same result obtains: he must either receive a §7(e) governor's exemption or insulate himself from the proceeds of the contract if his firm continues to perform work under the contract.[5] A DSB member having an interest in a construction contract for a project where the designer was originally selected by the DSB would be similarly restricted.

Of course, where a DSB member has an interest in a state contract which is not the subject of DSB action, he may comply with §7 by simply filing the §7(d) disclosure statement with the Commission.

2. Housing Projects Within the Jurisdiction of EOCD

Where there is a funding arrangement between EOCD and a local housing authority for a housing project, a DSB member's contract with that housing authority would come within the §7 prohibition. Having reviewed the DSB's enabling legislation, the Commission reaffirms its finding in EC-COI-84-87 that, due to DSB's jurisdiction to review the EOCD selection procedures promulgated for housing projects, DSB members participate in or have official responsibility for activities of the EOCD. Consequently, the §7(d) exemption is unavailable to DSB members with financial interests in such housing projects. The remaining options include a §7(e) governor's exemption or insulation from the receipt of housing project contract proceeds, as described above.

3. Municipal Projects

Financial interests in distinctly municipal projects are not subject to the §7 prohibition inasmuch as they do not constitute financial interests in state contracts. When state funding is involved, a DSB member's contract to perform work on a municipal project does come within §7. However, cities and towns are specifically exempted from DSB jurisdiction pursuant to G.L. c. 7, §38K [i.e. they need not utilize the two-year exemption procedure provided in G.L. c. 7, §38C(b)]. While the DSB does publish guidelines pursuant to G.L. c. 7, §38K(b) to assist municipalities in the establishment of designer selection procedures, the Commission concludes that this interrelation by itself does not rise to the level of DSB members "participating in or having official responsibility" for the activities of municipalities. DSB members having a financial interest in municipal project contracts may therefore comply with §7 by filing a §7(d) disclosure form with the Commission.

This result necessarily changes in instances where a municipality, in connection with projects receiving state funding, requests the DSB to exercise jurisdiction regarding the selection of designers pursuant to G.L. c. 7, §38K(c). In such cases, the DSB member's contract with the municipality would be subject to the DSB process, requiring him to obtain a §7(e) governor's exemption.

4. Capital Facility Projects of All Other Public Agencies

This category includes public agencies such as Massport, the Mass. Convention Center Authority, the Government Land Bank, and the Water Resources Authority. The DSB's statutory jurisdiction includes the actual selection of design finalists and semifinalists for the building projects of such entities. However, these agencies are eligible to apply for two year exemptions from DSB jurisdiction pursuant to G.L. c. 7, §38C(b), and in fact most of the agencies in this category have ap-

plied to the DSB for such an exemption. Section 38C(b) provides that the DSB "shall" grant such an exemption if the required application has been filed by the agency

> provided, however, that the board shall withhold an exemption if the board determines that the designer selection procedure proposed by the public agency does not substantially incorporate the procedures required in section thirtyeight B to thirty-eight J, inclusive, and section thirty-eight M, or that the selection of finalists will not be made with the advice of design professionals or that the procedure proposed by the public agency does not satisfy the purposes of sections thirty-eight A 1/2 to thirty-eight O, inclusive, as set forth in said section thirty-eight A 1/2, or that withholding such an exemption is in the best interest of the commonwealth.

In granting the original exemption to these agencies, DSB members were integrally involved in developing and/or assessing the designer selection procedures of these agencies which would qualify for the two year exemption, whereas the renewal of these exemptions requires less participation on the part of DSB members. However, DSB members retain the right to accept or reject the DSB Executive Director's recommendations regarding a renewal exemption and to outright withhold an exemption or renewal as requested by an agency. If the DSB withholds an exemption, jurisdiction over designer selection for such agencies reverts to the DSB until the agency makes the changes in its procedures required for an exemption to be granted. Due to the DSB's authority in this regard, the Commission concludes that DSB members "participate in or have official responsibility for" the activities of these public agencies, rendering a §7(d) exemption unavailable.

B. Section 6

Section 6 of c. 268A prohibits a state employee from participating[6]/ as such an employee in a particular matter[7]/ 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. The Commission reaffirms its finding in EC-COI-81-75 with respect to the §6 restrictions on DSB members. Namely, a DSB member may not participate in any Board proceedings concerning the selection of designers for projects subject to the selection jurisdiction of the DSB for which he, his firm or partners of his firm have submitted applications. Further, a DSB member may not participate in any Board review of the selection procedures involving local housing projects within the jurisdiction of EOCD for which he, his firm or partners of his firm have applied. While DSB members do not make the final selection in such cases, the Commission concludes that their role in reviewing the proposed selection procedures and in granting a G.L. c. 7,§38C(b) exemption constitutes "participation" in the selection decision in view of the substantial control statutorily afforded the DSB over the selection process.

G.L. c. 268A, §6 further provides that any state employee whose duties would otherwise require him to participate in such a prohibited matter must disclose to his appointing official and the Ethics Commission the nature and circumstances of the matter and the financial interest involved. The appointing official may then (1) assign the matter to another employee, (2) assume responsibility for it himself, or (3) make a written determination, to be filed with the Ethics Commission, "that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the matter." Accordingly, a DSB member may participate in such matters only if he makes the required disclosure to his appointing official and receives the written certification described above, with a copy of that determination being filed with the Commission. The specific disclosure requirements contained in G.L. c. 268A, §6 are not nullified by the absence of disclosure requirements in G.L. c. 7, §30G(e).[9]/ It should be noted that even if the DSB member files the required §6 disclosure and either receives the required certification or in fact abstains on the matter, he would have to address the §7 issues. As discussed supra, many cases will require the DSB member to obtain a §7(e) governor's exemption.

C. Section 5

The restrictions on former state employees are set out in G.L. c. 268A, §5. Section 5(a) permanently prohibits a former state employee from acting as the agent or attorney for, or receiving compensation from, anyone other than the state in connection with 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. For example, a former DSB member would be prohibited from being a consultant to a designer on a project for which the DSB had jurisdiction over the selection process and in which the DSB member had participated. Similarly, a former DSB member would be prohibited from challenging, on behalf of a private party, selection procedures he had participated in approving. These restrictions would last only for the duration of that particular matter, e.g. until the end of an agency's two year exemption period the DSB member had participated in granting.

Section 5(b) prohibits a former state employee for one year from personally appearing before any court or agency of the Commonwealth as agent or attorney for anyone other than the Commonwealth in connection with any particular matter in which the state is a party or has a direct and substantial interest and which was under his official responsibility as a state employee during the last two years of his state employment. This provision would prohibit a former DSB member for one year from personally appearing before EOCD, the DSB or any other state agency in connection with any designer selection determinations which had been within the DSB's jurisdiction during the past two years.

D. Section 4

Section 4 of Chapter 268A prohibits a special state employee from acting as the agent or attorney for, or receiving compensation from, anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest and in which he has participated or which is or within one year has been a subject of his official responsibility. For instance, §4 prohibits a DSB member from acting as agent[10]/ for or appearing before the DSB on behalf of his firm or any other private party. Because the partners of a DSB member's firm would be similarly restricted under G.L. c. 268A, §5(d)[11]/ it appears that a DSB member's firm would be required to hire an independent consultant for any appearances before the Board. The DSB member would further be required to insulate himself from the proceeds of any resulting contract[12]/ if he did not obtain a §7(e) governor's exemption.

E. Section 23

Section 23 of c. 268A contains general standards of conduct applicable to all state, county and municipal employees. These recently revised standards provide that no state employee shall knowingly, or with reason to know:

> (1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;
>
> (2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, disclosed in a manner which is public in nature, the facts which would otherwise lead to such a conclusion;
>
> (4) accept employment or engage in any business professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority;[13]/
>
> (5) improperly disclose material 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.[13]/

G.L. c. 268A, §23(b) and (c).

Application of these standards to DSB members focuses on the avoidance of being unduly influenced by the fact that a designer applicant had previously worked with or on the same project as a DSB member's firm. The member himself should disclose the prior relationship to his appointing authority, and all DSB members should avoid being improperly influenced by the fact of that relationship in reviewing that application. The last two standards prohibit a DSB member from using confidential information (e.g. non public business information of a competitor) obtained by virtue of being on the Board to his personal advantage.

DATE AUTHORIZED: April 29, 1986

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[9]/Exempted from subsections (1) and (2) of G.L. c. 7, §40A are building projects "to the extent provided for by sections forty B and forty-three C." Section 40B of c. 7 appears to exempt from these subsections ordinary maintenance costing less than $25,000 and not involving structural or mechanical work. Section 43C of c. 7 provides for supervision of the exempt maintenance and repair work of state agencies and building authorities. In certain cases, the exemption may be revoked pursuant to the order of the commissioner of administration. In a case of revocation, it appears that the responsibility for selection of designers for such maintenance and repair may be added to DSB's responsibilities.

[10]/By G.L. c. 38K, referred to in G.L. c. 38C(a), contracts by cities and towns for design services, although not within DSB jurisdiction, must be awarded by selection procedures adopted in writing, "complying with the purposes and intent of sections thirty-eight A 1/2 to thirty-eight O [of G.L. c. 7]" and certain other requirements. G.L. c. 7, §38K(a).

[11]/Partners in a DSB member's firm should also be aware of the limitations contained in G.L. c. 268A, §5(d) which prohibits a partner of a state employee from acting as agent or attorney for 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 which is the subject of the state employee's official responsibility.

[12]/It should be noted that "insulation from the proceeds of a contract" refers not only to direct payment under the contract, but also to any indirect benefit the DSB member could derive from the contract through his partnership in the firm. For example, monies from such a contract could not be figured into the totals used for any profit sharing arrangement of the firm in which the DSB member participates.

[13]/This does not mean that the DSB member is ineligible to share in the proceeds for work performed before his appointment to the Board, even if payment is delayed so that he receives it while on the Board. The restriction applies only to work performed after his appointment.

[6]G.L. c. 268A, §1(j) defines participate as participating 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.

[7]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.

[8]Eight of the DSB members would make this disclosure to the Governor, while the three remaining members would disclose to the Mass. State Association of Architects, the Government Affairs Council of Design Professionals and the associated general contractor respectively. See G.L. c. 7, §38B(a).

[9]See, jurisdiction discussion, supra.

[10]Acting as agent for a private firm means signing its contracts, acting as its advocate in application processes, submitting its applications, presenting supporting information on its behalf to the DSB or representing it in any way before the DSB. See EC-COI-84-6.

[11]See footnote 3, supra.

[12]Due to the substantial §7 restrictions on a DSB member's financial interest in any such contract, the Commission finds it unnecessary to reach the overlapping §4 prohibitions regarding the receipt of compensation.

[13]These two standards apply to former as well as current state employees.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-8

FACTS:

You are both a full-time firefighter and an elected constable in the same town.

QUESTION:

1. Is an elected constable considered a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A?
2. Does the conflict of interest law permit you to serve in both positions?

ANSWERS:

1. Yes.
2. No, unless the Board of Selectmen classifies the position of constable as a "special municipal employee" position pursuant to G.L. c. 268A, §1(n).

DISCUSSION:

I. Jurisdiction

For conflict of interest law purposes, the term "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." G.L. c. 268A, §1(g). Elected constables hold an office in a municipal agency within the meaning of G.L. c. 268A, §1(g). The statute which provides for the election of town officers, G.L. c. 41, §1, provides in pertinent part:

> Every town at its annual meeting shall in every year when the term of office of any incumbent expires, and except when other provision is made by law or by charter, choose by ballot from its registered voters the following town officers for the following terms of office:. . . One or more constables for a term of one or more years, unless the town by vote provides that they shall be appointed. [Emphasis added].

By holding a municipal office pursuant to this statutory provision, elected constables are municipal employees for purposes of the conflict law.

This result is buttressed by the fact that constables are afforded a broad range of statutory powers normally associated with public office. Constables serve process in civil and criminal cases, "have the powers of sheriffs to require aid in the execution of their duties," and serve all warrants and other processes directed to them by the selectmen of their town for notifying town meetings or for other purposes." G.L. c. 41, §94. While constables secure their own clients and have discretion as to what services within their authority they will provide, the fees constables may charge for their services are regulated by statute. See G.L. c. 262, §8 (as amended by the Acts of 1985). Constables have the power to pre-empt local officials in some instances. See G.L. c. 40, §37 (chief of police must make local lock-up accessible to constables); G.L. c. 41, §39 (constables serve as tax collectors if the appointee refuses to serve or no one is elected or appointed as collector of taxes). Constables also possess the power of arrest without a warrant under a number of circumstances, including: violation of the election laws (G.L. c. 56, §57); illegal manufacture, sale or transport of alcohol (G.L. c. 138, §56); trespassing, after notice, upon a house, building, boat, wharf, etc. (G.L. c. 266, §120); playing games in a public place for money or other property (G.L. c. 271, §2); and keeping a house, room or place for prostitution. (G.L. c. 272, §10). Other instances in which constables have the statutory power of arrest include breaches of the peace and health law violations. The breadth of constabulary powers of arrest is evidenced by the fact that both the local and state police derive much of their power from constables: ". . . [police officers] shall have all the powers and duties of constable except serving and executing civil process." G.L. c. 41,§98. See also G.L. c. 22, §9A.

Based on the foregoing (i.e. the election of constables as municipal "officers," the statutory regulation of their fees, and their statutory authority to perform governmental functions), the Commission concludes that elected constables are municipal employees subject to the conflict of interest law.

II. Application of G.L. c. 268A, §20

Section 20 of Chapter 268A prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by the same municipality. Under this section, both positions must be analyzed. First, as a municipal firefighter, you do not run afoul of §20 inasmuch as the financial interest you have in the receipt of fees as a constable is in an electedposition and thus does not constitute a financial interest in a contract. See ECCOI-82-26.

However, you are also considered a municipal employee as a constable. Your financial interest in your firefighter's salary constitutes a prohibited financial interest in a municipal contract in violation of §20. If the Board of Selectmen designated the position of constable as a special municipal employee position pursuant to G.L. c. 268A, §1(n), you would be eligible for either of two exemptions to the §20 prohibition. See G.L. c. 268A, §20(c) and §20(d). These exemptions provide that the §20 prohibition against having a financial interest in another municipal contract shall not apply:

> (c) to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract, or
>
> (d) to a special municipal employee who files with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the city council or board of aldermen, if there is no city council, or the board of selectmen approve the exemption of his interest from this section.

However, you state that the Board of Selectmen has voted not to designate the position of constable such special status, which is within their discretion. Because you are ineligible for any other exemptions, your service as both a full-time firefighter and a constable in violates §20.[2/]

DATE AUTHORIZED: May 20, 1986

[1/]The only other potential exemption to §20 under the facts you present is §20(b). You do not qualify for the §20(b) exemption because you serve as a firefighter for more than 500 hours during a calendar year, and, therefore, fail to meet all of the criteria of that exemption.

[2/]Pursuant to §20(a), you have thirty (30) days in which to remedy your §20 violation.

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-9

FACTS:

The ABC Airport Commission (Airport Commission) has advertised for an airport manager, as you will be retiring in the near future. Pursuant to G.L. c. 90, §51E, the airport manager is appointed by the Airport Commission as its executive officer, and is responsible to said commission for the proper maintenance and operation of the airport and of all facilities under his supervision.

Of the twenty-eight applications received by the Airport Commission, two are contract management proposals submitted by fixed base operators (FBOs) who have ongoing business relationships with the Airport. You state that both Mr. X and Mr. Y. have leases with the Airport Commission. The business Mr. X operates out of the Airport is "DEF", which consists of charter flights, flight instructions and aircraft rental. "GHI", which Mr. Y owns and operates out of the Airport, includes an aircraft maintenance hangar and service, a storage hangar and flight instruction. You further state that Mr. Y was the former owner/operator of "JKL", which operates under a year-round lease with the Airport Commission. Mr. Y sold his stock in "JKL" in May of 1983, but took a mortgage from the new owner which is secured by the stock.

QUESTION:

Does the conflict of interest law permit either of these FBOs to serve as airport manager of the ABC Airport?

ANSWER:

No.

DISCUSSION:

The conflict of interest law, G.L. c. 268A, §1 et seq., 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 airport manager, who is responsible for the maintenance and operation of the ABC municipal airport, is a municipal employee within the meaning of the conflict law and is, therefore, subject to the provisions of that law.

Section 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. Both Mr. X or Mr. Y would have such a prohibited financial interest in a municipal contract, namely in their respective leases with the Airport Commission, if appointed airport manager. The sole exemption available to a full-time municipal employee is §20(b), which provides that the §20 prohibition shall not apply

> (b) to a municipal employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest and the interest of his immediate family; and if in the case of a contract for personal services (l) 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, and 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 airport manager, neither Mr. X nor Mr. Y would qualify for this exemption. Their leases are with the Airport Commission, which is also the employer of the airport manager. Failure to satisfy the first criterion of §20(b) renders them ineligible for the exemption. No other exemption under §20 is available to either FBO under the facts presented. The Commission concludes that the conflict law prohibits either Mr. X or Mr. Y from being appointed airport manager and simultaneously maintaining a lease with the Airport Commission.[2]/

DATE AUTHORIZED: May 20, 1986

[1]/Mr. X and Mr. Y join in your request on behalf of the Airport Commission for an advisory opinion concerning the applicability of G.L. c. 268A provisions to them.

[2]/Because §20 prohibits the appointment of either FBO to the position of airport manager, the Commission does not reach the conflict issues these facts raise under sections 17, 19 and 23 of Chapter 268A.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-10

FACTS:

You are both the full-time police chief and an appointed constable in the same town.

QUESTION:

Does the state's conflict of interest law, G.L. c. 268A, permit you to serve in both positions?

ANSWER:

No.

DISCUSSION:

As a police chief, you are considered a municipal employee for purposes of the conflict of interest law, and are consequently subject to the provisions of that law. G.L. c. 268A, §1 et seq. Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by the same municipality. You clearly have a financial interest in your constable appointment since you receive fees for performing constable duties. The issue remaining is whether serving as a constable results in a contract between the appointee and the town within the meaning of G.L. c. 268A, §20.

The Commission recently decided a similar issue at the state level. See **In the Matter of Robert J. Quinn**, 1986 Ethics Commission ____. The issue in **Quinn** was whether serving as a bail commissioner resulted in a contract between the appointee and the Superior Court [the appointing authority] within the meaning of G.L. c. 268A, §7 [the state equivalent to §20]. In **Quinn**, the Commission concluded, inter alia, that serving as a bail commissioner results in a contract between the state and the bail commissioner as the word "contract" (which is undefined in G.L. c. 268A) is used in traditional contract law of offer, acceptance, and consideration.[1]/ "The state offers the opportunity to be appointed and to serve as bail commissioner subject to regulation and supervision by the Superior Court. Acceptance occurs on each occasion a bail commissioner agrees to perform those services subject to applicable regulation."[2]/

In analyzing the "contract" in **Quinn**, the Commission considered six standards, including whether

> (1) the appointment confers upon the appointee the powers normally associated with public office;
> (2) the duties are similar or identical to the duties performed by public employees;
> (3) there is any choice in who will receive his services;

(4) the place for provision of the services is on public property;

(5) the procedures and work product of the appointee are substantially regulated by a public agency or by law;

(6) compensation for providing the services is specifically and substantially regulated by a public agency or by law.

In a given fact pattern, some of these standards may be given more or less weight. Each factual situation must also be viewed in light of the purpose of the conflict of interest law. One of the underlying policies of §20 is to prevent municipal employees from using their positions to obtain contractual benefits or additional appointments from the municipality and to avoid any public perception that municipal employees have an "inside track" on such opportunities. See generally Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299 (1965). On the basis of the above standards, particularly standards (1), (2), (5) and (6), the Commission concludes that your serving as an appointed constable in exchange for fees results in a contract within the meaning of G.L. c. 268A, §20 between you and the Town.

Constables in your town are appointed by the Board of Selectmen as "town officers." See G.L. c. 41, §1; G.L. c. 41, §91A. While most constables spend the substantial majority of their time serving process in civil and criminal cases pursuant to G.L. c. 41, §94, appointment to the position of constable confers upon them a broad range of statutory powers normally associated with public office. For instance, constables "have the powers of sheriffs to require aid in the execution of their duties." G.L. c. 41, §94. If no one is elected or appointed as tax collector, or if the appointee refuses to serve, constables serve in that capacity on behalf of the town. G.L. c. 41, §39. Constables also possess the power of arrest without a warrant under a number of circumstances, including: violation of the election laws (G.L. c. 56, §57); illegal manufacture, sale or transport of alcohol (G.L. c. 138, §56); trespassing, after notice, upon a house, building, boat, wharf, etc. (G.L. c. 266, §120); playing games in a public place for money or other property (G.L. c. 271, §2); and keeping a house, room or place for prostitution. (G.L. c. 272, §10). Other instances in which constables have the statutory power of arrest include breaches of the peace and health law violations. The breadth of constabulary powers of arrest is evidenced by the fact that both the local and state police derive much of their power from constables: "... [police officers] shall have all the powers and duties of constable except serving and executing civil process." G.L. c. 41,§98. See also G.L. c. 22, §9A. In summary, the Commission finds that among the statutory powers available to a constable upon appointment are powers and duties similar or identical to those of other public employees.

The fees constables may charge for their services are specifically set out by statute. G.L. c. 262, §8. Constables are also required to make an annual accounting of the fees they collect. Id. Thus, while constables secure their own clients and have discretion as to what services within their authority they will provide, their duties and compensation are regulated by statute. The Commission concludes that you have a contract with the town each time you perform services as a constable, because you carry the statutory authority to perform governmental functions such as arrest and your fee schedule is regulated by statute. Your financial interest in such a contract, i.e. your receipt of fees for performing constable services, violates §20.

The sole exemption under §20 available to a full-time municipal employee with a financial interest in a contract made by the same municipality is §20(b), which exempts:

> 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.

You do not qualify for this exemption. In previous opinions, the Commission has considered the nature of both a police chief's and a fire chief's duties in a municipality. See ECCOI-85-64; 85-65; 85-83. The Commission concluded that the general supervisory responsibilities such individuals possess over department matters require that they be on call twenty four hours a day.

Because your position as chief of police is considered a 24-hour a day job, you are rendered incapable of meeting the requirement that your constabulary services be provided outside your normal working hours.

DATE AUTHORIZED: May 20, 1986

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[1]The fact that a bail commissioner receives fees from someone other than the state was held to be irrelevant. "Section 7 prohibits a financial interest in a contract madeby a state agency, not in one fundedby the state. It is the existence of compensation, not the identity of its source, that is the issue." Quinn, supra. The opportunity to earn compensation from third persons is sufficient to support a contract. Id. (cites omitted).

[2]See footnote 5 in Quinn, supra.

[3]Because your receipt of fees for performing constable services violates §20, the Commission does not reach the issue of whether your police chief salary would qualify for a §20 exemption if the position of constable was expressly classified as a "special municipal employee" position by the Board of Selectmen.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-11

FACTS:

You are an associate justice of the Superior Court. On the evening of April 17, 1986 and during the entire day of April 18, 1986, you attended and participated in a seminar at a Law School at the invitation of a member of the Law School faculty. You participated in the seminar as a visiting expert from the Massachusetts judiciary and addressed principles of sentencing based on your experience as a trial judge. In preparation for the seminar, you prepared and submitted written sentencing decisions based on eight presentence investigation reports. You obtained assistance in typing the reports from a secretary employed by the Superior Court to which you were assigned at the time. All other preparation and "homework" was done on your own time.

Your attendance and participation in the seminar was approved by the chief justice of the Superior Court, and your participation on the date of April 18, 1986 was recorded as an "education day." As you describe it, a judge on leave on an education day is paid his regular judicial salary but is excused from performing customary courtroom duties on that day. The judge will attend or participate in a program related to judicial education.

The sponsor of the April 18, 1986 sentencing seminar has offered you an honorarium for your participation in the seminar.

QUESTION:

Does G.L. c. 268A permit you to accept the honorarium for your participation in the seminar on April 18, 1986, a day which was recorded as an "education day."

ANSWER:

No.

DISCUSSION:

As an associate justice of the Superior Court, you are a "state employee" for the purposes of G.L. c. 268A. Section 23(b)(2) of G.L. c. 268A prohibits a state employee from using his official position to secure for himself unwarranted privileges which are of substantial value and which are not properly available to similarly situated individuals. See, St. 1986, c. 12, eff. April 8, 1986. The propriety under G.L. c. 268A of the receipt of honoraria is governed by the provisions of G.L. c. 268A, §23. In 1980, the Commission concluded in EC-COI-80-28 that a state employee could accept an honorarium without violating §23 if all of the following requirements are met:

1) State supplies or facilities not available to the general public are not used in the preparation or delivery of the address;
2) State time is not taken for the preparation or delivery of the address;
3) Delivering the speech is not part of the employee's official duties;
4) Neither the sponsor of the address nor the source of the honorarium, if different, is a person or entity with which he might reasonably expect to have dealings in the employee official capacity.

The requirement that state time not be taken for the preparation or delivery of the address was the focus of a later advisory opinion, EC-COI-81-95. In that opinion, the Commission advised a state employee that he could receive an honorarium for participating in a training program only if (a) he did not receive compensation for his regular state employee responsibilities that day or (b) he chose to be absent under vacation leave or personal leave for that day. It is, therefore, an unwarranted privilege for a state employee to receive both his regular state compensation while serving on a state assignment and also compensation from other sources for performing work during the same time period.

By virtue of your use of an "education day," you have received your regular judicial compensation for your participation in the April 18, 1986 seminar. Your acceptance of an honorarium from the seminar sponsor for your participation the same day would secure for you an unwarranted privilege which is not properly available to other members of the judiciary.

Three final points need to be addressed briefly.

1. The Commission assumes that the honorarium to be offered will exceed fifty dollars in value. If so, the honorarium will be something of substantial

value for the purposes of §23(b)(2). See, **Commonwealth v. Famigletti**, 4 Mass. App. 584, 587 (1976); Commission Advisory No. 8 (1985). If the honorarium is less than fifty dollars, the restriction of §23(b)(2) does not apply.

2. The Commission's conclusion turns on the characterization of April 18, 1986 as an "education day". If you were to use a vacation or personal day for your seminar activities, you would no longer be paid by two sources for performing a judicial assignment on the same day. EC-COI-81-95. You would be required, however, to comply with the remaining standards for the receipt of honoraria set out on page 2 of this opinion, including reimbursing the commonwealth for state resources used in the preparation of the sentencing decision.[1/]

3. Irrespective of whether April 18, 1986 is characterized as an "education day", vacation or personal day, you may accept reimbursement from the sponsor for meals, lodging, travel and postage reasonably incurred in the preparation and presentation of the seminar. EC-COI-80-28.

DATE AUTHORIZED: May 20, 1986

[1/]Your seminar services on the prior evening do not appear to raise the same problems under §23 because you are not receiving judicial compensation for the same services. Assuming that your time is divisible, you may, therefore, receive an honorarium which reflects the portion of your seminar services which were performed on the prior evening provided that the other aforementioned honorarium standards are satisfied.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-12

FACTS:

You are a member of the General Court and also an attorney engaged in the practice of law. You have recently been asked by a potential client to represent him before the Massachusetts Parole Board (Board). The Board is authorized by G.L. c. 127 §133 to consider a parole petition filed by a state prison inmate. In determining whether to grant a petition, the Board will customarily allow the petitioner to make a personal statement but will not permit a personal appearance by the petitioner's attorney. Proceedings relating to parole petitions involve only one party, the petitioner; there is no institutionalized party-respondent role which either the Board counsel or private parties play in these proceedings. The Board's final decision is discretionary, **Commonwealth v. Hogan**, 17 Mass. App. 186 (1983), and there is no statutory authorization for an appeal to the court of the Board's decision.

QUESTIONS:

1. Does G.L. c. 268A permit you to appear before the Board in relation to the parole petition?

2. Would it be permissible if one of your associate attorneys appeared for compensation before the Board in relation to the parole petition?

ANSWERS:

1. No, unless your appearance is unpaid.

2. Yes, as long as your associate, rather than you, personally appears.

DISCUSSION:

As a member of the General Court, you are a state employee for the purpose of G.L. c. 268A. Section 4 of G.L. c. 268A generally prohibits state employees from receiving compensation from private clients in relation to any particular matter[1/] in which the Commonwealth or a state agency is a party. Because the Board is a state agency, a parole petition submittal to the Board is a particular matter subject to §4 prohibition. However, as a member of the General Court, you are subject to §4 in the following limited way:

> A member of the general court shall not be subject to paragraphs (a) or (c). However, no 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 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[2/]

G.L. c. 268A, §4 (¶5).

Based upon the information you have provided, the Commission concludes that your proposed representation is not exempt from §4. By your personally appearing for your client in the parole petition proceeding, you would be appearing personally before a state agency. You would not qualify for an exemption with respect to your appearance because

(1) the parole petition determination is not ministerial in nature but involves the exercise of discretion by the state agency;

(2) the Board is not a state court, and

(3) your appearance is not in a "quasi judicial proceeding" within the meaning of §4.

A Board hearing is not a "quasi-judicial proceeding" in that there are not "two sides" as such (and even the petitioner's right to representation is substantially restricted), and the Board's decision is not appealable to the courts pursuant to the provisions of the administrative procedure act, G.L. c. 30A §1(2).

On the other hand, the relevant restrictions of §4 apply only to yourcompensated personal appearances before state agencies, and not to appearances by your employees. The limitations of the §4 legislator restrictions reflects a concern over potential influence which a legislator could exercise in face-to-face dealings with state agencies over which the legislator has budgetary and legislative power. The potential for such influence is diminished, however, when an employee of a legislator, as opposed to the legislator himself, makes a personal appearance, and the statutory scheme under §4 does not extend the legislator prohibitions to others. Therefore, your associate's paid representation of your client would not place you in violation of §4. EC-COI-85-40.

DATE AUTHORIZED: June 16, 1986

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

[2]/For the purposes of §4 (¶5), a proceeding is 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.

CONFLICT OF INTEREST OPINION
EC-COI-86-13

FACTS:

You are the police chief in a city (City). In that capacity you are the chief investigative officer of infractions by liquor license holders, although in practice you have delegated most of the investigative responsibilities to three other police officers. Following the investigation of infractions (e.g. selling liquor to minors or remaining open beyond permissible hours) you or your department may submit to the city licensing board (board) a complaint against the license holder. The board, which has issued approximately sixty liquor licenses, will thereafter review the complaint and determine what sanctions, if any, should be imposed against the liquor license holder. The board will also periodically request from your department information concerning criminal law violations by license holders.

As police chief, you are also responsible for assigning police officers to areas in which license holders are located, and for investigating alleged violations of criminal laws at these establishments. Your wife is the 50% owner with another individual of a liquor establishment, ABC, which holds a liquor license issued by the board.[1]/ ABC is a neighborhood pub.

QUESTION:

In view of your wife's ownership interest in ABC, what limitations does G.L. c. 268A place on your official activities as they relate to liquor license holders?

ANSWER:[2]/

Absent written permission from your appointing officials pursuant to G.L. c. 268A §19(b)(1), you may be in violation of G.L. c. 268A §19 by participating as chief in any matter affecting the financial interest of any liquor license holder in the city.

DISCUSSION:

In your capacity as police chief, you are a municipal employee within the meaning of G.L. c. 268A. EC-COI-85-65. By virtue of your municipal employee status, you are required by G.L. c. 268A, §19 to refrain from participating[3]/ as police chief in any decision, determination, or other particular matter[4]/ in which your wife has a financial interest. The prohibition of §19, in effect, relieves you from choosing between the public's interests and your family's interests in the exercise of your official duties. Section 19 assures the public that its interests will not be clouded by potentially competing private interests. Compare, **Graham v. McGrail**, 370 Mass. 133 (1976); **Scuito v. City of Lawrence**, 389 Mass 939 (1983). Exemptions from §19 may be granted only by your appointing officials pursuant to §19(b)(1).

As applied to you, G.L. c. 268A, §19 clearly prohibits your participation in any particular matter involving ABC because of your wife's 50% ownership interest in the pub. The prohibition applies in particular to the assignment of officers to ABC, the investigation of alleged infractions involving ABC, and the communications between the police department and board concerning violations of law by ABC. Because the consequence of a liquor law violation may be the suspension or termination of a liquor license, your wife has a financial interest in each matter in which you participate involving ABC.

The prohibition on your official activities extends beyond your involvement in ABC matters. Section 19 prohibits your participation in any matter affecting your wife's financial interest and necessarily includes matters affecting competitors of ABC. Because the consequence of an investigation of an infraction by a com-

petitor may be the suspension or termination of the competitor's liquor license, the removal of a competitor would have a foreseeable financial impact on ABC. See, EC-COI-81-118; 82-95; 82-98. You must, therefore, not participate as police chief in the assignment of any police officer to, or in the investigation of, any complaint involving a liquor license holder which is in competition with ABC.

Based upon the information which you have provided, it is unclear if the scope of the competitive area is less than the entire city. Because your appointing officials are in a better position than the Commission to identify the local factors which would make a liquor license holder a competitor with ABC, you should review your situation with them. Under §19(b)(1), your appointing officials may grant you written permission to participate in matters in which your wife may have a financial interest.[5]/ The §19(b)(1) procedure therefore allows your appointing officials to accomodate the needs of the department to have a chief who can deal with liquor license matters with the public interest in having those dealings unclouded by potentially competing private loyalties.

Section 23(b)(2) is also relevant to your question. Under this paragraph, you may not use your official position as police chief to secure unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. St. 1986, c. 12. For example, you may not direct officers to treat ABC differently from other liquor establishments with respect to the investigation of infractions. You must also refrain from providing rewards to a police officer because of favorable action he has taken towards ABC, or from treating adversely any police officer because of unfavorable action he has taken towards ABC. See, **Craven v. State Ethics Commission**, 390 Mass.191 (1983). You should keep these principles in mind in particular when determining such personnel matters as promotions, shift assignments, detail opportunities and assignments, overtime opportunities and performance evaluations.[6]/

DATE AUTHORIZED: June 16, 1986

[1]/The pub was purchased several years ago from another police officer. Although it is unclear whether you also share the ownership of the pub, it is unnecessary to resolve this point. The Commission's conclusions regarding the application of §§17, 19 and 23 would be the same in either case.

[2]/The advice provided in this opinion is intended to guide your prospective conduct and does not purport to review the propriety of your prior activities. The opinion is limited to the application of G.L. c. 268A. You should ascertain from your City Solicitor the extent to which other statutes may regulate your activities.

[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 and municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[4]/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 petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[5]/The statute requires a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services as police chief.

[6]/As a municipal employee, you are also subject to the restrictions of G.L. c. 268A, §17(a) and (c). Although not directly raised by your opinion request, these sections come into play whenever ABC has a matter pending before any agency of the city, including the police department. Under §17, you may not receive compensation from ABC or act as the agent of ABC with respect to any of its dealings with city agencies or employees.

Members of the police department who are assigned to investigate complaints or to prepare reports involving ABC or any other license holders must comply with certain standards of conduct to assure that their actions will not be influenced by the fact that your wife is a 50% owner of ABC. Under G.L. c. 268A, §23, they may not use their official position to secure unwarranted privileges or exemptions of substantial value to ABC, or act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that they are likely to act or fail to act with respect to ABC because of their subordinate relationship to you. Issues under this section inevitably arise whenever police officers are assigned to investigate alleged violations by ABC. If an officer were to overlook an obvious violation at ABC because your wife has an ownership interest in the pub, the officer would violate §23. See **In the Matter of John Saccone**, 1982 Ethics Commission 87, reversed on other grounds sub nom. **Saccone v. State Ethics Commission**, 395 Mass. 326 (1985). Your subordinate officers should be made aware of these principles; any officer who has a specific question about the application of §23 may seek further guidance from the Commission.

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-14

FACTS:

Car dealership ABC was awarded a contract for police cars in 1986 under the Greater Boston Police Council (GBPC) Collective Purchasing Program conducted pursuant to G.L. c. 7, §22B. The police car bid is a "collective bid" as defined in the law which allows any department or agency to use the bid even though they are not members of the GBPC. One such non-member, municipal agency XYZ, recently purchased 9 police cars from dealership ABC under this collective purchasing program. Individual XYZ police officers have no involvement in the collective purchasing program bidding or contract award process, nor do they have involvement in XYZ decisions to utilize the program rather than to bid its purchases independently. In addition, individual officers have no discretion regarding the choice of car dealers to be used for repairs or other service on XYZ vehicles.

In the police car purchase program, the GBPC drafted specifications, invited bids and awarded the contract. The contract was awarded to the lowest compliant bidder. Dealership ABC was the lowest bidder of three compliant bids for the police car purchase program. (Twenty-eight invitations to bid were sent out with three responses). The purchase decision was made by the executive committee of GBPC. The executive committee is elected by the membership. The membership consists of the police chiefs or heads of the participating police departments or offices. The executive committee is comprised of police chiefs. Currently, there is a chairman and three members.

The XYZ Assistant Administrator for Fiscal Affairs, the Director of Public Safety, and the Contract Attorney were jointly responsible for the decision to participate in the program, as opposed to bidding individually. These same people will make future decisions whether to participate in the program. The decision to participate in the program includes a number of subsidiary decisions, such as choice of options, choice of accessories, whether to purchase or lease, the length of lease or financing, whether to purchase options at dealership ABC or another car dealer, and other procurement specifications.

Contact with dealership ABC for warranty service or problems is handled by the XYZ garage Fleet Manager. If he is unable to handle or resolve a problem, he will refer the matter to the legal department, which is a separate office from the Contract Attorney. The Fleet Manager has the discretion to have warranty service provided at dealership ABC, or any other authorized dealer of that type of car. The Fleet Manager or legal division would communicate any contract difficulties to the Director of Public Safety or Contract Attorney.

Dealership ABC has advertised that it will sell new cars at $100 over dealer invoice cost to any law enforcement officer "to show appreciation for being awarded the Greater Boston Police Council bid." XYZ police officers would like to take advantage of this offer.

QUESTION:

Does G.L. C 268A permit XYZ officials[1/] to accept the discount from car dealership ABC?

ANSWER:

No. Those XYZ employees who decide whether XYZ will participate in the program, or who monitor warranty compliance or service, may not accept the discount because they would be in receipt of an item of substantial value for or because of their official actions. Other XYZ officials or officers who are not involved in the purchase, warranty compliance, or service of the vehicles may not accept the discount because they would be in receipt of an unwarranted privilege of substantial value not properly available to similarly situated individuals.

DISCUSSION:

The sections of the conflict law which apply to the facts of this opinion are §3 and §23.

Section 3(b) of G.L. c. 268A prohibits a public official from accepting an item of substantial value for or because of any official act performed or to be performed by such employee.[2/] The intent of this provision of the conflict law has previously been articulated by the Commission. As the Commission stated **In the Matter of George Michael**, 1981 EC 59, 68:

> A public employee may not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do — a good job.

Thus, there need be no showing of an explicit understanding that the gratuity is being given in exchange for any specific act performed or to be performed. **Michael**, supra at 68. Indeed, any such quid pro quo understanding would raise extremely serious concerns under §2 of c. 268A (the "bribe" section). Thus "[a]ll that is required to bring section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited." Id.

The first issue is whether a discount in the purchase price of an automobile advertised as " $100 over invoice" is an "item of substantial value" within the meaning of §3. 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/]

In absence of evidence to the contrary, the Commission concludes that a "$100 over invoice" sale is of substantial value. The word "invoice" is specifically defined in the regulations of the attorney general adopted pursuant to the consumer protection statute, G.L. C. 93A, 940 CMR 5.02(5). Invoice means the total consideration paid by the dealer to the manufacturer, and where no holdback, rebate, promotional fee or any other consideration has been or will be paid by the manufacturer. The Commission will view the advertisement at face value and, therefore, will not assume that "$100 over invoice" has variable meaning or is subject to manipulation.[4/]

A second factor in determining whether §3 has been violated is whether the item of value has been given for any "official act performed or to be performed." Clearly, this element is met where a vehicle is sold at a discount to a member of the executive committee, or to a member of the GBPC where the body approves the con-

tracting decision of the executive committee. In this case the employees are in a position to use their authority in a manner which could affect the giver of the discount. A more specific question is whether the XYZ Assistant Administrator, the Director of Public Safety, the Contract Attorney, or the Fleet Manager may participate in the discount. Although the decision of XYZ to participate in the program had been made prior to the time of the discount, future official decisions of these named officials in their dealings with dealership ABC is reasonably foreseeable. Communication of contract experience to GBPC, whether favorable or unfavorable, is a foreseeable future act of the named employees. At a minimum, complete objectivity is required in order for these officials to exercise properly their official responsibilities, which may include whether to renew participation in the program, where to service purchased vehicles, whether to purchase certain options or accessories, where to purchase those options, when to dispute warranty compliance, when to add options after purchase, and determining the terms and conditions of service and normal maintenance. Complete loyalty is owed the public when these decisions are made, no matter how inconsequential those decisions may appear. This principle is reflected in the language of the law. In referring to an "official act performed or to be performed," §3(b) also includes prior and future acts by the official. See **In the Matter of George A. Michael**, 1981 EC 59, 68.

It might be argued that the discount was given solely to show appreciation for obtaining the GBPC contract, and that the award of the contract is distinct from the subsequent participation of XYZ in the program. The necessary and logical consequence of a bid award, however, is a continuing service relationship with participants in the program. At a minimum, service contacts are likely, if for no other reason than to maintain the effectiveness of the warranty. The Commission is not bound by dealership ABC's characterization of its reason for giving the discount. Dealership ABC obviously hopes to obtain future contracts, to expand the agencies who participate in the program, and to increase its service revenue incident to sales. In this context future dealings with public officials will inevitably result from the bid award.[5]/

The Commission concludes that acceptance of a discount offered to certain public officials also violates §23[6]/ of the conflict law where the discount is not available to a broad base of public and private groups and the discount is of substantial value. The concerns which the conflict law addresses in §3 do not generally arise where the discount does not potentially affect the performance of duties of public employees. See EC-COI-84-80. Section 23, however, raises different concerns. Whereas §3 is concerned with the potential effect a gift or salary supplementation may have on the performance of public duties, §23 is concerned with courses of conduct raising conflict questions in the mind of the public or the appearances of conflict. A discount which is available to a discrete public group, such as law enforcement officers, raises a conflict under §23 because the discount is given precisely because the recipients are public officials and for no other reason. See EC-COI-83-4. There is no statutory authorization or other justification for providing to law enforcement officers a privilege which is not available to private citizens or other public officials.[7]/ The discount is unwarranted because it is a privilege "not properly available to similarly situated individuals, "such as members of private groups and other public employees. See G.L. c. 268A, §23(b)(2). Thus the discount in this case is distinguishable from a discount which is available to a broad base of public and private groups which are the natural constituency of the vendor. ECCOI-83-4.

In the case of a selective discount to a public employee, the employee is able to realize a benefit from which the public is excluded. Receipt of such a benefit negates the trust that the public is entitled to place in public employees: that public, not private, interests are furthered when the employee performs his duties. In such a case the private citizen may reasonably ask why a public official is entitled to compensation or benefits over and above what the taxpayer has authorized and from which he has been excluded. As the Commission stated in EC-COI-83-4, §23 prohibits as an unwarranted privilege a favoritism policy under which "those who serve the people are treated better than the people themselves."[8]/

DATE AUTHORIZED: June 18, 1986

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[1]/Although the advertising appears limited to law enforcement officers, this opinion will address the broader class of officials at XYZ who may be eligible to participate in the discount although technically not law enforcement officers.

[2]/Section 3(b) provides in pertinent part:

> Whoever, being a present or former state, county or municipal employee . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

[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.")

[4]/The Commission is aware that "$100 over invoice" is not unusual advertising to the general public. In fact, one recent advertisement in a local newspaper stated "$1 over invoice" including advertising, prep charges, and transportation. Telephone contact with the sales department of dealership ABC confirmed that the advertisement was still in effect, and applied to law enforcement officials anywhere in the State. The department stated that the discount had substantial value. As an example, it was stated that a minivan from that car company usually sold between $1,200 and $1,400 over invoice.

[3]/Section 3(a) is the "flip side" of §3(b) and would prohibit dealership ABC from giving anything of substantial value, such as the discount in question, to an employee for or because of any official act performed or to be performed by such employee. It is the responsibility of the car dealership to assure that it does not provide any such discount to a law enforcement official who is on a purchasing or service committee, or otherwise has any input into decisions as to where to purchase or service public vehicles. Sales to any officials who have contracting or servicing authority will be examined closely by the Commission to assure the spirit of the law is met. Dealership ABC will receive notification of this opinion as per your permission and will be advised of its right to seek an opinion on its own behalf.

[4]/Section 23 provides in relevant part:

(a) In addition to other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county and municipal employees.

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

[5]/The Commission has confirmed that the discount is available only to law enforcement officers, that other groups would not qualify for the discount, and a private citizen would receive no corresponding benefit. Dealership ABC stated "you have to show the badge". Dealership DEF on the other hand, was willing to work out a "similar deal" with non law enforcement officers. For the purposes of this opinion, the Commission will take the advertisement and representations at face value and will not assume a violation of the consumer protection statute.

[6]/In view of the Commission's conclusion under §23(b)(2), it is unnecessary to determine whether other paragraphs of §23 may also apply. The Commission notes, however, that additional concerns may also arise under §23(b)(3) in the case of a selective discount because receipt of the discount places an unrealistic burden on public employees to separate their public and private lives. Few employees are totally isolated from the decision making process in some capacity. In the case of B.H.A. officials, for example, some may be called upon to drive official vehicles purchased under the program. Normally it would be expected that a problem with the car would be communicated to someone in authority to address the problem. If the same official purchased a private vehicle on favorable terms from the same car dealer, the employee may be reluctant to communicate defective performance out of need to extend a courtesy to the very dealer which gave him a deal. These concerns would be addressed customarily on a case-by-case basis to determine whether the overlap of public and private dealings creates an impression of undue favoritism. Additionally, recent amendments to §23(b(3) provide an opportunity for an employee to dispel any such impression by public disclosure to the employee's appointing official. See St. 1986, c.12.

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-15

FACTS:

You are a member of the General Court and are also a registered stockbroker. Your compensation is based primarily on commissions which you receive from business transactions. You also can receive fees and commissions for providing investment advice.

You are interested in soliciting business with municipal and county pension funds and anticipate either selling investments or providing investment advice.

QUESTION:

Does G.L. c. 268A permit you to solicit and/or do business with municipal and county pension funds?

ANSWER:

Yes. Should you do business with a county pension fund, however, certain limitations may apply to you in your official capacity as a legislator.

DISCUSSION:

As a member of the General Court, you are a "state employee" for the purposes of G.L. c. 268A. EC-COI-83-43. Section 4 of G.L. c. 268A governs the outside activities of state employees and imposes substantial limitations on the receipt of compensation and on the representational activities on behalf of non-state parties in relation to matters which the commonwealth regulates. As applied to members of the General Court, however, §4 restricts only paid appearances before state agencies in connection with certain types of proceedings. See G.L. c. 268A, §4(¶5). Paid appearances before municipal or county agencies do not fall within the prohibitions of §4. Accordingly, while §4 would restrict your soliciting or doing business with the state employee retirement board, the pension reserve investment management board, the teachers retirement board, and other state agencies, you will not be prohibited form soliciting or doing business with municipal and county retirement boards.

Aside from §4, issues under §6 may come into play if you are selected as an advisor for or do business with a county retirement board. Section 6 requires your abstention as a legislator whenever you are called upon to participate in a particular matter in which you or a business organization which employs you has a financial interest. Because members of the General Court may review the budget of each county, you might be called upon to review the line item retirement fund account of a county with which your are doing business. The line item retirement fund account of a county is a "particular matter" within the meaning of G.L. c. 268A, §1(k). See EC-COI-82-9. In view of the financial interest which both you and your company would have in the account, §6 requires your abstention in any legislative review of that matter.[1]/ Should such a situation arise, you would be required also to file a disclosure of your financial interest in the matter with the Commission pursuant to G.L. c. 268A, §6 and §6A.

DATE AUTHORIZED: July 3, 1986

[1]/In view of the passage of St. 1981 c.251, §§140-149, the General Court's review role no longer includes formal approval of each county budget.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-16

FACTS:

In 1981, representatives of five Indian tribes filed separate land claim suits in Federal District Court.[1] Each complaint sought declaratory and injunctive relief relating to the ownership and use of five land areas and named as defendants federal, state, county and municipal officials and private landowners. You represent the Town of Edgartown in **Chappaquiddick Tribe**; the Town of West Tisbury in **Christiantown Tribe**; and Hope Ingersoll in **Herring Pond Tribe.**

On May 26, 1986 the Federal District Court (Skinner, J.) issued decisions dismissing each of the five cases. The **Mashpee** dismissal was based on a res judicata determination from a previous lawsuit in which the standing of individual plaintiffs had been successfully challenged. In each of the four other cases, the court determined that the plaintiffs had not established the continuation of tribal existence.

The plaintiffs filed five separate notices of appeal with the United States Court of Appeals for the First Circuit, which has established a briefing schedule for the appeals. As an alternative to assigning the cases five separate docket numbers, the court clerk assigned the cases a common docket number and has indicated that the attorneys file a single brief, rather than five briefs.

QUESTION:

Does G.L. c. 268A permit you to file a brief on behalf of the Town of Edgartown in **Chappaquiddick**, the Town of West Tisbury in **Christiantown Tribe**, and Hope Ingersoll in **Herring Pond Tribe**?

ANSWER:

Yes.

DISCUSSION:

In 1984, the Supreme Judicial Court confirmed the Commission's conclusion that G.L. c. 268A, §17[2] prohibits a municipal attorney from representing non-municipal parties in the same lawsuit. **Town of Edgartown v. State Ethics Commission**, 391 Mass. 83 (1984). The decision was based on the plain language of §17 and on the priority of a policy which avoids potential questions over the municipal attorney's loyalty to the interests of the municipality.

As attorney for the Town of Edgartown in **Chappaquiddick Tribe** you are a municipal employee and a special municipal employee for the purposes of G.L. c. 268A. Id. While §17 prohibits your representation in **Chappaquiddick Tribe** of parties other than the Town of Edgartown, §17 does not restrict your representation of parties in other lawsuits provided that the lawsuits are different particular matters from **Chappaquiddick Tribe**. Compare, EC-COI-84-31; 81-28; 80108.

The Christiantown Tribe case was initiated by representative of the Christiantown Tribe with respect to the ownership of a land area in West Tisbury. The **Herring Pond Tribe** case was initiated by representatives of the Herring Pond Tribe with respect to a third land area. Both the **Christiantown Tribe** and **Herring Pond Tribe** cases involve parties, land areas, facts and standing issues which are different from **Chappaquiddick Tribe** and are separate particular matters for the purposes of §17. Your representation of parties in these three cases is therefore consistent with the conditions of §17.

The Commission concludes that your representation of parties in these three cases may continue during the appeal process. The fact that the clerk for the Court of Appeals has assigned the cases a common docket number and has required the filing of a single brief appears to be intended to further the goal of administrative economy. These administrative actions, however, do not remove the fundamental differences among the three cases. Because the three cases retain their separate parties, land areas, facts and standing issues, they will continue to be treated as separate particular matters for the purposes of §17.

DATE AUTHORIZED: September 15, 1986

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[1] **Mashpee, et al. v. Donald Hodel, et al.** Docket No. 81-3205-S
Christiantown Tribe, et al. v. Donald Hodel, et al. Docket No. 81-3206-S
Chappaquiddick Tribe, et al. v. Donald Hodel, et al. Docket No. 81-3207-S
Herring Pond Tribe, et al. v. Donald Hodel, et al. Docket No. 81-3208-S
Troy Tribe, et al. v. Donald Hodel, et al. Docket No. 81-3209-S

[2] G.L. c. 268, §17 prohibits a municipal employee from receiving compensation from or acting as attorney for a party other than the municipality in relation to any particular matter in which the municipality is a party or has a direct and substantial interest. A special municipal employee is subject to §17 with respect to those matters in which he participates or has official responsibility.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-17

FACTS:

You are an employee of government transportation agency ABC. You are seeking an advisory opinion under G.L. c. 268A relating to the propriety of the ABC's free pass policy. Under the current policy, ABC provides free, unlimited passes to the ABC members and their spouses, and the three surviving spouses of former

agency heads and county finance advisory board members. Additionally, free, unlimited annual passes are provided to all current permanent ABC employees and their spouses, to all retired ABC employees and their spouses, and to two employees of the General Court. Approximately thirteen lifetime passenger passes are also in circulation, although you are uncertain who possesses them or whether they are currently in use.

The passes are valid for both job-related and personal use and contain no limit on the frequency of usage.

QUESTION:

Does G.L. c. 268A permit the continuation of the ABC's current free pass distribution policy?

ANSWER:

The distribution of annual passes to ABC members, their spouses, the surviving spouses of former ABC and county finance advisory board members, and retired ABC employees is not permissible. Granting annual passenger passes to current ABC employees or their spouses is permissible if part of a negotiated or authorized compensation package.

DISCUSSION:

1. ABC Members

ABC members are subject to G.L. c. 268A, §23(b)(2), which prohibits the knowing use or attempted use of their official positions to secure for themselves or others unwarranted privileges or exemptions of substantial value and which are not properly available to similarly situated individuals. The Commission concludes that ABC members would violate §23(b)(2) by continuing to authorize the distribution to themselves of free annual passes unless the passes are restricted to use for job-related purposes.

By authorizing the free passes on an annual basis, ABC members are using their official positions to secure a privilege for themselves. The privilege is of "substantial value" because the passes can be used on an unlimited basis and would potentially exceed $50 in any calendar year. See, Commission Advisory No. 8 (1985). **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976). The distribution of a free annual pass which is usable for personal, non-job-related purposes grants an unwarranted privilege because the free passage is not properly available to other members of the public. Moreover, the pass cannot be characterized as part of the members' compensation package because the ABC's enabling statute expressly prohibits members from receiving compensation and limits their reimbursement to those expenses necessarily incurred in the performance of official duties. Therefore, ABC members may not authorize for themselves or their spouses a free pass distribution which permits personal, non-job-related travel.[1/]

2. ABC Employees

The Commission concludes that the continuation of the free pass policy for ABC employees would not violate §23(b)(2).

While ABC members may not grant unauthorized privileges of substantial value to themselves or others, the free pass would not constitute an unwarranted privilege for ABC employees. The pass may be characterized reasonably as part of an employee's compensation package and a term of employment. Under its enabling statute, the ABC is empowered to establish the compensation and benefit levels for its employees. The granting of a free pass to its employees as part of a negotiated process is a permissible exercise of this agency. This conclusion also recognizes that public officials possess substantial flexibility in making personnel and benefit package decisions, and that those decisions will not customarily be "second guessed". See, EC-COI-85-71. Therefore, as long as the ABC retains the discretion to determine the compensation package for its employees the distribution of a free pass would not constitute the granting of an unwarranted privilege to its employees.

In order for the distribution of free passes to be reasonably deemed part of a compensation package, certain steps are necessary. In the case of ABC employees who are represented by an employee organization, the ABC must incorporate the availability of a free pass into collective bargaining negotiations and agreements. With respect to ABC employees who are not represented by an employee organization, the ABC must authorize the availability of a free pass as part of the employee's compensation package. Such agreements or authorization could also reasonably extend to the spouses of ABC employees.

3. Retirees

The distribution of free passes to certain retired ABC employees and members violates §23(b)(2) because the free pass is an unwarranted privilege not properly available to other members of the public. Unlike benefits to current employees, the benefit package for retired ABC employees is not negotiated by the ABC; the ABC's role is limited to determining the size of its contribution to an employee organization's health and welfare plan. The inclusion of a free pass cannot therefore be regarded as a reasonable extension of a former employee's negotiated compensation package.

4. Legislative Liaisons

The continuation of a free passenger policy to the two legislative employees would not violate §23(b)(2) because the free passage would not constitute an unwarranted privilege. The legislative liaisons are entitled to reimbursement from the commonwealth for any travel expenses incurred in the performance of their official duties. Inasmuch as they would be entitled to free passage from the commonwealth in any event, the fact that the ABC, rather than the General Court, bears the burden of the expense does not grant an unwarranted privilege to them, within the meaning of §23(b)(2).[2]

5. Lifetime Passes

The continued recognition of free lifetime passes grants to the user an unwarranted privilege of substantial value. To comply with §23(b)(2), the ABC must rescind the lifetime passes and instruct its employees that such passes are invalid. In lieu of such passes, the ABC may provide free passage to guests provided that the aggregate value of such passage does not exceed $50 in any calendar year.[3]

DATE AUTHORIZED:[4] July 29, 1986

[1]To the extent that ABC members are conducting ABC business or traveling in connection with such activity, use of free passes is, of course, permissible.

[2]It is not clear whether the legislative liaisons also use the pass for personal, non-job-related purposes. To the extent that passage is sought for personal purposes, the aggregate value of any individual tickets distributed to each of the liaisons may not exceed $50 in any calendar year.

[3]The purpose of this opinion is to provide guidance to ABC members over the standard to be applied in adopting a future pass distribution policy. This opinion does not constitute a ruling concerning the past activities of ABC members or employees under this or other sections of G.L. c. 268A.

[4]To avoid confusion in the implementation of this opinion, the Commission will defer enforcement of the conditions concerning current employees until the completion of the 1986 season. This will allow time to modify existing collective bargaining or employment agreements. The other terms of this opinion must, however, be observed immediately.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-18

FACTS:

You are an employee in the ABC County Sheriff's Office. During off-duty hours, you also serve civil process as a deputy sheriff in ABC County. An attorney requesting your services is billed the appropriate fee as listed in G.L. c. 262, §8 by the Deputy Sheriff's Office, which office then compensates you for serving the process. A deputy sheriff's authority to serve civil process is also established by statute. G.L. c. 37, §11; c. 220, §7.[1]

QUESTION:

Does the state's conflict of interest law, G.L. c. 268A, permit you to serve in both positions?

ANSWER:

No.

DISCUSSION:

As an Assistant Deputy Superintendent in the ABC County Sheriff's Office, you are considered a county employee for purposes of the conflict of interest law, and are consequently subject to the provisions of that law. G.L. c. 268A, §1 et seq. Section 14 prohibits a county employee from having a financial interest, directly or indirectly, in a contract made by the same county. You clearly have a financial interest in your deputy sheriff appointment since you receive fees for performing deputy sheriff duties. The issue remaining is whether serving as a deputy sheriff results in a contract between the appointee and the county within the meaning of G.L. c. 268A, §14.

The Commission recently decided a similar issue at the state level. See, **In the Matter of Robert J. Quinn**, 1986 Ethics Commission _____. The issue in **Quinn** was whether serving as a bail commissioner resulted in a contract between the appointee and the Superior Court [the appointing authority] within the meaning of G.L. c. 268A, §7 [the state equivalent to §14.] In **Quinn**, the Commission concluded, inter alia, that serving as a bail commissioner results in a contract between the state and the bail commissioner as the word "contract" (which is undefined in G.L. c. 268A) is used in traditional contract law of offer, acceptance, andconsideration.[2] "The state offers the opportunity to be appointed and to serve as bail commissioner subject to regulation and supervision by the Superior Court. Acceptance occurs on each occasion a bail commissioner agrees to perform those services subject to applicable regulation."[3]

In analyzing the "contract" in **Quinn**, the Commission considered six standards, including whether

(1) the appointment confers upon the appointee the powers normally associated with public office;

(2) the duties are similar or identical to the duties performed by public employees;

(3) there is a lack of choice in who will receive his services;

(4) the place for provision of the services is on public property;

(5) the procedures and work product of the appointee are substantially regulated by a public agency or by law;

(6) compensation for providing the services is specifically and substantially regulated by a public agency or by law.

On the basis of the above standards (1), (2), (5) and (6), the Commission concludes that your service as an appointed deputy sheriff in exchange for fees results in a contract within the meaning of G.L. c. 268A, §14 between you and the County.[4]/

The office of deputy sheriff was created by statute, G.L. c. 37, §3. Deputy sheriffs are appointed by the sheriff and must "be sworn before performing any official act." Id. Deputies are charged by statute with assisting the sheriff, a county officer, in the discharge of his official governmental duties. See, inter alia, G.L. c. 37, §11 and c. 220, §7 (service of process); c. 37, §13 (requisition of aid in apprehending an individual); c. 37, §16 (attendance at sessions of courts); c. 37, §24 (transportation of prisoners or persons in custody); c. 41, §37 and c. 60, §34 (execution of warrants to detain property or arrest individuals delinquent in the payment of taxes); c. 120, §13 (warrantless arrest of a DYS ward who has breached parole); c. 138, §42 (execution of search warrants to search and seize unlawful use or possession of alcoholic beverages); c. 185, §13 and 25A (attend sittings of land court and serve process from that court); c. 213, §11 (authority to adjourn a court session in the absence of the Justice).

The deputy sheriff's authority to serve civil process, his conduct while serving, and the fees he may charge individuals for his services are also comprehensively regulated by statute. G.L. c. 37, §§11 and 14; c. 147, §8A; c. 220, §7; c. 262, §§8 and 8A; MRCP 4c. The variety of duties and the specific fees a deputy sheriff may charge for such service is enumerated at length in G.L. c. 262, §8. Deputies are also required to make an annual accounting of the fees they collect. G.L. c. 262, §8A.

In summary, deputy sheriffs are appointed by a county officer, carry the statutory authority to perform governmental functions, and have a fee schedule which is regulated by statute. The Commission concludes that a contract results on each occasion a deputy sheriff accepts the opportunity of his appointment and serve process pursuant to statutory requirements. See, **In the Matter of Robert J. Quinn, supra.** Your financial interest in such a contract, i.e. your receipt of fees for serving process as a deputy sheriff, therefore violates §14.[5]/

DATE AUTHORIZED: September 16, 1986

[1]/The ABC County Deputy Sheriff's Office is organized as a de facto unincorporated partnership. It is not a legal or taxpaying or tax reporting entity. Out of each fee collected, fifty percent is allocated to administrative costs and fifty percent to the deputy who serves process. This opinion is limited to the structure as described to us.

[3]/The fact that the bail commissioner receives fees from someone other than the state was held to be irrelevant. "Section 7 prohibits a financial interest in a contract made by a state agency, not in one funded by the state. It is the existence of compensation, not the identity of its source, that is the issue." **Quinn, supra.** The opportunity to earn compensation from third persons is sufficient to support a contract. Id. (cites omitted).

[5]/See, footnote 5 in **Quinn, supra.**

[4]/The Commission recognizes that the inapplicability of standards (3) and (4) to your duties as a deputy sheriff distinguishes your situation from that of a bail commissioner in **Quinn.** Because deputy sheriffs' powers, duties, procedures and fee schedules are extensively regulated by statute, the Commission finds such distinguishing factors nondispositive of the contract issue.

[5]/You are ineligible for any exemption under §14, because you are employed by the office of the county officer who also appoints you as a deputy sheriff.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-19

FACTS:

You are a member of a City Council, and your brother is a police officer in the police department of the City. Pending before the City Council is an order authorizing the Mayor to file with the General Court a home rule petition. The petition, if enacted, would authorize the City to require mandatory drug testing of public safety officers and employees, including your brother.

QUESTION:[1]/

Does G.L. c. 268A permit you to discuss and vote on the pending petition?

ANSWER:

Yes, provided that, prior to your participation, you publicly disclose that approval of the petition might have a potential impact on your brother.

DISCUSSION:

As a City Council member, you are a municipal employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A potentially limit your official activities as a City Councillor with respect to the home rule petition.

The first, §19, prohibits your participation in any particular matter[2]/ which affects the financial interest of your brother or other immediate family members. Because the petition authorizes discipline or court proceedings and potential suspensions, fines or loss of salary in the event of a positive test result, your brother could have a financial interest in the enactment of the petition which is pending before the City Council. In order to fall within the §19 abstention requirements, however, the petition must be a particular matter. Because the matter before you is a petition of a city for a special law related to its governmental powers and duties, it is excluded from the definition of particular matter.[3]/ Consequently, the petition, as currently drafted, would not be a matter requiring your abstention under §19.

The second, §23(b)(3), prohibits you from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that your action on the petition is the result of your kinship with your brother. Even assuming that your kinship with your brother could lead to this conclusion, however, §23(b)(3) further provides that such a conclusion would not be reasonable if you disclose the relevant facts in a manner which is public in nature. Therefore, prior to your discussing or voting on the petition, you can comply with §23(b)(3) by disclosing at a public meeting of the City Council the fact that your brother is a public safety employee who would be subject to potential impact should the petition be enacted.

DATE AUTHORIZED: September 15, 1986

[1]/You also ask whether G.L. c. 268A, as applied, would violate your constitutional right of free petition. Such a determination is beyond the Commission's authority and, based on the application of G.L. c. 268A to your situation, may be unnecessary.

[2]/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[3]/This was not always the case. Prior to 1983, the definition did not exclude home rule petitions of cities related to their powers and duties. The broad coverage of the term "particular matter" resulted in abstention requirements which placed burdens on legislators seeking to sponsor home rule legislation. See, EC-COI-81-81. In response to suggestions by the Legislative Research Council in 1975, see, 1975 House Doc. No. 6475, Report Relating to Conflict of Interest Law and Separation of Powers, pp. 56-58 and the Commission, 1982 House Doc. No. 1235 §1, the General Court inserted the current definition in 1982. See St. 1982 c. 612.

CONFLICT OF INTEREST OPINION
NO. EC-COI-86-20

FACTS:

You are an employee of the Executive Office of Elder Affairs (EOEA), a state agency responsible for planning, developing and implementing elderly housing programs. The EOEA budget for the current fiscal year includes an appropriation authorizing EOEA to contract with a non-profit organization (NPO) to conduct public education, advocacy, research and evaluation of elder equity conversion activities. St. 1986 c. 206, §2 Item 9110-1665. Among the budgetary conditions for the authorization is that the board of directors of the NPO consist of representatives from the Executive Offices of Consumer Affairs, Community Development and EOEA.[1]/

QUESTION:[2]/

Assuming that an EOEA employee is designated to the board of directors of the NPO, what restrictions does G.L. c. 268A place on the employee?

ANSWER:

The employee may serve on the NPO board of directors, subject to certain limitations.

DISCUSSION:

1. Section 4(c)

Under this section, a state employee may not act as the agent of the NPO in relation to any contract, application or other particular matter[3]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, the designated employee could not appear on behalf of the NPO in support of the NPO's funding application to EOEA. On the other hand, the employee could participate as a board member in general policy discussions concerning the implementation of the promotion, counselling and educational functions of the NPO. Compare, EC-COI-83-145; **In the Matter of James Collins**, 1985 Ethics Commission 228.

2. Section 6

This section places limitations on the official EOEA activities of the employee designated to serve on the NPO board. Under §6, an EOEA employee may not participate in any official capacity in any contract, determination or other particular matter in which the NPO has a financial interest. While an exemption from §6 is available from the employee's appointing official, specific notifications and disclosures must be made as a condition to granting any such exemption. See, G.L. c. 268A, §6 (¶2). Absent the granting of an exemption, the employee must abstain from participating as an EOEA employee from any matter in which the NPO has a financial interest.

DATE AUTHORIZED: September 15, 1986

[1]/Item 9110-1665 provides that the "non-profit shall conduct public education, advocacy, research and evaluation of older equity conversion activities; provided that a board of directors shall consist of at least four representatives of banks actively financing older home equity conversion instruments, five representatives of nonprofit agencies geographically distributed throughout the commonwealth, representatives from the executive officer of elder affairs, consumer affairs, and community development, and two representatives of the consumer population; provided, further, that not less than ninety thousand dollars shall be obligated for the payment of elderly home equity conversion counsellors with nonprofit organizations which currently participate in home equity conversion activities or will do so in the future."

[2]/Nothing in G.L. c. 268A would preclude the appointment of an EOEA representative or employee to the board of directors of the NPO. Such an appointment would be consistent with the conditions of Item 9110-1665 and would not amount to the granting of an unwarranted privilege or appear to otherwise violate §23.

[3]/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-21

FACTS:

Several years ago, a state agency awarded a contract to XYZ Engineering Co. to provide architectural and engineering services. By mid-1984, the agency was dissatisfied with XYZ's performance on the interior design and finish work and requested that XYZ subcontract its work as to this aspect of the project. Following an interview process, the agency selected as a substitute ABC (ABC), an architectural firm, on the basis of ABC's experience in the interior design of large spaces. The choice, which became effective in September, 1984, was acceptable to XYZ.

ABC initially subcontracted with XYZ in the traditional way. That is, the scope of ABC's subcontract was based upon XYZ's work and was limited to preliminary design tasks for the improvement of design quality. Based on the agency's acceptance of ABC's subsequent recommendations, ABC's scope of work developed and increased. In November 1985, ABC wrote directly to the agency for an amendment to the scope and value of the contract. The agency then consulted with XYZ before approval. The amendment increased the scope of services and requested additional compensation. Further, ABC also requested compensation for the design of artwork to be done by Mr. X. The cost of fabrication and installation of the finished product would be separately bid. The amended agreement between the agency and ABC specifically contemplated Mr. X's services. The allocation for Mr. X's professional services has been approved by the agency pending a resolution of the potential conflict of interest issues.

Mr. X's brother is an employee, officer, director and owner of more than 1% of the stock of ABC. He manages the project for ABC, although his services have not been specifically requested in the ABC/XYZ sub-contract. Mr. X's brother's responsibilities have included the preparation of the initial proposal to XYZ discussing ABC's scope of work and compensation directly with the agency attending meetings with the agency and submitting material for the agency's review. Mr. X also owns more than 1% of the stock of ABC.[1/]

In a technical sense, ABC is the subcontractor; XYZ, the principal contractor; and the agency the contracting agency. However, because of XYZ's previous performance and other facts, the agency has interacted directly with ABC regarding the amended items. The direct contact has included negotiation and decision-making, as well as the exchange of information and consultation. The agency views XYZ's role in a real sense, if not a legal one, as being limited to consulting and deferral to the relationship between ABC and the agency.

ISSUES:

1. Will Mr. X be a special state employee for G.L. c. 268A purposes if he accepts compensation for artwork design .
2. If so, does his ownership interest in ABC place him in violation of G.L. c. 268A, §7.
3. Is Mr. X's brother a state employee for G.L. c. 268A purposes by virtue of his project manager status for ABC.

ANSWERS:

1. Yes.
2. No.
3. No.

DISCUSSION:

A. Contractual Relationship between ABC and the Agency

The first issue is whether ABC has a contractual relationship with the agency. If ABC has no contractual rights or responsibilities to the agency but owes its loyalty to XYZ as a subcontractor, then it cannot fairly be concluded that employees or officers of ABC are performing services for a state agency.

In the circumstances of this case, to characterize ABC's relationship to the agency as a subcontractor would be to elevate form over substance and we decline to do so. ABC and the agency have a direct contractual relationship. Although initially ABC had a subcontract which was limited in scope by the confines of XYZ's contract, this relationship was short- lived. Within a short time, ABC was negotiating directly with the agency for an amendment to the scope and value of a substantial part of the contract. XYZ's role in this direct negotiation was limited to consultation and had become secondary, if not pro forma, given the agency's previous dissatisfaction with XYZ's performance on the interior design. The direct contact between the agency and ABC resulted in important decisions as to costs and services. For practical purposes, XYZ did not retain authority over the interior design work or coordination. Although ABC built upon earlier XYZ plans, ABC was substituted for XYZ as to $159,000 of amended work, including specialty items of an interior design nature.

B. Jurisdictional Status of Mr. X

We conclude that Mr. X performs the artwork design for the agency and is a "state employee" within the meaning of G.L. c. 268A, §1(q).[2/]

Although the definition of state employee does not customarily cover an employee of a corporation or vendor which contracts with the state, such an employee is

covered by the definition if the terms of the contract indicate that his specific services are being contracted for. In Attorney General Conflict Opinion No. 852, a 50% stockholder in a corporation was specifically named in a contract between that corporation and a state agency. In that case, the state agency could cancel the contract if the stockholder failed to perform the duties designated. The Attorney General concluded that under these circumstances the individual was a state employee for the purposes of G.L. c. 268A. See also, EC-COI-80-84, where the Commission concluded that the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state. By similar reasoning, Mr. X is also a state employee. Mr. X's services were specifically bargained for on November 25, 1985. Not only was he specifically named, but also a cost for his specific art work design services was agreed upon. The agency's interest in the final art work design contemplates Mr. X's specialized services.

C. Application of G.L. c. 268A, §7 to Mr. X

As a state employee, Mr. X will be subject to the restrictions of G.L. c. 268A, §7. Section 7 generally prohibits a state employee from having a direct or indirect financial interest in any contract made by a state agency. The agency is a state agency. The language of §7 literally applies to Mr. X who, as an owner of more than 1% of the stock of ABC, has an indirect financial interest in ABC's contractual relationship with the agency.

It is necessary, however, to give §7 a workable and common sense reading. It has long been recognized, for example, that §7 cannot be reasonably interpreted to prohibit a state employee from receipt of his own paycheck. Buss, The Massachusetts Conflict of Interest Statute: An Analysis 45 B.U. Law Review 299 (1965). Similarly, there is no policy advanced by prohibiting an owner of a company from performing services as a specifically named individual (and thus as a state employee) while at the same time receiving financial benefit as an investor in the same company. In such a case, the contract which creates state employee status is the same contract which results in the financial interest. Therefore, there is no opportunity to gain an inside track on a second state contract. On the other hand, a state employee may generally not own a company which has a second independent contract with the state. See, EC-COI-83-129.

In light of the above discussion, we must determine whether the professional fee for Mr. X's services is reasonably part and parcel of, an extension of, an amendment to, or integrally related to ABC's original contract with XYZ; or whether the fee is, in reality, a separate contract for a distinct service. Normally, the Commission will defer to an agency's own determination on this issue. Thus, if the agency considers the matters sufficiently connected so that it determines that it may amend the original contract to include Mr. X's services as an artist/graphic designer, the Commission will defer to this determination absent an obvious abuse or sham. If, on the other hand, the agency is unwilling to consider Mr. X's service as part of the original contract, §7 applies.

In this case, the agency has concluded that the contract for Mr. X's art services was under the authorization of the vote for the implementation of a program for the purchase of various artwork as a component of the project. The determination that the artwork was a component of the project and that Mr. X's services were authorized, appears reasonable. We therefore conclude that the specialized services of Mr. X may reasonably be regarded as an extension of the original contract between the agency and XYZ, and as subsequently substituted, ABC.

D. Jurisdictional Status of Mr. X's Brother

We conclude that Mr. X's brother is not a state employee for the purposes of G.L. c. 268A. In selecting ABC, the agency did not seek Mr. X's brother's services, nor has Mr. X's brother been expected to perform the services called for in the contract. Rather, the agency selected ABC based upon the company's ability to combine architectural and design disciplines. Unlike the contractual arrangement between the agency and Mr. X, the agency has made no specific allocation of money for Mr. X's brother's management services. Mr. X's brother's status as project manager, without more, does not make him a state employee for G.L. c. 268A purposes. Compare, EC-COI-83-129.

DATE AUTHORIZED: October 6, 1986

[6]In addition, he is the partner of a company called C and X, a separate legal entity from ABC. It is unclear whether payment to Mr. X for his defined services would be as an employee or owner of ABC or as an independent contractor. In either event, the result under G.L. c. 268A will be the same.

[7]The conflict of interest law defines "state employee" in relevant part, as "a person performing services for or holding office, position, employment or membership in a state agency, whether by election, appointment, consent of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis."

CONFLICT OF INTEREST OPINION NO. EC-COI-86-22

FACTS:

You are the spouse of a state employee and also perform substantive policy-making and advocacy services for the executive branch in certain areas. Your services are uncompensated and consume more than sixty days annually. Among your responsibilities is the chairing of a working group comprised of representatives of several state agencies.

In addition to your state activities, you are the director of a privately funded business which has official dealings with some of the state agencies in your working group. You work for the business on an uncompensated basis, although you may receive a salary in the future.

QUESTION:

What limitations does G.L. c. 268A place on your activities in connection with the Commonwealth and the business?

ANSWER:

You may continue to participate in both activities subject to the limitations set forth below.

DISCUSSION:

1. Jurisdiction

For the purposes of G.L. c. 268A, you are a "state employee".[1]/ While the spouse of a state employee does not ordinarily attain or otherwise share the employee's "state employee" status, the services which you provide for the executive branch make you a state employee within the meaning of G.L. c. 268A, §1(q). Your substantive policy-making and advocacy services for the executive branch are services which would customarily be performed by state employees, EC-COI-81-117, and for which your loyalty would be to the executive department, a state agency for G.L. c. 268A purposes. In view of your uncompensated status, you are treated as a special state employee pursuant to G.L. c. 268A, §1(o). As a special state employee, you remain subject to several prohibitions under G.L. c. 268A but also qualify for certain exemptions generally unavailable to full-time state employees. In general, the relevant provisions of G.L. c. 268A seek to preclude the overlap of your state and business activities.

2. Limitations on your state activities

(a) Section 6

This section prohibits your official participation as a state employee in any contract, decision or other "particular matter"[2]/ which affects the financial interest of a business organization for which you serve as a director. Because the business is treated as a business organization for the purposes of §6, you must abstain from matters which affect the business's financial interest. For example, if the state working group were considering utilizing the business, you could not participate as chair of the working group in any discussions or decisions relating to the utilization of the business. This prohibition on your participation would also apply to contracts with business organizations which are in competition with the business.

(b) Section 23(b)(2)

As a state employee, you may not use your official position to secure unwarranted privileges of substantial value for yourself or others. Issues under this section arise in the context of your receipt of office space and the use of your status as a state employee.

Initially, nothing in §23 would preclude your receipt of office space, telephones and support staff to carry out your responsibilities as a state employee. Because these resources are available to you as a state employee, however, you must continue to refrain from using these resources for business related activities. The incidental and occasional use of a state telephone to speak with other business employees would not constitute an unwarranted privilege of substantial value. See, **Commonwealth v. Famigletti**, 4 Mass. App. 363 (1976); EC-COI-85-29.

Section 23(b)(2) also prohibits a state employee from lending the prestige of her office to a business organization for the purpose of advancing its services. Such conduct may create the impression of a state endorsement and imbue the private venture with a credibility which may be unwarranted. Compare, EC-COI-84-127 (judge prohibited from appearing in a television commercial endorsing a corporation's activities); 83-82 (state agency may lend employees to a commercial film project as long as steps are taken to dispel endorsement by the state). Inasmuch as the business is a private, as opposed to a state venture, you must be cautious in the advocacy role which you play as the director of the business and keep your status as a state employee separate from your business activities.

(c) Section 23(b)(3)

This section in effect prohibits a state employee from conduct which creates a reasonable impression that her official acts may be unduly affected by private loyalties and relationships. Issues under §23(b)(3) inevitably arise whenever a state employee has an overlap of official and private dealings with the same agency or party. Because there are state agencies with which you have dealings as a working group member and business director, you must avoid creating the impression that your official dealings will be unduly affected by your business involvement with these same agencies.

3. Limitations on your business activities

Section 4(c) of G.L. c. 268A places limitations on the outside activities of state employees and is intended to preclude state employees from serving two masters in matters in which the state has a stake. As applied to you as a special state employee, you must refrain from acting as the business agent or spokesperson in connection with matters which are within your official responsibility as chair of the working group. For example, if the business were interested in submitting a proposal for

consideration by the working group, §4(c) would prohibit your dealing with the working group on behalf of the business.[3]/ You would also be prohibited from acting as agent for the business before a state agency in connection with a beautification proposal if the proposal were one that you had worked on, or within the past year had official responsibility for, as chairperson of the working group.

To the extent that you currently receive no compensation from the business, you are not limited by the §4(a) prohibition covering the receipt of compensation from nonstate parties in certain state-related matters. Should your compensation situation change, you should renew your opinion request to ascertain what additional limits may apply under G.L. c. 268A.

DATE AUTHORIZED: September 15, 1986

[1]/"State employee," a person performing services for or holding an office, position, employment or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group with the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

[2]/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[3]/This result would apply irrespective of the number of days you serve annually as chair of the working group.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-23

FACTS:

You were the Director of a Division (Division) of the a state agency until March, 1986. While you were the Division Director, you signed an escrow agreement which was negotiated by a member of your staff with X Company prior to its registration of its securities with the Division. The other parties to the agreement were the escrow agent and the two corporate founders. The Director may require an escrow agreement as a condition for registering a corporation's public offering of stocks. Cited law. The requirement for an escrow agreement is not common and is employed when the Division determines, following a review of the company's prospectus and other information, that the offering may work a fraud on potential investors. An escrow agreement usually restricts the holders of "cheap stock" (such as corporate founders) from any sale or disposition of such stock for a period of one year or longer. Cited law. The purpose of the escrow agreement is to place the corporate founders' stock, purchased at a low price, in escrow for a specified period of time to prevent a devaluation of investors' stocks and to prevent the founders from leaving the company without leadership.

The purpose of the agreement was to tie up the founders' stock for a minimum of two years and a maximum of five years, in addition to linking the agreement to a specific earnings ratio so that the founders would not unfairly benefit from the investors' capital. The agreement contains a clause which allows the founders to sell or give their escrowed shares to each other or to their families as long as the shares remain subject to the terms and conditions of the agreement. In essence, as long as the agreement remains in effect, the escrowed shares may not be sold to the general public. In addition, any transferee of shares under this clause who is not a party to the agreement must execute a declaration, satisfactory to the Director, making any such transferee a party to the agreement. Further, the declaration must be submitted to the Director and escrow agent at the time of the transfer.

The Division is a signatory to the agreement and retains the authority to enforce the provisions of the agreement. In the event that the holders of the escrowed shares wish to petition for an early release from the conditions of the agreement, such a request would be made to the Director. The Director would determine whether the company has met specific earnings requirements, whether changed circumstances or any other reason would be sufficient to terminate, revoke, rescind, modify or release any terms of the agreement.

QUESTION:

Does G.L. c. 268A permit you to represent one of the corporate founders in a possible buyout of the other founder?

ANSWER:

Yes, subject to the following conditions.

DISCUSSION:

As the former Director of the Division, you are a "former state employee" for the purposes of G.L. c. 268A. Section 5(a) of G.L. c. 268A prohibits a former state employee from acting as an 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 he participated as a state employee. Under §5(a) you may therefore not act as an attorney for anyone other than the state in relation to any particular matter in which you previously participated as Division

Director. 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. . ." An escrow agreement is a contract and thus is a particular matter. Participation is defined in G.L. c. 268A, §1(j) 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." Your participation in the escrow agreement consisted of your signing the agreement as Division Director and, in effect, becoming a party to the agreement and executing it. The signing of the escrow agreement paved the way for the company's stock registration. If the agreement had not been signed, the registration may not have occured. Cited law. Therefore, your signing constituted personal and substantial participation in the agreement. See, EC-COI-83-114. Even though a member of your staff negotiated the agreement, it does not minimize the fact that you also participated in the agreement. More than one person may participate in a particular matter.

Since you participated in the agreement, you are prohibited from acting as an attorney for any private party in relation to: any challenge to the validity of the agreement; any petition for a release, modification, recission or revocation of any terms of the agreement; any action brought by the Division or any party in interest to enforce any provision of the agreement, and any clause of the agreement which requires the Division's review and/or approval. On the other hand, you may represent one founder who wishes to buy out the other founder in a consensual transaction. The fact that founders are authorized by the agreement to sell or exchange shares with each other during the escrow period does not mean that the sale or exchange is "in connection with" the agreement. Cf. EC-COI-82-25. The founder's sale, which is consensual, is a private transaction which does not require Division review or approval, or place the Division in a position of being a party or a party in interest to any future litigation concerning the agreeement.[1]/ As long as the transaction remains independent of the Division's review or approval, you may therefore represent a founder in the transaction without violating §5(a).

DATE AUTHORIZED: October 27, 1986

[1]/Your opinion request and the Commission's response is limited to the implementation of the founder sale provisions contained within the text. This opinion is not intended to authorize your representation of the founder in relation to other matters contained in the escrow agreement. The registration of the public offering may have involved several particular matters, other than the agreement, in which you officially participated. You may renew your opinion request with respect to your representation in relation to those particular matters. It should also be noted that §23(c) prohibits a former state employee from accepting employment which will require him to disclose confidential information which he has gained by reason of his official position and from disclosing or using confidential information ro further his personal interest.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-24

FACTS:

You are a member of the General Court. Outside of your legislative duties, you assist your family in managing a family farm. The farm, which was owned by your father, was placed in Trust upon his death. Under the terms of the Trust, you, your brother and sister are trustees and have certain rights to profits, if any, from the farm. The beneficiaries of the Trust are the grandchildren and the assets of the Trust will be distributed to the grandchildren following the deaths of the three trustees. You do not receive compensation for your trustee services.

Your family is interested in selling its development rights in the farm to the Department of Food and Agriculture (DFA) pursuant to the Agricultural Preservation Restriction Program. See, G.L. c. 132A, §11. Under the Program, 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 permanent and runs with the land; it can be removed only by a two-thirds vote of the General Court.

Your family has asked you to approach DFA to ascertain DFA's interest in purchasing the development rights to the farm. Your activities on behalf of the farm would be uncompensated.

QUESTIONS:

1. Does G.L. c. 268A permit you to act as your family's agent in its dealings with DFA.
2. If DFA agrees to purchase your family's development rights to the farm, will you be placed in violation of G.L. c. 268A, §7.
3. What limitation does G.L. c. 268A place on your official activities as a member of the General Court with respect to the DFA.

ANSWERS:

1. Yes.
2. No.
3. You will be subject to certain limitations described below.

DISCUSSION:

As a member of the General Court, you are a state employee for purposes of G.L. c. 268A and are subject to certain restrictions in both your official and private capacities.

1. Private Dealings with DFA

Section 4 of G.L. c. 268A places limitations on the outside activities of state employees whenever the state has a stake in those matters. Specifically, under §4, a state employee may not receive compensation from, or act as agent for a non-state party in relation to any application, contract or other particular matter in which a state agency is a party or has a direct and substantial interest.

As applied to members of the General Court, §4 is less restrictive and applies only to certain paid appearances before state agencies. See, EC-COI-86-15; 86-12. Inasmuch as your appearance on behalf of your family will be on an unpaid basis, §4 will not restrict your private dealings with DFA.

2. Financial Interest in a State Contract

Under §7, a state employee, including a member of the General Court, is subject to substantial limitations on acquiring a financial interest in a contract made by a state agency. For example, in EC-COI-84-51, the Commission concluded that DFA's purchase of development rights under the APR Program constitutes a contract for §7 purposes and that a DFA employee who would be the direct recipient of the contract funds would have a financial interest in a DFA contract in violation of §7. By similar reasoning, if you have a financial interest, direct or indirect, in the DFA development rights contract with the Trust, you will also violate §7.

Based upon the information you have provided, including the trust documents, it appears that you will not have a financial interest in any contract development rights made by the Trust; the contract funds will be treated as the assets of the beneficiaries (grandchildren) to be distributed to them following the deaths of the trustees. Therefore, as long as you do not have a financial interest in the assets of the Trust, including the DFA contract, you will not violate §7. Because you may be eligible for certain rights to profits, if any, from the operation of the farm, the profits which you receive may not be calculated on a base which includes the DFA contract. Stated in another way, to avoid violating §7, you must forego any profits which are attributable to the DFA contract.

3. Limitations on Your Official Activities

In view of the likelihood that you will have private dealings with DFA, G.L. c. 268A establishes guidelines and limitations on your official dealings with DFA. In particular, §6 requires your abstention from any "particular matter"[1/] in which you or your immediate family, or the Trust has a financial interest. Issues under §6 will arise if DFA grants an APR contract to the Trust and you are called upon to vote as a legislator on the line item in the annual appropriation bill which funds the APR contract. In such a case, the line item would be treated as a particular matter, see EC-COI-82-9, and you would be required to abstain from participation in the matter.

Under §23(b)(2), a state employee may not use his official position to secure unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. For example, a member of the General Court was found to have violated this provision by pressuring a state agency to award a contract to his family's company, **Craven v. State Ethics Commission**, 390 Mass. 191 (1983). While the principles of §23(b)(2) are largely self-explanatory, you should keep these principles in mind whenever you have dealings with DFA.[2/]

DATE AUTHORIZED: October 6, 1986

[1/]"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[2/]Absent a formal request, we cannot provide an advisory opinion as to the conduct of DFA officials who would be reviewing your APR request. In general, DFA officials should be aware that the §23(b)(2) restrictions apply to them and that they may not grant to the Trust an unwarranted privilege of substantial value. We are available to provide more detailed guidance to them if they so desire.

CONFLICT OF INTEREST OPINION NO. EC-COI-86-25

FACTS:

You are one of eleven elected members of the X City Council. The Council, together with the Mayor and School Committee, will be meeting in joint convention on November 18, 1986 to select an appointee from among four applicants to fill a vacancy on the School Committee. Outside of your City Council duties, you are a full-time employee of the Massachusetts Teachers Association (MTA). One of the MTA's local affiliates, the X Education Association (XEA), represents a collective bargaining unit of teachers and nurses within the X School System. Pursuant to the affiliation arrangement between the XEA and MTA, each member of the bargaining unit pays annual dues or agency service fees to the MTA.

The collective bargaining agreement between the School Committee and XEA expired on August 31,

1986, and the parties are currently in mediation over the terms of a successor agreement. Among the provisions which may be included in the successor agreement are salaries for bargaining unit members and continuation of agency service fees and dues deductions payable to the MTA.

QUESTION:

In view of your employment by the MTA, does G.L. c. 268A permit your participation in the November 18, 1986 joint convention to fill a School Committee vacancy.

ANSWER:

No.

DISCUSSION:

Section 19 of G.L. c. 268A prohibits you from participating[1]/ in any particular matter[2]/ in which a business organization which employs you has a financial interest. The selection of an appointee to fill a School Committee vacancy is a "particular matter" in which you would "participate" if you discussed or voted on the vacancy selection at the November 18, 1986 joint convention. Whether §19 requires your abstention depends on whether the MTA, a business organization which employs you, has a financial interest in the selection. Based upon the information you have provided, we conclude that the MTA has a financial interest in the selection.

The new appointee to the School Committee will necessarily become involved in the negotiation and approval of a successor collective bargaining agreement. The MTA has a reasonably foreseeable financial interest in the selection because the new appointee will decide whether to approve provisions directly affecting the MTA's financial interests. The inclusion, for example, of an agency service fee or dues checkoff provision, has a direct financial impact on the MTA. Similarly, to the extent that the approval of a salary increase may result in insufficient resources to fund other bargaining unit positions, any resulting loss of bargaining unit members will result in fewer deductions or agency service fees being paid to the MTA.

For the purposes of §19, whether a financial interest is sufficiently foreseeable depends on the facts of each case. EC-COI-84-98. For example, if the appointee were to serve during a one-year period in which there were an existing collective bargaining agreement in place, then it would be unlikely that the appointee would be involved in deciding matters affecting the MTA's financial interest sufficient to warrant abstention under §19. The facts which you have provided, however, present a different picture because your employer, the MTA, will be affected financially from the resolution of the contract dispute in which the appointee will participate.

DATE AUTHORIZED: November 17, 1986

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

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

COMMISSION ADVISORY NO. 9

STATE EMPLOYEE STOCK OWNERSHIP

Through requests for advisory opinions and a review of annual statements of financial interest, the Commission has become aware that many state employees own stock in corporations which contract with state agencies. State employees are frequently uncertain as to whether their stock ownership is permissible and, if so, what limitations their stock ownership will place on their official actions as state employees. The purpose of this advisory is to review the principles of G.L. c. 268A, the conflict of interest law, which apply to state employees who own stock in corporations which contract with state agencies.

In general, most state employees may own stock in corporations which contract with the commonwealth or a state agency. The starting point is G.L. c. 268A, §7, which prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency. By owning stock in a corporation which contracts with the state, a state employee necessarily has a financial interest in the corporation's contract with the state, and is therefore subject to the limitations of G.L. c. 268A, §7.

The prohibition is not absolute, however, and is tempered by several exceptions. One such exception depends on the percentage of the corporation's stock owned by the state employee. If a state employee owns less than one percent of the stock of a corporation which contracts with the state, the prohibition of G.L. c. 268A, §7 does not apply. For example, a state employee who owns ten shares of IBM stock will not be in violation of §7 due to IBM's contracts with the state, because the ten shares represent less than one percent of IBM stock.

If the state employee's stock ownership represents one percent or more of the corporations's stock, then the state employee will be subject to the prohibition of §7 if the corporation contracts with the state. In such circumstances, the employee must exercise within thirty days one of the following four options:

1. The employee may reduce his ownership interest in the corporation to less than one percent. The divesture must be made in good faith. For example, an employee would not satisfy §7 by transferring the excess stock to a family member or engaging in a transaction which would permit the employee to retain his control over the stock.

2. The corporation may terminate its contract with the state, thereby eliminating the prohibited financial interest in a state contract.

3. The employee may resign from state employment, thereby removing himself from the contractual financial interest restrictions of §7.

4. The employee may qualify for an exemption to §7. For a full-time state employee who is not a legislator, the most likely exception, §7(¶b), would apply if the following conditions are satisfied:

a. the employee does not work for or regulate the activities of the state agency which contracts with the corporation;
b. the contract is made after competitive bidding, and
c. the employee files with the Commission a disclosure of the financial interests of himself and his family in the contract by virtue of their stock ownership.

If a legislator owns more than one percent of the stock of a corporation which contracts with the state, the legislator is eligible for a separate exemption, G.L. c. 268A, §7(¶c). As long as the contract was made through competitive bidding and the ownership interest does not exceed ten percent of the corporation, a legislator will be exempt from §7 after filing a disclosure with the Commission of his and his family's interests in the contract.

Assuming that state employee's stock ownership is permissible, the ownership interest will place certain limitations on the employee's official duties as a state employee. The principle limitation appears in G.L. c. 268A, §6 and requires abstention from certain actions. Specifically, a state employee who owns stock in a corporation must refrain from participating as a state employee in any particular matter in which the corporation has a financial interest, because, as a stockholder, the employee's financial interest will be affected. For example, G.L. c. 268A, §6 would apply to a state employee who owns stock in a corporation whose product the employee is assigned to evaluate. In addition to abstention, the employee must submit to both his appointing official and the Commission a written disclosure of his and his family's financial interest in the matter. The employee must continue to refrain from further participation in the matter unless and until his appointing official makes a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which are expected from the employee. This determination must be in writing and filed with the Commission in order to be effective.

State employees are also subject to the standards of conduct which appear in G.L. c. 268A, §23. These standards are intended to prevent situations which may create the appearance of conflicts of interests. In particular, a state employee may not use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others nor may he improperly use any confidential information acquired in the course of his official duties as a state employee. Potential violations of these provisions would arise, for example, if a state employee purchased stock based on confidential information about the company which he had access to and acquired as a state employee. On the other hand, a stock purchase based on information available to the public would involve no such misuse of confidential or inside information and therefore would not implicate G.L. c. 268A, §23.

To summarize, stock ownership in companies which contract with the state will not ordinarily pose problems for state employees under the conflict of interest law. Compliance with the law does require state employees to monitor the extent of their ownership interest in corporations which contract with the state. Employees should also monitor their assignments as state employees to avoid handling matters which affect the corporation's financial interest.

DATE AUTHORIZED: February 25, 1986

COMMISSION ADVISORY NO. 10

CHIEFS OF POLICE DOING PRIVATELY PAID DETAILS

The Commission has received a number of inquiries from small towns concerning how their chiefs of police might work privately paid details in conformance with the conflict of interest law, G.L. c. 268A. The following guidelines are offered to Boards of Selectmen and City Councils[1/] to aid them in restructuring a chief's employment arrangements so as to permit such outside work without violating the conflict law. Any such restructured employment arrangement should be submitted to the Commission to verify that the conflict of interest issues have been adequately addressed by the terms and conditions actually decided upon by the selectmen.[2/]

I. Background

Police detail work is performed in a broad range of situations, most frequently involving traffic control at utility and road construction sites. Other examples in-

clude crowd control, cash escort service for businesses and security work. Police officers perform detail work on other than their normal duty shift. These officers are, however, still serving as police officers when they provide these services and are answerable to the police chief for their conduct. The municipality bills the private entity who is being serviced. The municipality, after substracting an administrative fee, pays the officers. All of this is done in accordance with G.L. c. 44, §53C.

The primary conflict of interest issues raised by police chiefs working privately paid details, and being paid pursuant to G.L. c. 44 §53C, arise under §19 and §23 of G.L. c. 268A.[3]/ The position of chief of police is generally considered a twenty-four-hour-a-day job, carrying with it the ultimate responsibility for the operation and activities of the police department. Because detail work is a police function, and officers performing detail work have all the law enforcement authority they normally possess as police officers, detail work falls within the chief's overall responsibility. If a municipality has not restructured the chief's compensation package to allow for extra pay for detail work, then the chief's salary is presumably payment for all of his duties including detail work. Therefore, if he were to receive additional public compensation for acts for which he is already being paid, he would be violating §23 by securing an unwarranted privilege.[4]/ In addition, by deciding which details to assign himself to work, the chief would be participating in a particular matter in which he has a financial interest in violation of §19.[5]/

II. Considerations in Restructuring the Chief's Employment Contract

A chief of police's employment arrangement can be restructured by the Board of Selectmen to avoid these conflict of interest issues. By acknowledging in writing that the chief's compensation shall consist of a base salary plus certain additional compensation for detail work, the Board of Selectmen will negate the potential §23 allegation that a chief's receipt of detail compensation constitutes dual compensation.[6]/

The conflict issues under §19 require closer scrutiny. Currently, a police chief falls within the §19 prohibition against a municipal employee participating in a matter in which he has a financial interest whenever he assigns himself to work a private detail. An exemption procedure contained in §19 provides a workable alternative. Section 19(b) states, in pertinent part, that it shall not be a violation of this section:

> . . . if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.

As the appointing authority of the police chief, it is the Board of Selectmen which must make such a §19 determination. The Board's starting point should be to decide whether they are willing to grant a blanket §19 exemption concerning detail work or whether they will require the chief to seek such a determination on a detail-by-detail basis. If a blanket exemption is chosen, the Board should set out terms and conditions, including:

1. a maximum dollar amount the chief can earn as detail compensation annually, or alternatively, a maximum number of hours the chief can work details annually;
2. whether detail work can be performed during "normal" (i.e. weekday) working hours;
3. procedures to ensure that the chief does not assign himself either the "choice" details (at the expense of other members of the department) or regular, exclusive details with a particular private entity; and
4. procedures for when an emergency arises while the chief is doing detail work, e.g.
   (a) requiring the chief to make arrangements with the entity for which he is working the detail which allows him to leave if he is needed elsewhere, or
   (b) establishing a procedure whereby the chief will request that the police department of a neighboring town or the state police cover the matter.

Selectmen might well conclude that it would be preferable to approve such details on an individual basis. While the Commission does not encourage the practice of granting blanket exemptions, Selectmen may exercise this option provided that the terms and conditions are clearly established in writing.

Finally, it should be emphasized that the purpose of a Commission review of a Board's restructuring of a police chief's employment arrangement is not to pass judgement on a Board's decisions, but rather to ensure that a G.L. c. 268A issue has not been inadvertently left unaddressed. As long as the Board takes the above-noted considerations into account, the applicable §19 and §23 conflicts will be remedied. Board members should feel free to contact Commission staff with any questions they may have.

DATE ISSUED: June 26, 1986

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[4]/For ease of reading, this advisory is addressed to the situation of town police chiefs. For application to city chiefs, simply replace "Board of Selectmen" and "selectmen" with "City Council" and "councillors" respectively.

[2]/City Councils should also check their City Charters and ordinances, and Boards of Selectmen their by-laws and regulations, to insure that any such negotiated contracts are in conformance with applicable local provisions.

[3]/Prior Commission Advisory Opinions dealing with detail payment under G.L. c. 44 §53C (specifically EC-COI 85-64, 85-65, and 85-83)have analyzed the potential conflict under G.L. c. 268A §3(b). In the future, however, any opinions concerning this subject area will more properly focus on §19 and §23.

[4]/Section 23(b)(2) states that no municipal employee shall "use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similiarly situated individuals."

[5]/Section 19 prohibits a municipal employee from "participat[ing] as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest."

[6]/It should be noted that if the chief were to be paid directly by private parties for detail work (as opposed to through the statutory compensation mechanism outlined in G.L. c. 44 §53), he would violate §3 in that he would be receiving something of substantial value for himself for or because of an act within his official responsibility.

COMMISSION ADVISORY NO. 11
NEPOTISM

INTRODUCTION

The term "nepotism" originates from the Latin word for nephew. It originally referred to favoritism to a nephew in granting official positions. Nepotism is now commonly understood to include favoritism of any sort afforded any relative.

The term nepotism does not appear in the conflict of interest law, and for years it was unclear whether the conflict law prohibited nepotism. The Special Commission which initially drafted the law in 1962 indicated that the criminal sections of the law were not intended to apply to nepotism. In August 1983, however, the Supreme Judicial Court concluded in **Sciuto v. City of Lawrence**, 389 Mass. 929 (1983), that the language of the statute clearly prohibited public officials from acting on matters in which an immediate family member had a financial interest. The **Sciuto** case involved a claim by two city police captains of the Lawrence Police Department that the appointment of Patrick Schiavone to police chief was invalid because two prior promotions approved by his brother, the director of public safety, had violated the conflict of interest law. The Court agreed that these promotions violated G.L. c. 268A, §19 and returned the case to the lower court to decide whether any further action should be taken regarding the promotions. The lower court ordered the promotions rescinded pursuant to §21 of c. 268A, and the brother was demoted three levels, losing his position as chief. Following the **Sciuto** decision, the State Ethics Commission began to enforce the conflict law in complaints alleging nepotism.

The purposes of this advisory are to outline the prohibitions against nepotism contained in the conflict of interest law and to explain the Commission's enforcement policy regarding nepotism violations.

NEPOTISM IS PROHIBITED

The conflict law prohibits elected and appointed public officials at the state, county, and municipal level from participating[1]/ in particular matters[2]/ in which their immediate family members have a financial interest. (See, G.L. c. 268A, §§6, 13 and 19 dealing with state, county, and local officials, respectively.) Immediate family is defined in the statute as "the employee and his spouse, and their parents, children, brothers and sisters." Thus, for example, an official's brother-in-law would be considered "immediate family" if he were the brother of the official's spouse but not if he were married to the official's sister.

In addition to these sections of the law, nepotism raises concerns under G.L. c. 268A, §23, which sets forth standards of conduct regulating all public employees. Essentially, Section 23 prohibits a public official from using his position to secure an unwarranted privilege of substantial value for himself or others, or from acting in a manner which gives the basis for the impression either that he is improperly influenced by another person, or that someone is unduly enjoying his favor because of kinship. Therefore, if a public official wishes to participate in a matter which affects the financial interest of a relative, even if that relative is not a member of his immediate family, (e.g. a cousin or a niece) he may not give preference to the relative because of the relationship, and he must be careful to avoid the appearance of favoritism based on kinship. This is done by publicly disclosing the relationship and following ordinary and accepted procedures without deviation.

The purpose of these provisions is to prevent potential conflicts or the appearance of impropriety that arise whenever a public official's personal loyalty to a family member competes with the public interest that objective decisions be made regarding public employment.

SPECIFIC ACTS THAT ARE PROHIBITED

A public official may not hire an immediate family member.[3]/ As stated above, the conflict law prohibits a public employee from participating in any particular matter in which a family member has a financial interest. The decision to hire is a particular matter in which an official is "personally and substantially" participating, and the family member has an obvious financial interest in the hiring decision.

Personal and substantial participation involves any significant involvement in the hiring process. For example, interviewing or creating a test for applicants, one of whom is a family member, would violate the law.

An official need not be the sole decision-maker to be prohibited from participating in the hiring decision. For example, an official cannot, as one member on a board, vote to hire his family member, regardless of the size of the board. Nor would it matter that there was little, if any, controversy among the board members

regarding the decision. A person can no more participate in making a vote of a 15 member board unanimous by casting the 15th vote than one can cast the deciding vote in an eight-to-seven vote.

It also makes no difference whether an official has unilateral authority over personnel decisions or whether he is one link in a bureaucratic chain of approvals. A typical example arises where a sub-committee conducts a search to fill a municipal position. The sub-committee's preferred list of candidates is then narrowed down by the full search committee and the candidate is ultimately chosen by a city council. A public official with a family member in the pool of candidates cannot participate in the sub-committee's search, the full committee's approval of a list of candidates, or the city council's final decision.[4]

In addition to hirings, any significant involvement in the reappointment, promotion, reclassification, demotion, or firing of an immediate family member is prohibited. A public official may not participate in a job performance evaluation of an immediate family member because such evaluations play a critical role in job retention, promotion, and other job related benefits of financial interest to the employee.

The Commission also views day-to-day active supervision as constituting personal and substantial participation.[5] The process by which employees are retained or fired, promoted or demoted, or granted or refused step increases is not merely a function of a formal personnel evaluation. Realistically, those decisions are based on the supervisor's cumulative impressions derived from his day-to-day supervision of the employee. Therefore, while there may be exceptions, day-to-day supervision of a family member is barred because it is an integral part of the evaluation process.

Determining a family member's salary is barred. The prohibition includes approving or authorizing discretionary salary increases such as annual step increases even though they may be thought of as "automatic".[6]

Finally, a subordinate may not advise or recommend to his employer a personnel decision in which the subordinate's immediate family member has a financial interest.[7]

DELEGATION

A public official is prohibited not only from participating in personnel decisions affecting his family member, but also from delegating the authority to a subordinate. Because the official is in a position to choose and influence the person most likely to favor his family member, the choice of who will make the decision is an important part of the overall hiring decision.[8]

DISCLOSURE AND AUTHORIZATION

Since a public official cannot participate in perso nel decisions affecting a relative, what action, if a should he take when faced with a potential nepoti situation? The answer depends on the position t official holds, because the conflict of interest law tre state and county officials differently depending whether they are elected or appointed. The law al treats local appointed officials differently from state a county appointed officials.

State and County Appointed Officials

For state and county appointed officials, the rule quite specific: if their duties would otherwise requi them to participate in a particular matter in whic family member has a financial interest, they must d close all of the relevant facts to their appointing auth ity and the Commission, and the appointing author must then decide whether to undertake the functi himself, assign it to someone else, or allow the offic to participate. If the appointing authority decides authorize the public official to participate, he must do explicitly in writing, and a copy of that authorizati must be submitted to the Commission.

Municipal Appointed Officials

In contrast, under the conflict law, municip officials may abstain from participating in the matt and thereby avoid any violation. They do not have disclose to anyone that they are abstaining. Alterr tively, they may seek the authorization from their a pointing authority to participate, but the authorizati must be granted in writing. Copies of the request a the authorization do not have to be filed with the Co mission but they must be available for public inspectic

Elected Officials

Because elected officials do not have an appointi authority, they cannot take advantage of the disclosu and authorization provisions available to appoint officials. There is no statutory mechanism which p mits their participation without violating the statu and, therefore, they must abstain from participation

ACTION BY SUBORDINATES

The one remaining issue is whether an elect official (or an appointed municipal official who choos not to seek an authorization to participate) may absta from the process entirely and have a subordinate hanc the hiring (or other personnel) decision. This situati is distinguishable from the delegation of a hiring de sion by an elected official. As indicated above, dele tion is prohibited. The question is whether the elect official may simply abstain and, without providing a direction, leave to the subordinate the decision to hi (or promote, etc.) the family member.

The question of whether the subordinate has the authority to perform the duty in place of his superior is not addressed by the conflict of interest law. The answer must be determined by interpreting the statute which creates the principal official's position, and, specifically, any language which might provide a mechanism permitting a subordinate to act following the "disability" (whether physical, mental, or otherwise, including a conflict of interest) of the principal official.

A review of many such statutes reveals no consistent rule indicating when such authority may be exercised by a subordinate. Accordingly, any response the Commission will give to a request for an opinion on how the conflict of interest law will apply where an elected official abstains and a subordinate seeks to hire will be conditioned on the official's obtaining an opinion as to the legality of the personnel action by the subordinate. State officials should request such an opinion from the attorney general; municipal employees from the town or corporation counsel; and county employees from the legal counsel for the county.[9]/

ENFORCEMENT POLICY

Until the Supreme Judicial Court concluded in August, 1983 that §§6, 13 and 19 prohibited nepotism, there was, in the Commission's view, legitimate uncertainty as to whether those sections did apply to nepotism conflicts.

In exercising its enforcement discretion, the Commission has, as a matter of fairness, given deference to this uncertainty when the primary violation, the hiring, has occurred prior to the 1983 Supreme Judicial Court decision. Thus, the Commission has resolved numerous nepotism violations involving hirings prior to August 1983 with confidential letters apprising the public official of the violation. Similarly, when the hiring has occurred prior to August 1983, but additional violations involving promotions or salary increases involving the same family member have occurred thereafter, the Commission, again as a matter of fairness,[10]/ has resolved these cases in the same confidential manner.

When the family member is still in the official's employ, the Commission has explained the conditions which must be met if the person is to remain an employee. If an appointed official is involved, he must inform his appointing authority and the appointing authority must decide how the situation should be resolved. If the official is elected, the Commission has sought to identify an independent "appointing authority" to make the same determination. For example, county commissioners have been designated to perform ongoing supervisory functions or make promotion decisions regarding an elected county official's immediate family member.[11]/ The Commission will generally follow this approach as to any nepotism violation which took place prior to the date of this advisory if the original hiring was before August 1983. These situations will be resolved with confidential letters.[12]/

The fairness considerations which dictate confidential resolutions of nepotism violations occurring prior to August 1983 are not present for violations occurring after that date. These will be handled, as are all other c. 268A violations, on a case-by-case basis within these general guidelines: The more serious nepotism violations e.g. hiring, promotions and substantial salary increases, will be resolved publicly with fines and, where appropriate, action seeking resignation or rescission of the personnel actions involved. Less serious violations may be appropriate for public resolution without a fine, or if sufficiently minor, with a confidential letter.

CONCLUSION

This advisory highlights the most common nepotism violations. An advisory cannot deal with every possible situation and indeed, may raise as many questions as it answers. The Commission encourages public officials and employees at all levels of government to seek advice from the Commission as to how the law applies to their own situations.

The Commission issues Commission Advisories periodically to interpret various provisions of the conflict of interest law. Advisories respond to issues which arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. Copies of this Advisory and other Advisories are available from the Commission office.

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[1]/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."

[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]/See, e.g., **In the Matter of Rita Walsh-Tomasini**, 1984 SEC 207 (school committee woman violated §19 by hiring her son as her staff assistant; resolved with a $1,000 fine and son resigning). **In the Matter of George Ripley**, 1986 SEC 307 (state Commissioner of Labor and Industries violated §6 by hiring two daughters; resolved by paying $2,000 fine and both daughters resigning).

[4]/See, generally **Graham v. McGrail**, 370 Mass. 133 (1976). As the Court advised, participation involves more than just voting, but includes any significant involvement in the discussion or other matters leading up to the vote. The Court suggested that generally the best course would be to leave the room when a matter involving a family member's financial interest arises.

[5]/Active supervision is distinguished from those situations where the public official has official responsibility for his family member as a public employee, but does not directly participate in dealing with his family member. A typical example would be where the head of a large agency oversees several divisions but delegates the supervision of each to a division chief, and the division chief supervises the family member.

[6]/By law, step increases may be withheld by a department head. See, G.L. c. 30, §46(c)(3), and c. 35, §54 for state and county employees, respectively.

[7]/This should be distinguished from the situation where someone in a different division in the same agency or someone outside of an agency gives a recommendation or reference regarding a candidate for a job. For example, a municipal planning board member who called a supervisor in the Department of Public Works to recommend a family member for a DPW job would not be participating personally and substantially in the hiring decision. Similarly, a state official may recommend some one to another state agency for a job if this is done without placing improper pressure on the state agency. Section 23 concerns could arise, however, if pressure is or appears to be exerted. Indeed, an outsider's recommendation can involve such substantial pressure on an agency as to be deemed personal and substantial participation by the outsider, thereby, violating §6. **In the Matter of James Craven**, 1980 SEC 17.

[8]/The Commission recognizes that this is a difficult issue, because a family member's financial interest may or may not be affected by the choice of who will make the decision. Nevertheless, because it is not practical to determine which delegations are proper and which are not, and because such delegations can play a critical role in the hiring process, the Commission has determined that any such delegations fall within the definition of personal and substantial participation.

[9]/Even in those instances where a law authorizes a subordinate to assume the hiring role, two significant issues arise under §23 of the conflict law. First, the subordinate may not use his position to secure an unwarranted privilege for the applicant, i.e. hire the family member because of his relationship rather than his qualifications. If the subordinate so hired an unqualified family member, he would violate §23(b)(2).

Secondly, where the subordinate hires his supervisor's family member and where the subordinate serves at the pleasure of his supervisor, the question inevitably arises whether the subordinate can realistically make an objective decision regarding the family member. It would seem difficult, or nearly impossible, to avoid the appearance of a lack of objectivity. Thus, a problem is created under §23(b)(3), which prohibits an official from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can unduly enjoy his favor in the performance of his official duties.

Under a 1986 amendment to §23(b)(3), any such conclusion will be deemed unreasonable if the subordinate discloses in writing to his appointing authority, or if no appointing authority exists (or, of course, if the appointing authority is the same person who was originally disqualified), discloses publicly that he is making a decision affecting his supervisor's immediate family member. Public disclosure is not defined in the conflict law, although the statute makes it clear that all c. 268A disclosures must be made in writing. In fulfilling its function to interpret the statute, the Commission has determined that for state and county officials, this written public disclosure should be made to the Commission, where such disclosure will be a matter of public record. For local officials, the disclosure should be made, again in writing, to the town clerk.

[10]/Typically those situations involved a family member who was hired years prior to 1983, who was promoted or received salary increases prior to 1983, and then received a promotion, salary increase, or was being supervised by the public official after 1983 as well.

[11]/In resolving such violations, the Commission will insist that ongoing personnel decisions be made by an independent appointing authority if one can be identified rather than allowing abstention and the assumption of those duties by a subordinate.

[12]/Especially egregious circumstances may require public resolution and a fine.