Rulings

Enforcement Actions

Advisory Opinions

1987

STATE ETHICS COMMISSION

Published by The Massachusetts State Ethics Commission

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TABLE OF CASES

(By Subject or Respondent from 1979 through 1987)

1987 TABLE OF CASES

(By Subject or Respondent)

*Cases are listed consecutively from 1979. Cases from 1979-1986 appear in prior volumes.

Included are:

All Commissions Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1987, page 280.

Cite enforcement actions by name of cases, year and page, as follows:

In the Matter of John Doe, 19_____ Ethics Commission (page)

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

Included are:

1. All Advisory Opinions issued in 1987, page 128.

2. Commission Advisory No. 12 issued in 1987, page 186.

Cite Advisory Opinions as follows:

EC-COI-87-(number)

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

Included are:

Summaries of all Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1987.

SUMMARIES OF ENFORCEMENT ACTIONS (1987)

In the Matter of Marjorie Goudreault
(January 29, 1987)

In a Disposition Agreement with the Commission, Haverhill City Councillor Marjorie Goudreault was fined $500 for voting on a pay increase for her brother, the mayor, in violation of Section 19 of the conflict law.Goudreault voted in March 1986 on a salary ordinance which listed proposed salaries for administrative and professional positions within city government, including the mayor's.

In the Matter of Patrick D. Farretta
(February 10, 1987)

The Commission issued a Public Enforcement Letter concluding that Boston Housing Inspector Patrick Farretta violated the conflict law by taking actions to relocate an elderly woman after her property was condemned by the City of Boston, introducing her to real estate agents (friends of Farretta) who were interested in purchasing her property and receiving $100 from the woman to board up her property.

Section 17 of the conflict law prohibits municipal employees from acting as the agent for any private party in connection with a matter in which the city has an interest.

The Commission also advised Farretta that Section 23 of the law may, in fact, preclude his association with any real estate business in Boston while he is employed as a housing inspector. The Commission mandated that Farretta seek formal advice in the future before acting as a real estate salesman in Boston or accepting any employment with a real estate company which does business in Boston.

In the Matter of Thomas J. Nolan
(March 6, 1987)

In a Disposition Agreement with the Commission, Chelsea Mayor Thomas J. Nolan was fined $1,000 for appointing his brother to the Chelsea Housing Authority in June 1986, in violation of Section 19 of the conflict law. As a result of the Commission's action, Nolan's brother resigned his position with the Housing Authority in January 1987.

In the Matter of Charles Lawrence
(March 6, 1987)

Mashpee Board of Health (BOH) member Charles Lawrence was fined $4,000 for acting on official BOH matters that affected his employer, New Seabury Corporation.

Lawrence, as a BOH member, reviewed and approved New Seabury's septic system designs for various developments at BOH meetings, and also voted on New Seabury variance requests and perc extensions. Lawrence also, on numerous occasions, personally inspected New Seabury septic systems, witnessed New Seabury perc tests and issued various official documents for New Seabury, such as building permit applications.

Lawrence admitted in a Disposition Agreement that he violated section 19 of the conflict law, which prohibits a municipal official from acting on any matter that affects the financial interest of his employer.

In the Matter of Robert Lavoie
(March 18, 1987)

Saugus Selectman Robert Lavoie, in a Disposition Agreement with the Commission, was fined $250 for voting to authorize the renewal of his family's liquor license in December 1985. Section 19 of the conflict law prohibits municipal officials from participating in any matter which affects their own or their immediate family's financial interest.

In the Matter of Ernest LaFlamme
(April 8, 1987)

In a Disposition Agreement with the Commission, Chicopee City Treasurer Ernest LaFlamme was fined a total of $2,000 for violations of Section 19 of the conflict of interest law.

LaFlamme deposited and reinvested a substantial amount of money over 15 years in the Chicopee Cooperative Bank while sitting on the board of directors of the bank. Section 19 of the conflict law prohibits a municipal official from participating in any matter that affects the financial interest of a business organization for which he serves as director or which affects the financial interest of an immediate family member.

LaFlamme was also found in violation of the law by officially acting as the city's auctioneer and selling a parcel of city land to his brother — who was the only bidder on the property.

In the Matter of Wendell Hopkins
(April 29, 1987)

Former Rowley Selectman Wendell Hopkins, in a Disposition Agreement with the Commission, was fined $2,000 for advocating and voting for measures that

would advance the installation of a water system on a road on which he owns substantial property. Section 19 prohibits a municipal employee from participating in a particular matter in which he has a personal financial interest.

In the Matter of Walter Johnson
In the Matter of Goddard Memorial Hospital
(May 26, 1987)

In Public Enforcement Letters to former Stoughton Selectman Walter Johnson and Goddard Memorial Hospital, the Commission concluded that Johnson and Goddard had violated the conflict law. The Commission decided not to order formal adjudicatory proceedings, however, because Johnson had received inadequate legal advice from town counsel.

Johnson was found to have violated the conflict law on numerous occasions between July 1984 and January 1986 by acting as Goddard's liaison with town boards and officials while serving as selectman. Goddard was found to have violated the law by compensating Johnson for his activities.

Section 17 of the conflict law prohibits municipal officials from representing the interests of private parties before town boards; it also prohibits private parties from compensating municipal officials in connection with matters pending before town boards.

Johnson was also found to have violated Section 18, which regulates the activities of former public officials, in connection with his work for Goddard.

In the Matter of Frank Baj
(June 10, 1987)

Former Hadley Building Inspector Frank Baj was fined $500 for issuing building permits for new construction work when he had been hired in his private capacity to do the work. Section 19 of the conflict law prohibits inspectors from inspecting their own work or from issuing permits for construction work which they have been hired privately to do.

In the Matter of Paul T. Hickson
(June 25, 1987)

The Commission issued a Decision and Order ordering Paul T. Hickson, Westfield city councillor and maintenance worker for the Westfield Housing Authority, to resign either of his city positions within 30 days and pay a $500 fine to the Commission. The Commission found that Hickson violated section 20 of the conflict law by holding the two paid city positions. Hickson appealed the Commission's decision to Superior Court.

The Massachusetts Legislature passed a law during 1987 which now permits a city councillor to hold a job in a city housing authority but the law specifically states that it will not affect any previous court case or decision of an administrative agency such as that **In the Matter of Paul T. Hickson.**

In the Matter of James V. Thompson
(August 4, 1987)

In a Disposition Agreement with the Commission, Ludlow Town Counsel James V. Thompson admitted to having violated the conflict law by representing his private development company before the planning board during 1986 in a request for a zoning change. After this meeting, Thompson, acting as town counsel, advised the board to rehear all matters considered at the meeting, including his company's request.

Also during 1986, Thompson was retained by a private client to represent him on the sale of a piece of property in Ludlow. The land subsequently went to the town for a 90 day right of first refusal. Thompson noticed a mistake on his client's notice concerning the 90 day notice when he was reviewing correspondence to the board of selectmen. Thompson wrote up a corrected form and filed it with the board on behalf of his client.

Thompson admitted he violated section 17 of the conflict law by representing his company before the planning board and by acting as attorney for a client when resubmitting the corrected notice to the board of selectmen. He violated Section 19 by recommending that the planning board rehear all matters at their August meeting, including his company's request for a zoning change. He was fined $500 for these violations.

In the Matter of Walter Brewer
(August 28, 1987)

Walter Brewer, a supply officer for the Massachusetts Civil Defense Agency (CDA) was fined $2,000 for sending CDA vehicles to his son's Southboro automotive garage on 110 occasions between 1985 and 1987 for a total bill to the state of almost $9,000.In a Disposition Agreement with the Commission, Brewer admitted he violated section 6 of the conflict law which prohibits state employees from participating in any matter which affects their children's financial interest.

In the Matter of Roger H. Muir
(September 17, 1987)

The Commission fined Northeast Regional Director for the Division of Employment Security (DES) Roger H. Muir $250 for his involvement in the 1985 promotion of his son to a position under his supervision.

Muir admitted in a Disposition Agreement that he violated section 6 of the conflict law by signing his son's promotion recommendation in March of 1985 and by signing off on his son's performance evaluations in 1986 and 1987.

In the Matter of William Highgas, Jr.
(October 1, 1987)

William Highgas, Jr., Associate Justice of the Probate and Family Court Department of the Trial Court of Massachusetts, admitted in a Disposition Agreement that he twice violated the financial disclosure law. He was fined $1500 for the violations.

Highgas violated the financial disclosure law when he concealed from public scrutiny the fact that he was involved in private financial dealings with an attorney by failing to disclose certain information on his 1983 and 1984 financial disclosure forms.

The private attorney, pursuant to an understanding with Highgas, put up a $10,000 down payment and purchased a lot of land for Highgas in December 1982. A month later Highgas paid the $60,000 purchase price for the lot and the attorney's $10,000 was returned to him. But the title remained in the attorney's name for almost a year. During and after this time, from 1983 through 1986, Highgas made numerous court probate appointments to the attorney which paid almost $25,000 in fees.

Highgas failed to indicate on his 1983 Statement of Financial Interests (SFI) that the attorney was the record owner of the lot during 1983. Highgas also failed to identify the December 1984 transfer to him and his wife of the deed and legal title to the lot from the attorney on his 1984 SFI.

The Disposition Agreement states that Highgas' filing of false SFI's "whether or not intentional, were detrimental to the public interests protected by [the conflict of interest and financial disclosure laws] in that they concealed from public scrutiny the fact that Judge Highgas was involved in personal financial dealings . . . with an attorney to whom he made numerous probate appointments."

In the Matter of James Geary
(October 5, 1987)

The Commission issued a Decision and Order concluding its nepotism case against Avon Selectman James Geary. The Commission imposed a $250 fine ruling that Geary violated Section 19 of the conflict law by voting for his brother's appointment to acting and then permanent police chief in 1985. Geary, as selectman, also violated the law when he signed the chief's three-year contract with the town.

In the Matter of Edward Rowe
(October 6, 1987)

The Commission fined Edward Rowe, acting chief engineer for the MBTA's Engineering and Maintenance Department, $250 for signing off on documents which authorized the hiring of his son as a temporary and then permanent employee for the MBTA. Rowe's signature on the personnel authorization to hire his son temporarily was one of 10 signatures; for the permanent authorization, Rowe's was one of nine signatures.

In a Disposition Agreement with the Commission, Rowe admitted he violated section 6 of the conflict law which prohibits state employees from officially participating at all in the hiring process of an immediate family member.

In the Matter of Yvonne B. Desrosiers
(October 6, 1987)

In a Disposition Agreement, the Commission fined Acushnet Treasurer/Tax Collector Yvonne B. Desrosiers $250 for hiring her son as a Deputy Tax Collector in 1984. The fine was low because Desrosiers had been told that she could hire her son by the Department of Revenue. Also after being notified by the Commission that the appointment of her son raised conflict concerns, Desrosiers dismissed her son effective April 1987.

In the Matter of Mary L. Padula
(October 30, 1987)

The Commission fined State Senator Mary L. Padula (R. Lunenburg) $750 for requesting that her daughter be hired as a legislative aide for her district office working out of Padula's home in Lunenburg. Padula admitted, in a Disposition Agreement with the Commission, to violating Section 6 of the conflict law by participating in the hiring of her daughter.Padula's daughter resigned her position effective January 14, 1987.

In the Matter of Robert P. Sullivan
(October 30, 1987)

The Commission, in a Decision and Order, ordered Tewksbury Planning Board member Robert P. Sullivan to pay a civil fine of $1,000 for violating section 17 of the conflict law on two occasions in 1984 by representing a development corporation of which he was president and 50% owner before the planning board. The issues before the planning board involved the development of condominiums in Tewksbury.

Section 17 of the conflict law prohibits municipal officials from acting as the agent for a private party before town boards.

The legal dispute in the case centered on whether Sullivan was acting as "agent" for the corporation or whether he was acting on his own behalf when he spoke at the planning board meetings about the condominium development. Municipal officials may represent their own personal interests before town boards or agencies. The Commission concluded that Sullivan was acting on behalf of his corporation and his 50% partner when he spoke at the planning board meetings, in violation of section 17.

In the Matter of Marguerite Coughlin
(November 5, 1987)

In a Disposition Agreement Beverly Planning Board member Marguerite Coughlin admitted she violated the conflict law by voting on a zoning matter affecting her neighbor. There was no fine assessed in the case because Coughlin's actual financial interest in her neighbors' plans was minimal.

In the Matter of Abdullah Khambaty
(November 16, 1987)

In a Decision and Order, the Commission cleared Abdullah Khambaty, Gloucester school committee member, of one allegation that he participated officially at a city council meeting in a matter affecting his wife's financial interest.

The Commission found that Khambaty spoke at this meeting not as a school committee member but as a private citizen.

But Khambaty was found to have violated section 19 of the conflict law by participating officially at two school committee executive sessions involving the same issue. Because of the minor nature of the violation, no fine was imposed.

Khambaty's case centered on a local controversy surrounding the acceptance of professional development grants for Gloucester teachers and the terms and conditions under which these state funds were to be distributed to the teachers. Khambaty's wife is a Gloucester school teacher.

In the Matter of George Prunier
(November 18, 1987)

In a Public Enforcement Letter the Commission said that Grafton Selectman George Prunier appeared to have violated section 19 of the conflict law by participating in the deliberation and negotiations for the town's purchase of a private landfill site directly across the street from his home. But the Commission decided against taking formal action against Prunier because he did not stand to gain financially by his participation and, in fact, placed the town's interest before his own.

The Letter issued to Prunier states, "Without exception, abutting property owners are presumed to have a financial interest in matters affecting the value of the abutting property....It is irrelevant whether the matter beneficially or adversely affects your financial interest. As long as there is some effect, Section 19 prohibits your participation."

In the Matter of John P. Burke
(December 3, 1987)

The Ethics Commission reprimanded State Senator John Burke (D., Holyoke) in a Public Enforcement Letter for receiving a rifle worth over $400 from a Westfield company in 1986. Burke accepted the rifle as a token of gratitude by Savage Industries, a gun manufacturing company, for his extensive efforts during 1985 and 1986 in obtaining state assistance and refinancing for the company which was in danger of going bankrupt.

Section 3 of the conflict law prohibits any public employee from accepting a gift of substantial value ($50 or more) from anyone with whom the official has or has had official dealings — even if the motivation for the gift is to express gratitude or to foster goodwill.

The Commission resolved Burke's case with a Public Enforcement Letter — rather than going forward with formal enforcement proceedings — because of several mitigating factors. The role that Burke took in assisting the company located in his district was a normal part of his constituency services. He listed the gift on his financial disclosure form. The gift was given after Burke's involvement in getting state assistance to Savage so that it clearly represented a token of appreciation rather than an inducement for him to intervene on behalf of the company. And finally, Burke returned the rifle to Savage.

SUMMARIES OF ADVISORY OPINIONS (1987)

EC-COI-87-1 A selectman who is an officer of an organization which operates a private club may participate in the liquor license application of a restaurant which does not compete with the club.

EC-COI-87-2 A fire district is an independent municipal agency for the purposes of G.L. c. 268A, and an elected member of a prudential committee of the fire district is a municipal employee. He is not eligible for classification as a special municipal employee, nor does he qualify for any exemptions from §20 which would permit his receipt of additional compensation as a call firefighter.

EC-COI-87-3 Two members of the board of directors of the Community Economic Development Assistance Corporation (CEDAC) are special state employees and may continue their outside activities, subject to certain conditions. One director may consult to a housing development corporation which has a funding request pending before CEDAC, provided he abstains from any participation as a CEDAC member in the request and his consultation is independent of matters involving CEDAC. A second director must observe the limitations of §23 prior to participation in the funding request of the housing development corporation whose executive director is also on the board of directors of a state agency which employs her.

EC-COI-87-4 A member of the General Court may continue employment as a consultant to a company as long as his compensation is not derived from any contracts between the company and the state, and he refrains from appearing before state agencies in connection with state contracts or other particular matters. He must also abstain from voting or otherwise participating on any special legislation which financially affects the company.

EC-COI-87-5 A state employee may serve as a paid member of the board of directors of a bank, as long as he complies with the restrictions of §§4,6 and 23. Specifically, he may not participate as a state employee in any matter affecting the bank's financial interest and may not work for the bank on any leases, regulatory proceedings, scholarship programs or other matters in which the state has a direct and substantial interest.

EC-COI-87-6 The chief executive officer of a company which has performed services for the campaign committee of the head of a state agency may accept employment with that agency, provided he complies with the restrictions of §§4, 7 and 23. In particular, his company may no longer contract with state agencies, and he must observe the §23 conditions prior to his official dealings with agencies or employees with whom his company has previously contracted.

EC-COI-87-7 A municipal official who is invited to attend an out-of-state event in his official capacity would, by receiving payment or reimbursement for transportation, lodging, and event admission from a private sponsor, violate §23(b)(2) unless the municipality authorizes the payment or reimbursement.

EC-COI-87-8 The treasurer and owner of a for profit business corporation was advised that he was a municipal employee by virtue of a contract between the corporation and a city agency. The Commission announced interim standards to determine when a principal owner, or other individual who plays a significant role in the performance of a contract will be deemed a public employee. The factors include, but are not limited to:

1. Whether the individual's services are expressly or impliedly contracted for;
2. The type and size of the corporation. For example, an individual who is president, treasurer and sole stock holder of a closely held corporation may be deemed a public employee if the corporation has a contract with a public agency;
3. The degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to the agency;
4. The extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder and;
5. The extent to which the person has performed similar services to the public entity in the past.

EC-COI-87-9 A member of the city council may initiate a lawsuit against the council in connection with a prior council's termination of his employment with the city, subject to certain conditions. He may not officially participate in any decision or determination relating either to the lawsuit or the employment status of the incumbent in the position the councillor formally held. He must also keep separate the course of his lawsuit from his exercise of official responsibilities as city councillor.

EC-COI-87-10 A municipal treasurer who has been named as an unpaid corporator of a savings bank is prohibited by §19 from officially participating in matters affecting the board's financial interest, and from acting as the bank's agent in connection with matters in which the municipality is a party or has a direct and substantial interest.

EC-COI-87-11 A member of the general court must abstain from participating in any particular matter relating to a proposed project site which is located adjacent to real estate owned by a trust of which his father is a beneficiary. He may support general enabling legislation providing funding to similar projects because the legislation is not a "particular matter."

EC-COI-87-12 A selectman may also hold a second elected position as an assessor. He may not, however, accept another paid appointed town position as a school director until six months after his resignation as a selectman.

EC-COI-87-13 A chairman of a state agency may serve on the board of directors of a bank mutual fund, subject to the provisions of §§4, 6, and 23. Specifically, he may not be compensated as a bank fund director nor act as the bank's agent on any matters within his responsibility as the state agency chairman. He must abstain from participating as agency chairman on any matters which may affect the bank's financial interest and properly disclose that situation. Under §23, he may not use his position to secure an unwarranted privilege for the bank nor disclose confidential information which he acquired in his state position.

EC-COI-87-14 A state employee who is also a private developer is prohibited by §7 from participation in the EOCD home ownership program because he would have a financial interest in a contract made by EOCD, a state agency.

EC-COI-87-15 Where the brother of a state employee independently operates a business in which the state employee exercises no management or control, the brother's financial interest in his contract with the state will not be imputed to the state employee for the purposes of §7.

EC-COI-87-16 A city councillor who is either a potential candidate for mayor or who has an immediate family member who is a mayoral candidate may vote on a proposed pay increase for the mayor's position which would take effect after the election. Such a vote three months prior to the filing deadline for nomination papers would not affect the financial interest of the councillor or his immediate family member because the prospect of political success is too speculative and not reasonably foreseeable. Abstention may be required, however, if the vote is taken nearer to the election date, for example, after the deadline for filing nomination papers.

EC-COI-87-17 Members of the DEQE Water Resources Management Advisory Committee are state employees under G.L. c. 268A. As long as the Committee has no official responsibility for individual registration statements and permit applications, members may privately represent parties in connection with the filing of registration statements and permit applications with DEQE.

EC-COI-87-18 An attorney may serve as special municipal counsel representing a board of health in a state lawsuit, subject to the limitations of §17, 18 and 19.

EC-COI-87-19 The administrator of a county hospital is a county employee for G.L. c. 268A purposes because his services are specifically contemplated under a management agreement between a private management corporation and the County Hospital Trustees and County Commissioners. Neither his receipt of compensation under the county contract nor his representation of the corporation would violate §11 or 14 inasmuch as these activities are anticipated under the management agreement. He must abstain from official participation in salary reviews, evaluations, and other matters in which his wife has a financial interest.

EC-COI-87-20 A state employee who is on a leave of absence from a private firm which provides contractual services to state agencies and to human service providers must abstain from participating in matters which will financially affect his firm. Under §23(b)(2) he must not grant any unwarranted privileges or exemptions of substantial value to any providers which contract with the private firm. The employee may serve as a member of the board of directors of two corporations which have no dealings with state agencies, subject to §23(b)(2).

EC-COI-87-21 A selectman whose son is a patrolman in the police department may not approve collective bargaining agreements which include salary increases for patrolmen nor may she participate in the appointment or promotion of her son. The selectman may participate in other police department matters, such as the appointments which do not affect her son's financial interest. If the selectman's acts appear to be improperly influenced because of her son's employment on the police department, she must make a public disclosure of those facts to dispel the appearance of undue favoritism.

EC-COI-87-22 The head of a state agency must observe the limitations of §23 in connection with the handling of agency matters in which associates of his sister represent clients.

EC-COI-87-23 Section 3 prohibits a state agency head from receiving for himself a gift of substantial value relating to duties which the official has performed. By establishing a charitable trust which will receive and

expend such gifts, the official will not have received for himself a gift in violation of §3. He must observe the safeguards of §23, however, in his official dealings with the donor.

EC-COI-87-24 Section 7 prohibits a full-time state employee from being paid as an examination reader for the Board of Bar Examiners. Because there is no public notice of the availability of the reader position, the employee does not qualify for an exemption under §7(b).

EC-COI-87-25 A city councillor whose sister is an employee of the school department may vote on the total appropriation for the school budget but must abstain from participating in any recommendations on a budget line item which funds the collective bargaining agreement between the school department and teachers union.

EC-COI-87-26 A former state employee who has recently become a special assistant attorney general may privately represent a client in the appeal of an adverse ruling by a state agency which will be represented by another bureau in the attorney general's office. Under §23, the special attorney general is prohibited from disclosing confidential information obtained on the job and from using his official position to benefit his private client.

EC-COI-87-27 A former state employee who telephones his former agency in an attempt to adjust a case pending in that agency would be considered "appearing personally" before that agency within the meaning of §5(b).

EC-COI-87-28 A member of a municipal neighborhood council which serves as a discussion forum for municipal issues and which has no official responsibility is not a municipal employee for the purposes of G.L. c. 268A. Should the council become formally organized and be delegated official municipal functions, however, then the jurisdictional conclusion would need to be re-examined.

EC-COI-87-29 A newly-hired state employee may receive deferred compensation from his former law firm for services performed prior to becoming a state employee, but must abstain from participating as a state employee in all matters affecting the financial interest of the firm's partners while he remains a partner in the firm's investment fund. His receipt from the firm of free tax preparation services for the current year would not violate §23 because the firm makes the same service available to all former employees similarly situated.

EC-COI-87-30 A state employee who has been accepted into an uncompensated college fellowship program must comply with §23 whenever he participates as a state employee in matters effecting the college.

EC-COI-87-31 A municipal board of health member who owns a local restaurant may not participate officially on matters which concern either the restaurant, the restaurant's competitors, or the member's financial interest. Section 17 also prohibits the board member from installing septic systems locally as this work is presumptively in relation to the septic permit, a matter in which the town has a direct and substantial interest.

EC-COI-87-32 A municipal employee whose responsibility is limited to the ministerial act of signing a treasury warrant authorizing payment of compensation to employees does not personally and substantially participate in the warrant as long as the hours are certified by other individuals and the certification does not become the subject of a dispute.

EC-COI-87-33 A selectman, whose son is a police patrolman, may not participate in the creation of a new position or in the promotion of the son's supervisors, since the son has a financial interest in these matters.

EC-COI-87-34 A former state attorney may not represent private clients in connection with negotiations, discussions and other communication about the continued promulgation of draft regulations where he had participated in the initial draft in his official capacity.

EC-COI-87-35 Section 20 disqualifies a selectman from eligibility for a compensated position in the same town until six months after the selectman resigns.

EC-COI-87-36 A selectman who has been designated a "special municipal employee" is subject to a one-month, rather than a six-month waiting period prior to appointment to a paid municipal position.

EC-COI-87-37 State employees may participate in a discount negotiated by a state agency for all state employees where similar discounts are negotiated in the public and private sector and the process by which the benefit accrued to state employees was competitive, public and fair.

EC-COI-87-38 An employee of a state agency may accept an award of a trip for educational purposes paid for by a private company if the state agency does not directly or indirectly regulate the activities of the company, the award is given to the agency and is not a personal gift offered to any particular employee.

EC-COI-87-39 Members of the Massachusetts Corporation for Educational Telecommunications (MCET) must

observe the abstention requirements of both §6 and St. 1982, c. 560 in connection with matters which affect the financial interest of members or their business organizations. In most instances, members may seek exemptions from §6 from their appointing officials.

EC-COI-87-40 Employees of a state agency may not receive benefits under a scholarship grant program awarded by their own agency.

EC-COI-87-41 A Chief Probation Officer in a district court may not supervise an immediate family member, unless the First Justice of that Court, whom the Ethics Commission has determined to be the employee's appointing official for the purposes of the conflict law, makes the appropriate written determination pursuant to §6.

EC-COI-87-42 By virtue of Chapter 809 of the Acts of 1981, a town wiring inspector is not prohibited by §17 from engaging in a private electrical contracting business in the same community.

COMMISSION ADVISORY NO. 12 — County Charter Commissions. This advisory provides guidelines for all members of county charter commissions and specifically deals with the restrictions the conflict law places on county employees who serve on county charter commissions. Authorized January 12, 1987.

COMMISSION ADVISORY NO. 12
COUNTY CHARTER COMMISSIONS

INTRODUCTION:

In recent months, the State Ethics Commission has received numerous inquiries concerning the application of G.L. c. 268A, the conflict of interest law, to members of county charter commissions. The purpose of this advisory is to explain how G.L. c. 268A applies to county charter commission members and to answer the most commonly asked questions.

I. BACKGROUND OF COUNTY CHARTER COMMISSIONS

In November, 1986, voters from several counties approved the creation of a county charter commission for their respective counties and elected a fifteen member charter commission. In addition to the fifteen elected members, each charter commission includes the three county commissioners or their designees, and the chairman of the county advisory board or his designee. Under G.L. c. 34A, §8

> it shall be the function and duty of the charter commission to study the form of government of the county, to compare it with other forms available under the laws of this state, to determine whether or not in its judgment the government of the county should be strengthened, made more clearly responsive or accountable to the people or whether its operation could be more economical or efficient under a changed form of government.

The intent of c. 34A is to enable a county to perform efficiently its mandated duties. The jurisdiction of charter commissions does not include state-mandated services relating to judicial or penal administration, or the administration of the registry of deeds. **Id**, §15(c).

Within eighteen months following the election, each charter commission must complete its hearings and study and submit a report and recommendations to the citizens of the county. **Id**, §11. The charter commission may recommend:

> a) the retention of the current county commissioner form of government;
>
> b) the adoption of one of several optional model forms of government which retain the county commissioners but also provide for other statutory executive officers; or
>
> c) the adoption of a special charter recommending to the General Court a form of government different from the current or optional model forms of government.

The charter commission may also recommend changes in the number of county commissioners, the duration of their service, whether their terms should be staggered and whether they should be elected by districts, as opposed to elected at-large. **Id**, §12.

II. JURISDICTION UNDER G.L. c. 268A

Any person who serves on a county charter commission, whether by election or by designation, is a "county employee" for the purposes of G.L. c. 268A, §1(c), (d).[1]/ Because membership on a charter commission is unpaid, a member of a charter commission is also a "special county employee" within the meaning of G.L. c. 268A, §1(m). As a special county employee, a charter commission member will remain subject to the prohibitions of G.L. c. 268A but will be eligible for certain exemptions which are not otherwise available to full-time county employees.

III. LIMITATIONS ON MEMBERSHIP

A county employee may be elected or appointed to a charter commission. The relevant section of G.L. c. 268A is §14 which, in general, prohibits a county employee from having a financial interest in a contract made by an agency of the same county. As applied to a charter commission member, however, §14(c) permits a special county employee to retain a financial interest in an employment contract with the county following:

> (a) his filing of a statement with the State Ethics Commission disclosing the interest of the employee and his family in the contract; and
>
> (b) the approval by the county commissioners of his exemption from §14.

With respect to the county commissioner exemption approval, we expect that exemptions will be granted routinely to county employees.[2]/

The principles of §14 also apply to a charter commission member who, although not employed by the county, has an ownership interest in a company which contracts with the county or who otherwise has a financial interest in a contract made by the county. On the other hand, §14 does not apply to a charter commission member who is employed by either a different county, federal, state or municipal government, or who is a retiree from the county.

Assuming that there is no inherent limitation posed by G.L. c. 268A on serving as a charter commission member, the member will likewise be subject to no limitation regarding his eligibility for selection as chairman, vice chairman, treasurer or clerk of the charter commission.

IV. LIMITATIONS ON PARTICIPATION IN CERTAIN MATTERS

Two sections of G.L. c. 268A place limitations or

conditions on the matters in which a county charter commission member may participate. The principle limitations are contained in G.L. c. 268A, §13, which prohibits a county employee from participating in any decision or other particular matter in which he has a financial interest. The purpose of this section is to ensure that a county employee will not be placed in the position of choosing between the public interest and his own financial interest. The law recognizes that, where private financial loyalties are at stake, it is unrealistic to assume that a county employee will remain loyal to the interests of the county. There are no exemptions to §13 available to elected officials.

County commissioners who serve *ex officio* on a county charter commission are most directly affected by §13 because the scope of the charter commission's work will include whether to retain the current county commissioner form of government. The decision whether to retain the current county commissioner form of government is a particular matter in which county commissioners have a financial interest since the continuity of their salary as county commissioners depends on the retention of the current form of government. Similarly, decisions concerning the number of county commissioners, the duration of their terms, whether their terms should be staggered, and whether they should be elected by district, as opposed to at-large, are all matters in which county commissioners have a reasonably foreseeable financial interest and from which they must therefore abstain.

During charter commission deliberations or votes on the decision whether to retain the county commissioner form of government, county commissioners should leave the room. **See, Graham v. McGrail**, 370 Mass. 133, 138 (1976). Once the charter commission has completed its deliberations or votes on the separate issues in which the county commissioners have a reasonably foreseeable financial interest, the county commissioners may resume their participation as charter commission members, and may participate in the final recommendations of the charter commission. **Id.**[3] Similar abstention requirements will apply to any other charter commission member whose financial interest will be affected by the charter commission's recommendation. For example, a county personnel administrator who was elected to the charter commission must abstain from charter commission deliberations or votes which affect whether the county will retain the personnel administrator position.

The conclusion that county commissioners must abstain from the charter commission deliberations or votes on whether to continue the county commissioner form of government does not remove entirely county commissioners from the process. Inasmuch as G.L. c. 34A expressly includes county commissioners on the charter commission, we believe that the General Court intended to encourage county commissioners to lend their expertise and opinions to the charter commission's work. In order to effectuate this intention so as to give G.L. c. 268A a workable meaning, we conclude that a county commissioner will not violate §13 if he provides background information or offers his opinion to the charter commission concerning the decision whether to retain the county commissioner form of government. In so doing, a county commissioner must make clear that he is acting on his own behalf. The offering of such information or opinions would be appropriate, for example, during public hearings in which the charter commission solicits testimony from interested citizens. **See**, G.L. c. 34A, §11A.

The prohibitions of §13 are not limited to matters in which a charter commission member has a personal financial interest. Abstention is required whenever a particular matter before the charter commission affects the financial interest of either:

a) the charter commission member;
b) the member's immediate family (the member, his spouse and either of their parents, children, brothers or sisters);
c) a partner;
d) a business organization with which the member is employed, affiliated as an officer, director or trustee; or
e) a business organization with which the member is negotiating or has an arrangement for future employment.

For example, a charter commission member whose husband is the county treasurer must abstain from participating in any decision whether to retain the position of county treasurer.On the other hand, the same charter commission member would be permitted to vote on such matters as the selection of charter commission officers or the adoption of charter commission rules governing the conduct of meetings and proceedings because her husband would not likely have a foreseeable financial interest in those matters.

In addition to the mandatory abstention requirements of §13, charter commission members are also required by §23(b)(3) to avoid conduct which creates a reasonable impression of undue favoritism. Issues under §23(b)(3) may arise, for example, if a charter commission member is considering voting on whether to retain a county position currently held by his cousin. While the cousin is not expressly included in the definition of immediate family, G.L. c. 268A, §1(e), there is a reasonable impression created that the member may unduly favor his cousin. To dispel any such impression, the charter commission member must publicly disclose his relationship with his cousin prior to voting.This disclosure should be included in the meeting minutes.

V. OTHER LIMITATIONS

The previous discussion has highlighted the major

issues raised under G.L. c. 268A by charter commission members. Three further points warrant discussion:

(a) Section 23(b)(2) prohibits a charter commission member from using his official position to secure for himself or others unwarranted privileges or exemptions of substantial value. Charter commission members may therefore not use charter commission resources to further a private purpose if these resources are not available to the general public.

(b) Following the completion of the charter commission's work, each member will become a former county employee. G.L. c. 34A, §7. Given the limited nature of the charter commission's responsibilities, it is unlikely that a former charter commission member will be faced with opportunities which could violate the sections of G.L. c. 268A which limit the conduct of former county employees. Potential problems could arise, however, if a former charter commission member represented private clients in a court challenge to the validity of a charter reform which was approved based on a procedurally defective charter commission recommendation. Any related questions concerning the application of G.L. c. 268A to former employees should be directed to the Ethics Commission.

(c) Nothing in G.L. c. 268A limits a charter commission member's right either to vote as a county resident on a ballot question recommended by the charter commission or to express his personal views about the merits of any charter commission recommendation.

CONCLUSION:

We have addressed in this Advisory the most commonly asked questions concerning the application of G.L. c. 268A to county charter commission members. While we recognize that the potential for conflict of interest may be inherent in the county charter commission enabling legislation, we have attempted to accommodate the goals of G.L. c. 268A with the purposes for creating county charter commissions. This Advisory does not purport to anticipate every issue which may arise under G.L. c. 268A. We therefore encourage county charter commission members to contact the Ethics Commission Legal Division with any questions concerning the application of G.L. c. 268A to their situation.

DATE AUTHORIZED: January 12, 1987

Editor's Notes: Form for Disclosure of Financial Interest by County Employee is enclosed.

We have used the generic pronoun "he" throughout the advisory for ease of reading.

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[1]/The Commission is aware that the General Court has exempted members of *municipal* charter commissions from G.L. c. 268A. See, G.L. c. 268A, §1(g)(2). While it might be argued that a similar exemption ought to be granted to county charter commission members, particularly county commissioners who are designated by statute to serve on the charter commission, we find no indication from either the plain language of G.L. c. 34A or its legislative history that the General Court intended to provide such an exemption.

[2]/A denial of an exemption to a county employee would not only be contrary to the purpose of c. 34A in permitting voters to elect charter commission members, but could also subject county commissioners to allegations that they have used their official position to secure unwarranted privileges for themselves or others in violation of G.L. c. 268A §23(b)(2). This could be particularly true if the basis for the denial of an exemption were the stated position of the county employee with respect to the continuation of a county commissioner form of government. We also note that county commissioners need not grant themselves §14 exemptions in light of their *ex officio* status.

[3]/In view of the constraints which this section imposes, a county commissioner may wish to choose a designee to serve on the charter commission. While the designee would not be required to abstain from matters affecting his designator's financial interest, the designee must comply with §23(b)(2) requirements that he not use his official position to secure for the county commission member an unwarranted privilege or exemption of substantial value. **Compare, EC-COI-83-37; Commission Nepotism Advisory No. 11.**

Included are:

Summaries of all Advisory Opinions and Commission Advisory No. 12, issued in 1987.

CONFLICT OF INTEREST OPINION
EC-COI-87-1

FACTS:

You are a member of the Board of Selectmen (Board) of a Town. The Board also acts as the licensing authority for the Town. The Board held a public hearing on an application of a restaurant to change its license from a "common victualler/wines and malt beverage license" to an "all alcoholic beverages license." You abstained from the discussion and vote on that application because you are the paid president of a corporation which operates a private club located approximately 100 yards from the applicant and because you are the manager named on the club's liquor license. Motions to grant the license application and to deny the application resulted in a tie vote, thereby resulting in the defeat of the motions and the denial of the application. The applicant appealed the Board's decision to the Alcoholic Beverages Control Commission (ABCC) pursuant to G.L. c. 138, §67. The ABCC remanded the matter to the Board because the denial of the application contained no statement of reasons. The ABCC also recommended that if the Board were unable to obtain a majority decision without your participation, then you should participate in the matter under the rule of necessity.

You then sought an informal opinion from the Ethics Commission as to whether you could participate in future matters concerning the restaurant's license application. The staff's informal opinion to you, based upon facts presented at that time, advised you to abstain in the matter pursuant to G.L. c. 268A, §19 because you would be officially participating in a matter in which the corporation of which you are a paid officer has a financial interest. The opinion assumed the likelihood that the private club and the applicant-restaurant would be business competitors.

A second hearing was held on the restaurant's license application. You again abstained from participating and voting on the matter. The result again was a tie vote and the application was denied. The applicants re-appealed the denial to the ABCC, which heard the matter and issued a decision. In that decision, the ABCC concluded that you would not be prohibited from participating in the restaurant's license application because the private club holds a restricted liquor license whereas the applicant-restaurant is seeking a license for a commercial establishment. Therefore, there would be no business competition between the restaurant and your private club.

On that basis, the ABCC remanded the matter to the Board for further consideration and requested you to obtain an opinion from the Ethics Commission as to whether you could participate in the matter. You state that the private club would not be a likely business competitor of the applicant/restaurant for several reasons, despite the proximity of the locations of the two establishments. First, your club serves liquor only to members and their guests and not to members of the general public. Although the club rents its facilities, on occasion, to members and other private parties, and liquor may be served at those functions, there would not be any competition with the restaurant for that type of business. The club accommodates a substantially greater number of persons than the restaurant and the club offers an entirely different line of food from the restaurant. Further, the restaurant is open to the public, would only be serving alcohol with meals, and does not have a bar.

QUESTION:

Does G.L. c. 268A permit you to participate, as a Board member, in the restaurant's application?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

As a member of the Board of Selectmen, you are a municipal employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A are relevant to your question.

1. Section 19

As a municipal employee, you are prohibited under §19 from officially participating[1/] in any particular matter[2/] in which a corporation in which you are serving as an officer, trustee, partner or employee has a financial interest. Because you are the paid officer of a corporation which operates a private club and holds a liquor license, you are prohibited from participating in any matter which could foreseeably affect that corporation's financial interest. The abstention requirements apply not only to matters filed by your club, but also to matters filed by businesses which compete with your club. See, EC-COI-86-13, 81-118. Therefore, the propriety of your voting on the restaurant's application turns on whether the restaurant is a competitor to your club. Based upon the information which you and the ABCC have provided, we conclude that the restaurant does not compete with the club.

Notwithstanding the close proximity of the restaurant to the club, both you and the ABCC state that the restaurant and the club are not likely business competitors. The club holds a restricted liquor license which permits service only to its members and their guests

while the restaurant serves the general public. The fact that the club rents its facilities for functions does not make it a competitor to the restaurant because the club has a substantially larger seating capacity than the restaurant and offers an entirely different menu. In view of these differences, there is no reasonably foreseeable financial interest of the club which would be affected by the granting or denial of the restaurant's application.

2. Section 23

Aside from §19, your official actions with respect to the application are subject to two related restrictions of §23(b). Under §23(b), you may not use your official position to secure an unwarranted privilege of substantial value for the corporation, or act in a manner which would create a reasonable conclusion that you are likely to act as a result of your relationship with the corporation. To avoid violating these restrictions, you must

(a) publicly disclose, prior to your participation in the application, your affiliation with the corporation, and

(b) base your evaluation and vote on the merits of the application on the same objective standards which the Board applies to other applicants.

DATE AUTHORIZED: January 12, 1987

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

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

CONFLICT OF INTEREST OPINION
EC-COI-87-2

FACTS:

You serve as an elected member of the Prudential Committee of a municipal fire district (District). The District was established pursuant to a special act of the Legislature and is subject generally to the provisions of G.L. c. 48.[1]/ The District is an independent entity not subject to the authority of the Board of Selectmen or the Town (Town). It conducts its own annual district meeting at which appropriations and other matters are approved.

The District elects a three-member Prudential Committee whose responsibilities are not entirely clear. Although many of its duties established in the special legislative act seem obsolete, the Committee's major responsibility is to expend the money the district meeting appropriates through a treasurer elected by the District. See, G.L. c. 48, §71.[2]/ Section 73 of G.L. c. 48 establishes a limited relationship between the Town and the District. Under §73, the District clerk will periodically certify to the Town assessors the amount of taxes necessary to be raised, and in turn, the assessors presumably add this total to the Town tax bills. Section 73 provides that

> the assessors, treasurer and collector of a town in which such district is organized shall have the same powers and perform the same duties relative to the assessment and collection of the money voted by the Fire District as they have exercised relative to the assessment, collection and abatement of town taxes . . .

In effect, these town officers act as the agent of the District in the collection and assessment of taxes.

In addition to your Prudential Committee membership, you are a call firefighter for the District. You receive your hourly compensation from the District through an unincorporated fraternal organization, the ABC Hose Company (Company), which has historically acted as the conduit for the payment from the District for call firefighters' services.

QUESTIONS:

1. Is the District a municipal agency for the purposes of G.L. c. 268A?
2. In your capacity as a District Prudential Committee member, are you an employee of the District or of the Town?
3. Are you eligible for classification as a "special municipal employee" as a member of the District Prudential Committee?
4. Does G.L. c. 268A, §20 permit your receipt of compensation for serving as a District call firefighter while you remain a member of the District Prudential Committee?

ANSWERS:

1. Yes.
2. You are a municipal employee of the District and not of the Town.
3. No.
4. No.

DISCUSSION:

1. Municipal Employee Status

We conclude that the District is an independent

municipal agency within the meaning of G.L. c. 268A, §1(f), and that you are a municipal employee of the District within the meaning of G.L. c. 268A, §1(g) by virtue of your membership on the District Prudential Committee.

Although districts are not identified expressly as municipal agencies under §1(f), both the Ethics Commission and the Attorney General have concluded that districts supported by public funds to provide municipal services are independent "municipal agencies" for the purposes of G.L. c. 268A, §1(f). For example, in EC-COI-82-25 the Commission concurred with **Attorney General Conflict Opinions No. 98 and 384** that a regional school district supported solely by public funds engaged in providing mandatory educational services to member municipalities is an independent municipal agency under G.L. c. 268A. **See**, also, EC-COI-74 (private industry council found to be an independent municipal agency by virtue of decision-making function in the expenditure of public funds or in the operation of publicly-mandated programs); EC-COI-79-42 (manpower consortium of member municipalities found to be independent municipal agency).

We note that, for jurisdictional purposes, the question is not whether a governmental agency is covered by G.L. c. 268A but rather which sections of G.L. c. 268A most appropriately apply to that agency. **Compare**, EC-COI-63 (the county, as opposed to the state or municipality, appears to be the level of government served by a county regional housing authority). **See**, also, EC-COI-157. Here, the District cannot reasonably be regarded as serving a state or county constituency.

Although the Commission has not previously determined the municipal agency status of fire districts, such districts have been regarded explicitly as quasi-municipal agencies long before the enactment of conflict of interest laws. **See, Presidents etc. of Williams College v. Inhabitants of Williamstown**, 219 Mass. 46 (1914). In addition, the Commission's reasoning with respect to other independent districts applies to fire districts, given that the District is supported by public funds and provides services customarily provided for the public.

As a member of the District Prudential Committee, it follows that you are a municipal employee of the District. **See**, G.L. c. 268A, §1(g). While it is true that the geographic boundaries of the District and Town are the same, the geographic coincidence does not make you an employee of the Town for G.L. c. 268A purposes because the District is operationally independent of the Town. The District is in essence a corporation with the power to sue and be sued in its own name, to raise its own revenue by taxation on all real and personal property within the District, and is free of control or supervision by any agency of the Town, such as the board of selectmen. **See, Prout v. Pittsfield Fire Department**, 154 Mass. 450 (1891). Moreover, the Attorney General has acknowledged the independence of fire districts even where the District is entirely within the territorial boundaries of a city or town. Thus, the words "chief of a city or town fire department" do not include the chief of a fire district even where the fire district is within the town and there is no other fire department of the town. **Op. Atty. Gen.**, Oct. 23, 1984, p.42.

2. Special Municipal Employee

We conclude that you are not eligible for classification as a "special municipal employee" in your capacity as a District Prudential Committee member. The plain language of the special municipal employee definition authorizes the granting of such status only in cities or towns. Districts are not recognized as agencies possessing the capacity to grant special municipal employee status, and we are reluctant to infer such capacity in the absence of statutory authority.

The Legislature may very well have intended to preclude the granting of special employee status to employees and members of a district. Because the granting of special status leads to permission to take advantage of additional financial opportunities in public and private dealings with a district, **see**, G.L. c. 268A, §§17, 20, the Legislature could reasonably have intended to prevent such opportunities in districts whose limited organizational structure may be susceptible to undue insider influence. We also note that in G.L. c. 121B, §7 the Legislature expressly defined members of housing and redevelopment authorities and certain part-time employees as "special municipal employees" for the purposes of G.L. c. 268A. The enactment of c. 121B, §7 may have reflected a legislative intent to authorize special municipal employee status in light of the uncertainty of the scope of special municipal employee status as defined in §1(n) of G.L. c. 268A. The amendment to c. 121B §7 would have been unnecessary otherwise. We therefore conclude that the determination of eligibility for granting and receiving special municipal employee status rests with the Legislature, and that the authorization for granting special status to district employees cannot be inferred from §1(n).

We do not believe that the Board of Selectmen of the Town possesses the authority to classify district employees as special municipal employees under §1(n). Since the Board of Selectmen has no interaction or authority over the personnel decisions of the District, the Board of Selectmen could not reasonably classify all employees who hold equivalent office, or have knowledge of the contract or conditions of employment of District employees. It is for this reason that §1(n) appears, on its face, to limit its application to "all employees of any city or town" and does not extend to all employees of any city, town or district. Further, §§20(c) and 20(d) do not make policy sense unless the Legisla-

ture contemplated that special municipal employees were either city or town employees. The requirement of disclosure with the town clerk [§20(c)] or approval of an exemption from §20 by the Board of Selectmen [§20(d)], for example, logically assumes accountability of the employee to the town. As we have seen, District members have no accountability to the Town.

A construction which would permit the Town officials to designate District members as specials would also create absurd results. By analogy, in the case of regional districts, it would be necessary to determine whether all towns, certain towns, or some combination of towns should be the designating authority. A rule which would permit a District member to forum-shop from town to town until he obtained favorable treatment would be inconsistent with any concept of political accountability. Any other rule would, of necessity, require an arbitrary selection formula which would be inconsistent with the Legislature's intent to limit, in §1(n), eligiblity for special municipal employee exemptions.

While we are aware of our responsibility to give G.L. c. a workable meaning, **Graham v. McGrail**, 370 Mass. 133 (1976), we are unwilling to recognize a designation authority which is not authorized by G.L. c. 268A and does not provide a workable solution to the statutory void.[3]/

3. Call firefighter employment

We conclude that your service as a call firefighter for the District gives you a financial interest in a contract made by the District in violation of G.L. c. 268A, §20, and that no exemptions apply to you. Your employment relationship with the District which compensates you for your call firefighter services is a contract in which you have a financial interest. **See, Doherty v. State Ethics Commission**, Suffolk Superior Court Civil No. 58535 (February 27, 1984) affirming the Commission's conclusion that an arrangement for personal services in exchange for compensation creates financial interest in a contract for the purposes of G.L. c. 268A.[4]/

The only exemption which is relevant to your situation is §20(f), the so called "call firefighter exemption." The issue is whether the call firefighter exemption in §20 applies to fire districts. The literal language of this exemption clearly does not apply because the exemption applies to a fire department "of a town." The District, as we have seen, is not a fire department of a town but an independent entity. Once again, we are reluctant to infer an exemption for district call firefighters in the absence of more explicit authority. Our conclusion is consistent with our obligation to construe strictly an exemption from a general statutory prohibition. **See, Department of Environmental Quality Engineering v. Town of Hingham**, 15 Mass. App. Ct. 402, 412 (1983).[5]/

DATE AUTHORIZED: January 12, 1987

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[1]/G.L. c. 48, §80 makes clear that the District would be subject to G.L. c. 48. "Fire districts heretofore legally organized shall continue and be subject to the provisions of this chapter relative to Fire Districts."

[2]/G.L. c. 48, §71 provides in pertinent part: "Such districts shall choose a prudential committee, which shall expend, for the purposes prescribed by the district, the money so raised or borrowed, and shall choose a treasurer . . . he shall receive all money belonging to the district, and shall pay over and account for the same according to its order or that of the prudential committee."

[3]/We have also considered other configurations but find them equally unsatisfactory. In particular, if district prudential committee members are treated as the functional equivalent of boards of selectmen, it could be argued that district prudential committee members could, by implication, possess the same powers as boards of selectmen, including the authority to designate district employees as special municipal employees. Even if we were to adopt this construction by implication, the result in your case would not be different. Because members of boards of selectmen in communities of more than 5000 residents are ineligible for special municipal employee status, it follows that district members in districts of more than 5000 residents, such as the District, would be similarly ineligible for such status.

[4]/We regard the ABC Hose Company as merely a conduit for the payment of District compensation. Assuming, for the sake of argument, that you were an employee of the ABC Hose Company in performing fire services, your receipt of compensation would place you in violation of §17(a).

[5]/In view of our conclusion that the District is an independent municipal agency, nothing in G.L.c. 268A outright prohibits a full-time employee of the Town from serving as a member of the District Prudential Committee. The employee would be required, however, to abstain from participation in his Town position in any particular matter in which the District has a financial interest. See, G.L. c. 268A, §19; EC-COI-82-25.

CONFLICT OF INTEREST OPINION
EC-COI-87-3*

FACTS:

You are the executive director of the Community Economic Development Assistance Corporation (CEDAC), a quasi-public corporation created pursuant to G.L. c. 40H. Section 3(d) of c. 40H expressly provides that G.L. c. 268A applies to all directors, officers and employers of CEDAC, subject to certain conditions.[1]/ You have been authorized to seek an opinion on behalf of two members of the CEDAC board. Thomas Welch is a member of the CEDAC board of directors and is also a principal in Welch and Associates, a development consulting firm. CEDAC is currently reviewing a funding request from the Codman Square Housing Development Corporation (HDC) to pay for certain architectural services, test borings, and site surveys for the Lithgow Project(Project). The HDC has retained Welch and Associates as its development consultant. Under the proposed arrangement, Mr. Welch will not be paid for his consultant services out of any CEDAC funding, nor would he have any dealings as consultant with any CEDAC officials or staff. He will also abstain from any participation as a CEDAC member in connection with this project and follow the disclosure procedures of c. 40H §3(d) and G.L. c. 268A §6.

Linda Conroy is a CEDAC board member and also is employed on a full-time basis as the director of research and program development for the Massachusetts

Housing Finance Agency (MHFA). William Jones, a member of the MHFA board of directors, is the executive director of the Codman Square HDC and has appeared before the CEDAC board in connection with the Project.

QUESTIONS:

1. Does the proposed conduct of Mr. Welch satisfy the requirements of G.L. c. 268A?
2. Does G.L. c. 268A permit Ms. Conway to participate as a CEDAC member in reviewing the Codman Square HDC funding request?

ANSWERS:

1. Yes.
2. Yes, subject to certain conditions described below.

DISCUSSION:

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

We conclude that the safeguards which Mr. Welch has proposed are sufficient to prevent a violation of G.L. c. 268A. Four sections of G.L. c. 268A are relevant.

1. Section 6

This section prohibits Mr. Welch from participating[2] as a CEDAC director in any decision, contract or other particular matter[3] in which either he or his firm has a financial interest. The HDC funding decision is a particular matter which would require Mr. Welch's abstention under §6 because of his firm's consultant relationship with the HDC. Therefore, his proposed abstention from participation in any decision relating to the CEDAC project would satisfy G.L. c. 268A, §6. The safest course would be for him to leave the room during any CEDAC discussions or votes concerning the HDC.[4]

2. Section 23

This section, like §6, places limitations on Mr. Welch's CEDAC activities. In particular, §23(b)(2) prohibits him from using his official position to secure unwarranted privileges or exemptions of substantial value for the HDC. Because Mr. Welch will be abstaining as a CEDAC director from any matters relating to the HDC, however, §23 should not pose any problems for him.

3. Section 7

This section generally prohibits a part-time or special state employee from having a financial interest in a contract made by his own state agency. This section will not apply to Mr. Welch as long as his consultation fees will be derived from non-CEDAC sources. **See, also,** G.L. c. 40H, §3(d).

4. Section 4

This section restricts the outside activities of Mr. Welch. In essence, Mr. Welch may not receive compensation from or act as agent for his firm or the HDC in relation to any matter which is within his official CEDAC responsibility. For example, he could not (as a consultant) deal with CEDAC staff in connection with the CEDAC funding approval or oversight. Based on the information which you have provided, it does not appear that §4 will be a problem because Mr. Welch will not have any such dealings with CEDAC staff; as we understand it, CEDAC staff will be dealing with individuals other than Mr. Welch, and his development consultant fees will not be attributable to CEDAC funding.

B. Application of G.L. c. 268A to Ms. Conroy

We conclude that Ms. Conroy may participate as a CEDAC member in reviewing the Codman Square HDC funding request, subject to certain conditions. Under G.L. c. 268A, §6, Ms. Conroy must refrain from participating in any particular matter in which either 1) she; 2) her immediate family; 3) her partner; 4) a business organization in which she serves as officer, director, trustee, partner, or employee; or 5) a person or organization with whom she is negotiating, or has an arrangement for future employment has a financial interest. Based upon the information you have provided, we find that none of the above-described relationships are affected financially by Ms. Conroy's participation in the Codman Square HDC decision. The fact that the executive director of the HDC which is seeking CEDAC funds is also on the MHFA board of directors does not, without more, give rise to a sufficient financial relationship for §6 to apply.[5]

Although Ms. Conroy's participation will not violate G.L. c. 268A, §6, she must also comply with the restrictions of §23. Specifically, she must refrain from using her official CEDAC position to secure for Mr. Jones unwarranted privileges or exemptions of substantial value. G.L. c. 268A, §23(b)(2). She must also avoid creating a reasonable impression that her decisions as a CEDAC member will be unduly affected by the fact that Mr. Jones is a member of the MHFA board of directors. **Id.** §23(b)(3). To avoid creating such an impression, prior to participation in the CDC decision, she must disclose in writing to the governor the fact that she is employed by MHFA, and that Mr. Jones, the executive director of the DCD, is a member of the MHFA board. Alternatively, she may avoid creating an impression of

undue favoritism by voluntarily abstaining from participation in the CDC funding decision.

DATE AUTHORIZED: January 12, 1987

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/Under §3(d), CEDAC may purchase from, sell to, borrow from, loan to, contract with or otherwise deal with any eligible organization in which any director of the corporation is in any way interested or involved; provided, that such interest or involvement is disclosed in advance to members of the board and recorded in the minutes of the board; and provided, further, that no director having such an interest or involvement may participate in any decision of the board relating to such eligible organization.

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

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

[4]/His disclosure and abstention would also be consistent with the independent requirements of G.L. c. 40H, §3(d).

[5]/On the other hand, if Ms. Conroy's continued employment or promotional opportunities at MHFA will depend on how she votes on the HDC proposal, then she would be subject to the abstention requirements of §6. We understand that there are no pending personnel actions involving Ms. Conroy which are under review by the MHFA board. **Compare**, EC-COI-86-25.

CONFLICT OF INTEREST OPINION
EC-COI-87-4

FACTS:

You are a member of the General Court. Prior to your election, you were employed by a private company (Company). The Company is funded by public and private sector grants, and approximately one-half of the Company's budget is derived from a contract with state agency ABC.

You have notified the Company's board of directors that you will be unable to continue serving as a full-time employee and the Company is in the process of selecting your successor. The Company has requested you to continue with the Company on a short-term consultant basis until your successor is able to assume full responsibilities. You estimate this period to be two or three months. Your Company compensation during this period will not be attributable to any contract between the Company and an agency of the commonwealth. Your compensation will be derived entirely from a Company grant received from private entities.

QUESTION:

Does G.L. c. 268A permit you to continue working for the Company on a short-term basis while you also serve as a member of the General Court?

ANSWER:

Yes, subject to certain limitations described below.

DISCUSSION:

As a member of the General Court, you are a "state employee" for the purposes of G.L. c. 268A. You are therefore subject to certain limitations in both your Company and legislative activities.

1. Limitations on your Company Activities

Based on your description of the Company, we conclude that G.L. c. 268A does not place any inherent prohibitions on your short-term employment with the Company. While G.L. c. 268A, §7 would restrict your employment if you had a financial interest in a Company contract made with a state agency, your proposed employment will not violate §7 because your compensation would be derived entirely from non-state sources.[1]/

Aside from regulating the source of your Company compensation, G.L. c. 268A places limitations on your Company activities which involve the state. Specifically, G.L. c. 268A, §4 prohibits you from certain paid, personal appearances on behalf of the Company before any state agency. The two state agencies whose dealings with the Company are most likely to raise issues for you under the conflict of interest law are ABC and the General Court. With respect to ABC, §4 prohibits you from meeting with ABC officials, either to persuade them to continue the ABC contract with the Company or to resolve problems which have arisen in the Company's implementation of the contract.[2]/

With respect to the Company's dealings with the General Court, we understand that you will not be expected to serve as the Company's legislative agent, and that the Company's legislative dealings, if any, will be handled by another individual. Should your Company duties change and require your dealing with the General Court, we will need to examine whether your paid Company responsibilities are "inherently incompatible with the responsibilities of [your] public office." G.L. c. 268A, §23(b)(1).

2. Limitations of your Legislative Activities

During the period of your continued employment with the Company, you will be subject to G.L. c. 268A, §6. Under this section, you must abstain from participation as a legislator in any decision, or determination, including the enactment of special legislation,[3]/ in which the Company has a financial interest. This section should not pose problems for you because most legislative matters in which the Company has an interest neither affect the Company's financial interest nor are

related to the enactment of special legislation. You will be required to abstain, however, from legislative deliberations over the line item in the EOEA budget which authorizes the appropriation for the Company's contract. This requirement will not apply once your employment with the Company has ended.

Nothing in G.L. c. 268A §6 prohibits your legislative advocacy for general policy priorities which are shared by the Company. For example, if you were to serve as a member of a special legislative commission or standing legislative committee which addressed international trade issues, your activities would not violate §6 unless you were considering a particular decision, determination, contract or special legislation in which the Company had a financial interest.

You should be aware that G.L. c. 268A, §23(b)(2) prohibits the use of your official legislative position to secure unwarranted privileges or exemptions of substantial value for the Company. Those privileges or exemptions which you provide for the Company must be available to other organizations as well. EC-COI-81-88.

DATE AUTHORIZED: January 12, 1987

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[1]/Given the short-term nature of your Company employment, you cannot be said to have an indirect financial interest in the Company's contract with ABC. Specifically, the viability of your short-term contract will not be affected by the existence of an ABC contract. Should your Company employment become long-term, then we would need to re-examine whether you have an indirect financial interest in the ABC contract even though you will not be receiving funding directly from that contract.

[2]/Although §4 contains certain exemptions for Legislators where the matter before the state agency is ministerial or involves a quasi-judicial proceeding, none of these exemptions applies to the activities discussed above.

[3]/The enactment of general legislation, on the other hand, is exempt from the definition of "particular matter" and the abstention requirements of §6.

CONFLICT OF INTEREST OPINION
EC-COI-87-5

FACTS:

You are a full time state employee and are considering serving as a member of the board of directors of a bank. You may also become a member of a bank subcommittee regarding community issues. For your services as a member of the board, you would be paid an annual retainer for each board of directors' meeting.

QUESTION:

Does the conflict of interest law permit you to serve simultaneously as a state employee and a member of a bank's board of directors?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

You are a state employee within the meaning of G.L. c. 268A, the conflict of interest law. By virtue of your state employee status, you are prohibited from receiving compensation from the bank regarding any particular matter[1]/ in which the commonwealth or a state agency is a party or has a direct and substantial interest. G.L. c. 268A, §4(a). This restriction, for example, would prohibit you from participating in a bank decision to seek accounts with state agencies or to establish a state scholarship program. You may not assist in bank determinations to lease space in state buildings for automatic teller machines. Furthermore, if the subcommittee of the board confronts a matter which concerns the State Division of Banking, you may not participate in that matter. In short, the bank may not compensate you to perform any bank director services concerning matters of direct and substantial interest to the state.

In addition, §4(c) of the conflict law prohibits you from acting as bank agent in connection with a particular matter in which the commonwealth or a state agency has a direct and substantial interest. For example, you could not represent the bank in a meeting with state agency directors regarding state bank accounts. You may not approach or communicate with any state agency on the bank's behalf, whether formally or informally. Compliance with this restriction will avoid any question that you would or could influence a state agency on behalf of the bank.

Although there does not appear to be any current relationship between the bank and your state agency, we offer the following guidance if this situation changes. Generally, a state employee may not participate[2]/ in any particular matter in which a business organization in which he serves as director has a financial interest. Consequently, you would be prohibited from participating as a state employee in any matter in which the bank has a financial interest.[3]/

Finally, the "standards of conduct" provisions of the conflict law prohibit a state employee from using his official position to obtain unwarranted privileges for himself or others. G.L. c. 268A, §23(b)(2). For example, you may not conduct bank business on state time or use state resources for such work. You would be required to take vacation or personal time from your state job to attend daytime director meetings. You also must not engage in conduct which gives a reasonable basis for the impression that you could be improperly influenced by your relationship with the bank. G.L. c. 268A, §23(b)(3). You should consider these principles any time your state job places you in a position to affect or favor, directly or indirectly, the bank.[4]/

DATE AUTHORIZED: April 6, 1987

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[1]/"Particular matter," is defined as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract,

claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

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

[f] There is an exemption to the prohibitions of §6 if you receive written permission to participate from the offical responsible for your appointment. G.L. c. 268A, §6(b).

[f] Section 23(b)(3) provides that "No current officer or employee of a state agency shall knowingly . . . act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, disclose in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

CONFLICT OF INTEREST OPINION
EC-COI-87-6

FACTS:

You are the chief executive officer of ABC, a custom imprinting and embroidery business. In addition to private sector sales, ABC has contracted with state agencies and candidates for municipal, state and federal offices, including the campaign committee of a current head of a state agency, DEF. You state that ABC no longer bids with state agencies.

You have been offered employment to a full time position in the office of DEF, an office which you previously served as an employee.

QUESTION:

Does G.L. c. 268A permit you to accept employment with DEF?

ANSWER:

Yes, subject to certain limitations described below.

DISCUSSION:

Once you begin employment with DEF, you will be a "state employee" for the purposes of G.L. c. 268A. Nothing in G.L. c. 268A inherently prohibits you from accepting employment with a state official for whom you provided services during an election campaign.[1]

Because ABC no longer contracts with state agencies, your employment with DEF will not place you in violation of G.L. c. 268A, §§ 4 or 7. During your tenure as a state employee, ABC must continue to refrain from contracting with state agencies, otherwise, you may be in violation of G.L. c. 268A, §7 which prohibits you from having a financial interest in a contract made by a state agency, and §4, which prohibits you from either accepting compensation from or acting as agent for ABC in connection with any contract made by a state agency.

In carrying out your assignments for DEF, you may be called upon to deal officially with state agencies or employees with whom ABC has previously sought or performed work. Should you be given such an assignment, you must avoid using your official position to secure unwarranted privileges of substantial value to the state agency or employee. G.L. c. 268A, §23(b)(2). You must also avoid conduct which creates a reasonable impression that your official acts are unduly influenced by ABC's prior dealings with the agency or employee. G.L. c. 268A, §23(b)(3). To dispel any such impression, you must disclose to the head of DEF the fact that ABC has previously sought or performed work for a state agency with whom you have official dealings as an employee of DEF. Following disclosure, your appointing authority can determine whether reassignment of the matter to another employee is warranted.

DATE AUTHORIZED: February 23, 1987

[1] The head of DEF is also a state employee under G.L. c. 268A. Section 23(b)(2) prohibits his using his official position to secure unwarranted privileges or exemptions of substantial value for you. If you were unqualified to serve as an employee in DEF's Office, then a serious question could be raised as to whether your appointment resulted in an unwarranted privilege for you. Inasmuch as you previously worked in DEF's Office for sixteen years, however, it does not appear that your appointment would result in an unwarranted privilege.

CONFLICT OF INTEREST OPINION
EC-COI-87-7

FACTS:

You are a municipal official. You were invited by a prominent citizen to attend an out-of-state event involving this citizen. The citizen offered to pay for the flight, hotel room and tickets which together will total approximately $1,000. You were asked to be his guest in your capacity as a municipal official. You have stated that you were invited as a courtesy, because you are a municipal official. The citizen did not require or expect that you would perform any role as a municipal official in connection with the event.

In 1984, the citizen purchased tickets for and attended your inaugural ball. He has never contributed to your campaigns. You have attended functions which are held to raise money for charitable purposes in the municipality in which the citizen had been involved. Other than what has been previously stated, you have had no

personal or official dealings with citizen. He and his associates do not typically have official dealings with the municipality. You have learned that an application for a building permit was taken out recently for minor renovations to a three unit commercial building which is owned by a trust of which the citizen is a beneficiary. The permit is for minor repairs and would not call for a variance from the zoning code. If the repairs comply with the provisions of the state building and health codes, issuance of the permit is required.

QUESTION:

Is your receipt from the citizen of payment for the flight, hotel room and event ticket permissible under §3 and §23 of the conflict law?

ANSWER:

No. Payment of such expenses is not permissible under §23(b)(2) unless payment or reimbursement to you is authorized by the city council or board of selectmen.

DISCUSSION:

Section 23(b)(2) of the conflict law prohibits a public official from using or attempting to use his position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

A gift in the form of payment for or reimbursement for trip expenses and which is available only to one public official raises a conflict question under §23(b)(2) because the gift is given precisely because the recipient is a public official and for no other reason. See, EC-COI-86-14. In this case, the only reason you have been offered the trip is because of your position as a municipal official and no other reason. There is no statutory authorization or other justification for providing you a privilege which is not available to private citizens and other public officials.[1/] In the case of a selective gift to a public employee, the employee is able to realize a benefit from which the public is excluded. Receipt of such benefit negates the trust that the public is entitled to place in public employees: that public, not private, interests are furthered when the employee performs his duties. In such a case, the private citizen may reasonably ask why a public official is entitled to compensation or benefits over and above what the taxpayer has authorized and from which he has been excluded. As the Commission stated in EC-COI-4, §23 prohibits as an unwarranted privilege a favoritism policy under which "those who serve the people are treated better than the people themselves." Therefore, the gift is unwarranted.

Further, the gift is a privilege "not properly available to similarly situated individuals" such as members of private groups, or other public employees. Given that the gift is of substantial value,[2/] unwarranted, and not properly available to similarly situated individuals, your acceptance directly from the citizen would result in a violation of §23(b)(2).[3/]

Reimbursement for reasonable expenses paid for the trip would be appropriate, on the other hand, if the city council or board of selectmen expressly voted to authorize such expenditure of public funds. Your acceptance of the funds would not be unwarranted because it would represent the will of the people as expressed by the city council or board of selectmen, and would be subject to a political process which assures accountability.[4/]

DATE AUTHORIZED: April 27, 1987

[1/]Were you performing a legitimate ceremonial function at the event, it would not be securing an unwarranted privilege to provide you with free admission and reimbursement of related expenses. **Cf. Commission Advisory No. 2**

[2/]An item of substantial value has been determined by the Commission to be anything valued at $50 or more.

[3/]Section 3 of the conflict law, which prohibits anyone from giving, and any public employee from receiving, anything of substantial value "for or because of any official act performed or to be performed by such employee," would not be violated because the payment for the trip will not be given for any "official act performed or to be performed." See, G.L. c. 268A, §1(h). There is nothing pending before you as a municipal official, nor is it likely that in the future the citizen would have anything pending before you. The fact that there is a routine application for a building permit before the building department, a line agency of the municipality does not establish a violation where the offer of payment for the trip has nothing to do with the application for a building permit, there is no nexus between the offer and the application, and there are no forseeable future acts which you could perform regarding the giver. Cf. EC-COI-86-14. In these circumstances there is no opportunity that future decisions could be clouded, either consciously or subconsciously, by receipt of the gift. Id.

[4/]It is unclear whether the citizen may properly donate to the municipality the funds necessary to pay for or reimburse you for the reasonable costs of your trip and the municipality may then properly authorize the expenditure of those funds. You should consult with your municipal counsel if you have any questions as to whether there is an appropriate mechanism for the municipality to accept such a donation. (See, e.g., G.L. c. 44, §53A).

CONFLICT OF INTEREST OPINION
EC-COI-87-8

FACTS:

You are treasurer and owner of Y Consulting, Inc., a for-profit business corporation which provides real estate and economic development consulting. The directors and officers of the corporation are you as treasurer, your wife as president, and a third individual who is clerk. There are three full-time professional employees of the company: you, your wife and a third individual. The corporation shares the time of a secretary with another business located in the same building. In 1986 the corporation employed as consultants eight

individuals including architects, engineers and market researchers. In 1986, the corporation had 31 different clients, eight of which were municipalities; the remaining 23 were individuals, business corporations, and non-profit corporations. The corporation does business primarily in Massachusetts.

Firm Associates, Inc., d/b/a Y Associates, was incorporated in 1984. You were sole owner, president and the only professional employee. In 1985 Firm Associates became a sole proprietorship and operated as such throughout 1985. Then, in 1986, Y Associates again did business through a corporation, Y Consulting Inc., incorporated on January 1, 1986. In 1984, 1985 and 1986 you signed contracts between Firm Associates and the City of Z (City). Contracts were all signed in the same way, in a non-corporate capacity, and the invoices for services provided pursuant to those contracts appear on a letterhead which does not refer to a corporation. You personally rendered 100% of the services during 1984, 1985 and 1986 to the City. All three of the above contracts were substantially identical. None of contracts specifically identifies you as the person to provide the services, however, you exclusively performed all the services of Firm Associates which were rendered to the City. Further, the contracts read as a whole clearly contemplate your provision of services. For example, contracts provided for "membership on . . . the XYZ Committee and the Mayor's Economic Development Cabinet," services which it would have been reasonable for the City to assume would be performed by you.

The corporation has executed a new contract with the City for 1987. The form of the contract has substantially changed. The 1987 contract with the City is with Y Consulting, Inc. and Ms. X has signed the contract as president of the corporation. All invoices have been and will be submitted on corporate letterhead. The contract does not specify which employees of the corporation will provide the services required under the contract. As to form, the City has contracted with a corporation to provide real estate development services. In the 1987 contract, the parties agreed to delete the general category of "Economic Development Coordination", and thus, you were not assumed to serve as member of the XYZ Committee or the Mayor's Economic Development Cabinet. Under the 1987 contract, the community development department does not expect to deal exclusively with you, but rather expects that services will be provided by various employees of the corporation based on ability and other appropriate factors. To summarize, the differences between the previous contracts and the 1987 contract with Firm Consulting, Inc. are as follows: the 1987 contract with the City was the contract of that corporation and not of any individual; the name of the party contracting with the City was changed from Firm Associates to Y Consulting, Inc., which was then identified as a Massachusetts corporation; the corporation was identified as the vendor whereas previously the contracts had identified Firm Associates as the consultant; the scope of services was amended so as not to require your individual services; and Ms. X, your wife, signed the contract as president of the corporation rather than by you, as had been the case in the past.

You intend to concentrate your efforts with regard to the 1987 contract on project management, particularly, ABC Place and the proposed development of the BCD center and of CDE park. Your services with respect to ABC Place are a continuation of the services which you provided in 1986. You have asked the Commission to assume that your services under the 1987 contract might comprise as much as 90% of the total fees to be billed by Y Consulting, Inc. to the City. The services billed under the contract between the City and Y Consulting, Inc. will represent approximately 10% of the revenue of the corporation in 1987, based on the actual figure for 1986.

QUESTION:

Are you a municipal employee under G.L. c. 268A, §1(g), by virtue of the 1987 contract between Y Consulting, Inc., and the City?

ANSWER:

Yes.

DISCUSSION:

The definition of "municipal employee" under G.L. c. 268A, §1(g)[1/] is very broad. It covers not only individuals who work on a full-time basis for a municipality, but also individuals who perform services for a municipality on an intermittent basis under a contract of hire. The statute, for example, leaves no doubt that a lawyer, architect or the like rendering professional services to a municipal agency would be a municipal employee. Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U. Law Rev. 299, 311 (1965). It is obvious that a professional who performs services for a municipal agency would remain subject to the conflict law notwithstanding his having formed a corporation. For example, an attorney who formed a professional corporation would be deemed a municipal employee if he performed legal consulting work for a municipal agency irrespective of the form of the paperwork. **See** Manning, **Federal Conflict of Interest Law**, p.32 (1964).

The Commission has recognized that there are situations which may arise where the connection between an individual and a municipal agency is too remote to warrant municipal employee status. In recognition of this principle the Commission has previously held that a contract between a state or

municipal agency and a corporation does not generally operate to bring employees of the corporation within a definition of public employee. **See, e.g.**, EC-COI-83-129. To give an obvious example, a secretary who performed typing services for Arthur D. Little, Inc. would not be deemed a state employee by virtue of the fact that Arthur D. Little had a contract with a state agency.

The Commission, however, has not had occasion to establish a set of standards to determine when a principal, owner, or other individual who plays a significant role in the performance of a contract should be deemed to be a public employee.[2]/ The facts of this case demonstrate the need to establish such standards, particularly in light of the increased use of consultants by municipal, county and state agencies. In the interim, the factors considered by the Commission include, but are not limited to, the following:

1. Whether the individual's services are expressly or impliedly contracted for;
2. The type and size of the corporation. For example, an individual who is president, treasurer and sole stock holder of a closely held corporation may be deemed a public employee if the corporation has a contract with a public agency;
3. The degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to the agency;
4. The extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder and;
5. The extent to which the person has performed similar services to the public entity in the past.

Applying the above criteria to the facts of this case, the Commission concludes that you are a municipal employee within the meaning of the conflict law. Of particular significance is the history of your prior relationship to the City. In 1984, 1985 and 1986 the City believed that it was dealing with you as an individual. This conclusion is underscored by the fact that you provided all the services on the city contracts. The contract for 1987 is essentially the same as the previous contracts except for the deletion of the requirement of membership on and consulting to the XYZ Committee and the Mayor's Economic Development Cabinet. Some of the services which are outlined in the 1987 contract are indeed continuation of the same services which were provided for in 1986, e.g. ABC Place. The scope of services which you contemplate providing under the 1987 contract is not substantially different than the scope of services previously provided. The fact that you contemplate performing up to 90% of the services outweighs the fact that you can retain, on an as needed basis, professional consultants for various work to be performed under the contract or the fact that the City does not require that you exclusively perform the professional services required. Your duty and loyalty to the City is not changed because you may reduce the scope of the services which you personally provide to the City by 10 percent.

This case is distinguishable from cases where an employee of the corporation is performing ministerial or routine services. Services to be provided in this case are professional, highly specialized and call for discretion and judgment. For example, regarding the ABC Project, the corporation is to select developers, establish a system for managing the project from the selection of the developer through project completion, and oversee all municipal participation in the project. The contract here resembles a professional retainer agreement where the contract contains an open ended clause which permits the corporation to perform other services as may be requested in writing up to a maximum ceiling. Indeed, in providing the services to the municipality you must oversee other professional consultants including architects, engineers and market researchers.

The small size of the corporation, and the fact that you and your wife are 100% equitable owners for the corporation, are also factors which lead the Commission to conclude that the 1987 contract was based on your expertise and experience as an individual as much as the reputation of the corporate entity. In other words, the standards in which the City has come to expect in dealing with Y Associates, Inc. are the standards that the City had come to expect in its dealings with you as an individual in 1984, 1985 and 1986 when Y Associates and you, as an individual, were one and the same.

For all of the above reasons the Commission concludes that you are a municipal employee for conflict law purposes.

DATE AUTHORIZED: April 6, 1987

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[1]/"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

[2]/The Commission has stated that the project manager of a corporation, "without more," is not a state employee by virtue of his employer's contract with a state agency. EC-COI-86-21. On the other hand, the Commission, in the same opinion, held that public employee status will apply where "the terms of the contract indicate that his [the employee's] specific services are being contracted for."

CONFLICT OF INTEREST OPINION
EC-COI-87-9

FACTS:

You formerly served as a city official until your termination by the City Council in 1984. In March, 1987, you authorized your attorney to initiate a lawsuit against the City and the City Council in connection with your termination. The lawsuit alleges damages to your reputation and violations of your civil rights, as well as failure of the City to honor certain contractual benefit provisions. Although you seek money damages and other favorable determinations of your rights, you state that you do not seek reinstatement to your former position. You indicate, however, that you would be willing to serve as acting official if a vacancy occured in the permanent position.

On January 2, 1986, following a successful city-wide election, you began a two-year term as a member of the City Council.

QUESTIONS:

1. Does G.L. c. 268A prohibit you from initiating a lawsuit against a governmental body with which you are associated?
2. Assuming that you may initiate the lawsuit, what limitations does G.L. c. 268A place on your official conduct as a member of the City Council?

ANSWER:

1. No.
2. You are subject to certain limitations discussed below.

DISCUSSION:

As a member of the City Council, you are a municipal employee for the purposes of G.L. c. 268A. Three sections of G.L. c. 268A are relevant to your questions.

1. Section 17

This section prohibits a municipal employee from either receiving compensation from or acting as agent or attorney for a non-town party in connection with any particular matter in which the town is a party. While your lawsuit is a particular matter in which the City is a party, your initiating the lawsuit does not place you in violation of §17 because you are neither receiving compensation from nor acting as attorney for a non-city party in connection with the lawsuit. Moreover, even if you were acting as your own attorney, the Commission has recognized that a municipal employee does not violate §17(c) by acting on his own behalf. **See**, EC-COI-85-12. On the other hand, §17 would apply if you were representing the interests of others in connection with the lawsuit. **See, Edgartown v. State Ethics Commission**, 391 Mass. 83 (1984).

2. Section 19

Section 19 prohibits you from participating as a City Councillor in any decision, determination or other particular matter in which you have a reasonably foreseeable financial interest. Because the lawsuit is particular matter which affects your financial interest, you must abstain from any discussion or vote concerning the lawsuit. To avoid the improper disclosure of litigation strategy, you must also leave the room during such discussions or votes.

A similar restriction applies to the particular matter of the decision to retain the current official. Because you have expressed an interest in serving as interim official, if a vacancy were to occur, you have a foreseeable financial interest in this particular matter. Should you disavow any interest in serving as an official on an interim basis, however, then the abstention requirements of §19 would not apply to your participation in decisions concerning the status of the current official.

3. Section 23

This section prohibits you from using your official position to secure unwarranted privileges or exemptions of substantial value, and from engaging in conduct which creates a reasonable impression that you are likely to act because of the position or undue influence of any party or person. You are also required to refrain from improperly seeking and disclosing confidential information. These principles apply to you in connection with your official dealings with other city councillors as well as with the current official. You will comply with those restrictions by keeping separate the course of your lawsuit from your exercise of official duties as City Councillor.[1/]

DATE AUTHORIZED: April 6, 1987

[1/]Should you and the City settle your lawsuit, any resulting settlement agreement would not, as a matter of sound policy, place you in violation of §20. See, EC-COI-84-27.

CONFLICT OF INTEREST OPINION
EC-COI-87-10

FACTS:

You are the elected treasurer/collector for a town. You presently have an account for the town on deposit

at the XYZ Savings Bank (Bank), which has asked you to become one of its unpaid corporators.

A corporator is a statutorily-created position which is unique to a non-stockholder type of savings bank such as the Bank. A corporator's statutory duties are to attend an annual meeting and to elect trustees, the president and vice president of the bank, and other corporators. **Id.** Although corporators are not otherwise responsible for the management of the bank or for any business policies, they are required, together with trustees, to approve fundamental changes in a bank, such as a merger, consolidation, liquidation or dissolution. **Id.** In the event a savings bank is converted to a stockholder form of savings bank, corporators will become directors in the stock bank. **Id.**

QUESTION:

As a town treasurer/collector, does G.L. c. 268A permit you to serve as corporator for the Bank?

ANSWER:

Yes; however, you will be subject to the limitations discussed below.

DISCUSSION:

As a town treasurer, you are a municipal employee for the purposes of G.L. c. 268A. Several sections of c. 268A are relevant to your question.

1. Section 17

Section 17(c) prohibits a municipal employee from acting as an agent for anyone other than the town or municipal agency in connection with any particular matter in which the same town is a party or has a direct and substantial interest. Under this section, a recommendation or decision to deposit town funds with a specific bank would be a particular matter in which the town would have a direct and substantial interest. Therefore, as a corporator, you could not act as an agent for the Bank in connection with the deposit of the town funds at the Bank. You also could not act as an agent on behalf of the Bank in soliciting accounts from town agencies.

2. Section 19

Section 19 prohibits a municipal official from participating[1] in any particular matter[2] in which a business organization in which he is serving as officer, director, trustee, partner or employee has a financial interest. A corporation such as the Bank is considered a business organization. **See**, EC-COI-85-14. Under this section, if a corporator is considered an officer, director, trustee or partner of the Bank, you would be prohibited from officially participating as a treasurer in any particular matter which could foreseeably affect the Bank's financial interest.

While the term "corporator" is not expressly included within the categories of relationships which will mandate abstention under §19, the Commission is not bound by the formal name given to a position to determine whether the abstention requirements apply. For example, in EC-COI-80-43, the Commission concluded that a law office relationship, although technically not organized as a partnership, would be treated as a partnership for the purposes of G.L. c. 268A because the conduct of the attorneys gave the impression that they were partners.

Based on our review of the activities of corporators, we conclude that corporators are sufficiently similar in function to directors of stock banks to trigger the restrictions contained in §19. This decision is primarily based on two facts: 1) that the corporators, like directors, elect the management of the bank; and 2) that under G.L. c. 168, §§33, 34, 34A, B, C, D and E, corporators make fundamental decisions concerning the liquidation, dissolution or merger of the Bank. Furthermore, in the case of a conversion under §34C, corporators would be treated as directors in the stock corporation. Therefore, if you agree to become a corporator, you may not participate as town treasurer/collector in any matters which will affect the financial interests of the Bank.

You should be aware, however, that a limited exemption from §19 is available under certain circumstances. Section 19(b)(2) provides that it shall not be a violation, "if in the case of an elected municipal official making demand bank deposits of a municipal funds, said official first files, with the clerk of the city or town, a statement making full disclosure of such financial interest." This exemption is limited solely to demand deposits, such as checking accounts, which do not accrue interest. **See**, 12 U.S.C. §1828(g)(1) (1980). **See also**, Federal Deposit Insurance Corporation, 12 C.F.R. §329.2 (1987).

3. Section 23

In addition to the provisions of §19, you would also be subject to substantial limitations in your dealings with the Bank under §23. Section 23(b)(2) prohibits you from using your treasurer position to secure any unwarranted privileges or exemptions of substantial value for the Bank. For example, if you used your official position to promote the Bank or gave the impression that the Bank was endorsed by the town, you would violate this section. You must therefore make clear when engaging in your corporator activities on behalf of the Bank that you are not acting as a town official, and that your activities do not constitute a town endorsement of the

Bank. Further, you must avoid creating a reasonable impression that you will unduly favor the Bank in carrying out your treasurer duties. For example, decisions as to where to deposit town funds must be based on objective standards applicable to all eligible banks which are seeking the deposits. Moreover, prior to any official action affecting the Bank, you must publicly disclose your status as a Bank corporator.[3]

DATE AUTHORIZED: April 6, 1987

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

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

[3]Since the corporator position is unpaid, we do not reach the issue as to whether the corporator position is inherently incompatible with the duties of a town treasurer under §23(b)(1).

CONFLICT OF INTEREST OPINION
EC-COI-87-11

FACTS:

You are a member of the General Court. Your district includes a town which is the site of a proposed project. Directly across from the proposed project site is developed real estate owned by a realty trust. Your father is a primary beneficiary of the Trust. The project, if completed, will increase the value of your family's real estate, and in particular, your father's financial interest as Trust beneficiary. Because of this financial interest, you have not officially participated in any site selection decisions.

You are interested in facilitating the approval of the project by state and town agencies and private parties. In addition to providing a forum for the public and parties to resolve disputes regarding the project, you would like to meet privately with state agencies to persuade them to make certain decisions and to assist them in those efforts. You are also interested in supporting general enabling legislation which provides funding to similar projects. See, St. 1980 c. 846.

QUESTION:

Does G.L. c. 268A restrict your activities as a member of the General Court in connection with the proposed project?

ANSWER:

You are subject to the restrictions described below.

DISCUSSION:

As a member of the General Court, you are a state employee for the purposes of G.L. c. 268A. Section 6 of G.L. c. 268A prohibits a state employee from participating[1] in any particular matter[2] in which a member of his immediate family[3] has a financial interest. As applied to you, whenever any decision, determination, contract, special legislation or other particular matter affects your immediate family, you must comply with the abstention requirements of §6.

Because your father has a financial interest in the completion of the proposed project, you must abstain from participation in particular matters relating to the project. EC-COI-84-98. Compliance with §6 requires that you not participate personally and substantially in any particular matter, whether by voting or by meeting with state agency officials in connection with funding or licensing decisions relating to the project. **See, Craven v. State Ethics Commission**, 390 Mass. 191 (1983) (State legislator violates §6 by injecting himself into a state agency proceeding to award a contract to his family.)

On the other hand, you would not violate §6 by voting in favor of your legislation, or by engaging in activities in support of the legislation. Because general legislation is specifically exempted from the definition of "particular matter," you are not restricted from officially participating in the consideration of the bill. **See**, EC-COI-85-69; 82-169.

Further, it is likely that certain discussions or determinations made in connection with the project will not affect your family's financial interest. For example, decisions relating to the selection of a designer may not require your abstention under §6. Given the hypothetical nature of your question, we can provide a more complete advisory opinion to you only upon your renewal of your request with more specific, factual information.

DATE AUTHORIZED: April 27, 1987

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

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

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

CONFLICT OF INTEREST OPINION
EC-COI-87-12

FACTS:

You currently hold the elected offices of selectman and assessor in a town. Prior to your election, you served

as a full-time Director of the Community School, a public school in town. You resigned that position upon your election because of the full-time nature of the selectman's job and a new director was hired.Recently, town meeting voted to change the board of selectmen from a three to five person board with a full-time Executive Secretary. Coincident with the change in the structure of the Board, the Director of the School resigned. The School is seeking applicants to the Director's position, and you would like to be a candidate.

QUESTIONS:

1. Does G.L. c. 268A permit you to hold the elected offices of selectman and assessor?
2. Does G.L. c. 268A permit you to serve as the School Director while you remain a selectman?
3. Does G.L. c. 268A permit you to serve as the School Director within six months after you complete your service as selectman?

ANSWER:

1. Yes.
2. No.
3. No. You are eligible for appointment only after a six month waiting period following completion of your services as selectman.

DISCUSSION:

As an elected selectman and assessor, you are considered a municipal employee under the conflict of interest law, G.L. c. 268A, §1(g), and are subject to the provisions of §20 of that chapter.

1. Assessor and Selectman

Although there are several restrictions within G.L. c. 268A governing multiple position holding, the conflict of interest law specifically provides that any elected official in a town, paid or unpaid, may hold one or more additional elected positions. G.L. c. 268A, §20(g)¶2. Thus, you may properly hold the elected offices of assessor and selectman.

2. Selectman and School Director

The conflict of interest law states that "no . . . selectman shall be eligible for appointment to any additional position while still a member of the board of selectmen or for six months thereafter." The plain language of this statute prohibits you, as selectman, from being appointed to the additional municipal position of School Director. Sound policy considerations support this conclusion. The Legislature adopted this restriction in response to its concern that selectmen would or could acquire additional municipal positions "by virtue of their incumbency . . ." EC-COI-82-107. The enactment of a six month waiting period therefore reflects the Legislature's view that the period is "desirable in light of the authority and visibility which accompanies the office of selectman." EC-COI-83-1.

The conclusion that you may not hold the position of selectman and School Director is consistent with the plain language and legislative purpose of G.L. c. 268A, §20. Your situation is distinguishable from the facts which the Commission addressed in EC-COI-82-107. In that opinion,the Commission concluded that a police officer who was elected selectman could be reappointed to his police officer position which he consistently maintained because it was unclear whether the prohibition on appointments extended to reappointments. This conclusion does not apply where, as here, the Director job would not be a reappointment. In fact, you resigned from the job (as opposed to taking a leave of absence), a new full time Director was hired with no notion that the position was temporary or subject to your availability, the present vacancy requires a job posting, and you must be interviewed for the job and compete with a pool of other potential candidates. We do not believe that these facts would constitute anything other than seeking an appointment to an additional municipal job, in violation of G.L. c. 268A, §20(g)(¶2).

DATE AUTHORIZED: April 27, 1987

CONFLICT OF INTEREST OPINION
EC-COI-87-13

FACTS:

You are the chairman of state agency ABC and you serve in an unpaid capacity in that position. You have recently been asked by a Bank to serve on the six-member board of directors of a mutual fund which the Bank is creating. If appointed, you would meet periodically to provide general oversight of the fund's management and investment activity, and would receive a fee for your attendance at each meeting. You have been offered the directorship because of your prior experience as an investment broker and as a member of the business community.

QUESTION:

Does G.L. c. 268A permit you to serve on the mutual fund board of directors while you remain as the ABC chairman?

ANSWER:

Yes, subject to certain limitations set forth below.

DISCUSSION:

In your capacity as ABC chairman, you are a state employee and a special state employee for the purposes of G.L. c. 268A. If you accept the Bank's invitation, three sections of G.L. c. 268A will be relevant to your question.

1. **Section 6**

This section prohibits you from participating[1]/ as a ABC board member in any particular matter[2]/ in which the Bank has a financial interest. Inasmuch as there is no current business relationship between ABC and the Bank, there is no need to apply the disqualification requirements of §6. Should matters affecting the Bank's financial interest arise in the future, however, you will be required to abstain from official participation in the matter and to follow the disclosure procedures of §6. For example, §6 would apply to you if ABC were considering a Bank proposal to provide banking services to ABC.

2. **Section 4**

This section places certain restrictions on your Bank activities. Specifically, you may not be paid as a Bank fund director or act as its agent in connection with any particular matter which is within your official responsibility as an ABC member. Given the general oversight responsibilities which you anticipate performing as a fund director, and your statement that you will not be an agent or employee of the fund, issues under §4 are not likely to arise. Specifically, it does not appear that your fund director activities will relate to any ABC matters.[3]/

3. **Section 23**

This section prohibits a state employee from using his official position to secure unwarranted privileges of substantial value for himself or others and from improperly disclosing confidential information acquired as a state employee. To comply with these provisions, you must keep your Bank activities separate from your ABC working schedule and not use ABC resources to assist you in your Bank director capacity.

DATE AUTHORIZED: April 27, 1987

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

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

[3]/We note that the fund will have an as-yet unidentified variety of investment portfolios which could include stocks, fixed income corporate bonds and governmental issues. To the extent that ABC could potentially be affected by the portfolios whose management you would be overseeing, issues may arise under §4. If this hypothetical situation were to occur, you should renew your opinion request with the Commission. Given an actual set of facts, the Commission will be in a better position to assess such issues as whether your compensation as a fund director is "in relation to" any ABC matters.

CONFLICT OF INTEREST OPINION
EC-COI-87-14

FACTS:

The Massachusetts Housing Partnership (MHP), which is under the Executive Office of Community and Development (EOCD), finances projects through a home ownership opportunity program, established pursuant to St. 1985, c. 405, §35. You are a state employee, and are proposing to develop a condominium project in a city pursuant to this program. Approval of the project by EOCD is awaiting a determination of whether your participation in the project will place you in violation of §7 of the conflict of interest law.

The program normally works as follows. The developer of a housing condominium project in a city requires a variance in order to be permitted to build a project at all, or to be able to build a project in such a way that it would be economically feasible. The city and the state have an interest in increasing home ownership opportunities and increasing those opportunities for low and moderate income families. The city, the developer and representatives of EOCD enter into negotiations, the purpose of which is to encourage the developer to set aside a specific number and type of units for affordable housing. The city, in partnership with the developer, submits an application to EOCD for approval of the project. In this case, for example, you have committed to the city certain units to be available for affordable housing. You have agreed that the cost of the units to the buyer would be substantially below fair market value. You have also agreed to cooperate in the development of a marketing plan for EOCD and have agreed to certain deed restrictions which will ensure that the affordability of these units to lower income families is preserved over time. If EOCD approves the plan, it makes a commitment to the developer and to the City. The form of the commitment is a letter which states that the program will provide below market interest rate mortgages to first-time home buyers through the Massachusetts Housing Finance Agency (MHFA), and will further reduce the interest rates below MHFA rates through a direct subsidy program to income eligible home buyers. For example, as it pertains to the particular project in question, it is estimated that about one-half of the units would receive mortgages from the MHFA at a rate of 7.9%. The other half would receive mortgages also provided by MHFA, and in addition subsidized directly by EOCD to a rate of 5.5%. These reduced mortgages result from a contract between EOCD and participating lending institutions. If the developer does not go forward with his agreements, e.g., to sell the units at specified prices below market

rates, then EOCD would not release the money to the participating lending institutions.

If the project is approved by EOCD, the approval is subject to the City carrying through on its obligations. The City would screen applicants in order to assure that they meet the income requirements for potential buyers to be eligible for below market financing. They would also hold a lottery or otherwise make a determination as to eligibility for purchase if there were an excess number of applicants. The City would also refer the buyers to the appropriate participating lending institutions. Finally, the City undertakes to assure that the developer receives the necessary permits and/or variances for the property in order to build in such a way that the developer can participate in the program. If the City does not follow through on its negotiated obligations, EOCD would not release the funding to be available for the project.

The developer and EOCD do not enter into any formal executed contract with each other. EOCD approval of the project is in the form of the commitment letter. It is undisputed that the application by the local community and the commitment letter constitute an implied-in-fact contract between the local community and EOCD. Further, EOCD and the lending institutions execute a formal contract relating to these direct subsidies which reduce the MHFA financing below its usual rate.

The inducement which usually forms the basis for the developer's agreement to sell units below market rates and to agree to the other terms and conditions which are negotiated is the necessity of obtaining a variance from the City. There are, however, other benefits which accrue to the developer by agreeing to participate in the program. Given the need for low income housing for families in Massachusetts, the developer is assured a market for his units where there may otherwise not be one. For example, it is unnecessary for the developer to market the units through advertising or to secure purchasers through incentives such as private financing or other inducements. In other words, his market is guaranteed for the sale of the set-aside units. The developer also gets the benefits, whether economic or non-economic, of a mixed use development without paying the full cost of developing this type of project. Finally, the developer secures the good will of the city officials and obtains favorable publicity which may be beneficial to future development projects.

An unusual feature of this case is the lack of a variance subject to participation in the program. The variance for this project is unconditional; you state that you desire to offer the units to income eligible buyers for the purpose of establishing good community relations. Given the strong probable market for housing in the City, it is the opinion of EOCD that you will be giving up a significant profit to sell these units within the program.

QUESTION:

Does G.L. c. 268A, §7 permit your participation in the Home Ownership Opportunity Program of EOCD?

ANSWER:

No.

DISCUSSION:

You are a state employee for conflict of interest law purposes, and therefore are subject to the restrictions of G.L. c. 268A, §7, which prohibits you from having a financial interest in a contract "made by a state agency." The plain and unambiguous language of §7 does not require that the state employee be a party to a contract with a state agency. Typically, a person would not have a financial interest in a contract unless he were a party to it. The language of the conflict law, however, explicity recognizes that there may be situations where a person is not a party to a contract but still may fairly be said to have a financial interest in it. **See,** Buss, **The Massachusetts Conflict Statute: An Analysis**, 45 B.U. Law Rev., 299, 375 (1965). In EC-COI-81-189, for example, a legislator who was also a landlord was deemed to have a financial interest in an annual contribution contract between the Department of Community Affairs (DCA), a state agency, and a local housing authority. The landlord had no informal or formal agreement or contact with DCA; he dealt with, and received a rental subsidy from, the local housing authority. Although the landlord was not a party to the annual contribution contract, the Commission recognized that he had a financial interest in a contract made by a state agency within the meaning of §7. Thus, the fact that you are not a party to any contract with EOCD is not dispositive of this case. Because, upon examination of the totality of the circumstances, it can fairly be said that you would have a financial interest in the contract which exists between EOCD and the city, or EOCD and the participating lending institutions, the plain language of §7 applies.

There are two contracts in this case. In addition to the written contract which exists between EOCD and the lending institutions, there is also an implied contract that exists between EOCD and the local community. For purposes of G.L. c. 268A, the term "contract" refers not only to a formal, written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties, under which each undertakes certain obligations in consideration for promises made by the other, constitutes a contract. **See, e.g., Connolly v. Town of Ipswich**, 350 Mass. 201 (1967). In this case, EOCD and the local community each assume certain obligations of substan-

tial substance. The local community agrees to participate in and administer the program. EOCD agrees to provide funding which will make possible the provision of low income housing in the community.

Given that there are at least two contracts made by a state agency in which the commonwealth is an interested party, the only remaining issue is whether you would be deemed to have a financial interest in those contracts.

The Commission has recognized that not every financial interest in a contract made by a state agency results in a violation of §7. In EC-COI-84-13, a physician had a consulting contract with the Massachusetts Rehabilitation Commission (Mass Rehab). Eighty percent of the total income of the physician was derived from her contracts with Mass Rehab. The physician entered into a lease arrangement with a state employee who owned commercial property. The central issue in the case was whether the state employee had a financial interest in the contract between the physician and Mass Rehab. In a practical sense, of course, the state employee had a financial interest in the contract because, but for the contract, it was unlikely that the rent would be paid. The Commission held, however, that the rental fee which was charged was independent of the physician's receipt of Mass Rehab fee payments since the rent was the same rent that would be charged to any physician who wished to use the office space. In this case, however, the price which you intend to charge for the unit is dependent on EOCD's contractual relationship with the participating lending institutions. The buyers cannot participate in the program unless the units are sold at specified prices, and, unlike the state employee in EC-COI-83-173, you are unable to charge what the market will bear for the units if you participate in the program.

There is no requirement in §7 that the financial interest be substantial, direct or quantifiable. Where substantiality is a requirement of a violation, the General Court has explicitly so stated. **See**, G.L. c. 268A, §23(b)(1). Therefore, a requirement that the financial interest be substantial is not required by the plain language of §7. The explicit language of §7 states the financial interest may be "direct or indirect." In a typical case a developer who participates in the program would have a direct interest in the contractual arrangement between EOCD and the local community. This is because the project normally requires a variance and the variance is typically made conditional upon participation by the developer and the program. The very incentive for many communities to enter into the program or discussions with EOCD is the possibility of providing its citizens with low income housing opportunities. In this case, however, the financial interests which will accrue to you as the developer are not so direct. Indeed, EOCD is of the opinion that whereas many developers would benefit from the local community's cooperation in marketing the units, you will not financially benefit from the marketing plan in this case because of the exceedingly high demand for market condominium units in that particular location. Further, the financial benefit which you may gain as a result of establishing a track record of good will, or favorable public relations which may result from this project, is not quantifiable. The Commission, however, cannot make an exception to application of the literal language of §7 based on a factual determination that the financial interests involved are not substantial, direct, or quantifiable. The language of §7 is designed to prevent the opportunity to gain financially from contracts made by a state agency as much as it is designed to prevent the reality of financial gain. None of the exemptions contained in §7 applies to you.

DATE AUTHORIZED: April 27, 1987

CONFLICT OF INTEREST OPINION
EC-COI-87-15

FACTS:

You are a full-time employee of the state Department of Environmental Management (DEM). You are also the sole owner of ABC, a log and timber cutting business which you started five years ago. You are not legally organized as a family partnership, although you adopted the name ABC to use the goodwill from the name of a former family dairy farm in the area. You company owns a pick-up truck, cutting equipment and chain saws. You possess your own cutting license and personally bear all of the expenses of ABC.

DEM has recently notified your brother that he was the highest bidder for a contract to clear, cut and remove timber. Your brother runs the timber cutting business under his own name and possesses his own tractor, chain saws and cutting license. Your brother's work customarily involves hay cutting and tree jobs. His business, which is approximately three years old, is run out of his residence. Your brother has a separate checkbook for his business and makes his business decisions independent of you.

Although your brother has not wished to form a business partnership with you, he and you periodically assist each other in business activities. He works as a part-time cutter for you on an as-needed basis. Last year, he performed services for you approximately one day per week. You periodically permit him to use your logging truck in his business. Although you and your brother are financially independent for business purposes, he has lent you money to buy timber. ABC and your brother have separate business telephone numbers. Because you have had frequent residential address

changes in the last few years, you use his mailing address for ABC correspondence. Additionally, you occasionally receive ABC messages which have been left for you at his telephone.

QUESTION:

Will your brother's contract with DEM be imputed to you for the purposes of G.L. c. 268A, §7 so as to prohibit DEM from awarding the contract to him?

ANSWER:

No.

DISCUSSION:

As a DEM employee, you are a state employee for the purposes of G.L. c. 268A. Section 7 prohibits you from having a financial interest in a contract made by a state agency. For example, you would violate §7 by contracting directly with DEM, a state agency.

Your brother who is not a state employee, has an obvious financial interest in the DEM contract for which he has bid. If you shared his financial interest in the DEM contract, you would violate §7. Based on the facts which you have presented, the Commission concludes that your brother's financial interest in the DEM contract should not be imputed to you, and, therefore, his DEM contract is permissible for the purposes of §7.

In prior rulings, the Commission has imputed a contractual financial interest to a state employee who shared in the management or control of the company which had been awarded a state contract. **See**, EC-COI-85-24; 83-125. The Commission has also imputed a financial interest for §7 purposes when the state employee has transferred ownership of a company immediately prior to the company's receipt of a state contract. **See**, EC-COI-83-37; 83-111. The Commission, therefore, does not limit its inquiry solely to the name and owner of a company but examines the reality of who controls the company and whether the transaction is, for practical purposes, designed to evade §7.

The conclusion that you do not share his financial interest in the DEM contract is based on two reasons:

1. He runs his business independently of you and without your input regarding his business management or control. In particular, he possesses his own equipment and cutting license.
2. He has expressly refused to organize his business as a partnership with you and, therefore, there is no reasonable appearance to the public that you are a partner in your brother's business. **Compare**, EC-COI-80-43.

The fact that you have occasionally loaned equipment to your brother for use in his business does not give you a financial interest in his business, inasmuch as you have no other input into his business. The facts do suggest that he has a financial interest in your business, in view of his employment by and loan of money to your company, his allowing you to use his business address for your business correspondence, and your company's business name. It does not follow, however, that you have a financial interest in your brother's business merely because he has a financial interest in your business.[1/]

DATE AUTHORIZED: April 27, 1987

[1/]The Commission's conclusion is based on the facts as you have presented them. Should any of those facts change with the result that you are not entirely independent of the management or control of his business, then the Commission's conclusion under §7 will be different.

CONFLICT OF INTEREST OPINION
EC-COI-87-16

FACTS:

The City Council is currently considering increasing the salary of Mayor, to take effect following the forthcoming municipal elections. The Mayor has indicated that he may seek re-election; certain City Councillors have also indicated that they may seek election to the mayoral position. The deadline for filing nomination papers for the mayoral election is in August. A preliminary election will be held in September and the two candidates receiving the most votes will be on the ballot in November.

QUESTION:

Does G.L. c. 268A permit any city councillor, who is either a potential candidate for mayor or the immediate family member of a potential candidate, to vote on a proposed pay increase for the mayor's position which would take effect after an election?

ANSWER:

Yes.

DISCUSSION:

City councillors are municipal employees within the meaning of the conflict of interest law and, therefore, are subject to its provisions. G.L. c. 268A, §1(g). The conflict of interest law prohibits a municipal employee, such as a city councillor, from participating in a particular matter in which the employee, or a member of his or her immediate family[1/] has a financial interest. G.L. c. 268A, §19(a). A determination to increase the mayor's

salary is a particular matter, G.L. c. 268A, §1(k), and any discussion or vote on this matter would constitute participation. **See, Graham v. McGrail**, 370 Mass. 133 (1976); EC-COI-82-10. However, the disqualifying financial interest in a salary increase for the Mayor's position must be "direct and immediate, or at least reasonably foreseeable." EC-COI-84--123; **see, also** 84-96 and 84-98.

In this case, the Mayor's election is in November, and the deadline for taking out and filing nomination papers is three months away. The political success of any potential candidate for political office is, at best, speculative when that individual competes among a pool of candidates and not all candidates have officially announced their candidacy by filing nomination papers. Any financial interest which a candidate may have in a salary increase for the Mayor's position, which takes effect after the election, is not sufficiently identifiable at this point.[2]

For these reasons, City Councillors, who themselves are considering running for election (whether or not they have announced their candidacy), or who have immediate family members who are candidates, may participate in the matter of a salary increase for the Mayor's position provided that the vote is taken now, before the nomination deadline, and the increase is effective after the mayoral election.

DATE AUTHORIZED: May 18, 1987

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[1]Immediate family includes the municipal employee and his or her spouse, and both of their parents, children, brothers and sisters. G.L.c. 268A, §1(e).

[2]If a vote on a salary increase were taken nearer to the election date or, at a minimum, after the nomination deadline, or if there were substantially different facts in this case (e.g., only one candidate were running for election), there might be a sufficiently identifiable financial interest in the pay raise to disqualify one of the city councillors from voting on it. The Commission leaves these questions open. In this case, however, the intervening period of time between now, when the vote will be taken, and the final election, preliminary election and filing deadline renders any financial interest of the city councillors, or their family members too remote and attenuated to disqualify participation in the vote.

CONFLICT OF INTEREST OPINION
EC-COI-87-17

FACTS:

The Water Resources Management Advisory Committee (Committee) of the Department of Environmental Quality Engineering (DEQE) was established as a mandatory committee by St. 1985 c. 592 (the Act) to review the development of standards, rules and regulations for water resources management and to recommend methods by which existing water management practices and the laws regulating them may be supplemented and improved and their administration financed. Included in this general power is the authority to review and make recommendations concerning the adoption or amendment of regulations establishing procedures and forms for filing notifications and registration statements. The Committee may also adopt, review and amend: regulations establishing criteria, standards and procedures for issuing permits; requirements for the content and form of permit applications; reasonable permit application fees, and requirements for monitoring inspection and reporting of water withdrawals and usage by permitted water users. The Act requires that these regulations be developed in two phases within certain time frames: first, the regulations establishing a water withdrawal registration system, and second, the regulations establishing a permit system for withdrawals of water.

DEQE must consult with the Committee before it adopts such regulations. The requirement of registration statements or permit applications will not commence until initial regulations are established, and the Committee will continue to review the development and may make recommendations concerning supplementation or amendment. Under St. 1985 c. 592, a representative of each of eleven different organizations or constituencies serves on the Committee. Committee members are appointed by the Governor and serve without compensation. Members are representatives of the following organizations: Associated Industries of Massachusetts, the Massachusetts Municipal Association, the water works industry, an agricultural association, a consumer organization, a water well drill association, an environmental organization, a regional planning agency, and two representatives knowledgeable in water management affairs. Mr. X was chosen as the member knowledgeable in water management. He is a partner in a consulting engineering firm and he anticipates the possible receipt of compensation regarding registrations or permit applications on behalf of clients. Another potential appointee is Mr. Y who would represent the water works industry; Mr. Y is the superintendent of the ABC Board. He anticipates filing registrations and permit applications which would be required by the regulations drafted by DEQE. There is no requirement in the Act which would mandate the water works industry representative be employed by a water system operator.

The Committee is given explicit authority to consult regarding the enforcement of the Act and the regulations adopted thereunder. By policy of the Commissioner, dated May 11, 1987, excluded from the Committee's role is advice on specific, individual cases, whether such cases involve permit or enforcement issues or both. Committee members are prohibited from reviewing specific permit applications at any time while those applications are pending, and from advising the DEQE regarding the modification, supplementation or revocation of a specific permit. Committee members are also prohibited from advising the DEQE on specific enforce-

ment decisions about compliance with a particular regulation. Individual permit or enforcement decisions are intended by the Commissioner's policy to be outside the scope of the Committee's official responsibility.

QUESTIONS:

1. Are the members of the Committee "state employees" within the meaning of G.L. c. 268A, §1(q)?

2. Does G.L. c. 268A permit Committee members to file with DEQE registration statements or permit applications on behalf of their organizations?

ANSWERS:

1. Yes.
2. Yes, provided the Commissioner's policy dated May 11, 1987 remains in full force and effect.

DISCUSSION:

1. Jurisdiction

In EC-COI-86-4, the Commission concluded that members of the Administrative Penalties Advisory Committee (Committee) of DEQE are state employees within the meaning of the conflict law. The analysis herein is essentially the same as in that opinion. In both cases, the Committees are mandatory and permanent components to the implementation of a state statute, as opposed to temporary *ad hoc* advisory committees which the Commission has regarded in other cases as exempt from the definition of state agency. In both cases, the functions of the Committees appear to be permanent and ongoing, and include a review of the development of regulations on a continuing basis.

A critical factor in finding jurisdiction is that the Committee is performing essentially governmental functions by assisting in the work product of the state agency. The Act envisions regulation formulation, if not actual drafting, to begin at the Committee level. Thus, the Committee is contemplated as a working committee with a substantive role in the regulation process, and not simply as a sounding board for constituent groups. Agency regulation drafting is a governmental function customarily performed by governmental employees. Therefore, the Commission concludes that members of the Committee are state employees within the meaning of G.L. c. 268A, §1 **et. seq.**, and, as a result, subject to the restrictions set forth therein. In view of their unpaid status, Committee members are "special state employees" which means that certain provisions of G.L. c. 268A apply less restrictively to them.

2. Application of G.L. c. 268A, §4

Four potential Committee members have asked whether, as special state employees, they may appear before DEQE to file registration statements or permit applications on behalf of their organizations or clients while they are serving on the Committee. The section of the conflict law directly applicable to the members' question is §4. Section 4, as applied to the facts, prohibits a special state employee from receiving compensation from, or acting as an agent for, an organization or anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest, and which is or has been a subject of his "official responsibility"[1/] as a state employee. The state is a party to or has a direct and substantial interest in any registration filing or permit application with DEQE. A registration filing or permit application is a particular matter.[2/] The only issue remaining is whether a registration filing or permit application is a subject of a Committee member's official responsibility.

The keynote of official responsibility is the "potentiality" of directing agency action and not the actual exercise of power.[3/] Specific registrations and withdrawal permits would be a subject of potential action by committee members if the Committee had the ability to review a specific user or source and recommend that DEQE amend, supplement, or revoke a registration or withdraw a permit, recommend agency action regarding enforcement, or participate in the monitoring or inspecting of a specific user or water source. In this case, withdrawal permits would be "a subject of" the Committee's work, even if Committee members themselves do not have the final authority for judging the merits of a specific permit or application request or the final say as to an enforcement decision.

The Committee has the authority to review the development of the regulations and to make recommendations concerning supplementation or amendment. The restriction in §4 depends on how DEQE interprets the Committee's authority to "review" permit applications or filings. The Act envisions that a withdrawal permit, issued in accordance with the regulations establishing the criteria and standards for obtaining permits, is the beginning, not the end of a process.[4/] A permit may be modified, suspended or revoked as may be necessary to carry out the general purposes of the Act. Compliance with the terms of the permit may be enforced by additional orders, civil penalties or injunctive relief. The Committee is given explicit authority to consult regarding the enforcement of the Act and the regulations adopted thereunder. This authority, however, by policy of the Commissioner, does not include the authority to consult regarding review of a specific case to determine enforcement needs or requirements or to consult regarding the monitoring,

inspecting and reporting requirements of a specific user or water source during the period of a withdrawal permit as part of DEQE's enforcement obligation. There are explicit procedural rules, in writing, which prohibit all Committee members from reviewing specific permit applications at any time while they were pending *and* prohibit Committee members from consulting regarding the modification, supplementation or revocation of a specific permit and further from consulting regarding enforcement decisions relating to compliance with the terms of a specific permit, or user, or service. Therefore, the Commission concludes that individual permit applications are not a "subject" of the Committee's work. So long as the Commissioner's interpretation of the Act and his policy remain in force, Committee members may submit registrations or applications to DEQE.

DATE AUTHORIZED: June 8, 1987

[1]/"Official responsibility," means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

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

[3]/Buss, **The Conflict of Interest Statute: An Analysis**, Boston University Law Review, Vol 45, 299, at 321.

[4]/A permit is thus unlike a judgment, decision and order, or a court case; there is no final action since a permit is always subject to the continuing regulatory authority of DEQE. Thus, a permit may have conditions X, Y, and Z. A subsequent regulation may require conditions A, B, and C. If the permit holder does not comply with condition A the permit may be suspended or terminated even though the terms X, Y, and Z have been complied with. The only vested property right in a permit is the right to a hearing. See §11(7).

CONFLICT OF INTEREST OPINION
EC-COI-87-18

FACTS:

You are a partner in a law firm. Since 1986 you have represented ABC company and that company's president in a certain matter. DEF company is a competitor.[1]/ In your representation of ABC, you have submitted requests for public documents from various state and local agencies relating to DEF's operations. In relation to one of those requests, you submitted a brief and a motion to dismiss a request by DEF for a Massachusetts Department of Environmental Quality Engineering (DEQE) hearing to review a tentative determination by that agency as to whether certain DEF documents were confidential. The decision in that DEQE matter is still pending. One of the requests for records was submitted to the GHI Board of Health[2]/ and withdrawn. You currently have record requests pending in several communities and with DEQE. You and members of your firm have done other unrelated legal work for ABC and for its president.

The GHI Board of Health has recently hired you and your partner as special counsels. The special counsel position was designated a "special municipal employee" position for the purposes of G.L. c. 268A, by the Board of Selectmen. You will represent the GHI Board of Health in an action for declaratory judgment brought against that Board by DEF. That lawsuit, involves a disagreement as to whether DEF must obtain a permit. Prior to your appointment to the GHI position, you disclosed your prior dealing with ABC (and the company president) to the GHI Town Counsel.

DEF has filed a lawsuit naming various GHI town officials, ABC and you as defendants. The suit alleges that the defendants have conspired over a two-year period to deprive DEF of its rights under state and federal laws, and that they defamed it and interfered with advantageous relations. In particular, DEF alleges that the Board of Health has furthered its conspiracy against DEF by hiring you following your making adverse allegations against DEF in your representation of ABC. You will be represented by a partner of your firm. Neither you nor your firm will be representing any of the other defendants in that lawsuit.

QUESTION:

Does G.L. c. 268A permit you to serve as special counsel for the Town of GHI in light of your prior and ongoing representation of ABC and your status as a defendant in federal litigation initiated by a competitor of ABC?

ANSWER:

Yes, subject to the restrictions below.

DISCUSSION:

As special counsel to the Town of GHI, you are considered a "special municipal employee" for the purposes of G.L. c. 268A, since that position was designated as such by the Board of Selectmen in accordance with G.L. c. 268A, §1(n).

1. Section 19

Under this section, you are required to abstain from participating as a GHI special counsel in any lawsuit or other particular matter in which either you or your law firm has a financial interest. Because it is possible that the resolution of the state lawsuit in which you represent the Town might affect your financial interest in the federal lawsuit, we advise you to seek, from the Board of

Health, an exemption from the prohibition of §19. While it is true that the bulk of DEFs' allegations in the federal suit involve patterns of harassment and intimidation which are independent of the merits of whether a site permit is required, some of the allegations assert procedural irregularities by Town officials in the denial of every DEF submission, including its permit. To the extent that the resolution of the issue of the state case could affect the success of DEF's claim against you, you may have a reasonably foreseeable financial interest in the state lawsuit. To avoid any potential violation of §19, your further participation in the state lawsuit should therefore be approved by the Board of Health pursuant to §19(§b)(1). The Board of Health must be guided by the standards of conduct in §23 in granting you such an exemption.[3]/

2. Sections 17 and 18

Sections 17(a) and (c) of the conflict of interest law generally prohibit a municipal employee from receiving or requesting compensation from or acting as an attorney or agent for anyone other than the town or municipal agency[4]/ in relation to any particular matter[5]/ in which the same town is a party or has a direct and substantial interest. As to special municipal employees, however, the provision is less restrictive. A special municipal employee is subject to §17(a) and (c) "only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves no more than sixty days during any period of three hundred and sixty-five consecutive days."

Based upon the information you have provided, we conclude that your serving as special counsel to the Town will not disqualify you or your firm from either continuing your representation of ABC or representing you in defense of the federal lawsuit initiated by DEF.

(a) Your representation of ABC

Section 17 will pose potential problems for you only if you represent ABC or its officers in relation to any matters pending before the GHI Board of Health.[6]/ Your representation of ABC and its officers has involved requests in communities other than GHI and DEQE proceedings to determine the confidentiality of documents. Because these matters are not pending before the GHI Board of Health, §17 does not restrict your engaging in these activities. Should you wish to renew a DEF record request on behalf of ABC before the GHI Board of Health, then §17 would apply.

(b) Your firm's representation of you in the federal litigation

Under §18(d), a partner of a municipal employee will share certain prohibitions which apply to the municipal employee under §17. Specifically, the partner of a municipal employee may not act as attorney or receive compensation from a non-town party in connection with any lawsuit in which the municipal employee participates or has official responsibility for. Based upon our review of court papers in the DEF federal lawsuit, we conclude that your firm's representation of you would not be in connection with the same state lawsuit for which you represent the Board of Health. While, as we have seen, the state case may have an impact on the outcome of some of the allegations in the federal case, the two cases are different particular matters. The single focus of the state case is whether DEF is entitled to an operating permit. The bulk of the allegations in the federal civil rights suit, on the other hand, assert a two year pattern of harassment and conspiracy by GHI officials to deny every submission by DEF. Given the substantial difference in the issues posed by the two lawsuits, we find that the firm's representation of you in the federal case is not "in connection with" the state lawsuit involving DEF.[7]/

3. Section 23

Under this section, you must satisfy certain standards of conduct in your representation of the Board of Health, in light of your ongoing representation of ABC. Because you have disclosed your representation of ABC, and the litigation positions which are are advocating are consistent with the Town's interests in the state lawsuit, you will not be deemed to have accepted employment which is inherently incompatible with your responsibilities to the Town or to have created the appearance of undue influence in your Town position. **Compare,** EC-COI-82-7 (state mediator's acceptance of outside employment with a labor union is inherently incompatible with his state position). **See,** G.L. c. 268A, §23(b)(1). However, we caution you that issues under §23(b)(1) may arise in the future if your advocacy of the Board of Health's interests is impaired by your subsequent advocacy on behalf of ABC. We therefore advise you to renew your opinion request to us should your advocacy assignments on behalf of ABC subsequently change. You should be aware that §23(b)(2) prohibits you from using your official position with the Board of Health in gaining any exemptions or favors for ABC. Furthermore, you should bear in mind the §23(c) restrictions on the use of confidential information, and refrain from improperly disclosing or misusing confidential information which you have acquired in your Board of Health activities.[8]/

In summary, while your representation of the Board of Health does not outright violate §23, based on your current facts, any substantial change in your facts could place you in violation of the aforementioned standards of conduct.

DATE AUTHORIZED: June 8, 1987

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[1]/You state that you were hired by ABC only to gather information on DEF's operations. The purpose of your representation of ABC was not connected to DEF's operations.

[2]/You received a letter from that Board stating that the documents you requested were available for inspection. You never inspected those records and you subsequently withdrew your inspection request.

[3]/We note that you have filed a motion to dismiss DEF's allegations against you. The abstention procedures of §19 will apply as long as you continue to be a defendant in the federal lawsuit.

[4]/"Municipal agency", any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f).

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

[6]/For the purposes of your opinion request, we will assume that you or your partners will be performing services for the Board of Health for more that 60 days in any 365 day period. In any event, the application of §17 to your current facts will not be affected by the number of days you or your firm perform services.

[7]/By your being named as a defendant in the federal lawsuit, you would not be deemed to be participating in or having official participation in that matter as a GHI official. Your official responsibilities for the Town are limited to the state litigation. Therefore, your law firm would not be restricted under §18 in the federal lawsuit.

[8]/If your position in either the state or the federal lawsuits, or your representation of ABC changes, we advise you to seek a further opinion on those changed circumstances. We note that the constraints of c. 268A apply to you because of your municipal position and not as a result of any prior private business relationship. Issues as to the propriety of your representation of a client in connected matters may be properly considered by the Board of Bar Overseers.

CONFLICT OF INTEREST OPINION
EC-COI-87-19*

FACTS:

John J. Barmack (Barmack) is the Administrator of Norfolk County Hospital (Hospital). He is employed pursuant to a management agreement (Agreement) between a private corporation, HCA Management Company, Inc. (HCA) and the Trustees of the Norfolk County Hospital and Commissioners of the County of Norfolk. The Agreement states that HCA will provide "its experience, skills, supervision and certain personnel in the operations of the Hospital . . . with the full authority and ultimate control of [the Hospital] remaining with the Boards [referring to the Norfolk County Commissioners and the Hospital Trustees]." Agreement at 1. With regard to personnel, the Agreement states that HCA "shall provide a qualified Hospital Administrator ... whose initial and continuing appointment shall be subject to the approval of the Hospital Board of Trustees." **Id.** at 7-8. The Agreement regards the Administrator as an employee of HCA. **Id.** at 8.

Barmack was the Hospital Administrator prior to and after the Hospital and HCA entered into the Agreement. The Agreement provides that Barmack's salary and fringe benefits are the responsibility of HCA. In turn, the Hospital pays HCA a management fee which is deposited in a bank account against which HCA draws checks to pay the Administrator's salary.

Barmack's employment arrangement with HCA gives him the opportunity to acquire stock, or exercise future stock options, in HCA's parent company which owns all of the stock of HCA. (HCA is not publicly traded but HCA's parent company is.) Barmack presently owns less than one percent of the stock of HCA's parent company.

In 1984, Barmack married Mehbooba Anwar, M.D. Dr. Anwar was approved as Acting Medical Director effective July 4, 1977, and became the Medical Director of Norfolk County Hospital in August of 1977.

QUESTIONS:

1. Does Barmack's status as Hospital Administrator pursuant to the Agreement render him a county employee within the meaning of c. 268A?
2. If Barmack is a county employee, does c. 268A permit his financial interest in the Agreement?
3. If Barmack is a county employee, does c. 268A permit HCA to pay his salary and allow him to act as HCA's agent pursuant to the Agreement?
4. If Barmack is a county employee, what restrictions will the conflict of interest law place on his official dealings with the Medical Director, his wife?

ANSWERS:

1. Yes.
2. Yes.
3. Yes.
4. The restrictions of G.L. c. 268A, §13 apply.

DISCUSSION:

1. Status as a County Employee

The conflict of interest law broadly defines "county employee" to include any

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

Barmack fits squarely within the above definition as a "person performing services for . . . a county agency."[1] **Id.** Barmack's role as Hospital Administrator is, in all respects, a job that requires him to perform substantial services for the Hospital in overseeing its day to day business operations. Furthermore, the Agreement is clear that the Hospital delegated to the management company the responsibility of appointing the Hospital Administrator, retaining the right to approve the appointment. Barmack was selected for and maintains this position pursuant to the explicit terms of the contract. Agreement at 7-8. The logical implication of this arrangement is that Barmack, as Administrator, is performing services for a county agency by contract of hire or engagement.[2]

The Commission has previously stated that not all employees of corporations which contract with a public agency will be considered public employees. **Compare,** EC-COI-83-129 (discussing the status of state employee). However, there is substantial precedent that an employee of a corporation may be included in the definition of a public employee (be it a state, county or municipal employee) if the contract with the public agency contemplates the services of that particular individual. **See** EC-COI-86-21 (where an employee of a private corporation which contracted with the state was deemed a state employee when he provided highly specialized services which were specifically bargained for by the parties); 87-8 (where the owner of a private corporation was considered to be a city employee when his corporation contracted with the city and he played a significant role in the contract's performance); and 83-165 (where the president of a private company was considered a state employee because of his company's contract with the Metropolitan District Commission).

The Commission has recognized that certain factors are relevant in determining whether an individual who is an employee or officer of a private corporation which contracts with a public entity should be deemed to be a public employee. EC-COI-87-8. These factors include:

1. whether the individual's services are expressly or impliedly contracted for;
2. the type and size of the corporation;
3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;
4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and
5. the extent to which the person has performed similar services to the public entity in the past. **Id.**

Given the fact that the county must approve of Barmack's initial and continuing appointment and that Barmack has performed the identical services for the Hospital in the past, we believe that the Hospital specifically contemplated that Barmack would continue to act as the Hospital Administrator pursuant to the Agreement. Additionally, Barmack provides a degree of specialized expertise in the area of hospital administration and plays a significant role in implementing the management agreement as the chief administrative officer responsible for supervising hospital operations. Where, as here, many factors determinative of public employee status are met, Barmack will be considered a county employee.[3]

2. Financial Interest in a County Contract

A county employee is prohibited from having a financial interest in a contract made by a county agency. G.L. c. 268A, §14. A literal interpretation of this prohibition would prevent a county employee from having a financial interest in his own contract of employment. It would be absurd, however, to place a public employee, such as Barmack, in violation of the conflict of interest law because of his financial interest in his own job.

In order to give §14 a workable and common sense meaning, §14 (like its §7 "state" counterpart) "cannot reasonably be interpreted to prohibit an . . . employee from receipt of his own paycheck." EC-COI-86-21. **See also,** Buss, **The Massachusetts Conflict of Interest Statute: An Analysis,** B.U. Law Rev. 299 (1965). Barmack's financial interest is in his compensation which results from the Agreement.

> In such a case, the contract which creates [public] employee status is the same contract which results in the financial interest. Therefore, there is no opportunity to gain an inside track on a second [public] contract. EC-COI-86-21.

Accordingly, the Commission does not regard Barmack in violation of the law for getting paid to do his county job.[4]

3. Barmack's Arrangement for Compensation and Action as HCA's Representative Pursuant to the Agreement

Because Barmack is paid by and maintains an employment relationship with HCA, an issue is raised under §11 of the conflict law. Section 11 generally prohibits a county employee from being paid by or acting as the agent for a private entity in relation to a matter in which a county agency is a party or has a direct and substantial interest. However, for the reasons stated above, these prohibitions do not prevent an individual who attains public employee status by contract from performing services under that contract and being paid accordingly. **Compare,** EC-COI-87-8; 86-21; 83-129.

Here, the Agreement provides that the Hospital Administrator "will be and remain the employee of [HCA]. . ." and that HCA will be "responsible" for his salary and fringe benefits. Agreement at 8. In addition, Barmack will implement the policies of the management company, presumably as its agent, subject to the Hospital's approval. Agreement at 2-5 and 7. In essence, Barmack becomes an agent of HCA to the extent that HCA is the agent of the Hospital. HCA pays Barmack's salary and Barmack acts as HCA's agent solely in the context and as a consequence of the Agreement.

It is not only permitted but expected that an employee of a private company which has a contract with a public agency will continue to be paid by, and may be called upon to act as the agent for, the private company. Provided that these circumstances occur in the context of the same agreement which creates the public employee status, there is no conflict. If, on the other hand, the employee of the private company sought multiple contracts with a public agency, then his actions as the company's agent or his private compensation in connection with, for example, a second contract could create a conflict under §11(a) and (c) of G.L. c. 268A.[5]/

4. Restrictions on Official Dealings with the Medical Director

The conflict law prohibits a county employee from participating as such an employee in a particular matter in which, among others, he or his employer or his immediate family member[6]/ has a financial interest.[7]/ The financial interest must be "direct and immediate, or at least reasonably foreseeable." EC-COI-84-123; 84-98; 84-96. An employee's participation[8]/ is broadly defined to include, among other things, any discussion, recommendation, vote (binding or non-binding) or investigation. **See, e.g., Commission Advisory No. 11** regarding Nepotism at 3-5. A public employee *also* may not delegate the responsibility of dealing with a family member to another. **Id.** at 5. Therefore, because Barmack's wife is the Hospital Medical Director, he must abstain from every action which would have a reasonably foreseeable affect on her financial interests.[9]/ This includes salary reviews, personnel evaluations or other like recommendations to the Hospital.[10]/

DATE AUTHORIZED: June 30, 1987

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/The Norfolk County Hospital is a "county agency." G.L. c. 268A, §1(c).

[2]/The Hospital has chosen to fill the Administrator position by engaging a private management company. Even if Barmack can be said to hold an "appointment" in a county agency, he holds that appointment only pursuant to a contract between the Hospital and HCA.

[3]/This status, however, would not necessarily extend to other, less specialized employees of HCA who also perform services for the Hospital. These determinations would have to be made on a case by case basis in light of the factors articulated above.

[4]/It is unnecessary to reach the issue of Barmack's ownership of stock as he owns less than one percent of the stock of HCA's parent company. See, G.L. c. 268A, §14. We would note, however, that any financial interest resulting from such stock ownership would, like his compensation, relate to the same contract which creates his status as a county employee.

[5]/In light of the Commission's reasoning, it is unnecessary to determine whether Barmack's activities are provided for the proper discharge of his official duties within the meaning of G.L. c. 268A, §11. The Commission notes that its opinion is limited solely to the application of G.L. c. 268A and that its opinion is not intended to evaluate the sufficiency of the county's authorization to contract with HCA.

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

[7]/This prohibition restricts Barmack from participating in matters outside the scope of the Agreement which would affect HCA's financial interests. For example, if HCA became a vendor of medical supplies to the Hospital, Barmack could not represent the Hospital in purchasing these supplies.

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

[9]/G.L. c. 268A, §13 provides an exemption to this prohibition if Barmack "advise[s] the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

(1) assign the particular matter to another employee; or

(2) assume responsibility for the particular matter; or

(3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the county may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the county employee and filed with the state ethics commission by the person who made the determination." Thus, it may be possible for the Board of Trustees to grant Barmack permission to act on matters affecting the financial interests of his wife. In such an event, however, the Commission would carefully scrutinize all the facts to determine whether Barmack has received an unwarranted privilege of substantial value. See, G.L. c. 268A, §23.

[10]/Ethics Commission's opinions are addressed to the prospective conduct of the individual requesting the opinion. Therefore, any conduct which has already occured at the time of the request is neither sanctioned nor analyzed by this opinion.

CONFLICT OF INTEREST OPINION
EC-COI-87-20

FACTS:

You are an employee of state agency ABC.

Prior to your appointment, you were a partner in a firm (Firm) which provides contractual services to state agencies and the human service providers which receive state agency funding. Upon entering state service, you took a leave of absence from the Firm. Under the terms of the leave, your equity and retirement interest with the Firm will be frozen, and you will not be receiving Firm benefits which are attributable to services performed by the Firm after you began service with ABC.

You also serve as an unpaid member of the board of directors of two corporations. The first, DEF, provides software development and information for the spot oil industry and contracts with oil companies. The second, GHI, is an investment banking company which finances

private university intellectual property and out-of-state student housing. Neither of the corporations has any dealings with state agencies.

QUESTIONS:

1. What limitations does G.L. c. 268A place on your ABC activities while you are on leave from the Firm?
2. While serving as a state employee, can you maintain your directorships with DEF and GHI?

ANSWERS:

1. You are subject to the restrictions described below.
2. Yes.

DISCUSSION:

You are a state employee for the purposes of G.L. c. 268A. Three sections of G.L. c. 268A are relevant to your questions.

1. Limitations as ABC employee

Under G.L. c. 268A, §6, absent an exemption, you may not participate as a state employee in any particular matter[1]/ affecting the financial interest of a business organization with which you have an arrangement for future employment.

During the period of your leave of absence from the Firm, you have an arrangement for future employment with the Firm. Consequently, §6 prohibits you from participating as a state employee in matters in which the Firm has a financial interest. For example, you may not review contracts between state agencies and the Firm, or recommend that such contracts be extended. The prohibition also extends to your participation in contracts between human service providers and the Firm, and in-state contracts made by other accounting firms which compete with the Firm for the contracts under review.

Because Firm contracts will customarily come before you, you must disclose to your appointing official and the Commission the fact that these contracts are pending. Your appointing official has three options:

1. he may appoint certain employees to review the contracts;
2. he may review the contracts himself; or
3. he may exempt you from the prohibitions of §6 by determining in writing that the Firm's financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the state expects from you, and by forwarding a copy of the determination to the Commission.

Absent your receipt of a written exemption from your appointing official, you must abstain from participating in the review of Firm contracts.

Under §23(b)(3), you must avoid conduct which creates a reasonable impression that your official actions are unduly influenced by your status as a partner on leave. For example, because the Firm contracts with the Executive Office of Human Services (EOHS), you may create a reasonable impression of undue favoritism toward EOHS in your ABC activities. To dispel any such impression, you must disclose in writing to your appointing official the state agency and human service provider clients of the Firm. You must also avoid actually granting unwarranted privileges or exemptions of substantial value to agencies which contract with the Firm. See, G.L. c. 268A, §23(b)(2).[2]/

2. Limitations on your Outside Activities

Nothing in G.L. c. 268A prohibits your serving as an unpaid director of DEF or GHI, inasmuch as neither corporation has any current dealings with state agencies. Should either of the companies plan to conduct dealings with state agencies, you should renew your request for an advisory opinion. Based on the facts surrounding those future dealings, we will examine the application of the §4(c) restrictions on your acting as a corporate agent in matters in which the state is a party or has a direct and substantial interest. Independent of the extent of state dealings by the corporations, you must refrain from using state resources for your private corporate activities. G.L. c. 268A, §23(b)(2).[3]/

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

[2]/In the alternative, you ask how G.L. c. 268A would apply if you resigned from the Firm and terminated your leave of absence. While the restrictions of §6 would no longer apply because you would not have an arrangement for future employment, you will remain subject to the provisions of §23 discussed above.

[3]/Inasmuch as your compensation from the Firm will be calculated based on services which you performed prior to your becoming a state employee, you will not be deemed to have a financial interest in, or to be receiving compensation from, the Firm's contracts with state agencies or vendors while you remain a state employee. See, G.L. c. 268A, §4(a), 7.

CONFLICT OF INTEREST OPINION
EC-COI-87-21

FACTS:

You are a member of the Board of Selectmen of a Town. Your son is a patrolman with the twenty member Town police department and is interested in a promo-

tion to sergeant. The patrolmen are represented by a union; the sergeants are not organized and negotiate informally with the Town. You state that the salary of the sergeants is not tied to or otherwise dependent on the base salary of or increases negotiated by patrolmen.

QUESTION:

In view of your son's status as a police officer, what limitations does G.L. c. 268A place on your participation as selectman in police department matters?

ANSWER:

You are subject to the restrictions discussed below.

DISCUSSION:

As a member of the Board of Selectmen, you are a municipal employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A regulate your official activities as a Selectman.

1. Section 19

This section prohibits you from participating[1]/ in any particular matter[2]/ in which your son has a financial interest. **Graham v. McGrail**, 370 Mass. 133 (1976). Included within the prohibition are all votes, decisions, determinations and contracts in which your son has a reasonably foreseeable financial interest. For example, you may not approve a collective bargaining agreement which provides for a salary increase for your son and other patrolmen. You must also refrain from any decisions relating to the reappointment or promotion of your son.

On the other hand, the §19 abstention requirement does not extend to all police department matters but only to those matters in which your son has a reasonably foreseeable financial interest. EC-COI-84-98. For example, you are not required to abstain from deciding whether to appoint new patrolmen or to reappoint regular and special police officers (aside from your son), matrons and the chief because your son does not have a financial interest in these decisions. For the same reason, you may participate in decisions concerning the salary for the police chief and matrons, inasmuch as the salary of police officers is negotiated independently of these salary levels.

If your son is promoted to sergeant, you will no longer be prohibited from participating in decisions relating to your son's financial interest as a patrolman. The prohibition, however, will apply to your participation in matters such as contracts and decisions affecting your son's financial interest as a sergeant.

2. Section 23

In addition to §19, your participation in police matters must also satisfy the standards of conduct contained in §23. Section 23 prohibits you from:

1. using your official position to secure unwarranted privileges or exemptions of substantial value for your son (§23(b)(2)); or
2. engaging in conduct which creates a reasonable impression that your son or the police department will unduly enjoy your favor (§23(b)(3)).

By making a public disclosure of the fact that your son is a member of the police department, you will dispel any impression of undue favoritism under §23(b)(3). You must bear in mind the standards of §23 whenever you participate as a Selectman in matters affecting the police department. For example, your decision concerning the retention of or salary of the chief must be based on objective standards and cannot be based on how well or how poorly your son has been treated by the chief. You must also continue to comply with the confidentiality restrictions of §23(c) by not disclosing to your son any confidential information relating to the Town's bargaining strategy in its collective bargaining negotiations with the patrolmen's bargaining unit.

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

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

CONFLICT OF INTEREST OPINION
EC-COI-87-22

FACTS:

You are the head of state agency ABC. In that capacity, you oversee the supervision of employees in your agency.

Your sister is an attorney and is considering forming an association with three lawyers. The association would include a common letterhead and a sharing of office expenses, but would not include a sharing of fees received from clients. Your sister's practice is exclusively probate and does not include matters before your agency. Two of your sister's prospective associates occasionally represent clients in matters before your agency. By

virtue of your sister's proposed association arrangement, she will not share any fees received by her associates in connection with their representation of clients in ABC proceedings.

QUESTION:

What limitations does G.L. c. 268A place on your activities as ABC agency head in light of your sister's proposed association?

ANSWER:

You are subject to the limitations set forth below.

DISCUSSION:

As ABC agency head, you are a state employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A are relevant to your question.

1. **Section 6**

This section requires your abstention from participation as an ABC employee in any particular matter[1/] in which your sister has a financial interest. Based on the information which you have provided, we do not believe that the §6 abstention requirements apply to your oversight of the supervision of ABC employees in matters in which your sister's associates represent a client. Even assuming that your sister's associates could be regarded as having a financial interest in the cases for which they serve as counsel, their financial interest would not be imputed to your sister because she is not eligible to share any fees received by her associates in connection with their defense of cases before your agency.[2/]

2. **Section 23(b)**

In addition to §6, you are also subject to certain standards of conduct contained in §23. Specifically, you may not use your official position to secure unwarranted privileges or exemptions of substantial value to your sister's firm §23(b)(2). Issues would arise under §23(b)(2), for example, if you concurred in the assignment of an inexperienced employee to handle a complex matter involving your sister's firm. You must therefore keep the principles of §23(b)(2) in mind in carrying out your official duties.[3/]

Section 23(b)(3) also applies to your situation. That subsection prohibits a public official from acting in a manner which will lead a reasonable person to conclude that any person can unduly enjoy his favor. To dispel any such appearance, the official must "disclose in a manner which is public in nature, the facts which would otherwise lead to such a conclusion." §23(b)(3). Were you to participate in cases involving your sister's associates, a reasonable person might well conclude that they (and their clients) would unduly enjoy your favor. Therefore, a public disclosure is appropriate. Although the statute does not specify the precise manner of providing public notice, the notice must provide the public with access to relevant information concerning your sister's association with a firm which is defending a case involving your agency. You can satisfy this requirement by:

(a) filing a written disclosure to the Commission which will keep your disclosure on file as a public record, G.L. c. 268A, §24; and

(b) filing a similar disclosure with the Court which reviews decisions of your agency.

Alternatively, you may abstain from continuing your oversight role in the supervision of cases in which your sister's law firm represents a defendant. Aside from steps taken to dispel any impression of undue favoritism, you must, of course, avoid actual undue favoritism towards your sister's firm.

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

[2/] While her associates' financial ability to maintain their share of the office expenses could conceivably have an affect on her financial interest, in satisfying the terms of the assocation's office lease, the interest is speculative. EC-COI-84-98; 87-16.

[3/] Although largely self-explanatory, §23(c) prohibits you from disclosing to your sister or her firm any confidential information which you have acquired as a state employee.

CONFLICT OF INTEREST OPINION
EC-COI-87-23

FACTS:

You are the head of state agency ABC. Your agency has recently been involved in a particular matter. In anticipation of a possible filming of a movie about the matter, a film producer has offered you a fee primarily for the use of your name. An additional fee would be available to you if the film goes into production.[1/]

To avoid violating G.L. c. 268A, §3(b)[2/] you have directed the establishment of a charitable trust (Trust), named after your late father. The Trust, which is administered by two independent trustees, will execute all agency and option documents, and also receive and distribute funds which are received from the film producer. The exclusive purposes of the Trust are charitable and educational, and the Trust payments are

primarily intended to provide educational scholarships and program development relating to the conduct of public and private sector officials. You state that neither you nor your office would seek any payments or distributions from the Trust or otherwise receive any benefit from the Trust.

QUESTION:

Does your establishment of the Trust satisfy G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

In your capacity as a state agency head, you are a state employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A are relevant to your question.

1. **Section 3(b)**

Section 3(b) of G.L. c. 268A prohibits a state employee from directly or indirectly receiving anything of substantial value for himself for or because of any official responsibility performed or to be performed. The principle of §3(b) is straightforward: by accepting gifts of substantial value relating to duties which the official has performed and received public compensation, the official raises questions about the credibility and impartiality of his job performance. **See, In the Matter of George Michael**, 1981 Ethics Commission 59, 68; **Commission Advisory No. 8**. The Commission has also recognized, however, that the prohibitions of §3(b) apply only if the official seeks and receives anything of substantial value for himself. **See**, EC-COI-84-114 (gift of art prints donated for exhibition in government agency and not for the personal use of any employee does not violate §3). **Compare**, G.L. c. 268A, §2(b) (public official's corrupt acceptance of anything of value is prohibited whether received for himself or for any other person or entity). Because you will not be receiving, either directly or indirectly, the producer's fees relating to the performance of your ABC duties, you will not violate §3(b).

2. **Section 23(b)(2)**

Under this section, a state employee may not use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. In EC-COI-83-82, the Commission cautioned a state agency head to observe the safeguards of §23(b)(2) in connection with the production of a private film relating to his agency's jurisdiction. In that opinion, the agency head was advised to avoid giving any impression that the film was state sponsored or endorsed, and to provide the filmmaker only with information or advice which was routinely made available to the general public. **See**, also G.L. c. 268A, §23(c), prohibiting the disclosure of confidential information. You should keep these principles in mind in your dealings with the film producer.[3]/

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[1]/We understand that other current and former employees of your agency have been offered smaller fees for similar purposes. While this opinion is addressed to the facts as they apply to you, you may share the legal principles of this opinion with others. The Commission will provide opinions to other current and former employees if they wish.

[2]/Under §3(b), a state employee may not receive anything of substantial value given for or because of any official act or acts within his official responsibility as a state employee. **See**, Discussion, **infra**.

[3]/Given the circumstances, we do not believe that your establishment of a charitable trust in your late father's name for the receipt of the film production fees would constitute the use of your official position to secure an unwarranted privilege of substantial value for yourself or others.

CONFLICT OF INTEREST OPINION
EC-COI-87-24

FACTS:

You are employed by state agency ABC. You have been requested by a member of the Board of Bar Examiners to serve as a reader/grader of bar examinations of the applicants for admission to practice law in Massachusetts. Your employer, state agency ABC, does not regulate any activities of the Board of Bar Examiners. In your ABC capacity, you neither participate in nor have any official responsibility for the activities of the Board of Bar Examiners. The services that you have been requested to perform would be provided outside of the normal working hours of the Trial Court, are not required as part of your regular duties for the Trial Court, and would be completed in substantially less than 500 hours in any calendar year.

There is no public notice of the opportunity to serve as reader/grader of bar examinations. The process by which an attorney becomes a reader/grader is entirely by "word of mouth." There is no formal procedure or application process for the selection of reader/grader. The only qualification is that you be an attorney at law. As a matter of policy the Board of Bar Examiners will not hire a reader/grader who is also a state employee, so as not to cause any appearance of conflict, unless the potential reader/grader has a written opinion from the State Ethics Commission authorizing such employment.

QUESTION:

Does G.L. c. 268A permit you to receive compensa-

tion for your service as a reader/grader of bar examinations?

ANSWER:

No.

DISCUSSION:

The Commission concludes that your receipt of compensation from the Board of Bar Examiners will give you a financial interest in a contract made by the Board, and that you do not qualify for an exemption permitting such an interest because the process of appointment is not sufficiently open to satisfy the public notice requirement. G.L. c. 268A, §7(b).

A state employee may not have a direct or indirect financial interest in a contract made by a state agency in which the commonwealth or a state agency is an interested party, G.L. c. 268A, §7, unless an exemption applies. The general rule is that, absent such an exemption, when a state employee is appointed by another state agency such as the Board of Bar Examiners, and performs services for that agency and receives compensation, the employee violates §7. Prior to 1983, for all practical purposes, full-time state employees, like yourself, were prohibited by §7 from financial interests in other state contracts. **See**, EC-COI-80-117. In 1982, 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. 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."

The term "public notice" is not defined in the conflict of interest law. As the agency authorized to enforce and administer that law, the Ethics Commission possesses the authority to interpret it. **Grocery Manufacturers of America, Inc. v. Department of Public Health**, 379 Mass. 70, 75 (1979). Such an interpretation must keep in mind the "cardinal rule" that exemptions from general statutory provisions are to be strictly construed. **Department of Environmental Quality Engineering v. Town of Hingham**, 15 Mass. App. Ct. 409, 412 (1983). In this case, any such interpretation of "public notice" must also take into account the pairing of the term in the statute with "competitive bidding" and the stated purpose of the drafter that "the general public [have] equal access to the contract through notice . . ."[1]/ Generally, §7 is designed to eliminate the public impression that state employees have an "inside track" for the opportunity to compete for state jobs or contracts. Where applicable, the mechanics of the competitive bidding process are sufficient to meet that goal. Such competition is not appropriate in many personal service employment arrangements. Therefore, a process other than competitive bidding, but addressing the concerns satisfied by that mechanism, must be adopted. Both the public notice and the competitive bidding process must meet the goal of facilitating public access to state contracts which the §7(b) exemption was intended to achieve.

The Commission has had occasion to define public notice in the context of specific factual situations. The Commission has been flexible in the kind 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 a geographic area. **See**, EC-COI-83-97. The Commission's policy of departing from a hard and fast requirement that advertising be in a newspaper of general circulation is based on the common-sense notion that targeted advertising in trade or professional journals is more likely to reach the field of potential eligible candidates than is an advertisement in a newspaper of general circulation. Similarly, the Commission has concluded that a "process based primarily on word-of-mouth between a state agency and potential eligible employees does not possess sufficient vestiges of openness to satisfy the public notice requirement." **See**, EC-COI-83-95. In EC-COI-85-7, the Governor was looking for a representative of the public on a seven member board. The Governor did not publicize the current public member vacancy in a newspaper or other periodical of general circulation. The search was limited to a word-of-mouth request to three institutions seeking resumes from qualified women and minorities interested in health care issues. The Commission concluded that this was not "public notice" within the meaning of §7(b).

In the circumstances of this case, publication in a professional periodical such as the Massachusetts Lawyers Weekly would appear to be the minimum requirement to satisfy the public notice requirement of §7(b).

The Commission will not waive the public notice requirement upon a theory that public advertising would be impractical or not effective. There is no language in §7(b) which exempts public agencies from the public notice requirement for "good cause." If such an exemption were intended by the General Court, it could have so explicitly stated. **See, e.g., Federal Administrative Procedures Act**, §553(b)(B), which explicitly permits deviation from public notice if "impractical."[2]/ It is not for the Commission to waive the public notice requirement or broaden its scope by interpretation. Any such change in law or policy must emanate from the General Court.

In conclusion, equal access to the opportunity to be appointed to serve as reader/grader for bar examinations has not been provided to the members of the Bar. The Commission cannot waive a requirement which is

explicitly mandated by the General Court. Therefore, the Commission concludes that your situation is indistinguishable from EC-COI-85-7 and that you may not be a paid reader/grader for Bar examinations under the present circumstances.

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[1]/Summary statement accompanying House 1235, p. 10 (1982).

[2]/This exemption from public notice requirements if "impractical" or for "good cause" is viewed narrowly by the courts and, indeed, it is not infrequent that an administrative agency's interpretation of circumstances under which public notice will be "impractical" will be overturned by a court of law. **See, Independent Brokers Realtors, Trade Associations v. F.E.C.**, 442 F. 2nd 132 (D.C. Cir. 1971).

CONFLICT OF INTEREST OPINION
EC-COI-87-25

FACTS:

You are a City Councillor in a City. Your sister is a teacher in the public school system and her salary is subject to a collective bargaining agreement between the School Committee and the Teachers Association. There are approximately 1600 association members whose salaries are affected by the provisions of the agreement. The City Council neither negotiates nor formally approves the agreement.

In accordance with the statutory scheme for enacting municipal budgets, the School Committee presents to the Mayor, who, in turn, submits to the City Council, the annual school department budget. **See**, G.L. c. 44, §32. Funding for teachers' collective bargaining agreement is contained in the school budget. The City Council votes on the total appropriation requested for the school department but "shall not allocate appropriations among accounts or place any restriction on such appropriations." G.L. c. 71, §34. Although the City Council may make recommendations to increase or decrease certain line items, such recommendations are non-binding. **Id.**

The collective bargaining agreement with the Teachers Association is a two year contract. Last year, the City Council appropriated the necessary money to fund the first year of the agreement. Funding for the second year of the contract is now before the Council. If the City Council votes to reduce the total appropriation for the school department budget, the School Committee will remain bound to honor its contractual obligation with the Teachers Union. **See, Boston Teachers Union, Local 66 v. School Committee of Boston**, 386 Mass. 197, 203 (1982); **see, also** G.L. c. 150E, §7(b). In order to accommodate the reduction, the School Committee would have to make cuts in other areas of its budget.

QUESTIONS:

1. Does G.L. c. 268A permit you to vote on the total appropriation for the School Department budget?
2. Does G.L. c. 268A permit you to participate in making non-binding recommendations on the budget line item which funds the collective bargaining agreement?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

As an elected City Councillor, you are a "municipal employee" for purposes of G.L. c. 268A. Section 19 of G.L. c. 268A prohibits your official participation in any contract, decision or other "particular matter"[1]/ in which you or an immediate family member has a financial interest. Official participation includes your action to approve, disapprove, recommend or decide a particular matter, for example, by voting on it or through discussion of it. **See, e.g.**, EC-COI-86-25 and 84-123.

For reasons more fully set forth below, the Commission will not deem the budget figure proposed by the school department in this case to be a "particular matter" as that term is used in the conflict law. Therefore, you may participate in the City Council's vote concerning whether to fund the school department budget. However, specific line items are considered "particular matters," and, therefore, you may not participate in any action concerning line items which affect the financial interests of your immediate family.

1. Adoption of the Consolidated Budget

The Supreme Judicial Court noted in a 1976 decision that the definition of "particular matter" "did not seem apt to refer to the adoption of a budget." **Graham v. McGrail**, 370 Mass. 133, 140 (1976). **See, also** Braucher, **Conflict of Interest in Massachusetts in Perspectives of Law, Essays for Austin, Wakeman Scott**, (1964) at 26-27. However, the Court further found that

> [t]he formulation of a budget may include a multitude of particular decisions, and we think both the language and the policy of §19(a) forbid a school committee member to participate in such a decision when his [immediate family's] private right is directly and immediately concerned, at least if there is any controversy over the decision. **Id.** at 139-140.

Consequently, the Court established a process by which a committee member could vote on the total school department budget if a separate vote were taken on the

offending line items and he abstained from that separate vote. **See, Graham v. McGrail, supra**, at 140. EC-COI-81-62. The **Graham** process for voting on budgets was and, for most boards and committees, still is a viable option to permit a committee member to vote on a budget's bottom line when that member might otherwise be disqualified because of a conflict of interest on a particular line item.

The **Graham** line item process, however, is not available to city councils in their review of school budgets. **Graham** was decided prior to the enactment of Proposition 2½ and, therefore, could not have anticipated the consequences of that legislation.[3]/ Proposition 2½ provides a limited role for the city council in reviewing the school department budget,prohibiting the city council from taking a separate vote on specific line items, including those which present conflicts. Thus, the city council cannot take advantage of the **Graham** process as it was originally conceived.

Nonetheless, **Graham** is instructive. The Court in **Graham** stated that the conflict of interest law must be given a "workable meaning." **Graham, supra** at 140. In this case, the City Council cannot direct the School Committee to increase either particular line items or the total school department appropriation. The City Council may only reduce the overall budget. In light of this limited role, it is consistent with public policy considerations that the City Council be permitted to perform its governmental function. To prevent a city councillor from voting on a forty million dollar budget because her sister receives a twenty thousand dollar salary which has been contractually negotiated by an independently elected committee seems neither a desirable nor workable result.

The Supreme Judicial Court's statement that the language in the definition of "particular matter" "does not seem apt to refer to the adoption of a budget" is persuasive where, as here, there is no opportunity to influence the amount of any particular line item nor increase the overall budget. **Compare**, EC-COI-84-123.[3]/

It is the unique combination of circumstances presented on the facts of this case, including, among other things, the lack of opportunity for the City Council to influence action on line items, to increase the total budget figure, or to engage in the **Graham** line item process, which leads us to conclude that city councillors with "line item conflicts" may vote on the consolidated budget.[4]/

2. Discussion of Budget Line Items

Although the line item process articulated in **Graham** is technically unavailable here because the City Council cannot vote on line items, it is nonetheless consistent with that decision that a city councillor abstain from participating in any discussion or recommendation concerning those budget items which presents conflicts. Thus, a city councillor may not participate in those specific budget items which would affect her family member's financial interest.

Graham specifically held that the "formulation of a budget may include a multitude of particular decisions . . ." apparently referring to budget line items which are discussed throughout the **Graham** decision. **Graham** at 140. There is no question that your participation on those line items which affect the reasonably foreseeable financial interests of your sister is prohibited. EC-COI-84-123. Even though you do not have the statutory authority to vote on line items, the Council can make recommendations to the School Committee with respect to any such line item. It is well established that any such discussion constitutes participation and, consequently, is prohibited. **Id. See**, G.L. c. 268A, §1(j).

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

[2]/G.L. c. 71, §34 was amended by Proposition 2½ so that the "fiscal autonomy" previously enjoyed by school committees was modified. School committees no longer maintained full authority over their own budgets but rather became subject to the mayor's recommendation to the city council, and the council's vote to appropriate (or not appropriate) sufficient money to fund the bottom line figure of the school department budget. **See e.g., Superintendent of Schools in Leominister v. Mayor of Leominister**, 386 Mass. 114, 115 (1982).

[3]/G.L. c. 268A, §19 provides an exemption for municipal employees to participate in matters of general policy if the interests of the municipal employee's family are shared by a substantial segment of the population. Without the opportunity to increase line items or the total budget, a vote on the total appropriation may be participation in a matter of general policy. We need not reach this issue, given our conclusion that the adoption of this budget does not involve a particular matter when there is no ability to influence or abstain from voting on line items. See, G.L. c. 268A, §19(b)(3).

[4]/This conclusion is supported by the Supreme Judicial Court's statement in **Graham** that a school committee member should not participate in a budget decision if his family member's "private right is directly and immediately concerned, *at least if there is any controversy over the decision.*" **Id.** at 140. (emphasis added). In this case, the lack of controversy suggests that participation at this stage should be permitted. In another set of circumstances where a controversial vote were at stake, a different conclusion may be appropriate.

CONFLICT OF INTEREST OPINION
EC-COI-87-26

FACTS:

You formerly served as an assistant attorney general. In that capacity, you served within the ABC bureau. Following the completion of your services as an assistant attorney general, you formed a law partnership with XYZ, a former assistant attorney general, who was assigned previously to the ABC bureau. Both you and

XYZ have been recently retained by the Attorney General as special assistant attorneys general to complete certain pending ABC cases. Your work involves three ABC cases and you have no official dealings with the government bureau of the Attorney General's Office. You do not expect to perform services as a special assistant attorney general for more than sixty days.

In your private practice, you have been asked to represent a state employee whose discharge for absenteeism has been affirmed by the Civil Service Commission. You would represent your client in a court appeal of the adverse ruling, and the defendant state agency would be represented by an assistant attorney general within the government bureau.

QUESTION:

Does G.L. c. 268A permit you to represent your client in a discharge appeal while you also serve as a special assistant attorney general?

ANSWER:

Yes, subject to certain limitations described below.

DISCUSSION:

While you continue to serve as a special assistant attorney general, you are considered a state employee for the purposes of G.L. c. 268A. Because of your part-time status, you are also a "special state employee" within the meaning of G.L. c. 268A, §1(o) and are subject, therefore, to certain less restrictive provisions.

Section 4 of G.L. c. 268A generally prohibits a state employee from representing a private client in a court appeal of a state agency decision, since the appeal is a matter in which a state agency is a party. As a special state employee, however, you are subject to §4 only with respect to a particular matter in which you have either participated as a state employee or currently have within your official responsibility as a state employee, or have had within your official responsibility during the prior one-year period.[1]/ Based on our review of your current and prior assignments as an assistant attorney general, we conclude that your representation in the discharge case is permissible under §4. Specifically, the discharge case was not a matter in which you participated as an assistant attorney general, nor is it a matter within your official responsibility in the ABC bureau. Because we understand that the ABC bureau works independently of the government bureau, matters handled by the government bureau such as the defense of a state agency discharge decision would not be regarded as within your official responsibility in the ABC bureau.

In addition to §4, you are also subject to the standards of conduct contained in G.L. c. 268A, §23. In relevant part, §23 requires that you refrain from disclosing to your client or otherwise misusing confidential information to which you have access as an assistant attorney general, §23(c), and from using your position to secure unwarranted privileges or exemptions of substantial value for you or your client.[2]/

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[1]/There are further restrictions on the outside activities of special state employees who serve for more than sixty days in any 365 day period. Because you will be serving for less than sixty days as a special assistant attorney general, these further restrictions will not apply.

[2]/In certain instances, the Commission may examine whether a special state employee who also represents private clients in cases against his own agency, may be "accepting other employment . . . inherently incompatible with the responsibilities of his public office." G.L. c. 268A, §23(b)(1). Issues under this paragraph could arise, for example, if the private representation required taking ideological positions which were inherently incompatible with ideology required to represent the state effectively. We see no such incompatibility in your case. In addition, we leave open whether this subsection would apply were you retained to represent a client in a matter being handled by the criminal bureau.

CONFLICT OF INTEREST OPINION
EC-COI-87-27*

FACTS:

On January 21, 1987, you resigned as Chief of the Industrial Accidents Division (Division) of the Department of the Attorney General. The Division has responsibility for representing the interests of the commonwealth in compensation claims made by state employees. State employees who are injured during the course or scope of their employment are treated the same way as workers in the private sector. Within 48 hours after an injury, it is the responsibility of the agency which employs the employee to file a "Notice of Injury" with the Industrial Accident Board.[1]/ In general, if an employee were out of work for six consecutive days as a result of an injury sustained during work, he would have a claim for compensation. After the six days, the Attorney General's Office would be required to make a decision. One decision could be to commence payment pursuant to the statute.[2]/ Another decision could be to deny responsibility for the claim. A third option could be to conduct further investigation. If, after six days, the Commonwealth failed to acknowledge or pay the claim, the state employee could file a formal claim with the Industrial Accident Board. The commonwealth then has 14 days in which to admit or deny the formal notice of a claim. The Attorney General's office is officially involved in the claim when the decision is made whether to either make payment after the six day loss of compensation period or to conduct further investigation.

There are certain procedures which may commence

many years after an injury in the field of workers' compensation. For example, there are so called Section 36 benefits for loss of function or disfigurement. These claims are not viable or proper for presentation to the Industrial Accident Board until there is a so called "end result." This being the case, a Section 36 claim may not be filed until many years after an initial injury. If the Section 36 claim is not resolved privately, a separate adverserial proceeding will result. For example, there may be a dispute as to the extent or percentage of loss of function, and this would affect the amount of compensation. Similarly, there may be separate proceedings with respect to discontinuance of a claim. For example, under the former procedure an employer could request a "discontinuance conference" if the employer had reason to believe that the basis for the employee's receipt of compensation benefits no longer applied. The employer would file a Request for Discontinuance, which might result in a separate adversarial proceedings with respect to that issue.[3/]

You have now entered into the private practice of law and intend to concentrate in the area of industrial accidents, the area of expertise which you developed as Chief of the Division.

QUESTIONS:

1. May you, consistent with the conflict of interest law, represent a state employee in a workers' compensation claim if you did not previously participate personally and substantially in a compensable claim of that same employee?
2. Is a discontinuance conference or a Section 36 claim under the workers' compensation statute a separate particular matter from the original claim for compensation as a result of a work related injury?
3. Is calling the Attorney General's office in an attempt to adjust a workers' compensation case considered "appearing before that agency" as defined in §5(b)?

ANSWERS:

1. Yes, however you will be subject to the restrictions set forth in G.L. c. 268A, §5(b).
2. No.
3. Yes.

DISCUSSION:

1. G.L. c. 268A, §5(a)

Section 5(a) of G.L. c. 268A prohibits a former employee from representing a client in connection with a particular matter[4/] in which the state is a party or has a direct and substantial interest and in which he participated as a state employee. Participate is defined in §1(j) of the conflict law, in part, to participate in agency action "personally and substantially." As Chief of the Division, you will be deemed to have participated personally and substantially in a claim for compensation if you made any decisions, determinations, or approvals of a case. You will also be deemed to have participated personally and substantially in agency action if you actively supervised or consulted with others in their decisions, approvals or determinations. Therefore, because of your position as Chief of the Division, you must keep this restriction in mind whenever you are asked to represent a state employee if the date of injury occurred during the time that you were employed by the commonwealth. If, on the other hand, you are asked to handle a compensation claim made by a state employee, and the date of injury is after January 21, 1987, §5(a) would not prohibit such representation.

You have asked whether you may represent a state employee in a discontinuance conference or a Section 36 claim, if you had supervised the initial claim for compensation as Chief of the Division. The Commission concludes that a discontinuance conference or a Section 36 claim involves the same particular matter as the initial request for a claim by the employee to be compensated. The definition of particular matter includes claim and controversy. The claim is "in the matter of" the employee's claim for compensation, specific to a work-related injury. The fact that the compensation is payable in components or possibly through separate proceedings does not create distinct and separate claims for purposes of the conflict of interest law. Consequently, if you supervised a determination of an initial compensation payment regarding a specific employee, you may not subsequently represent that same employee in a discontinuance conference.

2. Section 5(b)

In addition to the restrictions of §5(a), you will also be subject to restrictions under §5(b). As a former state employee, you may not appear personally before any court or agency of the commonwealth for one year as an attorney for an employee in connection with a compensation claim which was under your official responsibility at any time within a period of two years prior to the termination of your employment. This provision would prohibit your appearance before the Attorney General's office regarding negotiation of a discontinuance conference or Section 36 claim if the employee were injured and was paid compensation benefits within two years prior to the termination of your employment.

You have asked whether this same restriction would apply if, in place of physically appearing before the Attorney General's office, you called the Attorney General's office in an attempt to adjust a worker's

compensation case. The Commission concludes that a former employee who contacts his former agency in person, in writing or orally, regarding a substantive matter, appears personally before that agency for purposes of the conflict of interest law. Thus, the Commission has consistently held that a member of the General Court may not "personally appear" for any compensation within the meaning of §4 by negotiating on behalf of a private client with a state agency. EC-COI-79-16. No distinction has been made between negotiating over the telephone, in person or in writing.

Prior to 1978, the Federal counterpart to §5 (18 U.S.C.A., §207) used the term "appear personally." In a law review article written in 1963 commenting on the language "appears personally," it was written: "The term 'appears personally' raises the question of whether physical appearance is essential. Probably, it includes the filing of documents . . . or even a letter of comments . . ." **The New Conflict of Interest Law,** 76 Harv. Law Rev., 1113 at 1155, April 1963.

The federal conflict law dealing with former employees was clarified in 1978, P.L. 87-849, October 23, 1978, because terminology such as "personally appears" was too ambiguous and there was a need to clarify and define. 1978 U.S. Code Cong. Adm. News, p. 4216, 4250. The law was strengthened to extend the prohibition against representing private parties on matters within the official's former responsibility from one to two years and to describe specifically what constitutes prohibited representation. The new law has been interpreted to prohibit "any contact" with any court, department or agency including "oral or written communications with intent to influence." **Id.** at 4368. The Commission's interpretation is thus consistent with the clarification of the federal law upon which G.L. c. 268A is modeled.

The Commission's interpretation carries out the intent of the restrictions applicable to former employees. One purpose of §5 is to ensure that former employees do not use their past friendships and associations within government to derive unfair advantage for themselves or others. **See, In the Matter of Thomas W. Wharton,** 1984 Ethics Commission, 182. One's influence is the same whether that influence is communicated orally, in writing or in person. To be sure, there may be certain communications which relate solely to procedure and which are so **de minimis** so as not to present an opportunity to derive unfair advantage. Consistent with the new federal law, this may be the case where the oral or written communication is not intended to influence. Calling the Attorney General's office in an attempt to adjust a workers' compensation case, however, is negotiation intended to influence and thus not fairly characterized as a **de minimis** communication.

The terms of §5(b) limit the application of the appearance restrictions to your "appearing personally." Therefore, it is permissible for your associates, or employees to negotiate with the Attorney General's office. The term personal means that the appearance of others will not be imputed to you even if the appearance is subject to your direction and control.[5]/

DATE AUTHORIZED: July 27, 1987

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/Since this opinion pertains for the most part to injuries which predated November 1, 1986, we will use the language of the previous workers' compensation statute which applied to all injuries preceding that date. G.L. c. 152. Currently, the Industrial Accident Board is called the Department of Industrial Accidents as a result of comprehensive amendments codified in St. 1986, c. 662, effective November 1, 1986.

[2]/The commonwealth is self-insured.

[3]/Under the new procedure, the employer has the right to discontinue payments unilaterally. The burden is then upon the individual employee to file a claim for further compensation.

[4]/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[5]/The phrase "appears personally" as used §5(b) should not be equated with the term "appearance" as it is used in the law of jurisdiction. An appearance is an act or proceeding by which parties to a civil action place themselves before the jurisdiction of the court, personally or by representation. An appearance may take the form of filing a document, posting a bond, accepting service, or physically appearing before a court. In some situations, courts have held that settlement negotiations and exchange of correspondence is sufficient to be deemed an appearance for certain purposes. **See, Christie v. Carlisle,** 584 P. 2d 687, 689, 94 Nev. 651 (1978). There is no indication that the general court, in enacting the conflict of interest law, intended the phrase "appears personally" to be synonymous with submitting to the authority of a civil court of law.

CONFLICT OF INTEREST OPINION
EC-COI-87-28

FACTS:

You are a member of a city Neighborhood Council (ANC) which provides neighborhood participation in municipal government decisions affecting land use, development and service delivery in a particular neighborhood. Council members were initially selected by the Mayor from residents who submitted 25 signatures from their neighbors. Since the ANC was created without law or ordinance, it has no power to compel agency action. Your power is limited to rendering advice as needed by various mandated City agencies. For example, the director of the city Redevelopment Authority (CRA) has from time to time invited neighborhoods within ANC's area to participate in discussion of projects in their applicable neighborhoods.

ANC has adopted bylaws but has not incorporated and, therefore, it is unclear whether the ANC has any legal status. The by-laws provide for open membership of anyone over 18 and regulates the conduct of meetings. The by-laws further provide that "to the extent that it is applicable in defining conflict of interest M.G.L.

c. 268A is applicable."[1]/

Recently the city has attempted to formalize the relationship between the City, the CRA and the neighborhood councils. This formalization has taken the form of a draft model agreement. The original draft agreement stated that neighborhood councils are to provide full and meaningful participation in City government and are to participate fully in municipal affairs. The revised draft eliminates the language "participate fully in municipal affairs" and substitutes "render advice in municipal affairs." Further, the original draft agreement stated that members of the neighborhood councils shall be special municipal employees within the meaning of G.L. c. 268A, the conflict of interest law. The revised draft eliminates any reference to c. 268A. The ANC is currently considering whether to execute this revised Agreement.[2]/

If the Agreement is signed, the City will delegate several responsibilities to the ANC. For example, the City agrees that it will notify ANC of any proposed change in zoning or land use. It agrees that no RFP for development of land or property owned by the City or the CRA will be issued prior to review by ANC. It also agrees to share communications resources and to give the ANC access to information from various City departments as well as the CRA, to enable the ANC to suggest improvements to land use and development decisions. The City will also obligate itself to consider all written recommendations and to provide written reasons for any decision inconsistent with those recommendations.[3]/

QUESTION:

Are ANC members currently municipal employees within the meaning of G.L. c. 268A?

ANSWER:

No. If the ANC executes the proposed agreement as drafted, however, the provisions of G.L. c. 268A may apply to ANC members.[4]/

DISCUSSION:

Generally, we have found that advisory committees created by law are public agencies, and its members are public employees. EC-COI-86-4 (DEQE Penalties Advisory Committee and cases cited therein). On the other hand, the Commission has generally concluded that unpaid members of citizens advisory committees which are not created pursuant to any statute, ordinance, rule, or regulation are not municipal employees within the meaning of the conflict law. In addition to taking into consideration the primary factor for the impetus for the creation of the position (whether by statute, rule, regulation or otherwise), the Commission also considers the degree of formality associated with the jobs and its procedures; whether the holder of the position will perform functions or tasks ordinarily expected of employees, or will be expected to represent outside viewpoints; and the formality of the person's work product, if any. Applying these criteria to ANC as presently constituted, we conclude that the ANC is not a municipal agency within the meaning of the conflict law and its members are not municipal employees.

Neighborhood councils, including ANC, were initially conceived for discussion forums, with a purely advisory role. Membership in the various councils has been flexible. For example, the Mayor has appointed members of some neighborhood councils while others have been elected, and in your neighborhood, membership is open to all residents of the neighborhood 18 years of age and older. As currently situated, the land use decisions to be reviewed by ANC and other neighborhood councils are subject to the discretion of the Mayor's office and/or the BRA. In the absence of any legal recognition that CNC is an integral part of the City's land use decisions, and in the absence of any legal requirements regarding the selection of council members, terms of office, removal, or formal recognition of the ANC's ability to act as City officials, we conclude that ANC is insufficiently organized and structured to be deemed an municipal agency for the purposes of G.L. c. 268A. This result is consistent with EC-COI-86-5, in which we found that an advisory committee organized to provide input into local land use decisions was not a public agency. The factors present in that case are present here: discretionary power, fluid membership, lack of organizational requirements spelled out in law or regulation, and the fact that committee members "are selected as representatives of constituency groups for the purpose of representing outside private viewpoints and for the purposes of receiving the viewpoints of a broad spectrum of the local community involved." **See, also** EC-COI-80-49; 82-81.

On the other hand, the execution of a contract like that currently proposed could result in the opposite conclusion. The execution of a contract between the City, the CRA and the neighborhood councils would reflect a determination of the importance of ANC's functions and the need to institutionalize ANC's input into a formal process. The proposed agreement reads like an ordinance and may be binding and enforceable. Given the explicit content of such an agreement, it may very well be that G.L. c. 268A would treat ANC no differently than any other advisory committee created explicitly by law if the contract is executed.[5]/

The contention that ANC should be deemed to be a municipal agency upon execution of the agreement is further supported by an examination of §8.8 of the proposed agreement. The City obligates itself to provide resources to ANC including installation and mainte-

nance of telephones and the establishment of an early notification system. These facts demonstrate an intent to have the councils perform service to the City.

DATE AUTHORIZED: December 9, 1987

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[1]/The intent of this language is unclear although it appears to reflect an intent to have the several principles of G.L. c. 268A apply to ANC members. Jurisdiction under G.L. c. 268A is, of course, a question of law which turns on the facts, rather that on the contents of a by-law.

[2]/A number of citizens have complained that participation in neighborhood councils is dependent on the adminstration's good will and that the advisory power of the councils results in their becoming partisan political tools. For this reason, the organization of neighborhood activists, has proposed establishment of elected neighborhood councils which are given power to deal with land issues. The organization has introduced an ordinance to be voted on by the city council. The ordinance would provide the neighborhood councils with approval powers over planning and development decisions. If approved, the ordinance may very well make ANC members municipal employees. See, page 4, infra.

[3]/We can make no assumptions as to the enforceability of any of the provisions of the proposed agreement.

[4]/Because the proposed contract is subject to revision, we will reserve any formal jurisdictional conclusion until a final agreement has been approved or submitted for review by ANC or the city solicitor. The analysis herein is intended to provide guidance concerning the factors the Commission would deem determinative.

[5]/The agreement would arguably provide ANC members with powers ordinarily executed by governmental personnel. It spells out that the ANC shall review draft requests for proposals (RFPs) and solicit proposals for BRA property. The agreement provides that ANC will play an integral role in formulating the terms that a RFP should take. Indeed, no RFP for development of land or property by the City or the BRA would be issued prior to review by ANC. ANC would also be given the authority to meet with applicants who are finalists in the consideration for designation by the City or the BRA. The City and the BRA would be obligated to consider all written recommendations received from ANC pertaining to matters within its jurisdiction and to give written reasons to ANC for any action inconsistent with a ANC recommendation.

CONFLICT OF INTEREST OPINION
EC-COI-87-29

FACTS:

You have recently withdrawn from your law partnership (Firm) and began employment with state agency ABC. Upon your withdrawal from the Firm, you were entitled to certain partnership profits which reflected work performed prior to your departure. Your share of the profits was not given to you upon your withdrawal, but will be distributed to you in installments over the next twelve months. The distribution calculation will be based entirely on work performed prior to the date on which you became a state employee, and will not include profits received by the Firm for services performed after that date. Your prior services for the Firm included your serving as special counsel to a state agency as well as representing private clients in state matters.

Although you have withdrawn from your partnership in the Firm, you have retained your membership in a venture capital fund, (Fund). The Fund is organized as a separate voluntary partnership, independent of the Firm, and is comprised of individual Firm partners who wish to participate in the Fund. Withdrawal from the Fund is permissible following the consent of a majority of the participating partners.

The Firm requires all partners to have the Firm prepare and complete, at no charge, their personal income tax returns for each calendar year in which they serve as a partner. The Firm's arrangement also extends to former partners who have withdrawn during a calendar year. You are eligible for this service for calendar year 1987.

You also serve as an unpaid member of the board of directors of DEF, a citizens' group concerned with certain public issues. DEF receives funding from state agencies.

QUESTIONS:

1. Does G.L. c. 268A permit your deferred receipt of partnership profits for services performed for the Firm prior to your becoming a state employee?
2. Does G.L. c. 268A permit you to retain your partnership in the Fund while you serve as a state employee and, if so, what limitations will G.L. c. 268A place on your official state activities?
3. Does G.L. c. 268A permit you to receive from the Firm at no charge the preparation and completion of your 1987 personal income tax returns?
4. Does G.L. c. 268A permit you to remain as a member of the board of directors of the Council?

ANSWERS:

1. Yes.
2. Yes; by virtue of your retention of fund partnership, however, you must abstain from participation as a state employee in matters affecting your partners' financial interests.
3. Yes.
4. Yes, subject to certain limitations.

DISCUSSION:

Upon your commencement of duties with ABC, you become a state employee within the meaning of G.L. c. 268A, §1(q). The application of G.L. c. 268A to each of your questions will be discussed in turn.

1. Deferred Compensation

The receipt by a state employee of additional compensation attributable to state contracts or fees for representing clients in state-related matters ordinarily raises concerns under both G.L. c. 268A, §§7 and 4. See, EC-COI-87-20. Where the additional compensation reflects solely services which an individual performed prior to becoming a state employee, it has been well

established that neither §4 nor §7 would be violated by the deferred receipt of such compensation. **See**, EC-COI-87-20; 79-27. **Attorney General Conflict Opinion Nos. 104, 147**; Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U.L. Rev. 299, 325 (1965). This conclusion is supported both by the statutory emphasis in the definition of "compensation"[1]/ on the rendering of services, as well as on sound policy. Newly appointed state employees may not practically be able to receive the complete payment of fees owed as of their final date of work in their private employment. It would, therefore, be unreasonable to place such newly appointed state employees in immediate violation of §§4 or 7 because of a compensation timing which they do not control.

These precedents will apply to your situation as well. As long as the distribution of Firm profits to you reflects solely services performed prior to your becoming a state employee, your deferred receipt of such profits does not violate §§4 or 7.

2. Fund Partnership

Nothing in G.L. c. 268A inherently prohibits your retention of your partnership in the venture capital Fund inasmuch as investment in the Fund was an opportunity which you acquired and exercised prior to becoming a state employee.[2]/

By virtue of your retention of status as a Fund partner, however, the abstention requirements of §6 will come into play. Specifically, §6 requires your abstention from participation as an ABC employee in any decision, determination, lawsuit or other particular matter[3]/ in which, in relevant part, a partner has a financial interest. The abstention requirements apply not only to matters specifically relating to the Fund, but also to all matters affecting the financial interests of your Fund partners. Because your Fund partners are also Firm partners, §6 prohibits your participation in matter affecting the Firm partners and, for practical purposes, in all matters involving the Firm's financial interest. **See**, Buss, **supra**, at 357 ("... even a partner's financial interest, growing out of a matter having nothing to do with the partnership affairs, is attributed to the state employee by statute."); Braucher, "Conflict of Interest in Massachusetts" in **Perspectives of Law** essays for Austin Wakeman Scott 3, at 24 (1964) ("it seems inadmissable to restrict the coverage of the financial interest of a partner to cases where the interest relates to partnership business").

Therefore, absent your receipt of a gubernatorial exemption from §6, you must abstain from participation in all cases in which the Firm partners have a financial interest. We presume that this would include the great bulk of cases represented by the Firm's partners or associates. The abstention requirements apply to your direct participation as well as supervision of such cases, and will continue to apply as long as you retain your partnership in the Fund.

3. Tax Return Service

The receipt by a state employee of a free service from an organization which has frequent dealings with the state ordinarily raises concerns under both §3 and §23(b)(2). **See, Commission Advisory No. 8.** EC-COI-87-7; 86-14. Based upon the facts you have presented, however, neither section would be violated. Even assuming that the Firm's free tax preparation service is something of substantial value, the service is not being offered to you for or because of your new status as state employee. To the contrary, the same service is customarily available to all partners who depart during a calendar irrespective of their subsequent employment destination. The purpose of the service is not related to your state employment but is rather a service which allows the Firm to prevent inadvertent tax errors by Firm partners, thereby protecting the Firm's reputation.

For similar reasons, your receipt of the tax service would not constitute the use of your position to secure an unwarranted privilege. **See**, G.L. c. 268A, §23(b)(2). This conclusion rests on the fact that the service is available to all former partners similarly situated and is a benefit which you acquired by virtue of your partnership, as opposed to your state employment. Were the free tax service to continue perpetually, however, we would need to examine the extent to which this privilege had been made available to other former partners. **Compare**, EC-COI-86-14 (substantial discount limited to certain public employees and not available to other public employees or to the general public violates §23(b)(2).

4. DEF Directorship

Should you retain your unpaid membership on the DEF board of directors, three sections of G.L. c. 268A will apply:

(a) Section 6

This section prohibits your participation as a state employee in any contract, decision or other particular matter in which DEF has a financial interest. This prohibition would come into play if DEF's applications for state grants are subject to review or oversight by your office. Absent your receipt of an exemption from your appointing official, you would be required to abstain from participation in such matters.

(b) Section 23(b)(3)

This section prohibits your acting in a manner which would cause a reasonable person to conclude that

the Council will unduly enjoy your favor in the performance of your official duties. Issues under this paragraph may arise if your office is asked to participate in controversies or issues in which DEF has taken a position. To dispel such an impression, you must publicly disclose in writing to your appointing official "the facts which would otherwise lead to such a conclusion." G.L. c. 268A, §23(b)(3). Alternatively, you may avoid the prohibited perception of §23(b)(3) by abstaining from participation as a state employee in any controversy or issue in which DEF has taken a position. If you were to resign from your DEF directorship, you would no longer be subject to §23(b)(3) or §6 in connection with DEF-related matters.

(c) Section 4(c)

This paragraph places certain limitations on your DEF activities. Specifically, §4(c) prohibits your acting as DEF agent in relation to any application, contract, decision or other particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, you could not contact state agencies on behalf of the DEF to request favorable consideration of DEF's grant application. On the other hand, you would not be acting as a DEF agent by your participation in general discussions of state-related issues at meetings of the DEF board of directors. See, EC-COI-83-145.

DATE AUTHORIZED: July 27, 1987

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[1]/"Compensation" is defined as any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or others.

[2]/We assume that the Fund will continue to be directed towards capital investments. Should the Fund change its investment direction and subsequently invest in bonds issued by state agencies, we would need to examine the application of §§7 and 23.

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

CONFLICT OF INTEREST OPINION
EC-COI-87-30

FACTS:

You are the head of state agency ABC. You have applied for a Fellowship at the private college. The Fellowship is designed to permit persons who have demonstrated leadership in particular professions to pursue a program of independent study. Fellows take non-credit courses at the college or at certain other schools. Fellows have an obligation to contribute to the educational experience of students by giving talks and slide presentations, advising students on their papers and thesis, or by serving, on occasion, as consultants in courses and at studios. Before the end of a year, Fellows prepare a written report describing their activities and their contributions to the school.

You followed the same application process required for all applicants. You state that you sought no special consideration because of your ABC position and none was accorded. The only significance of your ABC position was whether your duties were germane to the subject matter of the program. Application preferences were given to individuals in key professional positions who were continuing in their leadership roles to improve their professional environment. Applicants were asked to describe specifically how a Fellowship would enhance their abilities to make this kind of contribution. Applications were reviewed by a screening Committee of Fellows, none of whom are college employees. The award process is independent of the college and, once the Selection Committee makes its decision, it is routinely affirmed by the college.

You have identified three previous occasions in which you have participated in decisions which potentially may have a financial impact upon the college. Although there had been very few matters involving the college in the past, it is possible that you will be called upon to make decisions which may potentially have a financial impact on the college.

QUESTION:

If you commence the Fellowship in mid-September, will you be permitted to participate as an ABC employee in particular matters which may potentially impact the financial interest of the college.

ANSWER:

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

DISCUSSION:

As a state employee you are subject to the restrictions in the conflict law, the applicable sections of which are §§6 and 23. Each will be discussed in turn.

1. Section 6

Section 6 prohibits you from participating as an ABC employee in a particular manner in which to your knowledge, you or a business organization in which you are serving as officer, director, trustee, partner or employee, or any organization with whom you are

negotiating or have any arrangement concerning perspective employment, has a financial interest. We conclude that a Fellow is not an employee of the college within the meaning of the conflict law. A Fellow does not receive compensation in exchange for services rendered. Although the program provides Fellows with fixed allowances for certain incidental expenses, such allowances are more properly characterized as reimbursement rather than compensation.[1]/ Given that you are not an officer, director, trustee, partner or employee of the college by virtue of your fellowship, §6 would not prohibit your ability to participate in decisions which may potentially have a financial impact upon the college.

2. Section 23

Section 23(b)(3) prohibits a public official from acting in a manner which would cause a reasonable person, having knowledge of relevant circumstances, to conclude that any organization or person can improperly influence or unduly enjoy his favor in the performance of his official duties as a result of the person's relationship with the organization. A reasonable person might conclude that you will be unduly influenced in the performance of your duties if you are called upon to make an objective unbiased decision regarding the college at the same time that you are a Fellow. There is, however, a mechanism by which you may dispel any appearance of undue influence or favoritism. Specifically, you may disclose in writing to the Governor the facts which would otherwise lead to such a conclusion. In other words, if prior to making any specific decision regarding the college you disclosed to the Governor the fact of your Fellowship, and the nature of the decision you are required to make, you will have fulfilled the requirements of §23(b)(3), and will have dispelled any appearance of improper influence.[2]/

DATE AUTHORIZED: August 17, 1987

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[1]/We understand that under limited circumstances scholarship assistance may be available. Such assistance, if given an exchange for specified services, may constitute compensation. We understand, however, that you will not avail yourself with any scholarship assistance. If this is not the case, you should seek further clarification on this point.

[2]/Because you have sought and received the approval of your plans from the Governor and your cabinet secretary, it is unnecessary to determine whether stricter standards on your activities would be appropriate under G.L. c. 268A, §23(e).

CONFLICT OF INTEREST OPINION
EC-COI-87-31

FACTS:

You are the chairman of the ABC Board of Health (Board). The Board develops and implements health policies for the Town. The Board has the statutory authority to promulgate regulations concerning environmental health, including house drainage and sewer connections. G.L. c. 111, §127. However, it is the Water and Sewer Department which approves and licenses water and sewer connections.

The Board also enforces provisions of the State Environmental Code regarding on-site subsurface disposal systems. G.L. c. 21A, §13. The Board issues permits for the construction of septic systems and conducts site examinations for deep hole and percolation tests. 310 CMR §15.02(1) and 315.03 (1). In practice, it is the Health Agent who actually performs the inspections and issues the permits.

You install septic systems and make water and sewer service connections. The permits for this work may be applied for by you, the general contractor or engineer on the job or the owner of the property. You, as the installer, are listed on the permit applications.

You also own a small, local restaurant. The Town Health Agent, who performs inspections of and issues permits for all food establishments, similarly licenses your restaurant.[1]/

QUESTION:

1. While you serve as a member of the Board, may you also be the owner of a local restaurant?
2. While you serve as a member of the Board, may you also install local septic systems?
3. While you serve as a member of the Board, may you also connect local water and sewer service lines?

ANSWERS:

1. Yes, subject to the limitations discussed below.
2. No.
3. Yes, provided that you are designated as a "special municipal employee."

DISCUSSION:

In your capacity as a Board member, you are a municipal employee for purposes of the conflict of interest law. G.L. c. 268A, §1(g). Consequently, you are subject to the provisions of the law.[2]/

1. Restaurant Ownership

(a) Section 19

In your capacity as a Board member, you are prohibited from participating[3]/ in any decision, determination or other particular matter[4]/ in which you have a financial interest. G.L. c. 268A, §19(a). The financial

interest must be direct or reasonably foreseeable. EC-COI-84-123. In light of the fact that you own a restaurant, it is reasonably foreseeable that a Board determination concerning your restaurant would affect your financial interest. Accordingly, you may not participate, as a Board member, on matters affecting your restaurant. For example, you obviously cannot participate as a Board member in a hearing to determine whether to suspend your own food service permit. **See**, EC-COI-86-13 (where the police chief may not act on matters affecting his wife's liquor establishment).

You also may not act on matters affecting your restaurant's business competitors.

> Because the consequence of an investigation of an infraction by a competitor may be the suspension or termination of the competitor's . . . license, the removal of a competitor would have a foreseeable financial impact on [your own establishment]. EC-COI-86-13 citing EC-COI-81-118; 82-95; 82-98.[5]/

The Board of Selectmen, your appointing authority, may grant you an exemption from §19 by giving you written permission to participate in those matters in which you have a financial interest. G.L. c. 268A, §19(b)(1). The Board of Selectmen's determination to grant such permission must be based on the conclusion that the financial interest at stake is not so substantial as to be deemed likely to affect the integrity of your services as a Board of Health member.

(b) Section 23

The conflict law also prohibits you from using your position on the Board to gain unwarranted privileges of substantial value which are not properly available to similarly situated individuals. G.L. c. 268A, §23(b)(2). For example, as Chairman of the Board, you may not put implicit or explicit pressure on the Health Agent or other Board members to treat your restaurant differently from other food service establishments with respect to licenses, permits, inspections and the like. **See**, EC-COI-86-13.

(c) Section 17

In addition to the restrictions set forth above, you also you may not represent your restaurant (i.e., act as its agent) in its dealings with the Town. For example, you may not discuss matters such as licensure, inspections, potential health code infractions or their remedies with the Health Agent. **See**, EC-COI-83-17 (a public employee may not apply to his own Board on behalf of another for a permit for the removal of underwater archaeological resources); 80-53 (a public employee may not be the agent for a private party in applying for or renewing licenses to family day care homes). **See also**, EC-COI-87-17; 83-5. This issue becomes particularly sensitive if a representative of your restaurant must actually appear before a town agency. Pursuant to G.L. c. 268A, §17(c), you may not make the appearance.

2. Installation of Septic Systems

As applied to your case, §17 will prohibit your outside work installing septic systems. Section 17 generally prohibits a municipal employee from acting as the agent for or being paid by anyone (other than the town or a town agency) in relation to any decision, determination or other particular matter in which the town is a party or has a direct and substantial interest.[6]/

Where you operate your own business installing septic systems, and are the only installer on the job, the work you do is presumptively "in relation to" the septic permit. Absent facts to overcome this presumption, you are prohibited from engaging in this privately paid work.[7]/

In a prior opinion, the Commission concluded that the application for a Board permit, the decision to grant the permit, decisions regarding the oversight of the . . . operation . . . [pursuant to the permit] are all particular matters which are within [a Board member's] official responsibility. EC-COI-83-17.

Thus, the board member (and the only consultant on the job) was not permitted to receive compensation from the permit holder for work done pursuant to the permit. **Id.**

An application for a septic permit, the decision to issue the permit, the permit itself as well as the Health Agent's determination that a septic system installation has been done correctly, are all "particular matters" for purposes of the conflict of interest law. The Town is both party to these matters and has a direct and substantial interest in them in light of the town's extensive regulation in local health matters.

Your proposal to be privately paid for work done pursuant to a septic permit is presumptively "in relation to" the permit and may well be "in relation to" many of the other determinations made concerning the installation of a septic system. **See**, EC-COI-83-17 (where a state employee may not be privately paid to do work which is subject to the state's oversight and final approval); **See also**, EC-COI-83-155 (where being paid by a private party to fulfill licensure requirements is "in connection with" a particular matter); EC-COI-81-140 (where an action taken to satisfy the initial and ongoing conditions for nursing home licensure is "in connection with" the determination to approve the license).

Furthermore, the Commission has consistently held that a public employee may not appear on behalf of a private party in dealing with a public agency. **See**, EC-COI-84-22 (where one who does plumbing work for a private party and meets with the plumbing examiner

concerning the work is considered acting as an agent in connection with a particular matter); 87-3 (where a state employee may not act as a private party's agent in dealing with other state employees concerning the oversight of a private development project); 87-4 (where a public employee may not meet with other public officials on behalf of another "to resolve problems which have arisen in the [course of] implement[ing] . . . [the private project]. . . ").

Thus, as a septic system installer, you would be prohibited from meeting with the Health Agent on behalf of the private party for whom the installation was done.

The conclusion that you may not be paid by or act as the agent for a private party concerning septic installations is consistent with the policy considerations of §17. Section 17 is intended to prevent the divided loyalties an individual may feel if he both is in a public position which regulates a particular industry and is also paid by a private party to engage in that regulated work. **See**, EC-COI-87-13 (where a public employee may not be privately paid in connection with any matter within his official responsibility).[8]/

3. Connection of Water and Sewer Hookup

(a) Section 17

Although septic installations are approved by the Board or its Agent, water and sewer service connections are approved by the Town's Water and Sewer Department. Because approvals for water and sewer service connections are granted by a town agency other than the one where you hold a public position, you may be privately compensated to do this work provided that you are designated as a "special municipal employee." You would qualify for this designation upon an affirmative vote of the Board of Selectmen. **See, supra**, footnote 6 at page 4.

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[1]/In rendering this opinion, the Commission has relied on the facts as stated by ABC town officials and has not made an independent investigation of those facts.

[2]/The advice provided in this opinion is intended to guide your prospective conduct and does not purport to review the propriety of your prior activities.

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

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

[5]/There are inherently local factors which would influence the determination of the scope of competitive area for your restaurant; your appointing official is in a better position than the Commission to identify whether other restaurants should be considered your competitors. See, EC-COI-87-1.

[6]/As a Board member, you have not been designated a "special municipal employee." See, G.L.c. 268A, §1(n). Because the Board position is unpaid, you are entitled to be so designated by the Board of Selectmen. If you are designated a "special," you are only prohibited from being paid by or acting as agent for non-town parties if the matter (for which you are being paid or acting as agent) is (1) one in which you already participated as a municipal employee, or (2) is or, within one year, was the subject of your official responsibility, or (3) is pending in the Health Department or the Board of Health (if you have served more than sixty days of the past 365 days). Thus, if you are a "special", there are fewer restrictions on your ability to do outside work on matters which, in essence, do not concern the Board of Health. The result in the matter of septic system installation would be unchanged by this status. On a different set of facts, however, this issue could be determinative of a different result. **See, infra**, Part 3 at 6.

[7]/Certain facts may overcome the presumption that all work done pursuant to the permit is "in relation to" the permit. For example, a municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated "in relation to" the permit which allows the construction. Furthermore, certain permits which authorize a major construction project (e.g., a zoning municipal reuse permit to convert a school building into condominiums) will not necessarily render all work done on the project, e.g., interior painting, "in relation to" the permit). Although in any particular case there may exist facts relevant to overcome the presumption, we know of none applicable to your case.

[8]/You are also prohibited from being paid by or acting on behalf of a non-public entity in applying for a septic permit. See, EC-COI-87-17; 83-17; 83-5; 80-53. **See also**, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. L.Rev. 299, 328 (1965). While we understand that you presently do not take any part in the septic permit application process, we note the prohibition in case it becomes relevant in the future.

CONFLICT OF INTEREST OPINION
EC-COI-87-32

FACTS:

The ABC Fire District (District) is governed by a five-member elected Prudential Committee (Committee). The Committee is the appointing authority for the fire chief, who is the direct supervisor of each full-time and call firefighter. Three Committee members have immediate family members who are District firefighters.

The Committee signs and approves the treasury warrant authorizing the payment of compensation to District firefighters. The authorization process requires the chief to review and approve the accuracy of the payroll and to verify the hours in which the firefighters performed services during the payroll period.

QUESTION:

Is the action of a member of the Prudential Committee signing the treasury warrant for the payroll of the firefighters personal and substantial participation within the meaning of §1(j) of the conflict law?

ANSWER:

No, unless the payroll item which is signed is in dispute.

DISCUSSION:

The definition of "participate" requires that the participation be personal and substantial, §1(j), and excludes acts which are ministerial or insubstantial. **In the Matter of John Hickey**, 1983 SEC 158, 159. In its recent Advisory on Nepotism,[1]/ the Commission indicated that approval or authorization of salary increases for an immediate family member would constitute personal and substantial participation in a matter in which the family member had a financial interest. The Commission left open, however, the question of whether the signing of a payroll warrant would, by itself, constitute personal and substantial participation. The Commission now concludes that such a signing does not amount to personal and substantial participation, absent a dispute over the payroll item.

The Federal Office of Governmental Ethics has delineated "participate personally and substantially" through clarifying regulations as that term is used in setting restrictions on former federal government employees. 5 C.F.R. §7.5(d). The regulation states:

> substantiality means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than a official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. . .

In this case the signing of the warrant is peripheral to the determination of the correctness of the hours worked. It is the fire chief and not the Committee who certifies the hours of each firefighter. If the hours are certified by the fire chief, the firefighter is entitled to the appropriate compensation. The signing of the warrant which authorizes the paycheck is therefore ministerial and cannot be characterized as substantial.[2]/ If the number of hours certified by the fire chief became an issue or the subject of dispute, however, then the signing of the warrant by any member of the Committee could constitute substantial participation. In such a case abstention will generally be required if the dispute concerns an immediate family member. **See** G.L. c. 268A, §19.

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[1]/**Commission Advisory No. 11, issued December 15, 1986.**

[2]/This opinion is limited to the certification of a payroll by an appointing authority which does not actively supervise employees.

CONFLICT OF INTEREST OPINION
EC-COI-87-33

FACTS:

You are an elected member of the ABC Board of Selectmen. Your son is a patrolman with the town police department. The police department is comprised of one chief and several sergeants and patrolmen. The Chief has proposed the creation of a new position of Captain. Only current sergeants will be eligible for the newly created position of captain. Creation of the new position of captain requires approval of the board of selectmen, and if appointed, will create an opening for sergeant. If this occurs, your son would be interested in being promoted to the position of sergeant.

QUESTIONS:

1. Does G.L. c. 268A permit you, as a board of selectmen member, to participate in a vote to create the new position of captain?
2. If the board of selectmen votes to create a new position of captain, may you participate in a discussion or vote relative to the promotion of one of the four current sergeants?

ANSWERS:

1. No.
2. No.

DISCUSSION:

Members of the board of selectmen are municipal employees within the meaning of the conflict of interest law and, therefore, are subject to its provisions. G.L. c. 268A, §1(q). The conflict of interest law prohibits a municipal employee, such as a member of the board of selectmen, from participating in a particular matter in which the employee, or a member of her immediate family, has a financial interest.[1]/G.L. c. 268A, §19(a). A determination to create a new position of captain is a particular matter, G.L. c. 268A, §1(k), and any discussion or vote on this matter would constitute participation. **See, Graham v. McGrail**, 370 Mass. 133 (1976); EC-COI-82-10. The remaining issue is whether your son, an immediate family member, has a financial interest in the matter. The disqualifying financial interest in a determination to create the captain's position must be "direct and immediate or at least reasonably foreseeable" EC-COI-84-123; **see also**, 84-96 and 84-98.

In this case, the decision to create the new position of captain would foreseeably impact the financial interest of your son.

This is because you have stated that the appointment of captain will create a vacancy in one of the four sergeant positions, and your son has a current interest in being promoted to sergeant. Thus, there is a line of causation which will impact on your son. **Cf.** EC-COI-87-16 (where the individuals who might have potential interests in a future vacant elected position were not

sufficiently identifiable).

Since the opening for the sergeant's position will affect your son's financial interest as long as he is interested in the promotion, you will be prohibited from participating in any decision to appoint any one of the four sergeants to the position of captain. Similarly, you are prohibited from participating in the selection of a sergeant if your son in fact applies for the resulting vacant position.

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[1]"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters.

CONFLICT OF INTEREST OPINION
EC-COI-87-34

FACTS:

You are a partner in a law firm. A former employee of the Department of the Attorney General is also a partner in that firm. You have for some time represented certain clients in connection with regulations which were initially proposed by the Department of the Attorney General while your partner was employed in the Attorney General's Office. The former employee reviewed a draft proposal of certain regulations suggested changes, and subsequently met with various industry representatives regarding that draft. After those meetings and further review, the Attorney General's Office ordered the proposed regulations withdrawn.

The Attorney General's Office has continued the process of drafting and reviewing the same regulations and has recently issued a final draft (entitled XYZ Regulations). There are substantive differences between the final draft and the original draft initially proposed. The draft regulations, however, retain the same title, contain verbatim many of the same provisions as the earlier draft and the tables of contents of the drafts are nearly identical.

The subsequent draft is presently being reviewed by the Department of the Attorney General in cooperation and consultation with various industry representatives. You have been asked to continue your representation on behalf of your clients in discussing and negotiating these regulations. You intend to make a number of arguments which assert that the proposed regulations are overburdensome; they do not take into account well recognized custom and usage in the specific industry; the Attorney General did not properly take into consideration the views of the industry prior to announcement of the final draft; and the regulations are overly broad and therefore beyond the authority of the Attorney General.

After the regulations are formally promulgated you intend to continue to represent your clients in connection with the regulations.

You have recognized that if the former employee were prohibited by G.L. c. 268A, §5(a) from representing your clients before the Attorney General's Office, that you too would be so prohibited for a one-year period under §5(c) of the conflict law. You maintain, however, that the former employee would not be so prohibited in representing your clients before the Attorney General's Office within the meaning of §5(a).

QUESTIONS:

1. Does G.L. c. 268A, §5(a) permit the former employee or his law partners to represent private clients in negotiations, discussions or other communications with the Attorney General's Office in connection with the continued promulgation of the draft regulations?
2. Once the regulations are formally promulgated, does G.L. c. 268A, §5(a) permit the former employee and his law partners to represent private clients in connection with the application or interpretation of the regulations?

ANSWERS:

1. No.
2. Yes.

DISCUSSION:

You contend that the proposed regulations under consideration do not constitute "particular matters" within the meaning of §5(a). While it is true that the Commission has ruled that regulations, once promulgated, are not "particular matters", we also have held that the decisions and determinations made during the process of promulgation are "particular matters." EC-COI-81-34. In this case the proposed regulation is in draft form and policy considerations are still on the table. We conclude that the former employee would be prohibited from challenging the policy, judgment or wisdom of those draft regulations. The XYZ regulations are part and parcel of the promulgation process which included initial draft regulations. In substance, the two regulations are similar, and indeed, most of the provisions have been copied verbatim. See, EC-COI-81-34 (that a prior set of regulations were no longer in effect but had been superceded by a single regulation did not result in the conclusion that the subsequent single regulation was part of a separate promulgation process).

The former employee rendered advice and made decisions or determinations regarding the draft form of XYZ Regulations. Therefore, he participated personally and substantially in the promulgation process and made

decisions or determinations regarding the public policy of some or all of the regulations in this set. If the former employee were now to appear on behalf of a private client who was potentially affected by these regulations and opposed their promulgation as drafted, he would be, as stated in EC-COI-81-AA-34, "in essence seeking to tear down that which he had helped to build." Thus, the former employee is permanently prohibited from challenging the wisdom or legality of the draft regulation and you are similarly prohibited for a one-year period after the termination of the employee's state service.[1]/

In EC-COI-81-34, we recognized that, once the regulation is in final form, there exists a permissible scope of representation. We held that a former state employee may properly represent a private party in a case related to the interpretation or application of a regulation which he had previously participated in drafting as a state employee.[2]/ This interpretation is consistent with the policy that lawyers who develop a specialized area of expertise should not be perpetually precluded from representing private clients in that area of expertise. Such a ban would unduly restrict the livelihood of specialized attorneys and deprive clients of needed expertise. The Commission held, however, and reaffirms that such representation may not include an attack on the validity of the regulations.

In EC-COI-81-34, we recognized that such a subsequent challenge to the validity of regulations may take many forms. For example, there are certain prerequisites to the adoption of regulations which are set out in G.L. c. 30A, §§2 thru 6. A challenge based on a claim that the agency did not properly meet the prerequisites to the adoption of regulations would be a challenge to their validity. A complaint that an agency did not properly take into consideration the views of the industry which it regulates in adopting a draft set of regulations, although not technically a challenge pursuant to G.L. c. 30A, §2 thru 6, would nevertheless be a challenge to the decisions made in the process by which the regulations were formulated, and therefore, would be a challenge to the validity of the process.[3]/

Whether a particular representation will be considered a challenge to the validity of regulations or merely related to their interpretation or application must be decided on a case-by-case basis. If there is a question as to whether a particular form of representation involves a challenge to validity or an issue of application, you may obtain a subsequent opinion specific to the form of representation in question.

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[1]/This conclusion would apply equally to representation in support of the wisdom of the draft regulations, since such communication would also be in connection with determinations made in the promulgation process.

[2]/This interpretation of the conflict law is consistent with the current interpretation of federal law as enunciated in the Code of Federal Regulations. In discussing the restrictions on former federal government employees, the Federal Office of Governmental Ethics provides examples. One example is as follows:

> An employee is regularly involved in the formulation of policy, procedures and regulations governing department procurement and acquisition functions. Participation in such activities does not restrict the employee after leaving the government as to particular cases involving the application of such policy, procedure or regulations. 5 CFR §737.5(7)(c).

[3]/These examples are provided for illustrative purposes. Other examples include, but are not limited to, a claim the regulation is "arbitrary, capricious, or unlawful", is beyond the authority of the agency to promulgate, is unconstitutional (i.e. irrational), is contrary to the plain language of the enabling statute, or did not take into consideration those factors which the enabling statute or law requires be taken into consideration. All of these standard claims are a challenge to the underlying assumption of the lawfulness of the promulgation process. EC-COI-81-34.

CONFLICT OF INTEREST OPINION
EC-COI-87-35

FACTS:

You are the town counsel for a Town (Town). You seek formal guidance from the Commission in construing G.L. c. 268A, §20, §21A and sections of the recently enacted town charter.[1]/ Under the terms of the charter, a full-time town administrator will be appointed. During the interim period, the charter authorizes the Board of Selectmen (Board) to either act as the town administrator or to appoint a temporary town administrator. Under the charter, the Board may designate "a town employee, other person, or a member of the Board of Selectmen to exercise the rights and perform the duties of the Town Administrator during any vacancy caused by the temporary absence of the Town Administrator."

The Board has unanimously voted to appoint ABC, a Board member, as the temporary Town Administrator, and ABC has received compensation in the temporary position. In response to a request for an advisory opinion pursuant to G.L. c. 268A, §22, you advised ABC that approval by the town voters of the provisions of the town charter exempted him from the 30-day waiting period of G.L. c. 268A, §21A[2]/ and from the outright prohibition on selectmen accepting other municipal positions contained in G.L. c. 268A, §20[3]/

QUESTIONS:

1. Does G.L. c. 268A, §20 permit ABC to be appointed and compensated as the temporary town administrator?

2. Does the Town's purported compliance with G.L. c. 268A, §21A or the charter provisions relating to interim appointments result in ABC's exemption from the prohibition of §20?

ANSWERS:

1. No.
2. No.

DISCUSSION:

The plain language of G.L. c. 268A, §20 prohibits a selectman from being "eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter." The General Court adopted this restriction in response to its concern that selectmen would or could acquire additional municipal positions by virtue of their incumbency. See, EC-COI-82-107. "The enactment of the six-month waiting period therefore reflects the legislature's view that the period is desirable in light of the authority and visibility which accompanies the office of selectmen." EC-COI-83-1.

The Commission has consistently applied this language to prohibit a selectman from acquiring a second compensated position in the same municipal government until a six-month waiting period has elapsed following his service as a selectman. See, EC-COI-87-12; 83-1; 82-107.[4]/

We conclude that the plain language of §20 also applies to ABC, inasmuch as he has been appointed to a compensated position while a member of the Board of Selectmen. He can comply with §20 by refraining from receiving compensation as temporary town administrator, thereby divesting his financial interest in a contract made by the town. He would not comply with §20 solely by declining compensation as a selectman, because he would retain his impermissible financial interest in his town administrator contract. He would, in effect, be benefitting financially from his incumbency.

Even assuming that ABC's temporary appointment could be regarded as having been approved by an annual town meeting within the meaning of §21A, compliance with §21A does not supercede the restrictions of §20 applicable to selectmen. In EC-COI-83-1, we expressly held that the selectman provisions of the later statute, §20, prevailed over the earlier, less restrictive provisions of §21A. We see no reason either as a matter of law or policy to alter this conclusion. In particular, we cannot infer that the General Court intended to permit an annual town meeting to override the express prohibitions of §20.

With respect to the Town's compliance with the temporary appointment provisions of the charter, we see no conflict between the express terms of the charter and G.L. c. 268A, §20. The charter authorizes the appointment of a selectman as acting town administrator but does not, by its terms, authorize the appointee to receive compensation in carrying out the temporary duties. Absent receipt of compensation for additional duties, a selectman does not violate §20. We decline to assume a conflict where none exists between the terms of G.L. c. 268A and the charter. Should such a conflict arise, however, absent a clearly stated intent by the General Court, we will regard the plain language of G.L. c. 268A, §20 as prevailing over the conflicting charter.[5]/

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[1]/Prior to the adoption of the charter, the Attorney General determined that the charter was "not inconsistent with the constitution and laws enacted in pursuance thereto." You do not contend, nor do we conclude the Attorney General's review to constitute a determination regarding the application of G.L. c. 268A to the appointment of a temporary town administrator.

[2]/G.L. c. 268A, §21A provides that, absent town meeting approval or completion of a 30 day waiting period following completion of services, "no member of a municipal . . . board shall be eligible for appointment . . . by the members of such . . . board to any office or position under the supervision of such . . . board."

G.L. c. 268A, §20, in relevant part, provides that no "selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter."

[3]/Pursuant to 930 CMR 1.03, the Commission's Executive Director reviewed your advisory opinion and advised you on August 3, 1987 that the Commission staff did not concur with your conclusion or reasoning. You have recently requested that the full Commission review your advisory opinion.

[4]/The only exception to this rule, applicable to individuals who serve as selectmen in small towns and have been classified as special municipal employees, is not relevant here. See, EC-COI-82-106; 87-36.

[5]/This advisory opinion is prospective and does not address the propriety of conduct which has already occurred. In particular, the question of whether ABC improperly participated in an appointment as temporary town administrator cannot be addressed in the context of an advisory opinion.

CONFLICT OF INTEREST OPINION
EC-COI-87-36

FACTS:

You are a former member of a Board of Selectmen (Board). While a Selectman, you were designated a special municipal employee.[1]/ The Board is currently seeking applicants for the position of Alternate Building Inspector. The Alternate Building Inspector works under the supervision of the Board. You would like to apply for the job.

QUESTION:

Are you eligible for appointment to the position of Alternate Building Inspector?

ANSWER:

Yes, provided you have waited thirty days from the date you completed your services as Selectman.

DISCUSSION:

Your question requires us to reconcile two seemingly contradictory aspects of the conflict law: the require-

ments of §21A and §20(g)¶2. On the one hand, §21A requires a municipal board member to wait thirty days from the date he terminates his board membership before he is eligible for appointment to a position under the supervision of his board. Alternatively, §20(g)¶2 requires a selectman to wait six months after he terminates his selectman's services before he is eligible for appointment to an additional municipal position. In essence, your question is whether a "special municipal employee" selectman must follow the six month "cooling off" period required under §20(g)¶2 or the less restrictive thirty day period under §21A.

We conclude that the provisions of §20(g)¶2, including the six month "cooling off" period, only apply to regular selectman.[3]/ Consequently, as a "special selectman" you are subject to the provisions of §21A of the conflict law, and are required to wait thirty days from the date of your resignation as a Selectman before you are eligible for appointment as Alternate Building Inspector.[5]/

This conclusion reaffirms a 1982 Commission opinion. In EC-COI-82-106 we analyzed the then recent 1982 amendment to the conflict of interest law (St. 1982, c. 107; G.L. c. 268A, §20(g)¶2)[4]/ which set forth rules for town employees who also wanted to be selectmen. We were specifically asked to rule on whether a town school teacher who was elected to the position of selectman and designated a "special" could continue to receive the compensation from both jobs in light of the 1982 amendment. The amendment provided, in part, that town employees could be elected as selectmen if, among other things, they received only one salary. We concluded that the 1982 amendment (G.L. c. 268A, §20(g)¶2) did not repeal the earlier provisions for "special municipal employees" but rather

> was intended to apply only to those selectmen who were previously prohibited from receiving compensation for a second municipal office or position and not to selectmen who had been classified as special municipal employees under §1(n). EC-COI-82-106.

The Commission's present finding that all the provisions of that 1982 amendment (including the requirement that a selectman wait six months from his termination as selectman before he may obtain additional town appointments) do not apply to "special" selectmen is consistent with and relies on our previous opinion. This conclusion is further based on sound rules of statutory construction and supported by the Commission's obligation to give the conflict law a workable meaning. **See, Graham v. McGrail**, 370 Mass. 133, 140 (1976).

The 1982 amendment for selectmen "cannot be read in isolation but must be considered in connection with . . . the main object to be accomplished." **Robertson v. McCarte**, 13 Mass. App. 441, 442 (1982) quoting **Board of Education v. Assessor of Worcester**, 368 Mass. 511, 513 (1975). The goal of the 1982 amendment was to allow selectmen to hold two town positions.[5]/ This made no sense as applied to "special" selectmen who already could hold two town jobs and be paid for both.[6]/ **See**, EC-COI-82-106.

The language of the amendment itself supports this reading. The amendment provides that nothing in §20 should be construed to prohibit a town employee from also being a selectman provided that "such selectman shall not . . . receive compensation for more that one position . . ." G.L. c. 268A, §20(g)¶2. The words "such selectman" can reasonably be read to place a limitation on the application of §20 to only those selectmen who otherwise were unable to hold two positions, i.e., regular selectmen. "It is not to be assumed that words in a statute have no force or effect." **Gilliam v. Board of Health of Saugus**, 327 Mass. 621, 623 (1951).

In construing the provisions of §21A (thirty day waiting period) and §20(g)¶2 (six month waiting period) we must attempt "to give reasonable effect to both . . . and create [ ] a consistent body of law." **Boston v. Board of Education**, 392 Mass. 788, 792 (1984). Reasonable effect is given to both if §20(g)¶2 applies only to regular selectmen. To conclude otherwise would have special selectmen follow only some of the provisions of §20(g)¶2 only some of the time.[7]/ The construction of §20(g)¶2 outlined herein is one "in harmony with prior enactments . . . [and] give[s] rise to a consistent body of law." **Hadley v. Amherst**, 372 Mass. 46, 51 (1977).

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[1]/A selectman may be designated as a "special municipal employee" if he serves in a town with a population of 5000 or less and his position has been classified as such by the Board of Selectmen. G.L. c. 268A, §1(n).

[2]/Were you not a "special municipal employee" selectman, you would be subject to all of the requirements of §20(g)¶2. Regular selectmen must follow the mandatory "cooling off" period of six months, after they terminate their selectman services, before they are eligible for appointment to any additional paying municipal positions. See, EC-COI-87-35 issued this day.

[3]/If the Alternate Building Inspector position were not under the supervision of the Board of Selectmen, a former special selectman would have no waiting period for eligibility to appointment to that job. It is important to note that the provisions of §21A apply only when a municipal employee seeks a job under the supervision of his own or former board.

[4]/This 1982 amendment provides that section 20 of the law "shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have a right to chose which compensation he shall receive; and provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and provided, further that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties may require." G.L. c. 268A, §20(g)¶2.

[5]/The 1982 amendment was enacted in response to the **Walsh v. Love**, Norfolk Superior Court Civil Action No. 132687 (July 2, 1981) and a Commission Advisory Opinion EC-COI-80-89, where it was unlawful under the conflict of interest law for a full-time school teacher also to hold the position of town selectman and be paid in both positions.

[1]/G.L. c. 268A, §20(c) and (d) permit special municipal employees, including selectmen, to hold a second paying town job provided that they either receive the Board's approval or that the activities of one job do not require participation in the activities of the agency of the second job.

[2]/For example, §20(g)¶2 provides that a selectman is ineligible for appointment to any municipal position which he did not hold before his election. The exemptions for "specials" renders this provision inapplicable to "special" selectmen. If the six month waiting period of §20(g)¶2 applied to a "special" selectman, the selectman could be required to wait six months to apply for the same job which he could have held while he was a selectman. This result would occur by applying only some of the provisions of §20(g)¶2 to specials. This illogical manipulation of the conflict law surely was not the Legislature's intention in enacting the 1982 amendment.

CONFLICT OF INTEREST OPINION
EC-COI-87-37*

FACTS:

Beginning in April, 1985, the state Office of Management Information Systems (OMIS) procured bids from interested vendors for stand-alone micro-computers. The original invitation for bids, dated April 30, 1985, has subsequently been amended and extended from time to time. In basic terms, the invitation lists a number of system configurations and each configuration contains technical specifications.[1]/ OMIS accepts the lowest two bidders pertaining to each configuration. The selected vendors are called "blanket vendors" because any state agency may buy equipment from the vendor without having to go through the usual bidding procedures applicable to an RFP. Each of the 46 vendors which currently participate in the program signs the same blanket contract with the state. The blanket contract in question here is limited to stand-alone micro-computers. The contract, which is one out of seventeen blanket contracts administered by OMIS, is distinct from the others in that it contains a so-called employee discount provision which is a mandatory condition applicable to all bidders. Specifically, the discount term provides that employees may purchase any of the listed micro-computers and compatible peripheral equipment and software at a discount of at least 20%. Under this discount procedure, employees interested in obtaining a micro-computer go directly to the contract vendor and present to the vendor appropriate state employee identification. According to the terms of the contract, the vendor is then obligated to provide the employee a 20% discount for the applicable equipment or software.

OMIS distributes an informational mailing to approximately 850 department heads or data processing clerks for each state agency. You estimate that at least two people in each agency receive OMIS mailings. A copy of the blanket contract for stand alone micro-computers, with the accompanying vendor list, configurations, technical requirements, and the availability of the employee discount, would have been received by such department heads and/or data processing clerks at least once a year since April of 1985. Included in the package from OMIS is a notice for employees announcing the opportunity to purchase micro computers at significant discounts. This notice contains a statement from OMIS requesting that copies of this notice be posted in all employee work areas. The degree to which state employees are actually notified of the employee discount depends on the diligence of the department heads and data processing clerks in posting the OMIS notice.

You have stated that use of similar employee discounts is prevalent in the private and public sector for major customers who enter into high volume or high dollar level purchase agreements. For example, IBM has an agreement with Travelers Insurance Company whereby employees of Travelers may purchase equipment at a substantial discount by paying the corporation directly for the computer equipment. OMIS, while providing for a similar discount, has chosen not to act as intermediary so as to avoid the administrative cost of holding state employees' money.

You state that no part of the employee discount cost is built into the state's contract costs for micro-computer equipment given the fact that OMIS accepts the two lowest compliant bidders for each configuration. In addition, OMIS assures that vendors' bids meet the procurement technical specifications and has disqualified vendors whose equipment did not meet those technical specifications. You believe that the existence of configurations permits comparison and evaluation of vendors bids based on objective criteria, and that the combination of competitive bidding and the configuring of systems negates the potential that vendors build into the cost of their bids the employee discount.[2]/

QUESTION:

By requiring the availability of the discount, is OMIS securing for state employees an unwarranted privilege of substantial value which is not properly available to similarly situated individuals within the meaning of §23(b)(2) of the conflict law?

ANSWER:

No.

DISCUSSION:

Section 23(b)(2) regulates the granting of discounts or other gifts of substantial value given to public employees. Where the granting of a benefit is expressly authorized either by statute or made available by common industry-wide practice to all employees of participating organizations, we do not believe that the granting

of the benefit ordinarily constitutes an "unwarranted privilege . . . not properly available to similarly situated individuals." See, EC-COI-86-17. On the other hand, a benefit selectively provided to a single individual, EC-COI-87-7, or to a discreet group of employees, EC-COI-86-14, 83-4, will not be regarded as permissible for the purposes of §23(b)(2).

Based on the information you have provided, we find that the 20% equipment discount arranged under OMIS vendor contracts is available not only to at least 60,000 state employees but also to a substantially large number of other public and private sector employees who work for organizations which have negotiated similar employee discounts with the same companies. The OMIS discount is consistent with a common industry-wide practice and is therefore properly available to similarly situated individuals. We find that the benefit is warranted because the availability of the discount has been communicated to eligible employees and the negotiation of a discount is a commonly accepted business practice in the microcomputer industry.[3/]

Issues would arise under §23 if the availability of the discount were not widely publicized or known by all state employees. In such a case, it might reasonably appear that employees of OMIS or other officials who had participated in the formulation of the terms of the invitation for bids would have an inside track or advantage in obtaining an item of substantial value not **de facto** available to other employees. Based on the facts as you have presented them, however, it appears that OMIS has made reasonable efforts to notify state employees through department heads and computer personnel.

In this case, the discount is offered by a participating vendor because it is a condition of the invitation to bid. Because the condition is stated publicly as part of a competitive bid process there is no opportunity for one vendor to gain advantage over another. Therefore, this case is unlike the situation where a particular company attempts to gain an advantage by winning the gratitude or general good will of a discreet group of public officials.

For example, in EC-COI-86-14, the Commission found improper a discount that was available only to law enforcement officers, and that other public or private groups would not qualify. Further, in EC-COI-86-14, only one company offered the discount, the very same company whose cars would be driven by law enforcement officers. In this case, there is no potential for an appearance that one computer company/vendor would have an advantage over another.

The phrases "similarly situated individuals" and "unwarranted privilege" are not defined in the conflict of interest law. The Commission is entitled to apply common experience and common sense in the interpretation of those words. **See, Langlitz v. Board of Registration of Chiropractors**, 396 Mass. 374, 381 (1985). The officials at OMIS properly recognize that the economic power of the state regarding purchases of stand alone micro-computers enables them to bargain on behalf of all state employees a benefit, just like any other large organization. The process by which this benefit accrued to state employees was competitive, public, and presumably fair. There is no appearance of any advantage to any particular vendor or to any specific or discreet group of state employees.[4/]

Therefore as long as OMIS takes reasonable steps to assure that all state employees are given notice of the opportunity to participate in the employee discount program applicable to stand-alone micro-computers, we conclude that there is not an unwarranted privilege not properly available to similarly situated individuals within the meaning of §23(b)(2) of the conflict law.

DATE AUTHORIZED: September 16, 1987

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/]For example, configuration #12 is a configuration for an 80286/Based micro computer system. This configuration lists the technical specifications which in this case establishes a basic 512KB ram computer with a 20MB hard disk drive. There are at least 14 other such configurations.

[2/]We have great difficulty in accepting your contention that the state's contract costs do not reflect the employee discount cost. See, note 4, infra.

[3/]Unlike the case of the selective discount encountered in EC-COI-86-14, the broad based employee discount eligibility negotiated by OMIS precludes any appearance that employees have been selected for a discount because they may be in an official position to benefit the giver. Inasmuch as the discount is available to all employees, it does not appear that the discount has been offered to OMIS employees "for or because of their official acts." G.L. c. 268A, §3; EC-COI-87-29. We note, however, that questions would be raised under both §3 and §23(b)(2) if OMIS employees who administer the contract were eligible to receive a greater discount than other employees.

[4/]Were the state's purchase cost increased because of the discount requirement, the increased cost to taxpayers for a private discount for employees may very well constitute an unwarranted privilege. Our conclusion under §23(b)(2) nonetheless remains the same because the discount is available to similarly situated individuals, i.e., persons working for large private and public sector employers.

CONFLICT OF INTEREST OPINION
EC-COI-87-38*

FACTS:

Polaroid Corporation (Polaroid) proposes to fund an annual award in honor of its late vice president of consumer affairs. The award will consist of an all-expense paid trip to the annual national conference of the Society of Consumer Affairs Professionals (SOCAP). Polaroid proposes that the recipient will be an employee of the Executive Office of Consumer Affairs and Business Regulations (Executive Office), who works in the consumer service area of the Executive Office or one of its agencies. The issues of nomination and selection criteria will be left entirely to the Secretary and the Executive Office, and Polaroid will have no input into the nomina-

tion or selection process. The criteria for the award will be designed to recognize excellence in public service. Polaroid intends to prepay the registration, airfare and hotel, including most meals.

You have determined that, with the exception noted below, Polaroid is not subject to the regulation of the Secretariat, or any of the agencies within the Executive Office. None of the agencies within the Executive Office has jurisdiction over product sales, service or safety. The one exception is the Division of Banks,[1] which regulates a credit union which is operated for the benefit of employees of Polaroid and which operates on property owned by Polaroid. An employee of Polaroid, who is a member of a credit union, may file a complaint with the Division of Banks regarding a specific deposit. In such a case, the staff of the Division of Banks would inquire into such a complaint and mediate the dispute or engage in fact finding. The Division of Banks has no enforcement authority independent of referral.

Polaroid's motivation for providing the annual awards stems from its belief that there is a lack of public employee participation in the SOCAP. Polaroid believes that this lack of participation is attributable to the state's inability or unwillingness to fund and encourage training and development of consumer affairs professionals. Polaroid hopes that this award will increase public sector participation in the SOCAP and thereby "encourage greater understanding between government and business."

QUESTION:

1. Would the Executive Office be granting an unwarranted privilege of substantial value to a state employee in violation of §23(b)(2) by agreeing to participate in Polaroid's annual award program?

2. Would a state employee selected by the Executive Office violate §3 or §23 by attending the Polaroid-sponsored program?

ANSWER:

1. No.

2. No, except for employees in the Division of Banks.

DISCUSSION:

Section 3 of the conflict law prohibits anyone from giving, and any public employee from receiving, anything of substantial value "for or because of any official act performed or to be performed by such employee." The Commission has consistently held that a violation of §3 requires "a nexus between the motivation for the gift and the employee's public duties." **See, In the Matter of George A. Michael**, 1981 SEC 59, 68, **Commission Advisory No. 8**, p. 3. In this case, there is no potential nexus between any employee of Polaroid or the corporation itself and any of the agencies within the Executive Office, with the exception of the Division of Banks. Therefore, with the exception of an employee of the Division of Banks, there is no §3 restriction upon receipt of the award.[2]

An employee of the Division of Banks, on the other hand, could affect Polaroid as a public official. If such an employee were to accept a gift from Polaroid, any future official actions which he took with respect to Polaroid Corporation could reasonably be called into question. Even if such an employee could perform his official role objectively, there would be an appearance that his actions could be influenced by his prior receipt of the gift. By prohibiting receipt of a gift outright, §3(b) prevents any potential conflict on the part of an employee of the Division of Banks. **See, In the Matter of Carl D. Pitaro, et al**, 1986 Ethics Commission 271.

Section 23(b)(2) of the conflict law prohibits a public employee from using or attempting to use his position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. In general, a gift from a private party for use by a government agency does not violate §23. EC-COI-84-114. On the other hand, a gift in the form of payment for or reimbursement for trip expenses, which is available only to a named public official, raises a conflict question under §23(b)(2) when the gift is given because the recipient is a public official and for no other reason. **See**, EC-COI-87-7. In this case, however, the annual award is not being offered to any particular employee. In substance, the award is not a personal gift to a specific employee but an award which enables the Secretary to send a qualified employee to a national professional conference. Since the award is not directed at a named person, there is no opportunity for an individual employee to use his position to secure the award and thus the award would not constitute an unwarranted privilege. **See**, EC-COI-84-114.[3] This result is consistent with EC-COI-82-118, in which the Commission concluded that state employees whose job-related travel expenses are sponsored by a neutral third party, would not violate §23. **See, also**, EC-COI-80-28, in which the Commission concluded that §23 allowed an organization to reimburse the expenses of a state employee who had attended a conference sponsored by the organization. While the employee in EC-COI-80-28 was not permitted to keep an honorarium offered by the sponsoring organization, the employee's expenses for attendance at the conference were nonetheless deemed reimburseable.

In a later opinion based on EC-COI-80-28, the Commission permitted a state employee to accept a competitive prize from a private entity, subject to

certain limitations. EC-COI-82-161. The limitations required that neither the sponsor of the prize nor the decision making person, if different, be a person or an entity with which the employee might reasonably expect to have dealings within his official capacity. In this case, the award is in the nature of a prize, it is based on an objective selection process, and the potential recipient will not have any potential of official dealings with Polaroid. The fact that all issues of nomination and selection criteria have been left entirely to the Secretary dispels any appearance that Polaroid is attempting to win the favor of or to establish the good will of any particular state employee.

DATE AUTHORIZED: October 5, 1987

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/The Division of Banks is one of nine agencies within the Secretariat, the other agencies are: the Division of Standards, Division of Insurance, Division of Registration, Alcoholic Beverages Control Commission, Community and Tenant Television Commission, Board of Registration in Medicine, State Racing Commission, and Department of Public Utilities.

[2]/This conclusion rests on the facts as you have presented them. Should the jurisdiction of the Executive Office or agencies within the Executive Office be expanded to include Polaroid activities then the results of this opinion may be different. We suggest that you renew your opinion request if the current facts materially change.

[3]/The Commission might reach a different result if the award were in the nature of cash or other compensation which could be reasonably construed as salary supplementation. See G.L. c. 268A, §§3, 4.

CONFLICT OF INTEREST OPINION
EC-COI-87-39*

FACTS:

You are the Secretary of the Executive Office of Economic Affairs. In that capacity, you are also a member of several quasi-public corporations which have been established by the General Court since 1975 to further certain economic and development programs.[1]/

These corporations are typically administered by boards of directors composed in significant part by individuals with particular private sector backgrounds and institutional affiliations, as required by their respective enabling statutes. These statutorily prescribed qualifications create the potential for conflict, as they require that corporate directors have certain affiliations which will be affected by the actions they take as directors. The General Court has inserted exemptive provisions in each of the enabling statutes. The exemptive provision from the enabling statute of the Massachusetts Corporation for Educational Telecommunications (MCET), for example, reads as follows:

> The provisions of chapter two hundred and sixty-eight A of the General Laws shall apply to all directors, officers and employees of the corporation except that the corporation may purchase from, sell to, borrow from, contract with or otherwise deal with any organization in which any director of the corporation is in any way interested or involved; provided, however, that such interest or involvement is disclosed in advance to the directors and recorded in the minutes of the proceedings of the corporation; and provided further, that no director having such an interest or involvement may participate in any decision relating to such organization. St. 1982, c. 560, §3.

The exemptive provisions for the other enabling statutes are substantially similar.

QUESTION:[2]/

In the normal course of official duties of MCET directors, particular matters on the MCET agenda may affect the financial interests of business organizations for which MCET directors serve as officers or employees. Some of these matters may be contracts between MCET and their organizations. How do the provisions of G.L. c. 268A, §§6 and 7 and the exemptive provisions in the MCET enabling statute apply to MCET directors who are affiliated with organizations which have matters pending before MCET?

ANSWER:

MCET directors are subject to the conditions discussed below.

DISCUSSION:

Members of the MCET board of directors are state employees for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(p),(q); St. 1982, c. 560. In view of their part-time status, directors are also "special state employees" within the meaning of G.L. c. 268A, §1(o). Two provisions of G.L. c. 268A are relevant to your question.

1. Section 7

Section 7 generally prohibits a state employee from having a financial interest, direct or indirect, in a contract made by a state agency. For example, absent qualification for an exemption, a state employee who has an ownership interest in a company would violate §7 if his company contracts with his state agency. Further, a special state employee may have a financial interest in a contract between his company and his agency only if the governor, with the consent of the executive counsel, approves. G.L. c. 268A, §7(e).

As applied to MCET directors, §7 places few, if any, restrictions on directors' financial interests in contracts

made by state agencies. MCET directors, as special state employees, may have a financial interest in contracts made by state agencies other than MCET following their filing of a disclosure of their contractual interest pursuant to G.L. c. 268A, §7(d).

With respect to their having a financial interest in contracts made by MCET, directors need not comply with the gubernatorial exemption procedure of §7(e). Pursuant to MCET's enabling statute, St. 1982, c. 560, §3, MCET may purchase from, sell to, borrow from, contract with, or otherwise deal with any organization in which any MCET director is in any way interested or involved, as long as the disclosure and abstention requirements of St. 1982, c. 560, §3 are satisfied. In effect, the General Court has exempted MCET directors from the restrictions which §7 would customarily place on their financial interest in an MCET contract.[3]/

2. Section 6

Section 6 generally prohibits a state employee from participating[4]/ in any contract, decision, determination or other particular matter[5]/ in which, in relevant part, either the state employee or any organization for which the state employee serves as an officer, director, trustee, partner or employee has a financial interest. The abstention requirement is not absolute and is tempered by a disclosure and exemption procedure under which the employee may participate in the matter if his appointing official has made and filed with the Ethics Commission a written determination that the financial "interest is not so substanital as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee." G.L. c. 268A, §6(3).

As state employees, MCET directors would customarily be subject to these abstention, disclosure and exemption provisions with respect to all matters affecting financial interests covered by G.L. c. 268A, §6. In light of the exemptive language of St. 1982, c. 560, §3, there appears to be an ambiguity as to whether the §6 exemption avenue is available at all to MCET members. Based on our comparison of c. 560, §3 with G.L. c. 268A, §6, our application of principles of statutory construction and our examination of the legislative history of c. 560 and similar statutes, we conclude that the §6 exemption procedure is available to MCET directors except for contracts or other particular matters in which the director has been exempt from §7 by virtue of c. 560, §3.

Viewed in its entirety, c. 560, §3 appears to establish for MCET directors conflict of interest exemptions and restrictions which supplement, rather than replace, the existing provisions of G.L. c. 268A. The plain language of c. 560, §3 accomplishes three purposes:

1. a confirmation of the application of G.L. c. 268A to MCET directors subject to an exemption from §7 for MCET directors;
2. a disclosure requirement with respect to those interests made exempt by c. 560; and
3. an absolute abstention requirement with respect to matters relating to the organization and in which the director has an interest made exempt by c. 560.

We do not believe that the Legislature intended the abstention requirement of c. 560, §3 to supercede the exemption avenue of §6. Reasonably read, c. 560, §3 establishes an exemption to the §6 procedure only for contracts made exempt from §7.

The c. 560 abstention requirement does not appear in isolation but rather follows a proviso to a limitation or an exception to a general rule. The use of words such as "provided, further" and "having such an interest" seem to refer to conditions under which a director may take advantage of an exemption from §7. We therefore presume that the abstention requirement is confined to its previous antecedent. **Opinion of the Justices**, 286 Mass. 611, 620 (1934).[6]/

Our examination of the progression of legislative drafts which culminated in the enactment of c. 560 as well as in the enactment of other quasi-public corporations with similar exemption langage reveals no further guidance as to the Legislature's intent. The relevant language in c. 560, §3 was enacted in unchanged form from its original version, which was modeled after earlier precedents established by the Legislature. **See**, FN 1, **infra**. The original legislation creating this language was contained in St. 1975, c. 866 (MCDC) and thereafter "boilerplated" in the enabling statutes of other similarly-structured corporations. There is no indication that the Legislature was aware of the apparent ambiguity it was creating with §6 or that it intended any particular result.

In light of the apparent purpose of c. 560, §3, the absence of any legislative history to the contrary and our obligation to construe statutes so as to constitute a harmonious whole, we conclude that the §6 exemption avenue is available to MCET directors, except for contracts made exempt from §7 by virtue of c. 560, §3.[7]/ Accordingly, directors appointed by the governor may receive a §6 exemption from the governor. Those directors who are members by virtue of their governmental office, such as the Chancellor of the Board of Regents, may seek an exemption from the government officials who appointed them to their positions. Those directors who are members by virtue of their private position, such as the president of the WGBH Educational Foundation, would not appear to have an official responsible for these appointments to their positions. Consequently, they have no appointing official who exercises the exemption authority under §6.[8]/

DATE AUTHORIZED: October 26, 1987

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/These corporations include the Massachusetts Community Development Corporation, St. 1975, c. 866; the Massachusetts Technology Development Corporation, St. 1978, c. 497; the Community Economic Development Assistance Corporation, St. 1978 c. 498; the Bay State Skills Corporation, St. 1981, c. 351; the Massachusetts Technology Park Corporation, St. 1982, c. 312; the Massachusetts Corporation for Educational Telecommunications, St. 1982, c. 560; and the Massachusetts Products Development Corporation, St. 1984, c. 208.

[2]/For ease of discussion, this opinion will address the application of G.L. c. 268A to MCET directors. The principles in this opinion will apply with equal force to directors of other quasi-public corporations with exemptive lanaguage similar to MCET.

[3]/The exemption may also apply to other violations of G.L. c. 268A which otherwise accrue due to the dealings of a director's organization with MCET. See, G.L. c. 268A, §4(a), which prohibits a state employee from receiving "compensation" for the services which others perform in their dealings with state agencies. We note, however, that the exemption does not exempt MCET directors from the agency restrictions of §4(c). Under §4(c), an MCET director may not have any dealings with MCET on behalf of his organization.

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

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

[6]/This parsing of the enabling statute is supported by the rule of statutory construction called "the rule of the last antecedent." **United States v. Ven-Fuel, Inc.**, 758 F. 2d 741, 751 (1st Cir. 1985). That rule holds generally that qualifying phrases are to be applied to the words or phrase immediately preceding and not to be construed as extending to more remote phrases unless there is a plain indication to the contrary in the statute. **Id. See, also** 2A. C. Sands, **Sutherland Statutory Construction**, §§47.09, 47.33 (4th ed. 1972). The rule which is grounded in grammar as well as logic, has long been followed by Massachusetts courts, **Moulton v. Brookline Rent Control Board**, 385 Mass. 228, 231 (1982); **Druzik v. Board of Health of Haverhill**, 324 Mass. 129, 133 (1949); **West's Case**, 313 Mass. 146, 149 (1943).

[7]/Because of the hypothetical nature of your question, we cannot address whether a "blanket" §6 exemption granted by an appointing official would suffice or whether a separate §6 exemption need be sought each time a matter arises affecting the member's or his organization's financial interest. We would note that §6 seems to envision the latter course because the perceived impact of the financial interest may differ with each particular matter.

[8]/This is not to say that the Commission would not consider other potential surrogate appointing officials to effectuate the purposes of G.L. c. 268A, §6. **See, Commission Advisory No. 11.** Whether the creation of such an appointing official is feasible can only be examined in the context of a future opinion request. We note that the selection of the trustees of the WGBH Educational Foundation as the "appointing official" would not be appropriate in light of the obvious financial interest which the appointing official would have in the result.

CONFLICT OF INTEREST OPINION
EC-COI-87-40*

FACTS:

The Office for Children (OFC) has developed a pilot project whereby a lottery is held to award scholarships to eligible families for daycare. Eligibility guidelines have been established based on family size and income. The commonwealth distributes money to child care resource and referral agencies (providers) which are responsible for the implementation of the project. Specifically, OFC will distribute money only to those providers which have a contractual relationship with OFC to provide information, statistical and referral services. Any provider which accepts the distribution of the grant must agree to be a "voucher management recipient" and thereby subject to a "provider agreement" with a voucher management agency. A provider agreement details reporting, case management and billing procedures. The care provider must also be licensed or registered with OFC.

Approximately 100 to 150 families in six areas of the state will be selected. The families do not receive any of the money directly. Rather, the providers receive a scholarship fund from their local voucher management agency. Each of the providers currently participating in the program will be able to fund approximately 10-20 children. If selected, a family must agree to participate in an evaluation nine months after the scholarship begins. The family must also agree to sign a day care fee agreement which sets forth the amount the scholarship pays and the amount the parent pays.

Providers must assume responsibilities in the implementation of the program. They must distribute information sheets to interested families, publicize the program in their area, assist selected families in completing the application process which includes: income verification, fee assessment, completing vouchers, and assigning "child codes", and selecting potential recipients using a random drawing system. The providers must also maintain a waiting list and assist OFC in its nine-month evaluation of families participating in the program.

QUESTIONS:

1. Can employees of OFC participate in the day-care scholarship program and accept the benefits of the OFC grants?
2. Can employees of state agencies other than OFC participate in the day care scholarship program and accept the benefits of the OFC grants?

ANSWERS:

1. No, absent an exemption from the Governor, pursuant to G.L. c. 268A, §7(e).
2. Yes.

DISCUSSION:

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 . . ." It is clear that an OFC employee would have a direct or indirect financial interest in the receipt of the benefits of the OFC grant. Specifically, you estimate that the financial interests of the employee would range between

$10 and 64 per week, depending on the employee's income and family size. The determinative issue is whether the financial interests of the employee 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 to a formal, written document setting forth 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 of the others constitutes a contract for §7 purposes. The Commission has specifically ruled that a state grant subject to supervision by a state agency is a contract, see, EC-COI-81-64, and has also concluded that an arrangement by which a state agency provides funds to a non-profit agency from a state funded program for daily training to a retarded child constitutes a contract, see, EC-COI-82-24. In EC-COI-81-64, a supervised research grant to an associate professor was deemed a contract. In EC-COI-82-24, a grant from the Department of Social Services (DSS) to a Home Care Project which would be used to fund providers of services to retarded children was deemed a contract between DSS and the funded non-profit agency. In this case, the arrangement by which OFC provides a grant to a specific provider is essentially contractual in nature. The day care provider agrees to certain requirements in exchange for receipt of scholarship funds from the local voucher management agency. This exchange supported by consideration therefore constitutes a contract for the purposes of G.L. c. 268A, §7.

The particular grant in this case has some of the characteristics of an entitlement program, given its remedial purpose and the establishment of clearly defined eligibility guidelines. The Commission has not decided, and does not decide herein, that entitlement programs of general applicability administered by state agencies constitute contracts upon acceptance of benefits. Entitlement programs, such as general relief, are not grants, are made available pursuant to statutorily defined criteria and eligibility guidelines and are administered by governmental bodies. The grant in this case is administered by private non-profit organizations, which are not accountable to the public or the General Court, or subject to laws designed for the protection of the public.[1]/ A private recipient of a grant is subject to the obligations of a private contract and otherwise has no obligation to the public. Further, the grant in this case is not pursuant to a specific declaration of the General Court and is not universally available to qualified daycare providers or families. Therefore, although the funding in this case has some of the characteristics of an entitlement program, we conclude, on balance, that the funding is more in the nature of a specific conditional grant to a private non-profit organization which the Commission has historically construed as a contract for purposes of §7.

The §7 restriction detailed above will apply only to employees of OFC. Any other state employee would be eligible to participate in the program pursuant to the exemption standards in §7(b),[2]/ assuming the program is sufficiently publicized.

The sole exception which would allow an OFC employee to indirectly receive the benefit of program funds would be G.L. c. 268A, §7(e). This exception would require that the employee file a statement with the State Ethics Commission disclosing her interest in the program scholarship and that she obtain an exemption from the Governor, with the advice and consent of the Executive Council.

DATE AUTHORIZED: October 26, 1987

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1]/E.g., open meeting laws, public record laws.

[2]/§7(b) states that the restriction of §7 does not apply "to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding . . ."

CONFLICT OF INTEREST OPINION
EC-COI-87-41

FACTS:

You are the Chief Probation Officer of a District Court. Your wife is also employed by the same District Court. You and your wife were recently married, and you now supervise your wife.

You are interested in continuing to supervise your wife and in complying with the conflict law. You contacted the State Ethics Commission concerning the application of G.L. c. 268A, §6 to your situation. You were informed by informal Commission staff letter that §6 contains an exemption procedure which, if strictly followed, would permit you to supervise your wife. Specifically, you were informed that if you disclosed to your appointing official and the Commission the relevant facts surrounding your wife's financial interest in your supervision and if you received from your appointing official a written determination that her financial interest is not so substantial as to affect the integrity of services which the state expects from you, you would be able to participate in her supervision. You then indicated that the First Justice was your appointing official and have sought a written determination from him pursuant to §6.

QUESTION:

Is the First Justice of a District Court the appointing official of a Chief Probation Officer for the purposes of G.L. c. 268A, §6?

ANSWER:

Yes.[1]/

DISCUSSION:

As a probation officer in a District Court, you are a state employee for the purposes of G.L. c. 268A. Section 6 of G.L. c. 268A prohibits a state employee from participating[2]/ in any particular matter[3]/ in which a member of his immediate family[4]/ has a financial interest. By supervising your wife, you are participating in matters in which she has a financial interest. **See, Commission Advisory No. 11.** As applied to you, whenever you are required to supervise your wife, you must therefore comply with the abstention requirements of §6 or seek an exemption under that section.

The Section 6 exemption procedure can only be authorized by your appointing official. The conflict of interest law states that a state employee "shall advise the official responsible for appointment to his position" in seeking an exemption under §6. "The phrase seems to refer generally to the official with the statutory authority to make the appointment." Buss, **The Conflict of Interest Statute: An Analysis**, 45 B.U.Law.Rev. 299, 362 (1965). The phrase has also been interpreted to mean the state official responsible for the employment of the state employee. **Attorney General Conflict Opinion No. 282**, November 4, 1964.

G.L. c. 276, §83 states that ". . . the justices of each other district court . . . may appoint . . . probation officers . . . provided further that any such appointment shall be reviewed by the chief administrative justice of the trial court for compliance with the standards promulgated under §8 of c. 211B." G.L. c. 211B, §8 states, in pertinent part that:

> any appointment that is governed by standards promulgated by provisions of this section shall forthwith be certified in writing for compliance with such standards to the office of the chief administrative justice. The chief administrative justice shall have the power to reject any such appointment within 14 days after receipt of the certification of compliance by the appointing authority but such power shall be limited to non-compliance with the standards for appointment.

It has been noted that the language of G.L. c. 276, §83, combined with that of G.L. c. 211B, §8 reflects part of the confusion within the court system over lines of authority and administrative responsibility for the probation system.[5]/ Spanenberg Group, **Assessment of the Massachusetts Probation System**, at 54 (October, 1987).

The official with the statutory authority to make the appointment is clear, however. The First Justice of a District Court selects his or her candidate for the position of chief probation officer. This candidate's name along with the information required under c. 211B, §8[6]/ is forwarded to the Chief Administrative Justice for review for compliance with personnel policies and procedures. After the office of the Chief Administrative Justice receives the above information, there is a 14 day period to approve or disapprove. This power is referred to as the power to reject in G.L. c. 211B, §8.

The Commission concludes, as a result, that a First Justice is the appointing official of a Chief Probation Officer in that the First Justice is the state official affirmatively responsible for the employment of the Chief Probation Officer. The Chief Administrative Justice's rescission power, defined narrowly by statute, does not appear sufficient to make him the official with the statutory authority to make the appointment. The choice of the First Justice as the appointing official is also consistent with the purposes of the §6 exemption process. Section 6 anticipates that an appointing official will make a subjective decision regarding the appropriateness of permitting a subordinate to participate in a matter affecting a family member. "The official making the determination may take into account the employee's personal character. What might be too substantial an interest for one state employee may be for another [insubstantial] . . ." Buss, **supra**, at 362. We regard the First Justice who oversees the conduct of a probation officer in his or her court on a regular basis, to be in a knowledgeable position to make a subjective decision regarding the integrity of the probation officer.

DATE AUTHORIZED: November 16, 1987

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[1]/The Commission's conclusion is limited to the application of G.L. c. 268A, §6 to the Chief Probation Officer, and does not purport to address the determination of an appointing official either for other judicial employees or for the purposes of other statutes.

[2]/"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[3]/"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[4]/"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters has a financial interest.

[5]/Chief probation officers are also responsible to the Commissioner of Probation.

[6]/This information includes the candidate's personnel file, an explanation of how the position became vacant and a copy of any resignation which creates a vacancy; a certification that adequate funding is available in the current fiscal year budget to fill the position; the number of applicants for the position; a list

of all applicants interviewed and a copy of the application and resume of the final candidate, a written record indicating the reason why these applicants who met the minimum requirements for the position were not interviewed, a statement of the final applicant's relationship or lack of relationship to any judicial employee; a copy of all applications in which the pre-employment consideration section was completed, a listing of all locations in which the job was posted, a copy of the job posting, (if the position was advertised) a copy of the advertisement, (if the position was not advertised) a certification that adequate funding was not available, and the applicant interview and hiring record.

CONFLICT OF INTEREST OPINION
EC-COI-87-42

FACTS:

You were recently hired to serve on a part-time basis as the wiring inspector for a Town (Town). You also are a licensed electrician and manage an electrical contracting business in the Town. During the course of your performing private electrical services, your work is customarily subject to inspection by the wiring inspector.

Following your appointment, the Town Board of Selectmen voted to accept the provisions of St. 1981, c. 809. The act provides as follows:

> In a city, town or district which accepts this section, a licensed electrician who is appointed inspector of wires may practice for hire or engage in the business for which licensed under the applicable provisions of chapter one hundred and forty-one while serving as such inspector; provided, however, that within the area over which he has jurisdiction as wiring inspector he shall not exercise any of his powers and duties as such inspector, including those of enforcement officer of the state electrical code, over wiring or electrical work done by himself, his employer, employee or one employed with him. Any such city, town or district may in the manner provided in the preceding section appoint an assistant inspector of wires who shall exercise the duties of inspector of wires, including of enforcement officer of the state electrical code, over work so done. Said assistant inspector may act in absence or disability of the local inspector and for his services shall receive like compensation as the city, town or district shall determine.
>
> This section shall take effect upon its acceptance in a city, by vote of the city council, subject to the provisions of the charter of such city; in a town, by vote of the board of selectmen; in a municipality having a town council form of government, by a vote of the town council, subject to the provisions of the charter of such municipality and in a district, by vote as above provided of the cities and towns of the districts.

QUESTION:

Can you serve as Town wiring inspector and also maintain your private electrical business?

ANSWER:

Yes, subject to the conditions described below.

DISCUSSION:

In this opinion, we are asked to determine whether the General Court, by enacting St. 1981, c. 809, intended to permit a town to supercede the prohibitions of §17 with respect to the private electrical work of town wiring inspectors. We conclude that it so intended.

In your capacity as wiring inspector, you are a municipal employee for the purposes of G.L. c. 268A. Section 17 of G.L. c. 268A primarily regulates the outside business activities of municipal employees. Under this section, a municipal employee may not receive compensation from a private party or act as agent for the party in connection with any submission, decision or other particular matter[1]/ in which the town or a town agency is either a party or has a direct and substantial interest. As the Commission recently stated in the Decision and Order **In the Matter of Robert Sullivan**, 1987 Ethics Commission 320 (October 30, 1987), "the basic principle set forth by §17 is that public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with the government."

Ordinarily, §17 would prohibit you from performing private electrical work in the Town where the work would be subject to inspection by the Town wiring inspector, inasmuch as you would be receiving compensation in relation to a permit or determination to which the Town is a party. **See**, EC-COI-87-31 (chairman of board of health violates §17 by installing septic systems which could only be installed pursuant to a permit from his agency). In your case, your work would be in connection with a permit issued by your department. Consequently, you would be unable to maintain your electrical practice (within the Town) while serving as wiring inspector, unless you qualify for a statutory exemption from §17. Based upon our review of St. 1981, c. 809, and the legislative history surrounding its enactment, we conclude that the General Court intended to exempt town wiring inspectors from the §17 prohibitions which would have otherwise prohibited their private electrical practice in the same town.

In the absence of any specific reference to G.L. c. 268A, §17 in c. 809, we are obligated to construe c. 809 in light of its language and the presumed intent of the legislature which enacted it. Standing alone, c. 809 is not ambiguous; its plain language authorizes a municipal

wiring inspector to practice for hire or engage in the business of licensed electrician while serving as wiring inspector, subject to certain conditions which allow for the inspector's private electric work to be inspected by a different inspector. The title of c. 809, "An act permitting a local inspector of wires to work as an electrician and providing for the appointment of an assistant to such inspector to inspect his work", also reflects a legislative intent to authorize wiring inspectors to practice in their communities.

The legislative history of c. 809 also indicates that the legislature intended to create an exemption to the requirements of §17. The General Court enacted c. 809 in 1981 in response to two independent state agency administrative proceedings. The first was the enactment in 1980 by the Board of State Examiners of Electricians of a regulation prohibiting a local wiring inspector from practicing for hire or engaging in the electrician business within the same area over which the individual serves as wiring inspector. 237 CMR 4.08 (effective January 30, 1980). The regulation apparently created difficulty for smaller communities seeking to recruit wiring inspectors. Five related bills were thereafter filed with the General Court in 1981 to either repeal or modify the effect of the new regulation. **See,** 1981 **Senate Doc. Nos. 903, 938, 941, 942** and **House Doc. No. 1840.** The testimony before the Joint Committee on Local Affairs in 1981 emphasized the administrative difficulties encountered by towns as a result of the flat prohibition on the private electrician practice for wiring inspectors. The Committee was also aware that the Ethics Commission had recently imposed a civil penalty on a Salisbury wiring inspector who has performed electrical installations in the same town and had inspected his own work. **See, In the Matter of Andrew Bayko,** 1981 Ethics Commission 34 (February 9, 1981).

The Local Affairs Committee's recommended draft, 1981 **House Doc. No. 6720,** was adopted by both legislative branches and enacted in unchanged form as c. 809 as a local acceptance bill. When viewed in its entirety, the legislative history of c. 809 confirms that, while not expressly referencing G.L. c. 268A, §17, the General Court intended wiring inspectors to perform private work in their communities.

Finally, our conclusion is also based on principles of statutory construction which give preference, in the event of an ambiguity between two statutes, to the later, more specific enactment. **Pereira v. New England LNG Co., Inc.,** 364 Mass. 109, 118-119 (1973). EC-COI-83-1. Were we to hold otherwise and apply the prohibitions of §17 to wiring inspectors, we would be nullifying the legislative intent in enacting c. 809. We will not assume that the General Court intended by passing c. 809 to engage in a futile act. **Commonwealth v. Wade,** 372 Mass. 91, 95 (1977). Accordingly, we construe the provisions of c. 809 to permit your engaging in a private electrician practice in the Town, notwithstanding the general prohibition contained in G.L. c. 268A, §17.[2/]

DATE AUTHORIZED: November 16, 1987

[1/]"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[2/]Although you are exempt from the prohibitions of §17, you remain subject, as a municipal employee, to other restrictions in both your official and private capacity. Enclosed is a summary reviewing these other restrictions, and you may renew your opinion request if you have any questions about the application of these provisions.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 325

IN THE MATTER
OF
MARJORIE GOUDREAULT

DISPOSITION AGREEMENT

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

On September 15, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Ms. Goudreault, a city councillor in the city of Haverhill. The Commission concluded its inquiry and, on December 8, 1986, found reasonable cause to believe that Ms. Goudreault violated G.L. c. 268A, §19.

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

1. Ms. Goudreault is an elected member of the Haverhill City Council, a position for which she receives $8,000 per year. As a city councillor, Ms. Goudreault is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. William Ryan is Ms. Goudreault's brother and is the elected mayor of Haverhill. Mr. Ryan is a member of Ms. Goudreault's immediate family as that term is defined by G.L. c. 268A, §1(g).

3. In May, 1985, on a motion by Ms. Goudreault, the Haverhill City Council requested the city's Director of Finance and Records to conduct a salary survey for administrative and professional positions within city government. As a result of the study, Mr. Klueber submitted a proposed municipal reorganization ordinance on February 10, 1986.

4. The proposed ordinance included two attachments. Attachment A related to the reorganization of the structure of Haverhill municipal government. Attachment B related to proposed salaries for administrative and professional positions within the city government, listing each position on a two page schedule. The mayor's salary was listed as $37,500, to be increased to $47,500 effective July 1, 1986. Forty nine other positions were listed, although there was no bottom line total for the salaries listed on the schedule. The ordinance was brought before the city council for a vote on February 25, 1986. Ms. Goudreault was present at that meeting and voted in favor of tabling the ordinance until March 11, 1986.

5. On March 11, 1986, the city council voted to delete Attachment A in its entirety, and to pass only Attachment B of the ordinance. Ms. Goudreault was present and voted in favor of the ordinance as amended. The vote was six to three.

6. According to G.L. c. 44, §33A, a two-thirds vote of the city council is needed to pass an ordinance relating to salaries.

7. At the time the ordinance was being considered by the city council, there was discussion of the document as a whole, but no discussion of any individual on the schedule. Ms. Goudreault did not participate in any of the discussions.

8. According to the Haverhill City Charter, the city council has the power to determine the mayor's salary by ordinance.

9. General Laws chapter 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which he or a member of his immediate family has a financial interest.

10. By voting to approve the proposed administrative salaries as described above, Ms. Goudreault participated in a particular matter in which her brother had a financial interest, thereby violating §19.[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 Ms. Goudreault:

1. that she pay to the Commission the amount of five hundred dollars ($500) as a civil penalty for her violation of §19; and
2. that, in the future, she refrain from participating in any matter in which her brother has a financial interest; and
3. that she waive all rights to contest the findings of fact, conclusions of law and terms and conditions proposed under this Agreement in this or any related administrative or judicial civil proceeding in which the Commission is a party.

DATE: January 29, 1987

[1]Ms. Goudreault violated §19 by voting on the salary ordinance, even though it affected other administrative positions in addition to her brother's. As the Supreme Judicial Court made clear in **Graham v. McGrail**, 370 Mass. 133 (1976), a public official is barred from more than just those particular matters which affect only his immediate family member. "A decision to increase the [family member's] salary seems to us to be a particular matter in which the [family member] has a financial interest, even though a number of other employees are given similar increases." **Id.** at 133. In giving the statute a workable meaning, the Court went on to say that the public official could participate in a vote on a consolidated budget, including the salaries, once the salaries were approved without the involvement of the disqualified official. Finally, the Court observed that the best course in such circumstances is not only to abstain but also to leave the room during the discussion and vote on the matter.

Patrick D. Farretta
c/o Henry E. Quarles, Jr., Esq.
395 Washington Street, Suite #4
Dedham, MA 02026

RE: PUBLIC ENFORCEMENT LETTER 87-3

Dear Mr. Farretta:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that after inspecting and participating as a Boston housing inspector in the condemnation of property owned by an elderly woman, you took various actions, outside of your official capacity, in connection with her relocation. The preliminary inquiry has also concerned an allegation that you requested and received $100 from this individual, again outside of your official capacity, in order to board up her property.

The results of our investigation (discussed below) indicate that the conflict of interest law was violated in this case. Nevertheless, in view of certain mitigating factors, also discussed below, the Commission has determined that adjudicatory proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed by our investigation and explaining the applicable provisions of law, trusting that this advice will ensure your future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. You have been a housing inspector in the Housing Division of the City of Boston's Inspectional Services Department for the past fifteen years. As such, you are a "municipal employee" as defined in G.L. c. 268A, §1(g).

2. In 1984 and 1985, you worked as a real estate salesman for The Real Estate Co., Inc., 1350 Dorchester Avenue, Dorchester, earning $9,960.07 from the company in 1984 and $16,985.00 in 1985.

3. During 1984 and 1985 the owners of The Real Estate Co., Inc. were Stuart T. Schrier, Robert Raimondi and Edith Yanonis. Edith Yanonis's husband, Rick Yanonis, was office manager.

4. On September 28, 1984, you inspected the property at 15 Lawrence Street in the South End of Boston, a townhouse owned by a woman over 80 years old living on Social Security benefits, and cited it for numerous violations of the State Sanitary Code.

5. On October 10, 1984, you served a notice of possible condemnation of 15 Lawrence Street on this woman; at a hearing on that same day your supervisor, Frederick Sexton, decided that the building should be condemned and ordered vacated and secured.

6. On Saturday, October 20, 1984, you went to visit the elderly woman at 15 Lawrence Street. After finding that she had been beaten up by intruders, you moved her to the Susse Chalet Motor Lodge on Morrissey Boulevard in Dorchester, where, you have stated, you paid out of your own money for her to stay over the weekend. An employee of the Boston City Commission on Elderly Affairs, Kathy McNiven, then arranged for Charitable Donations of Boston to pay for her stay at the motel from October 22 to October 30, 1984.

7. During this time, you contacted Rick Yanonis of The Real Estate Co., Inc. to see if he could appraise 15 Lawrence Street and possibly buy it. Kathy McNiven had asked if you knew anyone who could do an appraisal of the property, which was necessary to get the elderly woman into public housing. You took Mr. Yanonis to meet the woman at the motel and then to see the property. He gave you a written opinion of value of $50,000, which you gave to Kathy McNiven, who then submitted it to the Boston Housing Authority in an attempt to place the woman with it.

8. You arranged with Rick Yanonis for him to pay for the woman's further stay at the motel. Mr. Yanonis agreed to do so in the hope that the woman would consider selling her property to him. No sale took place, however, because she would not sell until she had a place to go.

9. During the woman's stay at the motel, you also took Stuart Schrier, president of The Real Estate Co., Inc. to see her. He asked her whether she would be willing to sell her property; she replied that she was not ready to sell.

10. On November 7, 1984, you placarded the premises at 15 Lawrence Street as having been condemned and delivered a copy of a Vacate Order to the elderly woman.

11. On November 30, 1984, in accordance with your arrangement, Mr. Yanonis paid $904.16 by check to the Susse Chalet for the woman. According to Mr. Schrier, he, Mr. Yanonis, and Robert Raimondi (also an owner of The Real Estate Co.) each paid equal portions of this amount.

12. In early December, 1984, you contacted Quincy Community Action and helped to arrange a placement for the woman in Quincy Housing Authority housing.

13. In November or December of 1984, you asked the woman for $100 to board up 15 Lawrence Street. You later returned this money to her.

II. The Conflict Law

As a Boston housing inspector, you are a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 17(c) prohibits a municipal

employee, otherwise than in the proper discharge of his official duties, from acting as agent for anyone other than the city or municipal agency in connection with any particular matter in which the city is a party or has a direct and substantial interest.

The facts set forth in this letter, if proven, would establish violations of §17. The decision by the Inspectional Services Department to condemn 15 Lawrence Street was a particular matter in which the city was a party or had a direct and substantial interest. In taking the actions which you took to relocate the elderly woman after her property was condemned,[1] you were acting as her agent[2] in connection with the condemnation. Pursuant to G.L. c. 79A, §13, any public agency displacing someone by issuing an order to vacate property which has been condemned must provide that person with relocation assistance and a relocation payment for moving expenses. In fact, when it condemns a building, the Boston Inspectional Services Department fills out a "relocation information form," refers the occupants' names to the Boston Housing Authority, and furnishes the occupants with a housing information list to help them find housing. Thus the relocation of the occupant of a condemned building is a process which is "in connection with" the condemnation, and actions taken on behalf of such a person to relocate him or her violate §17(c) if they are not in the course of one's official duties. That you were not acting in the course of your official duties appears from the fact that you paid for part of the elderly woman's motel bill out of your own pocket and the fact that you turned to your private contacts at The Real Estate Co. to appraise 15 Lawrence Street, to try to buy the property from the woman, and to pay for her continued stay at the motel.

Likewise, you were not acting in the course of your official duties when you requested and received $100 from the woman to board up her property. Customarily, it is an owner's responsibility to board up a condemned building; if he or she does not, the Building Division of the Inspectional Services Department does so and puts a lien on the building. In requesting and receiving money from the woman to board up her property, you were again acting as her agent in connection with the particular matter of condemnation of the property, in which the city was a party or had a direct and substantial interest. Thus, if these facts were proven, they would establish another violation of §17(c). Also, if it were proven that you had intended at the time of your request to keep any part of the $100 in return for seeing to the boarding up, a violation of §17(a) would be established: section 17(a) prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation from anyone other than the city or municipal agency in relation to any particular matter in which the city is a party or has a direct and substantial interest.

The Commission has found no evidence that you received a financial benefit in relation to any of the events described in this letter. It also recognizes that, although it has had in this case no way of determining your motivation, you may have been motivated by the admirable desire to help an elderly woman. You may rather have been motivated, however, by your expectation that if she was happily relocated she would sell her property through your real estate company, a sale which would probably have resulted in a commission to you.

Because of the above mitigating factors, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings. It does, however, want to make clear to you and other municipal employees similarly situated that the public interest requires that public officials give their undivided efforts to serving their public functions. Section 17 reflects the maxim that a person cannot serve two masters. Whenever a city employee acts on behalf of private interests in matters in which the city also has an interest, there is a potential for divided loyalties, the use of insider information, and favoritism — all at the expense of the City. EC-COI-82-127. This means that even where the interests of a city or municipal agency and of a private party in a particular matter are not adverse, a public official must be careful not to act as an agent for the private party. See **Town of Edgartown v. State Ethics Commission,** 391 Mass. 83, 86-87 (1984).

Finally, the Commission wishes to advise you that §23 of the conflict of interest law may place additional restrictions on your future conduct.[3]

Section 23(b)(2) prohibits a municipal employee from using his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. Introducing an owner of a condemned or about-to-be-condemned building to your friends or employers in the real estate business could constitute a violation of this section.

Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position, or undue influence of any party or person. Any association between you and a private real estate business might violate §23(b)(3) in that — for example — it might cause the conclusion that your associates or employers in the real estate business could improperly influence you or unduly enjoy your favor in the performance of your official duties to inspect, serve notices, and placard buildings. The final sentence of §23(b)(3) provides a way for you to avoid a violation of the section by making a written disclosure to

your appointing authority.[4]/ Nevertheless, even if you were to make such a disclosure, it may be that §23(b)(1) precludes your association with any real estate business in Boston so long as you continue to be employed as a housing inspector for the City of Boston. Section 23(b)(1) prohibits your acceptance of other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of your public office.

In sum, because of the restrictions of all three of these sections, you should request an opinion from the Commission's Legal Division before acting as a real estate salesman in Boston or accepting employment with a real estate concern which does business in Boston. You should also request such an opinion before taking any action to bring together anyone with whom you have official business as a housing inspector and any of your friends or former employers and associates in the real estate business.

III. Disposition

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

If you have any questions, please contact me at 727-0060.

Date: February 10, 1987

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[1]/The actions which you took to relocate the woman include your efforts to obtain temporary accommodation for her, your efforts to find a buyer for her house, and your efforts to arrange a permanent place for her in public housing. Specifically, they include placing the woman in the Susse Chalet, arranging for Mr. Yanonis to appraise 15 Lawrence Street, arranging for him and perhaps others at The Real Estate Co., Inc. to contribute to the cost of the motel stay, arranging for Mr. Yanonis and Mr. Schrier to meet the woman with a view to their purchasing her property, and helping to arrange her placement in housing in Quincy.

[2]/An argument could also be made that you were acting as agent for Rick Yanonis, Stuart Schrier, or The Real Estate Co., Inc. in taking these actions to find the woman temporary and permanent accommodations. It is irrelevant which of these private parties you were acting as agent for, since §17 bars acting as agent for anyone other than the city or municipal agency.

[3]/The Commission has no jurisdiction to enforce violations of §23 occurring before April 8, 1986. See St. 1986, c. 12, §6; **Saccone v. State Ethics Commission**, 395 Mass. 326 (1985).

[4]/The final sentence of §23(b)(3) is as follows: "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 324

IN THE MATTER
OF
THOMAS J. NOLAN

DISPOSITION AGREEMENT

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

On November 17, 1986, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into a possible violation of the conflict of interest law, G.L. c. 268A, by Mayor Nolan of Chelsea. The Commission has concluded that inquiry and, on February 2, 1987, found reasonable cause to believe that Mayor Nolan violated G.L. c. 268A, §19.

The Commission and Mayor Nolan now agree to the following findings of fact and conclusions of law:

1. Mayor Nolan is the mayor of Chelsea, having been sworn in for his first two-year term in January 1986. Mayor Nolan is therefore a municipal employee as defined in §1(g) of G.L. c. 268A. Prior to becoming mayor, Mayor Nolan was a Chelsea alderman for two two-year terms between 1980 and 1984.

2. The Chelsea Housing Authority (CHA) is responsible, pursuant to G.L. c. 121B, §3, for public housing in Chelsea. The CHA is managed and governed, pursuant to G.L. c. 121B, §5, by five members (called "commissioners"), one of whom is appointed by the state Department of Community Affairs and four of whom are appointed by the mayor of Chelsea, subject to Chelsea Board of Aldermen (Board of Aldermen) approval.

3. CHA members are compensated for their services. CHA member compensation is determined on a quarterly basis, with each commissioner currently serving receiving an equal share of a total of two percent of the CHA income (less certain deductions) from certain CHA housing. During the past four years, annual compensation for CHA members has risen from approximately $1,000 to approximately $3,500.

4. On or about June 6, 1986, Mayor Nolan appointed his brother, Robert Nolan, to be a member of the CHA, and by letter requested the Board of Aldermen to confirm the appointment. Robert Nolan's appointment was subsequently confirmed by the Board of Aldermen by a 9-0-0 vote.

5. Mayor Nolan neither sought nor received any legal counsel regarding his appointment of his brother prior to that appointment being made.

6. On July 3, 1986, a check in the amount of $142.50 was issued to Robert Nolan by the CHA for his third quarter CHA commissioner's "salary." On or about July 7, 1986, Robert Nolan cashed the CHA check. Although, on or about July 21, 1986, Robert Nolan, on the advice of the Chelsea city solicitor, filed a notarized

"election to refuse and declination of compensation" with the CHA, he retained the $142.50 that he had previously received.

7. On or before November 24, 1986, Mayor Nolan was notified that the Commission had authorized a preliminary inquiry into the legality of his appointment of Robert Nolan to the CHA.

8. On January 28, 1987, Robert Nolan resigned from the CHA.

9. Section 19 of G.L. c. 268A provides in relevant part that, except as permitted*/ a municipal employee is prohibited from participating, as such an employee, in a particular matter in which, to his knowledge, a member of his immediate family has a financial interest.

10. The appointment of Robert Nolan to the CHA was a "particular matter." Mayor Nolan "participated" in that matter by making the appointment and by requesting that the Board of Aldermen confirm it. Because the position was a paid position, Robert Nolan had, at the time of the appointment, a "financial interest," in the appointment. Mayor Nolan was aware at the time he appointed his brother that his brother would receive compensation for his services as a CHA member.

11. By appointing his brother to be a CHA member, as described above, Mayor Nolan participated as mayor of Chelsea in a particular matter in which his brother had a financial interest, thereby violating G.L. c. 268A, §19.

In view of the foregoing violation of G.L. c. 268A, §19, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mayor Nolan:

1. that he pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating G.L. c. 268A, §19 by appointing his brother to membership on the CHA; and
2. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: March 6, 1987

*/None of the §19 exceptions apply to this case.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 328

IN THE MATTER
OF
CHARLES LAWRENCE

DISPOSITION AGREEMENT

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

On November 27, 1984, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Lawrence, a member of the town of Mashpee Board of Health (BOH). The Commission concluded its inquiry and, on May 29, 1986, found reasonable cause to believe that Mr. Lawrence violated G.L. c. 268A, §19.

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

1. Mr. Lawrence was elected to the BOH in 1977 and has served on that board ever since. As such, he is a "municipal employee," as that term is defined in G.L. c. 268A, §1(g). From 1979 until 1985, Mr. Lawrence was chairman of the BOH.

2. Among other public health issues, the BOH oversees town septic matters. BOH approval is necessary at several stages in construction of a new septic system and repair of an existing one.

3. Generally, when a developer seeks approval from the town planning board for a development, his engineer also submits plans to the BOH showing his overall proposed septic system and building design. The BOH considers this master plan and may suggest changes to it. When it is satisfied, the BOH approves the master plan.

4. Before obtaining a building permit for an individual lot, the developer must return to the BOH and obtain its approval of his individual lot plan. The developer (or generally, his engineer) submits the lot plan with an "application for disposal works construction permit" (ADWCP), which includes percolation data from a "perc" test conducted by the engineer and witnessed by a BOH representative (either the health agent or one of the BOH members). Where the health agent deems it advisable, the plans are referred to the BOH for its review and approval. The BOH may require changes to a proposed septic system before granting its approval. Once the plans have been approved, the health agent or a BOH member signs the "application approved" line on the ADWCP and a "disposal works construction permit" is issued. In addition, a BOH member must sign off on the developer's application for a building permit to show that the BOH has reviewed and approved the plans.

5. As construction proceeds, changes to a project's septic system may become necessary and, depending upon the change, BOH approval may also be required.

6. Finally, until January 1985, the BOH required that the developer have his septic system, as installed, inspected by the health agent or a BOH member before it was covered. The official making the inspection then issued a compliance certificate.

7. New Seabury Corporation (New Seabury) has been a major developer in Mashpee since the 1950's. In the last five years, New Seabury has principally built multi-unit condominium projects for marketing as vacation properties. In developing these sites, New Seabury obtained BOH approval at several stages.

8. On May 31, 1983, Mr. Lawrence began working for New Seabury in its construction department. His employment with New Seabury has continued to the present, although he was transferred to its warehousing department in September, 1985.

9. At the BOH meeting of July 25, 1983, the BOH, including Mr. Lawrence, reviewed and approved plans that New Seabury had submitted for repairs to the Popponesset Inn septic system.

10. On August 22, 1983, the BOH, including Mr. Lawrence, voted to extend the validity of perc test results for New Seabury's Maushop Village project, which were otherwise due to expire.

11. On August 25, 1983, Mr. Lawrence signed the "application approved" lines on 15 ADWCPs for the Maushop Village project.

12. Mr. Lawrence signed "application approved" lines on two ADWCPs for New Seabury's Mews Conference Center project on September 29, 1983.

13. On October 15, November 16 and November 28, 1983, Mr. Lawrence signed and issued three compliance certificates for Maushop Village sites, signifying that he had inspected the septic systems on these three sites.

14. On November 9, 1983, Mr. Lawrence acted as the official BOH witness to perc tests conducted by New Seabury's engineers at its Mews IV and Mews V project sites. On December 30, 1983 and January 4, 1984, Mr. Lawrence again served as the official witness for perc tests at these sites.

15. At the BOH's November 28, 1983 meeting, Mr. Lawrence spoke in favor of and voted to grant New Seabury a variance for its Featherie pool construction.

16. In the period from December 1983 through early February 1984, Mr. Lawrence inspected nine more Maushop Village septic installations and issued compliance certificates for them.

17. On January 26, 1984, Mr. Lawrence served as the official BOH witness to the perc test conducted by New Seabury's engineers at its Design Studio site.

18. At the March 12, 1984 BOH meeting, the BOH, including Mr. Lawrence, approved New Seabury's plans for its Mews VI and Maushop Facilities Building projects.

19. On March 13, 1984, Mr. Lawrence signed "application approved" lines on four ADWCPs for Mews VI construction. In addition as a BOH official, he signed New Seabury's four building permit applications for the Mews VI construction which signified the BOH's approval of New Seabury's plans.

20. On March 14, 1984, Mr. Lawrence, as a BOH member, witnessed New Seabury's perc test at its Maushop Laundry Facilities site on Triton Circle. He also signed New Seabury's building permit application for the site, which signified the BOH's approval of New Seabury's plans.

21. On or about March 16, 1984, Mr. Lawrence, as a BOH official, signed two building permit applications, this time for New Seabury's Promontory Point construction.

22. On March 28, 1984, Mr. Lawrence served as the BOH witness for a perc test conducted by New Seabury's engineers at the Cabana/Popponesset Inn site.

23. On May 21, 1984, Mr. Lawrence completed compliance certificates for three more Maushop Village septic systems.

24. At the July 16, 1984 meeting of the BOH, Mr. Lawrence cast the tie-breaking vote in favor of a variance sought by New Seabury for its Promontory Point septic systems.

25. Mr. Lawrence acted as the official BOH witness on July 26, 1984, for a perc test conducted by New Seabury's engineers at the Promontory Point sales office site.

26. On October 3, 1984, Mr. Lawrence issued three compliance certificates for septic systems at Promontory Point.

27. Section 19 of G.L. c. 268A provides in part that except as permitted by §19[1] a municipal employee is prohibited from participating as such in particular matters in which his employer has a financial interest.

28. As set forth in ¶¶9-26 above, Mr. Lawrence participated as a BOH member in approvals of New Seabury's septic designs, in votes on New Seabury variance requests and perc extensions, in witnessing of New Seabury perc tests, in inspections of New Seabury septic systems, and in signing and issuing of various official documents necessary to New Seabury's projects.

29. New Seabury had a financial interest in the foregoing BOH decisions and actions in which Mr. Lawrence participated, identified above.

30. Mr. Lawrence violated §19 by participating as a BOH member in the foregoing official decisions and actions in which New Seabury had a financial interest while he was employed by New Seabury.

31. As to his actions as described in ¶¶9-26 above, Mr. Lawrence did not knowingly violate nor was he aware that he was violating §19; the Commission has no knowledge of any evidence suggesting any financial gain or other benefit from New Seabury for his so acting.

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

1. that he pay to the Commission the sum of four thousand dollars ($4,000) as a civil penalty for violating G.L. c. 268A, §19;-
2. that so long as he is a municipal employee, he refrain from participating in any particular matter in which any business organization by which he is employed has a financial interest;-
3. that so long as he is a municipal employee, he refrain from acting as agent for or receiving compensation from anyone other than the town of Mashpee in connection with any particular matter in which the town of Mashpee is a party or has a direct and substantial interest;[2]/
4. upon becoming a former municipal employee, that he avoid acting as anyone's agent or receiving compensation from anyone in connection with any particular matter in which the town of Mashpee is a party or has a direct and substantial interest and in which he participated as a member of the Board of Health;
5. that he similarly refrain for one year after ceasing to be a member of the Board of Health from appearing personally before any agency of the town of Mashpee as agent or attorney for anyone, in connection with any particular matter in which the town of Mashpee is a party or has a direct and substantial interest and which was under his official responsibility as a member of the Board of Health at any time within a period of two years prior to the termination of his employment; and-
6. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement and any related administrative judicial proceeding to which the Commission is a party.

DATE: March 6, 1987

[1]/None of the §19 exceptions applies in this case.

[2]/For example, he should not submit any plans to the Board of Health as New Seabury's agent nor should he accept any compensation from New Seabury for his advice or assistance as a New Seabury employee regarding septic system questions which arise during the planning or construction stage of a development project.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 321

IN THE MATTER
OF
ROBERT LAVOIE

DISPOSITION AGREEMENT

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

On September 15, 1986, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Lavoie, a member of the Saugus Board of Selectmen. The Commission concluded that preliminary inquiry, and, on November 17, 1986, found reasonable cause to believe that Mr. Lavoie violated G.L. c. 268A, §19.

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

1. From November, 1985 to the present, Robert Lavoie has been an elected member of the Saugus Board of Selectmen. As a selectman, Mr. Lavoie is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Mr. Lavoie is part owner and manager of the Ballard Restaurant in Saugus, owned and operated by the Lavoie family for a number of years. The restaurant holds a liquor license and licenses for coin operated machines and a juke-box, all issued by the Saugus Board of Selectmen.

3. Prior to being elected, Mr. Lavoie consulted with town counsel and an employee of the Alcoholic Beverages Control Commission (ABCC) on the propriety of his voting on a liquor license for a restaurant owned by his family. Mr. Lavoie was told by the ABCC employee that an elected official could vote on such matters as liquor licenses even though he is employed by an establishment that owns a liquor license and that he could vote on matters affecting competitors if necessary to avoid a "stalemate."

4. Saugus town counsel states that he told Mr. Lavoie that he could vote on licensing matters as long as he and his immediate family had no financial interest in the particular matter. Mr. Lavoie states that he believed that town counsel's advice referred to matters in which Lavoie or his immediate family would realize additional financial growth. In any event, Lavoie did not obtain a written opinion from town counsel at that time.[1]/

5. On December 3, 1985, Mr. Lavoie participated in a 5-0 vote authorizing the "automatic" renewal of forty liquor licenses, including that of the Ballard Restaurant, for the upcoming year. The vote also included the renewal of two coin operated licenses and a juke-

box license for the Ballard Restaurant.

6. Section 19 of G.L. c. 268A provides, in pertinent part, that, except as otherwise permitted in §19,[2] a municipal employee may not participate as such in a particular matter in which he or his immediate family has a financial interest.

7. The December 3, 1985 vote in which Mr. Lavoie participated authorizing the renewal of the Ballard Restaurant's liquor, coin operated and juke-box licenses is a "particular matter" as defined in G.L. c. 268A, §1(k).

8. Mr. Lavoie's and his immediate family's stock ownership in the Ballard Restaurant gave him and his family a financial interest in the above vote.

9. By participating in the vote on the renewal of the Ballard Restaurant's liquor, coin operated and juke-box licenses, Mr. Lavoie thereby violated §19 of G.L. c. 268A.

10. There is no evidence to suggest that Mr. Lavoie intentionally violated G.L. c. 268A.

11. The Commission will not accept Mr. Lavoie's reliance on the incorrect advice of the ABCC employee as a defense to this violation. As the Commission has made clear in prior disposition agreements, see e.g., **In the Matter of John A. Deleire** (Docket No. 289), **In the Matter of James F. Connery** (Docket No. 285, **In the Matter of Raymond Sestini** (Docket No. 300), if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. The opinion must be from town counsel, in writing and made a matter of public record. **See** G.L. c. 268A, §22. (Note that as of May 1, 1986, such opinions must also be filed with the Commission. 930 CMR 1.03(3)). For the same reasons the Commission will not accept as a defense that Mr. Lavoie misunderstood town counsel's oral advice. This apparent misunderstanding underscores the importance of obtaining such advice in writing.[3]

Nonetheless, the Commission has given consideration to mitigating factors which apply here: Mr. Lavoie showed sensitivity to the conflict issue by seeking advice from both the ABCC employee and town counsel. While not a defense, the bad advice from an ABCC employee is a mitigating factor. Moreover, Mr. Lavoie's interpretation of town counsel's advice was not unreasonable given that liquor licenses are routinely renewed, and given the advice he had received from the ABCC employee. Accordingly, while the Commission can impose up to a $2,000 fine for each violation of §19, it has determined that a relatively small fine here is appropriate.

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. Lavoie:

1. that he pay to the Commission the amount of two hundred and fifty dollars ($250) as a civil penalty of his violation of §19;

2. refrain from participating as a selectman in any matter in which he or an immediate family member has a financial interest; and

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

DATE: March 18, 1987

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[1]In February, 1986, town counsel issued an opinion in which he asserted that if Mr. Lavoie were to vote on the issuance of a license for the Ballard Restaurant for coin operated amusement devices, Mr. Lavoie would be in violation of the conflict of interest statute. Town counsel issued a further opinion in which he stated that Mr. Lavoie's participation in the December, 1985 vote on the renewal of the liquor license for his family restaurant was not a conflict of interest. He based his opinion on G.L. c. 138, §16A, providing for "automatic" renewals of liquor licenses for the next annual license period. Town counsel also suggested that Mr. Lavoie refrain from voting on the renewal of the license in the future to avoid any questions of ethical propriety.

[2]None of the exceptions in §19 are applicable to this case.

[3]Mr. Lavoie, of course, cannot rely on town counsel's written opinion that he could participate regarding the "automatic" liquor license renewal. This opinion was obtained after the fact. (The Commission disagrees with town counsel's opinion. While the statute does provide that a license will be renewed absent a showing of cause not to, as a practical matter selectmen can refuse to grant renewals, even without cause, requiring licensees to appeal the denials.)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 329

IN THE MATTER
OF
ERNEST LaFLAMME

DISPOSITION AGREEMENT

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

On May 20, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. LaFlamme, the Chicopee City Treasurer. The Commission concluded its inquiry and, on December 8, 1986, found reasonable cause to believe that Mr. LaFlamme violated G.L. c. 268A, §19.

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

1. Mr. LaFlamme is the elected Treasurer for the City of Chicopee, a position that he has held for approximately 15 years. As City Treasurer, Mr. LaFlamme is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

Chicopee Cooperative Bank Deposits

2. Shortly after being first elected as Treasurer, Mr. LaFlamme became a member of the Board of Directors of the Chicopee Cooperative Bank. As a member of the board, he received a nominal yearly stipend of $700. More recently, however, because of additional bank duties, this stipend increased to approximately $10,000 per year.

3. As City Treasurer, Mr. LaFlamme has sole discretion to determine where to deposit city funds.

4. Although he deposited the bulk of city funds into large commercial banks, Mr. LaFlamme also deposited and reinvested substantial sums of city money into the Chicopee Cooperative Bank.

5. Although no written record can be found, Mr. LaFlamme states that he asked his bank's general counsel as long as 15 years ago whether it was a conflict of interest for him to deposit city money into a bank of which he served as director. The bank's general counsel incorrectly advised him that so long as he filed a disclosure statement relative to his bank position and the deposits he makes as treasurer, the conflict of interest law would be satisfied. Mr. LaFlamme contends that such a disclosure was prepared and filed with the city clerk.

6. General Laws c. 268A, §19 provides in pertinent part that, except as otherwise permitted in §19, a municipal employee may not participate as such in a particular matter in which to his knowledge a business organization in which he serves as a director has a financial interest. None of the exceptions in §19 applies here.[1/]

7. Each time he deposited or reinvested city funds with the Chicopee Cooperative Bank while he served as a director, Mr. LaFlamme participated in a matter in which the Chicopee Cooperative Bank had a financial interest, thereby violating §19.

8. The Commission has found no evidence that Mr. LaFlamme gave preferential treatment to Chicopee Cooperative Bank either in the amount of deposits placed with the bank or in terms of interest rates on those deposits.

9. The Commission recognizes that Mr. LaFlamme made an attempt to determine whether his service on the bank's board of directors created problems under the conflict of interest law. The Commission will not defer to the advice given to Mr. LaFlamme. Not only was the advice incorrect, it was sought and received orally, rather than in writing, and was not given by the city solicitor.

As the Commission has made clear in past disposition agreements involving certain City of Revere officials[2/] and members of the Massachusetts State Police[3/], if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against any action taken by the Commission, the important substantive provisions controlling the issuance of such opinion must be followed. Of paramount importance is that the opinion be in writing and be made a matter of public record. See, G.L. c. 268A, §24. As to municipal employees, the opinion must also be given by a corporation counsel, city solicitor or town counsel.[4/]

Sale of Parcel to Brother

10. Pursuant to G.L. c. 60, §77B, Mr. LaFlamme was appointed by the Mayor of Chicopee to act as custodian of city property. As custodian, he is responsible for the care, custody, management and control of tax title properties.

11. A parcel of land located at 76A River Avenue in Chicopee was taken by tax title in the early 1970's. A final decree, foreclosing all redemption rights, was issued by the Land Court on September 27, 1982. This decree allowed Mr. LaFlamme to sell the property at public auction.

12. Mr. LaFlamme's brother was at the time an abutter to the parcel of land.

13. Because his brother was an abutter, Mr. LaFlamme consulted with an assistant city solicitor to determine how he should conduct the sale. Although nothing was put in writing, the assistant solicitor apparently advised him to obtain an independent appraisal on the property instead of allowing the board of assessors to conduct its own appraisal. Mr. LaFlamme was further advised to follow the normal auction procedures and sell the property to the highest bidder.

14. On March 16, 1983 notices of the sale were posted at the main library and at city hall. Abutters were also notified, including Mr. LaFlamme's brother. The sale was also advertised in the newspaper.

15. According to the minutes of the sale, Mr. LaFlamme's brother was the only bidder; and Mr. LaFlamme accepted his bid of $3,000, which was equal to the appraisal amount.

16. General Laws c. 268A, §19 provides, in part, that, except as otherwise permitted in §19,[5/] a municipal employee may not participate as such in a particular matter in which, to his knowledge, a family member has a financial interest.

17. By participating in the sale of the land to his brother, Mr. LaFlamme participated in a particular mat-

ter in which his brother had a financial interest, thereby violating §19.

18. The Commission has found no evidence that Mr. LaFlamme gave preferential treatment to his brother in connection with the sale of the land.

19. The Commission recognizes that Mr. LaFlamme sought legal advice from the assistant city solicitor regarding problems inherent in his selling city land to his brother.

As previously indicated in ¶9, the Commission will not defer to such advice where, in addition to being incomplete and/or incorrect, it is not put in writing and made a matter of public record.

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. LaFlamme:

1. that he pay to the Commission the amount of fifteen hundred dollars ($1,500) as a civil penalty for depositing funds into the Chicopee Cooperative Bank in violation of §19;-
2. that he pay to the Commission the amount of five hundred ($500) as a civil penalty for selling city property to his brother in violation of §19;-
3. that, in the future, he refrain from participating, e.g. depositing or reinvesting city funds into the Chicopee Cooperative Bank, while serving as director for that bank; and
4. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions proposed under this Agreement in this or any related administrative or judicial civil proceeding in which the Commission is a party.

DATE: April 8, 1987

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[1]/Assuming Mr. LaFlamme had made the disclosure he contends he made, he would still not have avoided a §19 violation. In the case of demand bank deposits, elected municipal officials can be exempted under §19 by filing a disclosure of their financial interests with the city clerk. The deposits made by Mr. LaFlamme were not bank demand deposits as defined by the Banking Commissioner's office.

[2]/**In the Matter of John A. DeLeire**, (Docket No. 289); **In the Matter of James F. Connery** (Docket No. 285).

[3]/**In the Matter of John J. Hanlon**, (Docket No. 299).

[4]/Municipal employees may also seek an opinion directly from the Commission.

[5]/None of the exceptions in §19 is applicable to this case.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 311

IN THE MATTER
OF
WENDELL R. HOPKINS

DISPOSITION AGREEMENT

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

On April 29, 1986, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Hopkins, former Rowley selectman. The Commission has concluded that preliminary inquiry and, on June 10, 1986, found reasonable cause to believe that Mr. Hopkins violated G.L. c. 268A, §19.

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

1. Mr. Hopkins was a Town of Rowley selectman from 1976 to May 13, 1985. As a Rowley selectman, he was a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. At all times material to this Agreement, Mr. Hopkins lived on Stackyard Road in Rowley. Stackyard Road is approximately 6,600 feet long and has no public water. The town voted to install public water in the early 1970's, but subsequently rescinded that vote.

3. On May 2, 1983, at the annual town meeting, the town passed an article which proposed $30,000 to install a town water main on Stackyard Road for approximately 4,000 feet of its length. According to Mr. Hopkins, during debate on the article, he stated he would provide $5,000 towards the installation costs.

4. At the June 27, 1983 selectmen's meeting, a letter was received from town counsel asking whether he should research whether Stackyard Road was a public way. The board voted to affirm that the road was a town way.

5. Mr. Hopkins' involvement in the selectmen's vote on whether Stackyard Road was a public way became the subject of a Commission investigation. As a result of that investigation, Mr. Hopkins received a letter from the Commission on or about October 26, 1983 stating that his participation as a selectman in the vote confirming Stackyard Road as a public way could constitute a conflict of interest and suggesting that he seek town counsel's opinion before participating as a selectman in any matter which could benefit him privately. The letter also advised him that a formal Commission inquiry was not warranted.

6. On December 5, 1983, a special town meeting was held. The warrant for that meeting contained an article to approve an additional $69,000 loan for installing the water main on Stackyard Road. This additional article was inserted by the water commissioners because, according to Mr. Hopkins, they intended to use outside contractors rather than town personnel and

equipment; consequently, the costs were expected to be substantially higher than anticipated at the time of the original warrant. The town defeated this article.

7. At this same meeting, a related article was proposed by the water commissioners to authorize the water commissioners to accept $5,000 from Mr. Hopkins and his wife towards the cost of a water main on Stackyard Road. The town also defeated this article.

8. At the December 29, 1983 selectmen's meeting, in response to a request from the water commissioners, Mr. Hopkins moved that the board grant permission to the water commissioners to open Stackyard Road to install a town water main. The proposal passed 2 to 1, with Mr. Hopkins voting in favor. According to Mr. Hopkins, at the time he voted he stated that the vote was necessary and appropriate to enable the May 2, 1983 vote of the town to be implemented.

9. At the April 2, 1984 selectmen's meeting, Mr. Hopkins told the board that Chairman Don Nevens of the water commissioners had contacted him and requested that the selectmen insert an article in the 1984 annual town warrant asking that the town authorize the water commissioners to accept a $5,000 gift from the Hopkinses toward the installation of a water main on Stackyard Road. Mr. Hopkins moved that this article be put on the warrant. The vote was 2 to 0 to accept the proposal, with Mr. Hopkins voting and one selectman absent. According to Mr. Hopkins, it was the town's practice to accommodate requests of town boards, including the water commissioners, to put articles requested by them in the warrant, provided there was time to get them to the printer.

10. The May 7, 1984 warrant for the annual town meeting contained the article proposing to authorize the water commissioners to accept the $5,000 from the Hopkinses toward the installation of the Stackyard Road water main. During town meeting, town counsel ruled that the selectmen would have to accept the $5,000 check before there could be a vote on the article by town meeting. The selectmen then held a meeting in the midst of town meeting, voting 2 to 1 to accept the check. Hopkins voted in favor of acceptance despite being told by town counsel that his participation could result in a conflict.[1]/ Town meeting then voted against an amendment to the original article, thereby rejecting the $5,000.

11. On July 15, 1985, the outstanding $30,000 appropriation for Stackyard Road was rescinded.

12. During 1983 and 1984, the town of Rowley had a population of approximately 3900 people based on the 1980 census.

13. As of January 1, 1984 there were not more than 27 parcels abutting Stackyard Road. Hopkins owned four of these (two of which involved unbuildable wetlands); other abutters owned multiple parcels as well, for a total of not more than 16 abutting owners. There were five houses on these parcels, two of which were summer camps. The parcels on which houses had not been built were non-buildable lots.

14. Section 19 of G.L. c. 268A provides that except as permitted by paragraph (b),[2]/ a municipal employee is prohibited from participating as such an employee in a particular matter in which to his knowledge he has a financial interest.

15. The decisions of the board of selectmen on December 29, 1983, April 2, 1984 and May 7, 1984, concerning the installation of a town water main on Stackyard Road, were particular matters.

16. By moving and voting on December 29, 1983, by moving and voting on April 2, 1984, and by voting on May 7, 1984, all as described above, Mr. Hopkins participated as a selectman in these particular matters.

17. Mr. Hopkins knowingly had a financial interest in these particular matters because he owned parcels of property abutting Stackyard Road and because a proposal by which he would pay $5,000 to the town was contingent on these votes.

18. By his conduct, as described in paragraph 15 above, Mr. Hopkins participated as a municipal employee in particular matters in which to his knowledge he had a financial interest. None of the exceptions in paragraph (b) of §19 applies in this case. In particular, none of the particular matters involved a determination of general policy, nor was Mr. Hopkins' financial interest in those matters shared with a substantial segment of the population of Rowley.[3]/ Therefore, Mr. Hopkins violated §19.

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

1. that he pay the Commission a sum of two thousand dollars ($2,000) forthwith as a civil penalty for violating G.L. c. 268A, §19; and
2. that he waive all rights to contest the findings of fact, conclusions of law and conditions contained in this Agreement in this or any related administrative or judicial proceeding in which the Commission is a party.

DATE: April 29, 1987

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[1]/According to Mr. Hopkins, at the time he so voted he stated that this was the only way to get the matter before the town meeting where it could be "voted up or down." He further stated that he would call the State Ethics Commission regarding the conflict issue. (Mr. Hopkins called the Commission on May 10, 1984.)

[2]/Paragraph (b) of §19 provides: "It shall not be a violation of this section (1) if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee, or (2) if, in the case of an elected municipal official making demand bank deposits of municipal funds, said official first files, with the clerk of the city or town, a statement making full disclosure of such financial interest, or (3) if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate

family is shared with a substantial segment of the population of the municipality."

²/See footnote 1 above. Neither does either of the first two exceptions apply:
(b)(1) does not apply because Mr. Hopkins as a selectman was elected rather than appointed, and (b)(2) does not apply since this case does not involve demand bank deposits.

Walter Johnson
66 Elizabeth Street
Stoughton, MA 02072

RE: PUBLIC ENFORCEMENT LETTER 87-4

Dear Mr. Johnson:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that while serving as a member of the Stoughton Board of Selectmen (Board), you acted as agent for, and received compensation from, Goddard Memorial Hospital (GMH) in connection with matters in which the Town of Stoughton had a direct and substantial interest. Our inquiry also focused on your conduct as an agent/employee of GMH following your resignation from the Board.[1]/ The results of our investigation (discussed below) indicate that the conflict of interest law was violated in this case. However, in view of certain mitigating circumstances (also discussed below), the Commission has determined that further proceedings are not warranted, and that the public interest would better be served by bringing to your attention the facts revealed by our investigation and explaining the application of the law to those facts, trusting that this advice will ensure your future understanding of, and compliance with, 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 until January 20, 1986, you were a member of the Board and, as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). You also served as Acting Town Manager from January to May, 1984.

2. On June 22, 1984, you were interviewed for the position of Director of Planning and Construction at GMH. You were the only candidate considered, and you were hired to commence working for the hospital on July 5, 1984. As Director of Planning and Construction, you are in charge of all construction projects for the hospital.

Well Agreement

3. As early as 1982, representatives from the Town of Stoughton were negotiating with officials from GMH to develop jointly a water source found on the property of GMH. A joint development would allow the town to expand its water supply and allow GMH to expand its physical plant.

4. On January 17, 1984, the efforts of the town's negotiating team were discussed by the Board in executive session. According to the minutes, you participated as a Selectman in that discussion and in a vote to submit an article concerning the negotiations to Town Meeting. On April 10, 1984, you again participated in a discussion and vote to go forward with the well agreement. Your Board briefly reviewed the agreement at two other meetings in April, 1984. In addition to the Board meetings, you participated in these negotiations in February, 1984, when you joined the principal negotiators for a meeting at GMH to work out issues concerning the well agreement.

5. In late August, 1984, as a GMH employee, you attended a meeting to finalize the new well agreement. Shortly thereafter, you solicited bids for the well's engineering design and specifications, met with town officials to pinpoint the exact location of the well, discussed the wording of the well agreement with GMH's attorney, and attended a meeting with town officials at DEQE to discuss the well.

6. You also attended a January 16, 1986 meeting of the Zoning Board of Appeals as a representative of GMH where GMH officials threatened to void the well agreement if the medical office building (see below) was not permitted to be built.

Medical Office Building Proposal

7. In 1983, GMH submitted to the Board a request for a zoning change to allow the construction of a medical office building and other hospital development. Your Board, although it had no discretion to accept or reject articles submitted for the town meeting's warrant, did endorse the zoning change.

8. From April, 1985 to February, 1986, while employed at GMH and during the time you served as a Selectman, you represented GMH before the Zoning Board of Appeals, the Planning Board and the Board of Health in connection with various permits and zoning decisions relating to the medical office building. After you resigned as Selectman, you continued to represent GMH's interests in connection with the construction of the medical office building.

Reginald Cole Drive

9. On September 20, 1984, the President of GMH

filed an application with the Planning Board for approval to construct Reginald Cole Drive. You initialed this application. On November 8, 1984, you attended a Planning Board meeting concerning the road development and spoke on behalf of GMH. On May 9, 1985, you filed a notice of intent with DEQE. (Your name appeared on this notice as the "Responsible Officer/ Project Proponent.") On May 22, 1986, you appeared before the Planning Board to present a modification of the road plan and answer questions.

10. On June 11, 1985, your Board approved a recommendation of the Town Engineer that the Board recommend to the Zoning Board of Appeals that a special permit be granted to the hospital for the roadway named Reginald Cole Drive. You abstained in this approval.

Town Counsel Opinion

11. Shortly after you began employment with GMH, you wrote to Town Counsel, Leonard Kopelman, seeking direction with respect to conflict of interest issues. You wrote,

> I realize that I cannot act in any official capacity as a selectman in matters coming before the town which will affect the Goddard Hospital. I seek your opinion as to further questions arising under the conflict law relating to my duties responsibilities now that I am employed by Goddard Hospital.

Kopelman responded that he saw no conflict of interest in holding the two positions. "Since you are a paid employee of the Goddard Hospital, you should, of course, not sign any documents between the hospital and the Town of Stoughton and should abstain from any vote taken therein," Kopelman wrote.

II. The Conflict Law

Section 17 of G.L. c. 268A prohibits municipal employees from receiving compensation from, and/or acting as agent or attorney for, a private party in connection with a particular matter in which the municipality has a direct and substantial interest. Once you were hired by GMH in July of 1984, one of your principal responsibilities was to represent the hospital's interests before town boards in connection with matters that were of direct and substantial interest to the Town of Stoughton. The well agreement was one such matter. Your work on behalf of GMH to finalize the well agreement with the town, and to implement its terms, at a time when you also served as Selectman, constituted a violation of §17(a). Your appearances before various town boards as a GMH representative at a time when you also served as Selectman constituted violations of §17(c). Likewise, your appearances before town boards in connection with permits for the construction of the medical office building and for the construction of Reginald Cole Drive constituted violations of this section.

Section 18 prohibits a former municipal employee from knowingly acting as agent or attorney for, or from receiving compensation, directly or indirectly, from, anyone other than the same city or town in connection with any particular matter in which the city or town is a party or has a direct and substantial interest, and in which the person participated as a municipal employee. Section 18 also prohibits a former employee from appearing before any town agency as agent or attorney of any private party in connection with a particular matter which came under his official responsibility within the two years prior to the termination of his employment, whether or not he actually participated in the matter. This latter prohibition lasts for one year following termination of employment.

Your representation of Goddard's interests in matters involving the well, the medical office building and Reginald Cole Drive, during the first year following your resignation from the Board, created the same problems under §18 that existed under §17 while you were still a Selectman.

The purpose of §§17 and 18 of G.L. c. 268A is to ensure that a public employee's private representation of a private entity does not compromise the loyalty owed to the town he serves. The facts in this case suggest the potential for conflict between your private responsibilities and your public duties.

The principal reason why the Commission has decided to resolve this matter by means of this letter is because of your apparent good faith reliance on Town Counsel's opinion which did not adequately address the issues that you would be facing when you accepted employment at GMH.[2/] While good faith reliance on Town Counsel's opinion is not a shield from a violation of G.L. c. 268A, the Commission has generally considered such an opinion in mitigation of the violation. In this case, you asked the right question to the right person but received an incorrect opinion, and therefore the Commission has determined that a public enforcement letter is the appropriate way to resolve this matter.

You should be aware that, pursuant to the requirements of §18, you are forever barred from representing the interests of GMH, with or without pay, in any matter in which the Town of Stoughton had a direct and substantial interest and in which you participated as a Selectman.[3/]

In our view, your Board's endorsement of the GMH zoning change article placed on the town meeting warrant, was a discrete particular matter. Prospectively, G.L. c. 268A, §18 would prohibit you from acting as an agent for or receiving compensation from GMH in connec-

tion with the Board's decision to place the zoning change request on the town warrant. For example, you cannot challenge the Board's decision to place this article on the town warrant. Aside from this issue related to the zoning change, and assuming your prior participation as a Selectman was limited to what has been discussed above, you would be free to work for GMH on the medical office building. By contrast, because the well agreement involves a continuing contractual or joint venture arrangement between the town and GMH, and because you participated in the creation of the agreement, you will be barred from taking any action on behalf of GMH in connection with the well until the agreement is terminated.

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 and your future compliance with it. Thank you for your cooperation. If you have any questions, please contact me at (617) 727-0060.

Date: May 26, 1987

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[1]/A third allegation which was the subject of the preliminary inquiry concerned whether you officially participated in a particular matter — the well agreement — in which you knew GMH had a financial interest at a time when you were negotiating employment with GMH, in violation of §19 of G.L. c. 268A. Our investigation uncovered no evidence which would establish a violation of this section.

[2]/While the opinion addressed the limitations on official participation by you in matters in which your employee had a financial interest, it overlooked the restrictions with respect to your acting as agent for, or receiving compensation from, GMH.

[3]/You were barred for a period of one year from the date you left town service from appearing before any Stoughton town board or agency as agent for GMH in connection with any particular matter in which Stoughton is a party or has a direct and substantial interest, and which was under your official responsibility as a Selectman at any time within a period of two years prior to the time you resigned. This one-year limitation expired January 20, 1986.

William Sheehan
President
Goddard Memorial Hospital
c/o George L. Wainwright, Esq.
P.O. Box 336
Brockton, MA 02403

RE: PUBLIC ENFORCEMENT LETTER 87-5

Dear Mr. Sheehan:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that Goddard Memorial Hospital (GMH) compensated Walter Johnson, a member of the Stoughton Board of Selectmen (Board), to represent the hospital's interests in connection with matters in which the town of Stoughton had a direct and substantial interest. The results of our investigation (discussed below) indicate that the conflict of interest law was violated in this case. However, in view of certain mitigating circumstances (also discussed below), the Commission has determined that further proceedings are not warranted, and that the public interest would better be served by bringing to your attention the facts revealed by our investigation and explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of, and compliance with, the law. By agreeing to this public letter as a final resolution of this matter, the Commission and GMH are agreeing that there will be no formal action against it and that the hospital has chosen not to exercise its right to a hearing before the Commission.

I. The Facts

1. At all relevant times until January 20, 1986, Walter Johnson was a member of the Board and, as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). He also served as acting town manager from January to May, 1984.

2. On June 22, 1984, Johnson was interviewed for the position of Director of Planning and Construction at GMH. He was the only candidate considered and he was hired to commence working for the hospital on July 5, 1984. As director of planning and construction, he was in charge of all construction projects for the hospital.

Well Agreement

3. As early as 1982, representatives from the Town of Stoughton were negotiating with officials from GMH to develop jointly a water source found on the property of GMH. A joint development would allow the town to expand its water supply and allow GMH to expand its physical plant.

4. On January 17, 1984, the efforts of the town's negotiating team were discussed by the Board in executive session. According to the minutes, Johnson participated as a selectman in that discussion and in a vote to submit an article concerning the negotiations to Town Meeting. On April 10, 1984, he again participated in a discussion and vote to go forward with the well agreement. His Board briefly reviewed the agreement at two other meetings in April, 1984. In addition to the Board meetings, he participated in these negotiations in February, 1984, when he joined the principal negotiators for a meeting at GMH to work out issues concerning the well agreement.

5. In late August, 1984, as a GMH employee, Johnson attended a meeting to finalize the new well agreement. Shortly thereafter he solicited bids for the well's engineering design and specifications, met with town officials to pinpoint the exact location of the well, discussed the wording of the well agreement with GMH's attorney and attended a meeting with town officials at DEQE to discuss the well.

6. He also attended a January 16, 1986, meeting of the Zoning Board of Appeals as a representative of GMH where GMH officials threatened to void the well agreement if the medical office building (see below) were not permitted to be built.

Medical Office Building Proposal

7. In 1983, GMH submitted to the Board a request for a zoning change to allow the construction of a medical office building and other hospital development. Johnson's Board, although it had no discretion to accept or reject articles submitted for the town meetings warrant, did endorse the zoning change.

8. From April, 1985 to February, 1986, while employed by GMH and during the time he served as a selectman, Johnson represented GMH before the Zoning Board of Appeals, the Planning Board and the Board of Health in connection with various permits and zoning decisions relating to the medical office building. After he resigned as selectman, he continued to represent GMH's interests in connection with the construction of the medical office building.

Reginald Cole Drive

9. On September 20, 1984, GMH filed an application with the Planning Board for approval to construct Reginald Cole Drive. Johnson initialled this application. On November 8, 1984, he attended a Planning Board meeting concerning the road development and spoke on behalf of GMH. On May 9, 1985, he filed a notice of intent with DEQE. (His name appeared on this notice as the "Responsible Officer/Project Proponent.") On May 22, 1986, he appeared before the Planning Board to present a modification of the road plan and answer questions.

10. On June 11, 1985, Johnson's Board approved a recommendation of the town engineer that the Board recommend to the Zoning Board of Appeals that a special permit be granted to the hospital for the roadway named Reginald Cole Drive. Johnson abstained from this approval.

Town Counsel Opinion

11. Shortly after Johnson began employment with GMH, he wrote to Town Counsel, Leonard Kopelman, seeking direction with respect to conflict of interest issues. He wrote,

> I realize that I cannot act in any official capacity as a selectman in matters coming before the town which will affect the Goddard Hospital. I seek your opinion as to further questions arising under the conflict law relating to my duties responsibilities now that I am employed by Goddard Hospital.

Kopelman responded that he saw no conflict of interest in holding the two positions. "Since you are a paid employee of the Goddard Hospital, you should, of course, not sign any documents between the hospital and the Town of Stoughton and should abstain from any vote taken therein," Kopelman wrote.

12. GMH officials were provided with a copy of this letter by Johnson.

II. The Conflict Law

Section 17 of G.L. c. 268A prohibits a private party from giving compensation to a municipal employee in connection with a particular matter in which the municipality has a direct and substantial interest. Once you hired Johnson as a paid full-time employee of GMH, in July of 1984, his principal responsibility was to represent the hospital's interests before town boards in connection with matters that were of direct and substantial interest to the Town of Stoughton. The well agreement, which as selectman and town manager he had participated in negotiating, was one such matter. Compensating Johnson for his work on behalf of GMH to finalize the well agreement, and for his work to oversee the construction of the well at a time when he served as selectman, constituted a violation of §17(b) by GMH. Likewise, compensation for his appearances as an employee of GMH before town boards in connection with permits for the construction of the medical office building and for the construction of Reginald Cole Drive constituted violations of this section. Any matter requiring a determination by a town board is of direct and substantial interest to the town.

The purpose of §17 is to ensure that a public employee's private representation of a private entity does not compromise the loyalty owed to the town he serves. The facts in this case suggest the potential for conflict between Johnson's private responsibilities and his public duties.

The principal reason why the Commission has decided to resolve this matter by means of this letter is because of Johnson's and GMH's apparent good-faith reliance on Town Counsel's opinion, which did not adequately address the issues that he and GMH would be facing when he accepted employment at GMH. While

good-faith reliance on Town Counsel's opinion is not a shield from a violation of G.L. c. 268A, the Commission has generally considered such an opinion in mitigation of the violation. In this case, Johnson asked the right question to the right person but received an incorrect opinion, and therefore the Commission has determined that a public enforcement letter is the appropriate way to resolve this matter.

GMH should be aware that, pursuant to the requirements of §18 of G.L. c. 268A,[1]/ Johnson is forever barred from representing the interests of GMH, with or without pay, in any matter that the Town of Stoughton had a direct and substantial interest and in which he participated as a selectman.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure the hospital's understanding of the law and its future compliance with it. Thank you for your cooperation. If you have any questions, please contact me at (617) 727-0060.

Date: May 26, 1987

[1]/Although GMH has no liability under §18, it should be careful to ensure that Johnson is not asked to perform duties that would put him in a conflict situation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 334

IN THE MATTER
OF
FRANK BAJ

DISPOSITION AGREEMENT

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

On July 29, 1986 the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Baj, a former building inspector in the Town of Hadley. The Commission concluded its inquiry on January 12, 1987, finding reasonable cause to believe that Mr. Baj violated G.L. c. 268A, §19.

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

1. Mr. Baj was a part-time Hadley building inspector from 1978 through 1985. As a building inspector, Mr. Baj was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Mr. Baj was appointed by the Board of Selectmen. His basic duties were to review plans, issue permits, inspect buildings, and issue occupancy permits, all to insure that construction complied with the state building codes.

3. At all times relevant herein, Mr. Baj also carried on a sole proprietorship contractor business through which he built new homes, additions, and did remodeling.

4. Mr. Baj issued building permit No. 25-1983 on April 20, 1983 for the construction of an addition at 17 Arrowhead Drive. At the time Mr. Baj issued this permit, he knew he would be doing the private construction work pursuant to that permit.

5. On or about October 9, 1984, Mr. Baj issued a building permit No. 48-1984 for the construction of a one story dwelling at 63 Shattuck Road. At the time, Mr. Baj issued this permit, he knew that he was doing the private construction work which was the subject of the permit.

6. On or about February 12, 1985, Mr. Baj issued an occupancy permit for the construction at 63 Shattuck Road. This occupancy permit signified that all the work, including work done by Mr. Baj, had been properly completed and that the building was suitable for occupancy.[1]/

7. Except as otherwise permitted in that section, G.L. c. 268A, §19 in pertinent part prohibits a municipal employee from participating as such in a particular matter in which he has a financial interest.

8. None of the exceptions in §19 applies to this matter.

9. By issuing building permits for construction at 17 Arrowhead Drive and 63 Shattuck Road at a time when he knew he would be or was the private contractor for the work pursuant to those permits, and by issuing the occupancy permit for a building signifying that all work, including work done by him, had been completed properly, Mr. Baj participated in particular matters in which he had a financial interest, thereby violating §19.

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. Baj:

1. that he pay to the Commission the amount of $500 (five hundred) as a civil penalty for his violations of §19; and
2. that he waive all rights to contest the findings of fact, conclusions of law and terms and

conditions in this or any related administrative or judicial proceedings in which the Commission is a party.

DATE: June 10, 1987

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[1] It is unclear who issued the occupancy permit for the work done at 17 Arrowhead Road. Many of the Building Department records are missing and there is no record indicating who issued the occupancy permit for the construction done pursuant to permit No. 25-1983 at 17 Arrowhead Road.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 316

IN THE MATTER
OF
PAUL T. HICKSON

Appearances:

Robert A. Levite, Counsel for Petitioner
State Ethics Commission

Anthony C. Bonavita, Counsel for Respondent
Paul T. Hickson

Commissioners:

Diver, Ch., Basile, Burns, Epps, Gargiulo

DECISION AND ORDER

I. Procedural History

The Petitioner filed an Order to Show Cause on December 29, 1986 alleging that the Respondent, Paul T. Hickson, was in violation of G.L. c. 268A, §20[1] by serving as an elected city councillor for the City of Westfield (City) and as a maintenance worker for the Westfield Housing Authority (WHA). In lieu of an adjudicatory hearing, the Petitioner and Respondent stipulated to the relevant facts, submitted briefs, and orally argued before the full Commission on June 8, 1987. Based upon a review of the evidence and arguments presented by the parties, the Commission makes the following findings and conclusions.

II. Findings

A. Jurisdiction

The parties have stipulated that the Respondent, in his capacity as an elected city councillor, is a municipal employee within the meaning of G.L. c. 268A, §1(g).[2]

B. Findings of Fact

1. The Respondent has been employed as a WHA maintenance worker for approximately four years and is paid $20,000 annually.
2. The Respondent has also served as an elected city councillor in the City for approximately three years and is paid $4,000 annually.
3. On September 10, 1985 the Westfield City Solicitor rendered an opinion stating that there is "no express prohibition or inherent wrong in a maintenance employee of the Housing Authority being a member of the City Council..." Opinion of the City Solicitor, September 10, 1985.
4. On July 22, 1986, the Commission advised the Respondent through a compliance letter,[3] that as an elected city councillor and a maintenance worker for the WHA, he had a prohibited financial interest in a contract made by a municipal agency of the same city, in which the city is an interested party. The Commission noted that the city solicitor's advice was incorrect under §20 of the conflict of interest law. The Commission informed the Respondent that the violation could be cured if he resigned one of his municipal positions within thirty days.
5. Notwithstanding receipt of the Commission's compliance letter, the Respondent has continued to maintain both positions.

III. Decision

The Respondent, as a municipal employee, is prohibited by G.L. c. 268A, §20 from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city in which the city is an interested party. The Respondent stipulates that he is a municipal employee in his capacity as city councillor. He also has a financial interest in his employment contract with the WHA, a municipal agency, since he is compensated to work pursuant to that contract. The WHA's municipal agency status is plainly articulated in its enabling statute, G.L. c. 121B, §7. Consequently, the Respondent has a prohibited financial interest in his employment contract with the WHA, a municipal agency. By maintaining his position as a maintenance worker for the WHA while also serving as a city councillor for the City, we conclude that the Respondent has violated and continues to violate G.L. c. 268A, §20.[4]

This result is consistent with the Commission's conclusion in a nearly identical case, **In the Matter of Kenneth R. Strong**, 1984 SEC 195, in which an elected common councillor violated §20 by also serving as a maintenance worker for the city housing authority.[5]

The Respondent makes five arguments in support

of his contention that he has not violated G.L. c. 268A: 1) WHA is not a municipal agency because it is funded by the state; 2) the Respondent does not knowingly have a financial interest in his employment contract with a municipal agency; 3) the City is not an interested party in any contract he may have with the WHA; 4) the Commission's application of G.L. c. 268A, §20 deprives him of his right to be elected under Part 1, Art. 9 of the Massachusetts Constitution thus depriving him of equal protection of the law; and 5) that the Order to Show Cause contains various procedural and constitutional defects. For the following reasons, none of the contentions set forth above persuades us to overrule the principles which we articulated in **Strong** and reaffirm today.

1. The enabling statute which establishes housing authorities, G.L. c. 121B, provides that:

> For the purposes of chapter two hundred and sixty-eight A, each housing and redevelopment authority shall be considered a municipal agency . . .

Prior to the enactment of G.L. c. 121B and before the creation of the State Ethics Commission, the Attorney General ruled that housing authorities are municipal agencies for the purposes of G.L. c. 268A. **Attorney General Conflict Op. 25** (April 16, 1963). G.L. c. 121B codified this conclusion.

The plain language of G.L. c. 121B is conclusive as a matter of law that the WHA is a municipal agency. The Respondent's assertion that the source of the funding for his WHA salary is federal and state money does not alter this conclusion. The Legislature enacted G.L. c. 121B with the presumed knowledge that housing authorities received funds from various sources, including the state and federal government. Respondent's argument that the source of funding for his WHA salary renders the WHA something other than a municipal agency is an argument the Respondent has with c. 121B, not with the application of the conflict law.

2. The Respondent is employed by the WHA, a municipal agency, and is paid $20,000 annually. To the extent that the Respondent claims that he had no knowledge of his financial interest in a municipal contract, this question was definitively resolved when the Commission notified him in July of 1986 that he was in violation of G.L. c. 268A, §20. To the extent that he claims he did not have knowledge because his employment was not a contract made by a municipal agency, we have previously addressed this question in 1.[6]/

3. In the **Strong** decision, we held that the City is also an interested party to contracts the [housing authority] enters into with Respondent, a municipal employee of the City. The nature of the establishment and operation of a housing authority demonstrate that the City is an interested party in the activities of the [housing authority]. Its enabling statute provides that no housing authority may transact business or exercise its powers until a need for the authority has been determined by city officials. Four of the five housing authority members are appointed by the mayor. G.L. c. 121B, §5. The City's status as an interested party is also reflected in its statutory responsibility to provide safe and sanitary dwellings for families or elderly persons of low income. See G.L. c. 121B, §3. **Strong** at 196.

This conclusion applies equally here. The Respondent has offered no argument which rebuts this reasoning nor are we aware of any facts in this case which would warrant a different conclusion.

4. The Respondent also challenges the application of G.L. c. 268A on constitutional grounds, arguing that Chapter 268A, §20 deprives the Respondent of his right to hold elective office under Part 1, Art. 9 of the Mass. Constitution. This argument was addressed and definitively resolved in **Strong**. In **Strong**, we noted that the right "to be elected" is not absolute. **See, Opinion of the Justices**, 375 Mass. 795, 811 (1978). The conflict of interest law does not interfere with Hickson's right to be elected. Rather, it requires that, if elected, the City Councillor "refrain from contracting with an agency of the same municipality." **Conley v. Ipswich**, 352 Mass. 201, 205 (1967). **Strong, supra** at 196-197.

5. The Respondent has raised certain constitutional claims and argues various procedural defects in the Commission's Order to Show Cause, although he neither pursued these claims in his brief nor in oral argument. These contentions are addressed briefly.

The Respondent argues that the Order to Show Cause is barred by the statute of limitations.[7]/ Irrespective of the Respondent's argument, the statute does not bar enforcement actions against ongoing violations of the law. Hickson presently is violating the law, and the petitioner's case against Hickson is based on these continuing violations.[8]/

IV. Penalty

Following a finding of a violation of G.L. c. 268A, the Commission is authorized by G.L. c. 268B, §4(j) to issue an order requiring the violator to cease and desist from such violation and requiring the violator to pay a civil penalty of not more than $2,000 for each violation of G.L. c. 268A. The Respondent has been aware since July 22, 1986 of the consequences under §20 of his retaining his position as a city councillor in the City and as maintenance worker for the WHA. The Respondent has been collecting two paychecks, one of which he was not entitled to and by which he has profited in violation of the law. In addition, the Commission has precedent

squarely on point, **In the Matter of Kenneth R. Strong**, 1984 SEC 195, which definitively concluded that an individual may not be paid simultaneously to be a city councillor and housing authority employee. However, the Respondent did rely, at least up until July, 1986, on incorrect legal advice and, therefore, the Commission will not levy a maximum penalty. Nonetheless, the Commission orders the following sanctions to reflect the seriousness with which it views the Respondent's continuing violation of the statute, in light of the ample notice given to the Respondent, and in consideration of the city solicitor's earlier opinion.

V. Order

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

1. Cease and desist from violating G.L. c. 268A, §20 by either resigning as a city councillor or terminating his financial interest in his employment contract as a maintenance worker for WHA within thirty (30) days of the date of this Decision and Order; and
2. pay five hundred dollars ($500) to the Commission as a civil penalty for violating G.L. c. 268A, §20.

DATE ISSUED: June 25, 1987

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

[4]/"Municipal employee" is defined as a "person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

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

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

[7]/This conclusion was affirmed by the Superior Court. **Strong v. State Ethics Commission**, Suffolk Superior Court Civil Action No. 72374 (April 30, 1985). The Superior Court decision was later vacated on jurisdictional grounds which are no longer relevant in light of the enactment of St. 1986 c. 12.

[8]/We find no persuasive reason to conclude that c. 121B only applies to a limited number of housing authority employees.

[9]/The Conflict of Interest Statute of Limitations provides that an Order to Show Cause must be issued within three years of the date upon which a disinterested person learned of the violation. 930 CMR 1.02(10)(a).

[10]/We address the other procedural defects raised by Hickson by noting that the Order to Show Cause articulates the elements of a §20 violation, thereby stating a claim upon which relief can be granted, G.L. c. 268B, §3(i) gives the Commission jurisdiction to act as the civil enforcement agency for conflict of interest violations and although Hickson claims that the Commission is estopped from enforcing its Order to Show Cause, there is no factual or legal basis for this contention. Hickson has not demonstrated that his right to due process has been infringed as a result of the petitioner's maintaining the confidentiality of the complainant's identity. Moreover, the parties have stipulated to all the facts which form the basis of the petitioner's case, and the identity of the complainant is irrelevant now.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 336

IN THE MATTER
OF
JAMES V. THOMPSON

DISPOSITION AGREEMENT

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

On February 23, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Thompson, town counsel for the Town of Ludlow. The Commission concluded the inquiry and, on May 18, 1987, found reasonable cause to believe that Mr. Thompson violated G.L. c. 268A, §§17 and 19. Pursuant to G.L. c. 268B, §4(c), the Commission also authorized the initiation of a adjudicatory proceeding to determine whether there had been a violation.

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

1. Mr. Thompson currently serves as Ludlow Town Counsel and has been in this position since approximately 1982. As town counsel, Mr. Thompson is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. In approximately February, 1986, Thomas Hiersche (Hiersche), a previous law client of Mr. Thompson, approached Mr. Thompson with a signed purchase and sale agreement with a private purchaser for a particular piece of property located in Ludlow. Hiersche requested that Thompson represent him on the sale. Thompson agreed to represent Hiersche and charged a standard fee for handling the matter.

3. On February 5, 1986, prior to Hiersche retaining Thompson, Hiersche's realtor filed a notice with the town pursuant to G.L. c. 61B, §9, giving the town a 90-day right of first refusal (option) on the land.

4. Subsequent to being retained by Hiersche, and while as town counsel routinely reviewing correspondence to the Ludlow Board of Selectmen (Selectmen), Thompson observed the c. 61B notice filed by Hiersche's realtor and realized that it was incorrect. Thompson then contacted Hiersche, advised him of the problem and informed him that he (Thompson) would write a proper notice for Hiersche to the Selectmen. Thompson subsequently prepared a new notice, dated February 21, 1986, and filed it with the Selectmen on behalf of Hiersche.

5. At the February 25, 1986 Selectmen meeting, Mr. Thompson was asked questions by and provided clarification to the Selectmen regarding the c. 61B process. At the March 25, 1986 Selectmen meeting, Thompson again provided clarification to the Selectmen regarding the c. 61B process. In particular, at this latter meeting Thompson advised the Selectmen that the town had 90 days from the date of the notice to exercise the right of first refusal, that the Selectmen would have to have an appropriation from town meeting and be able to pay the sale price within the 90 day period, and that the description of the parcel the Selectmen were provided was sufficient to go to town meeting. Mr. Thompson participated in both the February 25 and March 25, 1986 Selectmen meetings in the role of town counsel, not as attorney for Hiersche.

6. At all times material herein, Mr. Thompson has been a 50 per cent stockholder in Pheasant Run, Inc. (Pheasant Run), which is a corporation which had been seeking to build condominiums in the Town of Ludlow. Pheasant Run had purchased property which was zoned industrial and sought a zoning change to Residence zone B to develop the property into a condominium project. On August 27, 1986 the Ludlow Planning Board (Board) held a public hearing concerning Pheasant Run's request for a zoning change. Mr. Thompson was present at that meeting and acted as agent or attorney for Pheasant Run in answering questions regarding the proposed development. There is no evidence that on August 27 Mr. Thompson provided the Board with any advice as town counsel regarding the proposed development.

7. In approximately December, 1986 the Board met and reheard all of the proposals which were presented at the August 27, 1986 Board meeting. This included a rehearing of the Pheasant Run proposal. The August 27, 1986 matters were reheard by the Board upon the advice of Mr. Thompson after he had reviewed the complaint of an individual who had claimed that the Board acted improperly at the August 27, 1986 meeting in failing to act properly in relation to the individual's proposal. Mr. Thompson acted as town counsel in advising the Board to rehear all the matters of the August 27, 1986 meeting. Mr. Thompson did not represent Pheasant Run during the rehearing.

8. General Laws c. 268A, §17(a) prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation from anyone other than the town in relation to any particular matter in which the same town is a party or has a direct and substantial interest.

9. By filing a corrected notice with the Selectmen on behalf of Hiersche on February 21, 1986, for which service Mr. Thompson was compensated by Hiersche, Mr. Thompson directly received compensation from 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, thereby violating G.L. c. 268A, §17(a).

10. General Laws c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone in connection with any particular matter in which the same town is a party or has a direct and substantial interest.

11. By filing the above corrected notice with the Selectmen on behalf of Hiersche, Mr. Thompson acted, otherwise than in the proper discharge of his duties, as attorney for Hiersche in connection with a matter in which the town had a direct and substantial interest, thereby violating G.L. c. 268A, §17(c).

12. By appearing before the Board at the August 27, 1986 public hearing and answering questions regarding Pheasant Run's request for a variance, Mr. Thompson acted, otherwise than in the proper discharge of his duties, as agent or attorney for someone in connection with a particular matter in which the town was a party or had a direct and substantial interest, thereby violating §17(c).

13. General Laws c. 268A, §19, except as otherwise permitted in §19,[1/] prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or a partner has a financial interest. By reviewing the August 27, 1986 Board minutes as town counsel and advising the Board that they rehear the August 27, 1986 matters, which included consideration of the Pheasant Run condominium project, Mr. Thompson participated as a municipal employee in a particular matter in which to his knowledge he or a partner had a financial interest, thereby violating §19.

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. Thompson:

1. that he pay to the Commission the total amount of five hundred dollars ($500) as a civil penalty for his violations of §§17(a), 17(c), and 19;

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

DATE: August 4, 1987

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[1]/None of the §19 exemptions applies in this case.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 338

IN THE MATTER
OF
WALTER BREWER

DISPOSITION AGREEMENT

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

On September 15, 1986, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Brewer, a supply officer for the Massachusetts Civil Defense Agency (CDA). The Commission concluded its inquiry and, on March 16, 1987, found reasonable cause to believe that Mr. Brewer violated G.L. c. 268A, §6.

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

1. Mr. Brewer is a supply officer for the CDA. As such, he is a "state employee," as that term is defined in G.L. c. 268A, §1(q).

2. As supply officer for the CDA, Mr. Brewer is responsible for the maintenance and repair of 31 CDA vehicles. Out of 31 CDA vehicles for which Mr. Brewer is responsible, 15 are owned by the CDA, and 16 are owned by Motor Vehicle Management (MVM) and leased to CDA.

3. The procedure that Mr. Brewer follows for choosing a vendor to repair a vehicle varies depending upon whether the vehicle is a CDA-owned car or an MVM (but leased to CDA) car.

4. CDA vehicles are generally on the road 24 hours a day. If, while on the road, a CDA driver has a problem with his vehicle, he radios Mr. Brewer.

5. Mr. Brewer does not need anyone's approval to choose the vendor to whom he sends CDA-owned vehicles for repair. When the CDA-owned car is in the general area of J&J Automotive in Southboro, MA (J&J), Mr. Brewer assigns it to J&J.

6. If the problem vehicle is owned by MVM (but has been assigned to CDA), Mr. Brewer telephones MVM for assignment approval.

7. When Mr. Brewer calls MVM seeking vehicle repair approval, he is asked where he wants to send the vehicle. If the car is in the general area of J&J, Mr. Brewer recommends assigning it to J&J.

8. In July, 1984 Brewer's son became 50 percent owner of J&J.

9. In November of 1984, J&J as a result of competitive bidding, became a contract vendor for repairs of state vehicles through the Motor Vehicle Management Bureau; unrelated to any authority in Mr. Brewer.

10. J&J Automotive was thereafter utilized by various agencies such as CDA, MVM, Registry of Motor Vehicles, Water Resources Authority and Board of Education.

11. On 45 occasions between January 30, 1985 and February 27, 1987, Mr. Brewer selected J&J to repair CDA-owned vehicles. The total of J&J approved payments for the period is $5,125.45.

12. Between March 31, 1985 and November 24, 1986, Mr. Brewer recommended J&J to do work on 65 MVM vehicles. The total amount paid J&J by MVM for the period is $3,851.68.

13. The records show that the first CDA payment to J&J for the repair of a CDA-owned vehicle was made on January 30, 1985. The first recorded payment to J&J for an MVM vehicle occurred on March 21, 1985.

14. Section 6 of G.L. c. 268A provides in part that except as otherwise permitted in §6 a state employee may not participate as such in a particular matter in which to his knowledge he or a member of his immediate family has a financial interest.

15. The decision or recommendation as to where to send a vehicle for repairs is a particular matter. As set forth in paragraphs 5 through 11 above, Mr. Brewer participated as a CDA supply officer in such particular matters by sending CDA-owned vehicles to J&J and by recommending that MVM vehicles be sent to J&J. As a 50 percent owner of J & J, Mr. Brewer's son had a financial interest in repairing the CDA and MVM vehicles as identified above. Finally, Mr. Brewer knew when he so participated that his son had a financial interest in each such decision or recommendation. Therefore, by this conduct Mr. Brewer violated §6.

16. The Commission has no evidence to suggest that Mr. Brewer was aware that his actions violated G.L. c. 268A when he sent cars to J&J.[1]/ In addition, the Commission, in resolving this matter, takes note of the CDA Director's statements that based on his dealings with J&J he believes that J&J provided CDA with very good work at fair prices.[2]/

In view of the foregoing violations of G.L. c. 268A, §6, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms agreed to by Mr. Brewer:

1. that he pay to the Commission the amount of two thousand dollars ($2,000) as a civil penalty for his course of conduct in violation of §6;
2. that so long as he is a state employee, he refrain from participating in any particular matter in which any member of his immediate family has a financial interest; and
3. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions proposed under this Agreement in this or any related administrative or judicial civil proceedings in which the Commission is a party.

DATE: August 28, 1987

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[1]Ignorance of the law is no defense to a violation of G.L. c. 268A. **In the Matter of C. Joseph Doyle**, 1980 SEC 11, 13. See also, **Scola v. Scola**, 318 Mass. 1, 7, (1945).

[2]There is no need to prove actual harm to the state or an undeserved benefit to a private party to establish a conflict of interest under §6. Section 6 is intended to prevent any questions arising as to whether the public interest has been served with the single minded devotion required of a public employee. See, **In the Matter of Mary V. Kurkjian**, 1986 SEC 303.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 340

IN THE MATTER
OF
ROGER H. MUIR

DISPOSITION AGREEMENT

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

On May 18, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Muir, Regional Director, Northeast Region, Division of Employment Security (DES). The Commission concluded its inquiry and, on July 27, 1987, found reasonable cause to believe that Mr. Muir violated G.L. c. 268A, §6. Pursuant to G.L. c. 268B, §4(c), the Commission also authorized the initiation of an adjudicatory proceeding to determine whether there had been a violation.

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

1. Mr. Muir is the DES Regional Director, Northeast Region. He has been in that position since August, 1983. The Northeast Regional Office is located in Lawrence, Massachusetts. Prior to that time, Mr. Muir served as Regional Director in the Metropolitan Region from October, 1982 until August, 1983. As such, he is a "state employee," as that term is defined in G.L. c. 268A, §1(q), and has been at all times relevant to the events contained in this Agreement.

2. Mr. Muir's son, Roger P. Muir, became employed at the DES office in Lynn on March 9, 1978 as a junior clerk. Mr. Muir played no role in the hiring or supervision of his son.

3. In approximately 1981, the Boston Region (in which Mr. Muir worked) and the Metropolitan Region (in which his son worked) merged. Mr. Muir was the deputy director of the combined region, but had no authority over his son.

4. In October, 1982, Mr. Muir became regional director and became the supervising authority for his son in the region. As supervising authority, Mr. Muir signed his son's performance evaluation for the period of June 7, 1982 to June 1, 1983. In August, 1983, Mr. Muir was transferred and became regional director of the Northeast Region; his son was no longer in his chain of command.

5. On February 15, 1985 a vacancy announcement was posted by DES for an employee service representative (ESR) position in the Lawrence office. There were three applicants for the position, including Mr. Muir's son. The DES employment office forwarded the applications with recommendations from the applicants' supervisors to the manager of the Lawrence post of duty. The manager interviewed each applicant, and then recommended Mr. Muir's son for the vacancy, which was in effect a promotion recommendation. The promotion recommendation was forwarded up the line to the next supervisor, who was Mr. Muir.

6. Customarily, the Deputy Director of Field Operations reviews a promotion package after Mr. Muir signs off on it, and then forwards it to the Personnel Department for their actions. Mr. Muir advised the Deputy Director of Field Operations that his (Muir's) son had applied for an ESR position in the Lawrence office and that he, Muir, wanted to ensure that he did the right thing because the applicant was his son. They agreed that Mr. Muir would turn over the responsibility for filling the ESR position to the Deputy Regional Director. Mr. Muir's deputy did handle the review and selection stage of the process — he customarily did this for all ESR applicants in any event — and recommended

Mr. Muir's son for the position. Mr. Muir, however, subsequently approved the hiring by signing the promotion package. He then forwarded it to the Deputy Director of Field Operations. After the package was approved by the Deputy Director of Field Operations, it was forwarded to the Personnel Director of Human Services, who checked it for procedural correctness, and handled the paperwork for the promotion.

7. Mr. Muir signed his son's performance evaluations for the periods of March 16, 1985 through March 16, 1986 and March 15, 1986 through March 15, 1987. The performance evaluations signed by Mr. Muir included a notation as to whether the employee should or should not be eligible for a step increase. He did not inform the Deputy Director of Field Operations that he would be doing these evaluations.

8. Section 6 of G.L. c. 268A, except as otherwise permitted in that section, provides in relevant part that a state employee is prohibited from participating as such an employee in a particular matter in which he knows his immediate family has a financial interest. The exception in §6 was not followed in this case as is discussed more fully below.

9. By Mr. Muir's signing his son's promotion recommendation in March of 1985 and also by signing his son's performance evaluations for the periods of March 16, 1985 through March 15, 1986 and March 16, 1986 through March 15, 1987, he participated in particular matters in which he knew his son had a financial interest, and thereby violated G.L. c. 268A, §6.

10. The Commission has no evidence to suggest that Mr. Muir was aware that his actions violated G.L. c. 268A when he signed the personnel evaluations and promotion package which resulted in his son receiving pay raises.[1]/ Indeed, as indicated above, Mr. Muir appears to have taken certain steps to inform his supervisor that his son was seeking a promotion.

Thus, an argument could be made that a state employee who discloses a §6 conflict to his supervisor ought to be able to rely on the supervisor's permission to participate in the promotion process. Strict compliance with §6 requires, however, that the disclosure be in writing and that authorization to participate be given by the appointing authority.[2]/ Such strict compliance is necessary to insure that all due consideration is given to issues with potential controversy and potential for abuse. **In the Matter of Hanlon**, 1986 SEC 299.

Here, however, Mr. Muir made his disclosure to his immediate supervisor and not his appointing authority. In addition, the disclosure was not put into writing or filed with the Commission. Finally, as to the 1986 and 1987 performance evaluations, no disclosure was made.

A further argument could be made that Mr. Muir was not personally and substantially involved in the promotion and performance evaluations,and therefore he did not participate in those decisions. In this view the signatures were insignificant. He merely forwarded along the chain of command decisions which were made by subordinates, and in which he took no part. This argument is unpersuasive. Absent Mr. Muir's signature, neither the promotional package nor the performance evaluations would be finally processed, and Mr. Muir's son would not become eligible for either the promotion or the yearly step increases. Second, based on the facts, it appears that Mr. Muir's role regarding those decisions was the same both before and after his disclosure: as regional director he had and exercised approval authority as evidenced by his signature.

Nonetheless, the Commission has given consideration to Mr. Muir's having made a disclosure to his supervisor regarding the 1985 promotion and his efforts to distance himself from the decision-making process when his son was involved. While the Commission can impose up to a $2,000 fine for each violation of §6, it has determined that a small fine here properly reflects these mitigating factors. That it has insisted on a public resolution and a fine reflects the importance the Commission places on proper compliance with §6's disclosure and exemption provisions. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure — particularly that the determination be in writing and a copy filed with the Commission — are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision. Imposing a fine also should act as a deterrent in making clear that ultimately the primary responsibility for compliance with these provisions rests on the public employee seeking the exemption.

11. In view of the foregoing violations of G.L. c. 268A, §6, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms agreed to by Mr. Muir:

1. that he pay to the Commission the amount of two hundred fifty dollars ($250) as a civil penalty for his violation of G.L. c. 268A, §6;
2. that so long as he is a state employee, if his duties would otherwise require him to participate in any particular matter in which an immediate family member has a financial interest, he must follow the procedure set out in G.L. c. 268A, §6.
3. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions proposed under this Agreement in this or any related administrative or judicial civil proceedings in which the Commission is a party.

[1]Ignorance of the law is no defense to a violation of G.L. c. 268A. In the Matter of C. Joseph Doyle, 1980 SEC 11, 13. See also, Scola v. Scola, 318 Mass. 1, 7 (1945).

[2]G.L. c. 268A, §6 provides in pertinent part:

Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

1. Assign the particular matter to another employee; or
2. Assume responsibility for the particular matter; or
3. Make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the employee and filed with the State Ethics Commission by the person who made the determination. Such copies shall be retained by the Commission for a period of six years.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 344

IN THE MATTER
OF
WILLIAM HIGHGAS, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and the Honorable William Highgas, Jr. (Judge Highgas), pursuant to Section 11 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission Order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On December 8, 1986, the Commission initiated a preliminary inquiry into possible violations of §§3, 6, 23 and other related sections of the conflict of interest law, G.L. c. 268A, and §7 of the financial disclosure law, G.L. c. 268B, involving Judge Highgas, an associate justice of the Middlesex County Division of the Probate and Family Court Department of the Trial Court. The Commission concluded its inquiry and, on April 27, 1987, found reasonable cause to believe that Judge Highgas violated G.L. c. 268B, §7 by failing to identify Anthony R. Rizzo (Attorney Rizzo) in Judge Highgas' 1983 and 1984 Statements of Financial Interests as the transferor and record owner of real property in which Judge Highgas had a financial interest. The Commission also found reasonable cause to believe that Judge Highgas had violated §23(b)(3) of G.L. c. 268A. At the same time, the Commission found no reasonable cause to believe that Judge Highgas had violated §§3, 6, or 23(b)(2) of G.L. c. 268A. In addition, the Commission found no reasonable cause to believe that Judge Highgas violated G.L. c. 268B, §7 in his reporting of compensation he received as trustee of a realty trust having a corporation, of which Attorney Rizzo was president, as its beneficiary.

Judge Highgas has agreed to enter into this Disposition Agreement concerning the violations of G.L. c. 268B, §7. Judge Highgas has declined to enter into a Disposition Agreement concerning his alleged violations of G.L. c. 268A, §23(b)(3), as to which an Order to Show Cause is being issued contemporaneously with this Agreement.

The Commission and Judge Highgas now agree to the following findings of fact and conclusions of law:

1. Judge Highgas is an associate justice of the Middlesex County Division of the Probate and Family Court Department of the Trial Court. Judge Highgas has held his judicial position since January 6, 1983.

2. As an associate justice, Judge Highgas is a designated public employee holding a major policy-making position, who is required annually to file a Statement of Financial Interests (SFI) with the Commission, pursuant to G.L. c. 268B, §5. Prior to becoming an associate justice, Judge Highgas, as Executive Director of the Commission on Criminal Justice, Chairman of the Criminal History Systems Board and Chief Legal Counsel to the Governor, had filed SFIs for calendar years 1980, 1981 and 1982.

3. In 1982, Judge Highgas lived with his family in Woburn and was seeking to relocate the family residence. In August or September, 1982, Judge Highgas and his wife toured several lots in a residential subdivision being developed in Lynnfield by Wildewood Realty Trust (Wildewood) with one of the Wildewood trustees, Frank Cremarosa (Cremarosa). The meeting between the Highgases and Cremarosa had been arranged by Attorney Rizzo. Judge Highgas had been friends for over ten years with Attorney Rizzo, who had built his own family's residence on a lot in the Wildewood subdivision.

4. Cremarosa told the Highgases that they could purchase any of the available lots for $60,000. Although Judge Highgas and his wife particularly liked Lot 66 of the subdivision located on Driftwood Lane, they took no action in the Fall of 1982 to purchase it.

5. Sometime in December, 1982, Attorney Rizzo informed Judge Highgas that, for tax reasons, the Wildewood trustees (Trustees) wanted to sell Lot 66 before the end of 1982 and asked Judge Highgas if he wanted to purchase it. Judge Highgas told Attorney Rizzo that he would be unable to raise the $60,000 purchase price before January, 1983. During the same conversation or during a conversation soon thereafter, Attorney Rizzo suggested to Judge Highgas that he (Attorney Rizzo) would purchase the lot and that, if Judge Highgas were

able to raise the money by the end of January 1983, he would transfer the lot to Judge Highgas, but that otherwise he would keep the lot. Judge Highgas assented to the arrangement Attorney Rizzo proposed.

6. Attorney Rizzo then entered into an agreement with the Trustees to purchase Lot 66. Pursuant to their agreement, on December 30, 1982, the Trustees executed a quitclaim deed transferring ownership of Lot 66 to Attorney Rizzo in exchange for Attorney Rizzo's downpayment of $10,000 and his promise to pay the $50,000 purchase price balance by January 31, 1983. The agreement between Attorney Rizzo and the Trustees was conditioned upon the lot's passing a percolation test conducted at the Trustees' expense and provided that, if the percolation test were unsatisfactory, Lot 62 would be transferred to Attorney Rizzo in exchange for Lot 66.

7. On January 24, 1983, Judge Highgas' broker, Fidelity Brokerage Services, Inc., having liquidated a portion of Judge Highgas' stock holdings, issued check no. 004307, payable to Judge Highgas' order in the amount of $60,000 and misdated "Jul 24 83."

8. Shortly thereafter, Judge Highgas endorsed the $60,000 check by signing his name on it (without indicating a payee) and gave it to Attorney Rizzo. Attorney Rizzo subsequently wrote on the check "Pay to the order of Wildewood Realty Trust by *Anthony R. Rizzo*" (underlining in the original) and gave the check to the Trustees. The check was then endorsed "Deposit Only Wildewood Realty Trust" and was processed on February 2, 1983.

9. There was no written agreement of any kind between Judge Highgas and Attorney Rizzo concerning the purchase and sale of Lot 66.

10. Judge Highgas did not take legal title to Lot 66 when he paid the purchase price for it. Judge Highgas and Attorney Rizzo had agreed that the deed to Lot 66 would stay in Attorney Rizzo's name until the percolation tests were done and until Judge Highgas' architect had determined that the house that Judge Highgas and his wife wanted to build could be built on the lot.

11. The percolation tests were successfully concluded by the end of June, 1983. The home Judge Highgas wished to construct required an easement (for a driveway) over a neighboring lot (Lot 65) which had not yet been sold by the developers. On August 27, 1983, the Trustees granted an easement to Attorney Rizzo, who still held title to Lot 66, for the use and benefit of Lot 66 over Lot 65. The recited consideration for the transfer was one dollar.

12. Title to Lot 66 was not transferred from Attorney Rizzo to Judge Highgas and his wife until December 29, 1984, when a quitclaim deed was executed by Attorney Rizzo and recorded transferring title to the property (together with the easement) from Attorney Rizzo to the Highgases. During the period in which the title to the property was in Attorney Rizzo's name, Attorney Rizzo received and paid all but one of the bills for real estate taxes levied by the Town of Lynnfield on Lot 66. On each occasion, Attorney Rizzo was reimbursed by Judge Highgas in full for the amounts he paid.

13. Judge Highgas subsequently had his family residence constructed on Lot 66. Construction of the house began in October, 1983 and Judge Highgas and his family moved into the new house in June, 1985.

14. On or about April 24, 1984, Judge Highgas filed with the Commission his SFI for calendar year 1983 (1983 SFI). In response to Question G, "Real Property," Judge Highgas identified vacant land at Driftwood Lane, Lynnfield, as real property in which he and his wife had a financial interest during 1983. Judge Highgas indicated that the land's value was $50,001 to $100,000, entered his name and his wife's name in the column under the heading "Person Holding Interest" and identified himself and his wife as the record owners of the property by entering the word "same" in the column under the heading "Record Owner(s)". It is Judge Highgas' position that he so identified himself and his wife as the record owners because he considered he and his wife to be the beneficial owners of the property. Judge Highgas did not provide the name and address of the transferor of the Driftwood Lane Property.

15. On December 3, 1984, Richard Reale of the Commission's staff wrote to Judge Highgas and informed him that, if the Driftwood Lane property were purchased in 1983, the name and address of the transferor must be disclosed on the SFI and invited Judge Highgas to amend his 1983 SFI.

16. On December 6, 1984, Judge Highgas responded to Mr. Reale's letter with an amended response to Question G and a cover letter in which Judge Highgas referred to the real property in question as "property which I purchased in 1983." The sole amendment to the response to Question G was the insertion, in the column under the heading "Name and Address of Transferor or Transferee," of the sentence "House lot purchased in 1983 from Frank Cremarosa, Anthony DeFilipis, Pasquale Santilli and Patrick De Salvatore, trustees of Wildewood [sic] Realty Trust of 551 Broadway, Malden, MA 02148." Neither the original 1983 SFI nor the 1984 amendment made any reference to Attorney Rizzo being the record owner of, or the transferor to the Highgases of any interest in, the Driftwood Lane property during 1983.

17. On or about April 30, 1985, Judge Highgas filed with the Commission his SFI for calendar year 1984 (1984 SFI). At Question K.1. "Real Property Owned in Massachusetts," Judge Highgas identified a single-family house under construction at Driftwood Lane, Lynnfield, as real property in which he and his wife had a financial interest during 1984. Judge Highgas indicated that the property's value was $50,001 to $100,000 and identified himself and his wife as its record owners. At Question K.3., "Real Property Transfers," in which Judge Highgas

was required to identify any property identified in Question K.1., which was "purchased, sold, or otherwise transferred to or from [Judge Highgas and his wife] in 1984," Judge Highgas checked the "not applicable" box and failed to identify the December 29, 1984 transfer to him and his wife of the deed and legal title to the Driftwood Lane property from Attorney Rizzo.

18. At the time Judge Highgas filed his 1983 SFI, he was aware that Attorney Rizzo was the record owner of the Driftwood Lane property. At the time Judge Highgas filed his 1984 SFI, he was aware that Attorney Rizzo had been the record owner of the Driftwood Lane property during most of 1984 and that Attorney Rizzo had transferred legal title to the property to Judge Highgas and his wife on December 29, 1984.

19. As a probate judge, Judge Highgas makes master, administrator, counsel and guardian ad litem (GAL) appointments. From 1983 through 1986, Judge Highgas made approximately 242 GAL appointments to 117 different persons. Of these appointments, 28 were made to Attorney Rizzo, during the period from November 2, 1983 to August 1, 1986. For the 28 GAL appointments Attorney Rizzo received from Judge Highgas, Attorney Rizzo received fees totalling over $20,000. Attorney Rizzo's sole master appointment by Judge Highgas led to Attorney Rizzo's receipt of an additional $2,750 fee.

20. Section 7 of G.L. c. 268B, in pertinent part, provides that any person"... who files a false Statement of Financial Interests under section 5 of [G.L. c. 268B] shall be punished by a fine of not more than one thousand dollars..." It is well established that a SFI filing need not be intentionally false to be a false SFI within the purview of §7. **In the Matter of George A. Michael**, 1981 SEC 59. It is the position of Judge Highgas that the misstatements contained in the SFI's in question were unintentional, since he considered himself and his wife to be the beneficial owners of the property.

21. Judge Highgas' 1983 SFI constituted a false Statement of Financial Interests within the meaning of G.L. c. 268B, §7, in that his 1983 SFI identified himself and his wife as the record owners of the Driftwood Lane property, rather than Attorney Rizzo. Judge Highgas' 1984 amendment to his 1983 SFI constituted a false Statement of Financial Interests within the meaning of G.L. c.268B, §7, in that it failed to identify Attorney Rizzo as the record owner of the Driftwood Lane property and listed the Wildewood Trustees, rather than Attorney Rizzo, as the transferor to the Highgases of the same property. Accordingly, in filing his 1983 SFI and his 1984 amendment thereto, Judge Highgas violated G.L. c. 268B, §7.

22. Judge Highgas' 1984 SFI constituted a false Statement of Financial Interests within the meaning of G.L. c. 268B, §7, in that his 1984 SFI failed to disclose that Judge Highgas and his wife had acquired the deed and legal title to the Driftwood Lane property from Attorney Rizzo on December 29, 1984. Accordingly, in filing his 1984 SFI, Judge Highgas violated G.L. c. 268B, §7.

23. Judge Highgas' violations of G.L.c. 268B, §7, whether or not intentional, were detrimental to the public interests protected by G.L. c. 268A and 268B in that they concealed from public scrutiny the fact that Judge Highgas was involved in the personal financial dealings described above with an attorney to whom he made numerous official probate appointments.

In view of the foregoing violations of G.L. c. 268B, §7, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Judge Highgas:

1. that Judge Highgas pay to the Commission the sum one thousand five hundred dollars ($1500) of which seven hundred and fifty dollars ($750) shall be a civil penalty for filing a false SFI for calendar year 1983 and seven hundred and fifty dollars ($750) shall be a civil penalty for filing a false SFI for calendar year 1984;
2. that Judge Highgas amend his 1983 and 1984 SFIs to reflect the facts as set forth hereinabove within twenty days of signing this Agreement; and
3. that Judge Highgas waive all rights to contest the findings of fact, conclusion of laws and terms and conditions contained in this Agreement in any related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: October 1, 1987

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. ADJUDICATORY
DOCKET NO. 323

IN THE MATTER
OF
JAMES GEARY

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

Gerard Mackin, Jr., Esq., Counsel for Respondent James Geary

Commissioners: Diver, Ch., Basile, Burns, Epps, Gargiulo

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on February 23, 1987 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 Geary, a member of the Avon Board of Selectman, violated G.L. c. 268A, §19 by voting as a selectman on his brother's appointment as acting police chief and permanent police chief, and by signing the police chief's three-year contract.

Respondent filed an Answer on March 10, 1987 in which he agreed to the factual allegations in the Order to Show Cause but denied any violation of the statute. The parties have also submitted additional stipulated facts and documents.

An adjudicatory hearing was held on July 30, 1987 before Commissioner Joseph J. Basile, Jr., a duly designated presiding officer. See G.L. c. 268B, §4(e). The parties thereafter filed post-hearing briefs and presented oral argument before the Commission on September 16, 1987. In rendering the Decision and Order, the Commission has considered the testimony, evidence and arguments of the parties.

II. Findings of Fact

1. Mr. Geary is an elected member of the Avon Board of Selectmen, and was a selectman at all times relevant to the Order to Show Cause.

2. Mr. Geary's brother, Robert Geary, has worked for the Avon Police Department since 1961. From 1961 to 1971 he was a patrolman; from 1971 to 1985 he was a sergeant; by April, 1985, he was the most senior officer in the department.

3. On April 18, 1985, the Board of Selectmen appointed Robert Geary acting police chief of the Avon Police Department. The former police chief had recently retired, and Robert Geary was the only applicant for the position. Mr. Geary was present and voted in favor of the appointment, on a unanimous (3-0) voice vote, on a motion made and seconded by the other two selectmen.

4. On August 29, 1985, the Board of Selectmen unanimously appointed Robert Geary permanent police chief for a three year period. Mr. Geary was present and voted in favor of the appointment, following a motion made and seconded by the other two selectmen.

5. On August 29, 1985, Mr. Geary, as a selectman, signed a three-year police chief's contract between the town and Robert Geary.

6. On April 7, 1983, Respondent received a letter from A. Stanley Littlefield, Town Counsel, advising him that he is "prohibited from participating in a vote on any issue in which his brother has a financial interest, i.e., salary or other compensation . . ."

7. A. Stanley Littlefield was present at the April 18, 1985 meeting of the Board of Selectmen. The minutes of the August 29, 1985 meeting of the Board of Selectmen do not indicate whether Mr. Littlefield was present.

III. Decision

For the reasons stated below, the Commission concludes that the Respondent violated G.L. c. 268A, §19 by participating in particular matters in which his brother had a financial interest.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to his knowledge, he or his immediate family has a financial interest. As an Avon Selectman, Mr. Geary is a municipal employee as that term is defined in G.L. c. 268A, §1(q), and his brother is a member of his immediate family. G.L. c. 268A, §1(e). Decisions to appoint a family member to a position and to execute a contract of employment for a term are particular matters.[1/] A family member has an obvious financial interest in the decisions resulting in his appointment under contract to a paid appointive position. **See, e.g., In the Matter of Rita Walsh-Tomasini**, 1984 Ethics Commission 207; **In the Matter of George Ripley**, 1986 Ethics Commission 307; **Commission Advisory No. 11** (Nepotism).

Respondent's attorney conceded at the July 30, 1987 hearing that Mr. Geary had committed "a technical violation" of §19. In his post-hearing brief and in oral argument, he argues that Mr. Geary's participation in unanimous votes was not substantial participation as that term is defined in G.L. c. 268A, §1(j).[2/] While we recognize that Mr. Geary's votes were not determinative of the outcome in either instance, nor was his signing of the contract, his voting and decisions regarding his brother's promotions nonetheless constituted substantial participation. As the Commission stated in Advisory No. 11:

> An official need not be the sole decision-maker to be prohibited from participating in the hiring decision. For example, an official cannot as one member of a board, vote to hire his family member regardless of the size of the board. Nor would it matter that there was little, if any, controversy among the board members regarding the decision. A person can no more participate in making a vote of a 15 member board unanimous by casting the 15th vote than one can cast the deciding vote in eight to seven vote.
> **(Commission Advisory No. 11**, p. 3.)

By voting for his brother's appointment and signing his brother's contract, Mr. Geary's participation was "more than a casual or incidental encounter" but involved a "decision-making" role. Buss, **The Massa-**

chusetts Conflict of Interest Statute, An Analysis, 45 B.U.L. Rev. 299, 335 (1965). This conclusion is consistent with a long line of Commission precedent finding violations of §19 despite the fact that the votes were either unanimous or involved approvals by a wide margin with little controversy. **See, In the Matter of William G. Slaby and Michael C. Mannix**, Commission Adjudicatory Docket Nos. 207 and 210, Disposition Agreements, May 24, 1983 (unanimous vote by selectmen); **In the Matter of John Rogers, Jr.**, 1985 Ethics Commission 227 (4-1 vote by school committee); **In the Matter of Robert Rennie**, Commission Adjudicatory Docket No. 253, Disposition Agreement, March 16, 1984 (8-2 vote by city council).

The plain language of §19 does not require that the participation be influential or determinative of a result. The substantiality of influence can, however, be considered in the determination of remedy, **see**, G.L. c. 268A, §21(a), or as an element of the Commission's discretion in assessing an appropriate penalty pursuant to c. 268B, §4(j). Substantiality of influence is not, however, an element of a violation of §19, nor would such requirement be consistent with the preventative purposes of §19. The flat prohibition of §19 not only protects the public confidence in the integrity of its municipal decisions, but also prevents a municipal employee from having to choose between the public interest and his personal loyalties.

IV. Sanction

The Commission may require a violator to pay a civil penalty of not more than two thousand dollars for each violation of G.L. c. 268A. Although the potential maximum fine in this case is $6,000, G.L. c. 268B, §4(j)(3), we believe that the imposition of a small fine is warranted in this case. **In the Matter of Frederick B. Cronin, Jr.** (August 27, 1986) the Commission issued a public enforcement letter without a fine where the respondent, a Lynn city tax collector, violated the conflict law by hiring his brother as his assistant. The Commission did not impose a fine because it found that Cronin had received express permission from the city council and the mayor, his appointing authority, to hire his brother. The express permission present in the **Cronin** case is not present here. The stipulated minutes reflect that A. Stanley Littlefield, who was town counsel, was present at the April 18, 1985 meeting. There is no indication in the minutes that Mr. Littlefield spoke, did not speak, was acting as town counsel, or whether there were some other matters with which he was occupied. Nor was Mr. Littlefield called as a witness. Therefore the Commission can make no finding of any express or implied permission to the Respondent to participate based on the silence of town counsel.[3]/

There are mitigating facts which dictate a low fine. The nature of participation is an appropriate circumstance for the Commission to consider in determining the amount of a fine. Fines are higher where §19 participation is determinative. In this case, the participation made no difference for two reasons: 1) because his brother was the only candidate for Chief of Police and 2) because his brother had the support of at least two other members of the Board of Selectmen. Similarly, there was no personal gain to the Respondent as a result of his participation and there was no attempt to conceal any of the relevant facts; nor was there evidence of an unfair advantage or financial preference or any harm to the public. **See In the Matter of Roger H. Muir**, 1987 Ethics Commission 340 (September 17, 1987). Also significant is the credibility of Mr. Geary's testimony. The Commission found him to be honest, forthright and open.

V. Order

On the basis of the foregoing pursuant to its authority under G.L. c. 268B, §4, the Commission orders Mr. Geary to pay two hundred fifty dollars ($250) to the Commission as a civil penalty for violation of G.L. c. 268A, §19.[4]/

DATE ISSUED: October 5, 1987

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

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

[3]/In fact, on April 7, 1983 Respondent was warned by Town Counsel not to participate or vote on any aspect of the "conditions of employment of his brother". A reasonable person of ordinary intelligence would understand that a promotion to the office of Chief is a condition of employment. At a minimum, Respondent had sufficient warning to seek an opinion specific to the facts prior to his participation.

[4]/**Notice of Appeal**: Respondent is notified of his right to appeal this Decision and Order pursuant to G.L. c. 268B, §4(k) by filing a petition in Superior Court within thirty (30) days of notice of this Decision and Order.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 346

IN THE MATTER
OF
EDWARD ROWE

DISPOSITION AGREEMENT

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

On October 27, 1986, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Rowe, the acting chief engineer of the Massachusetts Bay Transit Authority's (MBTA) Engineering and Maintenance Department. The Commission concluded its inquiry and on March 16, 1987, found reasonable cause to believe that Mr. Rowe violated G.L. c. 268A, §6.

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

1. At all times material herein, Mr. Rowe was deputy chief engineer of the MBTA's Engineering and Maintenance Department. As such, he was a state employee, as that term is defined in G.L. c. 268A, §1(q). (In 1986 Mr. Rowe was appointed Acting Chief Engineer of the Engineering and Maintenance Department.)

2. As deputy chief engineer, Mr. Rowe signed all personnel documents, including approximately two hundred personnel authorizations per year.

3. On October 31, 1983, Rowe signed a requisition seeking approval for two temporary driver/groundmen positions. The requisition was also signed by nine other MBTA employees, including the MBTA General Manager, James O'Leary, who signed off as final authority on December 15, 1983.

4. On January 4, 1984, O'Leary wrote to Frederick Salvucci, Secretary, Executive Office of Transportation and Construction, seeking certification of the critical need to fill twenty four vacancies, including two Local 104 driver/groundmen. On January 11, 1984, a copy of the approved certification signed by Salvucci went to the MBTA Engineering and Maintenance Department.

5. On February 8, 1984, the MBTA Personnel Director signed a personnel authorization to hire Edward Rowe, Jr. as a driver/groundman for the Engineering and Maintenance Department and sent the authorization to the head administrator in the Engineering and Maintenance Department.

6. When the head administrator in the Engineering and Maintenance Department received the personnel authorization from the personnel director, he initialed it (certifying that the department still needed to hire someone) and passed it on to Mr. Rowe for his signature.

7. Mr. Rowe was aware that his son was about to be referred by Local 104 to fill one of two Driver/Groundmen positions. He informed his immediate supervisor of the referral and received verbal approval to sign the personnel authorization.

8. On February 8, 1984 Mr. Rowe signed the document which authorized the hiring of his son. After Mr. Rowe signed the document, it was signed by the Chief Engineer, the Deputy Director and Chief of Staff for Operations, the Director of Operations, the Director of EEO/AA, the Treasurer, the Budget Office and finally the General Manager.

9. On February 21, 1984, Edward Rowe, Jr. was hired as a temporary driver/groundman in the MBTA Engineering and Maintenance Department.

10. In February, 1985, nine MBTA officials including Mr. Rowe signed the personnel document which formally made Edward Rowe, Jr. a permanent employee of the MBTA.[1]/

11. As far as the Commission is aware, the only MBTA documents that Mr. Rowe signed for Edward Rowe, Jr. were the February 1984 temporary and February 1985 permanent personnel authorizations.

12. Section 6 of G.L. c. 268A, except as otherwise permitted in that section, provides in relevant part that a state employee is prohibited from participating as such in particular matters in which, to his knowledge, a member of his immediate family has a financial interest. The exception in §6 was not followed in this case as is discussed more fully below.

13. The hiring of Edward Rowe, Jr. as a driver/groundman with the MBTA was a "particular matter." When Mr. Rowe signed the February 1984 and February 1985 personnel authorizations which resulted in the hiring of his son, Mr. Rowe participated in that matter. Because the position was a paid position, Edward Rowe, Jr. had a financial interest in the job. Mr. Rowe was aware at the time that he signed the personnel documents which hired his son that Edward Rowe, Jr. would receive compensation for working as a driver/groundman.

14. By signing personnel documents which resulted in first the temporary and later the permanent hiring of his son, Mr. Rowe participated as a state employee in a particular matter in which his son had a financial interest, thereby violating G.L. c. 268A, §6.

15. The Commission has no evidence to suggest that Mr. Rowe was aware that his actions violated G.L. c. 268A when he signed the personnel documents which resulted in the hiring of his son.[2]/ Indeed, as indicated above, Mr. Rowe appears to have taken certain steps to inform his supervisors that his son was being hired.

Thus, an argument could be made that a state employee who discloses a §6 conflict to his supervisor and is told to participate ought to be able to rely on the supervisor's familiarity with the conflict law. Strict compliance with §6, however, requires that the disclosure be in writing and that authorization to participate be given

by the appointing authority.[3]/ Such strict compliance is necessary to insure that all due consideration is given to issues with potential controversy and potential for abuse. **In the Matter of Hanlon**, 1986 SEC 299.

Here, however, Mr. Rowe made his disclosure to and received his authorization to participate from his immediate supervisor and not his appointing authority. In addition, neither the disclosure nor the authorization was put into writing or filed with the Commission.

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

16. In view of the foregoing violations of G.L. c. 268A, §6, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Rowe:

1. that he pay to the Commission the sum of two hundred fifty dollars ($250) as a civil penalty for violating G.L. c. 268A, §6;-
2. that so long as he is a state employee, if his duties would otherwise require him to participate in any particular matter in which an immediate family member has a financial interest, he must follow the procedure set out in G.L. c. 268A, §6; and
3. that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: October 6, 1987

[1]According to the collective bargaining agreement between the MBTA and Local 104, employees change automatically from "temporary" status (with union benefits) to "permanent" status (with MBTA benefits) after 200 working days. The "automatic" change in status, however, may be denied with sufficient cause.

[3]Ignorance of the law is no defense to a violation of G.L. c. 268A. **In the Matter of C. Joseph Doyle**, 1980 SEC 11, 13. See also, **Scola v. Scola**, 318 mass. 1, 7 (1945).

[4]G.L. c. 268A, §6 provides in pertinent part:

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 345

IN THE MATTER
OF
YVONNE B. DESROSIERS

DISPOSITION AGREEMENT

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

On March 16, 1987, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into a possible violation of the conflict of interest law, G.L. c. 268A, by Ms. Desrosiers. The Commission has concluded that inquiry and, on May 18, 1987, found reasonable cause to believe that Ms. Desrosiers violated G.L. c. 268A, §19.

The Commission and Ms. Desrosiers now agree to the following findings of fact and conclusions of law:

1. Ms. Desrosiers is and at all material times herein was the Treasurer/Tax Collector for the Town of Acushnet. Ms. Desrosiers is, therefore, a municipal employee as defined in §1(g) of G.L. c. 268A.

2. In or about May of 1984, Ms. Desrosiers appointed her son, Ronald Desrosiers, to be a deputy tax collector for the Town of Acushnet. As a deputy collector, Ronald did not receive a salary but received statutory fees that varied, depending upon what he did to collect the tax delinquency. For example, a deputy is entitled to seven dollars for sending out a notice of warrant and

$12 for serving it on a tax payer in person. According to Ms. Desrosiers, Ronald served as Deputy Tax Collector in 1984, 1985 and 1986, earning $1,140, $2,048, and $1,520, respectively.

3. According to Ms. Desrosiers, before she hired Ronald, she called the Property Tax Bureau at the Department of Revenue (DOR) and asked if it would be legal for her to hire her son. She stated she was told that she could hire her son.[1/]

4. After being notified by Commission staff that her employing her son raised a conflict of interest concern, she dismissed her son as a deputy tax collector effective April 3, 1987.

5. Section 19 of G.L. c. 268A provides in relevant part that, except as permitted by §19,[2/] a municipal employee is prohibited from participating, as such as employee, in a particular matter in which, to his knowledge, a member of his immediate family has a financial interest.

6. The appointment of Ronald Desrosiers as a deputy tax collector was a "particular matter." Ms. Desrosiers "participated" in that matter by making the appointment. Because the position entitled him to fees, Ronald Desrosiers had, at the time of the appointment, a "financial interest" in the appointment. Ms. Desrosiers was aware at the time she appointed her son that he would receive fees for his services as a deputy tax collector.

7. By appointing her son to be a deputy tax collector, as described above, Ms. Desrosiers participated as the Treasurer/Tax Collector for the Town of Acushnet in a particular matter in which her son had a financial interest, thereby violating G.L. c. 268A, §19.

8. The Commission has no evidence indicating that Ms. Desrosiers was aware at the time she acted as described above that she was violating G.L. c. 268A, §19.[3/]

9. Assuming that Ms. Desrosiers was told by someone from DOR that she could properly hire her son, the Commission will not accept her reliance on such incorrect advice as a defense to this violation. As the Commission has made clear in prior disposition agreements, see e.g., **In the Matter of John A. Deleire**, 1985 SEC 236; **In the Matter of James F. Connery**, 1985 SEC 233; if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. The opinion must be from town counsel, in writing and made a matter of public record. **See** G.L. c. 268A, §22. (Note that as of May 1, 1986, such opinions must also be filed with the Commission. 930 CMR 1.03(3)). For the same reasons, the Commission will not accept as a defense that Ms. Desrosiers received incorrect legal advice from DOR.

Nevertheless, insofar as Commission staff found Ms. Desrosiers' assertion that she received such advice from DOR to be credible, the Commission has given consideration to that factor in assessing a penalty here. Accordingly, while the Commission can impose up to a $2,000 fine for each violation of §19, it has determined that a relatively small fine is appropriate.

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 Ms. Desrosiers:

1. that she pay to the Commission the amount of two hundred fifty dollars ($250) as a civil penalty for her violation of §19;
2. that she refrain from participating as a municipal employee in any matter in which she or an immediate family member has a financial interest; and
3. that she waive all rights to contest the findings of fact, conclusions of law and terms and conditions proposed under this Agreement in this or any related administrative or a judicial civil proceeding in which the Commission is a party.

DATE: October 6, 1987

[1/]Commission investigators were not able to find anyone at DOR able to recall giving such advice to Ms. Desrosiers. On the other hand, in taking Ms. Desrosiers' testimony under oath, Commission staff found Ms. Desrosiers to be credible in her assertion that she received such advice.

[2/]None of the §19 exceptions applies to this case.

[3/]Ignorance of the law is no defense to a violation of G.L. c. 268A. **In the Matter of C. Joseph Doyle**, 1980 SEC 11, 13.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 347

IN THE MATTER
OF
MARY L. PADULA

DISPOSITION AGREEMENT

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

On June 8, 1987, the Commission initiated a preliminary inquiry pursuant to G.L. c. 268B, §4(a) into

possible violations of the conflict of interest law, G.L. c. 268A, by Senator Padula. The Commission has concluded that preliminary inquiry and, on September 16, 1987, found reasonable cause to believe that Senator Padula violated G.L. c. 268A, §6.

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

1. Senator Padula has been a state senator since January, 1983. As such, she is a state employee as defined in §1(q) of G.L. c. 268A.

2. Senator Padula has, at all material times herein, had a support staff of three or four legislative aides and clerical assistants.

3. In the Senate, the Committee on Rules makes the appointments of all staff assistants to individual senators. The Senate President is Chairman of the Committee on Rules. As a matter of practice, a senator's request to fill a staffing position with a certain individual is directed to the Senate President's attention. Such requests are typically granted.

4. In the late spring of 1984 there was a vacancy in one of Senator Padula's legislative aide positions. A member of Senator Padula's staff suggested the Senator's daughter, Gayle Padula, for the vacancy. Senator Padula accepted the suggestion.

5. Senator Padula spoke to Senate President William M. Bulger indicating she would like Gayle Padula hired to fill the above vacancy. Senate President Bulger directed Senator Padula to put her request in writing.

6. Senator Padula subsequently caused a letter to be sent to Senate President Bulger indicating that she had approved the hiring of her daughter, Gayle Padula, to serve as her legislative aide subject to Senate President Bulger's approval. She also asked that Gayle Padula be paid at the same salary level as her predecessor, such appointment to be effective July 1, 1984.

7. By letter dated June 28, 1984, Senate President Bulger notified the Comptroller that Gayle Padula was being hired as a legislative aide at a salary of $19,500 commencing on July 1, 1984.

8. By letter dated January 15, 1987, Gayle Padula resigned her legislative aide position, effective January 14, 1987.

9. Section 6 of G.L. c. 268A provides in relevant part that, except as otherwise permitted by §6, a state employee is prohibited from participating, as such an employee, in a particular matter in which, to his knowledge, a member of his immediate family has a financial interest.[1]/

10. The appointment of Gayle Padula as a legislative aide was a "particular matter." Senator Padula "participated" in that matter by approving her daughter to fill the legislative aide position and then requesting that the Senate President approve the hiring. Because the position was a paid position, Gayle Padula had, at the time of the appointment, a "financial interest," in the appointment. Senator Padula was aware at the time she participated that her daughter would receive compensation for her services as a legislative aide.

11. By approving her daughter to be her legislative aide and requesting the Senate President to approve that selection, all as described above, Senator Padula participated as a Senator in a particular matter in which her daughter had a financial interest, thereby violating G.L. c. 268A, §6.

12. The Commission has found no evidence to suggest that Senator Padula was aware that her actions violated G.L. c. 268A.[2]/ In addition, the Commission acknowledges Senator Padula's position that she was not technically the hiring authority for her daughter.[3]/

In view of the foregoing violation of G.L. c. 268A, §6, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Senator Padula:

1. that she pay to the Commission the sum of seven hundred fifty dollars ($750) as a civil penalty for violating G.L. c. 268A, §6 by participating in the hiring of her daughter as a legislative aide; and
2. that she waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: October 30, 1987

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[1]/Section 6 further provides that any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

> (1) assign the particular matter to another employee; or (2) assume responsibility for the particular matter; or (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the commission for a period of six years.

Senator Padula could not take advantage of this §6 exception inasmuch as she is an elected official with no appointing authority.

[2]/Ignorance of the law is no defense to a violation of G.L. c. 268A. **In the Matter of Joseph Doyle**, 1980 SEC 11, 13. **See also Scola v. Scola**, 318 Mass. 1, 7 (1945).

[3]/One does not need to be the sole or ultimate hiring authority to be prohibited from participating in the hiring decision. Any participation which is personal and substantial is prohibited. On these facts, Senator Padula's approval of her daughter's hiring and request to the Senate President clearly meet that test. That is particularly true where such requests are typically granted.

part in the discussion of a matter is enough for participation, even if one does not vote.

[5]The Commission has previously indicated that "parties in interest" as defined by M.G.L. c. 40A, §11 have a financial interest within the meaning of G.L. c. 268A, §19 in the particular matter as to which they are parties in interest, regardless of whether or not the financial interest is in fact substantial and whether or not it is actually realized. See, e.g., EC-COI-84-96.

[6]Ignorance of the law is no defense to a violation of G.L. c. 268A. In the Matter of C. Joseph Doyle, 1980 SEC 11, 13. See also, Scola v. Scola, 318 Mass. 1, 7 (1945)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 322

IN THE MATTER
OF
ABDULLAH KHAMBATY

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Michael J. Faherty, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Gargiulo

DECISION AND ORDER

I. Procedural History

The Petitioner initiated adjudicatory proceedings on February 23, 1987 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 Gloucester School Committee member Abdullah Khambaty (Respondent) violated §19 of the conflict of interest law by:

1. participating as a school committee member at a January 28, 1986 city council meeting concerning teachers' professional development grants which affected the financial interest of his wife, a school teacher; and
2. participating as a school committee member in two school committee executive sessions on April 2 and 16, 1986, concerning how teachers' professional development grants should be distributed.

Respondent denied many of the material allegations and raised three lines of defense. He asserted that his actions at the January 28, 1986 city council meeting were as a private citizen, not as a school committee member. Respondent further contended that none of the issues in which he participated involved "particular matters" as defined in the conflict of interest law. Finally, Respondent claimed that his actions were exempt under §19(b)(3) of G.L. c. 268A.

An adjudicatory hearing was held on July 17, 1987 before Commissioner Andrea W. Gargiulo, a duly designated presiding officer. See G.L. c. 268B, §4(e). The parties filed post-hearing briefs and presented oral argument to the Commission on October 26, 1987. In rendering this Decision and Order, the Commission has considered the testimony, evidence and arguments of the parties.

II. Findings

A. Jurisdiction

The Respondent admits that in his capacity as an elected school committee member, he is a municipal employee within the meaning of G.L. c. 268A, §1(g).

B. Findings of Fact

1. Respondent was at all times relevant to the allegations in the Order to Show Cause a member of the Gloucester School Committee. His wife, Lynne, is a Gloucester special needs school teacher.

2. Respondent has been an active member and observer of Gloucester city government since 1973, when he was elected to the Gloucester Charter Commission; subsequently he was elected to the city council in 1975, 1977, 1979 and 1981 (where he served on various subcommittees, as vice chair and ultimately president) and to the school commitee in 1983. Respondent is a well known attendee at City Council meetings and often speaks at these meetings on various issues.

3. Chapter 188 of the Acts of 1985, "An Act Improving the Public Schools of the Commonwealth" (Chapter 188) established a state-funded program of professional development grants for public school teachers. Chapter 188 provided that a city was eligible to receive the professional development grant money if both the school committee and the city council voted by a majority vote to accept the provisions of Chapter 188, Section 13. The law also stated that Chapter 188 funds were to be distributed by the local school committee pursuant to an agreement between the school committee and the teachers' union.

4. On October 16, 1985, the Gloucester School Committee voted to accept the Chapter 188 professional development grant funds and to request that the city council do the same. Respondent voted "present."

5. On January 15, 1986 the Superintendent of Gloucester Schools, the School Committee chairman and Respondent attended a City Council subcommittee meeting concerning Chapter 188. At this meeting, Respondent discussed the provisions of Chapter 188.

6. At a January 21, 1986 City Council meeting, the Council voted to reject acceptance of the Chapter 188 professional development grants. The City Council subsequently criticized the school committee for not attending this January 21st meeting.

7. On January 28, 1986 the City Council voted to reconsider its earlier vote on Chapter 188. The Superintendent of Schools and the school committee chairman had arranged to and did attend the January 28, 1986 City Council meeting to represent the school committee's position concerning the Chapter 188 grants.

8. Respondent had no prior arrangement with the School Committee to attend the City Council meeting. He did not discuss the Chapter 188 issue with any city councillor before the meeting. The Respondent's decision to attend the January 28th City Council meeting was made at the last minute that evening with his wife. Respondent and his wife attended the meeting together.

9. The first speaker at the January 28th City Council meeting was the School Committee chairman. The Chairman supported the acceptance of Chapter 188 money and presented the School Committee's point of view. When the Respondent subsequently spoke at the meeting concerning Chapter 188,[1] he did not identify himself as a school committee member although the City Council meeting minutes identify him as such.

10. Respondent attended an April 2, 1986 school committee executive session where negotiations between the School Committee and the Gloucester Teachers Association concerning the last of four installments of Chapter 188 money were discussed. Respondent indicated that he felt teachers should engage in some professional development activity before receiving the grant money. Respondent made a motion that the superintendent negotiate for that goal and voted in favor of that motion.

11. The Gloucester Teachers Association did not want the distribution of Chapter 188 funds contingent on the teachers performing any additional services or professional development activity. Respondent attended an April 16, 1986 school committee executive session and voted in favor of having "the Superintendent continue negotiations [concerning Chapter 188 grants] under the same guidelines given him before." April 16, 1986 Executive Session minutes.

III. Decision

For the reasons stated below, the Commission concludes that Respondent (1) did not violate G.L. c. 268A, §19 by attending and speaking at the January 28, 1986 city council meeting; (2) did violate G.L. c. 268A, §19 by participating in the April 2 and 16, 1986 School Committee executive session votes concerning Chapter 188.

A. Respondent's Actions at the January 28, 1986 City Council Meeting Were Not in His Official Capacity as a School Committee Member

Municipal employees are prohibited from participating in matters in which an immediate family member has a financial interest. G.L. c. 268A, §19(a). Participate, for purposes of the conflict of interest law, means to

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

This definition of participate "describes action carried on in the public employee's public capacity." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law Rev. 299, 320 (1965).

The threshold question in this case is whether the Respondent participated at a City Council meeting in his official and public capacity as a School Committee member. We are not persuaded by a preponderance of the evidence that Respondent did participate in his official capacity in the January 28, 1986 City Council meeting. Although the evidence on this issue is close, we believe the facts tend to show that Respondent's appearance at the City Council meeting was as a private citizen, not a public official. Speaking as a private citizen, and not in one's public capacity does not satisfy the element of "participation" required under §19 of the conflict law.[2]

Respondent admits that he attended and spoke at a January 28, 1986 City Council meeting. At the meeting, he neither identified himself as a School Committee member nor as a private citizen.[3] Because Respondent did not state to the City Council whether his appearance was as a municipal official or a private citizen, we must necessarily rely on the circumstantial evidence introduced by the parties in order to make this determination.

Petitioner introduced evidence that, two weeks prior to the city council meeting, Respondent had attended a city council subcommittee meeting to discuss the very same issues he addressed at the January 28, 1986 meeting. Petitioner asserted that it was after the city council had criticized members of the school committee for not explaining the terms of Chapter 188 at the January 21st City Council meeting, that Respondent attended the January 28th City Council meeting. The evidence shows that Respondent was known to the city council as a school committee member; in fact, even though Respondent did not refer to himself as a school committee member, the city council meeting minutes identify him as such. In addition, at least one member of the city council presumed that Respondent attended the city council meeting in his capacity as a school commit-

tee member. This testimony was contradicted by that of another city councillor who believed Respondent attended the meeting in his private capacity.

The Commission finds credible the testimony of Respondent and his wife that Respondent's decision to attend the Janaury 28, 1986 meeting was made not in conjunction with the school committee, but at the last minute over dinner with his wife. This evidence is supported by the testimony of the Superintendent that he had no arrangement to be at the January 28, 1986 meeting with Respondent, although he did have an arrangement to attend the meeting with the chairman of the school commitee and, further, that there was an arrangement that the chairman would present the school committee's position to the Council. In fact, the Chairman did present the School Committee's position to the City Council and, only subsequent to that, did Respondent address the Council meeting.[4/]

There was uncontradicated evidence that Respondent had a long and active history of involvement in city government. In 1973, he was elected to the Gloucester Charter Commission and served for two years, was subsequently elected to the city council in 1975, 1977, 1979 and 1981 (where he served on various subcommittees, as vice chair and ultimately president), and was then elected to the school committee for the first time in 1983. All four city councillors who testified acknowledged Respondent's length of government service and noted his frequent appearance at city council meetings. One city councillor stated that Respondent's opinion is often sought out by the city council.

In weighing the reasonable inferences to be drawn from Respondent's actions before and during the city council meeting, we are not persuaded by a preponderance of the evidence that Respondent participated in the city council meeting in violation of §19 of G.L. c. 268A.[5/] Respondent's history of local political involvement and frequent attendance at City Council meetings when he was no longer a member of the Council, sets the stage for Respondent as an active citizen demonstrating unusual concern for the workings of city government. Furthermore, Respondent was not the authorized representative of the school committee sent to the City Council meeting — that was a task specifically delegated to the School Committee chairman. In carrying out that task, the Chairman attended the City Council meeting with the top school department administrator, the superintendent, *not* with other School Committee members. In fact, Respondent's decision to attend the Council meeting was made at the last minute on that evening over dinner with his wife — his decision was not to carry out some official responsibility he had as a School Committee member, but rather was a decision which was prompted by private concerns he discussed with his wife. The superintendent had no arrangement or knowledge that Respondent would attend the meeting.

Respondent did not speak first at the Council meeting. The official presentation of the School Committee came initially from the School Committee Chairman who was the first member of the audience to address the City Council. It was this situation which prompted one city councillor to state that he thought the Chairman represented the School Committee and that Respondent, as he so often did before, contributed as a private citizen, a citizen whose opinion was often sought out because of his general experience and knowledge about city government.

Respondent did not identify himself as a School Committee member, did not assume an official role as part of the School Committee delegation in addressing the City Council and did not agree to attend the meeting with the School Committee. Respondent's attendance of this meeting with his wife and his last minute decision to go, in light of the foregoing, distinguishes the Respondent's participation from that of a public official acting officially before another municipal board. This is not to say that a public official may affirmatively interject himself into another agency's proceedings. **See, Craven v. State Ethics Commission**, 390 Mass. 191 (1983). He may not. In order to sustain a violation, however, it must be shown that the municipal employee was acting officially. We do not find that that has been demonstrated by a preponderance of the evidence in this case.

B. Respondent's Actions at the April 2 and 16, 1986 School Committee Executive Sessions Satisfy the Elements of a §19 Violation

Respondent admits that he attended the April 2 and 16, 1986 School Committee executive sessions and participated in the discussion and votes concerning Chapter 188. Respondent also admits that his wife had a financial interest in the funds. The school committee executive session minutes, although cryptic, were not disputed by other evidence and indicate that Respondent participated in voting on how the school department negotiations for the distribution of Chapter 188 money should proceed.

The Commission finds that the only reasonable conclusion to draw from this evidence is that Respondent participated precisely in the matter of how the Chapter 188 money would be distributed (i.e., with or without "strings") by discussing and voting on whether and how the school department should negotiate with the teachers' union concerning the teachers' receipt of the money. **See, Graham v. McGrail**, 370 Mass. 133, 138 (1976) (participation includes voting as well as other activities). Accordingly, Respondent's participation concerning how those funds would be distributed necessarily affected a matter in which his wife had a financial interest.[6/]

The practical consequence of Respondent's actions worked to his wife's (and all teachers') disadvantage by requiring teachers to engage in some professional development activity as a condition of receipt of the last of four installments of Chapter 188 money (as opposed to having no conditions imposed on the receipt of the money). This consequence is irrelevant to a determination of whether Respondent violated the law. Participation by a municipal employee on a matter which is adverse to the employee's or the employee's family's financial interest still constitutes a violation of §19 of the conflict of interest law. However, this circumstance is considered by the Commission in mitigation of the violation that occurred.

The Respondent claims that his actions as a school committee member are exempt under the terms of §19(b)(3) of the conflict law. Section 19(b)(3) provides that it is not a violation of §19 if a municipal employee participates in a particular matter in which his wife has a financial interest

> if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

Respondent claims that even if he did participate in a matter in which his wife had a financial interest, he was exempt from the conflict law because he was dealing with a matter of general policy. The Commission does not agree with Respondent's characterization of the facts. Even if the decision to accept Chapter 188 money is one of "general policy," Lynne Khambaty's interest (i.e., in receipt of the money) is *not* shared by a substantial segment of Gloucester's population; rather, it is shared by Gloucester school teachers (many of whom are not Gloucester residents and, even if they were, would not constitute a "substantial segment" of the population of Gloucester).

IV. Conclusion and Order

Based upon the foregoing, the Commission concludes that Respondent did not violate G.L. c. 268A, §19 by attending and speaking at the January 28, 1986 City Council meeting, but did violate G.L. c. 268A, §19 by participating in the April 2 and 16, 1986 school committee executive sessions through discussion and vote on the matter of the distribution of Chapter 188 money.

Although the Commission has the authority under G.L. c. 268B, §4(j) to order a payment of a civil penalty upon finding a violation, the Commission does not impose a fine in this case. Respondent's actions at the April 2 and 16, 1986 School Committee meetings served to require teachers to perform some professional development activity in order to receive the last installment of the professional development grant money. Consequently, rather than receiving the money "without strings," the teachers were required, in essence, to earn it. In light of the relatively minor violation which occurred and the fact that Respondent's actions appeared to be adverse to his wife's financial interests, the Commission declines to impose a fine. **See, In the Matter of Marguerite Coughlin**, 1987 Ethics Commission 331 (no fine imposed where municipal employee participated in matter in which she had only a slight financial interest).

DATE ISSUED: November 16, 1987

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[1]/There is contradictory testimony in evidence concerning whether Respondent "urged" the City Council to accept the provisions of Chapter 188 or whether he merely explained what those provisions were. In view of the conclusions we reach in this case, we need not resolve this factual disparity.

[2]/A municipal employee's appearance in his private capacity on behalf of another may violate §17 of the conflict law which prohibits a municipal employee from acting as the agent for a private party in a matter of direct and substantial interest to the city. We do not address whether Respondent impermissibly acted as his wife's agent at the January 28, 1986 City Council meeting as the Petitioner has made no allegation to that effect.

[3]/Petitioner proposes, as a matter of policy, that the Commission adopt a presumption that if a municipal employee, such as Respondent, does not make it clear that he is acting as a private citizen, it should be presumed that he is acting in his municipal capacity. We do not regard a presumption to be necessary in this instance. The determination of whether a municipal employee acted in his official capacity may be made by weighing the evidence introduced by the parties. Such evidence is not unobtainable. The Commission has, in other contexts, stated that upon establishing certain facts, a presumption that a specific conclusion would follow was appropriate. **See, Commission Advisory No. 8** ("Free Pass" Advisory) where we stated that if certain facts exist, an official will be considered to have received an item "for or because of any official act performed or to be performed." G.L. c. 268A, §3. Such a conclusion is appropriate when the problems of proof are not susceptible to resolution by weighing the evidence. This is not such a case.

[4]/The record reveals a brief exchange between the Respondent and others at the city council meeting that if Respondent spoke, he would be in a conflict of interest. There are two equally plausible but conflicting inferences to be drawn from this evidence — either Respondent was fully aware of the conflict and made no effort to comply with the law *or* was confident that his actions did not constitute a problem because he had a right to attend and speak at the meeting as did any citizen. Consequently, on the issue of how to characterize Respondent's participation, this evidence is not determinative.

[5]/It is unnecessary to analyze the other elements of a §19 violation, i.e., whether the issue before the city council was a particular matter and whether Respondent's wife had a financial interest in it, since the threshold element of a §19 violation, i.e., that Respondent acted as a school committee member, has not been proven.

[6]/If Respondent, in fact, contends that no "particular matter" was at issue in the School Committee executive sessions, the Commission finds this contention unpersuasive. The definition of particular matter includes any "controversy", "decision" or "determination." G.L. c. 268A, §1(k). The school committee discussion and vote on whether and how the superintendent should negotiate with the teachers' union concerning the distribution of Chapter 188 funds certainly was a determination or decision the school committee made. Respondent further asserts that the definition of "particular matter" excludes the enactment of general legislation and that this exclusion is applicable here because the City Council and School Committee's decisions to accept Chapter 188 was part of the process of enacting Chapter 188. The process of enactment of Chapter 188 ended with its enactment by the General Court. Subsequent decisions made by agencies of Gloucester either to accept or reject the provisions of that law, and the conditions under which an acceptance would be acted upon, are all separate "particular matters" for purposes of the conflict of interest law. G.L. c. 268A, §1(k).

Mr. George Prunier
85 Millbury Road
Grafton, MA 01519

RE: PUBLIC ENFORCEMENT LETTER 88-1

Dear Mr. Prunier:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you as a Grafton Selectman participated in a matter in which you had a financial interest. More specifically, the inquiry involved your participation in the deliberation and negotiations for the town's purchase of a landfill site directly across from your own residence. The results of our investigation, which are discussed below, indicate that you appear to have violated the conflict of interest law. However, in view of certain mitigating circumstances and action you have agreed to take, also discussed below, the Commission has determined that an adjudicatory proceeding is not warranted.

Rather, the Commission concluded that the public interest would be better served by disclosing the facts revealed by our investigation and explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of, and compliance with, the conflict of interest 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. You serve as a selectman in the Town of Grafton and have since 1984.

2. You live on Millbury Road in Grafton, on property you purchased in 1981. Since that time you have made substantial improvements to that property, including additions to your residence, construction of a garage and your place of business, plus extensive improvements such as landscaping.

3. On Millbury Road, across from your residence, is a solid waste sanitary landfill owned by the Adams Corporation. At the time you purchased the property you were aware of the sanitary landfill operation. The approximately six-acre landfill site, located 800 feet from Millbury Road and behind a knoll on a portion of the property away from your residence, was used as the town's solid waste landfill from approximately 1978 to December of 1985.

4. During that period and subsequent to the closing of the landfill operation, the Adams Corporation and Grafton Board of Health had numerous disagreements over the use of the landfill site and the fees charged to the Town of Grafton. After terminating the use of the Millbury Street landfill, the town began considering what measures would be necessary to close out the landfill according to DEQE guidelines and restore the site to its original condition. Discussion to this effect began in the spring of 1986 between the Town Engineer, the Board of Health and the Board of Selectmen.

5. In July of 1986, as Chairman of the Board of Selectmen, and upon the suggestion of other selectmen, you approached a representative of the Adams Corporation to negotiate for the eventual Town of Grafton's purchase of the landfill site. The former chairman had attempted to accomplish the same purchase before leaving the Board. After several exchanges of proposals and counterproposals and further negotiations with another selectman, the Adams Corporation through its representative requested the matter be placed on the Board of Selectmen agenda.

6. At a Board of Selectmen meeting on September 16, 1986, you participated in a lengthy exchange with the Adams Corporation attorney regarding the acquisition of the landfill site. Although no vote was taken on the matter, you also played a primary role in the deliberations at that meeting. You commented on the same issue at a subsequent selectmen meeting on October 14, 1986.

II. The Conflict Law

Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such in a matter in which he has a financial interest. This section is intended to ensure that a public official is acting in the best interest of a municipality and not pursuing his own self interest. This section thus prohibits you, as a Grafton Board of Selectman member, from participating in a matter in which you have a financial interest. The facts as set forth above, if proven, would indicate a violation of §19 for the reasons discussed below.

That you are a municipal employee and that you participated in a particular matter (Grafton's proposed purchase of the landfill site) are indisputable. The nature of your financial interest in that particular matter requires further discussion.

In EC-COI-84-96,[1] the Commission discussed the potential financial interest of abutting property owners and other parties in interest. Without exception, abutting property owners are presumed to have a financial interest in matters affecting the value of the abutting property. As an abutting owner you have, and had, a financial interest in the disposition of the Millbury Street landfill site. Whether purchased by the Town of Grafton, or retained by the Adams Corporation, the landfill site affects the value of your property. It is irrelevant whether the particular matter beneficially or adversely affects your financial interest. As long as there

is some effect, §19 prohibits your participation.

Thus, it appears that you as a Grafton Board of Selectman member participated in the matter of the proposed town's purchase of the landfill site and that you had a financial interest in that purchase. Therefore the Commission concludes that you appear to have violated §19 of c. 268A, the conflict of interest law.

The Commission also recognizes, however, that there are mitigating circumstances associated with this violation and because of this, the Commission has decided that this case does not warrant the initiation of a formal adjudicatory proceeding. The evidence in this matter tends to indicate that you placed the Town of Grafton's interest before your own when considering issues involving the landfill site. Thus you supported the continued operation of the site as a municipal landfill, even though the value of your own property would presumably increase if the landfill were closed and restored. You made your position public at a Board of Health Public Hearing in August of 1984 and on other occasions. Your persistent support of the continued operation of the landfill site with town ownership may thus have been contrary to your own financial interest. Because it does not appear that you stood to gain financially by your participation in this matter, the Commission has elected to issue this Public Enforcement Letter instead of pursuing adjudicatory proceedings.

In the future you must exercise caution whenever a matter is brought before the Grafton Board of Selectmen which deals with a property abutting your own, or whenever you have any financial interest in the outcome, no matter how small or speculative. If you are at all uncertain about the applicability of the conflict of interest law, the Commission encourages you to contact our Legal Division for an opinion.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law. This matter will be closed once we have received acknowledgement of your receipt of this letter.

If you have any questions, please contact me at (617) 727-0060.

Date: November 18, 1987

[1]This citation refers to previous advisory opinions issued by the Commission. Copies of these and all other advisory opinions may be obtained at the Commission's office.

Senator John P. Burke
577 Pleasant Street
Holyoke, MA 01040

RE: PUBLIC ENFORCEMENT LETTER 88-2

Dear Senator Burke:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding your receipt of a rifle from Savage Industries of Westfield, Massachusetts, given in recognition of your efforts as a State Senator on behalf of that company.

The results of our investigation (discussed below) indicate that you may have violated the conflict of interest law in this case. Nevertheless, in view of certain mitigating factors, also discussed below, the Commission has determined that adjudicatory proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed by our investigation and explaining the applicable provisions of law, trusting that this advice will ensure both your and other government employees' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are the State Senator for the Chicopee, Westfield, Holyoke and Southampton area. You have served in that capacity for approximately nine years. One of your Senate responsibilities is the chairmanship of the Legislature's Banks and Banking committee.

2. Savage Industries (Savage) is a gun manufacturing company which currently operates in Westfield. The company was previously located in Chicopee.

3. Approximately one week before Thanksgiving, 1985, you received a telephone call from Tim Sullivan, head of theemployees union at Savage, asking if you would attend a lunch with retirees of Savage. At that time, Sullivan explained to you that Savage was having substantial financial difficulties and it appeared that the company might go bankrupt. Sullivan requested your help in attempting to keep the company operating.

4. From that point through April, 1986 you spent substantial hours attempting to keep Savage from going out of business. You contacted Fleet National Bank in Rhode Island, with which Savage had a substantial debt. At the time all proceeds of gun sales that came in as accounts receivable to Savage were turned over to Fleet National, which in turn provided a check to Savage to cover the minimum cost of a maintenance crew. By this time Savage was no longer operating and the maintenance crew was paid merely to keep the building and machinery from going into disrepair.

5. You met with one of Fleet National's lawyers and an agreement was reached to provide Savage time to find alternative financing. Fleet National also agreed

to provide Savage additional money from accounts receivable to cover the costs of health benefits for laid off employees. At this time Savage had a negative net worth.

6. You additionally met with Paul Eustace, Secretary of Labor for the Commonwealth, and discussed the possibility of obtaining state loan money which is available to help distressed companies. Secretary Eustace had independently determined to send in a management team, which analyzed the situation.

7. Secretary Eustace, through the Industrial Services Program,[1]/ began working with Fleet National towards relieving Savage's financial problems. You participated in these discussions at the request of both Secretary Eustace and Fleet National.

8. Bay State Investors began reviewing the Savage situation and considered investing in the business. Bay State Investors agreed to do so if Thrift Fund[2]/ money was available from the state of Massachusetts. A loan was made available to Savage from the Industrial Services Program and additional money was made available from the Thrift Fund. You state that you had no contact with Bay State Investors until after Secretary Eustace had involved them in the process.

9. The above described arrangements were consummated in April of 1986, and the company and union had an awards ceremony where Paula Gold, Secretary of Consumer Affairs, presented a $2,000,000 check from the Thrift Fund to the company. Both Secretary Eustace and you were honored at the ceremony and presented with plaques. Sometime after the ceremony Tim Sullivan and Savage's Chief Executive Officer, General Freedman, presented you with a rifle manufactured by Savage.

10. When originally contacted by this office, you stated that you thought that the rifle was not meant to be used and could not be fired. You subsequently checked into this and found that the gun can be fired, but was not designed for actual use. Apparently, the gun was one of a group that was made by the company to be given as gifts, but should not be used for hunting or shooting purposes. You state that you are not a hunter and you had not taken the gun out of the original box. Your recollection was that someone told you that the rifle was worth approximately $700 at the time that it was presented to you. A check with the company revealed that the retail value of the gun is $428. On November 6, 1987 you returned the rifle to Savage.

II. The Conflict Law

As a State Senator, you are a state employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) prohibits a state employee, otherwise than as provided by law for the proper discharge of his official duty, from accepting anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him.

As the Commission stated **In the Matter of George Michael**, 1981 SEC 59, 68:

> A public employee may not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value in order for a violation of §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 §3 in to 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.

For the purposes of G.L. c. 268A, "substantial value" has been determined to be anything valued at more than $50. **See Commonwealth vs. Famigletti**, 4 Mass. App. 584, 587 (1976); **Commission Advisory No.8**, February 25, 1986.

The facts set forth in this letter, if proven, would appear to establish a violation of §3. Thus you accepted the rifle as a token of gratitude by the company for your efforts as a Senator in obtaining refinancing for the company. This is exactly the kind of conduct covered by the language quoted from **Michael**, above. **See, also, A Practical Guide to the Conflict of Interest Law and Financial Disclosure Law for State Employees**, p. 3-4.

Nevertheless, there are several mitigating factors here. The role that you took in assisting Savage was a normal part of your constituency services — you were helping a company which is located in your district and employs over 400 people. In addition, you listed the gift in your financial disclosure form, so that obviously you were not attempting to conceal its receipt. Furthermore, the gift was given after the services were rendered and after all the critical steps involving state assistance had been completed, so that it clearly represents a token of appreciation rather than an inducement to you to intervene on behalf of the company. Last, you have returned the rifle to Savage.

Because of the above mitigating factors, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings.

III. Disposition

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

Date: December 3, 1987

[1]/The Industrial Services Program was established by legislation several years ago to help "mature" Massachusetts industries deal with severe financial difficulties. The program is jointly run through the Executive Office of Consumer Affairs and the Executive Office of Labor.

[2]/The Thrift Fund is a $100 million direct lending pool established to facilitate economic development initiatives throughout Massachusetts. The Fund's paramount objective is the creation and retention of jobs. The funds come from banking institutions. Targeted areas include mature industries such as Savage.