Massachusetts State Ethics Commission

Enforcement Actions And Advisory Opinions

1985

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ENFORCEMENT ACTIONS
ADVISORY OPINIONS
1985

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Colin Diver (Chairman)
Frances M. Burns
Andrea W. Gargiulo
Joseph I. Mulligan, Jr.
Constance M. Sweeney
Andrew B. Crane, Executive Director

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Mr. Emil N. Niro
87 Oak Street
Middleboro, MA 02346

RE: Public Enforcement Letter

Dear Mr. Niro:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that as Middleboro Inspector of Wires (a) you inspected your own private electrical work, and (b) you provided private electrical work to the town for compensation. The results of our investigation (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 determined that the public interest would better be served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to those facts.

By agreeing to this public letter as a resolution in this matter, you and the Commission are agreeing that there will be no formal action against you and further, that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. At all relevant times, you were the Middleboro Inspector of Wires and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. You own and operate the E. N. Niro Company, an electrical contracting business which has performed services for private customers in Middleboro.

3. As Inspector of Wires, for many years you have performed inspections and signed the necessary documentation for electrical work performed by the N. E. Niro Company in Middleboro. Since July of 1983, you have had Joseph Benton, the proposed assistant wire inspector, inspect all of the private work performed by your company, although you have continued to sign the necessary documentation because Mr. Benton does not yet have the authority to do so.

4. During the years 1982 and 1983, the E. N. Niro Company contracted with the town of Middleboro to perform certain electrical wiring services for a fee. The company performed seven different jobs, resulting in gross income of $2,985.51. While your company was performing work on a computer room in town hall in November, 1982, you were informed that a potential conflict of interest existed as a result of that work. Your company stopped work on that job immediately, pending an opinion of town counsel which was received on or about June 7, 1983. Your company has not performed a further work for the town.

II. The Conflict Law

As Inspector of Wires, 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 filling out and signing the necessary documentation, you participated as a municipal employee in a particular matter (the inspection of wiring done by the E. N. Niro Company) in which you had a financial interest.

Section 20 of G.L. c. 268A generally prohibits a municipal employee from having a financial interest in a contract with the same municipality which he serves as an employee. The facts set forth in this letter, if proven, would support a violation of that section because they suggest that your privately-owned company contracted with the town of Middleboro to provide certain services for a fee.

As previously stated, the Commission has decided that this case does not warrant further formal proceedings. As to the §20 issue, the Commission, in exercising its enforcement discretion, feels it is appropriate to resolve this matter with an advisory letter because: (1) there is no evidence that you knew or should have known that your financial interests in the questioned contracts were prohibited under §20; (2) those contracts were not with your own department;[1] and (3) certain exceptions in §20 may have exempted the financial interests from that section.[2]

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[1] Section 20 generally prohibits municipal employees from having a financial interest with their municipality because of a concern that the interest will have been obtained through the use of an "inside track" available to the employee. This concern is obviously heightened when the contract is with the employee's own department.

[2] As a part-time employee, you could have been designated a "special municipal employee." As a "special," you then could have had your financial interests in your contracts with the town exempted from the §20 prohibition. Because you would not have participated in or had official responsibility for the awarding of those contracts, all you would have to do to obtain the exemption is file a statement with the town clerk disclosing your financial interest in those contracts.

It is the §19 issue which is of greater concern to the Commission. This is because the Commission takes a very serious approach to conflicts of interests which involve public safety. The public has a right to be absolutely confident in the integrity and thoroughness of public safety inspections including, and especially, wiring inspections intended to prevent fires.

Where a public inspector inspects his own work, two questions arise: one, were the inspections honestly performed given the inspector's private interest in the outcome; and, two, 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 inspector similarly situated that the public's interest in safety cannot tolerate any inspector having a private financial interest in his inspections. In short, under no condition should an inspector inspect his own work.

Nevertheless, in chosing this public advisory letter as an appropriate resolution of this §19 issue, the Commission was mindful of the following mitigating factors:

1. the question of your inspecting your own private work was fully scrutinized by your employer, the Middleboro Board of Selectmen, in the summer of 1983. This scrutiny provided a certain amount of public education on this issue, and no doubt the public controversy created has had a deterrent effect on you and other similarly situated inspectors;

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

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

III. Disposition

Based on its review of this matter, the Commission has, therefore, determined that the sending of this letter should be sufficient to ensure your understanding of the law. This matter is now closed.

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

Edward C. Hoeg
3 Alden Street
Randolph, MA 02368

RE: Public Enforcement Letter

Dear Mr. Hoeg:

As you know the State Ethics Commission has conducted a preliminary inquiry into allegations that you, as a member and treasurer of the Randolph Housing Authority (RHA), participated in the decision to invest RHA funds at the Randolph Cooperative Bank, a bank where you were a director. The results of our investigation (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 determined that the public interest would better be served by bringing to your attention the facts revealed by our investigation and explaining the applicable provisions of law to those facts.

By agreeing to this public enforcement letter as a resolution in this matter, you and the Commission are agreeing that there will be no formal action against you and further, that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were an elected member and treasurer of the RHA and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. You are executive vice president, treasurer and a director of the Randolph Cooperative Bank.

3. Since 1972, the RHA has maintained savings accounts at the Randolph Cooperative Bank.

4. In February 1981, you participated in RHA board discussions concerning the possible purchase of $200,000 worth of term deposit certificates at the Randolph Cooperative Bank. You also participated in the final decision to purchase those certificates.

5. Since 1981, the RHA has reinvested in these term deposit certificates at the Randolph Cooperative Bank every six months, as they become due. You have participated in the discussions of the RHA board concerning the repurchase of these term deposit certificates at the Randolph Cooperative Bank.

6. In September 1982, you, as treasurer of the RHA, transferred $15,000 in RHA funds from another bank and

deposited them into one of the RHA's accounts at the Randolph Cooperative Bank. This deposit was later ratified by the full RHA board.

7. In March 1984, although you did not vote on the issue, you participated in the RHA discussions concerning the RHA's decision to affirm its investment policies at the Randolph Cooperative Bank.

II. The Conflict Law

As a housing authority member, you are a municipal employee for purposes of applying the conflict of interest law, G.L. c. 268A (See G.L. c. 121B, §7). Section 19 of the conflict law generally prohibits a municipal employee from participating as such in a particular matter in which to his knowledge, a business organization in which he serves as officer, director, trustee, partner or employee has a financial interest. "Participate" is defined by §1(j) of c. 268A to include personal and substantial participation through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

The facts set forth in this letter, if proven, would suggest a violation of §19 because they indicate that by transferring funds to the Randolph Cooperative Bank and by participating in decisions to purchase and to repurchase term certificates at that same bank, you participated as a municipal employee in particular matters in which your employer had a financial interest.

Section 23(¶2)(3) of the conflict law prohibits a municipal employee from giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. Again, the facts set forth above, if proven, would support a violation of this section because your simultaneous official involvement with the RHA investments and your position as director of the bank give a reasonable basis for the impression that the bank could improperly influence or unduly enjoy your favor as a housing authority member and treasurer.

As stated above, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings. This decision is based on the following factors:

1. three of the five members of the RHA board who approved and discussed investments were parties with no affiliation with the Randolph Cooperative Bank;

2. the other members of the RHA board appear to have been aware of your involvement with the Randolph Cooperative Bank;

3. the Randolph Cooperative Bank received no financial gain in 1981 when the RHA funds, already on deposit in a savings account with a substantial lower interest rate, were transferred to the term certificates paying a much higher rate of interest; and

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

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of the law. This matter is now closed.

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

Mr. James W. Brennan
1 DeCelle Drive
Randolph, MA 02368

RE: Public Enforcement Letter

Dear Mr. Brennan:

As you know the State Ethics Commission has conducted a preliminary inquiry into allegations that you, as a member of the Randolph Housing Authority (RHA), participated in the decision to invest RHA funds at the Randolph Cooperative Bank, a bank where you were a director. The results of our investigation (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 determined that the public interest would better be served by bringing to your attention the facts revealed by our investigation and explaining the applicable provisions of law.

By agreeing to this public enforcement letter as a resolution in this matter, you and the Commission are agreeing that there will be no formal action against you and further, that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were an elected member and chairman of the RHA and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. You were a director of the Randolph Cooperative Bank until June, 1981, when you became an honorary director.

3. Since 1972, the RHA has maintained savings accounts at the Randolph Cooperative Bank.

4. In February 1981, you participated in RHA board discussions concerning the possible purchase of $200,000 worth of term deposit certificates at the Randolph Cooperative Bank. You also participated in the final decision to purchase those certificates.

5. Since 1981, the RHA has reinvested in these term deposit certificates at the Randolph Cooperative Bank every six months, as they become due. You have participated in the discussions of the RHA board concerning the repurchase of these term deposit certificates at the Randolph Cooperative Bank.

6. In September 1982, you, as chairman of the RHA, transferred $15,000 in RHA funds from another bank and deposited them into one of the RHA's accounts at the Randolph Cooperative Bank. This deposit was later ratified by the full RHA board.

7. In March 1984, although you did not vote on the issue, you participated in the RHA discussions concerning the RHA's decision to affirm its investment policies at the Randolph Cooperative Bank.

II. The Conflict Law

As a housing authority member, you are a municipal employee for purposes of applying the conflict of interest law, G.L. c. 268A (See G.L. c. 121B, §7). Section 19 of the conflict law generally prohibits a municipal employee from participating as such in a particular matter in which to his knowledge, a business organization in which he serves as officer, director, trustee, partner or employee has a financial interest. "Participate" is defined by §1(j) of c. 268A to include personal and substantial participation through approval, disapproval, decisions, recommendation, the rendering of advice, investigation or otherwise.

The facts set forth in this letter, if proven would suggest a violation of §19 because they indicate that, by transferring funds to the Randolph Cooperative Bank and by participating in decisions to purchase and to repurchase term certificates at that same bank, you participated as a municipal employee in particular matters in which an organization for which you served as director had a financial interest.

Section 23(¶2)(3) of the conflict law prohibits a municipal employee from giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. Again, the facts set forth above, if proven, would support a violation of this section because your simultaneous official involvement with the RHA investments and your position as director of the bank give a reasonable basis for the impression that the bank could improperly influence or unduly enjoy your favor as a housing authority member.

As stated above, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings. This decision is based on the following factors:

1. three of the five members of the RHA board who approved and discussed investments were parties with no affiliation with the Randolph Cooperative Bank;

2. the other members of the RHA board appear to have been aware of your involvement with the Randolph Cooperative Bank;

3. the Randolph Cooperative Bank received no financial gain in 1981 when the RHA funds,already on deposit in a savings account with a substantial lower interest rate, were transferred to the term certificates paying a much higher rate of interest;

4. for most of the relevant period, you were an honorary director of the bank, a position which, while probably within the statutory meaning of director, nevertheless gave you a less significant private tie with the bank; and

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

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of the law. This matter is now closed.

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

STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 262

IN THE MATTER

OF

MANUEL F. SPENCER

Appearances:

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

Harvey B. Heafitz, Esq., Counsel for Respondent Manuel F. Spencer

Commissioners:

Diver, Ch., Brickman, Burns, Mulligan

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner initiated these adjudicatory proceedings on July 26, 1984 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR §1.01(5)(a). The Order alleged that the Respondent, Manuel F. Spencer, a sewer inspector with the Town of Barnstable Department of Public Works (BDPW), had violated G.L. c. 268A, §23(¶2)(2) and (3) in connection with the installation of a new sewer main. Specifically, Mr. Spencer was alleged to have violated §23(¶2)(2) by handing out his son's construction company business cards to Town homeowners when he was responding to their requests for information about sewer hook-ups between the homeowner's property and the new sewer main's lateral connections. The §23(¶2)(3) violation was based on an allegation that Mr. Spencer had approached the general contractor on the job regarding using his son's construction company to perform the installation of the lateral connections.

Mr. Spencer's Answer admitted some of the factual allegations, denied others, and denied any violation of the aforementioned provisions. The Answer raised the jurisdictional issue of whether Mr. Spencer was a municipal employee within the meaning of that term as defined in G.L. c. 268A, §1(g), but this issue was not thereafter pursued by Mr. Spencer.

An adjudicatory hearing was held on October 9, 1984 before Commissioner Colin Diver, a duly designated presiding officer. See G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral arguments before the Commission on December 20, 1984. In rendering this Decision and Order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. FINDINGS OF FACT

1. In August 1982 the BDPW contracted with the QRS Corporation (QRS) to install a sewerage drainage system in the Town. Construction began on or about November 19, 1982 and was shut down for the winter on December 23, 1982. Work resumed in March 1983 and was completed in June 1983.

2 In the fall of 1982, Mr. Spencer was hired by the BDPW to inspect QRS's work, including the work of its subcontractors. As inspector it was Mr. Spencer's job to ensure that all sewer construction was done properly. If the work was not done properly, the contractor or subcontractor would have to redo the work.

3. Mr. Spencer worked as the inspector on the job until it was shut down for the winter. He did not work for the BDPW thereafter.

4. In addition to inspecting the work of QRS and its subcontractors, Mr. Spencer's duties required him to respond to questions and complaints from homeowners regarding the project, including questions about the installation of sewer hook-ups from the homeowners's property lines to the lateral connections. Each homeowner was responsible for his or her own hook-up.

5. On at least fifteen occasions when visiting homeowners, Mr. Spencer gave them his son's business card when he was questioned regarding contractors who could perform the installation work.

6. On at least some of these occasions Mr. Spencer also gave the homeowners names of other contractors.

7. In November 1982, QRS hired Craig Medeiros and Son Contractors (Medeiros) as subcontractor to do the lateral connections from the sewer main to the property line of each homeowner along the route of the sewer main.

8. Shortly after Medeiros began work on the laterals, both QRS's superintendent, Ron Pacella, and Mr. Spencer became dissatisfied with the quality of Medeiros' work and the amount of time it was taking him to do it. Mr. Spencer and Mr. Pacella discussed this dissatisfaction with each other.

9. Mr. Spencer's son Jeffrey is the president of a construction corporation, JJS Contractors, Inc.

10. At some point in December 1982 Mr. Spencer and Mr. Pacella discussed the fact that Mr. Spencer's son was in the construction business. In a subsequent conversation, Mr. Spencer asked Mr. Pacella if he would consider putting his son's company on the job to perform the lateral installations. There was also conversation regarding Mr. Spencer's son's availability and capability of doing the work on the lateral connections.

11. When the sewer project reopened in March 1983 after the winter shut-down, Mr. Spencer's son's company contracted with QRS to replace Medeiros and thereafter completed the work on the laterals.

III. DECISION

For the reasons stated below, the Commission concludes that Mr. Spencer violated G.L. c. 268A, §23(¶2)(2) and (3).

A. Section 23(¶2)(2)

As an independent contractor hired by the BDPW to serve as sewer inspector, Mr. Spencer was a "municipal employee" as defined in G.L. c. 268A, §1(g)[1] during all relevant times. As such he was subject to the provisions of G.L. c. 268A. Section 23(¶2)(2) prohibits a municipal employee from "us[ing] or attempt[ing] to use his official position to secure unwarranted privileges or exemptions for himself or others." In Mr. Spencer's case the handing out of his son's business cards to homeowners in the course of performing his official duties in effect attached the endorsement of the BDPW and the Town to his son's business. Such an endorsement constitutes an unwarranted privilege. See EC-COI-84-127. Mr. Spencer admitted in his answer that on occasion he had handed out his son's card although he denied having done so on fifteen occasions. The only testimony on this point came from James Sullivan, Director of Investigations for the Petitioner. The basis of his testimony was an interview he had conducted with Mr. Spencer in which Mr. Spencer told him he had given his son's card to fifteen or twenty homeowners. We find Mr. Sullivan's testimony credible. Since Mr. Spencer did not take the stand there is no competing evidence on this point. Moreover, as a practical matter, the exact number of times the card was handed out is irrelevant. The parties agree that it happened on more than one occasion, and that is sufficient for purposes of finding a violation.

The fact that Mr. Spencer mentioned the names of other contractors at the same time he gave out his son's card does not alter our conclusion. Giving out a business card goes substantially beyond simply giving out a name. This is particularly true when a personal interest such as a family relationship is involved. This is not to say that public employees may never privately recommend names of qualified individuals without violating §23(¶2)(2). What distinguishes Mr. Spencer's conduct is that, by handing out his son's card during official BDPW visits to homeowners in relation to the sewer hook-ups, he was lending the endorsement of the BDPW to his son's business. We therefore find that Mr. Spencer's conduct violated G.L. c. 268A, §23 (¶2)(2).

B. Section 23(¶2)(3)

General Laws c. 268A, §23(¶2)(3) prohibits a municipal employee from "by his conduct [giving] reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties..." A major purpose of §23(¶2) is "to avoid situations where employees engage in conduct which raises questions about the credibility and impartiality of their work as public employees. The Commission has consistently applied the [§23(¶2)(3)] prohibitions whenever public employees have had private financial dealings with the same parties with whom they deal as public employees."[2] Commission Advisory 83-1. The record clearly demonstrates that there was conversation between Mr. Spencer and Mr. Pacella about putting Mr. Spencer's son on the sewer project as a subcontractor. It is also clear that in his official position Mr. Spencer had significant power over Mr. Pacella and QRS. Thus, even if Mr. Pacella, rather than Mr. Spencer, had initiated the conversations about using Mr. Spencer's son, the fact that there were discussions on the subject which Mr. Spencer made no effort to avoid is sufficient to give the "reasonable basis" called for in §23 (¶2)(3). This is particularly true in light of the fact that when the project reopened in the spring of 1983 Mr. Spencer's son did perform the work on the laterals. The yardstick by which "reasonable basis" is

[1] G.L. c. 268A, §1(g) 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, 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.

[2] See, e.g., In The Matter of William L. Bagni, Sr., 1981 Ethics Commission 30 (state inspector violated §23 (¶2)(3) by repeatedly soliciting private work from businesses over which he has official responsibility); In The Matter of Louis L. Logan, 1981 Ethics Commission 40 (state employee violates §23(¶2)(3) by advancing his personal funds to a company while the company is applying for a large loan which the employee will review in his state position).

measured is not what Mr. Pacella actually thought, but rather what reasonable impression has been created by the overlap of public and private dealings.

The Commission has recognized that there might be cases where it is unrealistic or impossible for public employees to avoid private dealings with the same individuals with whom they deal in their official capacity. In thosesituations, a public employee has a duty to take affirmative steps to eliminate or at least minimize the impression of favoritism, for example by disclosing the situation to an appointing official. See Commission Advisory 83-1; EC-COI-83-25. Failure to take such steps creates a reasonable basis for the impression that a private party will unduly enjoy the public employee's favor. In **The Matters of Frank Wallen and John Cardelli**, 1984 Ethics Commission 197. Mr. Spencer could have avoided problems under §23(¶2)(3) by disclosing his conversations with Mr. Pacella to his appointing officials. If he had, the officials could have taken responsibility for overseeing the potential conflict of interest and for determining how the credibility and impartiality of the BDPW could be maintained.

The fact that there is no evidence of actual favoritism by Mr. Spencer on QRS's behalf does not alter the result. We have consistently held that §23(¶2)(3) does not require such a showing. See Wallen, supra. The §23 prohibition is intended to prevent more serious situations from occurring, and more serious questions from being raised. Accordingly, we find that Mr. Spencer's conduct violated G.L. c. 268A, §23(¶2)(3).

C. Sanction

In determining an appropriate sanction it has been the Commission's policy to take mitigating circumstances into account. See e.g. **Logan**, supra; **The Matter of William G. McLean**, 1982 Ethics Commission 75. We do so here.

In connection with the §23(¶2)(2) violation the Commission takes note of the following mitigating circumstances. First, there was evidence that on occasion Mr. Spencer gave homeowners the names of other contractors in addition to his son. Although the crux of the violation is that he actually handed out his son's business card in the course of his official duties, the effect of the impression is somewhat mitigated by the fact that he did give other names. Second, the BDPW itself should have anticipated that, in the course of the sewer project, homeowners would request information as to who could perform the hook-up work for them. Thus, it should have had a policy for employees in Mr. Spencer's position to follow. For example, it could have put together a comprehensive list of local contractors which could have been given to the homeowners who then could make their own arrangements. Without condoning Mr. Spencer's actions, we feel that the absence of such an official policy contributed to the situation in which Mr. Spencer found himself. Finally, there was no evidence of unjust enrichment either to Mr. Spencer or his son as a result of Mr. Spencer's conduct. We therefore believe that a finding of a violation of §23 (¶2)(2) is a sufficient sanction in this situation, and no monetary penalty need be imposed.

There are mitigating circumstances in connection with the §23(¶2)(3) violation as well. First, although Mr. Spencer's conduct in discussing the hiring of his son with Mr. Pacella clearly constitutes a §23(¶2)(3) violation, it is comparable in degree to the conduct which the Commission recently reviewed **In The Matter of John J. Rosario**, 1984 Ethics Commission 205 and assessed no penalty for. Although Mr. Spencer should have recognized the inherent impropriety of such conversation and taken steps to minimize any improper impression, the circumstances surrounding the conversations were such that it may have been difficult for him to have avoided them entirely. Second, although Mr. Spencer's son ultimately performed the work on the lateral connections, the evidence indicates that he only did so after submitting acceptable estimates and satisfying the contractor he was capable of performing the job. No evidence of public harm was presented. We therefore believe that a finding of a violation of §23(¶2)(3) is a sufficient sanction under these circumstances.

DATE: January 22, 1985

Robert Burger
41 Fernwood Drive
Hampden, MA 01036

RE: Public Enforcement Letter

Dear Mr. Burger:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as a Hampden selectman, you may have participated in a particular matter in which your private employer, Massachusetts Mutual Life Insurance Company (Mass Mutual) had a financial interest. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. However, in view of certain mitigating circumstances (also discussed below), the Commission does not feel that further proceedings are warranted. Rather, the Commission has determined that the public interest would

better be served by bringing to your attention the facts revealed by our investigation and explaining the applicable provisions of law, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were a town of Hampden selectman, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. At all relevant times, in addition to being a Hampden selectman, you were director of fiscal operations for Mass Mutual.

3. In the summer of 1984, the Hampden Board of Selectmen (Board) was approached by agents of Mass Mutual to establish a payroll deduction plan for insurance for Town employees. The Board was generally amenable to the concept but wanted to see what other companies had to offer by way of such a plan.

4. The Board solicited and received six to seven proposals, one of which was from your private employer, Mass Mutual.

5. Because you are a chartered life underwriter with substantial expertise in the field of insurance, the other members of the Board asked you to evaluate the proposals and draft a synopsis of each one.

6. At the time that you were asked to review and evaluate the proposals by the other members of the Board, both of those other members knew that you were employed by one of the candidates.

7. You evaluated the proposals, drew up a synopsis of each one, and suggested that the Board could select one of two proposals, one of which was from Mass Mutual. At the time you made that recommendation, you indicated your intention to abstain from voting on the matter because you were privately employed by one of the candidates.

8. The other two Board members voted to accept Mass Mutual's proposal. You did not participate in the vote.

II. The Conflict Law

Section 19 of G.L. c. 268A prohibits a municipal employee from participating in a particular matter in which his employer has a financial interest. The facts as set forth in this letter, if proven, would suggest that you violated §19 because they indicate that you participated in a particular matter in which your employer, Mass Mutual, had a financial interest. The particular matter was the selection of an insurance company to provide insurance for Town employees through a payroll deduction plan. You participated in this matter by reviewing and evaluating the proposals submitted, and by recommending two of the proposals for final consideration.

Assuming the selectmen requested you to take these actions knowing that Mass Mutual was your employer, that does not affect the conclusion that you violated §19.[1] As you may know, an appointed municipal employee may participate in a particular matter in which he, or certain other persons connected to him such as his employer has a financial interest if he first advises his appointing authority of the nature of the particular matter and the financial interest, and receives in advance from the appointing authority a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services he (the employee) will be providing. G.L. c. 268A, §19(b)(2).

The legislature did not, however, provide a mechanism by which elected officials may disclose their financial interest in order to participate. Presumably lawmakers did not believe that disclosure, either to the public at large or to fellow board members, would be sufficient to prevent improper mixing of public and private interests. Voters' memories tend to fade. Fellow board members, especially on small boards and where reelection of the same members is common, could become too tolerant of each other's potential conflicts of interests. For the same reasons, it makes no difference that the other selectmen asked you to participate. Compare, for example, §20 which prohibits selectmen from being appointed to another town position during their term of office. Indeed, under §20, former selectmen are not eligible for such appointments for six months.

The point is that the Commission views a §19 violation of this kind as serious, and not just technical. That is why it directed the staff to resolve the matter publicly rather than privately. Nevertheless, the fact that you had unique insurance expertise among the Board members, that the Board members asked you to participate knowing you were employed by one of the candidates, and that you abstained when the final selection was made, were all considered as mitigating factors in deciding that a public enforcement letter would be an appropriate

[1] Indeed were those factors not present here, the Commission, assuming the facts were proven or admitted, would have almost certainly resolved this matter by imposing a substantial fine.

resolution rather than a formal adjudicatory proceeding and possible imposition of a fine.

III. Disposition

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY DOCKET NO. 278

IN THE MATTER

OF

PAUL ROMEO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Paul Romeo (Mr. Romeo) pursuant to Section II of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in superior court pursuant to G.L. c. 268B, §4(d).

On September 25, 1984, the Commission initiated a preliminary inquiry, pursuant to the conflict of interest law, G.L. c. 268A, involving Mr. Romeo, treasurer and tax collector of the town of Ashland. The Commission concluded its inquiry and on December 20, 1984 found reasonable cause to believe that Mr. Romeo violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Romeo is the treasurer and tax collector for the town of Ashland, and has held this elected office since 1978. This is a part-time position, with an annual salary of $5,100 per year. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. As treasurer and tax collector, Mr. Romeo is responsible for the collection of real estate taxes owed to the town of Ashland.

3. Due to financial difficulties, Mr. Romeo failed to make timely payments of real estate taxes he owed to the town of Ashland for the years 1980 through 1983. The taxes due for these years on Mr. Romeo's residence and commercial properties in the town amounted to $23,852 for 1980, $27,392 for 1981, $18,353 for 1982 and $22,171 for 1983, for a total amount of $91,768 in taxes, exclusive of interest. Mr. Romeo's unpaid taxes accounted for approximately 29 percent of the total real estate taxes of $315,433 owed to the town for the years 1980-1983.

4. Mr. Romeo sent out timely demand notices to all delinquent taxpayers (including himself) for the years 1980-1983. To collect these taxes he followed these demand notices with telephone calls or other informal contacts with delinquent taxpayers and succeeded in achieving a good collection rate of 95-98 percent for these years.

5. Pursuant to G.L. c. 60, §37, unpaid property taxes are a lien upon the real estate for a period of three years from October 1st of the year of assessment. Beyond that period, the town may collect from the taxpayer personally, but without the security of any lien on the land.[1] The generally preferablemethod of tax collection is for the town to take title to the land. Pursuant to G.L. c. 60, §53, tax titles may be filed (with proper notice) whenever a tax is not paid within 14 days of demand. Up until 1978, the town of Ashland had a practice of filing tax titles when taxes were approximately three years overdue. Since 1978, the town has not made use of this procedure. As tax collector, Mr. Romeo was responsible for initiating tax title proceedings for the town.

6. Pursuant to G.L. c. 58, §57, delinquent taxpayers must pay 14 percent interest on overdue taxes. However, once a tax title has been recorded by the town, the taxpayer may redeem the land only by paying the full amount in the tax title account plus 16 percent interest. G.L. c. 60, §62.

7. On January 13, 1984, the town's independent auditor informed the Board of Selectmen by letter that Mr. Romeo was in arrears on the payment of all real estate taxes for 1980-1983. The letter also advised that tax title proceedings should be initiated within 45 days of the tax bill.

8. On January 20, 1984, Mr. Romeo paid $114,182.77 to the town, which covered interest owed of $31,736.54 for the years 1980-1983 and taxes for these

[1] This lack of security could have significant adverse consequences for the town, e.g., if the delinquent taxpayer filed for bankruptcy protection, the town, as to its tax claim more than 3 years old, would be just one of many unsecured creditors whose claims of recovery would be questionable.

years of $82,446.23. In November, 1984, Mr. Romeo paid the balance due of $4955.92 in interest and $31,117.70 in taxes for 1983 and 1984, for a total of $36,073.62.

9. Mr. Romeo paid a total interest, calculated at 14 percent, of $36,580. If he had continued the prior practice of recording tax titles on delinquent properties when taxes were approximately three years overdue, he would have owed 16 percent interest on at least the 1980 taxes, so would have paid an additional $1,823.00 in interest.

10. Section 19(a) of G.L. c. 268A prohibits a municipal employee from participating in a particular matter in which, to his knowledge, he has a financial interest. By participating as tax collector in the decisions as to when and how to collect his own delinquent real estate taxes for the years 1980-1983, Mr. Romeo violated §19(a).

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

1. that he pay the Commission the sum of fifteen hundred dollars ($1,500.00) as a civil penalty for violating G.L. c. 268A, §19(a);

2. that he pay to the town of Ashland the sum of one thousand eight hundred twenty-three dollars ($1823.00) as recoupment of the two percent interest lost by the town in connection with the 1980 taxes because tax titles were not recorded; and

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

DATE: February 5, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 279

IN THE MATTER

OF

KENNETH TARBELL

DISPOSITION AGREEMENT

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

On September 25, 1984, the Commission initiated a preliminary inquiry, pursuant to the conflict of interest law, G.L. c. 268A, involving Mr. Tarbell, a former employee of the Department of Environmental Quality Engineering. The Commission concluded its inquiry and on December 20, 1984 found reasonable cause to believe that Mr. Tarbell violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Tarbell was an employee of the Department of Environmental Quality Engineering ("DEQE") since it was created in 1975 until October, 1980. As such, he was a state employee within the meaning of G.L. c. 268A, §1(q).

2. In 1975 and 1976, Mr. Tarbell was the regional engineer for the northeast region of DEQE, responsible for, among other things, DEQE's monitoring of the operation of sanitary landfills in the region. From October, 1976 until October, 1980, Mr. Tarbell continued to work as a senior engineer in this regional office, with primary responsibility for wetlands issues.

3. During the years 1975-1980, Mr. Tarbell participated in DEQE's monitoring of the operation of the sanitary landfill located off Pond Street in Billerica, Massachusetts, owned by Graypond Realty Trust, and known as the "Shaffer landfill."

4. As a DEQE employee, Mr. Tarbell participated in DEQE's monitoring of the operation of the Shaffer landfill by:

(a) writing to and meeting with the owners in January, 1975 regarding regulatory violations, the submission of design and operational plans, and the general upgrading of the landfill operation;

(b) reviewing operating plans submitted by the owners in August, 1975;

(c) corresponding with the attorney for the owners in 1976 regarding the operating plans, reports on operations and the requirement of a performance bond;

(d) meeting with the owners at a March 9, 1978 pre-order conference and participating in the issuance of an April 7, 1978 DEQE order seeking compliance by the landfill with various statutory and regulatory requirements; and

(e) receiving letters and telephone calls from the owners' attorney in late 1978 and 1979 regarding the landfill's compliance with the April 7, 1978 order.

5. In October, 1980, Mr. Tarbell left his job at DEQE and began to work in a full-time, salaried position for the owners, as the engineer in charge of the operation of the Shaffer landfill. From that time until December, 1983, DEQE continued to seek enforcement of the terms of the April 7, 1978 order by sending a series of written notices to the landfill owners of the continuing violation of this order. Mr. Tarbell's work for the landfill owners included:

(a) all engineering work for the landfill, including the preparation and submission to DEQE in August 1981 and August 1982 of operating plans as required by the April 7, 1978 order and the subsequent notices, and discussing the suitability of these plans with DEQE;

(b) corresponding with DEQE by letter regarding the efforts to upgrade the operation of the landfill to comply with the requirements of the April 7, 1978 order (e.g., letter dated January 22, 1981 from Mr. Tarbell to DEQE regarding adequate coverage of refuse and DEQE's response dated February 27, 1981 marked to the attention of Mr. Tarbell); and

(c) preparation and submission to DEQE of periodic operating reports detailing efforts to comply with the April 7, 1978 order and with the subsequent notices of the continuing violation of that order.

6. On May 23, 1983, DEQE issued a "final directive" to the landfill owners alleging a continuing violation of the April 7, 1978 order and subsequent notices, and detailing specific actions to be taken by the landfill to avoid litigation. In July and August, 1983, Mr. Tarbell wrote a series of letters to DEQE reporting on the efforts to respond to the May 23, 1983 directive.

7. On December 21, 1983, the Commonwealth brought a lawsuit in Superior Court against the landfill owners alleging, in part, violation of the April 7, 1978 order. (Only one count of the seven count complaint dealt directly with the 1978 order. For example, one count involved an alleged violation beginning in 1983 of the Clean Air Act.) In June, 1984, the parties agreed to a final judgment. This 1984 judgment was in effect a new order to the Shaffers, superceding the 1978 order. It was new not only in the sense it occurred six years later, but because it contained numerous significant requirements not in the 1978 order. For example, the 1984 judgment ordered an assessment to be done of the possible adverse environmental consequences, past and future, of the landfill operation, including those that might occur after its closing, with particular emphasis on possible harmful seepage into the water table. It also ordered that if such seepage was discovered, actions would have to be taken to contain and dispose of the same. A substantial security was required, $615,000, to ensure that these steps were taken. The judgment also ordered that an additional security be set aside to ensure that the operation was properly closed-down when it reached capacity, and written, detailed closing plans were ordered. In considerable part, the focus of the judgment was on the closing down of the landfill, which was anticipated to occur within a few years, and the Shaffers' responsibilities for ensuring against any adverse environmental consequences thereafter.

8. Section 5(a) prohibits a former state employee from receiving compensation from anyone other than the Commonwealth in connection with any particular matter in which the state is a party or has a direct and substantial interest and in which he participated as a state employee. The issuance of the April, 1978 order and the monitoring of Shaffer's efforts to comply with that order was a particular matter in which Mr. Tarbell participated as a DEQE employee. By receiving compensation from the Shaffer landfill owners in connection with the landfill's non-compliance with the requirements of the April 7, 1978 order, Mr. Tarbell violated §5(a).[1]

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. Tarbell:

1. that he pay the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §5(a); and

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

DATE: February 12, 1985

[1]Mr. Tarbell continues to work as the engineer in charge of the operations of the Shaffer landfill. Because the current focus of the operations is compliance with the requirements of the June, 1984 final judgment, with particular emphasis on proper closure of the facility, and because this final judgment in effect supercedes the April 7, 1978 order and violation notices of that order, the Commission concludes that his current and future work for this landfill does not violate §5(a) because it is in connection with a different particular matter than that in which he participated as a DEQE employee.

STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 271

IN THE MATTER

OF

ALFRED D. SMITH

Appearances:

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

Alfred D. Smith: pro se

Commissioners:

Diver, Ch., Brickman, Burns, Mulligan, Sweeney

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner filed an Order to Show Cause on October 26, 1984 alleging that the Respondent, Alfred D. Smith, had violated G.L. c. 268B, §5[1] by failing to file his Statement of Financial Interests for calendar year 1983 (1983 SFI) within ten days of receiving a Notice of Delinquency (Notice) from the Commission. The Respondent did not file an Answer. Pursuant to notice, an adjudicatory hearing was conducted on January 31, 1985 before David Brickman, a Commission member duly designated as presiding officer. See, G.L. c. 268B, §4(c). The Petitioner submitted a brief, and the full Commission heard oral argument on February 26, 1985. In rendering

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

(c) Every public employee shall file a statement of financial interests for the proceeding calendar year with the Commission within ten days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee and on or before May first of the year after such person ceases to be a public employee...

(g) Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter, or the filing of an incomplete statement of financial interests after receipt of such a notice, is a violation of this chapter and the Commission may initiate appropriate proceedings pursuant to the provisions of section 4 of this chapter.

this Decision and Order, the members of the Commission have fully considered the evidence and arguments presented by the parties.

II. FINDINGS OF FACT

1. The Respondent was employed by the Department of Social Services as an area director from September, 1982 until December, 1984.

2. In January, 1984, the Respondent was designated by the Executive Office of Human Services as a person holding a "major policy making position"[2] for the purposes of filing a 1983 SFI.

3. The Respondent failed to file his 1983 SFI by May 1, 1984 as required by G.L. c. 268B, §5.

4. On June 27, 1984, the Respondent received a formal notice of delinquency from the Commission requiring him to file his 1983 SFI within ten days of receipt of the Notice.

5. The Respondent failed to file his 1983 SFI within ten days of receipt of the Notice.

6. The Commission authorized a preliminary inquiry on July 17, 1984 and the initiation of adjudicatory proceedings against the Respondent thereafter.

7. The Respondent filed his 1983 SFI on September 5, 1984, thirty-eight business days after the expiration of the ten-day period contained in the Notice.

III. DECISION

The elements necessary to establish a violation of G.L. c. 268B, §5 are: (1) the subject was a public employee (as defined by the statute) during the year in question; (2) the subject was notified in writing of his delinquency and the possible penalties for failure to file his 1983 SFI; (3) the subject did not file his 1983 SFI within ten days of receiving notice of delinquency. Inasmuch as the Respondent admits the facts which constitute a G.L. c. 268B, §5 violation, the Commission concludes that he violated G.L. c. 268B, §5 by failing to file his 1983 SFI within ten days of receiving a Notice from the Commission.

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

IV. SANCTIONS

Under G.L. c. 268B, §4(d), the Commission may order an individual who violates G.L. c. 268B to pay a civil penalty of not more than $2,000.00 for each violation. In cases involving Statements of Financial Interests which are filed late, the Commission imposes a fine calculated on the number of days which elapse after the expiration of the ten-day period following the Commission's notice. The fine schedule, which was adopted in April, 1983, imposes a daily fine of $10.00 for the first ten working days and $20.00 per working day thereafter, or a total of $560.00 in the Respondent's case. However, the Commission has adopted a $500.00 ceiling on the civil penalty to be imposed on late filers. See, **In the Matter of Vernon R. Thornton**, 1984 Ethics Commission 171.

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

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

2. Given the total circumstances, the Respondent made a serious, good faith effort to comply as expeditiously and fully as possible after being put on notice of the filing requirement. See, **In the Matter of Thomas A. Chilik**, 1983 Ethics Commission 130.

Applying the above criteria to the Respondent, no mitigating factors exist in this case sufficient to warrant reducing the customary fine. The Commission is aware of the Respondent's preoccupation with other pressing matters; however, this does not excuse his disregard for the filing obligations of G.L. c. 268B. Despite several opportunities to meet the requirements of the financial disclosure law, the Respondent did not make a good faith compliance effort and chose to delay complying with the statute. Compare, **In The Matter of Nicholas Paleologos**, 1984 Ethics Commission 169.

V. ORDER

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

DATE: March 13, 1985

STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 264

IN THE MATTER

OF

GEORGE NAJEMY

Appearances:

Nancy R. Hayes, Esq.: Counsel for Petitioner State Ethics Commission

Michael Angelini, Esq.: Counsel for Respondent George Najemy

Commissioners:

Diver, Ch., Brickman, Burns, Mulligan, Sweeney

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner initiated these adjudicatory proceedings on August 16, 1984 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Order alleged that the Respondent, George Najemy, (1) violated §19 by directing the Worcester city treasurer's office to deposit the insurance proceeds on property which he owned and (2) violated §23(¶2)(2) and §23(¶2)(3) by negotiating for and purchasing property which was the subject of condemnation proceedings before the Worcester Building Inspection Committee (BIC), a committee which he represented as assistant city solicitor.

An adjudicatory hearing was held on January 10 and 11, 1985 before Commissioner Frances Burns, a duly designated presiding officer. See G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral argument before the full Commission on February 26, 1985. In rendering this decision and order, each member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. FINDINGS OF FACT

1. George Najemy has been employed by the City of Worcester Law Department since 1973, and served as an assistant city solicitor during the period at issue in this proceeding. His appointing official is the city manager and his direct supervisor is the city solicitor.

2. On June 14, 1983, Mr. Najemy was formally appointed by the city manager as the law department representative on the Worcester's BIC. Pursuant to City Executive Order No. 13, the BIC is charged with specific responsibilities with respect to the demolition of condemned structures under G.L. c. 139, including the authority to decide whether or not a c. 139 hearing will be held. As the law department representative on the BIC, Mr. Najemy's duties included advising the BIC relative to any legal matters or questions which arose at various stages of the condemnation and demolition proceedings and drafting the necessary legal documents and correspondence; checking court records for any appeals from demolition orders made by property owners and arranging the necessary court hearings; and litigation of the appeal for the BIC if an appeal had in fact been filed. Mr. Najemy also attended BIC meetings, although he was not a voting member.

3. The property at 7-9 Woodland St. (the property) was condemned and ordered demolished at a hearing in March of 1982. Following a series of continuances of the demolition order and a second fire, the property was again ordered demolished in June of 1983. On July 19, 1983, Mr. Najemy signed off as the law department representative on a Request to Demolish the property, a copy of which was sent to the property owner's (Mr. Ali's) attorney.

4. The city's policy regarding insurance proceeds claimed on fire damaged property was to retain a certain amount for the city pending the owner's rehabilitation or demolition of the building, and releasing the rest to the owner. The amount retained by the city, usually $10,000, was based on the recommendation of the BIC. Mr. Najemy had the responsibility for preparing the necessary documents for the partial release of insurance proceeds.

5. Mr. Ali referred his attorney to Mr. Najemy, either (a) by mentioning Mr. Najemy by name and noting Mr. Najemy's familiarity with the insurance proceeds withholding process or (b) by mentioning that there was a person at the law department of Mr. Ali's ethnic and cultural background. Mr. Ali's attorney then had discussions with Mr. Najemy during the summer of 1983 concerning the amount of insurance proceeds to be withheld on the property and the options available to Mr. Ali to free up that money. In his official capacity as assistant city solicitor, Mr. Najemy acted as a liaison to the BIC in September of 1983 by making a written request to determine the amount to be withheld. On October 12, 1983, the required $10,000 insurance draft was received by the law department. The city solicitor, in Mr. Najemy's absence due to illness, forwarded the draft to the city

treasurer with instructions to hold the draft until rehabilitation of the property was complete.

6. Mr. Najemy began negotiating with Mr. Ali, the owner, to purchase the property sometime in October of 1983. On November 14, 1983, Najemy wrote the vice-chairman of the BIC on private letterhead indicating that he was negotiating to purchase the property, and asking whether the city would release the $10,000 to Mr. Ali if he (Najemy) put down $5,000 as security for the rehabilitation or demolition of the property. Following the November 16, 1983 BIC meeting, at which Mr. Najemy was not present, the vice-chairman informed Mr. Najemy that the request was denied.

7. Mr. Najemy purchased the property from Mr. Ali on December 12, 1983. Within the next 3 days, Mr. Ali endorsed the insurance draft, received $10,000 from Mr. Najemy, and on December 15, 1983, signed a document prepared by Mr. Najemy in which he (Ali) assigned his rights in the $10,000 draft held by the city to Mr. Najemy. Mr. Ali subsequently left the country.

8. Following conversations with the assistant city treasurer on the subject, Mr. Najemy wrote to her on January 26, 1984, using law department letterhead, giving her instructions as to the handling of the draft. He advised her to deposit the $10,000 draft relating to the property into an escrow account, which by city policy is to be an interest bearing account, so that when the lien on the property was released a check could be written out to the "new owner." The check was deposited in such an account the next day.

III. DECISION

For the reasons stated below, the Commission concludes that the evidence supports the finding of a G.L. c. 268A, §19 violation on Mr. Najemy's part, but not a §23(¶2)(2) or §23(¶2)(3) violation.

A. Section 19

Section 19 prohibits a municipal employee from participating as such an employee in a particular matter in which he has a financial interest. That the Respondent was, and continues to be a "municipal employee"[1] subject to Chapter 268A in view of his position as an assistant city solicitor is not in dispute. The Commission finds that the Respondent violated §19 by, in his official capacity, advising the assistant city treasurer in January, 1984 to deposit a $10,000 draft representing insurance proceeds which had previously been assigned to him.

1. Participate as a Municipal Employee in a Particular Matter.

Participation for purposes of G.L. c. 268A, §19 is defined as participation in agency action or in a particular matter personally and substantially as a municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, §1(j) (emphasis added). A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court. G.L. c. 268A, §1(k).

The Commission finds that the decision as to whether the treasurer's office would deposit the $10,000 insurance draft into an escrow account constitutes a particular matter. Both the city treasurer and the assistant city treasurer testified that the treasurer's office followed instructions from the law department concerning the disposition of such drafts. Inasmuch as the original instructions as to this particular draft were to hold the draft pending rehabilitation, the $10,000 draft was deposited only after receiving the Respondent's letter of instructions. The Commission concludes that the Respondent's personal and substantial participation in the particular matter, by deciding that the draft should be deposited and subsequently advising the assistant city treasurer to this effect, was established by a preponderance of the evidence.

The Respondent contends that his role in instructing the treasurer's office to deposit the draft was a non-discretionary act and therefore did not constitute participation for §19 purposes. The evidence did establish that the city manager's written policy dated March 14, 1983 provided that checks representing insurance proceeds withheld by the city were to be delivered to the City Treasurer to be held in an interest bearing escrow account. Yet despite the fact that the Respondent may have been acting in accordance with city policy, his letter dated January 26, 1984 to the assistant city treasurer precipitating the deposit of the insurance draft nonetheless constitutes "participation" under §19. For purposes of §19, "participation" is not limited to discretionary and/or final decisions. It is enough that he interjected himself personally into the making of a decision by a state agency, whether his duties required it or not, and that his participation is deemed substantial. See, e.g., EC-COI-

[1] "Municipal employee" is defined, in relevant part, as a person performing services for 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). Municipal agency is defined as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, §1(f).

82-143. The Commission finds that the Respondent substantially participated in the treasurer's office decision to deposit the draft because (1) the treasurer's office followed law department instructions in that regard and (2) until the Respondent's letter of January 29, 1984, the draft was not deposited.

2. Financial Interest

The Commission finds that the Respondent's financial interest in the disposition of the $10,000 draft was established by the evidence. As long as a financial interest is "direct and immediate, or at least reasonably foreseeable," §19(a) applies. EC-COI-84-98. The Respondent himself testified that he had been assigned the rights by Mr. Ali to the $10,000 insurance proceeds the draft represented, and that he would receive the $10,000 plus interest once the property was rehabilitated. These facts sufficiently identify the Respondent's financial interest for §19 purposes. See **Commonwealth v. Cola**, 18 Mass. App. 598 (1984). The fact that the city also had an interest in the draft is irrelevant.

3. Disclosure and Exemption

The Commission finds that the Respondent's disclosure to the vice-chairman of BIC that he was negotiating to purchase the property does not qualify as the disclosure required by G.L. c. 268A, §19(b). That disclosure was made in the Respondent's self interest, in an attempt to obtain a reduction in the amount of insurance proceeds to be withheld, and was made to an individual who had no authority to require the Respondent to abstain from participation. See Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 299, 362 (1965) [disclosure to the wrong person, and any resulting exemption under §6 [state equivalent to §19] is of no force or effect]. The exemption procedure outlined in G.L. c. 268A, §19(b) requires the full disclosure of one's financial interest to one's appointing official, and that official's advance written determination that the interest is not so substantial as to be deemed likely to affect the integrity of one's municipal services. Since giving such advice to the city treasurer's office was part of the Respondent's official duties, he should have disclosed his financial interest to the city manager and/or the city solicitor, either of whom could then have determined the proper course to take. The record reflects the Respondent's failure to make such a disclosure and in fact evidences the Respondent's intent to conceal his identity as the present owner of the property: in his reference to the "new owner" instead of himself in his January 26, 1984 letter to the assistant city treasurer.

B. Section 23(¶2)(2)

Section 23(¶2)(2) prohibits a municipal employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others. The Commission has held that this section requires public employees to refrain from engaging in private business with individuals who have pending matters subject to the public employee's official authority due to the exploitability inherent in such situations. See, e.g. EC-COI-84-61; 83-156; 82-124; 82-64.

However, the evidence in this case does not sufficiently support the existence of a public relationship between Mr. Najemy and Mr. Ali at a time when the relationship could have been exploited to Mr. Najemy's personal benefit. It may be true that Mr. Najemy had an official relationship with Mr. Ali during the summer of 1983 concerning the city's process of withholding insurance proceeds. However, the Commission is not persuaded that such a relationship extended beyond early September, the date of Mr. Najemy's official correspondence to determine the amount of Mr. Ali's proceeds to be withheld. By all accounts, purchase negotiations concerning the property did not commence until a month later (October, 1983).

This is not to say that a §23(¶2)(2) inherent exploitability violation necessarily requires the public relationship and private business dealings to be simultaneous. Where there is evidence that an employee has capitalized on the public relationship arising from his official dealings and/or a private party has been pressured to engage in private business with an employee in order to maintain goodwill in the public relationship, a §23(¶2)(2) violation may be found regardless of a timing gap. The evidence presented by the parties did not support such a finding in this case.

C. Section 23(¶2)(3)

The Commission also finds that the Petitioner failed to established a violation of §23(¶2)(3) by a preponderance of the evidence. A §23(¶2)(3) violation requires a showing that the Respondent, as a municipal employee, gave a reasonable impression by his conduct that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. The Commission finds that by the time the Respondent entered into negotiations with Mr. Ali to purchase the property, the bulk of BIC involvement with the property had already occurred. The Respondent's more significant roles in the process - e.g. giving the BIC legal advice pertaining to the condemnation and demolition of the property and signing off on the Request to Demolish the property - had already been accomplished with respect to this property. Thus, there would be no opportunity for the Respondent's official acts to be influenced based on his on-going negotiations to

purchase the property. Similarly, the evidence on record does not demonstrate that the Respondent's officials acts pre-dating the beginning of negotiations were conducted in such a way as to foster the development of such negotiations. In summary, the Commission concludes that the overlap of public and private roles in this instance does not rise to the level of a §23(¶2)(3) "appearance of a conflict" violation. Compare, In the Matter of John J. Rosario, 1984 Ethics Commission 205; In the Matter of Louis L. Logan, 1981 Ethics Commission 40.

IV. ORDER

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

Pay $500.00 (five hundred dollars) to the Commission as a civil penalty for participating as a municipal employee of the City of Worcester in a particular matter in which he had a financial interest.

The Commission orders Mr. Najemy to pay this penalty of $500.00 (five hundred dollars) to the Commission within thirty days of the receipt of this Decision and Order.

DATE: March 25, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 284

IN THE MATTER

OF

PAUL A. BERNARD

DISPOSITION AGREEMENT

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

On August 14, 1984 the Commission initiated a preliminary inquiry, pursuant to §4(a) of the conflict of interest law, G.L. c. 268A, involving Mr. Bernard, a member of the Freetown Planning Board. The Commission concluded its inquiry on March 12, 1985, finding reasonable cause to believe that Mr. Bernard violated G.L. c. 268A, §§17 and 19. The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Bernard has been an elected member of the Freetown Planning Board since 1982, serving as chairman of that Board from February, 1984 until March, 1985. As a member of the Planning Board, Mr. Bernard is a special municipal employee within the meaning of G.L. c. 268A, §1(n).

2. Mr. Bernard is also a real estate broker who owns and operates a real estate firm in Freetown.

3. In January 1984, the Planning Board was considering a plan which sought to make property located at Howland Estates, known as the "green area," into a buildable lot.

4. At all times relevant to this Agreement, Mr. Bernard was acting privately as the real estate broker for the sale of the green area. By January 1984, Mr. Bernard had a buyer ready to purchase the green area if the property was approved as a buildable lot.

5. During January and February, 1984, Mr. Bernard participated as a Planning Board member in discussions during Planning Board meetings relating to the plan to make the green area a buildable lot and advocated that the Planning Board approve the plan.

6. General Laws c. 268A, §19 prohibits a special municipal employee from participating as such in a particular matter in which to his knowledge he has a financial interest. By participating in Planning Board discussions of the green area while he was privately acting as the real estate broker for that property, Mr. Bernard violated §19.

7. Mr. Bernard was on notice from an oral discussion with town counsel in mid-January 1984 and from a January 23, 1984 letter from town counsel to the Planning Board that he could not be involved in any way with the green area matter since he was privately involved with the property as a real estate broker.

8. On February 6, 1984, Mr. Bernard, in his private capacity, presented a plan relating to property on West Howland Road to the Planning Board on behalf of the property owners. The property owners were seeking the Board's approval to make a certain parcel of land into three buildable lots.

9. Mr. Bernard indicated that he was presenting the plan to the Planning Board and he responded to the questions of other Board members concerning the plan. The plan was approved and signed by the Planning Board, including Mr. Bernard.

10. At the time Mr. Bernard presented the plan to the Planning Board, he was privately acting as the real estate broker for the sale of the property involved.

11. General Laws c. 268A, §17(c) provides in pertinent part that a special municipal employee may not act as agent for someone other than the town in relation to a particular matter in which the town is a party or has a direct and substantial interest and which is pending in the municipal agency in which that special municipal employee serves. By presenting the plan to the Planning Board where he served as a member and chairman, Mr. Bernard violated §17(c).

12. By approving and signing the plan when he was also privately acting as a real estate broker for the sale of the property involved, Mr. Bernard violated §19.

WHEREFORE, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following:

1. Mr. Bernard will cease and desist from acting as agent for anyone other than the town in relation to particular matters in which he has at any time participated as a municipal employee and/or which are or within one year have been the subject of his official responsibilities;

2. Mr. Bernard will cease and desist from participating in any particular matter before the Planning Board in which he, his immediate family, a business organization in which he serves 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; and

3. Mr. Bernard will pay to the State Ethics Commission the amount of $1,000 as a civil penalty for violating G.L. c. 268A, §§17 and 19.

DATE: April 3, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 283

IN THE MATTER

OF

JOHN ROGERS, JR.

DISPOSITION AGREEMENT

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

On November 27, 1984, the Commission initiated a preliminary inquiry, pursuant to §4(a) of the conflict of interest law, G.L. c. 268A, involving Mr. Rogers, a member of the Fairhaven School Committee. The Commission concluded its inquiry into Mr. Rogers' involvement in the matters set forth herein, and on January 31, 1985 found reasonable cause to believe that Mr. Rogers violated G.L. c. 268A, §19. The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Rogers has been an elected member of the Fairhaven School Committee since April, 1980. Between April, 1983 and April, 1984, Mr. Rogers served as its chairman. As a member of the school committee, Mr. Rogers is a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. Mr. Rogers' wife, Margaret, is presently a first-grade teacher in the Fairhaven School system. Prior to September, 1984, she was a kindergarten teacher at the Tripp and Anthony schools in Fairhaven.

3. Fairhaven school teachers are represented, for collective bargaining purposes, by the Fairhaven Educators' Association. The collective bargaining unit applicable to teachers is designated as "Unit A." At all times relevant to this Agreement, Margaret Rogers was a member of Unit A.

4. On several occasions during 1984, Mr. Rogers participated in discussions during the Fairhaven School Committee's executive sessions, relating to the Unit A 1984-1986 Collective Bargaining Agreement.

5. On September 19, 1984, Mr. Rogers voted, along with four of the five other school committee members, to ratify the Unit A 1984-1986 Collective Bargaining Agreement.

6. The 1984-1986 Collective Bargaining Agreement ratified on September 19, 1984 covered such areas as teachers' benefits and duties and the teaching load.

7. General Laws, c. 268A, §19 provides in pertinent part that a municipal employee shall not participate in a particular matter in which to his knowledge a member of his immediate family has a financial interest. By participating in discussions relating to, and voting to ratify, the Collective Bargaining Agreement of the bargaining unit of which his wife was a member, Mr. Rogers violated §19.

8. Mr. Rogers was on notice from town counsel opinions he had requested and received in 1981 and 1982, that he could not participate in discussions or votes on particular budgetary items which would affect his wife's financial interests as a teacher, such as teachers' compensation or other terms of employment.

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. Rogers will cease and desist from participating, as a school committee member, in discussions or votes relating to matters in which his wife has a financial interest; and

2. Mr. Rogers will pay to the State Ethics Commission the amount of $500 as a civil penalty for violating G.L. c. 268A, §19.

DATE: April 3, 1985

STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 267

IN THE MATTER

OF

JAMES M. COLLINS

Appearances:

Nancy R. Hayes, Esq.: Counsel for Petitioner State Ethics Commission

Albert L. Hutton, Esq.: Counsel for Respondent James M. Collins

Commissioners:

Diver, Ch., Brickman, Burns, Mulligan, Sweeney

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner initiated these adjudicatory proceedings on October 15, 1984 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Order alleged that the Respondent, James M. Collins, Norfolk County treasurer and treasurer and chairperson of the Norfolk County Retirement System (NCRS), had violated G.L. c. 268A, §§11(c),[1] 23(¶2)(2)[2] and 23(¶2)(3)[3] by assisting a private entity in obtaining mortgages on very

[1]G.L. c. 268A, §11(c) provides that "no county employee shall, otherwise than as provided by law for the proper discharge of official duties, act as agent or attorney for anyone other than a county or a county agency in prosecuting any claim against a county or county agency, or as agent or attorney for anyone in connection with any particular matter in which a county or county agency is a party or has a direct and substantial interest."

[2]G.L. c. 268A, §23(¶2)(2) provides that no county employee shall "use or attempt to use his official position to secure unwarranted privileges or exemptions for hi uself or others."

[3]G.L. c. 268A, §23(¶2)(3) provides that no county 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."

favorable terms from two banks in which NCRS had deposited substantial County funds. Specifically, Mr. Collins was alleged to have violated §11(c) on two occasions. On the first occasion he allegedly acted as agent for the Hollister House Trust (Trust) in seeking a second mortgage from Commercial Bank & Trust (CBT) of Lowell on some Trust property, and induced CBT to grant the mortgage by committing NCRS to purchasing the mortgage from CBT. On the second occasion, Mr. Collins allegedly acted as agent for the Trust a year later by obtaining another second mortgage on the same property from University Bank & Trust (UBT) of Chestnut Hill on very favorable terms. He did this after deciding to remove the Trust's mortgage from NCRS's investment portfolio. The two §23(¶2)(2) violations are based on the allegations that in both the CBT and UBT transactions Mr. Collins used his official position to secure second mortgages for the Trust at favorable interest rates. The §23(¶2)(3) violation is based on Mr. Collins' conduct in asking for and accepting private loans on behalf of a third party from banks with whom he had substantial public dealings and who would not ordinarily have granted such mortgages.

Mr. Collins filed an answer in which he admitted his County employee status and the County's depositor relationship with both CBT and UBT. He declined, on the advice of counsel, to respond to the remaining allegations. Adjudicatory hearings were held on January 24 and January 25, 1985 before Commissioner Colin Diver, a duly designated presiding officer. See G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral arguments before the Commission on March 12, 1985. In rendering this Decision and Order, each participating member of the Commission has heard and/or read the evidence and arguments presented by the parties.

II. FINDINGS OF FACT

1. The Respondent James M. Collins was, at all times relevant to the violations alleged in the Order to Show Cause, the treasurer for Norfolk County, and the treasurer and chairperson of the NCRS.

2. As NCRS chairperson, Mr. Collins had sole responsibility for the investment and management of NCRS funds.

3. As NCRS chairperson and County treasurer, Mr. Collins had substantial County funds on deposit with CBT and UBT at all times relevant to the violations alleged in the Order to Show Cause.

4. Joanne Wadsworth, the treasurer of Berkshire County, was a friend of Mr. Collins in 1982. Ms. Wadsworth, whose mother was a trustee of the Trust, asked Mr. Collins in 1982 if he would assist her in seeking a loan for renovations on family property in Pittsfield, Massachusetts owned by the Trust.

5. Sometime in June 1982, Arthur Tanger, chairperson of CBT's board of directors, asked CBT's president, Peter J. Iannotti, if CBT would consider granting a $70,000 second mortgage to the Trust on the property it owned in Pittsfield, Massachusetts. Mr. Iannotti informed Mr. Tanger he was not interested in the investment because it was outside of CBT's market area.

6. Approximately two to three weeks later, Mr. Tanger renewed his request to Mr. Iannotti and informed him that it had been initiated by Mr. Collins. In this second request Mr. Tanger stated that Mr. Collins, on behalf of NCRS, would purchase the mortgage from CBT if CBT would grant it in the first instance.

7. As a result of this conversation, Mr. Iannotti agreed to grant the mortgage both as an accommodation to Mr. Collins, a good customer of CBT, and because he believed the investment would pose no risk to CBT.

8. Mr. Iannotti represented CBT in this matter even though it was not his normal role to represent the bank in mortgages of this size. He participated personally to accommodate Mr. Collins and NCRS. In granting the mortgage Mr. Iannotti did not follow the procedure normally used in reviewing applications for second mortgages in that no property appraisal was done, no credit check was done, and no analysis of rental income was done. He also agreed to have CBT service the mortgage for NCRS.

9. Mr. Iannotti personally set the interest rate for this second mortgage at fifteen percent even though the market rate for second mortgages in July 1982 was considerably higher than fifteen percent.

10. Sometime prior to the loan closing on July 22, 1982, Mr. Iannotti informed Mr. Collins that he had approved the loan conditional upon CBT's receipt of a letter of commitment from NCRS. Mr. Collins prepared the letter and delivered it to CBT prior to the closing.

11. On July 22, 1982, Mr. Iannotti sent the loan disbursements directly to Mr. Collins. In the letter accompanying the disbursement checks Mr. Iannotti asked Mr. Collins to send him some additional verifications in connection with the mortgage.

12. On August 4, 1982, CBT assigned the mortgage to NCRS after having received a check for $70,000 from NCRS. The check contained only the notation "Purchase."

13. Since 1945, G.L. c. 32, §23 has prohibited public employee retirement systems from investing in mortgages. In NCRS's annual statement for 1982 submitted to the Public Employees' Retirement Administration by Mr. Collins, the mortgage owned by NCRS was listed as a bond.

14. In late spring of 1983, Mr. Collins approached John Nyhan, president of UBT, and asked him whether UBT would grant a second mortgage to the Trust to pay off another bank which was already holding a second mortgage on the property.

15. Mr. Nyhan agreed to make the loan because the request was from Mr. Collins whom he considered a good customer of UBT. He stated, however, that if the Trust had sought the mortgage on its own behalf, it was very unlikely UBT would have granted the mortgage.

16. Mr. Nyhan obtained all information required by UBT about the Trust property in connection with the mortgage application solely from Mr. Collins. At no time during the loan process did anyone at UBT contact the property owners.

17. On May 20, 1983, UBT granted the Trust a mortgage in the amount of $80,000 with the interest at the prime rate plus one percent, but never to exceed eleven and one half percent. In the meeting at which the papers were passed, Mr. Collins handled the signing of the documents and acted as notary public.

18. At the time the mortgage was granted, the market rate for home mortgages was generally one to two percentage points above eleven and one half percent. Although an eleven and one half percent interest rate would have been available to other good customers of UBT, UBT had made no other loans at that time on which it had agreed to an eleven and one half percent cap.

19. The loan closing occurred on June 17, 1983 at which time UBT disbursed the funds. Mr. Collins arranged for and handled the distribution of the proceeds.

20. Shortly after June 17, 1983, the attorney representing UBT in the transaction sent a check to CBT in the amount necessary to pay off the outstanding second mortgage owned by NCRS. A representative of CBT informed UBT's attorney that since NCRS and not CBT was the holder of the mortgage, CBT could not issue a discharge. The check was deposited into the NCRS mortgage receivable account that CBT had established to service the mortgage.

21. In July 1983, Mr. Collins contacted a representative of CBT and requested a reassignment of the mortgage from NCRS to CBT so that CBT could then issue the discharge. CBT agreed and issued the discharge on July 19, 1983.

III. DECISION

For the reasons stated below, the Commission concludes that Mr. Collins violated G.L. c. 268A, §11(c) on two occasions and §23(¶2)(2) on two occasions.

A. The §11(c) violation in relation to the CBT transaction

G.L. c. 268A, §11(c) prohibits a county employee from acting as agent for someone other than the county in connection with any particular matter[4] in which the county or a county agency is a party or has a direct and substantial interest. A primary purpose of this proscription is to protect both the employee and the public from situations in which the employee might have divided loyalties. **Edgartown v. State Ethics Commission,** 391 Mass. 83, 89 (1984) (construing G.L. c. 268A, §17); Cf. **Commonwealth v. Cola,** 18 Mass. App. 598, 610 (1984); Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 323 (1965). The need for this protection is particularly compelling where the public employee is entrusted with the care and management of public funds. Indeed, the chairperson of a public employee retirement system has a statutory mandate to "discharge his duties for the exclusive purpose of providing benefits to [system] members and their beneficiaries..." G.L. c. 32, §23(3). Mr. Collins' conduct must be evaluated in light of this purpose and these responsibilities.

Finding a violation of §11(c) requires the establishment of two elements. First, it must be shown that the county employee was acting as agent for someone other than the county. Second, it must be shown that the acts of agency were in relation to a matter or matters in which the county was a party or had a direct and substantial interest. The particular matters in this case were Mr. Collins' decision to use NCRS funds to purchase CBT's mortgage on the Trust property and the actual purchase of the mortgage. The Commission concludes that Mr. Collins acted as the agent of the Trust, and that the County had a direct and substantial interest in the particular matter at the time the acts of agency occurred.

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

At the hearing there was conflicting testimony on the timing of Mr. Collins' activities on behalf of the Trust. Mr. Iannotti testified that one of the reasons he agreed to make the loan to the Trust in the first place was that NCRS had agreed to purchase the mortgage from CBT. He testified that NCRS had made its commitment prior to July 22, 1982, the date of the loan closing. Mr. Collins, on the other hand, testified that he did not commit NCRS to purchasing the loan until at least July 24, 1982 when he was asked to do so by Arthur Tanger. We find Mr. Iannotti's testimony more credible and persuasive. First, there is no logical reason why Mr. Iannotti would have reversed his initial decision not to make the loan unless all risk to CBT were removed from the transaction. Second, Mr. Iannotti's testimony is supported by the documentary evidence. A so-called face sheet for the loan transaction which Mr. Iannotti filled out on July 21, 1982 indicates that NCRS would be purchasing the mortgage from CBT "without recourse." Also, the check stub for the check that was used by NCRS to purchase the mortgage indicates that the check was removed from the NCRS checkbook on or before July 21, 1982.

Mr. Collins activities as agent for the Trust must be viewed in light of this chronology. At the hearing he maintained that his actions on behalf of the Trust did not rise to the level of acting as agent. In making the initial contact with CBT, he asserted that he was merely doing a favor for a friend, and in receiving the loan disbursement checks from CBT, he was simply serving as a messenger. The record does not support Mr. Collins' contentions. It is reasonable to infer that Mr. Collins offered, in a conversation with Mr. Tanger, to have NCRS purchase the loan from CBT as an inducement for CBT to grant the loan. Such action on behalf of another constitutes something considerably more than a favor. Additionally, it is clear from the letter to Mr. Collins from Mr. Iannotti in which the loan checks were enclosed that Mr. Iannotti was looking to him and not the Trust to provide the remaining verifications. It can therefore be inferred that Mr. Iannotti had previously looked to Mr. Collins as the person acting on the Trust's behalf.

It is also clear that Mr. Collins' role in the matter exceeded that of messenger. The primary element of an agency relationship is that one does something for or on behalf of another, the principal, at the request of that person. See e.g. **La Bonte v. White Construction Co., Inc.**, 363 Mass. 41, 44 (1973); **Patterson v. Barnes**, 317 Mass. 721 723 (1945). Furthermore, even if we were to characterize Mr. Collins actions as he suggests, his activities would still be covered by §11(c). There is substantial support for utilizing an expansive definition of the term "agent" in construing G.L. c. 268A. The Buss article, supra. suggests that "[m]erely speaking or writing on behalf of a non-state 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." Likewise, courts construing the federal counterpart of §11(c) have made it clear that a definition of "agency" is not to be limited to its "strict common-law notion." See **U.S. v. Sweig**, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1979).

The manner in which Mr. Collins structured the entire transaction to avoid detection of NCRS's role in it also confirms that he was acting for someone besides the County. He clearly did not want NCRS to grant the mortgage directly to the Trust because he undoubtedly was aware that such an investment was illegal. Second, he arranged to have CBT actually service the mortgage, presumably so it would appear that the mortgage was held by CBT. Third, when he entered the mortgage on the NCRS books, it was identified as a bond. Finally, when the mortgage was discharged a year later, Mr. Collins reassigned the mortgage to CBT so that CBT, not NCRS, would issue the discharge. Accordingly, the Commission concludes that Mr. Collins acted as agent for the Trust in connection with the CBT transaction.

The fact that Mr. Collins received no compensation for his activities on behalf of the Trust is not a relevant consideration because compensation is not a precondition for agency under G.L. c. 268A, §11(c). Any act of agency on behalf of a non-county party, whether motivated by personal friendship or compensation, is subject to §11(c).

B. The §11(c) violation in relation to the UBT transaction.

In connection with the UBT transaction, the evidence of Mr. Collins' role as agent of the Trust is even more compelling. All negotiations regarding the Trust mortgage were done directly with Mr. Collins, and Mr. Collins was the person Mr. Nyhan looked to for information. Mr. Collins admitted assisting UBT's title attorney in preparing the documents, and he was present at the passing, even acting as notary. Since Mr. Collins concealed the fact from UBT that NCRS was the holder of the mortgage that was being discharged, his argument at the hearing that he was only acting in his official capacity is not persuasive. He clearly was holding himself out to Mr. Nyhan as agent of the Trust.[5] Even assuming that he had told Mr. Nyhan he was acting in his official capacity, it is clear from the evidence that Mr. Collins' interest was at least two-fold; to avoid the auditor's

[5] See e.g. **Hudson v. M.P.I.U.A.**, 386 Mass. 450, 457 (1982).

scrutiny of an improper investment, and to obtain another mortgage on very favorable terms for the Trust.

Because retirement systems are prohibited from investing in mortgages, Mr. Collins could have been ordered to remove the investment from NCRS's portfolio pursuant to G.L. c. 32, §24. This obviously would have been detrimental to the Trust. Thus, in seeking to avoid this result and at the same time in seeking to assist the Trust in obtaining another second mortgage on very favorable terms,[6] Mr. Collins was working on behalf of someone besides NCRS in connection with this transaction. Accordingly, the allegations in the Order to Show Cause relating to Mr. Collins' acting as agent for the Trust in connection with the UBT transaction have been proved by a preponderance of the evidence.

C. The §23(¶2)(2) violation in connection with the CBT transaction. The crux of a §23(¶2)(2) violation is that a public official cannot use his official position to obtain an unwarranted privilege for himself or someone else. The Commission finds that Mr. Collins used his position as Norfolk County treasurer to obtain three unwarranted privileges for the Trust. First, he was instrumental in causing CBT to make the loan to the Trust by committing NCRS funds. Second, he was instrumental in obtaining a very favorable interest rate for the Trust because he, as Norfolk County treasurer, was a good customer of CBT. Finally, he conferred an unwarranted privilege on the Trust by lending NCRS funds to it at an interest rate considerably lower than NCRS could have received on the open market.

Without Mr. Collins' intervention, CBT would not have agreed to make the loan to the Trust. There is undisputed testimony from Mr. Iannotti that he agreed to make the loan because of Mr. Collins' official position. Further, Mr. Collins concedes that his conduct in interceding with CBT on the Trust's behalf was violative of §23(¶2)(2).

In previous decisions the Commission has found §23(¶2)(2) violations in situations where a public employee has used the leverage of his office to obtain a privilege for someone which would not normally have been forthcoming. For example, a legislator violated §23(¶2)(2) when he used his position as a member of the Ways and Means Committee to pressure a state agency to award a grant to a private organization and to abandon its customary award procedure. See **In The Matter of James J. Craven, Jr.**, 1980 Ethics Commission 17, affd. sub nom. **Craven v. State Ethics Commission**, 390 Mass. No. 191 (1983). The director of the State Division of Food and Drugs violated §23(¶2)(2) when he obtained store discounts for others as a result of prompt service he had his Division render to the stores. **In The Matter of George A. Michael**, 1981 Ethics Commission 58. There is no basis for distinguishing Mr. Collins' conduct from these examples. Accordingly we find that Mr. Collins violated §23(¶2)(2) in connection with this transaction.

D. The §23(¶2)(2) violation in connection withthe UBT transaction.

As with the CBT transaction, Mr. Collins used his official position to obtain the UBT mortgage at a very favorable interest rate. The fact that Mr. Collins, as Norfolk County treasurer, was viewed as a good customer of UBT was the only reason UBT agreed to make the loan. Accordingly we find that Mr. Collins violated §23(¶2)(2) in connection with this transaction.

E. The §23(¶2)(3) violation in connection with both bank transactions.

Because the facts and analysis necessary to establish a §23(¶2)(3) violation are not materially different from those needed to establish a §23(¶2)(2) violation, we find no need to establish duplicative violations under this section.

IV. CONCLUSION AND ORDER

Based upon the foregoing, the Commission concludes that James M. Collins violated G.L. c. 268A, §11(c) on two occasions and §23(¶2)(2) on two occasions.

The four violations are serious ones. Although there is no evidence that Mr. Collins benefitted personally from his actions, his conduct clearly benefitted a private interest, perhaps to the detriment of NCRS. General Laws c. 32, §23 presumably prohibits retirement systems from investing in mortgages because such investments inherently involve risks. Even though NCRS earned what Mr. Collins characterized as a good return on its investment, the interest rate he agreed to was substantially below the market rate which NCRS could have earned on one of its investments.

Mr. Collins' actions in connection with the mortgage transactions are precisely the conduct which the statute was intended to prevent. In committing NCRS funds to an illegal loan that would produce a less-than-market-rate return he breached his duty of loyalty to NCRS while acting on behalf of the Trust. In using his official position to obtain the mortgage, he secured a privilege for

[6] We note that the loan which the Trust received from UBT was $10,000 higher than the earlier CBT loan. The interest rate on the loan was available only to UBT's good customers, and was subject to an interest cap which UBT made available to no other customer during the same period.

the Trust to which it would not have been entitled in the ordinary course of business. Mr. Collins' actions in attempting to conceal NCRS's involvement in the transactions clearly evince an awareness on his part of the impropriety of his conduct. Therefore, pursuant to its authority under G.L. c. 268B, §4(d),[7] the Commission orders James M. Collins to pay one thousand dollars ($1,000) to the Commission as a civil penalty for each violation of §11(c) and one thousand dollars ($1,000) for each violation of §23(¶2)(2) for a total civil penalty of four thousand dollars ($4,000).

DATE: APRIL 9, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 285

IN THE MATTER

OF

JAMES F. CONNERY

DISPOSITION AGREEMENT

This disposition agreement (Agreement) is entered into between the State Ethics Commission (Commission) and James F. Connery (Chief Connery) pursuant to §11 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in Superior Court pursuant to G.L. c. 268B, §4(d).

On October 16, 1984, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Chief Connery, fire chief for the city of Revere. The Commission concluded its inquiry and on April 2, 1985, found reasonable cause to believe that Chief Connery violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. From 1979 to the present, Chief Connery has been chief of the Revere Fire Department. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1(g). As chief, he receives approximately $42,000 per year.

2. Suffolk Downs Racetrack straddles the Revere/Boston border. The stables, dormitories and kitchen are in Revere; the track, grandstands and patron parking are in Boston. Currently, roughly 1300 horses are stabled at the track, cared for by approximately 400 employees.

3. In 1972 the Revere city ordinances were revised to single out Suffolk Downs for particular emphasis. Thus, c. 8.32 (§7-90 in 1972) of the ordinances, consisting of 14 sections and covering 5 pages, deals in great detail with Suffolk Downs. These ordinances are concerned with the unique fire hazards presented by the stable area. For example, they contemplate a system for replacing all the old barns and for ensuring that new barn construction meets certain codes. They also require a 24-hour firewatch detail which is provided by regular uniformed Revere Fire Department firefighters (2 on each shift). The fire chief is responsible for enforcing these ordinances and he has a specific right of entry to ensure compliance.

4. In or about September of 1981, Connery began receiving $150 per week from Suffolk Downs. He continued to receive these payments through approximately March 1985. The arrangement was oral. He was paid directly by the track. No specific hours or written work product or reports were required. Chief Connery had no business relationship with Suffolk Downs before becoming chief.

5. In exchange for these payments, Chief Connery periodically visited the stable area in his city fire vehicle. At those times, he supervised the firewatch detail,[1] inspected the stable area to ensure its conformance with city ordinances and state fire code requirements, and gave advice to track personnel regarding fire safety and fire prevention issues. Chief Connery also gave advice as to how the old barns could be improved to comply with fire code requirements and conducted inspections of the adequacy of the sprinkler systems and water flow in the fire hydrants.

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

[1] Firefighters provide this and other "detail" services to private entities on other than their normal shifts. They are, however, still serving as firefighters when they provide these services and are answerable to the fire chief for their conduct. They are paid for a specific number of hours at union rates set forth in the collective bargaining agreement between the fire department and the union. The fire chief is excluded from that agreement. Payments for these services are made pursuant to G.L. c. 44, §53C which provides that where a town or city employee does "detail work" for a private entity, the town or city will bill that entity for those services, the entity will pay the city, and the city will subtract an administrative fee and then pay the employee for his services.

6. The above-described services provided to the track fell within Chief Connery's duties and responsibilities as fire department chief. These were duties and responsibilities covered by his annual city salary. As fire chief, Chief Connery is responsible for the fire department and he is on duty 24 hours a day. As a result of city ordinances, fire department rules and regulations and his job description, he is already responsible for supervising all fire "detail" services in the city and for enforcing the city ordinances dealing with fire prevention and for enforcing the state fire code. More particularly, he is responsible under the city ordinances for supervising the firewatch detail in the stable area and for ensuring fire safety and prevention in that area. Therefore, he cannot supervise detail work, perform fire inspections or provide fire safety and prevention advice for additional private compensation. These are all services he is required to perform as chief and is paid to provide by the city.

7. Section 3(b) of G.L. c. 268A prohibits any municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly seeking or accepting 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.

8. By receiving $150-weekly payments from Suffolk Downs for the services described in paragraph 5 above, services which were within his official responsibilities and duties as fire chief and for which he was already being paid by the city of Revere, Chief Connery received substantial value for or because of his official acts as fire chief. Therefore, he violated §3(b).

9. In his defense, Chief Connery has relied on Suffolk Downs' 20-year practice of compensating the fire chief for the services performed as fire chief in the stable area. As in past cases, the Commission will give no deference to a long-standing practice, whether or not endorsed by city officials, if that practice violates the conflict of interest law. See **In the Matter of the Collector-Treasurer's Office of the City of Boston, et al.**, 1981 Ethics Commission 35.

10. Chief Connery has also relied on two city solicitors' opinions in his defense. The first is a 1972 opinion from the then city solicitor to the then fire chief. The Commission gives no deference to this opinion for several reasons.

First, the request for the opinion does not appear to have involved the detailed submission of facts contemplated by G.L. c. 268A, §22.[2] Second, the opinion was not requested by or issued to Chief Connery. Third, the opinion is 9 years old. The second city solicitor's opinion on which Chief Connery relied is one he received in November 1984.

Its conclusion -- that the chief might work for Suffolk Downs -- is wrong.[3] While the Commission might give deference to an incorrect opinion which otherwise complied with G.L. c. 268A, §22, this opinion is essentially after the fact, the Chief having been on the Suffolk Downs payroll from September 1981. Therefore, no deference will be given. 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 Chief Connery:

1. that he pay the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §3(b);

2. that he refrain from accepting a private fire prevention consulting arrangement with any private entity that has substantial needs for fire protection in the city of Revere; and

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[2]Section 22 provides in pertinent part: any municipal employee shall be entitled to the opinion of the corporation counsel, city solicitor or town counsel upon any question arising under this chapter relating to the duties, responsibilities and interests of such employee.... The town counsel or city solicitor shall file such opinion in writing with the city or town clerk and such opinion shall be a matter of public record; however, no opinion will be rendered by the town counsel or city solicitor except upon the submission of detailed existing facts which raise a question of actual or prospective violation of any provision of this chapter.

[3]The November 1984 opinion Chief Connery received informed him that he could be paid by Suffolk Downs for supervising the firewatch detail in the stable area and for providing limited consulting services for Suffolk Downs on the Boston-side of the track facility. Such an arrangement is prohibited under §§3 and 23 of G.L. c. 268A. Chief Connery may not be paid by Suffolk Downs for supervising the detail work there because that is what the city of Revere is already paying him to do. Section 3 prohibits this. (See **In the Matter of the Collector-Treasurer's Office of the City of Boston**, 1981 EC 35.) And §23(¶2)(1) (which bars a public official from accepting other employment which will impair his independent judgment in his official capacity), prohibits a fire chief from accepting any private employment with an entity with substantial needs for his department's services, especially where the private consulting involves giving fire safety and prevention advice (See EC-COI-81-133).

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

DATE: APRIL 23, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 269

IN THE MATTER

OF

JOANNE BARBOZA

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

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

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Petitioner filed an Order to Show Cause on October 26, 1984 alleging that the Respondent, Joanne Barboza, had violated G.L. c. 268B, §5 [1] by failing to file her Statement of Financial Interests for 1983 (Statement) within ten days of receiving from the Commission a Formal Notice of Delinquency (Notice). The Respondent did not file an Answer to the Order to Show Cause.

II. FINDINGS OF FACT

1. The Respondent, Joanne Barboza, was Director, Citizen Participation in the Department of Social Services through September 3, 1983.

2. In January, 1984, the Commission was notified by Manuel Carballo, Secretary of the Executive Office of Human Services that the Respondent was designated as a person in a "major policy making position" [2] for the year 1983. As a result, she was a "public employee" as defined in G.L. c. 268B, §1(o) [3] and was required to file a Statement for 1983 on or before May 1, 1984.

3. The Respondent failed to file her 1983 Statement by May 1, 1984.

4. On May 11, 1984, the Respondent received from the Commission a Formal Notice of Delinquency pursuant to G.L. c. 268B, §3(f) requiring her to file her Statement within ten days of receipt of the Notice.

5. The Respondent failed to file her 1983 Statement within ten days of receipt of the notice.

6. The Commission initiated a preliminary inquiry on June 19, 1984 pursuant to the Respondent's failure to file her 1983 Statement and thereafter authorized the initiation of adjudicatory proceedings.

7. The Respondent has not filed her 1983 Statement or formally answered this action by the Commission.

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

(c) Every public employee shall file a statement of financial interests for the preceding calendar year with the commission within ten days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee and on or before May first of the year after such person ceases to be a public employee...

Failure of a reporting person to file a statement of financial interests within ten days after receiving notice as provided in clause (f) of section 3 of this chapter, or the filing of an incomplete statement of financial interests after receipt of such a notice, is a violation of this chapter and the commission may initiate appropriate proceedings pursuant to the provisions of section 4 of this chapter.

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

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

b) all members of the judiciary;

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

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

e) persons exercising similar authority.

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

8. The Respondent has failed to respond to the Commission's Notice or Order to Show Cause why summary decision should not be entered against her.

III. DECISION

The evidence demonstrates that the Respondent was designated to file a Statement for 1983 by the Secretary of the Executive Office of Human Services. Although she received a Formal Notice of Delinquency on May 11, 1984, she did not file a Statement within ten days of receiving that Notice and, as of the date of the hearing, has not filed such a Statement. Therefore, the Respondent has violated G.L. c. 268B, §5.

IV. SANCTION

The Commission, upon finding that there has been a violation of G.L. c. 268B, may issue an order requiring the violator to (1) cease and desist such violation; (2) file any statement or other information required by G.L. c. 268B; or (3) pay a civil penalty of not more than $2000 for each violation. G.L. c. 268B, §4(d). In cases in which a Respondent has failed to file a Statement and to formally Answer the Commission's proceeding, a penalty of $1000 has been imposed.[4] A similar penalty is appropriate in this case. The Respondent has disregarded entirely her statutory obligation to file a Statement for 1983.

V. ORDER

The Petitioner's Motion for Summary Decision is granted. The Respondent, Joanne Barboza, is ordered to:

1. File a Statement for 1983 within seven (7) days of receipt of this Decision and Order; and

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

DATE: MAY 7, 1985

[4]See In the Matter of Allison Goodsell, 1981 Ethics Commission 38, In the Matter of Terrence McGee, 1984 Ethics Commission 167.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 289

IN THE MATTER

OF

JOHN A. DELEIRE

DISPOSITION AGREEMENT

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

On September 25, 1984, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Mr. DeLeire, the then police chief of the city of Revere. The Commission concluded its inquiry and on April 2, 1985 found reasonable cause to believe that Mr. DeLeire violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. Mr. DeLeire, was chief of the Revere Police Department until approximately March 1, 1985 when he submitted his resignation and applied for a disability pension. He became chief in March 1980, receiving an annual salary of approximately $42,000. As such, he was a municipal employee within the meaning of G.L. c. 268A, §1(g).

Suffolk Downs Racetrack

2. Suffolk Downs Racetrack straddles the Revere/Boston border. The stables, dormitories and kitchen are in Revere; the track, grandstands and patron parking are in Boston. Suffolk Downs has its own full-time, private plainclothes security force supplemented on the Boston side with Boston Police Department detail officers and on the Revere side with Revere Police Department detail officers.

3. For a number of years prior to becoming police chief, Mr. DeLeire was on the Suffolk Downs payroll in one private capacity or another. In the late 1970's he was a private security consultant who, beginning in September

1979, was placed on salary at $125 per week. He was kept on that salary when he became police chief in March 1980. The salary was increased to $150 per week in March of 1981.

4. In exchange for this salary, Mr. DeLeire periodically appeared on Saturday and Sunday afternoons at the track clubhouse area on the "Boston-side." His function was to be the "eyes and ears" of the vice-president of operations, to monitor the effectiveness of the private security force and to identify any potential security problems.

5. On two separate occasions while Mr. DeLeire was chief, in March of 1980 and June of 1981, respectively, at Suffolk Downs' request, he arranged for and supervised special details which were placed at the track's Revere entrances which were being picketed in a union action.

6. On or about January 1981 Mr. DeLeire as chief also took police preventative actions in response to a tip that an armored truck that would be entering and leaving the track from a Revere entrance would be robbed.

7. Section 19 of G.L. c. 268A, in pertinent part, prohibits any municipal employee from participating as such in a particular matter in which any business organization by which he is employed has a financial interest.

8. By arranging and supervising the police details and by responding to the hold-up tip, described in paragraphs 5 and 6, above, Mr. DeLeire participated in particular matters in which his employer, Suffolk Downs, had a financial interest. In each of these instances he therefore violated §19.

9. Section 23(¶2)(1) of G.L. c. 268A provides that no municipal employee shall "accept other employment which will impair his independence of judgment in the exercise of his official duties."

10. By accepting a private consulting arrangement with a private entity which has substantial needs for his department's services, especially where that private consulting arrangement involves the same area of expertise for which he is responsible in his public position as chief, Mr. DeLeire violated §23(¶2)(1).

Wonderland Dog Track

11. Wonderland Dog Track is located in Revere. It is owned and operated by the Westwood Group, Inc. The track contracts with a private security firm, Ajay Investigations and Security Services, Inc. (Ajay), which handles plainclothes security. This security is supplemented by 18-20 Revere police officers on detail who are paid in accordance with the established union rates. On any typical racing night, this detail includes a regular police captain as the supervisor of the detail. The work is performed by the officers, including the captain, 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 city bills Wonderland, which in turn pays the city for the detail hours. The city, after subtracting an administrative fee, pays the officers. All of this is done in accordance with G.L. c. 44, §53C.

12. In or about June 1980, Ajay hired Mr. DeLeire to supervise the uniformed detail officers. Ajay initially paid DeLeire $600 a month for his services, increasing that amount to $750 and $800 in 1983 and 1984, respectively. Ajay was in turn reimbursed by Wonderland for these payments. There was no written contract between Mr. DeLeire and Ajay or Wonderland. No set hours were required. No reports were submitted. Before becoming chief, Mr. DeLeire had no private relationship with Wonderland or Ajay.

13. In exchange for these monthly payments, Mr. DeLeire periodically visited the track to ensure that the detail officers were present and performing properly. On occasion, he discussed with Wonderland's vice-president for operations concerns Wonderland had as to the detail officers' performance.

14. The above-described services provided at Wonderland were within Mr. DeLeire's duties and responsibilities as police department chief and covered by his annual city salary. The chief is on duty 24 hours a day. He is responsible for all of the activities of his department, including the providing of detail services to private entities. He is also responsible for enforcing the department's regulations regarding the performing of details and for disciplining detail officers for any misconduct.

15. Section 3(b) of G.L. c. 268A prohibits any municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly seeking or accepting 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.

16. By receiving at first $600, then $750 and finally $800 per month from Ajay for the services described in paragraph 13 above, services which were within his official responsibilities and duties as police chief and for which he was already being paid by the city of Revere. Mr. DeLeire received substantial value for or because of his official acts as police chief. Therefore, he violated §3(b).

Northeast Theatre Corporation, d/b/a Showcase Cinemas

17. In or about July 1982, Northeast Theatre Corporation, d/b/a Showcase Cinemas opened a 10-theater complex in Revere. In preparing to begin operations, Showcase personnel approached Mr. DeLeire to discuss potential security issues in which the Revere Police Department might play a role: traffic and crowd control, cash escort service and responding to stolen vehicles and other crimes. Showcase was particularly concerned that a minimum number of uniform police officers would be present at the facility on a regular basis to meet their security needs. This was especially true of Friday and Saturday nights.

18. Mr. DeLeire and Showcase also discussed matters regarding the internal security within the threatre property including crowd control, parking lot security needs, handling of cash inside the threatre complex and related security matters not on public property.

19. Mr. DeLeire indicated to Showcase that he could consult on internal security matters with Showcase on his off-duty time and that this type of work had been approved by a Revere City Solicitor provided the services did not interfere with his official duties and were on his off-duty time. Mr. DeLeire indicated he was being paid privately for security services for other companies in Revere.

20. Mr. DeLeire and Showcase agreed that when the theatre complex opened payment of approximately $20 per hour would be appropriate for his services which were anticipated to involve an average of 5 hours a week, i.e. pay of $100 per week. A portion of Mr. DeLeire's pay was to be attributed to Mr. DeLeire arranging for and supervising uniform police officers on detail to meet security needs.

21. Mr. DeLeire began receiving $100 a week payments on July 23, 1982. The payments were made by check, recorded on the books of Showcase, and taxes were appropriately withheld. These payments stopped in January 1985 when the employment arrangement ended.

22. In July of 1982 Mr. DeLeire began periodically appearing at the theatre complex to perform the services for Showcase described in paragraphs one and two above.

23. Mr. DeLeire was not able to arrange for sufficient uniform detail police officers for Showcase, so that Showcase in early-August employed special police officers who were not regular uniform police officers of the department but were allowed to wear a uniform and badge, carry a gun and have the power of arrest.[1] Thereafter, until his employment with Showcase ended, Chief DeLeire included supervising the special police as part of the services he provided to Showcase.

24. Mr. DeLeire had as one of his general responsibilities supervision of special police officers.

25. The agreement by Mr. DeLeire to arrange and supervise uniform detail police, his supervising such police for a few weeks in July through August 1982, and his subsequent supervision of special police officers until January 1985, were within Mr. DeLeire's duties and responsibilities as police department chief. These were duties and responsibilities covered by his annual city salary. By receiving a portion[2] of the $100 weekly payments from Showcase for these services, Mr. DeLeire received substantial value for or because of his official acts as police chief. Therefore, he violated §3(b).

26. The Commission has found no evidence of corrupt intent by Mr. DeLeire or Showcase. Nor did it find any evidence that Showcase ever asked for or that Mr. DeLeire provided any special or favorable treatment as police chief to benefit Showcase during the period of his employment by Showcase.[3] In fact, Mr. DeLeire on one occasion publicly opposed the issuance of a valuable license to Showcase for the operation of a "flea market" and cited traffic and public safety reasons for his opposition.

27. In his defense to all of the above-described violations involving Suffolk Downs, Wonderland, and Showcase, Mr. DeLeire has relied on city solicitors' opinions. First, he points to the prior city solicitors' opinion in July of 1972 to the then fire chief as to whether

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[1] See Revere City Ordinance 2.60.100.

[2] To the extent Chief DeLeire had a private security consulting arrangement with Showcase not involving his duties and responsibilities as chief, that employment arrangement was prohibited under G.L. c. 268A, §23(¶2)(l). Section 23(¶2)(l), which would apply only to Mr. DeLeire and not to Showcase, bars a public official from accepting other employment which will impair his independence of judgment in the exercise of his official duties. Section 23(¶2)(l) would prohbiit a police chief from accepting private employment with an entity with substantial needs for his department's services, especially where the private consulting involves security matters. See EC-COI-81-133. See also In the Matter of Henry A. Brawley (1982 Disposition Agreement, Docket No. 152.

[3] Other than the §3 violation which is the subject of this disposition agreement.

that fire chief could be paid privately by Suffolk Downs for performing certain services as fire chief in Suffolk Downs' stable area. The Commission gives no deference to this opinion: it is not to Mr. DeLeire, it involves a different department chief, and it is more than 9 years old.

Secondly, Mr. DeLeire states that the city solicitor orally informed him -- when he accepted his employment with Suffolk Downs and Wonderland -- that no conflict of interest would be created. The Commission gives no deference to this oral opinion. It does not appear to have involved the detailed submission of facts contemplated by G.L. c. 268A, §22.[4] Nor will the Commission give deference to oral advice.

Third, Mr. DeLeire points to a written city solicitor's opinion received on November 7, 1984[5] confirming earlier advice that the chief may "moonlight" the same as any other police officer so long as the services to be provided did not interfere with his powers and duties as chief during his regular working hours. The Commission gives no deference to this opinion in that it does not appear to be based on a detailed submission of facts; moreover, it is substantially after the fact (the majority of Mr. DeLeire's compensation was received prior to that date); and finally, for the reasons discussed above, Mr. DeLeire's "moonlighting" did interfere with (Suffolk Downs) or already involve (Wonderland and Showcase) his duties as chief.

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. DeLeire:

1. that he pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for his violations of §§19 and 23(¶2)(1) in participating in particular matters in which Suffolk Downs had a financial interest, and in accepting employment which will impair his independence of judgment in the performance of his official duties, respectively;

2. that he pay the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §3(b) by receiving compensation from Wonderland Dog Track for or because of official acts he performed;

3. that he pay the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §3(b) by receiving compensation from Showcase Cinemas for or because of official acts he performed; and

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

DATE: MAY 14, 1985

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 236

IN THE MATTER

OF

ADAM DIPASQUALE

DISPOSITION AGREEMENT

This disposition agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Adam DiPasquale (Lt. DiPasquale) pursuant to §11 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in Superior Court pursuant to G.L. c. 268B, §4(d).

On January 8, 1985, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Lt. DiPasquale, a member of the city of Revere Police Department. The Commission concluded its inquiry and on April 2, 1985, found reasonable cause to believe that Lt. DiPasquale violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

[4]Section 22 provides in pertinent part:
any municipal employee shall be entitled to the opinion of the corporation counsel, city solicitor or town counsel upon any question arising under this chapter relating to the duties, responsibilities and interests or such employee.... The town counsel or city solicitor shall file such opinion in writing with the city or town clerk and such opinion shall be a matter of public record; however, no opinion will be rendered by the town counsel or city solicitor except upon the submission of detailed existing facts which raise a question of actual or prospective violation of any provision of this chapter.

[5]The 1984 opinion is remarkable in making no reference to G.L. c. 268A and in not discussing the specifics of the private employment contemplated.

1. Lt. DiPasquale has been a Revere police officer since 1954. He has been a lieutenant since 1974. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1(g). As a police lieutenant, he receives approximately $32,000 per year.

2. Lt. DiPasquale at all times relevant to this Agreement has served as either the "officer-in-charge" or patrol supervisor on either the second (4:30 p.m - 12:30 a.m.) or third (12:30 a.m. - 7:30 a.m.) shift. As such, he is responsible for all police department personnel on duty at that particular time.

3. Lt. DiPasquale has also been employed throughout this time by Suffolk Downs Racetrack. He works there six days a week as the assistant security chief earning approximately $450 per week.

4. Suffolk Downs Racetrack straddles the Revere/Boston border. The stables, dormitories and kitchen are in Revere; the track, grandstands and patron parking are in Boston. Currently, roughly 1300 horses are stabled at the track, cared for by approximately 400 employees.

5. Suffolk Downs has its own private security force. As assistant security chief, Lt. DiPasquale is responsible for crowd control, including supervising plainclothes private detectives in the grandstands, providing appropriate security measures for the handling of large cash transfers, supervising internal security in the stable area including the protection of stable personnel and horses, and dealing with violations of the track's safety and conduct rules by stable personnel.

6. Suffolk Downs has substantial need for Revere Police Department services. Suffolk Downs maintains a direct security line between the track and the Revere Police Department. It uses Revere Police Department detail officers in uniform to patrol the stable area and provide traffic control at important events. The track also calls on the Revere Police Department to respond to any breaches of the peace which occur in the stable area.

7. Section 23(¶2)(l) prohibits a state, county or municipal employee from accepting other employment which will impair his independence of judgment in the exercise of his official duties.

8. As discussed above, Lt. DiPasquale has been either the "officer- in-charge" or patrol supervisor of several Revere Police Department shifts each week. By having a paid, six-day-a-week private employment arrangement with Suffolk Downs, a private entity with substantial needs for Revere Police Department services, Lt. DiPasquale is accepting private employment which necessarily impairs the independence of his judgment in the performance of his official duties.[1] This is particularly true where that private employment involves an overlapping area of function, i.e., security consulting work.

9. In his defense, Lt. DiPasquale points to the long-standing practice of his working both as a police lieutenant, and as a private security consultant for Suffolk Downs, and that his superiors were aware of his having both jobs. As in past cases, the Commission will give no deference to a long-standing practice, whether or not endorsed by city officials, if that practice violates the conflict of interest law. **See In the Matter of the Collector-Treasurer's Office of the City of Boston**, 1981 Ethics Commission 35.

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 Lt. DiPasquale:

1. that he pay the Commission the sum of $500 as a civil penalty for violating G.L. c. 268A, §23(¶2)(l);

2. that he resign from either his police department or Suffolk Downs job;

3. that should he keep his police department job, he refrain from accepting a private security consulting arrangement with any private entity that has substantial needs for Revere Police Department services; and

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

DATE: MAY 14, 1985

[1] It would make no difference if Lt. DiPasquale first had his private consulting relationship and then became officer-in-charge of police department shifts. The sequence is not significant, but rather it is the fact of his simultaneous employment that creates the potential for divided loyalties and thus the impairment of independence.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 287

IN THE MATTER

OF

NORTHEAST THEATRE CORPORATION d/b/a
SHOWCASE CINEMAS

DISPOSITION AGREEMENT

This disposition agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Northeast Theatre Corporation d/b/a Showcase Cinemas (Showcase) pursuant to §11 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in Superior Court pursuant to G.L. c. 268B, §4(d). On October 16, 1984, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Showcase's dealings with the city of Revere police chief. The Commission concluded its inquiry and on April 2, 1985, found reasonable cause to believe that Showcase violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. In or about July 1982, Showcase opened a 10-theater complex in Revere. In preparing to begin operations, Showcase personnel approached the city of Revere Police Chief (Chief Deleire) to discuss potential security issues in which the Revere Police Department might play a role: traffic and crowd control, cash escort service and responding to stolen vehicles and other crimes. Showcase was particularly concerned that a minimum number of uniform police officers would be present at the facility on a regular basis to meet its security needs. This was especially important for Friday and Saturday nights.

2. Chief Deleire and Showcase agreed that when the theater opened he would arrange to provide and supervise sufficient uniform police officers on detail[1] to meet those security needs. Showcase agreed to pay Chief Deleire $100 a week for his services.

3. Chief Deleire began receiving his $100 a week payments on July 23, 1982. These payments were continued until January 1985 when he was terminated.[2] The contract was oral. No written work product was required.

4. Showcase was not satisfied with the attendance and performance of uniform detail officers during its first month of operations in late July of 1982. As a result, Showcase arranged to have special police officers provide its security needs.[3]

5. From about the time Showcase began its operations, Chief Deleire periodically visited the Showcase complex to check on the performance of first the uniformed detail officers and then the special police officers. He continued to perform that service until he was terminated in January 1985. (As of approximately March 1985 Chief Deleire resigned as chief.)[4]

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[1]Police officers provide "detail" services to private entities on other than their normal shifts. They are, however, still serving as police officers when they provide these services and are answerable to the police chief for their conduct. They are paid for a specific number of hours at union rates set forth in the collective bargaining agreement between the police department and the union. The police chief is excluded from that agreement. Payments for these services are made pursuant to G.L. c. 44, §53C which provides that where a town or city employee does "detail work" for a private entity, the town or city will bill that entity for those services, the entity will pay the city, and the city will subtract an administrative fee and then pay the employee for his services.

[2]Showcase states it kept Chief Deleire on its payroll after early October, 1984 (the date it was first contacted by the Commission about Chief Deleire's activities) because it had been requested to keep the matter confidential. Showcase construed this request to mean not alerting Chief Deleire in any way to the investigation, which included not terminating him from its payroll.

[3]Showcase states it kept Chief Deleire on its payroll after early October, 1984 (the date it was first contacted by the Commission about Chief Deleire's activities) because it had been requested to keep the matter confidential. Showcase construed this request to mean not alerting Chief Deleire in any way to the investigation, which included not terminating him from its payroll.

[4]Special police officers fall within the police department's ordinances. See Revere City Ordinances 2.60.100. The officers answer to the police chief as to their performance. They wear a uniform and badge, and are authorized to carry a gun. They are supplementary, however, to the full-time regular members of the department.

6. Also in exchange for his weekly payments, Chief Deleire assisted Showcase in obtaining a spotlight at the entrance to the theater complex for traffic safety purposes by writing to Massachusetts Electric on city letterhead as chief of police in support of Showcase's request for that spotlight.

7. The above-described services Chief Deleire agreed to and/or did provide to Showcase were within Chief Deleire's duties and responsibilities as police department chief and covered by his annual city salary. The chief is on duty 24 hours a day. He is responsible for all of the activities of his department, including the providing of detail services to private entities. He is responsible for enforcing the department's regulations regarding the performing of details and for disciplinning detail officers for any misconduct. He is also responsible for the conduct of special police officers.

8. Section 3(a) of G.L. c. 268A prohibits anyone otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly offering or giving anything of substantial value to any state, county or municipal employee for or because of any official act performed or to performed by him.

9. By offering and giving $100 weekly payments to Chief Deleire for the above-described services, Showcase offered and gave substantial value to Chief Deleire for or because of his official acts as police chief. Therefore, Showcase violated §3(a).

10. In its defense, Showcase points to the long-standing practice in Revere of the police and fire chiefs receiving private compensation for supervising "detail" work. As in past cases, the Commission will give no deference to a long-standing practice, whether or not endorsed by city officials, if that practice vioaltes the conflict of interest law. **See In the matter of the Collector-Treasurer's Office of the City of Boston, et al., 1981 Ethics Commission 35.**

11. Showcase also points to certain city solicitors' opinions. First, it points to the prior city solicitor's opinion in July of 1972 to the then fire chief as to whether that fire chief could be paid privately by Suffolk Downs for performing certain services as fire chief in Suffolk Downs' stable area. The Commission gives no deference to this opinion: it is not to Chief Deleire, it involves a different department chief, and it is more than 9 years old.

Second, Showcase points to Chief Deleire's representation that the city solicitor orally informed him -- before he accepted his employment with Showcase -- that he could "moonlight" and no conflict of interest would be created. The Commission gives no deference to this oral opinion. It does not appear to have involved the detailed submission of facts contemplated by G.L. c. 268A, §22.[5] Nor will the Commission give deference to oral advice.

Third, Showcase points to a written city solicitor's opinion to Chief Deleire received on November 7, 1984 confirming earlier advice that the chief may "moonlight" the same as any other police officer so long as the services to be provided did not interfere with his powers and duties as chief during his regular working hours. The Commission gives no deference to this opinion in that it does not appear to be based on a detailed submission of facts; it is substantially after the fact (the majority of Chief Deleire's compensation was received prior to that date); and finally, for the reasons discussed above, Chief Deleire's "moonlighting" for Showcase did interfere with his duties as chief in the sense that he was already supposed to be performing those duties as chief.[6]

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 Showcase:

1. that it pay the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §3(a) by offering and giving compensation to Chief Deleire for or because of official acts he performed; and

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

DATE: MAY 14, 1985

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[5]Section 22 provides in pertinent part:

any municipal employee shall be entitled to the opinion of the corporation counsel, city solicitor or town counsel upon any question arising under this chapter relating to the duties, responsibilities and interests of such employee... The town counsel or city solicitor shall file such opinion in writing with the city or town clerk and such opinion shall be a matter of public record; however, no opinion will be rendered by the town counsel or city solicitor except upon the submission of detailed existing facts which raise a question of actual or prospective violation of any provision of this chapter.

[6]The 1984 opinion is remarkable in making no reference to G.L. c. 268A and in not discussing the specifics of the private employment contemplated.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 288

IN THE MATTER

OF

OGDEN SUFFOLK DOWNS, INC.

DISPOSITION AGREEMENT

This disposition agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Ogden Suffolk Downs, Inc. (Suffolk Downs) pursuant to §11 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in Superior Court pursuant to G.L. c. 268B, §4(d). On October 16, 1984, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Suffolk Downs. The Commission concluded its inquiry and on April 2, 1985, found reasonable cause to believe that Suffolk Downs violated G.L. c. 268A. The parties now agree to the following findings of fact and conclusions of law:

1. Suffolk Downs owns and operates Suffolk Downs Racetrack which straddles the Revere/Boston border. The stables, dormitories and kitchen are in Revere; the track, grandstands and patron parking are in Boston. Currently, roughly 1300 horses are stabled at the track, cared for by approximately 400 employees.

2. In 1972 the Revere city ordinances were revised to single out Suffolk Downs for particular emphasis. Thus, c. 8.32 (§7-90 in 1972) of the ordinances, consisting of 14 sections and covering 5 pages, deals in great detail with Suffolk Downs. These ordinances are concerned with the unique fire hazards presented by the stable area. For example, they contemplate a system for replacing all the old barns and for ensuring that new barn construction meets certain codes. They also require a 24-hour firewatch detail which is provided by regular uniformed Revere Fire Department firefighters (2 on each shift). The fire chief is responsible for enforcing these ordinances and he has a specific right of entry to ensure compliance.

3. In 1972, the then fire chief obtained a written opinion from the city solicitor of Revere that he could be hired and paid privately by Suffolk Downs for services performed as supervisor of fire prevention and supervisor of the fire watch detail in the stable area.

4. In or about September of 1981, Suffolk Downs hired and began to pay Revere Fire Chief James Connery (Chief Connery) $150 per week for such services. These 150 dollar payments were made directly by the track by check, were properly reflected on the books and records of Suffolk Downs, were reported to the appropriate taxing authorities, and were continued until March of 1985. No specific hours or written work product or reports were required. Suffolk Downs had no business relationship with Chief Connery prior to his becoming chief.

5. In exchange for these payments, Chief Connery periodically visited the stable area in his city fire vehicle. At those times, he supervised the firewatch detail,[1] inspected the stable area to ensure its conformance with city ordinances and state fire code requirements, and gave advice to track personnel regarding fire safety and fire prevention issues. Chief Connery also gave advice as to how the old barns could be improved to comply with fire code requirements and conducted inspections of the adequacy of the sprinkler systems and water flow in the fire hydrants.

6. The above-described services provided to the track fell within Chief Connery's duties and responsibilities as fire department chief. These were duties and responsibilities covered by his annual city salary. As fire chief, Chief Connery is responsible for the fire department and he is on duty 24 hours a day. As a result of city ordinances, fire department rules and regulations and his job description, he is already responsible for supervising all fire "detail" services in the city and for enforcing the city ordinances dealing with fire prevention and for enforcing the state fire code. More particularly, he is responsible under the city ordinances for supervising the firewatch detail in the stable area and for ensuring fire safety and prevention in that area. Therefore, Suffolk Downs cannot pay Chief Connery to supervise detail work, perform fire inspections or provide fire safety and prevention advice. These are all services Chief Connery is required to perform as chief and is paid to provide by the city.

[1] Firefighters provide this and other "detail" services to private entities on other than their normal shifts. They are, however, still serving as firefighters when they provide these services and are answerable to the fire chief for their conduct. They are paid for a specific number of hours at union rates set forth in the collective bargaining agreement between the fire department and the union. The fire chief is excluded from that agreement. Payments for these services are made pursuant to G.L. c. 44, §53C which provides that where a town or city employee does "detail work" for a private entity, the town or city will bill that entity for those services, the entity will pay the city, and the city will subtract an administrative fee and then pay the employee for his services.

7. Section 3(a) of G.L. c. 268A prohibits anyone, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly offering or giving anything of substantial value to a municipal employee for or because of any official act or acts within his official responsibility performed or to be performed by him.

8. By paying Chief Connery $150-weekly payments for the services described in paragraph 4 above, services which were within the chief's official responsibilities and duties as fire chief and for which he was already being paid by the city of Revere, Suffolk Downs gave substantial value for or because of his official acts as fire chief. Therefore, Suffolk Downs violated §3(a).

9. In its defense, Suffolk Downs points to its good faith reliance on the 1972 opinion letter from the then city solicitor to the then fire chief informing him that he could be paid privately by Suffolk Downs for being supervisor of fire prevention and the firewatch detail in the stable area. The Commission gives no deference to this opinion for several reasons.

First, the request for the opinion does not appear to have involved the detailed submission of facts contemplated by G.L. c. 268A, §22.[2] Second, the opinion was not requested by or issued to Chief Connery. Third, the opinion is 9 years old.

There also exists a second city solicitor's opinion letter which Chief Connery received in November 1984. Its conclusion -- that the chief might work for Suffolk Downs --is wrong.[3] While the Commission might give deference to an incorrect opinion which otherwise complied with G.L. c. 268A, §22, this opinion is essentially after the fact, the Chief having been on the Suffolk Downs payroll from September 1981. Therefore, no deference will be given. 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 Suffolk Downs:

1. that it pay the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §3(a); and

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

DATE: MAY 14, 1985

[2]Section 22 provides in pertinent part:

any municipal employee shall be entitled to the opinion of the corporation counsel, city solicitor or town counsel upon any question arising under this chapter relating to the duties, responsibilities and interests of such employee.... The town counsel or city solicitor shall file such opinion in writing with the city or town clerk and such opinion shall be a matter of public record; however, no opinion will be rendered by the town counsel or city solicitor except upon the submission of detailed existing facts which raise a question of actual or prospective violation of any provision of this chapter.

[3]The November 1984 opinion Chief Connery received informed him that he could be paid by Suffolk Downs for supervising the firewatch detail in the stable area and for providing limited consulting services for Suffolk Downs on the Boston-side of the track facility. Such an arrangement is prohibited under §§3 and 23 of G.L. c. 268A. Chief Connery may not be paid by Suffolk Downs for supervising the detail work there because that is what the city of Revere is already paying him to do. Section 3 prohibits this. (See **In the Matter of the Collector-Treasurer's Office of the City of Boston**, 1981 EC 35.) And §23(¶2)(l) (which bars a public official from accepting other employment which will impair his independent judgment in his official capacity), prohibits a fire chief from accepting any private employment with an entity with substantial needs for his department's services, especially where the private consulting involves giving fire safety and prevention advice (See EC-COI-81-133).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 291

IN THE MATTER

OF

DENNIS FLYNN

DISPOSITION AGREEMENT

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

On May 28, 1985, the Commission initiated a preliminary inquiry pursuant to the conflict of interest law, G.L. c. 268A, involving Mr. Flynn, an employee of the Boston Fire Department. The Commission concluded its inquiry on June 18, 1985, finding reasonable cause to believe that Mr. Flynn violated G.L. c. 268A, §23(¶2)(2). The parties now agree to the following findings of fact and conclusions of law:

1. Mr. Flynn has been a member of the Boston Fire Department (fire department) since 1971. As a fire department employee, Mr. Flynn is a municipal employee within the meaning of G.L. c. 268A, §1(n).

2. Since January, 1984, Mr. Flynn has been the acting supervisor of maintenance for the fire department. As acting maintenance supervisor, Mr. Flynn is responsible for all fire department equipment, including all motor vehicles used by the maintenance department.

3. Mr. Flynn owns a summer home in the Pocasset section of Bourne, Massachusetts.

4. On six occasions from mid-March to early April, 1985, Mr. Flynn drove a fire department vehicle assigned to the maintenance department (a tow truck, pick-up truck or automobile) from Boston to his Pocasset home and back (approximately 120 miles), using fire department gasoline or diesel fuel. On each occasion, Mr. Flynn went to his Pocasset home on personal business which was unrelated to his duties with the fire department.

5. Fire department regulations prohibit the use of fire department vehicles for personal business.

6. The economic value of Mr. Flynn being able to use these city vehicles for the above-described private purposes was approximately $500.

7. General Laws c. 268A, §23(¶2)(2) provides in pertinent part that a municipal employee may not use or attempt to use his official position to secure unwarranted privileges or exemptions for himself. By using fire department vehicles for his personal business, Mr. Flynn violated §23(¶2)(2).

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

1. that he cease and desist from using any fire department vehicles or other property for his personal purposes;

2. that he forfeit the economic advantage he derived from violating §23 by paying to the City of Boston the sum of $500; and

3. that he pay to the State Ethics Commission the amount of $500 as a civil penalty for violating G.L. c. 268A, §23(¶2)(2).

DATE: June 18, 1985

SUMMARIES OF DISPOSITION AGREEMENTS

***In the Matter of Paul Romeo**
(February 5, 1985)

Paul Romeo, Ashland tax collector acknowledged he violated §19 of the conflict of interest law, and in connection therewith, agreed to pay $3,323 to settle the matter.

According to an Agreement between Romeo and the Commission, Romeo admitted he violated §19 by participating, in his capacity as tax collector, in decisions as to when and how to collect his own delinquent real estate taxes. G.L. c. 268A, §19 prohibits a municipal employee from participating in a particular matter in which he has a financial interest.

The $3,323 settlement represents a $1,500 civil penalty paid by Romeo for having violated the law. That payment was made to the commonwealth. The remaining $1,823 was paid to the town of Ashland to settle his delinquent tax debt.

In the Matter of Kenneth Tarbell
(February 12, 1985)

Kenneth Tarbell, a former engineer for the Department of Environmental Quality Engineering (DEQE) admitted he violated §5(a) of the conflict of itnerest law, and in connection therewith, agreed to pay a $2,000 civil penalty.

According to the Agreement, Tarbell, while employed by DEQE, participated in the establishment of a DEQE compliance order affecting the operation of a particular sanitary landfill. When Tarbell left the employ of DEQE, he went to work for the owners of the landfill, and, according to the Agreement, received compensation from his new employer in connection with his efforts to bring the landfill into compliance with the terms of the DEQE's compliance order.

The parties agreed that Tarbell violated §5(a) because he accepted compensation from someone other than the commonwealth (the owners of the landfill) in connection with the compliance order, a matter of direct interest to the commonwealth and one in which he had participated while a state employee.

In the Matter of Paul Bernard
(April 3, 1985)

According to an Agreement between Paul Bernard, a Freetown Planning Board member and the Commission, Bernard acknowledged he violated §17 of G.L. c. 268A when, in his private capacity as a real estate broker, he represented private clients before his own board. Section 17 prohibits a town official from acting as agent for someone other than the town in relation to particular matters of direct and substantial interest to that town.

Bernard agreed he also violated §19 of G.L. c. 268A when he took steps, as a board member, to further the goals of two development proposals in which he, as a real estate broker, had a financial interest. Section 19 prohibits a municipal official from participating in particular matters in which he has a financial interest. In connection with his admissions, Bernard paid a $1,000 civil penalty.

In the Matter of John Rogers
(April 3, 1985)

John Rogers, a Fairhaven School Committee member admitted he violated §19 of G.L. c. 268A when, on several occasions, he participated in school committee discussions relating to a collective bargaining agreement which would affect the financial interests of his wife, who was a teacher in the Fairhaven school system. Section 19 prohibits a municipal official from participating in a particular matter in which a member of his immediate family has a financial interest. In connection with his admission, Rogers paid a $500 civil penalty.

In the Matters of John Deleire, James Connery, Adam DiPasquale, Ogden Suffolk Downs, Inc. and Northeast Theater Corporation
(May 14, 1985)

In separate disposition agreements with John DeLeire, James Connery and Adam DiPasquale, three fire and police officials from Revere, and Ogden Suffolk Downs, Inc. and Northeast Theater Corporation, two corporations conducting business in Revere, the Commission ended long-standing employment arrangements that violate the conflict of interest law. By the terms of those agreements, four of the five subjects paid maximum civil penalties; the fifth paid a smaller penalty consistent with the seriousness of his offense. In total, the Commission collected $12,000 in penalties.

According to the disposition agreements, the police and fire chiefs violated the conflict of interest law inasmuch as they were employed and paid by the private corporations to perform functions that fell within their official municipal responsibilties and for which they were already paid through receipt of their government salaries. Section 3 of G.L. c. 268A prohibits a municipal employee from accepting, and anyone from offering, something of substantial value for or because of official acts performed or to be performed. Because §3 prohibits the offer as well

as the receipt of something of value, the corporations were also found to have violated §3. By the terms of the various agreements, the parties agreed to terminate those private employment arrangements which formed the bases of the §3 violations.

The disposition agreements also indicate that the two police officials (DeLeire and DiPasquale) violated one of the standards of conduct set forth under §23 of G.L. c. 268A by entering into private consulting arrangements with corporations which rely heavily on the Revere Police Department for service and protection. Section 23(¶2)(l) prohibits municipal officials from accepting outside employment which will impair their independence of judgment in the exercise of their official duties. According to the agreements, by accepting private employment with corporations with substantial need for their official services, both officials opened themselves up to divided loyalties and thus the impairment of their judgment in their performance for the city.

In the Matter of Dennis Flynn
(June 18, 1985)

Dennis Flynn, the acting superintendent of maintenance of the Boston fire department acknowledged that he violated §23(2)(2) of G.L. c. 268A when he used fire department vehicles to prepare his vacation home for summer use. Section 23(¶2)(2) prohibits a municipal employee from using his official position to secure an unwarranted privilege. In connection with his acknowledgement, Flynn forfeited the $500 economic advantage he gained by using city vehicles for personal business. He also paid a $500 civil penalty.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-5

FACTS:

You own a business and have applied for financial assistance under a state department's (Department) program providing payment for certain business expenses. Although there is federal agency involvement in the program, the final review and payment is made by the Department.

You are also a member of the state Board which, by statute, has supervision and control over the Department.

QUESTION:

Does G.L. c. 268A permit you to receive financial assistance from the Department's program while holding your present position?

ANSWER:

No, unless you obtain a gubernatorial exemption.

DISCUSSION:

As a member of the Board, you are a state employee within the meaning of G.L. c. 268A, §1(q). Due to the part-time nature of your position, however, the conflict law will apply less restrictively to you as a special state employee[1] under certain circumstances. Section 7 of c. 268A 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..." While it is clear that you would have a financial interest in the receipt of Department monies, an issue is raised as to whether that interest would be "in a contract made by a state agency."

The Commission has taken a broad view of what constitutes a contract for c. 268A purposes. In prior advisory opinions, the Commission has determined that the term "contract" is not limited solely to a formal, written document setting forth the terms of two or more parties' agreement. Rather, 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) constitutes a contract for §7 purposes. See, e.g. EC-COI-84-74 (employment arrangements are "contracts" under §7); 84-10 and 83-37 (bonds issued by state agencies are contracts); 82-24 (arrangement providing compensation from state-funded program for daily training to a retarded child constitutes a contract); and 81-64 (a state grant is a contract).

Under the Department's program, you will receive a financial assistance payment from the Department once it is verified that you have had the work done on your business. Based on prior conflict opinion precedent, the Commission concludes that this arrangement constitutes a contract.[2]

There are, however, a number of exemptions from the §7 prohibition. Two of these exemptions, the §7(b) and §7(d) exemptions, require that you not participate in or have official responsibility for any of the activities of the contracting agency. In other words, these two exemptions have the prerequisite that the contract in which you have a financial interest be made by a state agency other than your own. Because the Department is within the overall authority of the Board, you necessarily share in the official responsibility for Department activities and so are ineligible for these exemptions. As a Board member, the sole exemption which would allow you to receive Department program funds would be §7(e). This exemption would require that you file a statement with the State Ethics Commission disclosing your interest in the Department program funds and obtain an exemption from the Governor, with the advice and consent of the Executive Council.

In the event that you obtain the §7(e) exemption, you will still be subject to the restrictions set forth in §6. In relevant part, that section prohibits a state employee from participating[3] as such an employee in any particular

[1] Included within the definition of "special state employee" are those state employees who in fact do not earn compensation as a state employee for more than eight hundred hours during the preceding three hundred and sixty-five days. G.L. c. 268A, §1(o)(2)(b). As a Board member, you qualify as a special state employee under this subsection.

[2] In this opinion, the Commission does not reach the issue of whether the receipt of monies from an entitlement program based solely on status constitutes a contract.

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

matter[4] in which he has a financial interest. Section 6 would therefore require your abstention from any Board vote or action taken which would impact financially on your application with the Department. Additionally, should such a matter come before you, you must advise the Governor and the Commission of the nature and circumstances of the particular matter and make a full disclosure of your financial interest therein.

DATE AUTHORIZED: January 31, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-6

FACTS:

The Department of Revenue (Department) recently established a Practitioners Liaison Committee (Committee) to serve as a link between the Department and the tax practitioner community. The purpose of the Committee is to improve communications between the Department and the broad spectrum of professionals with which it deals. The Committee, which will meet on a quarterly basis, has fourteen members. The majority of the members represent tax organizations such as the Massachusetts and Boston Bar Associations, the Massachusetts Society of Certified Public Accountants, and the Massachusetts Taxpayers Foundation. Some of the members are employed as legal or accounting tax practitioners. The Committee is designed as a forum through which the Department can be apprised of the general problems which tax practitioners and taxpayers face in complying with state tax laws. The Committee will also serve as a mechanism through which the Department can disseminate information on tax law changes and Department practices. Committee members will not participate in Department decision-making processes with respect to any particular matter.

QUESTION:

Does G.L. c. 268A permit lawyers and accountants serving on the Committee to appear before the Department as representatives of individual taxpayers with matters pending before the Department?

ANSWER:

Yes.

DISCUSSION:

Because the provisions of G.L. c. 268A relevant to your question are applicable only to state employees, the focus of the Commission's response is whether Committee members are state employees. The conflict of interest law defines a state employee as

> a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis...
> G.L. c. 268A, §1(q). (emphasis added)

Prior opinions have identified several criteria useful to an analysis of what constitutes "performing services for a state agency." Among those criteria are

> (1) the impetus for the creation of the entity (e.g. legislative or administrative action);
>
> (2) the entity's performance of some essentially governmental function;
>
> (3) whether the entity receives and/or expends public funds;
>
> (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 considers the cumulative effect produced by the extent of each factor's applicability to a given entity, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. Keeping these precedents in mind, the Commission concludes that Committee members would not be performing services for a state agency within the meaning of G.L. c. 268A.

First, the Committee is not an entity created by law, rule or regulation. It appears to be merely an ad hoc body formed to improve communications between the Department and the public it serves. Second, the Committee will not be performing some essentially

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

governmental function. You have stated that the Committee will not participate in the decision-making process within the Department with respect to particular matters. In this way it is similar to the kinds of entities the Commission has considered in previous opinions which serve as outside resources to an agency and which are not delegated any authority by the agency they are associated with. See e.g. EC-COI-83-21; 82-81; 80-49; 79-12.[1] Third, the Committee will not be receiving or expending public funds, since you have stated that Committee members will be serving on a pro bono basis. Finally, although you were responsible for organizing the Committee, it does not appear that you will be directing the work of the Committee beyond establishing its basic parameters. You anticipate the Committee members bringing their constituents' problems and concerns to the forum. Thus control and supervision by the Department of the Committee do not appear to be issues here.

For the foregoing reasons the Commission concludes that Committee members are not state employees within the meaning of G.L. c. 268A and that the potential §4 limitations on their appearances before the Department do not apply to them. Should the Committee's work become more formalized, or should its function expand, you should seek further guidance from the Commission.

DATE AUTHORIZED: January 31, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-7

FACTS:

You currently work on a full-time basis as a consultant to state agency ABC. You are being considered for appointment by the Governor as a representative of the public on a board of registration (Board). If selected, you will receive from the Board an annual salary in addition to per diem compensation.

The Governor has not publicized the current public member vacancy in a newspaper or other periodical of general circulation. The search has been limited to a "word of mouth" request to three institutions, seeking resumes from qualified women and minorities interested in issues related to the Board's jurisdiction. Of the four or five individuals who were interviewed, you are the leading candidate.

QUESTION:

Does G.L. c. 268A permit you to serve as a Board member while also continuing your consultant work with ABC?

ANSWER:

You may serve as a Board member, but without compensation.

DISCUSSION:

As a full-time consultant to ABC, you are a state employee for the purposes of G.L. c. 268A. In view of your full-time responsibilities, you do not qualify for "special state employee" status under §1(o) which would make you eligible for certain exemptions not otherwise available to full-time employees.[1]

Section 7 of G.L. c. 268A in general prohibits state employees from having a financial interest in a contract made by a state agency. Prior to 1983, for all practical purposes, full-time state employees were prohibited by §7 from financial interests in state contracts. See, EC-COI-81-67; 81-125.[2] Following the enactment of St. 1982, c. 612, the General Court established an exemption, §7(b), which allows, in a limited way, certain full-time state employees to have a financial interest in state contracts. The several statutory conditions, which were designed as safeguards against potential insider influence, include a requirement that the contract be "made after public notice or where applicable, through competitive bidding."

[1] These citations refer to previous advisory opinions issued by the Commission including the years they were issued and their identifying numbers. Copies of these and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission's offices.

[1] Should your employment status change and your duties wind down so that you are permitted personal or private work dring normal working hours, you would then be eligible for special state employee status. Should you become a special state employee, the Commission's opinion to you under §7 would be different because you would qualify, following disclosure, for an exemption under §7(d).

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

Based upon the information which has been provided, the Commission concludes that your receipt of salary and per diem compensation from the Board will give you a financial interest in a contract made by the Board, and that you do not qualify for the §7(b) exemption because the process leading up to your appointment has not been sufficiently open to satisfy the public notice requirement.

The Commission has recognized that, in the personal service contract area, the requirements of competitive bidding process may not be practical. See, EC-COI-83-35; 84-10. In such situations, the Commission looks at the solicitation and advertising process to determine whether there are sufficient vestiges of openness and whether equal access to the position has been provided to the general public. EC-COI-83-95. The Commission has been flexible in the type of advertising necessary for a §7(b) exemption, for example, by permitting advertising in trade or professional journals designed to be circulated to all eligible appointees within the geographic area. EC-COI-83-97; 83-56. However, the Commission requires a good faith effort to notify all qualified individuals. "A process based primarily on word of mouth between a state agency and four other firms does not possess sufficient vestiges of openness to satisfy the public notice requirement." EC-COI-83-95. In view of the limited scope of the solicitation process leading up to your selection, the Commission concludes that your situation is indistinguishable from EC-COI-83-95 and therefore insufficient for "public notice" purposes.

DATE AUTHORIZED: January 31, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-9

FACTS:

You are a member the Massachusetts General Court. In the past, you have been employed by ABC, a private business. ABC has sold goods and materials to various state agencies for at least ten years. These sales are based on a uniform pricing policy of ABC applicable to all its customers, and generally are not made through competitive bidding. The total volume of sales to these state agencies represents less than 3/8 of 1 percent of ABC's annual sales. Your father has a greater than 10 percent proprietary interest in ABC, but you do not now have, nor have you ever had, any propriety interest in ABC.

You would like to maintain a relationship with ABC as a paid consultant. You will not have any contact with or control over contracts between state agencies and ABC, either as a member of the General Court or as a consultant.

QUESTION:

May you serve as a paid consultant to ABC while that firm contracts with state agencies?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

As a member of the General Court, you are a state employee as defined in the state conflict of interest law, G.L. c. 268A, §1 et seq., and, as a result are subject to the provisions of that law. The sections of the law applicable to the question you have asked are §§4, 7 and 23.

1. Section 4

Section 4 provides in relevant part that no state employee may act as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter[1] in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Members of the General Court are exempt from this provision; however, no member may personally appear for any compensation other than his legislative salary before any state agency unless:

(1) the particular matter before the state agency is ministerial in nature; or

(2) the appearance is before a court of the Commonwealth; or

(3) the appearance is in a quasi-judicial proceeding.

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

For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

(l) 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.

Thus, this section prohibits you from appearing for compensation before state agencies in connection with the formation or performance of ABC contracts with state agencies, since those contracts would be particular matters. As long as you comply with your stated intention to avoid any contact with contracts between state agencies and ABC, you will not violate §4.

2. Section 7

Section 7 provides in relevant part that a state employee may not have a financial interest, directly or indirectly, in a contract made by a state agency in which the Commonwealth or a state agency is an interested party. While there are statutory exemptions to §7, it is unnecessary to address them in your case. As long as you are not working for ABC on state contracts and your compensation is not attributable to those contracts, you will not be considered to have a financial interest in them. In addition, you do not have any proprietary interest in ABC. Therefore, you will not be considered to have a financial interest prohibited by §7 in the contracts between ABC and the state agencies with which it does business if you are employed as a consultant by that firm.

3. Section 23

As a state employee, you are also subject to the provisions of G.L. c. 268A, §23 which, in relevant part, prohibit you from using your official position to secure unwarranted privileges for yourself or others, and by your conduct giving reasonable basis for the impression that any person can unduly enjoy your favor in the performance of your official duties. The Commission has previously found a member of the General Court in violation of §23 when he used his position in the legislature to influence the award of a state agency contract to a community development corporation in which members of his immediate family were financially interested. In the Matter of James J. Craven, Jr., 1980 Ethics Commission 17. You should remain aware of these provisions of §23 whenever you have official dealings as a legislator with state agencies which contract with ABC.

DATE AUTHORIZED: January 31, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-12

FACTS:

You were employed by the ABC state agency from January, 1983 to January, 1985. Since November, 1983, you have participated in the planning team (team) for the ABC. The team was formed to create a funding program. As a team member, you participated in discussions of different versions of the guidelines. You also drafted guidelines which were considered by the team. The guidelines and suggestions you contributed were not accepted by the team, although your participation in the team did result in being included as a category for funding.

You have submitted on your own behalf an application for funding under this program. Grant guidelines are available to any person applying for funding. The selection process is made by an out-of-state jury, and ABC staff do not participate in the deliberations. The ABC has informed you, based on their application of the conflict of interest law, that you are ineligible to apply for funding during the current round of grants. They are concerned that an award to you under this program during the first year following your employment with the ABC would have the appearance of impropriety. The ABC believes that its application of the conflict of interest law will serve to protect its reputation for fairness and impartiality.

QUESTIONS:

1. Does G.L. c. 268A prohibit you from applying for or receiving a grant from the ABC?

2. May the ABC impose standards for the awarding of grants which are stricter than G.L. c. 268A and consistent with the purposes of G.L. c. 268A?

ANSWERS:

1. No.

2. Yes

DISCUSSION:

Upon leaving state employment, you became a former state employee for purposes of the state conflict of interest law, G.L. c. 268A, §1 et seq. The applicable provisions to your situation are §§5 and 23. Section 5(a) provides that a former state employee may not knowingly act as agent or attorney for, or receive compensation directly or indirectly 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. Although the provisions of §5 are applicable to former state employees, they do not apply in your situation because you are acting on your own behalf, not for someone else. Compare, EC-COI-84-116; 84-117. Further, any compensation you would receive would be from the commonwealth and not from a private party.

Section 23 outlines standards of conduct applicable to former state employees with regard to confidential information obtained by, or available to them in their state positions. These provisions prohibit you, as a former state employee, from engaging in any business or professional activity which will require you to disclose confidential information which you have gained by reason of your official position or authority. Section 23 will not outright prohibit you from applying for a grant from ABC.

The guidelines for funding are available to any person applying for a grant. The process of selecting winners is made by an out-of-state jury. In addition, ABC staff do not[1] participate in this decision. Accordingly, the process established by the ABC for the awarding of grants minimizes the possibility for your use of confidential information you may have obtained as an employee of the ABC.

2. ABC's establishment of stricter standards for the award of grants

The ABC has informed you that, based on their application of the conflict of interest provisions, you are ineligible to apply for funding under this program. The ABC is concerned that former state employees of the ABC will benefit from past friendships and associations within the ABC and from confidential information obtained while a ABC employee. In addition, the ABC believes that their interpretation of the conflict of interest law will serve to protect its reputation for fairness and impartiality.

The conflict of interest statute does not preempt government agencies from promulgating their own employee regulations which address the subject of conflict of interest. The Commission has encouraged other government agencies to promulgate their own codes of conduct to expand the standards of §23 and to clarify the agencies' expectations of their employees with respect to the applicability of G.L. c. 268A. For example, in EC-COI-80-51, the Commission ruled that where a state agency imposed stricter standards on its employees than found in G.L. c. 268A, the Commission, absent special circumstances, will not evaluate an agency ruling which gives guidance to its employees in the area of conflict of interest and which is consistent with the principles and aims of §23. Here, the ABC is sensitive to its authority to award grants of money to the public. The ABC has the inherent power to formulate personnel rules and standards which further its goals and interest. The ABC's exercise of its power is both reasonable and consistent with the purposes of §23, and the Commission will defer to the ABC's policy.

DATE AUTHORIZED: February 26, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-17

FACTS:

You are the director of the Division of Fairs in the Massachusetts Department of Food and Agriculture (Department). In that capacity, you are responsible for promoting agricultural and animal husbandry in the Commonwealth through the establishment and holding of fairs. G.L. c. 128, §38A. Until recently, you also oversaw the thoroughbred and standardbred horse breeding programs of the Commonwealth. A director has since been appointed to the newly created Division of Equine Programs within the Department, which severs the equine program from the Division of Fairs. See G.L. c. 20, §6.

[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.

The Department is allotted an annual sum of prize money for standardbred and thoroughbred races. All state purses are paid directly to the winners, rather than via the raceway management. Department-sponsored Sire Stakes Races, limited solely to Massachusetts bred pacers and trotters (standardbred), are run at food and agriculture fairs authorized by the Department, and at Foxboro Raceway, a commercial track. Although Foxboro Fair has also been granted ten days of racing at the Foxboro Raceway in the past, you state that will not be the case this year. Only a limited number of fairs have been certified this year, and they will all be involved in thoroughbred, as opposed to standardbred racing.

Your duties as director require your involvement in the certification of fairs. In order for a fair to be certified or approved, the Division of Fairs must inspect the premises and the quality and number of agricultural and animal exhibits to be included, and make a recommendation to you. You then make a recommendation to the Board of Food and Agriculture, which makes its decision on certification, which must finally be approved by the commissioner of the Department (Commissioner). Once a fair is certified, which enables them to be eligible for racing dates granted by the State Racing Commission, you state that your Division has no further involvement with races.

You also own and have raced pacers and trotters in Massachusetts, New Hampshire and Maine for a number of years. At the request of the Commissioner, you stopped racing in Massachusetts at the beginning of 1984. However, both you and your wife continue to own and train standardbreds.

QUESTIONS:

1. Does G.L. c. 268A permit you to race at Foxboro in events other than those scheduled during the Foxboro Fair or as part of the Massachusetts Sire Stakes Program?

2 In view of your official responsibilities as Director, does G.L. c. 268A permit you to have financial dealings with Massachusetts breeders?

ANSWERS:

1. Yes.

2. Yes, subject to the limitation set forth below.

DISCUSSION:

1. Racing at Foxboro Raceway

As Division of Fairs Director for the Department, you are a state employee subject to the provisions of the conflict of interest law. See G.L. c. 268A, §1(q). Section 4(a) of c. 268A prohibits a state employee from receiving compensation from anyone other than the commonwealth or a state agency in relation to any particular matter[1] in which the commonwealth or a state agency is a party or has a direct and substantial interest. The races you contemplate entering at Foxboro Raceway are not connected with a Department-certified fair or otherwise sponsored by the state. However, the State Racing Commission (SRC) and its staff regulate, through supervision and licensing, horse and harness racing in the Commonwealth. G.L. c. 128A, §1 et seq.; 205 CMR 2.01 - 6.15. The extent of the SRC's regulation of such races includes, interalia, the licensing of a horse owner, driver and trainer; the attendance of representatives of the SRC at races to ascertain if SRC regulations are being complied with; and the hearing of appeals brought before it. Id. Due to its pervasive regulation of horse racing, the SRC, and thus the state, would appear to have a direct and substantial interest in the races you wish to enter. You would not violate §4(a) by entering your horses in these overnight races and receiving a portion of their winnings, however, because you would not be receiving "compensation" for §4 purposes. "Compensation" is defined in G.L. c. 268A, §1(a) as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." See EC-COI-83-61. Your receipt of money would be based on your ownership interest in the horse, not due to your performance of services. Thus, despite the state's interest in the outcome

[1] Particular matter is defined in G.L. c. 268, §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, or finding..."

of such races, your receipt of overnight race event monies would not violate §4(a).[2]

Section 6 prohibits you from participating[3] as a state employee in a particular matter in which, in relevant part, you or an immediate family member has a financial interest. It does not appear that you would have any occasion in your official capacity to participate in any matter affecting the overnight races at Foxboro Raceway, inasmuch as they are not a part of a fair certified by the Department. Moreover, the purses to be won in these races are not state funded but rather are a percentage of the bets which individuals place with the Raceway.[4] In this regard, you participate neither in decisions affecting the eligibility for racing dates nor in decisions affecting the amount of purse money you would be competing for nor in overseeing the disbursement of the purses to the winners in these races. Therefore, §6 would likewise not prohibit you from entering such races.

Section 23 sets forth standards of conduct for state employees, including that no state employee should 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). You state that to be eligible for these overnight racing events, you must enter qualifying races which are held under the rules and regulations of the U.S. Trotting Association. The horses which qualify as fast enough are then ranked by preference date; i.e. those which ran the qualifying race on the earliest calendar day receive top eligibility for the racing event. Actual post positions of the nine horses participating in the racing event are not appointed, but rather are drawn at random. From these facts, it again appears that you would have no opportunity to secure any special privileges from the Foxboro Raceway management for such a race based on your position as Director.[5] The Commission therefore concludes that the conflict of interest law does not preclude you from racing your horses in overnight events at Foxboro.

2. Dealings with Massachusetts Breeders

Section 23 prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others and from by his conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. Prior to the establishment of the Division of Equine Programs in December of last year, you were the Department official responsible for overseeing the horse breeding programs in the state. Because of this fact, and the great likelihood that you will be called upon as a resource by the new Director of Equine Programs during this transition period, you must take great care to abide by the §23 standards to avoid even the appearance of a conflict. Any favorable treatment of a breeder, either in your own official capacity until December of last year or in any current recommendation or advice to the Director of Equine Programs, could be viewed as a prelude to your private financial dealings with such a breeder. However, if you observe your proposed one year cooling off period before entering into any financial dealings with Massachusetts dealers, the Commission concludes that you would avoid giving such an impression.

DATE AUTHORIZED: February 26, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-20

FACTS:

You are a private attorney and are a partner with a law firm. One of your partners, XYZ, formerly served as the city solicitor for the city (City) and thereafter as special counsel to the City more than one year ago. As city

[2]Section 4(c) prohibits a state employee from acting as agent or attorney for anyone other than the commonwealth or a state agency in relation to any particular matter in which the state is a party or has a direct and substantial interest. Because you cannot act as your own agent, you would not violate §4(c) by applying for your own owner's or trainer's license.

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

[4]Because the purses are not state funded, no issues are raised under §7 of the conflict law. Compare previous Commission advisory opinion EC-COI-82-30.

[5]Should you or your wife decide at a later date to enter horses in the Mass. Sire Stakes Program races, potential conflict issues would be raised under §§6 and 23 as well as under §7 (see footnote 4). For example, you would be prohibited from participating (e.g. through the rendering of advice to the Supervisor of Standardbred) in the oversight of state purse allocation in the Program. If and when you or your wife enter a state sponsored race while you are still a state employee, you should renew your advisory opinion request with the relevant facts at that time.

solicitor, XYZ represented the City in an attempt to collect overdue taxes for certain years on property owned by a realty trust. You now represent a potential purchaser of the property and expect to negotiate with the City over the amount of overdue taxes which will be paid to the City out of the proceeds of the sale. The negotiations would cover overdue taxes from the same period in which XYZ sought collection.

QUESTION:

Does G.L. c. 268A permit you to represent your client in negotiating with the City over the amount of overdue taxes which the City will receive?

ANSWER:

Yes, subject to certain limitations. However, the Code of Professional Responsibility may establish additional limitations on your activities.

DISCUSSION:

Following XYZ's completion of his services as city solicitor and special counsel to the City in January, 1984, he became a former municipal employee for the purposes of G.L. c. 268A. Under §18(a), he is prohibited from receiving compensation from or acting as agent or attorney for any non-City party in relation to any particular matter[1] in which he previously participated as a municipal employee. The determination of the amount of overdue property tax on the property is a "particular matter." Because XYZ previously participated in that determination and in proceedings related to that determination, he is now prohibited by §18(a) from representing a private client in relation to that matter.

As a partner of a former municipal employee, you share some of the restrictions which apply to XYZ. Specifically, for a one-year period following the termination of XYZ's employment with the City, you may not engage in any activity in which XYZ is himself prohibited from engaging by §18(a). Because your proposed representational activity will occur more than one year after the last date of XYZ's employment with the City, you are not subject to the §18(c) prohibition.[2] Two additional points should be made. Although your proposed activities are not expressly prohibited by §18(c), you are also subject to the restrictions of the Code of Professional Responsibility. Under Canon 9, DR-9-101(B) appearing in Supreme Judicial Court Rule 3:22, 359 Mass. 829 (1971), a lawyer may not accept private employment in a matter in which he had substantial responsibility while a public employee. You should ascertain from other sources such as the Massachusetts Bar Association whether, as a partner, you will be deemed to share the former employee's disqualification. See, **United States v. Standard Oil Co.**, 136 F. Supp. 345, 360 (S.D. N.Y., 1955).

Second, assuming that you are otherwise permitted to pursue your proposed activity, XYZ must not only refrain from assisting you or acting as attorney or agent for the client in relation to the tax negotiations, but must also be removed from any share of the fees which you will receive for your representation. The §18(a) prohibition on XYZ's receipt of compensation includes "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, §1(a) (emphasis added). As long as XYZ is a partner and may potentially share the assets of the partnership, including the fees received by you, he will be receiving "compensation" for the purposes of §18(a). See, Buss, The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U.L. Rev. 299, 349 (1965); Braucher, Conflict of Interest in Massachusetts in Perspectives of Law, Essays for Austin Wakeman Scott, 22 (1964). To avoid placing XYZ, in

[1] For 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."

[2] The original version of G.L. c. 268A proposed by the drafters in 1962 recommended a two-year prohibition on the representational activities of partners of former municipal employees. See, Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 13, 14, 40. The final version adopted by the General Court in 1962 reduced the prohibited period from two years to one. St. 1962, c. 779 §1. By way of comparison, the federal counterpart to G.L. c. 268A, 18 USC 207, contains no prohibition on the activities of partners of former government employees. The version of the House of Representatives (upon which the Massachusetts version was modeled) provided for a two-year bar on partner activities. It was rejected by the Senate as more appropriate for resolution under the Canons of Ethics than under a criminal statute. See, Sen. Rep. No. 2213, September 29, 1962, reprinted in 1962 U.S. Code Congressional and Administrative News 2, 3852, 3862.

violation of §18(a), you should therefore segregate, from the partnership assets which XYZ would otherwise share, the fees which you will receive from the client for the tax negotiations.

DATE AUTHORIZED: March 12, 1985

COMMISSION ADVISORY NO. 7

Over the last few years, the propriety of holding more than one position at the local level has been the subject of numerous Commission rulings and enforcement actions. In turn, those rulings and actions have triggered legislative debate, statutory amendments and local controversy in many cities and towns, resulting in some instances in town meeting action and even special elections.

The precise legal issue involved concerns that part of the conflict of interest law (specifically §20 of G.L. c. 268A) which prohibits a municipal employee from having a financial interest in a contract with his own city or town. That prohibition has been deemed to encompass other employment contracts or relationships; in other words, if you have another job with your municipality, you will be deemed to have another contract. Whether a person who holds more than one position in a municipality will run afoul of the conflict law may depend on several considerations: whether the positions are elected or appointed, whether the person is a special municipal employee and therefore qualifies for one of the exemptions applicable to special employees, whether one of the positions held is that of selectman or clerk for whom there are specific provisions, and whether the person qualifies for the exemptions for certain kinds of part-time work.

In an effort to clarify a very complicated subject, we have devised the following chart. The fourteen situations listed generally cover the most common forms of multiple office-holding at the local level. There can be dangers, however, in any attempt to simplify. In using this chart, we caution you as follows:

* Make sure you distinguish a simple "yes" from a "yes, if." Where the latter applies, read the rest of the columns to the right to see what conditions must be satisfied.

* A more detailed analysis of the conflict law as it applies to these situations follows the chart. You may also need to refer to portions of that analysis.

* If any questions still remain, take them up with your town counsel or city solicitor.

* If there are any changes in the law in this area, we will highlight them in the BULLETIN.

1. As noted above, §20 of G.L. c. 268A prohibits an employee of a city of town - whether elected or appointed - from having a financial interest in a contract with that same municipality. This provision is intended to prevent municipal employees from using their positions to obtain contractual benefits from their own municipality and to avoid the public perception that they have an "inside track" on such opportunities. The relationship between a city or town and its employees is considered contractual in nature. Thus, §20 will come into play whenever a municipal employee has another employment relationship with his city or town.

2. The Commission first addressed this issue in September of 1980. In an advisory opinion (EC-COI-80-89), it was found that a selectman who was a teache violated §20. A court subsequently ruled the same way in the case of **Walsh v. Love**, Norfolk Superior Court, Civil Action No. 132687. These rulings led to various attempts to amend the statute. Those proposed amendments ranged greatly in effect; some would have allowed most kinds of office-holding, others addressed specific situations. To date, there have been three statutory changes.

3. First, a specific provision was passed for selectmen. According to c. 107 of the Acts of 1982, someone may work for a town and also be selectman provided

a. as a selectman he does not vote on matters within the purview of the agency he works for,

b. he was a town employee before he became a selectman,* and

c. he receives only one pay.

* A selectman is not eligible to be appointed to anothe town position while serving as selectman or for six months thereafter.

4. Second, a specific provision was passed for clerks. According to c. 5 of the Acts of 1984 (amending G.L. c. 41),

Notwithstanding the provisions of c. 268, any clerk of a city or town who also serves in any other position for such city or town may in addition to any compensation to which he may be entitled as such city or town clerk receive such additional compensation for such additional services as the selectman, town meeting, town counsel or mayor and city council may provide.

This provision has been interpreted to apply to clerks only, and not their assistants. See EC-COI-84-142.

5. Finally, Governor Dukakis recently signed into law c. 459 of the Acts of 1984 which allows someone holding more than one elected position in a town to be compensated in both positions.

6. As to people not covered by the provisions discussed in paragraphs 3, 4 and 5, whether they violate the statute by having more than one position depends on

a. whether the positions involved are elected or appointed,

b. whether the person is a special municipal employee,

c. if so, whether the person would qualify for one of the exemptions available to special employees,

d. if not a special, whether the person would qualify for one of the limited exemptions available to regular employees.

In the paragraphs that follow, these four considerations will be discussed.

7. The distinction between elected and non-elected positions is important because the courts have held that election to public office does not give rise to a contractual relationship. See cases cited in EC-COI-82-26. Thus, there would be no financial interest in a municipal contract for purposes of §20.

8. The conflict law distinguishes between regular municipal employees and special municipal employees. Typically, the latter are individuals who serve on a part-time or unpaid basis. The distinction is important since §20 will apply in a less restrictive fashion to special employees. Specifically, there will be exemptions available to "specials" that are not available to other employees. These exemptions make it easier for special municipal employees to have other jobs or positions with their own city or town. In the following two paragraphs are discussed (1) the process by which employees are designated as specials and (2) the exemptions available to specials.

9. It is the city council, board of aldermen, or board of selectmen, as the case may be, which alone has the authority to designate a municipal employee as a "special." The following rules or standards apply to that designation process:

* A Mayor, an alderman, or a city councilor cannever be a "special municipal employee."

* A selectman in a town with a population in excess of 5,000 people can never be a "special."

* A person is eligible for special employee status only if

a. he is not paid, or

b. he is specifically permitted to have private employment during normal working hours, or

c. he did not earn compensation for more than 800 hours during the preceding 365 days.

Typically, the "special" category would include members of part-time boards and commissions or individuals serving on a consultant basis.

* All employees who hold equivalent offices, positions, employment or membership in the same municipal agency must have the same classification. For example, designating only one member of a school committee as a "special" would be inappropriate. Either all the members of the committee are "specials" or none of them may be.

10. There are two exemptions in §20 applicable to special municipal employees. While these exemptions are general in nature and apply to all types of contracts, their impact on multiple office-holding situations is as

follows. First, a special municipal employee may have another paying position in his city or town if

* in his capacity as a special municipal employee, he does not participate in or have official responsibility for any of the activities of the agency with which he wants to have the second job (in other words, as noted in the above chart, it is a different agency), and

* he files a statement with his city or town clerk disclosing that he has the other job.

Second, a special municipal employee may have a second job with his own agency if

* the city council, board of aldermen, or board of selectmen, as the case may be, approve, and

* he files a statement with the clerk disclosing that he has the other job.

Thus, the special can have a second job with another agency just by filing the required disclosure. If he wants to have a second job with his own agency, he must file the disclosure and get the approval of the applicable board.

11. There are two exemptions in §20 that come into play for people who are not special employees. The first of these (§20(b)) would allow a municipal employee to have a second job with his city or town if all of the following conditions are satisfied:

a. the second job is with a completely separate agency,**

b. there has been public advertising for the position;

c. he files a statement with the city or town clerk disclosing that he has the other job,

d. the hours he works on the two jobs do not overlap,

e. the services he performs in the second job are not part of his duties in his regular job,

f. he is not compensated in his second job for more than 500 hours a year,

g. the head of the second agency certifies that no employee of that agency is available to do this work as part of his regular duties, and

h. the city council, board of aldermen, or board of selectman, as the case may be, gives its approval.

These conditions are set by the statute in order to ensure that everybody has an opportunity to seek such jobs and that the additional work is necessary and does not impinge on the employee's regular work.

12. Second, there is an exemption that allows a municipal employee to work part-time or on call for the police, fire, rescue or ambulance department of the city or town if

a. the city or town has a population under 35,000,

b. the head of that department certifies that no employee of his department is available to do this work as part of his regular duties, and

c. the city council, board of aldermen, or board of selectman approve.

13. Finally, a separate provision of G. L. c. 268A (§ 21A) prohibits a member of a municipal board or commission from being appointed by the members of that commission or board to any position under its supervision unless there has been prior approval at an annual town meeting. A former member could not be so appointed until the expiration of thirty days from the termination of his service on the board or commission (again unless there has been town meeting approval).

CONCLUSION

We realize that much of this seems like a legal morass. Yet all of these statutory provisions, all the do's and don't's and all the various conditions, are necessary to balance various concerns. On the one hand, public service must not be seen as a closed "club" or, to put it another way, the notion that public employees "take care of their own" must be dispelled. On the other hand, public employees must not be unduly restricted merely because they work for government; government must be able to take advantage of the expertise and skills of its own employees; and, particularly at the local level,

** In his regular position, he must not even participate in or have official responsibility for any of the activities of the second agency. Moreover, the agency for which he regularly works must not regulate the activities of the second agency.

MAY YOU SIMULTANEOUSLY HOLD THE FOLLOWING PAID POSITIONS?	YES NO	MAY YOU RECEIVE BOTH PAYS	MUST YOU BE A SPECIAL EMPLOYEE	MUST BOARD OF SELECTMEN OR CITY COUNCIL APPROVE	MUST YOU MAKE A DISCLOSE TO CLERK	MUST YOU SATISFY OTHER CONDITIONS	MUST TOWN MEETING APPROVE
NON-ELECTED EMPLOYEES							
1. 2 FULL-TIME APPOINTIVE POSITIONS	NO						
2. A FULL-TIME APPOINTIVE POSITION AND A PART-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, IF	YES, IF	NO	YES	YES	YES (SEE ¶11)	NO
3. A FULL-TIME APPOINTIVE POSITION AND A PART-TIME APPOINTIVE POSITION IN SAME AGENCY	NO						
4. 2 PART-TIME APPOINTIVE POSITIONS IN SAME AGENCY	YES, IF	YES, IF	YES, IN BOTH POSITIONS	YES	YES	NO	ONLY IF AGENCY IS A TOWN BOARD OR COMMISSION OF WHICH YOU ARE A MEMBER (SEE ¶13)
5. 2 PART-TIME APPOINTIVE POSITIONS IN DIFFERENT AGENCIES	YES, IF	YES, IF	YES, IN BOTH POSITIONS	NO	YES	IF NOT A SPECIAL IN BOTH, BE GUIDED BY QUES. 2 ABOVE	NO
CITY AND TOWN CLERKS							
6. CLERK and ANY OTHER POSITION	YES	YES	NO	YES	NO	YES; IN A CITY, MAYOR MUST APPROVE	YES
SELECTMEN							
7. SELECTMEN and ANOTHER ELECTED POSITION	YES	YES	NO	NO	NO	NO	NO
8. SELECTMEN IN A TOWN WITH POPULATION UNDER 5,000 AND AN APPOINTIVE POSITION (REGARDLESS OF WHEN ACQUIRED)	YES, IF	YES, IF	YES, AS A SELECTMAN; IF NOT A SPECIAL, BE GUIDED BY QUESTIONS 9 AND 10 BELOW	YES (WITHOUT YOUR PARTICIPATION)	YES	NO	YES, IF BOARD OF SELECTMEN APPOINT YOU TO OTHER POSITION
9. SELECTMAN and AN APPOINTIVE POSITION HELD PRIOR TO BECOMING SELECTMAN	YES	NO, BUT YOU MAY CHOOSE WHICH PAY	NO	NO	NO	NO	NO
10. SELECTMEN and AN APPOINTIVE POSITION ACQUIRED AFTER BECOMING SELECTMAN	NO						
OTHER ELECTED OFFICIALS							
11. 2 ELECTED POSITIONS	YES	YES	NO	NO	NO	NO	NO
12. AN ELECTED POSITION and A FULL-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, IF	YES, IF	YES, IN ELECTED POSITION	NO	YES	NO	NO
13. AN ELECTED POSITION and AND A PART-TIME APPOINTIVE POSITION IN DIFFERENT AGENCIES	YES, IF	YES, IF	YES, IN ELECTED POSITION	NO	YES	ONLY IF YOU ARE NOT A SPECIAL IN ELECTED POSITION	NO
14. AN ELECTED POSITION and ANY APPOINTIVE POSITION IN THE SAME AGENCY	YES, IF	YES, IF	YES, IN ELECTED POSITION	YES	YES	NO	ONLY IF AGENCY IS A TOWN BOARD OR COMMISSION OF WHICH YOU ARE A MEMBER (SEE ¶13)

official responsibility. G.L. c. 268A, §17(¶4)(c).7/ For example, the IRC member who is also a Committee member cannot act on behalf of the Committee before the IRC with regard to the sale of the Iron Rail property because, as an IRC member, the property is the subject of his official responsibility. However, he could appear on behalf of the Committee before the Board on the zoning issue.

Municipal employees are also subject to the standards of conduct contained in G.L. c. 268A, §23. Specifically, §23(¶2)(3) prohibits a municipal employee from by his conduct giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by kinship, rank, position or influence of any party or person. For example, IRC members should not use their official position to favor the Team. In addition, the standards of conduct prohibit a municipal employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or others or disclosing confidential information. For example, the municipal employees who are members of the Committee should be careful not to reveal information received as a result of their official position to private parties interested in the elder housing project.

DATE AUTHORIZED: March 12, 1985

7/Clause (c) of G.L. c. 268A, §17(¶4)(c) applies only if the special municipal employee serves on no more than sixty days during any 365 day period.

government must be able to attract people to part-time positions for little and sometimes even no compensation. These provisions, complicated as they are, strike this balance. We urge everyone in a multiple office-holding position to take a few minutes to review this chart and memo and determine if he has a problem. If any uncertainty remains, he should take the matter up with his town counsel or city solicitor.

CONFLICT OF INTEREST OPINION NO. EC-COI-85-23

FACTS:

You are the Secretary of an Executive Office (ABC). A Department within ABC has entered into an agreement to test and operate a product produced by a Massachusetts corporation (Corporation). The Corporation has donated equipment to a board within ABC, for field testing of the system by the Department. To date, certain employees of ABC have participated in product testing and/or public information activities or the Corporation's private promotional activities. You have been advised that a number of ABC employees are considering purchasing Corporation stock, or may have already done so.

QUESTION:

Does G.L. c. 268A permit ABC employees to purchase Corporation stock at this time?

ANSWER:

No. However, ABC employees will not be precluded from purchasing such stock once the testing phase is completed and the general public has access to the same information about the system.

DISCUSSION:

ABC employees are state employees within the meaning of G.L. c. 268A and are therefore subject to the restrictions of that law. Section 23(¶2)(2) prohibits state employees from using or attempting to use their official positions to secure unwarranted privileges for themselves or others. The Commission has previously applied §23(¶2)(2) to prohibit a state employee from using his access to state officials and information that is unavailable to the general public, as well as his ability to direct certain state activities, to benefit his immediate family members or his private business. EC-COI-84-1.[1] This section also prohibits state employees from using state supplies or facilities not available to the general public for use in the preparation or delivery of a paid presentation. See, e.g. EC-COI-84-135; 84-115; 84-95. The purpose of §23(¶2)(2) is to prevent state employees from taking advantage of their state positions to further their private interests.

On the basis of the information which you have provided, the Commission advises you that ABC employees would violate §23(¶2)(2) by purchasing Corporation stock themselves or giving to anyone else information which would lead them to purchase such stock during the testing phase. ABC employees, especially the Department and Board employees who have participated directly in the testing of the system or the attending promotional activities, are in a unique position by virtue of their state employment to assess the utility and the potential of such a system before it becomes actively marketed by the Corporation. These employees, as well as any other ABC employees who know about the system through work, who take advantage of inside information for their private gain, would be securing an unwarranted privilege in violation of §23(¶2)(2). See EC-COI-82-17 [state photographer prohibited by §23(¶2)(2) from privately selling reprints of photographs he took on the job where those negatives are neither generally available to the public nor catalogued in a manner which would permit public access to the negatives under his custody].

ABC employees who have already purchased Corporation stock are presently in violation of §23(¶2)(2) and would secure an unwarranted privilege in any sale of such stock in which they realized a profit. They should therefore sell their stock back to the Corporation for no more than the price they originally paid for it. Only after the testing of the system is complete, and the general public has access to the same information about the system would ABC employees be free to purchase Corporation stock.[2]

DATE AUTHORIZED: April 2, 1985

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[1]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 offices.

[2]While outside the jurisdiction of this Commission, the facts you present also raise potential "insider trading" issues under Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. and section 101 of the Massachusetts Uniform Securities Act, G.L. c. 110A, §101 et seq.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-24

FACTS:

You are a full-time employee of state agency ABC and are not permitted to engage in personal or private work during normal working hours.

In 1961, you and your wife started a business and incorporated as the DEF Corporation (DEF), taking its name from your respective first names. Until 1967, both you and your wife ran the business and had an ownership interest in DEF, and you also consulted to the company. In 1967, you reduced your involvement with DEF and left the primary running of the business to your wife.

Currently the business operates out of your home, which you own jointly with your wife, and DEF pays a portion of the utilities costs and mortgage. Your wife owns all of the shares of the corporation, and the annual gross income of DEF is approximately $500,000. Since the corporation's creation, you have regularly played a role as a financial advisor and have continued in that role since 1967. You state that your advice is in two forms. Approximately once a month, you offer advice to your wife over the wisdom of purchasing the company's products, as well as over how DEF's money should be invested. You also meet with DEF's accountant/bookkeeper on a monthly basis to review DEF's books. Although your wife characterizes your contribution as more akin to spousal discussion rather than to status as a financial consultant, you perform your services on a regular basis.

DEF is now interested in selling technical equipment to ABC. DEF has not done business with ABC since you joined ABC in 1972, pursuant to a directive of the ABC counsel.

QUESTION:

Would DEF's contracting with ABC place you in violation of G.L. c. 268A, §7?

ANSWER:

Yes, as long as you maintain your current advisor relationship to DEF.

DISCUSSION:

As an employee of ABC, you are a state employee for the purposes of G.L. c. 268A and are therefore subject to the restrictions of that statute. Under G.L. c. 268A, §7, you are prohibited from having a financial interest in a contract made by a state agency (other than your employment contract). For example, you could not personally contract with ABC.[1] For the reasons stated below, the Commission concludes that your wife's financial interest in her proposed ABC contract would be attributable to you, and that you would therefore have a financial interest prohibited by §7.

When the wife of a state employee contracts with a state agency, the financial interest which may accrue to the wife is not automatically attributed to the state employee solely as a result of the marriage relationship. For example, in EC-COI-79-77,[2] the Commission concluded that §7 did not prohibit the wife of a state employee from being employed by a state agency. However, there are cases where the nature of the interest and the circumstances involved will necessarily result in attribution of the financial interest to the state employee. Where the husband shares in the management and control of his wife's business, or has a formal ownership interest in the proceeds of the wife's contract, the financial interest of the wife will be attributed to the husband for the purposes of §7. For example, in EC-COI-83-111, the Commission concluded that a husband state employee retained a financial interest in his wife's sale to his state agency of land which until recently they had owned jointly. The Commission reached a similar conclusion in EC-COI-83-37, in which the husband was a general and limited partner in a partnership which had a contract with a state agency. Upon learning of his impending employment by the state, he assigned all of his rights in the partnership to his spouse for no consideration. Prior to that assignment, his spouse was

[1] Although recent amendments to §7(b) have eased somewhat the broad prohibition against contracts with other state agencies, the statute retains the prohibition against an employee contracting with his own state agency.

[2] 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 offices.

not involved with the partnership. In view of the circumstance surrounding the assignment, the Commission concluded that the husband would have a financial interest in the partnership for §7 purposes. See, also, EC-COI-84-13; 83-125.

The key question in each case is whether the state employee can fairly be said to have a financial interest in his wife's contract with the commonwealth. See, Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 299, 375 (1965). Cf. **Starr v. Board of Health of Clinton**, 356 Mass. 426 (1969). Because you share in the management and control of your wife's business, you will be deemed to have a financial interest in her contract with ABC. Your contributions are substantive, regular, and affect the financial decisions of your wife's company. Therefore, as long as you maintain your advisory relationship to the company, you will share your wife's financial interest in her ABC contract.

To avoid violating §7, you must, at a minimum, cease advising your wife concerning the purchase of products, how DEF's money should be invested, and meeting with DEF's accountant/bookkeeper to review DEF's books. Although desirable to dispel any impression that you contribute to your wife's company, it is not necessary for your wife to change the name of DEF. See, EC-COI-83-123.[3]

DATE AUTHORIZED: April 2, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-27

FACTS:

You are a full-time employee of state agency ABC. You were recently contacted to ascertain your interest in preparing, outside of normal working hours, a visual and tactile map of the campus of DEF Community College (DEF). The work would be paid for under a contract with DEF. DEF has not publicly advertised in a newspaper the availability of the contract. DEF has initially contacted three educational institutions, Perkins School, Boston University and Boston College, which it believes can potentially provide names of qualified mapmakers and is in the process of contacting other vendors and potential referral sources.

QUESTION:

1. If you were selected by DEF, would you have a financial interest in a state contract for the purposes of G.L. c. 268A, §7?

2. Has the process of soliciting qualified mapmakers satisfied the "public notice" requirement for an exemption under §7(b)?

ANSWER:

1. Yes.

2. Yes.

DISCUSSION:

As a full-time ABC employee, you are a state employee for the purposes of G.L. c. 268A. Absent compliance with an exemption, a state employee is prohibited by G.L. c. 268A, §7 from having a financial interest in a contract made by a state agency. The prohibition is preventative, and it applies irrespective of whether a state employee has actually used insider influence to acquire the contract. See, Buss The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U.L. Rev. 299, 374 (1965). If selected to perform the map work for DEF, you would have a financial interest in a contract made by a state agency within the meaning of §7. See, EC-COI-81-126.[1]

In 1982, the General Court amended §7(b) and eased somewhat the absolute prohibition as it applied to full-time state employees. St. 1982, c. 612. The standards, set forth

[3]No exemptions under §7 are available to you. Unlike faculty members, you are not a special state employee because you are not permitted to engage in personal or private work during normal working hours. See, G.L. c. 268A, §1(o); §7(d), (e).

[1]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 offices.

in the footnote below,[2] are generally self-explanatory. However, the facts in your opinion request raise the question of whether you would satisfy the "competitive bidding" or "public notice" conditions of §7(b). Based upon the information you and DEF officials have provided, the Commission concludes that the DEF process of soliciting qualified mapmakers satisfies the §7(b) "public notice" requirement.

The Commission has recognized that, in the personal service contract area, the requirements of the competitive bidding process may not be practical. See, EC-COI-83-35; 84-10. In such situations, the Commission looks at the solicitation and advertising process to determine whether there are sufficient vestiges of openness and whether equal access to the position has been provided to the general public. EC-COI-83-95. The Commission has been flexible in the type of advertising necessary for a §7(b) exemption, for example, by permitting advertising in trade or professional journals designed to be circulated to all eligible appointees within the geographic area. EC-COI-83-97. In EC-COI-83-56, the Commission advised a state employee who owned a travel business that compliance with §7(b) required an interested state agency to contact other travel agencies in order to compare terms. At a minimum, the Commission requires a good faith effort to notify all qualified individuals. In reviewing the process for soliciting names of qualified mapmakers, it appears that DEF has initiated a process designated to reach all qualified individuals in the geographic area. Given the limited number of mapmakers available to perform the specialized DEF contract, a solicitation process which is designed to reach all such mapmakers, even if not advertised in a professional journal, would be sufficient for the public notice purposes of §7(b). Compare, EC-COI-85-7 (a process limited to word of mouth to three institutions to solicit names for "a representative of the public" on a state regulatory board does not satisfy the public notice requirement).

As long as you comply with the remaining conditions under §7(b), your financial interest in the DEF contract will be exempt from §7.

DATE AUTHORIZED: April 2, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-28

FACTS:

You are employed full-time by state agency ABC as a product designer. The clients for whom you design products are so-called "class member," members of the plaintiff class in a lawsuit. You would like to start a product design business which would service persons who are not class members. In connection with this, you would like to investigate whether there would be a significant market for your services. You would like to investigate both private and public sources such as state agencies, with a view to eventually entering into business relationships with such entities should there be such a market. If there is a market for your services, you would incorporate. You also have been approached recently by some private parties who would like you to do some product design work for them. You would be paid for this work out of non-state funds.

QUESTIONS:

1. What limitations would G.L. c. 268A place on your activities while you are a state employee?

2. What limitations would G.L. c. 268A place on your activities if and when you leave state service?

ANSWER:

You are subject to the following limitations.

DISCUSSION:

1. Limitations on you while you are a state employee

[2]Section 7 does not apply

b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

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[1] in which the commonwealth or a state agency is a party or has a direct and substantial interest. Applying these provisions to your inquiry about doing product design for private parties, you may perform that work as long as the client is not a referral from a state agency or a class member. See e.g. EC-COI-83-101, 82-42.[2] Section 4 is also relevant to your question as to whether you can approach state agencies regarding your proposed business. The Commission has concluded in previous opinions that acting solely on one's own behalf does not constitute acting as an agent of a non-state party for purposes of §4.[3] You have stated that, at this time, you would be limiting your inquiries to whether or not there would be any interest on the part of other state agencies in your product design services. You are not seeking this information on behalf of a business that is already in operation. Thus you would not be acting as an agent for anyone other than the commonwealth in making initial inquiries. The result might well be different if your business were further along in the planning stage or you had definite plans to incorporate. The Commission's view would also be different if it appeared from a given set of facts that an individual were proceeding in a particular way so as to circumvent the provisions of G.L. c. 268A.[4]

Section 6 places limits on your activities as a state employee with regard to your private interests. It provides in pertinent part that no state employee may officially participate[5] in any particular matter in which he or a business organization in which he is serving as an officer, director or employee has a financial interest. This section would prohibit you, for example, from participating as an ABC employee in the ABC contract bidding process if either you or your company were bidding on a contract.

Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party. This section would prohibit you and/or any business of yours, for example, from entering into a vendor relationship with a state agency while you are a state employee, or from being paid for your non-ABC design services with state funds. There are two exceptions to this broad prohibition which might be applicable to you. The first 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 (l) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties..

Assuming that these requirements are met, you and/or your business could contract with any state agency except ABC while you are a state employee. The second exception states that §7 does not apply to a state employee

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[1]For purposes of G.L. c. 268A, §l(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."

[2]These citations refer to previous advisory opinions issued by the Commission. Copies of this and all other advisory opinions may be obtained at the Commission's offices.

[3]See e.g. EC-COI-83-28, 83-12.

[4]The §4(c) prohibition applies to you personally and would not prohibit you from having someone else represent your business before any state agency. See e.g. EC-COI-85-16.

[5] For purposes of G.L. c. 268A, §l(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."

...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.

Section 23 contains general standards of conduct applicable to all state, county and municipal employees. It provides in pertinent part that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. This section would prohibit you from using your ABC position to obtain a clientele for your private business. See e.g. EC-COI-84-131. It also prohibits you from using state resources, time or supplies to further your personal interests. See e.g. EC-COI-84-52.

2. Limitations on you as a former state employee

If and when you leave your ABC position you will be subject to the provisions of §§5(a) and 23.[6] Section 5(a) prohibits a former state employee from acting as agent 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. The subject of product design is not itself a particular matter, nor is the purpose of G.L. c. 268A to prohibit individuals from using the expertise they have gained in state employment.[7] Provision of product design services to ABC clients would, however, constitute a particular matter. Thus you are prohibited from acting as agent for or being paid by anyone other than the state in connection with the provision of design services to agency clients. The provision of §23 applicable to former state employee prohibits them from using confidential information acquired in the course of their official duties to further their personal interests. You could not, for example, take advantage of confidential ABC evaluative criteria for contract awards to obtain business for yourself.

DATE AUTHORIZED: April 2, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-29

FACTS:

You are a member of the General Court. In your the legislative capacity you participate in a program with ABC State College (College) in which students are assigned to work in your legislative office for part of the school year. Student candidates for the internship are screened and selected for recommendation to you by the College History and Political Science Department chairperson. Those student interns whom you select receive either course credit or work-study payments from the College.

In addition to the customary duties which a student would perform as a student intern in your office, you would like to assign an intern to a research project in January, 1986. Approximately one-third of the student's time would be spent in your representative district reviewing and comparing lists of registered voters with lists of voters who voted in the 1982 and 1984 primary elections. This information would be used to create a data base for polling purposes for the next election and a voter behavior questionnaire. Ordinarily your political committee would pay for having this work completed.

QUESTION:

Does G.L. c. 268A permit you to assign a student intern to perform these tasks?

ANSWER:

No.

DISCUSSION:

As a member of the General Court, you are a state employee for the purposes of G.L. c. 268A. Section 23(¶2)(2) prohibits state employees from using or attempting to use their official position to secure an

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[6] It is not necessary to consider the application of §5(b) here because you have stated you have no official responsibility for the operation of product design department within at ABC.

[7] See e.g. EC-COI-84-113; Guide to the Conflict of Interest Law, p. 14 (1983).

unwarranted privilege or exemption for themselves or others. Based upon the information you have provided, the Commission concludes that the use of a student intern to perform the proposed voting list assignments would be an unwarranted privilege for you and your political committee, and that you would be using your official position to secure that privilege in violation of §23(¶2)(2).

In EC-COI-84-88,[1] the Commission advised a legislator that §23(¶2)(2) prohibited his making available to a private organization his office space, telephone and other facilities which were not available to other private organizations. Similarly, in EC-COI-82-112, the Commission ruled that this section prohibited a legislator from using a word processor located in his legislative office for purely personal or campaign-related purposes.[2] Whether any particular purpose is predominantly campaign-related, as opposed to an official legislative act, depends upon the facts in each case. EC-COI-83-102.

The Commission has recognized that legislators perform unique functions, and that their official position necessarily includes activities which are not customarily performed by other state employees. Compare EC-COI-83-102 (endorsement of a voter registration drive is within customary use of legislative office); EC-COI-83-87 (receipt of excessive travel reimbursement for private speaking engagements exceeds the customary use of office and benefits a private, as distinct from a public interest). The assignment of a student intern to perform tasks which would predominantly benefit your political committee and your re-election effort would exceed the customary use of your office and would therefore be an unwarranted privilege. See, also, House of Representatives, Rule 16A ¶9 ("No member, officer or employee shall employ anyone from public funds who does not perform tasks which contribute substantially to the work of the House...") This is not to say that each task, no matter how small or ministerial, must be scrutinized to determine if it conveys an unwarranted privilege to your election effort. For example, under the Interpretive Rulings of the Select Committee on Ethics, United States Senate, Ruling No. 154 (June 22, 1978) an inadvertent and minimal overlap between the duties of a senator's staff with respect to the senator's official duties and the senator's re-election campaign is permissible. However, the senator has the responsibility to ensure that such an overlap is of a de minimis nature and that staff duties do not conflict with campaign responsibilities. Id. Because a substantial portion of the student intern's time will be allocated to the voter list project in your district, the overlap cannot be said to be inadvertent or minimal.

DATE AUTHORIZED: April 2, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-31

FACTS:

You represent ABC, a partnership of physicians who want to develop a privately-financed medical office building at a city hospital (Hospital).[1] The partners are physicians who are members of the medical staff at the Hospital. The Hospital is a community hospital established as a department of the City to provide hospital services to the citizens of the City and the communities surrounding the City. The Hospital is operated as part of the City government through the mayor and a board of managers (Board). Through the Hospital by-laws, the Board is directed to organize the "physicians, dentists and appropriate other persons granted clinical privileges in the Hospital into a Medical Staff under Medical Staff By-laws approved by the Board." (See Article VII, Hospital By-Laws). The Board has ultimate authority over the medical staff. The authority for granting membership on the medical staff and clinical privileges rests with the Board. All physicians with admitting privileges or rights to practice at the Hospital must be members of the medical staff. Members of the medical staff receive no payment from the Hospital or City in such capacity,[2] but are required to admit patients to the Hospital or face

[1] 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 offices.

[2] It is an equally unwarranted privilege for non-legislative employees to use state time, offices and supplies for political activities. See EC-COI-82-51.

[1] Although the city solicitor is authorized under G.L. c. 268A, §22 to render advisory opinions to municipal employees, the Commission has rendered this opinion because your question presents issues of first impression. We note that the city solicitor has joined in your request.

[2] You note in your request that some individual medical staff members have entered into specific contracts for services with the Hospital. It appears that these medical staff members would be considered municipal employees for the purposes of G.L. c. 268A. If there is a question as to their status, it may be confirmed through an advisory opinion by the city solicitor.

suspension.[3] You state that the primary purpose of the medical staff is to ensure what the Hospital By-Laws describe as "the highest standards of professional care to the Hospital's patients." The medical staff By-Laws set forth related particular purposes, among them to serve as a primary means of accountability to the Board to ensure an optimal level of professional performance, to provide "an appropriate educational setting that will assist in maintaining patient care standards" and to "supervise the establishment of rules and regulations for the operation of each medical department." The medical staff operates, through its officers, a number of committees with responsibilities for particular medical areas in the Hospital. With the approval of the Board, medical staff members hold appointments in the Hospital as department chairpersons and division directors. (See Article XI - Medical Staff By-Laws). You indicate that department chairpersons are responsible for a number of matters relating to the care of patients admitted to the Hospital with illnesses in their field.

QUESTION:

Are physicians who are members of the medical staff at the Hospital considered municipal employees for the purposes of G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

There is no question that the Hospital is considered a municipal agency pursuant to G.L. c. 268A, §1(f). See EC-COI-83-74.[4] The Hospital was established by statute and derives its powers through the statutes and ordinances of the City. It operates as part of the City government through the mayor and a board of managers.

The threshold question is whether physicians who are appointed by the Board of the Hospital to its medical staff are considered municipal employees for the purposes of G.L. c. 268A. The Commission concludes that they are. A 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). The Commission has previously held that persons in the private sector who are performing services for government and "actually performing the tasks and functions that might ordinarily be performed by government employees" will be considered public employees for the purposes of G.L. c. 268A. See EC-COI-82-54. All physicians with admitting privileges or rights to practice at the Hospital must be members of the medical staff. The Hospital delegates specific functions to the medical staff in order that the Hospital can fulfill its stated purposes. The physicians provide more than informal, general advice to the Hospital. Compare EC-COI-82-54. The relationship between physicians and the Hospital is structured and formalized. Besides covering persons who are obviously municipal employees, the statute..."[l]eaves no doubt that a lawyer, architect or the like, rendering professional services to a municipal agency whether paid or not, would be a 'municipal employee'."[5]

The appointment of physicians to the medical staff is not analogous to licensing procedures imposed on other professions. Attorneys are required to be licensed in order to practice law under rules of the Supreme Judicial Court, yet the licensing relationship does not rise to the level of governmental employee status for all attorneys. Likewise, physicians who are required to obtain licensure from the Board of Registration of Medicine are not state employees by virtue of the licensure. Here, however, the physicians are an integral part of the Hospital. The Hospital By-Laws provide extensive rules as to the requirements for appointment to its medical staff. Once appointed, a member of the medical staff must participate in Hospital committees and ensure that the Hospital is providing optimum care to its patients. The Hospital and the medical staff are mutually responsible to each other to provide quality health care for the City. Members of the

[3] Article III, section 7b provides:

b. When a member of the active category of the Medical Staff has not admitted a patient to the Hospital or has not provided services to any patient in the Hospital for a period of twelve (12) continuous months, he shall be given special notice by the Director that in thirty (30) days he shall automatically be deemed in a leave of absence status for the next succeeding six (6) months.

[4] 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 offices.

[5] Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U. Law Review 299, 311 (1965). You indicate that medical staff members have no control over Hospital or City activities or decisions, and thus are not susceptible to the sorts of misuse of governmental power for private purposes that G.L. c. 268A is intended to prevent. Your argument on this point is with the legislature's broad definition of municipal employee.

medical staff head the Hospital departments. Without the medical staff referring and admitting patients to the Hospital, the Hospital would not be able to fulfill its stated purposes to provide hospital services to the citizens of the City and the communities surrounding the City.[6]

DATE AUTHORIZED: April 2, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-36

FACTS:

You currently serve as a lieutenant in the police department of a city (City). Until recently you were also employed as the assistant security chief at ABC, a large institution. You expect to be assigned to provide detail services to private entities in the City and to be paid pursuant to G.L. c. 44, §53C.[1] Among the private entities to which you may be assigned is ABC.

QUESTION:

Does G.L. c. 268A permit you to accept detail assignments at ABC?

ANSWER:

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

DISCUSSION:

In your capacity as a lieutenant in the City police department, you are a municipal employee for the purposes of G.L. c. 268A. Although nothing in G.L. c. 268A outright prohibits your eligibility for special details at either ABC or other locations in the City, you have agreed that your acceptance of a regular employment arrangement at ABC violates G.L. c. 268A, §23(¶2)(1).[2] Thus, if you were to arrange for special detail assignment on a regular, exclusive basis at ABC, you would be indirectly continuing the same conduct which has resulted in a §23(¶2)(1) violation. To avoid this result, you should observe safeguards to ensure that your assignment to special details and your performance of work in special details conforms to the rules and regulations of the City police department. In particular:

1. The activity to which you are assigned must be consistent with the types of activities for which detail officers are customarily assigned.

2. Your assignments for special detail must be available to all other eligible police officers and must be made on a rotating basis.

3. Your rate of compensation for special detail must be consistent with the rate schedule established in the collective bargaining agreement covering City police officers.

4. Your compensation for special detail must be received from the police department pursuant to G.L. c. 44, §53C.

By complying with these safeguards, you will avoid recreating an employment relationship with ABC which impairs the independence of judgment in the exercise of your official duties as lieutenant.

DATE AUTHORIZED: May 14, 1985

[6] As municipal employees, the members of the partnership would be prohibited by G.L. c. 268A, §20 from having a financial interest directly or indirectly in a contract made by a municipal agency of the same city, in which the city is an interested party. The proposed development by the partnership of a private professional building which is owned by the city would give partners a financial interest in a municipal contract. Notwithstanding their municipal employee status, by becoming special municipal employees the medical staff members of the partnership could engage in the proposed development. G.L. c. 268A, §20(d). The decision to grant special municipal employee status and to approve any exemption from §20 rests with the city council.

[1] Under G.L. c. 44, §53C, the private entity receiving detail services pays the City, rather than the employee, for those services. The City, in turn, pays the employee pursuant to the detail rates established in its police collective bargaining agreement.

[2] This paragraph prohibits municipal employees from accepting other employment which will impair their exercise of independent judgment as municipal employees.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-40

FACTS:

You are a member of the General Court. You also are an attorney engaged in the practice of law and you employ other attorneys.

You have been approached by a prospective client to represent him at a closing relative to the purchase of land from state agency ABC. Your anticipated services would include negotiating the purchase and sale agreement with ABC, examining the title, preparing documents to consumate the transaction, and representing the client at the closing.

QUESTIONS:

1. Does G.L. c. 268A permit you to represent the client for compensation in relation to the proposed purchase and sale agreement?

2. Does G.L. c. 268A permit you to represent the client for no compensation in relation to the proposed purchase and sale agreement?

3. Would you violate G.L. c. 268A if one of your associate attorneys performed the proposed work for the client for compensation?

ANSWERS:

1. No.

2. Yes.

3. No, as long as your associate, rather than you, personally appears before ABC and its representatives. However, any fee which you receive from the associate's services, either directly or indirectly, may not be based on the sale price under the contract with ABC.

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 ABC is a state agency, a contract between a private party and ABC is a particular matter subject to the §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.
>
> 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 personally representing your client in the negotiations with ABC or its representatives over the purchase and sale agreement, you would be appearing personally before a state agency. You would not qualify for an exemption with respect to your appearance because

(1) the purchase and sale agreement negotiations are not ministerial in nature but involve the exercise of discretion by the state agency,

(2) ABC is not a state court, and

(3) your appearance is not in a "quasi judicial proceeding" within the meaning of §4.

Therefore, you would be subject to the §4 prohibition if you were to receive compensation from your client for your personal appearance.

On the other hand, the relevant restrictions of §4 apply only to your compensated personal appearances

[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 the enactment of general legislation by the general court."

before state agencies, and not to appearances by your employees. The limitation 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 the 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.

Because the proposed purchase and sale agreement is a contract made by a state agency, you must also comply with the restrictions of G.L. c. 268A, §7 which, in general, prohibit state employees from having a financial interest in a contract made by a state agency. Issues under §7 will arise only if you receive, either directly or indirectly, any of the compensation which your associate receives for performing legal services in connection with the purchase and sale agreement. If you expect to receive such compensation, that level of compensation must be based on hourly fees customarily charged by your associates for such services and may not be based on a percentage of the sale price of the land.

Finally, you should be aware that the restrictions of §23 apply to members of the General Court. In particular, a member of the General Court may not use his official position to secure an unwarranted privilege or exemption for himself or others, or by his conduct give reasonable basis for the impression that his official actions may be unduly affected by his private relationships. You should keep these principles in mind with respect to your public and private dealings with ABC.

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-41

FACTS:

You are a court officer in a probate court. As such, you perform security work in maintaining order and in protecting judges, jurors and prisoners.

You are also a constable appointed by municipalities. As a constable, you are authorized to serve civil and criminal process in the municipalities which appoint you. G.L. c. 41, §§92 and 94. You state, through your attorney, that you serve process on your own time outside of your usual work hours, and that you do not use any of the state's facilities to perform that work. You further state that you currently do not serve process which emanates from your court or from state agencies. However, you would like to serve process for such entities, if permitted under the conflict law.

QUESTION:

What restrictions does G.L. c. 268A place on your activities as a court officer and a constable?

ANSWER:

You will be subject to the following limitations.

DISCUSSION:

I. Section 4

As an employee of the probate court, you are a state employee as defined in §1(q)[1] of G.L. c. 268A, and are therefore subject to the provisions of that law. Section 4 prohibits a state employee from receiving compensation from, or acting as agent or attorney for, anyone other than

[1] Section §1(q) of 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, including members of the general court and executive council."

the state in connection with a particular matter[2] in which the state is a party or has a direct and substantial interest. For §4 purposes, "anyone other than the state" includes another governmental body such as a municipality. However, §4 permits a state employee to hold an elective or appointive office in a city, town or district and to be paid for doing so as long as he does not vote or act on any matter within the purview of the state agency by which he is employed or over which he has official responsibility.

You hold such an appointive office in your position as constable. You would therefore be permitted under §4 to serve process, notwithstanding your status as a state employee, provided that such process did not originate in the probate and family court department (i.e. within the purview of your state agency). You would not violate §4 by serving process in connection with cases before any of the other six departments of the trial court (e.g. the district court department, the juvenile court department, or the superior court department) inasmuch as they constitute separate state agencies for conflict of law purposes[3] (i.e. such matters would not be within the purview of your state agency).

2. Section 7

Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency in which the commonwealth or a state agency is an interested party. This section would prevent you as a state employee from performing paid services as a constable for the commonwealth or any state agency. See EC-COI-82-59.[4] As a full-time state employee in your court officer position, you could avoid the §7 prohibition only by meeting all of the criteria of the §7(b) exemption. That exemption provides that the §7 restriction does not apply

> (b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does
>
> > not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties.

For example, unless a state agency such as the Department of Public Welfare met the public notice requirement in seeking a constable, you would be prohibited from serving process for such an agency.

3. Section 23

You are also subject to the standards of conduct set forth in §23 of the conflict law. In particular, §23(¶2)(2) provides that a state employee may not use his official position to secure unwarranted privileges for himself or others. Performing constable and court officer duties simultaneously during court sessions would violate this section. **See, In the Matter of Roger B. Whitcomb**, Ethics Commission (June 23, 1983). Thus, you would not be able to serve civil arrest warrants (capiases) in cases where the constable must appear in your court with the person arrested pursuant to the capias to collect his fee. Similarly, you would violate §23(¶2)(2) by using state supplies, state employees, state time or state equipment for your constable services. For example, you may not use courthouse copying facilities for your constable business, or use courthouse telephones to conduct such business. You are also prohibited from soliciting potential clients for your constable services by referring to your qualifications as a state employee.

DATE AUTHORIZED: May 28, 1985

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[2]For purposes of 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 EC-COI-84-86 for a comprehensive discussion of the Commission's rationale in determining that each of the seven departments within the trial court is a separate state agency for c. 268A purposes.

[4]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.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-42

FACTS:

You are the head of state agency ABC, whose members hear and adjudicate cases. As ABC head you direct and supervise the activities of all members of ABC. You have the authority to assign cases and to assign members to review appeals from decisions, although you state that in practice the clerical staff actually makes the assignments.

In your private capacity you are seeking to purchase some property and, to this end, you have been investigating various mortgages. Recently you spoke with a long-time acquaintance who is an attorney who practices before ABC on a regular basis and who is also in the mortgage business. He has offered you a thirty-year mortgage at an interest rate which is at least one-half of a percentage point lower than any bank or financial institution has offered. You have had no significant prior business relationship with this person, nor any close social relationship. Your personal relationship with this attorney arises primarily from the fact that you both grew up and continue to live in the same community.

QUESTION:

Would G.L. c. 268A permit you to obtain a mortgage at a discount rate from this attorney?

ANSWER:

No.

DISCUSSION:

As the head of ABC you are a state employee and, therefore, subject to the provisions of G.L. c. 268A, the conflict of interest law. The section of that law relevant to the question you have asked is §3(b). It provides in relevant part that no state employee shall accept, receive or agree 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. A public employee need not be impelled to wrongdoing as a result of receiving an item of substantial value. The Commission has held in the past that

> ...[The item of substantial value] may simply be a token of gratitude for a job well done, or an attempt to foster goodwill. All that is required to bring §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." **In the Matter of George A. Michael**, 1981 State Ethics Commission 59, 68.

The first issue to be determined is whether the item being offered to you is one of substantial value. In the past, the Commission has used a figure of fifty dollars as a gauge for determining substantial value. In utilizing this figure the Commission has relied on **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976), in which the court held that fifty dollars was substantial value within the meaning of the statute. It is clear that a savings of half of an interest percentage point on a thirty-year mortgage of even one thousand dollars would exceed fifty dollars. Thus, the item you are being offered is of substantial value for purposes of §3.

The second requirement for establishing a §3(b) violation is that the item of value must be given for any "official act performed or to be performed." Section 3(b) is broad enough to include not only pending matters before an official but also prior and future acts of the official. This construction of §3(b) is consistent with the federal courts' analyses of its federal counterpart, 18 U.S.C. §20(f) and (g). **See United States v. Standefer**, 452 F. Supp. 1178 (W.D. P. 1978), aff'd on other grounds, 447 U.S. 10 (1980); **United States V. Irwin**, 354 F. 2d. 192, 196 (2d. Cir. 1965). You have stated that it would be possible for you to screen yourself from ABC matters in which the attorney making the mortgage represents a party. This would not be sufficient however because you are the chief administrative and executive officer of the ABC and, as such, have official statutory responsibility for the activities of the ABC. The fact that you would be in a position to use your authority in a matter which could affect the giver is sufficient for purposes of §3(b). Although evidence of a prior close business or social relationship of long standing might be sufficient to rebut an inference that a §3(b) situation is occurring, it does not appear from the information you have given us that there is a sufficiently close relationship between you and the attorney here. Because you have had no previous business dealings with the attorney prior to your appointment to the ABC, there is a reasonable inference that the availability of the discounted mortgage is for or because of acts within your official responsibility, rather than because of any

prior acquaintance. Thus your acceptance of a mortgage at a discount rate from him would be prohibited by §3(b).[1]

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-44

FACTS:

You are a member of an advisory board to a special legislative committee (Committee). The Committee was established to investigate the management of an entity managed by state agency ABC. Although the Committee has no authority to direct or interfere with that agency's management, ABC has assigned a person to act as a liaison with the Committee.

The advisory board is made up of private citizens with expertise in the subject of the entity. They were asked to serve in order to provide the Committee with their expert input regarding management and operation. The members are neither compensated nor reimbursed for their expenses. You have attended four or five meetings of the advisory board since becoming a member.

ABC has decided to transfer management of the entity to private organizations and will soon release a request for proposals (RFP) in connection with that plan. Although the advisory board has addressed the topic of proper management, it has not participated in the drafting of the RFP, nor has it reviewed its contents.

You anticipate that because of your expertise, organizations interested in responding to the RFP may wish to hire you as a consultant in connection with their response.

QUESTIONS:

1. Are you a state employee as a member of the advisory board to the Committee?

2. May you accept employment as a consultant in connection with responses to the ABC's RFP?

ANSWERS:

1. No.

2. Yes.

DISCUSSION:

The conflict of interest law defines a state employee as a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis. G.L. c. 268A, §1(q).

Prior opinions issued by the Commission have identified several criteria to determine what constitutes "performing services for a state agency."[1] Among those criteria are:

(1) the impetus for the creation of the position (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 government employees, or will he or she be expected to present outside, private viewpoints, and

(4)the formality of the person's work product.

Applying the criteria above to the facts as you have stated them, the Commission concludes that the advisory board does not have the status of a body created by law,

[1]Because of the Commission's conclusion that the proposed transaction is prohibited by §3(b), it is unnecessary to consider whether it might also raise serious questions under G.L. c. 268A, §23(¶2)(2), which prohibits a state employee from using his official position to secure an unwarranted privilege for himself, and G.L. c. 268A, §23(¶2)(3) which 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.

[1]See EC-COI-83-21; 82-81; 80-49; 79-12. These citations refer to previous advisory opinions issued by the Commission including the year issued and the identifying number. Copies of these and all other opinions are available for public inspection, with identifying information deleted, at the Commission offices.

rule or regulation. From the information you have provided concerning its composition, the advisory board is apparently an ad hoc body formed to obtain and utilize in an organized way private professional viewpoints and expertise not normally available to public officials. The advisory board has no binding authority over any state agency or employees, and its members are not reimbursed for their expenses.

In addition, even if the advisory board members could be considered to be performing services for the Committee, which is a state agency, these services are intended to reflect a private sector viewpoint and not "the tasks and functions that might ordinarily be expected of government employees" because of the board's informal structure and advisory nature. EC-COI-82-54. Therefore, those services do not make the members of the advisory board state employees for the purposes of G.L. c. 268A.

In view of these factors, the Commission concludes that the members of the advisory board are not state employees for purposes of the conflict of interest law. Therefore, that law will not prohibit you from accepting employment as a consultant in connection with the RFP of ABC while you remain an advisory board member.

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-45

FACTS:

You are one of two principals in the firm of (ABC). You have been under contract with the Bureau, a state agency, to evaluate an alcohol education program since 1979. You indicate that you are specifically named in each contract and the contracts are renewed annually. The program is prevention oriented and is administered and coordinated out of the public schools.

In 1983, you also received a research grant from the USA, a federal agency, to develop and test an alcohol education program. The grant is administered through Harvard Medical School. Your project involves surveys and interviews with students at a high school and the evaluation of any new prevention program developed from your research. The state has no involvement in this program.

QUESTIONS:[1]

1. Assuming the Bureau renews ABC's contract for evaluation of the program, would you be considered a state employee for the purposes of the conflict of interest law, G.L. 268A?

2. If so, would you violate G.L. c. 268A by continuing to work on the research grant?

ANSWERS:

1. Yes.

2. No.

DISCUSSION:

1. Status as a State Employee

The conflict of interest law defines "state employee," in relevant part, as "a person performing services for or holding an office, position, employment or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis." G.L. c. 268A, §1(q).

This definition has not generally been construed to include an employee of a corporation or vendor which contracts with the state. See, e.g., EC-COI-83-94.[2] However, both the Commission and the Attorney General have held that such an employee is covered by the definition if the terms of the contract indicate that a specific individual's services are being contracted for. In Attorney General Conflict Opinion No. 854, a fifty percent stockholder in a corporation was specifically named in a contract between that corporation and a state agency which could cancel the contract if the stockholder failed to perform the duties designated. The Attorney General

[1] Advisory opinions issued by the Commission are prospective in nature. This opinion is intended for guidance on your future activity and does not evaluate past conduct.

[2] 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 offices.

concluded that under these circumstances the individual was a state employee for the purposes of G.L. c. 268A. In Commission advisory opinion EC-COI-80-84, the Commission concluded that the partners in a law firm were "state employees" because the contracting state agency specifically contemplated that each of the firm's partners would work on the project for the state.

In your case, you are one of two principals in ABC. Because the ABC contract with the Bureau specifically contemplates your services and your name appears in the contract, you would be considered a "state employee" for purposes of the conflict law. In view of the part-time nature of your contract, you would be eligible for special state employee status within the meaning of G.L. c. 268A, §1(o)(2)(a).[3] In this regard, some provisions of the conflict of interest law will apply less restrictively to you. The applicable provisions to your situation are §§4 and 6.

2. Section 4

Under §4, as a "special state employee" you will be prohibited from receiving compensation from or acting as agent for anyone other than the state in relation to any particular matter[4] in which the state is a party or has a direct and substantial interest if the matter is one in which you have either participated or have had official responsibility for as a special state employee. If you serve more than sixty days in any three hundred sixty-five day period, the prohibition will apply to any matter pending in the Bureau. This provision would apply to you only if the state were either a party to or had a direct and substantial interest in your research contract. While your research contract may ultimately benefit the public, it is not a matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Therefore, on the basis of the facts as you have presented them, you will not be prohibited by §4 from working on the USA contract.

3. Section 6

Section 6 provides in pertinent part that no state employee may participate 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. The Commission has previously ruled that the financial interest must be direct and immediate or at least reasonably foreseeable. See EC-COI-84-98. In terms of the practical application to your situation, it is not foreseeable that the consequence of any evaluation you perform for the Bureau would affect either your or ABC's financial interest as it relates to the USA research.

The project is an established specialized prevention program administered by the public schools. Your work on the USA consists of basic research for the development of a new prevention program. There is no indication that your yearly evaluation of the program would affect your financial interest in a grant that you were awarded in 1983 to perform research for USA. Therefore, your evaluation of the program while performing USA research does not constitute a financial interest under §6.

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-46

FACTS:

You are an employee of a county (County) and also have a part-time real estate and conveyancing law practice. You have been asked to represent clients in matters involving the purchase and sale of property in the County. Among your anticipated responsibilities as attorney is the submission of deeds and other appropriate documents for recording in the County Registry of Deeds (Registry).

The Registry is headed by a Registrar of Deeds elected by the voters of the County. For the purposes of recording, the Registry's function is ministerial and involves a review of whether a deed submitted for recording facially satisfies the statutory standards of G.L. c. 183,

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[3] G.L. c. 268A, §1(o)(2)(a) defines a special state employee as one

(2) Who is not an elected official and

(a) Occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

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

§6.[1] The Registry does not conduct an independent investigation or review of the terms of the sale nor does it make a formal decision with respect to the submission. Once the Registry accepts a deed submitted for recording, the Registry plays no further role aside from ministerial indexing functions.

QUESTION:

Does G.L. c. 268A permit you to submit deeds for recording with the Registry?

ANSWER:

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

DISCUSSION:

In your capacity as an employee of the County, you are a county employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A are relevant to your situation.

The first, G.L. c. 268A, §11, prohibits you from either receiving compensation from or acting as agent or attorney for a private client in connection with any particular matter[2] in which the County or an agency of the County is a party or has a direct and substantial interest. For example, you could not represent a client in contract negotiations with a County agency, because that agency would be a party to the particular matter. While the determination of whether a county agency is a party to a particular matter is relatively straightforward, the determination of whether an agency's interest in a matter is direct and substantial is frequently less obvious. Compare, **Commonwealth v. Mello**, 11 Mass. App. Ct. 70 (1980) (city does not have a direct and substantial interest in the prosecution of a state law violation which occurred in the city); EC-COI-84-9 (state appellate tax board has a direct and substantial interest in pending appeals of local assessments, abatement classifications and exemption determinations).

If the interest of a county agency in a matter is too remote or tenuous, the prohibition of §11 does not apply. See, Buss, The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U.L. Rev. 299, 331 (1965). The filing of documents with the Registry for recording is such a matter. The Registry's role contrasts with the institutional decision-making role which the Appellate Tax Board plays in reviewing and deciding the merits of pending applications. The Registry has no stake in the filing beyond ministerial processing, and whatever interest the Registry has in the filing is not "substantial." Therefore, as long as the Registry's role remains limited to its current facial review and indexing, the Registry will not have a direct and substantial interest in any filing.[3]

The second, G.L. c. 268A, §23, prohibits you from using your official position to secure an unwarranted privilege for yourself or others. While this provisions is largely self-explanatory, you should be aware that it prohibits the expediting of filings or affording you opportunities which are not available to other attorneys. For example, you may neither request nor accept preferential treatment in the processing of your filings, either in the period in which you would wait in line for filing or in acceptance of personal checks.

DATE AUTHORIZED: May 28, 1985

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[1] G.L. c. 183, §6 provides as follows:

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. Failure to company with this section shall not affect the validity of any deed. No register of deeds shall accept a deed for recording unless it is in compliance with the requirements of this section.

[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."

[3] In your opinion request, you review those portions of G.L. c. 268A which apply the outside representation prohibitions less restrictitvely to legislators in court proceedings. Those provisions are not analogous to your situation.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-47

FACTS:

You are a senior vice president in commercial lending at the United States Trust Company (UST). You are also chairman of the board of the Massachusetts Community Development Finance Corporation (CDFC). CDFC is a state agency which, upon application of a community development corporation, invests funds in specific business projects within economically depressed areas of the commonwealth to stimulate the creation of jobs in those areas. See G.L. c. 40F, §1 et seq. You are one of two directors the Governor is required to appoint from the investment finance field to the nine-member CDFC board. G.L. c. 40F, §2.

You have recently been approached for appointment to the board of the Boston Industrial Development Finance Authority (BIDFA). Pursuant to G.L. c. 40D, §2, each municipality shall have a board to be known as the Industrial Development Financing Authority, provided that [in Boston's case] the city council, with the approval of the mayor, has by vote declared that such an authority is needed. The purpose of such an authority is to provide security against future unemployment and lack of business opportunity by attracting new industry to the municipality or substantially expanding existing industry in the municipality through industrial development projects. Id. The municipality, acting by or through such an authority, finances these development projects by issuing industrial development revenue bonds. See G.L. c. 40D, §9. As a member of the board of directors of BIDFA, you would serve without compensation but would be reimbursed for expenses.

You state that if appointed to BIDFA, you would abstain from voting or discussion on any matters that related to UST or CDFC, even if you were not directly involved in the matter.

QUESTION:

Does G.L. c. 268A permit you to serve on the board of directors of BIDFA in light of your employment at UST and your chairmanship of the CDFC board?

ANSWER:

Yes, based on your self-imposed abstention from participation in matters where there is any overlap among any of the three entities.

DISCUSSION:

As chairman of the CDFC board, you are a "state employee" for the purposes of G.L. c. 268A. G.L. c. 268A, §1(q). Your part-time and unpaid status renders you a "special state employee," however, which means that the conflict law will apply less restrictively to you under certain circumstances. G.L. c. 268A, §1(o). If appointed to the BIDFA board, you would also be a municipal employee, which would subject you to the corresponding conflict law prohibitions at the municipal level. See G.L. c. 268A, §1(g). "Special" status as a BIDFA member, unlike at the state level, would require that the city council specifically designate the position of BIDFA board member as a "special municipal employee" position. G.L. c. 268A, §1(n).

In view of your voluntary abstention in situations involving any overlap between UST, CDFC and BIDFA, it is unnecessary to discuss the applicability of §6 (or its municipal counterpart §19), which prohibits a state employee from participating in a particular matter in which, inter alia, a business organization in which he is serving as a director or employee has a financial interest.[1] As a special state employee in your CDFC position, you also would not run afoul of §4 under the facts you present. Section 4(c) prohibits 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 is a party or has a direct and substantial interest.[2] As a special state employee, this prohibition applies only to particular matters (a) in which you have participated as a state employee; (b) which are or within one year have been the subject of your

[1]To assure your compliance with §6, you should submit a written disclosure to the Governor, (your CDFC appointing official) and the Commission whenever matters come before you affecting the financial interests of UST or BIDFA.

[2]Section 4(a) prohibits a state employee from receiving compensation from any non-state party in connection with these same particular matters. The Commission has held that reimbursement of expenses does not constitute compensation under this section. See, e.g. EC-COI-85-2; 81-142. Because your CDFC board position does not entitle you to payment other than the reimbursement of expenses, the §4(a) prohibition is inapplicable to your situation.

responsibility or (c) which are pending in your state agency. A §4(c) issue would only be raised where, for example, you signed a contract or otherwise acted as agent for BIDFA in connection with a funding proposal for a project which CDFC was also funding. Again, your voluntary abstention from participation in such instances obviates the potential conflict.[3]

You should be aware, however, that you are also subject to the standards of conduct set forth in G.L. c. 268A, §23. That section provides that no state, county or municipal employee 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 persons;

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; or

5. improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and which were acquired by him in the course of his official duties or use such information to further his personal interests.

The Commission concludes that your proposed dual board status does not inherently violate any of the §23 provisions. However, because the two board positions and your UST position are involved with commercial lending, you must take great care to abide by these §23 provisions. For example, §23 issues would be raised if you were to discuss or recommend (as well as vote on) a direct loan proposal being considered by CDFC or BIDFA where UST was also participating in the deal. To dispel any impression of improper influence or the appearance of a conflict, you should (1) abstain from participating in discussions or votes on matters connected to the other entities you serve, (2) go on record in that board's minutes giving the reason for your abstention (disclosing the overlap, e.g. that BIDFA and CDFC are considering a joint funding proposal of a project and that you serve on both boards), and (3) leave the room while the matter is being discussed.

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-48

FACTS:

You currently serve as the assistant director for a division of the ABC, a state agency. You supervise a staff of fifteen employees and are responsible for two primary areas. The first is the receipt and review of provider claims which require further pricing because of the service provided. In such situations, as in the pricing of certain dental services, you do not make a substantive decision or recommendation concerning the price but merely forward the claim to the appropriate ABC staff for its review and determination. Aside from your routing responsibilities, you also handle inquiries from providers and attempt to facilitate the handling of their claims. In carrying out this responsibility, which you state is a public relations function, you deal primarily with other staff in requesting the status of pending claims.

Currently, ABC does not process the actual claims "in-house." In September, 1982, ABC entered into a four-year contract with a private corporation (Corp), to process all claims. You state that you were not involved as an ABC employee in the selection process which led up to the Corp.'s contract, nor in any negotiations with the Corp. concerning its responsibilities under the contract. You currently have no official role in the Corp. contract nor do you make any decisions or evaluations concerning Corp.'s performance. In carrying out your public relations functions, you regularly contact Corp. employees to ascertain the status of particular claims.

You are considering leaving your ABC position and are interested in applying for one of several computer systems analyst vacancies which Corp. has in the implementation of the ABC contract.

[3]For these same reasons, no conflict issues are raised under §17, the municipal counterpart to §4.

QUESTION:

Does G.L. c. 268A permit you to accept a position with the Corp. in the implementation of its ABC contract in light of your current ABC responsibilities?

ANSWER:

Yes.

DISCUSSION:

In your capacity as an ABC employee, you are currently a state employee for the purposes of G.L. c. 268A. If you resign your ABC position to work for the Corp., you will become a former state employee and will be subject to the restrictions of §§5 and 23 of G.L. c. 268A.[1]

Under §5(a) you are prohibited from receiving compensation from or acting as agent or attorney for the Corp. in connection with any particular matter[2] in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which you previously participated[3] as a state employee. The Corp.'s contract with ABC is a particular matter to which a state agency is clearly a party. Because you now wish to work for the Corp. in relation to this contract, the application of §5(a), therefore, turns on whether your involvement in the Corp. contract as an ABC employee has risen to the level of personal and substantial participation in the Corp.'s contract. The Commission concludes that it has not. To participate within the meaning of G.L. c. 268A requires a degree of approval, decision-making, recommending, or advising which you have not exercised with respect to the Corp.'s contract. In particular, the decisions with respect to the selection of the Corp. and the evaluation of the Corp.'s performance have been made by other ABC officials. While it is true that you have regular dealings with the Corp.'s employees who implement the ABC contract, the public relations function which you perform in requesting the status of particular provider inquiries from the Corp.'s employees is not personal and substantial participation in the Corp. contract.[4] Compare, EC-COI-84-45; **In the Matter of John Hickey**, 1983 Ethics Commission 158, 159.

Three provisions in §23 are relevant to your situation. Until you leave your ABC position, you should be aware that G.L. c. 268A, §23(¶2)(2) and (3) prohibit you from using your official position to secure unwarranted privileges or exemptions for the Corp., and from, by your conduct, giving reasonable basis for the impression that the Corp. can improperly enjoy your favor in the performance of your official duties. Because you make regular inquiries to the Corp. employees in carrying out your public relations function, you should take steps to assure that your loyalty remains with ABC during the period prior to your departure. For example, you may wish to discuss your employment plans with your appointing official so that the official can determine what if any safeguards should be taken to avoid potential problems under §23. You should also be aware that §23(¶3) prohibits you from disclosing to the Corp. any confidential information which you have acquired as an ABC employee.

DATE AUTHORIZED: May 28, 1985

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[1]Based upon the information you have provided, it does not appear that you would retain your state employee status by working on Corp.'s contract with ABC. Absent circumstances demonstrating that ABC expects you to provide the services called for in the Corp. contract, you will be treated as an employee of a vendor corporation and therefore not covered by the definition of state employee in §1(q).

[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."

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

[4]Because you do not possess the authority to approve, disapprove or otherwise direct ABC action under the Corp. contract, you will not be deemed to have "official responsiblity" for the contract. G.L. c. 268A, §1(i). Therefore, it is unnecessary to address the limitations which §5(b) would impose on your personal appearances in relation to matters which were under your official responsibility.

CONFLICT OF INTEREST OPINION
NO. EC-COI-85-49

FACTS:

You are a partner at a law firm (Firm). The Firm wishes to enter into a contract with municipal agency ABC to provide legal services in connection with a parcel of land owned by the ABC. The legal services called for in the contract would include such activities as investigation, negotiation and possible litigation. The contract, as it is presently drafted, is between the ABC and you personally, although you state it is contemplated that other partners and employees of the Firm will also perform work on it. At the present time, the Firm represents clients in connection with other unrelated matters pending before the ABC and other authorities and agencies of the municipality.

QUESTION:

What limitations will G.L. c. 268A place on the activities of the Firm and its partners and employees should you enter into the contract with the ABC?

ANSWER:

You and the Firm will be subject to the following limitations.

DISCUSSION;

ABC is a municipal agency as that term is defined in G.L. c. 268A, §1(f). You would, therefore, be considered a municipal employee, but because you would be providing part-time services, your status would be that of a special municipal employee. Certain provisions of G.L. c. 268A apply less restrictively to special municipal employees.

The sections of the statute relevant to the questions you have asked are §§17 and 18. Section 17 provides in relevant part that a special municipal employee may not receive compensation from or act as agent or attorney for anyone other than the municipality in connection with any particular matter[1] (1) in which he has at any time participated as a municipal employee, or (2) which is or within one year has been a subject of his official responsibility or (3) which is pending in the municipal agency in which he is serving. This last restriction applies only to a special municipal employee who serves as such for more than sixty days during any period of three hundred and sixty-five consecutive days. If you were to provide services under the contract for more than sixty days, you could not be retained by or represent other clients in connection with any matters before ABC during the duration of your municipal employment because such matters would be considered to be pending in the agency in which you are serving.

Several points should be made with respect to calculating days served for purposes of the sixty-day limit. The inclusion of a sixty-day limit in the statute recognizes that special municipal employees whose services in a one-year period exceed sixty days are likely to possess and exercise influence with respect to their agency's actions. The Attorney General and, subsequently, the Commission have addressed this sixty-day limit in previous opinions and concluded the following. First, a day is not counted for purposes of the sixty-day limit unless services are actually performed for the public entity on that day. Atty. Gen. Conf. Op. 229. Second, if an employee serves only part of a day for the public entity, he or she will be considered to have served for a complete day. EC-COI-80-31.[2] Third, if the special public employee assigns one of his firm's associates to perform the work under his supervision, he will be considered as having served on each day in which the associate performs such services even though the employee himself may not have performed billable services on such days. EC-COI-84-129. You have asked how the Firm must calculate days on which more than one attorney performs services under the contract. Because the concern addressed by the statute is the potential for influencing pending agency matters if the employee serves more than sixty days, it is clear that the issue is the total number of days on which work is performed for a given project, and not the total number of people who

[1] For purposes of G.L. c. 268A, "particular matter" is defined as "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] This citation refers to a previous opinion of the Commission including the date it was issued and its identifying number. Copies of this and all other opinions are available for public inspection, with identifying information deleted, at the Commission offices.

actually perform the work. Thus a day on which more than one firm partner or associate performs any work under the contract will be counted as one day for purposes of calculating the sixty-day limit. This is true regardless of the combination of partners or associates performing work on a given day, whether including you or not.

You have also asked whether the time expended by paralegals and non-legal support staff must be calculated toward the sixty-day period. In answering this, the Commission distinguishes between the substantive legal services the contract calls for you to provide, and the ancillary services that go along with those substantive services, such as secretarial, word-processing, and photocopying services. You have stated that the contemplated legal services include investigation, negotiation and possible litigation in connection with the ABC land parcel. Presumably the paralegals will be involved in the delivery of these substantive legal services such as by performing title searches, preparing documents, or assisting with discovery. Thus the time they spend on those substantive legal services must be counted for purposes of the sixty-day limit. In the unlikely event that non-legal support staff perform substantive, as opposed to ancillary, services under the contract, that time too must be counted toward the sixty days. However, time spent on provision of purely ancillary services need not be counted.[3] It is not possible for the Commission to anticipate every type of task that might be called for in performing the work under the contract, and questions might arise as to whether certain work is substantive or ancillary in nature. Should this be the case, further guidance may be sought from the Commission.

The other section of G.L. c. 268A that is relevant to your question is §18(d). It provides in pertinent part that no partner of a municipal employee may act as attorney for anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest and in which the municipal employee participates or has participated as a municipal employee or which is the subject of his official responsibility. The only limitation on the Firm's partners is that they may not represent anyone but the ABC or another municipal department or agency in connection with the parcel of land that is the subject of the contract as long as ABC or any other municipal department or agency is a party to the matter or has a direct and substantial interest in it.

DATE AUTHORIZED: May 28, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-50

FACTS:

You are the city solicitor for the City (City), and you and a partner also have a private law practice. Pursuant to §39 of the charter of the City, the city solicitor has overall responsibility for defending all claims in which the City is an interested party. Recently your sixteen-year-old daughter was a passenger in a car which was involved in an accident with a City police cruiser. She sustained injuries in the accident which remove her from the no-fault provision of the motor vehicle law. It is not yet clear where liability for the accident lies, but it is possible that your daughter may have a cause of action against the City. The police department motor vehicles are insured, and the amount your daughter would seek to recover is within the limits of the policy. You state that the city solicitor's department does not defend any motor vehicle accidents where an insurance company is involved on behalf of the City, although the situation might be different if the amount sought to be recovered exceeded the policy limits. If suit is brought on behalf of your daughter, your spouse would be the nominative plaintiff. You have stated that if suit is filed against the City you would take no part in the handling of the matter either in your official capacity or in your private practice. Should your partner handle the case, your office would not receive a fee.

QUESTIONS:

1. May your law partner handle the settlement and/or liability case on behalf of your daughter?

2. What limitations would be placed on your activities as city solicitor should your spouse pursue an action against the City on your daughter's behalf?

ANSWERS:

1. No.

2. You are subject to the following limitations.

[3]The Commission makes this distinction between ancillary and substantive work only in relation to paralegals and non-legal support staff. There is a presumption that any work done under the contract by an attorney is substantive, and therefore all attorney time must be counted towards the sixty-day limit.

DISCUSSION:

As city solicitor, you are a municipal employee. Consequently, you and your law partner are subject to certain provisions of G.L. c. 268A, the conflict of interest law. The section of that law which is applicable to your partner is §18. That section prohibits the partner of a municipal employee from acting as agent or attorney for anyone other than the city in connection with any particular matter in which the same city is party or has a direct and substantial interest and which is the subject of the municipal employee's official responsibility. Even though the city solicitor's office does not ordinarily become involved in motor vehicle matters in which the City's insurer is involved, the City's charter gives you, as city solicitor, official responsibility for defending all claims in which the City is an interested party. Thus, any action brought against the City by your spouse on your daughter's behalf would be one which would be the subject of your official responsibility. This is true even though you might not personally participate in the matter as city solicitor. See e.g. EC-COI-85-22.[1] Consequently, your law partner is prohibited by §18 from acting as agent or attorney for your daughter in this matter, as long as the City is involved, regardless of whether suit is actually filed.[2] The fact that your office would not be receiving a fee for its representation would not alter this result.

Because you have stated that you would have no part in the handling of this matter either through your official office or through your private practice, it is not necessary here to discuss the provisions of §§17 or 19 of G.L. c. 268A. You should, however, be aware of §23 which contains general standards of conduct applicable to all state, county and municipal officials. It provides in pertinent part that no employee shall use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. It also provides that no municipal employee shall, by his conduct, give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person. These provisions would be implicated if, for example, your daughter's claim were to receive special consideration or treatment from the city solicitor's office. See e.g. EC-COI-84-97. Section 23 also prohibits a municipal employee from disclosing confidential information acquired in the course of his employment, and use of such information to further his personal interests. See generally, EC-COI-84-16. Should your daughter's claim reach the city solicitor's office, you should take measures to screen yourself completely from the matter. We also recommend that you notify your appointing official at that time both of the claim and of the steps you have taken to avoid contact with the matter.

DATE AUTHORIZED: June 18, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-51

FACTS:

You are general counsel to the ABC City Corp. (Corp.). You and a partner wish to purchase a parcel of land from a city authority (Authority). You state that the Corp. has no regulatory authority over the Authority.

When the Authority has parcels of land available for redevelopment, either of two processes is used to dispose of them. A developer kit is prepared for larger parcels and a public notice soliciting responses from individual developers is published. Smaller parcels generally do not receive this treatment. They are held by the Authority, and persons or entities interested in developing a particular parcel may approach the Authority. This latter process was utilized here.

In this case, the Authority informed you that you and your partner would have to secure community support for your proposal before it would be approved. You met with surrounding neighbors and abuttors, many of whom expressed their approval in letters to the Authority. The preservation society also registered its support of the proposal. The Authority had published in local newspapers a legal notice about the proposal, the principals involved, and the date and time of the Authority meeting at which it was to be considered.

QUESTION:

[1]This citation refers to a previous advisory opinion issued by the Commission, including the year it was issued and its identifying number. Copies of this and all other advisory opinions are available for public inspection, with identifying information deleted, at the Commission offices.

[2]You should note that this prohibition on your partner's activities would extend to any matter for which you have official responsibility as city solicitor.

May you and your partner purchase the parcel of land from the Authority?

ANSWER:

Yes.

DISCUSSION:

As general counsel to the Corp., you are a municipal employee for purposes of the state conflict of interest law, G.L. c. 268A, and, as a result, are subject to the provisions of that statute.

Section 20 of the conflict law prohibits a municipal employee from having a financial interest in a contract made by a municipal agency. The Authority is a municipal agency, and the agreement between you and the Authority for the sale of the land in question would be a contract in which you would have a financial interest. Therefore, unless you can qualify for one of the exemptions to §20 in that statute, you are prohibited from purchasing the land from the Authority.

There are several exemptions from the §20 limitation on financial interests in municipal contracts. Section 20(b) provides that the limitation shall not apply 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 interests of his immediate family in the contract.

You are not employed by the Authority and you state that the Corp. does not regulate the Authority's activities. Therefore, as long as the process used by the Authority satisfies the requirement of "public notice" set out in the exemption, and you file the required disclosure, your financial interest in the sale of the land by the Authority will not be prohibited by §20.

The term "public notice" is not defined in §20(b), but the Commission has found the requirement to be satisfied by various processes. See, e.g. EC-COI-83-35; 83-37; 83-56; 84-34.[1] In each of these cases, the process was sufficiently open that the impression that public employees had unique or special access to those contracts was dispelled.

In EC-COI-83-37, the Commission ruled that a general announcement to the public that a state agency would be making certain development funds available, and a post-application public hearing regarding the proposed development were sufficient to satisfy the public notice requirement. The process used by the Authority is similar to that approved in EC-COI-83-37. Attempts were made by the Authority, and by you at the Authority's direction, to make interested parties aware of the proposed land sale. Those parties were also notified of where and when to appear to support or object to the proposal. Therefore, this process offered "the vestiges of openness that are contemplated by the [public notice requirement]." EC-COI-83-37. Therefore, if you file the appropriate disclosure of your financial interest with the city clerk, you will be in compliance with §20(b) and may proceed with the purchase of the parcel of land from the Authority.

DATE AUTHORIZED: June 18, 1985

CONFLICT OF INTEREST OPINION NO. EC-COI-85-52

FACTS:

You are currently employed as director of legislative and business affairs for the Executive Office of ABC. Your responsibilities include the preparation of draft legislation which the Secretary submits; recommending action to the Secretary on legislation filed by or affecting agencies within ABC; monitoring activities of ABC agency legislative liaisons with respect to legislation and budget; consulting with certain committees of the General Court in order to advise the Secretary, and advocating for legislation of interest to the Secretary.

You are considering leaving your ABC position to take a new position as a legislative agent with DEF. You anticipate that your activities will include advocacy on

[1] 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 offices.

behalf of DEF before the General Court and/or its committees, and before agencies within the executive branch.

QUESTIONS:

1. How broadly does the one-year bar under G.L. c. 268A, §5(e) apply to your legislative agent activities on behalf of DEF?

2. Aside from §5(e), what other limitations does §5 place on your proposed activities on behalf of DEF?

ANSWERS:

1. During the one-year period following your resignation from ABC, you may act as DEF's legislative agent before the General Court and executive branch agencies other than those within ABC. During that period, you may not act as DEF's legislative agent before ABC or before agencies within ABC.

2. In general, §5 will not impose additional limitations on your proposed activities because your ABC position primarily involves the enactment of general legislation, or legislation which is limited to a specific legislative session.

DISCUSSION:

1. Section 5(e)

Upon leaving your ABC position as director of legislative and business affairs, you will be subject to the restrictions of §5(e) which provide as follows:

A former state employee or elected official including a former member of the general court, who acts as legislative agent, as defined in section 39 of chapter 3,[1] 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.

Unlike other provisions within §5, the focus of §5(e) is not on whether the particular matter on which the former employee is now working is the same matter on which the employee previously worked or had responsibility for as a state employee. As the Commission stated in EC-COI-84-146, "[t]he purpose of G.L. c. 268A, §5(e) was to establish a one-year cooling off period for former state employees who might otherwise be in a position to take undue lobbying advantage of former associates whose loyalties they acquired as state employees." The scope of the §5(e) prohibition, as applied to you, turns on whether your activities as legislative agent will be before the same governmental body with which you have been associated.

Although the term "governmental body" is defined neither in G.L. c. 268A, §5(e) nor in the definition provisions of G.L. c. 268A, §1, the term is defined in G.L. c. 268B, §1(h),[2] and the Commission has concluded that the General Court intended the G.L. c. 268B definition of "governmental body" to apply to G.L. c. 268A, §5(e) as well. See, EC-COI-84-146.

The definition of governmental body clearly includes ABC and the agencies within ABC. ABC is treated as the governmental body responsible for each governmental body within ABC for the purposes of G.L. c. 268B. See, G.L.

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[1] G.L. c. 3, §39 defines legislative agent as any person who for compensation or reward does any act to promote, oppose, or influence legislation, or to promote, oppose, or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and no simply incidental thereto, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services.

[2] 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.

c. 268B, §3(j)(8).[3] Given the broad range of responsibilities in your current position, and particularly as they involve your relationship with agencies within ABC, the scope of the one-year bar will cover your appearing as DEF's legislative agent before ABC and any agency within ABC.[4] By way of example, for one year you could not appear before ABC Department officials or staff members to seek that agency's approval of legislation or regulations in which DEF is interested. The prohibition would also extend to your arranging meetings between DEF and ABC agencies with respect to the passage of legislation or approval of regulations. See, **In the Matter of Cornelius J. Foley, Jr.**, 1984 Ethics Commission 172. On the other hand, you may act as legislative agent for DEF before the General Court and governmental bodies other than ABC and agencies within ABC. In response to your specific inquiry, §5(e) would similarly not prohibit you from attending meetings of the Coalition[5] as a representative of the DEF. Given the purpose of the Coalition, your attendance as a DEF representative would not be treated as an appearance before a governmental body. However, your subsequent lobbying efforts on DEF's behalf will be subject to §5(e) if they involve your appearing before ABC agencies in relation to legislation or regulations.

2. Section 5(a)

In addition to the restrictions of §5(e), discussed above, you are also subject to G.L. c. 268A, §5(a). This paragraph prohibits you from receiving compensation from or acting as DEF's agent in relation to any particular matter[6] in which you previously participated[7] as an ABC employee.

On the basis of the information which you have provided, this paragraph should not place substantial limitations on you for two reasons. To the extent that most of the legislative activities in which you have been involved in your ABC capacity have been in the enactment of general, as opposed to special legislation, the definition of particular matter excludes those matters from the scope of §5(a). For example, the enactment of St. 1982 c. 372 (the cost containment act) would be treated as general, as opposed to special, legislation for the purpose of §5(a). Second, each legislative session lasts one year. Even if you had previously participated in proposed special legislation as an ABC employee, the commencement of a new legislative session makes the refiling of such legislation a different particular matter for the purposes of §5(a).[8] Compare, EC-COI-80-2 (each annual budget is a separate particular matter for §5 purposes).

3. Section 23

Finally, you should be aware that once you leave your ABC position you will be subject to the restrictions of §23(¶3). This paragraph prohibits you from

> accepting employment or engaging in any business or professional activity which will require you to disclose confidential information which you have gained by reason of your official position or authority, and

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[3]The Commission's Rules regarding the designation of public officials under G.L. c. 268B envision that certain governmental bodies may be within the control of larger governmental bodies. See, 930 CMR 2.02(8).

[4]In EC-COI-84-146, the Commission concluded that the governor's office was a separate governmental body from the budget bureau for G.L. c. 268A, §5(e) purposes. The conclusion turned on the statutory separation of the governor's office from the executive offices for G.L. c. 268A, §3(j) purposes, as well as on the relative independence of the functioning of the budget bureau in the budget process. The relationship between ABC and its member agencies is substantially different.

[5]You state that the Coalition is a loosely-organized group of major health care representatives, including health insurers, hospitals and businesses. The Coalition's goal is to achieve a consensus on legislation amending the cost containment provisions of St. 1982, c. 372. Among the six Coalition members is the commonwealth, represented by ABC.

[6]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."

[7]G.L. c. 268A, §1(j) defines, "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."

[8]Given the broad range of the scope of your participation, there are no new restrictions under §5(b) which would be relevant to your situation.

improperly disclosing materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and

which you acquired in the course of your official duties nor use such information to further your personal interests.

DATE AUTHORIZED: June 18, 1985

COMMISSION ADVISORY NO. 8

Through requests for advisory opinions, complaints received from the public, and its own independent investigations, the Commission has become aware of a widespread and longstanding practice in the entertainment industry of providing free passes to public officials for entertainment events. The purpose of this Advisory is to alert both the industry and public officials that this practice often involves a violation of the conflict of interest law, G.L. c. 268A, in many instances by both the giver and the receiver.

I. Background

The Commission has information that several theater chains and racetracks are or until recently have been providing free season passes to public officials at the state, county and local levels. The Commission also has information that certain persons and corporations, including the owners of certain professional sports teams, have been providing free admission to such officials.

II. The "Giver"

Section 3(a) of G.L. c. 268A[1] prohibits anyone from giving anything of substantial value to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such employee.

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.

A season pass to a theater, racetrack or other entertainment facility which charges a fee for admission is an "item of substantial value" within the meaning of §3. Although the precise market value of such a pass may be speculative (as it cannot be known in advance how often the pass will be used), so long as there is more than a nominal fee charged for admission, the unlimited ability to use the pass for as many entrances as desired makes the pass an item of substantial value. (This is particularly true where the cost of theater admissions is rising, and, indeed, where some of these passes provide for admission for the holder and a guest.)

Rather than season passes, some establishments and organizations provide public officials with single admission tickets. In determining whether such tickets are an "item of substantial value" under §3, generally the face value multiplied by the number of tickets involved will be the value. If that value exceeds $50, it will be considered substantial value.[2] In extraordinary circumstances where the real value of a ticket far exceeds its printed face value (world series tickets, for example), such tickets may be considered to be items of substantial value.

In addition, a §3 issue may arise if there is a standing offer to be accepted at anytime for tickets. It is likely that any such offer would be deemed to involve

[1] Section 3(a) and (d) provide in pertinent part:

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee...for or because of any official act performed or to be performed....shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more thantwo years, or both.

[2] See, Commonwealth v. Famiglietti, 4 Mass. App. 584 (1976).

substantial value. Similarly, if there is a pattern of periodically giving a public official tickets, the course of conduct will be evaluated as to its value. This would be the case, for example, if someone gave a public official a ticket to an entertainment event each and every weekend.

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, where a matter of interest to the giver is pending before the public official who receives it, this element is met. Thus, if a theater chain gave a season pass or individual tickets of substantial value to a local tax assessor where the chain has a tax abatement application pending before that assessor, §3(a) would be violated.

Section 3(a), however, is not limited to instances where a matter is actually pending before the official. In referring to an "official act performed or to be performed," §3(a) also includes prior and future acts by the official. See **In the Matter of George A. Michael**, 1981 EC 59, 68.[3] In fact, even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use his authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver.[4] In such a case, the gratuity is given for as yet unidentified "acts to be performed."

[3]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.

[4]As the federal courts construing the federal counterpart of §3 (18 U.S.C. §201(f) and (g)) have observed,

> [it is] unnecessary to prove that the gratuities received by a public official were in any way generated by some specific identifiable act performed or to be performed by the official....It was sufficient that the gratuities to which he was not legally entitled were given to him in the course of his everyday duties for or because of official acts performed or to be performed by him and where he was in a position to use his authority in a manner which could affect the gift giver.

United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D.Pa. 1978), aff'd on other grounds, 447 U.S. 10(1980). It is the danger of preferential treatment rather than the particular preference against which the gratuity sections guard. **United States v. Irwin**, 354 F.2d 192, 196 (2d Cir. 1965).

By way of example, if a developer is doing business in a city or town, he may not give tickets of substantial value to any town official in a position to use his authority in a manner which could affect the developer. Thus, even if the developer had no recent subdivision plan pending or anticipated, it could not give such tickets to a planning board member without raising §3 concerns. Indeed, he could not give such tickets to a mayor, a selectman or councilman, a board of health, zoning board of appeals or conservation commission member, or any other such public official, all of whom could presumably exercise authority to affect the giver's interests.

All this is not to say that any gift of tickets or passes to a public official would constitute a violation of c.268A. Where no services or discretionary activity have been or are being performed, nor is the public official in a position to use his authority in a manner which could affect the giver, nothing illegal has occurred. In many, if not most instances, however, an expectation (at the very least) of favorable consequences is anticipated by the giver and under such circumstances §3(a) would be violated.

A third factor in determining if §3 has been violated is whether the item of substantial value is given "for or because of" the official acts described above. As just discussed, absent a legitimate prior social or business relationship between the giver and the public official recipient, an inference to be drawn where tickets are given to officials with authority to affect the giver's interests is that the gratuity is intended to do precisely what the statute prohibits: obtain the public official's goodwill. Indeed, some pass lists maintained by givers of these free passes are not by name, but rather by public position only.

III. The "Recipient"

Section 3(b)[5] is the "flip-side" of §3(a). It prohibits a public official from accepting an item of substantial value for or because of an official act performed or to be performed. The analysis here is similar to that

[5]Section 3(b) and (d) provide 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.

described above. Any state, county or local official who receives a season pass, a standing offer for a ticket, or tickets of substantial value from a person whose interests he could affect as a public official, faces an inference that he knew that the reason he was receiving the gratuity was for or because of his official position and an official act he had performed, would, or could perform. Therefore, such officials may violate §3(b) whenever they ask for or accept such a gratuity.

In addition, as to public officials, the conflict of interest law contains what is commonly referred to as a "code of conduct," §23. In pertinent part, §23 prohibits[6] a public official from using his position to secure an unwarranted privilege or by his conduct creating the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. As the Commission observed in EC-COI-83-4 (dealing with the practice of Worcester Centrum officials providing themselves with the privilege of reserving as many as 15-20 tickets for even the most coveted performances), "those who serve the people are treated better than the people themselves."

Public employees are already compensated for the performance of their duties. To request or accept any item of more than nominal value -- and in most instances these tickets are clearly of more than nominal value -- from private entities which have been, are, or may be subject to the public official's responsibilities and duties, is to use one's public position to secure an unwarranted privilege and, in addition, necessarily creates the impression that the private entity may be improperly influencing or unduly enjoying the favor of the public official in the performance of his official duties. Such a practice undermines the public's confidence in the credibility and impartiality of the governmental process.

IV. Conclusion

The practice of private entities giving and public officials accepting "free passes" strikes at the heart of what the conflict of interest law was intended to prohibit. Both the givers and the public official recipients should be on notice that such acts can come within the Commission's jurisdiction and present the possibility of Commission proceedings under §3 and/or §23. The civil fine that the Commission may impose for each such violation is $2,000. In appropriate cases the Commission may also seek to recover any economic advantage any person obtained in violating §3. Section 3 also carries the possibility of criminal penalties (see footnotes on pages 2 and 7, above).

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[6]Section 23(¶2)(2) and (3) provide in pertinent part that:

No current officer or employee of a state, county or municipal agency shall:

(2)use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;

(3)by his conduct give reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person.

SUMMARY OF ADVISORY OPINIONS

(Where an asterisk appears, the text of the advisory opinion has been included among the forgoing opinions.)

EC-COI-85-1 - A full-time state employee who leaves his state position to work for a vendor under a contract with a state agency would remain a state employee for G.L. c. 268A purposes because the contract expressly calls for the employee's services.

EC-COI-85-2 - A member of a state board of registration may also serve as a member of the board of directors of a regional organization providing educational services to individuals subject to the board's jurisdiction. However, the member may neither represent the organization in any state matter, nor officially participate in matters affecting the organization's financial interest.

EC-COI-85-3 - A part-time consultant to the Department of Mental Health is a special state employee. Absent receipt of a gubernatorial exemption under G.L. c. 268A, §7(e), the consultant may not have a financial interest in a second contract with DMH.

EC-COI-85-4 - The president of a small consulting firm which provides management consultation for DMH is a state employee for the purposes of G.L. c. 268A because DMH has specifically contemplated that he will be performing those services. As a special state employee, he may not have a financial interest in other state contracts unless he qualifies for a §7 exemption.

*EC-COI-85-5 - A part-time member of a state board may not receive financial assistance from a state agency within the authority of that board unless he obtains a §7(e) gubernatorial exemption.

*EC-COI-85-6 - Members of a practitioners' liaison committee established by the Commissioner of the Department of Revenue are not state employees for the purposes of G.L. c. 268A. The committee, an ad hoc body primarily formed to facilitate communications between DOR and its practitioners, will not be performing an essential government function.

*EC-COI-85-7 - A full-time state employee may also serve as a member of a state board of registration, but only on an uncompensated basis. By accepting compensation, the employee would have a financial interest in a second state contract in violation of §7. The employee does not quality for an exemption under §7(b) because the process by which the employee was solicited and selected was based primarily on word of mouth rather than a good faith effort to notify the general public.

EC-COI-85-8 - A municipal police chief may also serve as a deputy sheriff, subject to several limitations. He may neither serve civil process in any matter in which the municipality is a party or has a direct and substantial interest (§17); nor receive compensation from the municipality for his services (§20), nor use municipal telephones supplies, automobiles or personnel for his deputy sheriff activities (§23).

*EC-COI-85-9 - A member of the General Court may also consult to a private company which does a small amount of business with state agencies. Because he will neither work on state contracts nor have his compensation attributable to those contracts, and has no propriety interest in the company, he will not have a financial interest in the company's contracts with the state.

EC-COI-85-10 - An attorney who consults part-time to a state board is a special state employee. Because he will be serving as a consultant for less than sixty days annually, §4 prohibits his representation of private clients only in matters in which he has participated or has official responsibility. Should he appear before the board in permissible matters, board members must avoid giving the appearance of unduly favoring his clients because of his consultant relationship (§23).

EC-COI-85-11 - A former state employee may not work for a private firm in connection with matters in which he previously participated as a state employee. Examples of prohibited matters include permit determinations and proceedings challenging the validity of regulations which he drafted.

*EC-COI-85-12 - The conflict of interest statute does not preempt government agencies from promulgating their own employee regulations which address the subject of conflict of interest. The Commission has encouraged other government agencies to promulgate their own codes of conduct to expand the standards of §23 and to clarify the agencies' expectations of their employees with respect to the applicability of G.L. c. 268A. Therefore an agency may prohibit a former employee from receiving a grant

even if the employee's acceptance would be permissible under §5.

EC-COI-85-13 - Following appointment to a part-time state board of registration, an attorney will be subject to the limitations of §4 applicable to special state employees. The attorney would be prohibited from representing private clients in matters before the board, but would be free to represent clients before other boards of registration.

EC-COI-85-14 - A member of the General Court would not be disqualified from voting on most banking legislation if his wife were named as a member of the board of directors of a bank. However, he should avoid making decisions which are unduly affected by his wife's affiliation with the bank.

EC-COI-85-15 - A developer who also serves as an unpaid member of a state board is a special state employee. He may neither submit private proposals on property under the control of his board, nor officially participate in decisions in which he has a financial interest. He may seek development financing from other state agencies following his compliance with the disclosure provisions of §7(d).

EC-COI-85-16 - An assistant district attorney may serve as an incorporator of a non-profit corporation. He may not represent the corporation as its agent or attorney before state agencies and must abide by the standards of conduct in §23 whenever his public and private dealings overlap.

*EC-COI-85-17 - The director of the division of fairs in the Department of Food and Agriculture may race his own horses at Foxboro in events other than those scheduled during the Foxboro Fair or as part of the Mass. Sire Stakes Program without violating §§4, 6 or 23. After a one-year cooling off period, he may also have financial dealings with Massachusetts breeders without violating §23.

EC-COI-85-18 - A member of an independent state authority is a special state employee for the purposes of G.L. c. 268A, and is subject to restrictions under §4 on his private activities.

EC-COI-85-19 - A member of the Massachusetts Historical Commission (MHC) who also owns a corporation which may have an interest in a matter before the MHC must comply with §4. Neither he nor his partner may appear on behalf of the corporation or receive compensation in relation to the matter. To avoid violating §4 or §5, the corporation should hire for the MHC proceedings an agent or attorney with no ownership interest in the company.

*EC-COI-85-20 - The partner of a former city solicitor may represent a private client in a matter in which the solicitor previously participated, because more than one year has passed since the solicitor completed his municipal employment (§18(c)). However, the former city solicitor may not share those partnership assets which are attributable to the representation. Further, the proposed activity may violate the code of professional responsibility, and the partner should seek guidance from other sources on this point.

EC-COI-85-21 - A general partner of consulting firm may accept a consultant contract with the Executive Office of Energy Resources, subject to the limitations of §§4, 6 and 23. Specifically, he may not represent the firm before EOER, share in any fees received by the firm from EOER grant recipients, or participate officially in EOER matters in which the firm has a financial interest.

EC-COI-85-22 - A former member of the town planning board may not act as the agent for or receive compensation from a development team in which he is a partner, on matters in which he previously participated in as a board member. Further, he may not appear before the board on any matter which was pending before the board while he was a member. This restriction also prohibits the former municipal employee from sharing in the fee that the development team will receive for its work before the planning board. His partner is prohibited for one year from participating in any activity in which the former board member is prohibited from participating. A committee of church members promoting the development is not a municipal agency. However, the committee members who are also municipal employees should refrain from appearing on behalf of the committee before the town.

*EC-COI-85-23 - Employees of the Executive Office of Public Safety may not purchase stock in a corporation whose product is being tested by EOPS employees until the product testing is complete and the general public has access to the same information as EOPS employees.

*EC-COI-85-24 - A state employee would have a financial interest in his wife's proposed contract with his

state agency because he shares in the management and control of his wife's business.

EC-COI-85-25 - A member of an independent state authority is a special state employee for the purposes of G.L. c. 268A. If he serves for more than sixty days in any 365 day period, he may not represent private parties in any matter pending in his agency. His representation of parties before other state agencies will not be treated as matters pending in his agency.

EC-COI-85-26 - A General Court member whose legislative employee plans to marry his daughter, is subject to the §23 standards of conduct in his official dealings with his employee. For example, he must grant salary increases, and vacation leave which are consistent with objective personnel criteria applicable to other employees. He is not subject to the mandatory disqualification of §6 because his son-in-law would not be an immediate family member.

*EC-COI-85-27 - A full-time state employee may have a second contract with a state community college because she qualifies for an exemption under §7(b). Specifically the solicitation process which the college has used to notify all eligible employees is sufficient for the purposes of "public notice."

*EC-COI-85-28 - A full-time state employee who wishes to start a business is subject to several restrictions under the conflict of interest law. He may neither perform work on referrals from a state agency, nor act as the agent of his business in seeking contracts with state agencies. He may have a financial interest in a state contract only if he qualifies for an exemption under §7. Once he leaves his state position, he may not work privately on matters which previously came before him in his state position.

*EC-COI-85-29 - A student intern who participates in a legislative internship through a state college may not be assigned to perform predominantly campaign-related work. By performing such work, which would ordinarily be paid for by the legislator's political committee, the legislator has used his official position to secure an unwarranted privilege.

EC-COI-85-30 - A member of the Massachusetts Historical Commission (MHC) who also owns a development corporation which will have matters pending before the MHC must comply with §4. Neither he nor his partner may appear on behalf of the corporation or receive compensation in relation to the matter. To avoid violating §4 or §5, the corporation should hire for the MHC proceedings an agent or attorney with no ownership interest in the company.

*EC-COI-85-31 - Physicians who are members of the medical staff of a municipal hospital are municipal employees for the purposes of G.L. c. 268A, because they are an integral part of the hospital's operation.

EC-COI-85-32 - An attorney who works in a state agency may conduct her own real estate business subject to certain limitations. In particular, she may not take any action as a state employee with respect to any property or person with whom she does, or expects to do, business, nor may her business receive a commission from the purchase or sale of state property unless certain special conditions have been satisfied.

EC-COI-85-33 - An administrative official at a state educational facility and a management representative on the Board of Regents' Health and Welfare Trust Fund may also serve on the Board of Directors of a health maintenance organization.

EC-COI-85-34 - A full-time manager in a regional office of a state agency is prohibited from reviewing or recommending service contract proposals prepared by her husband for a vendor of that state agency, and must also exercise caution in reviewing proposals submitted by competing vendors.

EC-COI-85-35 - A full-time social worker for the Department of Social Services (DSS) may become a part-time DSS employee and also work for a private counseling agency, subject to certain limitations. In particular, she may not receive compensation from the private agency in relation to the referral or treatment of clients from DSS.

*EC-COI-85-36 - A lieutenant in a city police department may accept special detail assignments to private locations in that city if he complies with certain conditions in order to avoid creating the type of employment relationship with a private entity which impairs the independence of judgment in the exercise of his official duties as lieutenant.

EC-COI-85-37 - A consultant to state agency ABC is a special state employee and is therefore permitted to assist a private firm in preparing a proposal to state agency DEF. while there is considerable coordination and cooperation between ABC and DEF, they are independent entities, so that a matter pending in one would not ordinarily be deemed to be pending in the other. If the contract is awarded to the firm, she may perform work under that contract without violating the conflict of interest law.

EC-COI-85-38 - A partner in a law firm may be appointed to the board of directors of the Government Land Bank, but he may not receive compensation accruing from his partners' services in connection with matters before the Land Bank, and his partners may not act as agents or attorneys for non-state parties in connection with matters before the Land Bank.

EC-COI-85-39 - The chief financial officer of a municipal housing authority will be subject to certain restrictions when he leaves to begin employment with a real estate management corporation. Specifically, he will be prohibited from receiving compensation from the corporation in relation to contracts he awarded to the corporation as a housing authority employee. Further, if he becomes a part-time consultant to the housing authority, he must limit his consulting to 60 days per year if he also wants to receive compensation from the corporation in connection with any matters pending before the authority.

*EC-COI-85-40 - A member of the General Court is prohibited from representing for compensation a private client in connection with the sale of land to a state agency. His associate, however, may represent the client subject to certain conditions.

*EC-COI-85-41 - A court officer in a probate court may serve as a local constable subject to certain restrictions.

*EC-COI-85-42 - The head of state agency ABC, whose members hear and adjudicate cases, is prohibited from accepting a discount mortgage from a long-time attorney acquaintance who practices regularly before the ABC. Although they have known each other many years, they have no history of a significant business or social relationship sufficient to rebut a presumption that the discount was altered because of the agency head's official duties.

EC-COI-85-43 - An inspector with a corporation or vendor which contracts with the state is not a state employee for the purposes of Chapter 268A where the state contract does not specifically call for him to perform particular services.

*EC-COI-85-44 - A private consultant who has been asked to serve with other private citizens on an advisory board to a special legislative committee is not a state employee for Chapter 268A purposes because the advisory board is not a state agency. His services for the legislative committee are intended to provide private sector input rather than to play a role normally expected of government employees.

*EC-COI-85-45 - One of two principals in a firm which contracts with a state agency to evaluate alcohol education programs is a state employee for Chapter 268A purposes because his specific services are called for in the state contract. He is not prohibited, however, from working on a separate federal alcohol education grant under which he evaluates a new alcohol prevention program in a different community.

*EC-COI-85-46 - A county employee who is also a private attorney may represent clients by submitting deeds for recording in his county's Registry of Deeds, because the Registry (a county agency) does not have a direct and substantial interest in the filing. He must exercise caution, however, to ensure that he does not use his official position to secure unwarranted privileges.

*EC-COI-85-47 - A member of a quasi-public agency, who is also an officer of a bank, may in addition serve as an unpaid member of a municipal industrial development finance authority as long as he abstains from participation in matters overlapping any of the three entities and files appropriate disclosures.

*EC-COI-85-48 - The assistant director for a division of a state agency may accept a position with a company to work under a contract with that agency (upon resigning from the agency) because he has not substantially participated in the contract while employed by that agency.

*EC-COI-85-49 - An attorney who contracts with a municipal redevelopment authority to provide legal services in a particular matter must limit his work, and that of his firm, to 60 days per year if the firm wishes to represent private parties before the authority on unrelated matters.

*EC-COI-85-50 - The law partner of a city solicitor may not represent the city solicitor's daughter in a motor vehicle injury action brought against the city. The city solicitor must also guard against any actions which would result in special consideration being given to his daughter's case by the city solicitor's office.

*EC-COI-85-51 - The general counsel to a municipal corporation may purchase a parcel of land from that municipality's redevelopment authority without violating the conflict law as long as he meets a number of special requirements. He satisfies the "public notice" requirement because the process by which the redevelopment authority will sell the parcel was sufficiently open.

*EC-COI-85-52 - The current director of legislative and business affairs with the Executive Office of ABC will be subject to a limited one-year lobbying ban upon his leaving ABC to serve as a legislative agent for a private entity. The restrictions will apply to his appearances before ABC and agencies within ABC, but will not apply to appearances before the legislature and secretariats other than ABC.