Rulings

Enforcement Actions

Advisory Opinions

1988

Published by The Massachusetts State Ethics Commission

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STATE ETHICS COMMISSION

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

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TABLE OF CASES

(By Subject or Respondent from 1979 through 1988)

1988 TABLE OF CASES

(By Subject or Respondent)

Included are:

All Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1988, page 326.

Disposition Agreement issued June 20, 1986, **In the Matter of Robert N. Scola**, page 388.

Footnotes previously omitted from **The Matter of John J. Hanlon**, page 389.

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.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 348

IN THE MATTER
OF PAUL X. TIVNAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Paul X. Tivnan (Mr. Tivnan) 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 27, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Tivnan, a County Commissioner in Worcester County. The Commission concluded its inquiry and, on May 18, 1987, found reasonable cause to believe that Mr. Tivnan violated G.L. c. 268A, §13.

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

1. Mr. Tivnan is an elected Worcester County Commissioner and was a County Commissioner at all times relevant to this proceeding. As a County Commissioner, Mr. Tivnan is a county employee as that term is defined in G.L. c. 268A, §1(d).

2. Mr. Tivnan's son, Michael Tivnan, and Mr. Tivnan's daughter, Maureen Anderson, are members of Mr. Tivnan's immediate family as defined in G.L. c. 268A, §1(e). Michael Tivnan and Maureen Anderson are employees at the Worcester County House of Correction.

3. On January 6, 1987, Worcester County Sheriff-elect John Flynn requested, in writing, a transfer of approximately $18,000 from the Worcester County Reserve Account to the House of Correction budget to fund certain promotional changes involved in Flynn's proposed re-organization of the Jail and House of Correction. The approval of reserve fund transfers requires the presence of three voting County Commissioners. After approval by the County Commissioners, a request for reserve fund transfer is sent to the Worcester County Advisory Board for the approval of that Board.

4. The Sheriff-elect's request was sent to the County Commissioners through the Worcester County Manager and included a list of the promotional changes. The list named seventeen individuals and included Michael Tivnan (Michael) and Maureen Anderson (Maureen) among those being promoted and set forth the respective dollar amounts by which their annual salaries were being increased (Michael - $506.75, Maureen - $519.93).

5. On January 15, 1987, the County Commissioners voted to request the approval of the County Advisory Board of a transfer of $17,754.30 from the Reserve Fund to the Jail and House of Correction to be used to fund salary increases for the promoted employees. Mr. Tivnan was present, voted in favor of the request and signed the request. The request form which Mr. Tivnan signed referred to a copy of the Sheriff-elect's request which was attached to it.[1]/

6. On January 18, 1987, the Executive Committee of the County Advisory Board voted to approve the transfer request.

7. On January 28, 1987, Sheriff Flynn submitted to the County Commissioners, pursuant to G.L. c. 35, §§48-56, Notice of Intent to Fill a Vacancy or to Establish a New Position forms relating to the promotions and salary increases of Michael and Maureen which were funded by the January 15, 1987 vote. On February 4 and February 11, 1987, the County Commissioners respectively approved Michael's and Maureen's promotions, by signing the Notice of Intent forms relating to them. Mr. Tivnan did not sign Michael's or Maureen's Notice of Intent forms, which were signed by the two other County Commissioners.

8. On or before February 4, 1987, there were media reports concerning Mr. Tivnan's participation in the January 15, 1987 vote of the County Commissioners.

9. On February 9, 1987, at Mr. Tivnan's request, the attorney for the County called the Legal Division of the Commission concerning Mr. Tivnan's participation in the January 15, 1987 vote. The County's attorney was advised that Mr. Tivnan should self-report to the Commission's Enforcement Division in order to resolve the matter.

10. On February 10, 1987, at the request of Mr. Tivnan, the County's attorney contacted the Commission's Enforcement Division and informed the division that Mr. Tivnan intended to seek Commission review of his role in the January 15, 1987 vote. The County's attorney confirmed this information by letter dated February 11, 1987.

11. On February 10, 1987, at a meeting of the County Commissioners, Mr. Tivnan informed the other two County Commissioners of his intent to request a Commission review of his participation in the January 15, 1987 vote and stated that he would leave the room if there was to be any further discussion of that matter. At the same meeting, while Mr. Tivnan was not present, the remaining two County Commissioners voted to reconsider the January 15, 1987 vote on February 17, 1987.

12. On February 17, 1987, Charles Hudson was appointed as acting County Commissioner because Mr. Tivnan had disqualified himself, pursuant to G.L. c. 34, §12.[2]/

13. At the County Commissioners' meeting of February 17, 1987, the January 15, 1987 vote was rescinded

and cancelled. Mr. Tivnan did not attend the meeting, and Mr. Hudson participated as acting County Commissioner.

14. Also at the February 17, 1987 meeting, the County Commissioners, with Mr. Hudson as acting County Commissioner, voted to approve the transfer request after a presentation by Sheriff Flynn.

15. Mr. Tivnan submitted a letter to the Commission dated February 26, 1987 disclosing the relevant facts in this matter and included copies of pertinent documents.

16. Except as permitted in that section, G.L. c. 268A, §13 prohibits a county employee from participating as such in a particular matter in which to his knowledge he, or a member of his immediate family, has a financial interest. None of the exceptions to §13 applies to this matter.

17. The approval of the Reserve Fund transfer request to fund promotional changes on January 15, 1987 was a particular matter as that term is defined in G.L. c. 268A, §1(k). By voting on the transfer request, Mr. Tivnan participated in a particular matter in which he knew members of his immediate family had a financial interest, thereby violating §13.

18. The Commission has found no evidence suggesting that Mr. Tivnan intentionally violated the conflict of interest law.[3]/

Based upon 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. Tivnan:

1. that he pay to the Commission the amount of five hundred dollars ($500.00) as a civil penalty for violating §13;
2. that in the future 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 or may be a party.

DATE: January 11, 1988

[1]/Mr. Tivnan knew when he signed the request that it would affect the organization and salary structure of the department in which his son and daughter were employed, matters in which Mr. Tivnan was aware his children had a financial interest.

[2]/Section 12 of G.L. c. 34 states in pertinent part:
In case of inability to attend, or interest in a question before the commissioners, or if any part of a highway relative to which they are to act lies within the town where a commissioner resides, the commissioners qualified to act and the clerk of courts for the county shall appoint one or more persons, not residing in the same town as any commissioner, nor in the same town with each other, if more than one, to act as commissioners in place of those absent or disqualified, until such absence or disqualification ceases.

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 352

IN THE MATTER
OF
ROBERT EGAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert Egan (Mr. Egan) 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 6, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Egan, a former Natick Zoning Board of Appeals member. The Commission concluded its inquiry and, on October 5, 1987, found reasonable cause to believe that Mr. Egan violated G.L. c. 268A, §§17 and 18. 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. The Selectmen of the Town of Natick appointed Mr. Egan, an architect who had been employed by John Sharratt Associates, Inc. (Sharratt Associates) for 16 years, to Natick's Board of Zoning Appeals (ZBA) in 1978. Mr. Egan served as a member of the ZBA and as its Chairman until he resigned in 1985. He received no remuneration for these services.

2. In July, 1984, the Zoning Board of Appeals members were designated special municipal employees by the Board of Selectmen.

3. In or about August, 1985, Baseball Factory Trust (Trust) asked Sharratt Associates to produce architectural drawings for the rehabilitation of an old baseball factory located in the Town of Natick.

4. Mr. Egan expended approximately 40-50 hours on the project before he left Sharratt Associates. He was compensated for that work by Sharratt Associates as part of his regular salary.

5. On October 28, 1985, Sharratt Associates filed a Notice of Appeal with the ZBA on behalf of the Trust from the decision of the Inspector of Buildings withholding a special permit that the Trust needed to construct

multi-family housing in the area where the baseball factory was located. In order to be eligible for such a permit, the ZBA would have to find that the Trust had made adequate provision for off-street parking there.

6. Mr. Egan resigned his position with Sharratt Associates on November 4, 1985. In order to compensate Mr. Egan for the fees that they owed him, Sharratt Associates asked Mr. Egan to assume responsibility for the baseball factory job that he had been working on as well as other jobs that Sharratt Associates was responsible for.

7. On November 6, 1985, Mr. Egan submitted a letter to the Board of Selectmen, tendering his "resignation from the Zoning Board of Appeals, effective November 6, 1985." The Board of Selectmen voted to accept Mr. Egan's resignation on November 18, 1985. Mr. Egan's resignation was effective as of November 18, 1985 and any matters initiated with the ZBA prior to that time were the subject of his responsibility.

8. Mr. Egan did not act as a member of Natick's ZBA nor did he participate as a ZBA member in any matter that was pending before the ZBA after November 6, 1985.

9. On November 13, 1985, the ZBA held a hearing upon the appeal filed by the Trust. The developers, their attorney and Mr. Egan appeared before the ZBA and presented plans and arguments in support of the appeal that had been filed by the Trust. Mr. Egan presented and explained the architectural plans and was compensated for the appearance by the Trust.

10. On November 18, 1985, the Board of Selectmen sent a letter to Mr. Egan advising him that they had voted to accept his resignation.

11. On November 20, 1985, Mr. Egan again appeared before the ZBA and indicated that the Trust was in the process of negotiating a lease for the property across the street from the baseball factory that would provide additional parking spaces for use by the development. Mr. Egan further explained that the lease would likely be for a two year period and that possible changes in the existing retail uses of the building might negate the need for these additional spaces in the future. On that evening the ZBA made formal findings regarding the special permit application and these were filed with the town clerk on December 5, 1985.

12. On December 9, 1985, Mr. Egan entered into a formal written contract with the developers which provided for his architectural services on the baseball factory project. Mr. Egan was compensated through this contract for his appearances before the ZBA on November 13 and November 20, 1985.

13. Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than the town in any particular matter in which the town is a party or has a direct and substantial interest.

14. Section 17(c) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, acting as agent for anyone in connection with a particular matter in which the town is a party or has a direct and substantial interest.

15. Section 17(a) and (c) apply to special municipal employees, like Mr. Egan, "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 the subject of his official responsibility ..."

16. By receiving compensation from the Trust in relation to its appeal heard at the November 13, 1985 ZBA meeting and by acting as agent for the developers in connection with said appeal at that meeting, Mr. Egan violated Section 17(a) and Section 17(c), respectively.

17. Section 18(b) prohibits a former municipal employee, within one year after his last employment, from appearing personally before an agency of the town as agent for anyone other than the town in connection with any particular matter in which the town has a direct and substantial interest and which was under his official responsibility as a municipal employee at any time within two years prior to the termination of his employment.

18. By acting as agent for the Trust before the ZBA on November 20, 1985 (2 days after his resignation was accepted by the Board of Selectmen) in connection with the special permit application of the Trust, Mr. Egan violated Section 18(b).

19. In view of the foregoing violations of G.L. c. 268A, §§17 and 18, 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. Egan:

1. That he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil penalty for his alleged violation of G.L. c. 268A, §§17 and 18;
2. That he waive all rights to contest the findings of fact and the 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: February 10, 1988

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 327

IN THE MATTER
OF
CLARENCE D. RACE

Appearances: Marilyn Lyng O'Connell, Esq.
Stephen P. Fauteux, Esq. Counsel for Petitioner
Alan J. Rilla, Esq.
John J. McQuade, Esq. Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Gargiulo, Jarvis

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on March 13, 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 Clarence D. Race (Respondent) had violated G.L. c. 268A, §19[1]/on November 8, 1983 by requesting, by letter and as Chairman of the Egremont Board of Selectmen, that the Department of Environmental Quality Engineer (DEQE) review a particular set of septic plans in which the Respondent and his immediate family had a financial interest.

The Respondent's Answer raised a statute of limitations defense and denied that Respondent personally and substantially participated in a matter in which he knew he or his family had a financial interest in violation of §19.

In lieu of a hearing, the parties stipulated to the relevant facts. The parties filed briefs and presented oral arguments before the Commission on January 6, 1988. In rendering the Decision and Order, the Commission has considered the evidence and arguments of the parties.

II. Findings of Fact

1. Respondent is a member of and chairman of the Egremont Board of Selectmen and has been since 1981.

2. In 1980, Respondent formed Egremont Contractors, Inc., a family owned business engaged primarily in the construction of single family homes. At all times relevant hereto, Respondent's son, Thomas Race, has been the president and chief operating officer of the corporation. Also at all times relevant hereto, Respondent, his wife, Thomas Race and one other son were the sole owners of the corporation.

3. In September, 1980, Respondent, his wife and two sons purchased a 5.8 acre parcel of land located on Mt. Washington Road in Egremont for $8,000. The land was purchased as a valid building lot with satisfactory percolation test.

4. In the fall of 1983, the Races agreed to sell the Mt. Washington Road property to Lindsey Crawford for $12,000. There was no formal purchase and sale agreement nor any other written agreement, although in the fall of 1983 (and prior to November, 1983) Lindsey Crawford gave Respondent a $1,000 deposit on the property.

5. On October 31, 1983, a registered engineer performed a percolation test on the Mt. Washington Road property and designed a septic system. The chairman of the Egremont Board of Health reviewed the percolation test results and system design and requested that the president of the privately owned South Egremont Water Company also review the test results and system design because the property was within the watershed. The water company president then requested an opinion from the State Department of Environmental Quality and Engineering (DEQE) as to whether this system conformed to Title 5 of the State Sanitary Code.

6. On November 8, 1983, Respondent met with the Chairman of the Egremont Board of Health at the Egremont Town Hall. Also present were Thomas Race and Mary Brazie, the Selectman's secretary. A discussion ensued concerning the request by the president of the Egremont Water Company for an opinion from the DEQE as to whether the system, as designed, complied with the requirements of Title 5 of the State Sanitary Code. It was decided that the request be made in writing and that it be signed by Respondent, in his capacity as Chairman of the Egremont Board of Selectmen, to elicit a prompt reply.

7. In the letter to the DEQE, dated November 8, 1983, Respondent enclosed for its review the engineer's plans for a septic system on the Mt. Washington Road property which his family intended to sell to Lindsey Crawford. Respondent informed DEQE in this letter that at least nine homes had been built in the watershed area. The letter included a post-script signed by the Chairman of the Egremont Board of Health which indicated his approval on behalf of the Board of Health of the system design. DEQE responded to the November 8, 1983 letter by letter dated November 18, 1983.

8. On December 2, 1983, Thomas Race, on behalf of Egremont Contractors, Inc., applied for a permit to construct a sewage disposal system on the Mt. Washington Road property. The permit was approved on December 15, 1983.[2]/

9. The sale of the property became final by deed dated January 30, 1984. Respondent's share of the profits in the sale amounted to less than $1,000.

10. On February 10, 1984, Lindsey Crawford applied for and received a building permit, in which he listed Egremont Contractors as the contractor. The estimated cost of the construction was listed at $35,000.

11. Egremont Contractors, Inc. did not participate in the construction of the house or the sewage disposal system on the parcel purchased by Lindsey Crawford.

III Decision

For the reasons stated below, the Commission concludes that the Order to Show Cause was issued in a timely fashion and that Respondent violated G.L. c. 268A, §19.

A. Statute of Limitations

1. Sufficiency of Affidavits

The Commission has promulgated a regulation concerning the assertion of a statute of limitations defense. 930 CMR 1.02(10)(c). When a statute of limitations defense has been asserted, Petitioner has the burden of showing that a disinterested person learned of the violation no more than three years before the order was issued. Petitioner has submitted the affidavits of Ms. Gallant, Mr. Roberto, and Mr. Krant to satisfy this burden.

Respondent claims that District Attorney Roberto's affidavit is legally deficient because it fails to explain whether such a complaint has been received and fails to speak with certain clarity. We decline to adopt a reading of 930 CMR 1.02(c)(2) that would require District Attorney Roberto to have left no stone unturned in his efforts to determine if such a complaint had been filed. The regulation at issue does not appear to have contemplated any such requirement even when, as here, there are no complaint files to search. District Attorney Roberto's assertion that such a complaint would have been brought to his attention and his lack of recollection of such a complaint, coupled with his consultation with present and former staff who similarly had no recollection of such a complaint, is sufficient.

The second claim is related to the first. District Attorney Roberto stated what efforts he made to ascertain whether a complaint had been filed. His conclusion, at each stage of his inquiry, was that no complaint had been made. This also satisfies the requirements of 930 CMR 1.02(c)(2), as applied reasonably to the situation where no complaint files are kept.

2. General Knowledge in the Community

930 CMR 1.02 (10)(d)(1) provides that if the Petitioner meets his burden under 930 CMR 1.02(10)(c), the Respondent will prevail on his statute of limitations defense only if he shows that more than the three (3) years before the order was issued the relevant events were a matter of general knowledge in the community. Respondent argues that the facts that four people were present at the Selectmen's office on November 8, 1983, when the letter which is the subject of the Order to Show Cause was signed, that a deed evidencing Respondent's (and his family's) ownership interest in the subject property was recorded at the Registry of Deeds, that a design for a sewage disposal system was prepared and percolation test was conducted on the subject property by engineer George Adote, that the water company president received a copy of the November 8, 1983 letter and then wrote a letter to the Board of Selectmen and the Board of Health (November 26, 1983), and that certain officers of the water company may have been aware of that November 26 letter as well, all indicate that, in a town with a population of approximately 1,300, the matter was of general knowledge in the community.

Not all of the people listed above knew enough of the relevant events to be described as members of the community who knew about the relevant events. Respondent, for example, makes no claim that the selectmen (other than Respondent) knew that Respondent's family owned the property which was a subject of dispute. The fact that Respondent, as a Selectman, knew the relevant facts is irrelevant. **Nantucket v. Beinecke**, 379 Mass. 345, 350 (where the court refused to attribute the knowledge of the defendant municipal employees to the municipality being wronged by their acts). Neither the letter of November 8, 1983 nor the letter of November 26, 1983 refers to Respondent and his family's financial interest in the subject property. Moreover, this crucial relevant fact was not known by those listed above. We conclude, therefore, that the relevant facts were not a matter of general knowledge in the community.

B. Substantive Violation

There is no dispute that as a member of the Egremont Board of Selectmen, Respondent is a municipal employee, as that term is defined in G.L. c. 268A, §1(g). Section 19 of G.L. c. 268A prohibits him from participating as a municipal employee in a particular matter in which, to his knowledge, he or his immediate family, has a financial interest.

There is also no dispute that the November 8, 1983 request to DEQE to review the septic plans was a particular matter as that term is defined in G.L. c. 268A, §1(k). This definition includes a "request for a ruling or other determination."

Respondent argues that G.L. c. 268A, §1(j) requires personal and substantial participation and that this requirement was not met by the November 8, 1983 request to DEQE. He contends that the letter was a ministerial act that did not directly affect a particular matter and that the letter neutrally conveyed another's request for review to DEQE. Petitioner responds that Respondent both requested DEQE review and suggested the result which DEQE should reach.

We conclude that Respondent's sending of the letter as Chairman of the Board of Selectmen amounted to personal and substantial participation as defined in G.L. c. 268A, §1(j). Respondent's contention that his was a ministerial act fails here because, although not every

action by a public official will satisfy the substantiality requirement, **In the Matter of John R. Hickey**, 1983 Ethics Commission 158 at 159, this was more than a **pro forma** act. "For purposes of §19, 'participation' is not limited to discretionary and/or final decisions." **In the Matter of George Najemy**, 1984 Ethics Commission 223 at 224. The November 8, 1983 letter's inclusion of information about other, obviously acceptable, completed septic plans in the area is clear evidence that this was not merely a ministerial act by Respondent.

We conclude that the financial interests of Respondent and his immediate family in the November 8, 1983 letter were both obvious and reasonably foreseeable. Respondent knew of the agreement to sell the lot to Mr. Crawford and of Mr. Crawford's intent to build a house on the property. Respondent and his immediate family had a financial interest as owners of the parcel and as prospective sellers of the parcel.

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. G.L. c. 268B, §4(j)(3). Although the potential maximum fine in this case is $2,000, we believe that the imposition of the maximum fine is not warranted. This violation involved less attempted and less actual affect on a particular matter than is found in some Commission precedent on §19 violations. **See, In the Matter of Paul A. Bernard**, 1985 Ethics Commission 226 (violation of §19 by member of planning board who approved and signed a plan when he was also privately acting as a real estate broker for the sale of the property involved).

Respondent's personal profit from this particular matter was less than $1,000. There was no large personal stake here. His personal participation did not have a determinative effect on DEQE's decision. His participation was an attempt to effect DEQE's decision on a disputed matter, however. Respondent's act was not ministerial and not neutral. Therefore, a fine reflecting these facts is appropriate.

V. Order

On the basis of the foregoing pursuant to its authority under G.L. c. 268B, §4, the Commission orders Respondent to pay two hundred and fifty dollars ($250.00) to the Commission as a civil penalty for violation of G.L. c. 268A, §19.

DATE AUTHORIZED: February 3, 1988

1/ "... a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both." G.L. c. 268A, §19.

2/ When a statute of limitations defense has been asserted, the Petitioner will have the burden of showing that a disinterested person learned of the violation no more than three (3) years before the order was issued. The burden will be satisfied by: (1) an affidavit from the investigator currently responsible for the case that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the order was issued, and (2) with respect to any violation of M.G.L. c. 268A other than 23, affidavits from the Department of the Attorney General and the appropriate Office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the order was issued, or (3) with respect to any violation of M.G.L. c. 268A, 23, an affidavit from respondent's public agency that the agency has reviewed its files and the agency was not aware of any complaint relating to the violation more than three (3) years before the order was issued.

3/ G.L. c. 268A, §1(k) defines "particular matter" as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, 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/ Commissioners Basile and Jarvis concur with the conclusions of this Decision and Order regarding the violation of 19 but believe that the publicity of this finding, without a fine, is a sufficient sanction under these circumstances.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 330

IN THE MATTER
OF
MICHAEL RILEY

Appearances: Robert L. Levite, Esq.
Counsel for the Petitioner

Matthew E. Dwyer, Esq.
Counsel for the Respondent

Commissioners: Diver, Ch., Basile, Epps, Gargiulo, Jarvis

DECISION AND ORDER

I. Procedural History

Michael Riley (Respondent), has served since 1983 as a full time custodian with the Boston Public Library and also as a full time custodian for the Boston School Department. On July 18, 1986, Respondent was sent a letter by the Enforcement Division of the State Ethics Commission explaining G.L. c. 268A, §20 and its application to his employment arrangement. The letter informed him that §20 prohibits a municipal employee from having a financial interest in a contract with an agency of the same municipality and that, as a School Department custodian, he was a municipal employee who has a financial interest in the compensation he receives as Library custo-

dian. He was directed to inform the Enforcement Division within thirty days of his plans to resolve the matter. Respondent admits that he received this letter but elected not to resign from either position.

On February 23, 1987, the Commission voted to initiate a preliminary inquiry into whether the Respondent had violated §20. On that same date, the Commission also found reasonable cause to believe that a violation of §20 had occurred and authorized adjudicatory proceedings.

On November 13, 1987, the parties submitted Stipulation of Facts and Exhibits in lieu of a formal adjudicatory hearing. On January 5, 1988, the parties presented oral argument before the full Commission. In rendering this Decision and Order, the Commission has considered the stipulations, evidence and arguments of the parties.

II. Findings of Fact

1. Respondent has been employed by the Boston Public Library since July 9, 1976. On that date, Respondent was appointed provisionally to the position of custodian by the Director of the Library. Respondent's appointment was made pursuant to G.L. c. 31, §12, 13. Respondent served under his provisional appointment at the Library from July 9, 1976 to October 9, 1984.

2. On October 8, 1984, after Respondent's successful completion of an open, competitive examination administered under G.L. c. 31, §16, Respondent was permanently appointed to the position of custodian at the library and has since served therein on a full-time, continuous basis.

3. On or about October 31, 1983, Respondent successfully completed an open, competitive school custodian examination pursuant to G.L. c. 31, §16, 18 . Respondent was permanently appointed to the position of junior building custodian within the Department of Facilities Management of the Boston School Committee on November 27, 1984, and has since served at the Lewis Middle School in that capacity on a full-time, continuous basis.

4. Respondent's hours of employment at the Boston Public Library are from midnight to 8:00 a.m. His hours of employment with the Boston School Department are from 2:30 p.m. to 11:00 p.m.

5. As of the date of this decision, Respondent has continued to hold both his position at the Library and his position at the Lewis Middle School, receiving compensation for each position.

6. Respondent was compensated for more than 500 hours work on each job in calendar year 1986.

III. Discussion

Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest in a contract made by a municipal agency of the same city and in which the city is an interested party. Respondent concedes that he is a full-time salaried custodian of the Boston School Department and, as such, is a municipal employee within the meaning of §1(g). Respondent also concedes he has a financial interest in his employment contract with the Boston Public Library, a municipal agency of the same City. Therefore, Respondent has violated and continues to violate §20. **In the Matter of Kenneth R. Strong**, 1984 Ethics Commission 195; **In the Matter of Paul T. Hickson**, 1987 Ethics Commission 316; **see also, In the Matter of Henry M. Doherty**, 1982 Ethics Commission 115.

Respondent initially questioned Commission precedents in arguing that an individual does not have a "financial interest" in a personal service arrangement with his own municipality. That past precedent established a reasonable proposition that, where a public employee performs a service to a public agency in exchange for compensation, he has a financial interest in a contract within the meaning of the conflict law. As conceded by Respondent in oral argument, any doubt upon the issue was recently settled by the Supreme Judicial Court in the case of **Robert J. Quinn v. State Ethics Commission**, 401 Mass. 210 (1987), which held "barring an exemption or exception under §7, an employee of one state agency may not receive compensation for performing personal services under contract with another state agency."[1] Therefore, Respondent is a full-time municipal employee who has a financial interest in his second employment contract. Since no exemption applies[2] Respondent has violated, and continues to violate G.L. c. 268A, §20.

IV. Remedy

In light of the remedial purposes of §20, it is the Commission's opinion that the public interest will be best served by Respondent's resignation from one of his positions within thirty days. This opinion is based on the fact that Respondent's status as a municipal employee had no bearing on his obtaining his second position nor compromised his services to the City. **See, In the Matter of Robert J. Quinn**, 1986 Ethics Commission 265. Respondent has offered to resign one of his two positions in light of the recent pronouncement of the Supreme Judicial Court in **Quinn, infra**; and thereby negate a need for a civil enforcement action. If Respondent does not resign, on the other hand, the circumstances of this case warrant a substantial fine. Past Commission precedent and the past advice of the Enforcement Division have been unequivocal. Any good faith reliance on Respondent's counsel's representation of ambiguity regarding §20 has now been resolved by the Supreme Judicial Court. There is no possible continuing justification for failing to resign one of the two positions.

V. Order

Pursuant to the authority of G.L. c. 268B, §4(j), the Commission orders Respondent to cease and desist continued violation of G.L. c. 268A, §20 by resigning one of his two positions within thirty days of the date of notice of this Decision.

If the Respondent continues to violate G.L. c. 268A, §20 by failing to resign one of his two positions within thirty days of the date of this Decision, the Respondent will be ordered to pay a civil penalty of one thousand dollars ($1,000.00).

DATE AUTHORIZED: February 24, 1988

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[1]/Section 7 is the state counterpart to §20.

[2]/Specifically, the exemption in §20(b) does not apply because Respondent has worked more than 500 hours in both positions. (See Finding of Fact 6).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 354

IN THE MATTER
OF
FRANK MAGLIANO

DISPOSITION AGREEMENT

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

On July 27, 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 Mr. Magliano, the Building Inspector for the City of Brockton. The Commission has concluded that inquiry and, on October 26, 1987, found reasonable cause to believe that Mr. Magliano violated G.L. c. 268A, §19.

The Commission and Mr. Magliano now agree to the following findings of fact and conclusions of law:

1. Mr. Magliano is the Building Inspector in Brockton and, as such, has overall supervision of the Public Property Department. Mr. Magliano is therefore a municipal employee as defined in §1(g) of G.L. c. 268A.

2 Mr. Magliano has a son, Daniel J. Magliano (Daniel). Daniel is a member of Mr. Magliano's immediate family within the meaning of G.L. c. 268A, §1(e).

3. On June 2, 1986, Mr. Magliano posted a promotional bulletin in the Public Property Department shop giving notice of an opening for a permanent storekeeper at $9.16 per hour, starting July 1, 1986. The bulletin was posted for five working days as required by G.L. c. 31, §29.

4. The creation of the position of storekeeper had been approved by the Brockton City Council in the spring of 1986, with an annual salary of $19,125.00.

5. On June 11, 1986, Mr. Magliano filed a municipal Civil Service Requisition and a Position Description with the Division of Personnel Administration (DPA). The requisition stated that the position of storekeeper would be a newly-created, full-time, permanent position. The requisition also stated that the appointment would be made by certification from an existing eligible list established as a result of an open competitive examination or, if there was no suitable eligible list, by holding an open competitive examination. Mr. Magliano signed the requisition in certification that he was the officer authorized by law to make the appointment. Mr. Magliano also signed the position description as the appointing authority. There was, in fact, no existing eligible list in June, 1986 from which applicants could be appointed to the storekeeper position.

6. By letter dated June 17, 1986, Mr. Magliano notified the DPA that he had made a provisional appointment of Daniel as storekeeper, effective June 30, 1986. In the letter, Mr. Magliano certified that he had been unable to find a veteran qualified for the position who was available and that he had complied with all the provisions of G.L. c. 31, §25[1]. Daniel was the sole applicant for the position. At no time did Daniel take an open competitive examination for the storekeeper position; between June, 1986 and April, 1987, no such examination was held to create an eligible list of applicants for the position.

7. On August 6, 1986, Mr. Magliano sent a letter to DPA requesting that the requisition, dated June 11, 1986, be changed to reflect a salary of $9.25 per hour (instead of $9.16 per hour). Mr. Magliano also requested that the notification of provisional appointment be changed to reflect an effective date of July 14, 1986.

8. On January 16, 1987, The Brockton Enterprise printed an article alleging that Mr. Magliano had created the new position of storekeeper and appointed his son Daniel to the position. The article raised the issue of whether Mr. Magliano's hiring of Daniel violated the state conflict of interest law.

9. On April 17, 1987, Daniel submitted his resignation from his position, citing a possible conflict of interest as his reason for taking the action. On the same date, Mr. Magliano sent a letter to City Solicitor Paul Adams informing him of Daniel's resignation "[d]ue to a possible conflict of interest."

10. Mr. Magliano has maintained throughout these proceedings that when he took the steps involved in

hiring Daniel, he was unaware that his actions would create a conflict of interest. The Commission knows of no evidence indicating that Mr. Magliano knowingly or intentionally violated the conflict of interest law. Mr. Magliano understands that ignorance of the law is no defense to a violation of G.L. c. 268A.[2]

11. Section 19 of G.L. c. 268A provides in relevant part that, except as permitted by §19,[3] 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.

12. The appointment of Daniel to the storekeeper position was a "particular matter." Mr. Magliano "participated" in that matter by making the appointment and by taking the other actions concerning the appointment which are set forth above. Because the position was a paid position, Daniel had, at the time of the appointment, a "financial interest" in the appointment. Mr. Magliano was aware at the time he appointed his son that his son would receive compensation for his services as a storekeeper. As Mr. Magliano's son, Daniel was a member of Mr. Magliano's immediate family within the meaning of G.L. c. 268A, §19. G.L. c. 268A, §1(e).

13. By appointing his son to the storekeeper position, as described above, Mr. Magliano participated as the Brockton Building Inspector in a particular matter in which his son 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 Mr. Magliano:

1. that he pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §19 by appointing his son to the storekeeper position; 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 3, 1988

[1]/General Laws c. 31, §25 governs the establishment of a certified eligible list by DPA and certain aspects of the appointment of persons from that list.

[2]/In the Matter of C. Joseph Doyle, 1980 SEC 11, 13. See also, Scola v. Scola, 318 Mass. 1, 7 (1945).

[3]/None of the §19 exceptions applies to this case.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 343

IN THE MATTER
OF
WILLIAM HIGHGAS, JR.

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Lawrence T. Perera, Esq.
Diane C. Tillotson, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Gargiulo, Jarvis

COMMISSION'S RULING ON RESPONDENT'S MOTION TO DISMISS OR FOR DECISION ON THE PLEADINGS

I. Introduction

The Enforcement Division of the State Ethics Commission (Commission) issued an Order to Show Cause on October 1, 1987 alleging that a state judge, William Highgas, Jr. (Respondent), violated §23(b)(3) of the conflict of interest law. Respondent has filed a Motion to Dismiss or For Decision on the Pleadings challenging the Commission's jurisdiction to enforce the provisions of §23(b)(3) of G.L. c. 268A against a member of the judiciary on the basis that the Commission lacks both statutory and constitutional authority to do so.

II. Procedural History

On December 8, 1986, the State Ethics Commission initiated a preliminary inquiry into allegations that Respondent made beneficial guardian ad litem appointments to an attorney who had done significant financial favors for Respondent, thereby violating §23(b)(3) and other related sections of the conflict of interest law.[1] On April 27, 1987, the Commission found reasonable cause to believe that Respondent violated §23(b)(3) of G.L. c. 268A.[2]

On September 24, 1987, Respondent sought an order from the Supreme Judicial Court to restrain the Commission's Enforcement Division from issuing an Order to Show Cause on the §23(b)(3) violation. Respondent contended that the application of... §23(b)(3) to a member of the judiciary, coupled with the assertion of power by the Ethics Commission to enforce that statute against a member of the judiciary, violates the separation of powers clause of Article XXX of the Declaration of Rights of the Massachusetts Constitution.

Respondent's Complaint in the Nature of Mandamus and Cert. and Temporary Restraining Order, September 24, 1987. A single justice of the Court entered the restraining order which, after review by the full Court, was vacated one week later.

The Enforcement Division subsequently issued an Order to Show Cause **In the Matter of William Highgas, Jr.** on October 1, 1987. On November 19, 1987, Respondent requested the Supreme Judicial Court to stay the Commission proceedings against Respondent until the Court could rule on the merits of his jurisdictional claims. The Court indicated that the Commission should initially address the jurisdictional question on the basis of the allegations made in the Order to Show Cause. Accordingly, Respondent filed with the Commission his Motion to Dismiss or For Decision on the Pleadings on December 18, 1987. The Commission issues this Decision and Order on Respondent's Motion.

III. Findings of Fact

For purposes of deciding the jurisdictional question raised by Respondent's Motion, the Commission takes notice of the facts alleged in the Order to Show Cause.[3] The factual allegations which form the basis of Respondent's alleged §23(b)(3) violation are largely undisputed and are summarized herein:

1. Respondent is an Associate Justice of the Massachusetts Probate and Family Court. He lives in Lynnfield where his property was part of a subdivision developed by Wildewood Realty Trust (Wildewood). Attorney Anthony R. Rizzo (Rizzo), a friend of Respondent, resides in the same development.

2. Respondent learned of the Wildewood Development through Rizzo. In December 1982, when Wildewood wanted to sell the property which interested Respondent, Respondent did not have the money on hand to buy it. Rizzo offered to buy the property for Respondent and transfer it to him later.

3. On January 19, 1983, thirteen days after Respondent was sworn in as a probate judge, Respondent sold some stock to pay Rizzo for the property but did not pay any interest. Rizzo continued to hold title to the property for two years so that the Respondent could take advantage of Rizzo's agreement and relationship with Wildewood to ensure that he could build the house he wanted (for example, by getting an easement over another lot for a driveway).

4. During the approximately two year period in which title to the property was in Rizzo's name, he received and paid all but one of the bills for real estate taxes. Respondent reimbursed Rizzo sometime after the payments were made but did not pay Rizzo interest on the tax payments.

5. As a probate judge, Respondent makes master, administrator, counsel and guardian ad litem (GAL) appointments. From 1983 to 1986, Respondent made 242 appointments to about 117 different persons. Respondent appointed Rizzo to be a master once, an administrator once or twice and a GAL 28 times. These appointments were made from November 2, 1983 through August 1, 1986. Rizzo received fees totaling over $22,000 for the GAL appointments. These appointments were made at a time when Rizzo was doing significant favors for Respondent in connection with Respondent's purchase of property.

6. Respondent did not make any public disclosure in connection with his appointments of Rizzo as a guardian ad litem pursuant to G.L. c. 268A, §23(b)(3).

IV. Decision

For the reasons stated below, the Commission concludes that it has statutory jurisdiction to enforce the provisions of §23(b)(3) of G.L. c. 268A against Respondent, a member of the judiciary, and that the exercise of such jurisdiction on the facts alleged in the Order to Show Cause is constitutionally permissible.

A The Conflict of Interest Law is Applicable to the Conduct of a State Judge

The plain language of G.L. c. 268A and c. 268B endows the Commission with statutory jurisdiction to enforce all sections of the conflict law against judges. The conflict law defines "state employee" as "a person performing services for or holding an office, position, or membership in a state agency ...", G.L. c. 268A, §1(q), and defines "state agency" to include "the judiciary." G.L. c. 268A, §1(p). Thus, a state judge is a state employee within the meaning of the conflict of interest law and is subject to its provisions. Further, the Commission's authority to enforce all sections of G.L. c. 268A, including §23, is explicit. G.L. c. 268B, §3(i). Accordingly, the Commission may apply §23 and other sections of the conflict of interest law to Respondent.

Respondent contends that the legislature did not intend this result. However, a brief review of the law's development demonstrates that this is precisely what the legislature intended. In the conflict law's original enactment, St. 1962, c. 779, the definitions of "county employee" and "state employee" excluded members of the judiciary. St. 1962, c. 779, §1(d) and (q).[4] The conflict of interest law was amended by the enactment of St. 1969, c. 350, "An Act Making Members of the Judiciary Subject to the Law Governing the Conduct of Public Officials". This amendment eliminated the exclusion of members of the judiciary from the definitions of state and county employees. Consequently, members of the judiciary have been subject to the provisions of G.L. c. 268A since 1969. The conflict of interest law was subsequently amended giving the Commission explicit statutory power to enforce §23 after April 8, 1986, the date of enactment. St. 1986, c. 12.[5]

The course of legislative amendments therefore reveals that G.L. c. 268A applies to judges and that the Commission is empowered to enforce every section of G.L. c. 268A, including §23. Thus, the Commission has

statutory authority to exercise §23 jurisdiction over Respondent.[6]

B. The Commission's Exercise of Jurisdiction over Respondent is Constitutional

I. The Application of Section 23(b)(3) to Respondent Does Not Impermissibly Interfere with His Appointments of Guardians ad Litem

Article XXX of the Massachusetts Declaration of Rights[7] provides that there shall be three branches of government and that "[t]he legislative and executive departments are prohibited from exercising powers entrusted to the judicial department." **Opinion of the Justices to the Senate**, 375 Mass. 795, 813 (1978). The Supreme Judicial Court has recognized, however, that there is "the need for some flexibility in the allocation of functions among the three departments." **Id.** "[A]n absolute division" of the three branches of government is "neither possible nor always desirable." **Opinion of the Justices**, 365 Mass. 639, 641 (1974). What is prohibited in a case such as this is "...impermissible interference by the legislative or executive branches with the functions of the judicial branch." **Opinion of the Justices**, 375 Mass. 795, 813 (1978) (emphasis added).

Respondent contends that the Commission's exercise of jurisdiction over him on the basis of a possible violation of G.L. c. 268A, §23(b)(3) is an unlawful interference with the powers of the judiciary to exercise its discretion in the appointment of a GAL. These appointments, Respondent asserts, are governed by G.L. c. 201, §34 which authorizes the appointment of a "suitable person" in the judge's discretion. Respondent's counsel stated in oral argument that when a judge acts in his or her discretionary capacity as a judge, i.e., performing a core judicial function, the application of §23(b)(3) to any such discretionary act (such as the appointment of a GAL) is impermissible interference. We do not agree.

First, it is not clear that the appointment of a GAL is properly characterized as a core judicial function. The appointment of a GAL seems more of an administrative act than a substantive legal action. Core judicial functions would more logically include actions taken during trials and other court proceedings, such as the issuing of rulings on legal questions and the rendering of legal decisions. The appointment of a "suitable person" to be a GAL would appear to require primarily judgment of personnel, as opposed to the exercise of expert legal analysis. The GAL statute does not even require the "most" or "best" suited person for the job — it merely requires a "suitable person."

More important, we are not persuaded that, however one defines core judicial functions, they are entirely insulated from the application of the conflict of interest law. As Respondent's counsel conceded in oral argument, were a judge to accept a bribe in exchange for the appointment of a GAL, surely the Ethics Commission could enforce the bribery section of the conflict of interest law against the judge. See G.L. c. 268A, §2. This is so notwithstanding the characterization of the GAL appointment as a core judicial function. By the same token, the Commission could presumably enforce the anti-nepotism provisions of the law, §6, to a judge who appointed an immediate family member to be a GAL. We can discern no legitimate basis for characterizing the Commission's jurisdiction as appropriate when bribery or nepotism is involved, but inappropriate when an appearance of undue influence is at stake.

Furthermore, Respondent has failed to demonstrate that the effect of the application of §23(b)(3) would constitute an impermissible interference, regardless of whether the appointment is a "core" or administrative act. The application of §23 of the conflict law to Respondent's appointment of a GAL merely requires that, if a reasonable person knowing the relevant circumstances would believe that Respondent is making a GAL appointment to one who could unduly enjoy Respondent's favor, Respondent should dispel this appearance of favoritism by "disclos[ing] in writing to his appointing authority ... the facts which would otherwise lead to such a conclusion." G.L. c. 268A, §23(b)(3). This disclosure remedies any appearance of a conflict. Section 23 of the conflict law does not require Respondent to appoint a different person or even instruct Respondent concerning who is a suitable person. Section 23 merely requires a disclosure when an appointment is made which gives the appearance of favoritism. Such a requirement permits the appointing authority to intervene when appropriate, in this case to maintain appropriate ethical standards, and to that extent the requirements of §23 can properly be characterized as complementary to the Judicial Code of Conduct.[9]

Respondent's contention that the application of §23(b)(3) would create a chilling effect on his GAL appointments is belied by the sheer number of appointments he has made which did not raise §23 concerns. In a three year period, excluding the twenty-eight appointments to Rizzo, Respondent made approximately 242 appointments to 117 different persons, or about two appointments per lawyer every three years. Accordingly, the argument that §23(b)(3) will chill the judge's ability to exercise his discretion to appoint GAL's is unpersuasive. The limitation on a judge's discretion to appoint a GAL is minimal. A judge is merely required to dispel any appearance of bias and, in the same way that a judge is prohibited from appointing his immediate family members as GAL's and from appointing GAL's who offer bribes, a judge must make his appointments in accordance with §23(b)(3) of the law, concerning the appearance of favoritism. Therefore, we do not find that the application of §23 to Respondent impermissibly inter-

feres with his exercise of discretion or the performance of his judicial function.

2. The Application of Section 23(b)(3) to Respondent Does Not Impermissibly Interfere with the Judiciary's Power to Regulate its Members

The Commission on Judicial Conduct (CJC) was established in 1978 pursuant to St. 1978, c. 478 to assist the Court in the superintendence of judges. The CJC's enabling act provides that

> Notwithstanding any other provision of the law, the commission shall investigate, upon complaint of any person ... the action of any judge that may ... constitute a breach of the Canons of Judicial Ethics as promulgated by the Supreme Judicial Court

G.L. c. 211C, §2.[10]

Respondent argues that the proceedings of the State Ethics Commission constitute an unconstitutional interference with the "exclusive and paramount" power of the judiciary (as assisted by the CJC) to regulate its members. Respondent's Brief at 7. Respondent's argument overlooks the very language of the CJC's enabling act (...notwithstanding any other provision of the law...) which expressly contemplates that other laws and entities may govern the conduct of judges. Furthermore, contrary to Respondent's assertion, we do not find that the Supreme Judicial Court has ever declared that it alone may exclusively address the conduct of a member of the judiciary, nor do we agree that the authorities upon which the Respondent relies for this proposition so state. **See, e.g., In the Matter of Troy**, 364 Mass. 15, 21-22 (1973) (where the Court held that, in addition to the responsibility of the Governor and General Court for removing judges, the Court had the authority to review a judge's conduct); **O'Coins, Inc. v. Treasurer of the County of Worcester**, 362 Mass. 507, 509-510 (1972) (where a judge, in addition to the executive branch, not exclusive of it, may contractually bind the state for expenses reasonably necessary for the operation of his court); **In the Matter of Edward J. DeSaulnier**, 360 Mass. 757, 758-759 (1971) (where the court, as well as the executive branch, may take action "to protect the integrity and reputation of the judicial process").

The Commission finds the Supreme Judicial Court's decision in **Edgartown v. State Ethics Commission**, 391 Mass. 82 (1984), instructive in light of Respondent's constitutional claim that the judiciary has "exclusive" power over members of the judiciary and that application of the conflict law violates Article XXX of the Massachusetts Declaration of Rights. In **Edgartown**, the court found unpersuasive a municipal attorney's claim that the application of the conflict law to his conduct as an attorney violated Article XXX of the Massachusetts Declaration of Rights. The Court held that the conflict of interest law did not "contradict[], impair[] or otherwise affect[]" the judiciary's disciplinary rules and, thus, was not an impermissible interference with the functioning of the judiciary. **Id.** at 90. Where, as here, the conflict of interest standards of conduct do not contradict, impair or otherwise affect the canons of ethics, there is no unconstitutional exercise of jurisdiction.[11] As in the case of a municipal attorney, a court judge may also be "properly regulated by statute [the conflict law] as well as by rules promulgated by [the] Court." **Id.**[12]

The Supreme Judicial Court has already held that its authority to establish standards of conduct does not preempt other legislation "establishing complementary standards." **Opinion of the Justices**, 375 Mass. 795, 813 (1978) (addressing the application of the financial disclosure law, G.L. c. 268B, to all judicial department employees and officials, other than judges). Thus, it follows that the existence of the Code of Judicial Conduct does not and cannot preclude regulation of all judicial conduct arguably covered by that Code; if it did, the Commission would be unable to enforce that section of law prohibiting bribery, G.L. c. 268A, §2, or nepotism, G.L. c. 268A, §6, against a state judge. Respondent does not dispute that judges may be subject to prosecution for bribery and other crimes. In fact, the notion that the separation of powers principle would insulate a judge from an executive branch indictment and prosecution for criminal conduct already has been unequivocally rejected. **United States v. Issacs**, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). Judges are not exempt from the application of criminal laws, and, although it does not contain criminal penalties, §23(b)(3) is a general standard of conduct applicable to all public employees, including judges.

The conflict of interest standards of conduct are consistent with and complementary to the judicially-imposed standards in the Code of Judicial Conduct and are therefore permissible.[13] **Compare, Opinion of the Justices**, 375 Mass. 795, 813-814 (discussing the standards of the conflict of interest law and the Code of Professional Responsibility). As we previously noted, **supra** at p. 12, the requirement of §23(b)(3) is nothing more than a written disclosure to one's appointing authority when a judge proposes to act in a manner which would reasonably lead to an impression of undue influence. It is difficult to imagine how such a requirement could be viewed as anything but complementary, since it would enable a supervising judge to apply the judicial canons when appropriate. Indeed, we do not understand Respondent to claim that the conflict law deprives the Court of the power to impose stricter standards of conduct on judges or forces the Court to accept lower standards. **Id. at 795; Collins v. Gregory**, 324 Mass. 574, 576 (1949); **United States v. Miller**, 624 F.2d 1198 (3rd Cir. 1980). Yet, short

of such a claim, the Respondent has not demonstrated a constitutional defect in the application of §23 of c. 268A on the basis that it impermissibly "interferes with the internal functioning of the judicial branch" and offends the principle of separation of powers. **New Bedford Standard Times Publishing Co. v. Clerk of the Third District Court of Bristol**, 377 Mass. 404, 410-411 (1979).

Respondent's counsel also stated in oral argument that the Commission should adopt the "doctrine of self restraint." The Respondent's argument appears to be that the judiciary has primary authority to address a judge's conduct, and accordingly, the Commission should defer taking any action in this case. However, the Commission is not inclined to defer on a question of conflict of interest where, as here, the CJC proceeding is confidential and the Commission has no knowledge that the CJC is reviewing the same conduct as is the Commission. In fact, although Respondent's counsel has indicated that the CJC is investigating certain (unspecified) conduct of Respondent, the Commission has no way of knowing how or when the CJC will resolve its investigation.

The Commission's action to proceed with this case in no way diminishes or contradicts the judiciary's important function in regulating the conduct of its own members. When previously faced with a question of whether G.L. c. 268B was constitutionally permissible as applied to all judiciary employees and officials, other than judges, the Supreme Judicial Court stated that

> The critical inquiry here is whether the requirements which the proposed law would impose on attorneys and employees and officials of the judicial department would interfere with the functions of that branch of government. **See Opinion of the Justices**, 372 Mass. 883, 892 (1977). **Opinion of the Justices**, 365 Mass. 639, 641-642 (1974) There is nothing in the provisions to which the question refers which would constitute an impermissible interference by the legislative or executive branches with the functions of the judicial branch. Although we have the authority by rule to establish standards of conduct for judicial employees and officials, as we have done for attorneys and judges, [footnote omitted] this does not preclude legislation establishing complementary standards and providing administration and enforcement through a commission whose decisions would be subject to judicial review. [footnote omitted] **See Burnside v. Bristol County Bd. of Retirement**, 352 Mass. 481, 482-483 (1967). As to attorneys admitted to practice before the courts of the Commonwealth, we retain the ultimate authority to control their conduct in the practice of law. **Collins v. Godfrey**, 324 Mass. 574, 576 (1949). "Legislation," nevertheless, "may be enacted in aid of the judicial department, and doubtless in appropriate instances standards of conduct may be set up by statutes..." **Id.** If the judicial department promulgates a rule imposing standards higher than or in conflict with those imposed by the legislation, the judicial rule would prevail. [footnote omitted] **Id.**
>
> **Opinion of the Justices**, 375 Mass. 795, 813-14 (1978).

The same reasoning as articulated above supports the application of §23(b)(3) to judges. To decide otherwise would permit a stricter standard of governing law for all judicial departments employees and officials other than judges. In essence, such a standard would hold judges above the law.

Separation of powers does not prohibit the enactment of legislation which sets up standards of conduct for the judiciary provided that " ... such statutes [do] not preclude the judicial department from imposing higher standards or deprive that department of its ultimate power of control." **Collins v. Godfrey**, 324 Mass. 574, 576 (1949). We do not find that the standards of conduct provisions of the conflict law work such a deprivation on the court or divest it of its power of control. The power to determine the appropriateness of the Commission's actions and decisions always ultimately rests with the judiciary. G.L. c. 268B, §4(k); **Opinion of the Justices**, 375 Mass. at 813. Consequently, in this and all other cases, the judiciary has the opportunity to exercise its ultimate review.[14]

V. Conclusion

For all the reasons set forth above, the Commission finds that its exercise of jurisdiction is statutorily sound and constitutionally permissible as applied in this case. The Commission denies Respondent's Motion to Dismiss or For Judgment on the Pleadings.

DATE AUTHORIZED: March 14, 1988

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[1]/Section 23(b)(3) of G.L. c. 268A provides that:
No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know ... 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.

[2]/The Commission also found reasonable cause to believe that Respondent violated G.L. c. 268B, 7 for filing a false statement of financial interest which failed to disclose the financial relationship between Respondent and the attorney whom he appointed twenty eight times as a guardian ad litem. On September 24, 1987, Respondent admitted that he violated this section of law in a signed Disposition Agreement and, accordingly, paid a fine of $1500. Respondent did not contest the Commission's jurisdiction to enforce G.L. c. 268B, §7 against him.

[3]/The Order to Show Cause and Respondent's Answer are attached to this Decision as Exhibits A and B.

[4]/Members of the judiciary were subject to G.L. c. 268A, 2 and 3 (concerning bribery and the receipt of gratuities) by specific inclusion.

[5]/The 1986 amendment was passed by the General Court in response to Saccone v. State Ethics Commission, 395 Mass. 326 (1985) which held that the conflict law did not give the Commission jurisdiction over §23 violations.

[6]/Memorandum in Support of Respondent's Motion to Dismiss (Respondent's Brief) at §14 However, it appears that the legislature has given a number of agencies and commissions jurisdiction over the conduct of judges (e.g., the district attorney, Attorney General, the Governor and

General Court, State Ethics Commission, the judiciary and Commission on Judicial Conduct all, to varying degrees, have the power to regulate the conduct of judges). In addition, there is no indication in the legislative history that there was any intent to carve out an exception in the present law concerning the application of §23 to judges.

[7]/Article XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

[8]/G.L. c. 201, 34 provides that:

If, under the terms of a written instrument or otherwise, a minor, a mentally retarded person, an autistic person, or person under disability, or a person not ascertained or not in being, may be or may become interested in any property real or personal, or in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act herein as guardian ad litem or next friend of such minor, mentally retarded person, autistic person, or person under disability or not ascertained or not in being; and a judgment, order or decree in such proceedings, made after such appointment, should be conclusive upon all persons for whom such guardian ad litem or next friend was appointed.

[9]/While technically a judge's appointing authority would be the Governor, the Commission has already indicated to a member of the judiciary (a district court judge) that, for the purposes of the disclosure provisions of c. 268A, the Chief Justice of the Supreme Judicial Court would appear to be the appropriate appointing authority EC-COI-83-117; 84-28.

[10]/The Commission is aware that G.L. c. 211C was recently amended by St. 1987, c. 656 By virtue of section 4 of St. 1987, c. 656, the effective date of the amendments is April 1, 1988 and, therefore, they do not affect this case.

[11]/This conclusion is supported by a New Jersey Supreme Court decision, Knight v. Margate, 86 N.J. 374 (1981). There, the conflict of interest law imposed stricter restrictions on members of the judiciary than those contained in the state's Code of Judicial Conduct. The Court upheld the legislatively imposed standards of conduct because they were not incompatible with the Court rules. In Pennsylvania, on the other hand, where the state constitution specifically preempts certain legislative activity (e.g., the regulation of attorneys), courts have concluded differently See, Wajert v. State Ethics Commission, 420 A. 2d 439 (Pa. 1980); see also, Kramer v. State Ethics Commission, 469 A. 2d 593, 595 (Pa. 1983) (where the Supreme Court of Pennsylvania held that it did have the "exclusive" power to supervise the conduct of attorneys and judges based on the state's constitution). Massachusetts' Constitution does not preempt the activity at issue here.

[12]/We do not accept Respondent's effort to distinguish the Edgartown case on the basis that Respondent's actions were solely as a judge and not as a public employee (whereas, Respondent contends, the attorney in Edgartown acted in an identifiably municipal capacity). Respondent argues that he "was not representing the interests of the state when he made the appointments in question, but was carrying out his duties as a member of the judiciary." Respondent's Brief at 10. We find the "distinction" neither accurate nor persuasive Respondent's public employee status and identity as a judge are inseparable; Respondent is subject to the laws governing both and may not insulate himself from one set by claiming to be governed only by the other. If this distinction had validity, Respondent's "public employee" self could eschew the judicial canons by claiming to be responsible only to the conflict law.

[13]/Canon 2 of the Code of Judicial Conduct, adopted as Rule 3:09 of the Supreme Judicial Court, provides that(a) A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (b) A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

[14]/Commissioner Jarvis, while concurring in the majority's decision that the Commission possesses the authority to consider allegations against Respondent, concludes that authority possessed must be distinguished from authority exercised. On the grounds of both administrative efficiency and the principle of restraint, Commissioner Jarvis concludes that the Commission should defer action in light of the CJC's proceeding.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 355

IN THE MATTER
OF
REV. BENJAMIN LOCKHART

DISPOSITION AGREEMENT

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

On June 30, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Rev. Lockhart, Agawam Town Councillor. The Commission concluded its inquiry and, on September 16, 1987, found reasonable cause to believe that Rev. Lockhart violated G.L. c. 268A, §19.

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

1. Rev. Lockhart has been an Agawam Town Councillor since October, 1985. This is a part-time, elected position, for which he receives $2,000 annually. As such he is a municipal employee subject to the conflict of interest law, G.L. c. 268A.

2. Rev. Lockhart's son, Peter Lockhart, is an Agawam firefighter and has been so since 1969. In July, 1986, Rev. Lockhart's son held the rank of private.

3. On July 7, 1986, the Agawam Town Council, at a regular council meeting, considered an ordinance authorizing salary increases for the Agawam Fire Department. The ordinance specifically listed privates, lieutenants, mechanics, inspectors and drill masters as the recipients of the salary increases. The salary increase listed for privates ranged between $1,072 and $1,238, depending upon the step level of the particular individual.

4. The salary increases called for in the ordinance being considered by the Council had been negotiated between town counsel and the firefighter's union during the previous year. Town councillors did not participate in any matters concerning the negotiations.

5. The ordinance was passed by a 13 to zero vote, with Rev. Lockhart voting favorably on the ordinance. Town counsel was present at the council meeting at the time of the vote, but there was no discussion regarding G.L. c. 268A.

6. Except as otherwise permitted in that 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 his immediate family has a financial interest.[1]

7. The salary increase proposed for the particular categories of firefighters in the ordinance is a particular matter as that term is defined in G.L. c. 268A, §1(k).

8. Rev. Lockhart's son's interest in the proposed raise listed in the ordinance gave him a financial interest in the passage of the ordinance.

9. By voting on passage of the pay raise ordinance, Rev. Lockhart was personally and substantially involved in its passage,[2] knowing his son had a financial interest in the ordinance. Therefore, Rev. Lockhart thereby violated §19.

10. 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 Rev. Lockhart:

1. that he pay to the Commission the amount of two hundred fifty dollars ($250.00) as a civil penalty for his violation of §19; and
2. 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 or may be a party.

DATE: May 17, 1988

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[1]/None of the exceptions in 19 is relevant here.

[2]/The plain language of §19 does not require that the participation be influential or determinative of a result. A §19 violation can arise despite the fact that the vote was unanimous **In the Matter of James Geary**, Commission Docket No. 323, October 5, 1987; See, also, **In the Matter of John Rogers, Jr.**, 1985 SEC 227. The fact that it was a unanimous vote may be considered in mitigation when determining a fine, however. **Geary, supra.**

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss — COMMISSION ADJUDICATORY DOCKET NO. 319

IN THE MATTER
OF
PAUL H. SULLIVAN

Appearances: Robert A. Levite, Esq.
Counsel for Petitioner

John H. Cuhna, Jr., Esq.
Kevin C. Sullivan, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Jarvis

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on December 8, 1986 by filing an Order to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Order alleged that Respondent Paul H. Sullivan had violated G.L. c. 268A, §17(c) and §19. Specifically, Respondent allegedly acted as agent for either FIC Carter and Sons or FIC Associates by personally appearing before the Tewksbury Planning Board (Board) on September 24 and 26, 1984, and by discussing particular matters in which the Town of Tewksbury (Town) was a party or had a direct and substantial interest. Further, the Order alleged that Respondent participated during the Board of Selectmen meeting on September 25, 1984 in discussions concerning the water and sewer availability for the Carter Green Condominiums (Carter Green) in which Respondent's father, Kevin Sullivan, had a financial interest.

The parties stipulated to a number of facts and documents which are included in the record. In addition to the stipulation of facts, an adjudicatory hearing was held on September 25, 1987. Respondent was the only witness to testify at the adjudicatory hearing.

Respondent has raised two procedural defenses. The first is that Petitioner's action is barred by a two year statute of limitations contained in G.L. c. 260, §5. The other procedural defense is that Commission's failure to extend the preliminary inquiry within ninety days of the initiation of the preliminary inquiry entitles Respondent to an Order of Dismissal.[1]

The parties filed briefs and presented oral arguments before the Commission on April 13, 1988. In rendering the Decision and Order, the Commission has considered the evidence and arguments of the parties.

II. Findings of Fact

1. Respondent, at all relevant times, served as a member of the Tewksbury Board of Selectmen. In 1983 and 1984, he was Chairman of the Board of Selectmen.

2. Respondent, at all relevant times, worked for his father's real estate agency. Respondent's father is Kevin Sullivan and the name of the real estate agency is Sullivan Real Estate.

3. The Carter Green condominium development was being developed by FIC Associates, a partnership.[2] The development required a special permit by the Planning Board. In order for the Planning Board to approve FIC Associates' application for a special permit, the Board required final assurance from the Department of Public Works (DPW) that Carter Green had adequate water and sewer availability.

4. In June 1984 Kevin Sullivan, at the request of the Board, sought a letter from the DPW certifying that there were adequate water and sewer hookups available for

Carter Green.

5. The DPW superintendent issues certification letters certifying that there are adequate water and sewer hookups available at development sites, which letters are then subject to approval by the Selectmen who also serve as Commissioners of the DPW. On August 21, 1984, the DPW issued a letter certifying that adequate water and sewer hookups were available for Carter Green. This letter is a standard letter given to developers during the approval stage of a project.

6. On September 24, 1984 Respondent and John B. Hodges were present at a meeting of the Planning Board. Mr. Hodges is an attorney in private practice who, on previous occasions, has represented Carter Green. Mr. Hodges did not request Respondent to accompanying him to the Planning Board meeting for any specific purpose except that they were going out afterwards socially. Respondent was not given explicit authority to speak on behalf of FIC Associates at this meeting.

7. At the September 24, 1984 meeting, the substance of the DPW letter referred to in finding of fact §4 and Carter Green were subjects of the discussion. Toward the end of the meeting Respondent asked the Planning Board whether "we" could expect to be on the agenda for the meeting two days later on Wednesday. Respondent stated "we'll expect that Wednesday we'll be here for a meeting". Respondent further stated that "we are just looking and you people are satisfied that we have complied and you people have stated that you are". The "we have complied" refers to the requirements set forth by the Planning Board regarding water and sewer requirements for Carter Green. Respondent further asked the Planning Board whether they had everything they needed from FIC Associates or from Jack Hodges. The "we" that Respondent was referring to was the development entity, Carter Green, or FIC Associates.

8. Jack Hodges did not address the Board relative to Carter Green or respond to questions at the September 24, 1984 meeting.

9. Respondent did not attend the September 24, 1984 Planning Board meeting as a member of the Board of Selectmen. The purpose of his comments was to ascertain whether the Planning Board would give a decision on that evening as to whether the requirements in connection with the application for a special permit had been met.[3]

10. Respondent spoke at the September 24, 1984 meeting on behalf of FIC Associates.

11. The discussion between Respondent and the Planning Board at the September 24, 1984 meeting was in connection with requirements set forth by the Planning Board regarding water and sewer availability for Carter Green. These requirements in turn were in connection with an application for special permit by FIC Associates.

12. The discussion of Carter Green and water and sewer requirements were continued to a scheduled meeting of September 26, 1984.

13. On September 25, 1984 Respondent attended a regularly scheduled Board of Selectmen meeting. Respondent was sitting as a Selectman that evening. Respondent requested that the Board forward a letter to the Planning Board relative to FIC Associates.

14. At the September 25, 1984 meeting the Board of Selectman unanimously voted, with Respondent abstaining, to forward correspondence to the Planning Board confirming that FIC Associates, developers of Carter Green, had access to and would be allowed to tie in to the municipal Main Street sewer system, and that upon completion and acceptance of the plans by the DPW Commissioners, work would commence.[4]

15. On the same evening, the Board of Selectmen went into executive session.[5] After the executive session had ended, Respondent was asked by another Selectman whether he had the DPW letter certifying the availability of water and sewer with him. Respondent stated that he did not have the letter with him, having no reason to have it, but would bring it in the following day. The letter was correspondence dated August 21, 1984, signed by Philip Pattison, the Superintendent of Public Works, relative to the availability of water and sewer to Carter Green. Respondent also requested that the Board agree with the correspondence contingent upon production of the letter to the Board the following day. The Board informally agreed to this. No vote was recorded.

16. Respondent's suggestion that the Board of Selectmen agree with the correspondence contingent upon production of the letter to the Board on the following day was included in the minutes at the suggestion of Respondent. He was concerned about possible violations of the Open Meeting Law. He intended to avoid the Board of Selectmen voting on a decision at a time when they were not permitted to conduct public business under the Open Meeting Law.

17. Respondent subsequently delivered the letter to the Board of Selectmen, pursuant to §15.

18. On September 26, 1984, Respondent attended a scheduled Planning Board meeting. At that meeting the Planning Board continued a discussion from September 24, 1984, regarding Carter Green and the availability of adequate water and sewage.

19. Present at the September 26 meeting was Kevin Sullivan, Respondent's father. Kevin Sullivan had a financial interest in FIC Associates, and had represented FIC Associates in the past.

20. Respondent accompanied his father to the meeting after encountering him outside Respondent's home which was adjacent to his father's office. At the meeting Respondent submitted and the Planning Board reviewed two letters from the Board of Selectmen dated September 26, 1984 regarding water and sewer availability for Carter Green. The substance of one letter was that

the Board of Selectmen had voted at its meeting of September 25, 1984 to concur with the correspondence dated September 21, 1984 signed by Philip Pattison, Superintendent of Public Works, relative to the availability of water. The second letter stated that the Board of Selectmen, at its meeting of September 25, 1984, had voted to concur that the developers of Carter Green had access and would be allowed to tie into the municipal main street sewer system.

During the meeting, Respondent submitted a sketch showing the sewer route from Carter Green and pointed on the sketch to the proposed route. Respondent also stated that the sewer route had been approved by the Board of Selectmen. At the same meeting Respondent also stated that the building inspector, in order to issue building permits, would like a letter from the Planning Board, saying that "we have complied with the conditions" listed in the building inspector's letter to the Planning Board.

21. Respondent spoke at the Planning Board meeting of September 26, 1984 on behalf of FIC Associates.

22. No vote was taken at the September 26, 1984 meeting. The matter was continued to a later meeting.[6]

23. Respondent had knowledge that Kevin Sullivan had a financial interest in the decision by the Tewksbury Planning Board regarding adequate availability of water and sewer at Carter Green.

III. Decision

A. Statute of Limitations

The Commission has promulgated a three-year statute of limitations pursuant to its regulatory authority. G.L. c. 268B, §3(a); 930 CMR 1.02(10).[7]

There is no dispute that the Order to Show Cause was issued within three years after the violations alleged therein, as required by the regulation. Nor does Respondent allege as a defense that the three year statute of limitations promulgated in 930 CMR 1.02(10) has run. Therefore, there was no need for Petitioner to show that a disinterested person learned of the violation no more than three years before the Order was issued by affidavit or otherwise. See, 930 CMR 1.02(10)(c).

Respondent argues that 930 CMR 1.02(10) is unlawful because it is inconsistent with G.L. c. 260, §5, which establishes a two year statute of limitations in actions for penalties under penal statutes if the penalty "is given ... to the Commonwealth." The Commission concludes that this statute does not apply because an enforcement proceeding pursuant to G.L. c. 268B, §4 is not reasonably construed as enforcement of a penal statute.

The essence of a civil enforcement action under G.L.c. 268B is a breach of official duty or fiduciary obligation of a public employee. In upholding the use of a civil standard of proof, and rejecting the application of a criminal standard in Commission proceedings, the Supreme Judicial Court has held, "The sanctions which the Commission may impose do not implicate particularly important individual interests or rights." **Craven v. State Ethics Commission**, 390 Mass. 191, 200 (1984). The controlling purpose of an adjudicatory proceeding under G.L.c. 268B, §4 is not punishment. The Commission's mandate is remedial in nature, to enforce civilly the provisions of G.L. c. 268A, to provide advice and education, (see, G.L.c. 268B, §3(g)), and to act as a respository of disclosures and other information. See, c. 268A, §6, §7(d). Although G.L. c. 268A provides for a criminal penalty enforceable by criminal law enforcement agencies, as well as civil relief, the existence of an alternate criminal penalty does not defeat the broad civil remedial purposes given to the Commission in G.L. c. 268B. The fact that the Commission may potentially impose a civil fine after an adjudicatory hearing does not render the proceeding penal. The Commission's regulation, establishing a three year statute of limitations, reasonably rejects the application of G.L. c. 260, §5 to a civil administrative agency which has no criminal enforcement authority.

The reasonableness of the regulation is further supported by examination of precedents. The Supreme Judicial Court held in the case of **Beinecke v. Nantucket**, 379 Mass. 345 (1979) that the essence of an action under G.L. c. 268A, §21 is a breach of official duty which sounds in tort, and therefore the three year statute of limitations applies.[8]

A regulation by a duly constituted administrative agency has the full force and effect of law and is entitled to "all rational presumption in favor of its validity ..." **Levy v. Board of Registration**, 373 Mass. 519, 525 (1979) cited in **Borden v. Commissioner of Public Health**, 388 Mass. 707 (1984). Given the broad civil remedial nature of an enforcement proceeding under G.L.c. 268B, §4 and relevant prior case law, there is no inconsistency between 930 CMR 1.02(10) and G.L.c. 260, §5 so as to render the regulation void.

B. The Seven Day Delay

There is no merit to Respondent's contention that the delay in the vote to extend the preliminary inquiry, which took place 97 days after the initial vote to initiate the preliminary inquiry, requires dismissal of the case. Dismissal is not required as a matter of law because the 90 day rule derives from internal enforcement policy, and not by statute, regulation or other authority having the force of law; therefore, the policy is not jurisdictional.

It is well established that "a statute imperative in phrase ... where it relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done ... is only a regulation for the orderly and convenient conduct of public business and

not a condition precedent to the validity of the act done." **Chencey v. Coughlin**, 201 Mass. 204, 211 (1909). Accord, **Cullen v. Building Inspector of North Attleborough**, 353 Mass. 671, 679-680 (1968) (decision of appeal from issuance of a building permit filed five days late); **Monico's Case**, 350 Mass. 183, 185-186 (1966) (decision of Industrial Accident Board filed over 10 months late); **Amherst-Pelham Regional School Committee v. Department of Education**, 376 Mass. 480, 496-497 (1978) (failure of Department of Education to issue timely decision in contravention of own internal procedure).

Even assuming that Respondent has suffered expense, humiliation, anxiety and public suspicion as a result of Petitioner's proceedings,[9] there has been no showing that Respondent suffered prejudice as a result of the seven-day delay in initiating the preliminary inquiry. This case is thus indistinguishable from the case of **In the Matter of Thomas W. Wharton**, 1984 Ethics Commission 182, where we held

> The 90-day rule is not based on any statute, but reflects the Commission's desire that inquiries be conducted as expeditiously as possible. Its principle purpose is to make the Commission aware of the length of inquiries and to require its acquiescence for them to go beyond 90 days. That purpose is satisfied whether the extension is granted before or after the initial 90-day period ends. With respect to the time period after the finding of reasonable cause, it should be noted that neither the provisions of c. 268B dealing with investigations (see §4) nor the Commission's procedures impose any requirement as to when the Order to Show Cause must issue. Here again, there is no showing that Mr. Wharton was prejudiced or that the Petitioner gained any undue advantage by the delay ... Accordingly, this Motion to Dismiss is denied.

Accordingly, the seven-day delay in extending the preliminary inquiry does not require dismissal.

C. Substantive Violations

1. Section 17(c)

The portion of §17(c) applicable to this case states that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent for anyone in connection with any particular matter in which the same town is a party or has a direct and substantial interest. Respondent has stipulated to all the elements of a §17(c) violation, except the element of acting as agent.

The basic principle set forth by §17(c) is that "public officials should not in general be permitted to step out of their official rules to assist private entities or persons in their dealings with government." Perkins, **The New Federal Conflict Law**, 76 Harv. L. Rev. 113, 1120 (1963). Regardless of whether any evil results from the conduct, "confidence in government is undermined because the public cannot be sure that no [evils] will result." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299, 322 (1965). Buss suggests that "merely speaking or writing on behalf of a non-state party would be acting as agent." Buss, **supra**, at 326. Consistent with the above remedial purpose, the Commission has concluded that the distinguishing factor of acting as agent within the meaning of the conflict law is "acting on behalf of" some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications. **EC-COI-84-116**.

Upon reviewing the facts, the Commission concludes Respondent was acting on behalf of FIC Associates. Repondent's consistent use of the term "we" in his discussions with the Board demonstrates that he was not speaking on his own behalf at the September 24th or 26th meeting of the Board. He had no interest in FIC Associates nor had he received any benefits from that entity. Logically, if Respondent was not speaking for himself, he must have been speaking for FIC Associates. There is no evidence that the Respondent was acting on behalf of his own interest, as opposed to the interest of FIC Associates. In fact, Respondent denied that he had any present or future interest in Carter Green on the applicable dates. The Planning Board required some evidence that there was adequate water and sewer availability at the projects. That requirement was placed on FIC Associates and not the Respondent.

Respondent's primary defense, as advanced in oral argument, was that Respondent was not given explicit authority by his father to speak on behalf of FIC Associates, nor was Respondent subject to the "direction and control" of FIC Associates at the September 24th and 26th meetings. The defense has no merit. If the conduct of the party is such that an inference is warranted that one is acting on behalf of and with knowledge and consent of another, an agency exists as a matter of law, irrespective of the party's [scope] of actual authority. **Choates v. Board of Assessors of Boston**, 304 Mass. 298, 300 (1939).[10] In this case, Respondent spoke on behalf of FIC Associates and thus it would reasonably appear to members of the Planning Board that he had authority to further the interests of his father or his father's partnership. This is especially true given that Respondent worked for his father's real estate business.

Respondent argues that the presence of a recognized spokesperson, Jack Hodges, negates agency. The existence of a recognized spokesperson might negate a finding that someone other than the spokesperson is an agent. In the **Robert Sullivan** Decision and Order, the Commission stated "the presence of a recognized spokesperson for the corporation, other than Respondent, such as an attorney might dispel the appearance of an agency" (at footnote 7, p.20). This assumes, of course, that the

spokesperson participates in the discussion in some way. In this case Jack Hodges remained silent. Furthermore, just as a company can have more than one employee, or hire more than one independent contractor, it can have more than one agent. 2A **C.J.S. Agency**, §31 (1985), at p. 593. The mere presence of a recognized spokesperson, without more, does not prevent a finding that someone else is also acting as agent.

In conclusion, the preponderance of evidence is that Respondent was speaking on behalf of FIC Associates at the September 24th and 26th meetings. Speaking on behalf of another entity constitutes acting as agent within the meaning of §17.[11]

2. Section 19

Section 19 of the conflict law prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge his family member has a financial interest. Participate is defined in §1(j) as to participate in a particular matter "personally and substantially." Although there is no doubt that Respondent participated in the discussion to forward the certification letter to the Planning Board, the Commission concludes his participation was not substantial.

Not all participation by a municipal employee will be deemed personal and substantial. **In the Matter of John Hickey**, 1983 SEC 158, 159 the Commission stated:

> [N]ot every action by a public official satisfies the substantiality requirement. In those instances where a government employee is involved in ministerial activity not directly affecting a particular matter, the conduct may not constitute substantial participation as defined in the statute.

There are certain terms by which the Commission has described non-substantial participation. These terms are ministerial, pro forma, preliminary, after the fact, or not part of or integral to a decision-making process. **See, e.g. EC-COI-82-46** (the filing of an appearance by an attorney is not personal and substantial involvement); **EC-COI-82-138** (submission of a non-binding list of qualified contractors, absent any order or indication of preference, to someone other than the ultimate decision-maker does not constitute participation in the contract award); **EC-COI-82-82** (providing general information to decision-makers may not constitute participation in the decision; "your role was more in the nature of providing information than decision-making, and somewhat peripheral to the decision-making process"); **EC-COI-82-62** ("[e]diting alone [of a procedural order] does not constitute participation"); and **EC-COI-82-58** (explanation of agency regulations in connection with a licensing determination does not constitute participation in that determination).

In the Matter of John Hickey, 1983 SEC 158, the Commission found the Respondent not to have participated "personally and substantially." The Commission stated that as a selectman, Hickey's announcement of a board of selectmen vote "was ministerial and after the fact." **Id.** The Commission went on to state that Hickey's presiding over the board of selectmen's meeting was also not substantial. The Commission characterized his presiding as "pro forma." **Id.** The Commission distinguished **Graham v. McGrail, supra**, on the grounds that the presiding in **McGrail** was more significant:

> At a subsequent meeting where the opponents to the budget were absent, the abstaining member and the other member alternated disqualifying themselves from the actual vote but presiding [sic] over the process until a budget reflecting salary increases to their family members was passed. Presiding over the vote was the mechanism used to ensure completion of the budget process at a time when those who contested the budget were absent. **Id.** n. 3.

A majority vote of a qualified quorum was necessary to approve the items. Apparently a quorum required three members present, and Hickey's presence was not necessary to the result.

The **Hickey** case can be contrasted with a recent case, **In the Matter of James Geary**, 1987 SEC October 6, 1987, Adjudicatory Docket No. 323, at 5. In **Geary**, the subject voted for his brother's appointment as police chief and signed his contract. His participation was not determinative because his brother had the unanimous support of the other members of the board of selectmen. The Commission concluded that:

> 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 Massachusetts Conflict of Interest Statute, An Analysis**, 45 B.U.L. Rev. 299, 335 (1965).

Applying the above precedent to the facts, the Commission concludes that Respondent's participation was not substantial. Respondent requested the Board of Selectmen to forward a letter to the Planning Board relative to FIC Associates. Forwarding the letter is best described as ministerial — the physical act of forwarding. The letter would have been forwarded in any event. At best the request was superfluous. These facts do not, by themselves, rise to the level by "substantial participation." The participation was ministerial and after the fact and, therefore, not substantial.

With respect to the events that occurred after the Board came out of executive session, Respondent was drawn into the conversation by other Board members who carried on public business after the termination of an executive session meeting. The other Board members had previously voted to forward the DPW letter to the Planning Board. Therefore, as a practical matter, it was

necessary for the Board to obtain possession of that letter and to accomplish this the Board members requested Respondent to play a role of messenger. Therefore, Respondent's statement that he did not have the letter with him, but would bring it in the next day, after the executive session had terminated, cannot be deemed to be participation in an official capacity.

Respondent's later comment, however, requesting that the Board of Selectmen agree with the DPW Superintendent's letter contingent upon his producing it the next day is more problematic.[12] Although no formal vote was taken, the Board decided that it would agree with the letter contingent upon seeing it. Since the Board of Selectmen had already voted to forward its consent to the Planning Board, it is unclear why the Respondent asked the Board to agree to the correspondence contingent upon seeing the letter. It appears Respondent was undertaking to assure that the Board of Selectmen would forward the correspondence to the Planning Board. Not only was the discussion and decision informal, it was also superfluous. As noted in Geary, **infra**, the Commission has previously drawn a line between casual or incidental encounters and involvement in the decision-making role. Although a close question, Respondent's participation here appears to be casual discussion.

Petitioner argues that the communication was substantial by inferring that there was some question whether the correspondence was actually going to be sent to the Planning Board pursuant to the earlier discussion. Petitioner's inference however is not supported by any evidence in the record and in any event is not persuasive. Therefore, the Commission finds there is insufficient evidence in the record to find that the communication was substantial within the meaning of §1 (j) of the conflict law.

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. G.L. c. 268B, §4(j) (3). Although the potential maximum fine in this case is $2,000, the Commission believes that the imposition of the maximum fine is not warranted. Respondent made an effort to comply with G.L. c. 268A by not participating as a member of the Board of Selectmen in particular matters in which his father had a financial interest. See G.L. c. 268A, §19. There is insufficient evidence for the Commission to assume that Respondent's participation had any determinative effect on the outcome of decisions made by the Board of Selectmen acting as the Department of Public Works, whereby they determined there was adequate water and sewerage for Carter Green. Finally, there was no effort by Respondent to conceal his participation; Respondent on one occasion made his participation a matter of public record in an effort to comply with the Open Meeting Law.

The violation in this case, on the other hand, cannot be viewed as technical. Forwarding of the letter was a necessary precondition to the granting of a subdivision. Expediting the forwarding of that letter was, therefore, of advantage to Respondent's father even if there was no controversy over its contents.[13] As Chairman of the Board of Selectmen, Respondent was in a position to exert consciously or unconsciously undue influence upon the actions of the Planning Board. The public could reasonably ask how members of the Planning Board could make an objective unbiased decision when a request for action was made by the chairman of the Town's governing body.[14] Moreover, there is no evidence Respondent sought advice as to the propriety of his actions prior to engaging in what an ordinary person would understand to be questionable conduct.

In conclusion, Respondent sought to intervene himself on behalf of a private development effort in which his immediate family had a financial interest. Seeking to expedite a determination which is critical to a private development is not inconsequential. A fine reflecting this fact is appropriate.

V. Order

On the basis of the foregoing pursuant to its authority under G.L. c. 268B, §4, the Commission orders Mr. Sullivan to pay five hundred dollars ($500.00) to the Commission as a civil penalty for violation of G.L. c. 268A, §17(c).

DATE AUTHORIZED: May 19, 1988

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[1]/Specifically, on June 10, 1986, the Commission voted to initiate a preliminary inquiry into whether Respondent violated 17. On September 15, 1986, the Commission voted to extend the preliminary inquiry. Therefore, the vote to extend took place 97 days after the initial vote to initiate the preliminary inquiry.

[2]/Kevin C. Sullivan told the Planning Board at the September 26, 1984 meeting that FIC Associates, a partnership, was developing Carter Green. The deed assigning ownership to FIC Associates, a partnership, from FIC Carter and Sons was not recorded until September 25, 1985. Both FIC Carter and Sons, which was the property holder in September, 1984 and FIC Associates, a partnership, were composed of the same three individuals: Kevin Sullivan, D. Harold Sullivan, and Costa Psoinos.

The Order to Show Cause refers to the entity other than the Town of Tewksbury as FIC Carter and Sons, rather than FIC Associates. The Order constituted sufficient notice to Respondent of the substance of the allegations. Respondent makes no claim of prejudice. Petitioner moved in his brief to amend the Order to reflect the correct name of the development entity. The motion is allowed.

[3]/Robert P. Sullivan, the brother of Kevin Sullivan and Respondent in the case of In the Matter of Robert P. Sullivan, Docket No. 320 (October, 1987) was a member of the Planning Board at the time, but had stepped down from the Planning Board for the discussion.

[4]/Respondent had previously excused himself from participation and discussion of the availability of water and sewer hookups at past Board of Selectmen meetings.

[5]/The Board did not state that it would be returning to any public session. This is a requirement of the Open Meeting Law if the Board were to return to public session. G.L. c. 39, §24B.

[6]/There is no record of what transpired after the September 26, 1984 meeting.

[7]/Statute of Limitations: (a) An Order to Show Cause must be issued within three (3) years after a disinterested person learned of the violation (b) A respondent must set forth affirmatively a statute of limitations defense

(c) When a statute of limitations defense has been asserted, the petitioner will have the burden of showing that a disinterested person learned of the violation no more than three (3) years before the Order was issued. That burden will be satisfied by: 1. an affidavit from the investigator currently responsible for the case stating that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the Order was issued, and 2. with respect to any violation of c. 268A other than 23, affidavits from the Department of the Attorney General and the appropriate office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the Order was issued.

[8]/Even in the absence of a duly promulgated regulation, the use of a three year statute of limitations codified in G.L.c. 260, 2A would be appropriate to this case. Prior to the promulgation of 930 CMR 1.02(10) the Commission decided in its case law on a three year statute of limitations. The essence of allegations of violations of 17 or 19 is that Respondent violated his duty to the public, which sounds in tort See In the Matter of John P. Saccone, 1982 Ethics Commission 87; Saccone v. State Ethics Commission, 395 Mass. 326 (1985)(reversed on other grounds).

[9]/This claim was made by Respondent's attorney, although there is nothing in the record to support it.

[10]/Respondent's argument that the doctrine of strict construction requires proof of actual authority and actual direction and control by a principal is not persuasive. The doctrine of strict construction does not apply to a civil administrative agency interpreting a remedial statute See, Robert J. Quinn v. State Ethics Commission, 401 Mass. 210, footnote 10 (1987).

[11]/The Commission has recently summarized in its past precedent regarding the phrase "acting as agent" in Commission Advisory #13, dated January 6, 1988. This advisory states:

> An agent is one who acts on behalf of another. A municipal employee acts as agent when he or she appears before or otherwise communicates with a municipal board or agency on behalf of another, submits an application, petition or other documentation for another, or merely attends a municipal meeting and answers questions for another.

[12]/The letter was a correspondence signed by Philip Pattison, dated August 21, 1984, relative to the availability of water and sewer for Carter Green.

[13]/Respondent's counsel, Kevin Sullivan, represented at oral argument that there was no controversy concerning the adequacy of water and sewer for the development. There is nothing in the record which supports or negates this representation.

[14]/Although planning board members are elected, they would not be immune from potential political pressure from the board of selectmen (e.g., budget determinations).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 335

IN THE MATTER
OF
JOSEPH D. CELLUCCI

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Paul G. Holian, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on September 17, 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 Joseph D. Cellucci (Respondent) had violated G.L. c. 268A, §19 by:

1. on June 11, 1986, ordering Cambridge Inspectional Services Department (CISD) inspectors to terminate the inspection of a dwelling at 150 Holworthy Street, Cambridge, a matter in which he and/or members of his immediate family had a financial interest;
2. between June 11 and July 9, 1986, ordering a CISD inspector to reinspect 150 Holworthy Street despite instructions to the contrary from the state Department of Public Health (DPH) Director of Community Sanitation;
3. on July 21, 1986, sending a letter to the Director of Community Sanitation for DPH defending CISD's actions concerning 150 Holworthy Street and questioning the DPH's assertion of jurisdiction over the inspection of 150 Holworthy Street;
4. on September 9, 1986, representing the City of Cambridge at a DPH hearing concerning 150 Holworthy Street and raising the issue of whether a CISD inspector's request for court orders as to uncorrected violations at 150 Holworthy Street would interfere with DPH's assertion of jurisdiction over 150 Holworthy Street; and
5. on September 9, 1986, making a notation in the CISD official file regarding 150 Holworthy Street, which read:

> Pursuant to a directive at a hearing on this date, only the State will be responsible for the Enforcement of the State Sanitary Code regarding this property until such time that jurisdictional enforcement is resolved.

The Respondent filed his Answer to that Order on October 28, 1987, denying that he ordered CISD inspectors, on June 11, 1986, to terminate the inspection of 150 Holworthy Street, denying that he, between June 11 and July 9, 1986, ordered a CISD inspector to reinspect 150 Holworthy Street. Cellucci denied all other material allegations contained in the Order.

Prior to the hearings, Respondent filed a Motion to Dismiss contending that Petitioner failed to comply with the Commission's Rules of Practice and Procedure by disclosing confidential information. The Motion was taken under advisement for the full Commission by Commissioner Andrea W. Gargiulo, who was designated as the Presiding Officer.[1]

Adjudicatory hearings were held on November 30, 1987, December 7, 1987, January 11, 1988 and February 1, 1988. The parties filed posthearing briefs and presented oral arguments before the Commission on April 13, 1989. In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties.

II. Findings of Fact

1. At all times relevant to these proceedings, Respondent was the CISD Commissioner and, as such, an employee of the City of Cambridge.
2. As Commissioner, Respondent is responsible for overseeing a staff of sanitation inspectors whose responsibility is to respond to complaints alleging unsanitary conditions in residential buildings in Cambridge.
3. The CISD inspectors enforce the state Sanitary Code.
4. As CISD Commissioner, Respondent is responsible for the enforcement of the Code in the City of Cambridge.
5. At all times relevant to these proceedings, a two-family dwelling at 150 Holworthy Street, Cambridge, was owned by members of Respondent's immediate family. Respondent was a record owner of an undivided one-sixth interest in 150 Holworthy Street from October 20, 1983 until June 20, 1986, when he sold and transferred that interest to members of his immediate family.
6. As of June, 1986, the downstairs apartment at 150 Holworthy Street was occupied by tenants Michael and Marie Stanley. As of June, 1986, the Stanleys had been served with an eviction notice for non-payment of rent. Marie Stanley's father, Joseph Talarico, was a former inspector for CISD.
7. On June 11, 1986, Marie Stanley called the CISD to complain about conditions at 150 Holworthy Street. She originally spoke to Joseph Nicoloro, senior sanitation inspector at CISD, a good friend of Marie Stanley's father who referred the call to John Courtney's department. John Courtney was an inspector with CISD. Marie Stanley requested that John Courtney be assigned to her complaint.
8. Rudy Williams, a trainee at CISD, fielded the complaint and filled out the official CISD complaint form.
9. Complaints received by the CISD are recorded on complaint record forms which consist of two joined sheets, the top one being white and the bottom one being a yellow carbonless copy referred to as the "back-up copy."
10. The CISD inspector writing up the complaint dates and time stamps the complaint record and files the yellow back-up copy for logging in an in-basket at the front of the CISD office. The white original is placed into the CISD file folder for the particular property inspected.
11. CISD office procedure requires that an office supervisor assign a complaint to an inspector for investigation.
12. CISD inspectors were, at all relevant times, assigned to specific field districts in Cambridge and not expected to investigate complaints outside their districts. The Cellucci house was located in Joseph Cremen's district. As of June 11, 1986, John Courtney was an inspector with CISD. He was also, as of June 11, 1986, the CISD shop steward of the American Federation of State, County and Municipal Employees. Respondent and John Courtney had a history of animosity over union disputes. As of March 24, 1987, John Courtney was suspended from his job at CISD for misconduct. The complaints leading to this suspension had been received as of June 11, 1986.
13. Courtney took it upon himself to inspect 150 Holworthy Street on June 11, 1986 without seeking, from a supervisor, assignment of the complaint or permission to inspect property outside his district.
14. Courtney asked Joseph Cremens and Rudy Williams to accompany him to 150 Holworthy Street at about 9:45 a.m.
15. Courtney, Cremens and Williams proceeded to the Cellucci house, and Courtney conducted a full inspection of 150 Holworthy Street. Courtney then called Howard Wensley, Director of Community Sanitation at the DPH, on behalf of the Stanleys, left a message with the Stanley's name, and left the house at 150 Holworthy Street.[2]
16. At home on the evening of June 11, 1986, Courtney wrote up Housing Inspection Report and Order No. 12263 on 150 Holworthy Street from notes he had made while conducting the inspection and filed his inspection report on June 12, 1986, after it had been co-signed by Cremens and Mr. Williams.[5] The Cellucci family ultimately spent approximately $5,000 correcting code violations at 150 Holworthy Street.
17. On June 12, 1986, Respondent conferred with Attorney Robert Amoroso, CISD's consultant attorney, concerning the inspection already undertaken and a future course of conduct for the building department. Mr. Amoroso indicated to Respondent that, because of the inspection already undertaken, jurisdiction over the matter rested with CISD.
18. Howard Wensley, DPH Director of Community Sanitation, received phone calls on June 20, 1986 from Courtney and Michael Stanley expressing concerns about multiple outstanding violations of the state sanitary code and requesting DPH involvement in the enforcement. Howard Wensley ordered DPH supervising sanitarian Jeffrey Lane to inspect 150 Holworthy Street. These inspections took place on June 23, 1986,[4] August 5, 1986 and September 8, 1986.[6]
19. Sometime between June 12 and July 9, 1986, Wensley told Courtney not to reinspect 150 Holworthy Street because DPH had assumed jurisdiction over the property.
20. Courtney reinspected 150 Holworthy Street on July 16, and 28, 1986.[7] Courtney twice made the entry "Court order, please" in the CISD file as to the June

11, 1986 Housing Inspection Report and once as to the separate July 16, 1986 Housing Inspection Report.[8] The purpose of these notations was to indicate to the CISD court officer that a court order should be sought ordering the owner to show cause why the owner should not be found in violation of the Code because there had been insufficient progress in correcting the previously cited violations. CISD inspectors request that a court order for a show cause hearing before a magistrate be sought when in their judgment there has been insufficient progress in correcting cited Code violations. Courtney's request for a court order was denied by the CISD court officer.

21. On July 17, 1986, Wensley wrote a letter to Respondent informing him of the DPH inspection of 150 Holworthy Street, highlighting the fact that Respondent's ownership interest in the property created an appearance of a conflict of interest, and informing him that DPH would issue an order concerning the violations at 150 Holworthy Street.
22. Respondent wrote to Wensley on July 21, 1986, to assure the state that his department was effectively enforcing the Code with regard to 150 Holworthy Street and arguing that the state would not have to intervene.
23. On July 21, 1986, Wensley on behalf of DPH, issued to Respondent, as owner of 150 Holworthy Street, an order to correct code violations at 150 Holworthy Street.[9]
24. On August 19, 1986, Attorney Jeffrey M. Graber wrote to Wensley on behalf of the owners of 150 Holworthy Street requesting a hearing concerning the DPH's July 21, 1986 order.
25. The DPH show cause hearing, conducted by Hearing Officer Priscilla Fox, was held on September 9, 1986.
26. Respondent attended the September 9, 1986 DPH hearing, as the representative of CISD, to try to resolve the jurisdictional dispute over 150 Holworthy Street.
27. At the September 9, 1986 hearing, two main issues were discussed: the status of the violations at 150 Holworthy Street, and whether the CISD or the DPH had jurisdiction.
28. Respondent's participation at the hearing consisted of listing himself on the attendance sheet as representing the City of Cambridge, discussing Courtney's outstanding requests for court orders as they might interfere with DPH's jurisdiction, and indicating that he would talk to Courtney about holding off on the court orders while the jurisdictional issue was resolved.
29. After the hearing on September 9, 1986, Respondent went to the CISD office and wrote on the notation sheet for the CISD file for 150 Holworthy Street: Pursuant to the directive from Howard Wensley, State Director at a hearing on this date, only the state will be responsible for the enforcement of the State Sanitary Code regarding this property until such time that jurisdictional enforcement is resolved. J. Cellucci.
30. Respondent's purpose in making this entry was to inform his department's personnel that no further action was to be taken in connection with 150 Holworthy Street.

III. Decision

The Respondent has been charged with five separate violations of G.L. c. 268A, §19. We will address each of these alleged violations separately. Before turning to the five alleged violations, however, we will discuss certain preliminary issues.

A. Respondent's Motion to Dismiss

Respondent moved, in accordance with 930 CMR 1.01(6)(d), for dismissal on the grounds of Petitioner's failure to comply with the Commission's Rules of Practice and Procedure. Specifically, Respondent asserted that G.L. c. 268B, §4 was violated by a conversation a representative of the Enforcement Division had, sometime in October of 1987, with Howard Wensley of the state Department of Public Health (a witness in the case) indicating that information was being sought to help settle the case. Petitioner has responded that there was no disclosure of any information required to be kept confidential by either G.L. c. 268B, §4 or 930 CMR 3.01.

Respondent has claimed no prejudice or harm from this alleged breach of confidentiality. The issue of this breach of confidentiality, if it was breached by Petitioner's disclosure that the parties were discussing a settlement agreement, is best raised in a separate proceeding brought pursuant to 930 CMR 3.01(9) and referred to the Attorney General for investigation.[10] Accordingly, Respondent's Motion to Dismiss is denied. We would note, however, that the Order to Show Cause in this case was issued in September of 1987. This case, at the time of the November, 1987 conversation at issue, was already public in accordance with G.L. c. 268B, §4(c) and (h).[11]

B. Exemption Burden of Proof

Respondent has argued, in his post-hearing brief, for the dismissal of the Order to Show Cause for failure to state a cause of action. Since our Rules of Practice and Procedure make no provision for a post-hearing motion to dismiss, 930 CMR 1.01(6)(d), Respondent's argument as to statutory construction is discussed below as an affirmative defense.

Respondent asserts that Petitioner was required to

plead and prove that Respondent's conduct was not within the exception to G.L. c. 268A, §19 set forth in §19(b)(1). Petitioner responds that Respondent had the burden of pleading and proving a §19(b)(1) exception as a matter of defense.

It is well established in Massachusetts law that, as a general rule of pleading, when an exception or proviso is embodied in the clause which defines the offense (the enacting clause), it must be negatived in the indictment or complaint; but that if it is only found in a subsequent distinct clause of the same or another statute, it need not be so negated. **Commonwealth v. Jennings**, 121 Mass. 47, 49 (1876); G.L. c. 277, §37. "When an exception is not stated in the enacting clause otherwise than by merely referring to other provisions of the statute, it need not be negatived, unless necessary to a complete definition of the offense." **Id.** at 51; G.L. c. 277, §37. The exceptions of §19(b), not being embodied in the enacting clause of §19, are matters of defense or excuse which must be plead and proven by the Respondent.

Were we to assign the burden of proof of the exemption to the Petitioner, such an allocation would be plainly inconsistent with the expressed intent of the original framers of G.L. c. 268A. In its Final Report, the Special Commission on Code of Ethics explained that the format they had chosen for the statute "was deliberately designed in order to avoid the necessity of indictment and proof which must carry the burden of negating all such possible exceptions and exemptions" and declared that "[i]t was the judgment of the Commission that the burden of proof of an exception or exemption should be on the public official who claims it." Mass. House Doc. No. 3650, **Final Report of the Massachusetts Special Commission on Ethics**, (April, 1962), at 10. **But see**, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299, 360 (1965).

Even assuming for the sake of argument that we were to adopt Respondent's position, the evidence establishes that the §19(b)(1) exception is not applicable. Paragraph 20 of the Order to Show Cause alleges that Respondent failed to comply with §19(b)(1) prior to the acts charged as constituting violations of §19. In addition, substantial evidence in the record establishes that Respondent's participation was not authorized by his appointing official under §19(b)(1). Respondent testified that he approached only CISD's consultant Attorney Joseph Amoroso to discuss the conflict of interest law after the CISD inspection of 150 Holworthy Street.

C. Substantive Violations

There is no dispute that as Superintendent of CISD, Respondent is a municipal employee as that term is defined in G.L. c. 268A, §1(g). Section 19 of G.L. c. 268A prohibits him from participating as a municipal employee in a particular matter in which, to his knowledge, he or his immediate family has a financial interest.

Participation for purposes of G.L. c. 268A, §19 is defined as participation in agency action or in a particular matter personally and substantially as a municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).[12] A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the General Court. G.L. c. 268A, §1(k). The Commission finds that the determinations of whether there were violations of the Code at 150 Holworthy Street, whether those violations had been corrected and which agency (CISD or DPH) would enforce the Code as to the property were "particular matters" within the meaning of G.L. c. 268A, §1(k), as was the DPH show cause hearing concerning 150 Holworthy Street, and as was the determination of whether court orders would be sought or other action taken by CISD to enforce the Code as to violations which had not been corrected by the owners of 150 Holworthy Street within the time stipulated in the housing inspection reports and orders filed by Courtney. The Commission also finds that the Respondent participated in these particular matters by disapproving, in his July 21, 1986 letter to Howard Wensley, of DPH's assertion of jurisdiction over the inspection of 150 Holworthy Street, by representing, on September 9, 1986, the City of Cambridge at a DPH hearing concerning 150 Holworthy Street and raising the issue as to whether a CISD inspector's request for court orders as to uncorrected violations at 150 Holworthy Street would interfere with DPH's assertion of jurisdiction over 150 Holworthy Street, and by making a notation in the CISD file on 150 Holworthy Street, on September 9, 1986, indicating that only the state would be responsible for enforcement at 150 Holworthy Street. Petitioner has also alleged additional violations of G.L. c. 268A, §19 based on Respondent's role in ordering CISD inspectors to leave an ongoing inspection of 150 Holworthy Street on the morning of June 11, 1986, and Respondent's ordering a CISD inspector, sometime between June 11 and July 9, 1986, to reinspect 150 Holworthy Street. The Commission finds that there is insufficient credible evidence to support these two allegations. The Commission, in particular, finds CISD Inspector John Courtney's testimony on both of these allegations not to be credible. Finally, the Commission finds that Respondent and his immediate family had a financial interest in the controversy surrounding the inspection of 150 Holworthy Street because as owners of the property, Cellucci's immediate family would bear the cost of repairs.

Respondent contends that his July 21, 1986 letter to DPH, his September 9, 1986 appearance at the DPH hearing and his September 9, 1986 addition to the file on

150 Holworthy Street were all acts that did not violate G.L. c. 268A, §19 in that these acts were done solely with regard to the jurisdictional conflict with DPH. Respondent's attempt to draw a line between his participation in resolving the jurisdictional dispute between CISD and DPH and participation in the actual inspection at 150 Holworthy Street fails. The determination of whether there were violations of the Code at 150 Holworthy Street is one of the particular matters in this case. The jurisdictional issue arose in the context of the controversy surrounding the inspection and a resolution of the jurisdictional issue would have had a reasonably foreseeable impact on the financial interest of Respondent and his immediate family in this case. The determination of whether the violations occurred and which agency would enforce the Code as to the property were "particular matters" within the meaning of G.L. c. 268A. These matters were particular matters in which members of Respondent's family had a direct financial interest. Respondent's letter to Wensley on July 21, 1986 indicates clear knowledge of his immediate family members' ownership interest of 150 Holworthy Street.

Respondent's discussion of the particular status of the inspection and reinspection of 150 Holworthy Street, in that letter, demonstrates participation in that determination. The Commission has held that, for the purposes of §19(a), "participation" is not limited to discretionary and/or final decisions; rather it is enough that one has interjected oneself into the making of a decision by a municipal agency, whether one's duties required it or not, and that one's participation is deemed substantial. **See, In the Matter of George Najemy**, 1984 SEC 223, 224, rev'd on other grounds **Najemy v. State Ethics Commission**, Worcester Superior Court No. 85-31001 (1986); **In the Matter of James J. Craven, Jr.**, 19800 SEC 19, 22 aff'd sub nom. **Craven v. State Ethics Commission**, 390 Mass. 191 (1983). Respondent's July 21, 1986 letter falls well within this standard.

Respondent's participation in the September 9, 1986 DPH hearing was clearly in his official capacity. The jurisdictional and inspectional controversies were both addressed at the meeting. His raising at the hearing Courtney's requests for court orders on 150 Holworthy Street was participation in a particular matter in which he knew his immediate family member had a financial interest. Respondent, by raising the issue, was attempting to secure exclusive state jurisdiction over 150 Holworthy Street, just as the July 21, 1986 letter to Howard Wensley, before Respondent knew of CISD inspector requests for court orders, sought to secure exclusive CISD jurisdiction over 150 Holworthy Street. Similarly, Respondent's September 9, 1986 notation to the CISD file, in light of the unsettled jurisdictional question, was a further attempt to secure exclusive state jurisdiction over 150 Holworthy Street. We find that each of these three acts amounts to personal and substantial participation as defined in G.L. c. 268A,§1(j).

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. G.L. c. 268B, §4(j)(3). Although the potential maximum fine in this case is $6,000, we believe that the imposition of the maximum fine is not warranted. This is because we find Respondent's motives in these acts to have been a desire to repress insubordination at CISD and to assert his authority against Howard Wensley, intertwined with a desire to protect his family's financial interests. A genuine complaint to CISD started this case, but it was a complaint advanced by Respondent's antagonists at CISD that created the context for Respondent's acts in violation of §19. The context of these violations serves as a mitigating factor. Respondent's acts were not neutral, however, and did seek to protect his family's financial interest. Therefore, a fine reflecting these facts is appropriate.

V. Order

On the basis of the foregoing pursuant to its authority under G.L. c. 268B, §4, the Commission orders Respondent to pay one thousand dollars ($1,000.00) to the Commission as a civil penalty for three violations of G.L. c. 268A, §19.

DATE AUTHORIZED: May 24, 1988

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[1]/Commissioner Gargiulo resigned from the Commission prior to the issuance of this Decision and Order and, therefore, she is not a signatory hereto.

[2]/Although the record reflects considerable evidence as to an alleged telephone conversation between Courtney and Cellucci while Courtney was at 150 Holworthy Street on the morning of June 11, 1986, the Commission does not find credible Courtney's testimony that he spoke with Cellucci or that Cellucci ordered him to terminate the inspection. Accordingly, Petitioner has not carried the burden of proof on allegation number one from page one, supra.

[3]/This report listed 12 violations of the State Sanitary Code including the need for the repair of selected stairs, selected walls and ceilings, tiles in the bathroom, selected floors, windows, the kitchen stove, the front exterior door, a second exterior door, a leak in the cellar, exposed wires in the bathroom, and the bathroom water pressure. In addition, the landlord had not posted his name, address and phone number in the appropriate manner. The report gave the owners 21 days to rectify the deficiencies and stated a reinspection date of July 9, 1986.

[4]/This report listed twentysix violations of the State Sanitary Code, including the need for the repair of the front porch's ceiling paint, the front door, the door to the second floor, the front hall ceiling, the kitchen floor, the kitchen oven, the pantry floor, the bathroom wall tiles and grouting, the bathroom faucet, the bathroom ceiling, a bedroom window, the living room ceiling, a living room window, the front room's windows, the rear closet walls, the leak in the cellar, the front steps, and the rear stairs to the second floor. In addition, the kitchen was infested with cockroaches, an old mattress needed to be moved from the cellar, and the owner's name and address was not posted.

[5]/This report listed fifteen violations of the State Sanitary Code including eleven outstanding violations from the June 23, 1986 inspection. In addition, there were problems with a lack of hot water, rodent infestation, the pantry windows and a hole in the cellar floor.

[6]/This report listed fourteen violations of the State Sanitary Code including a lack of hot water, rodent infestation, problems with the pantry windows, the bathroom grouting, the bedroom windows, the front room windows, a leak in the cellar, an old sofa pad covering a hole in the cellar

floor, debris in the storage area, the front steps, the rear stairway and the garage foundation.

[7]/The July 16, 1986 reinspection prompted Courtney to write up another report indicating that the Stanley's refrigerator was not working. Courtney, on that date, noted that, of the violations listed in his report of June 11, 1986, numbers 1 and 2 were partially done and there was no progress on numbers 5, 9, and 12. Violations numbers 3, 4, 6, 7, 8, 10, and 11 were corrected. Courtney subsequently reported these developments on the 150 Holworthy Street file notation sheet. The July 28, 1986 reinspection found that no progress had been made on the outstanding (as of July 16, 1986) violations from either the June 11, 1986 or July 16, 1986 reports Courtney reported his findings on the CISD notation sheet.

[8]/Although Courtney testified that he reinspected on the order of Respondent, the Commission does not find this testimony credible. We find more credible Respondent's testimony that he did not discuss the inspection of 150 Holworthy Street with Courtney.

[9]/This letter called upon Respondent to adjust the hot water, exterminate for roach infestation, repair the oven element, repair broken windows, fix a leak in the front hall, fix the kitchen and pantry floors, repair bathroom tiles, repair bathroom grouting, repair tile walls at the faucet spout, repair bathroom and living room ceilings; repair the bath faucet, repair bedroom, living room and front room windows, repair the rear closet, remove debris from the cellar, repair the rear railing and stairway to second floor, provide railing on both sides of the front steps, investigate and repair the cause of mold growth on the living room ceiling and to post the building with the name, address and telephone number of the owner.

[10]/Complaints that Commission members and employees have violated the provisions of M.G.L. c. 268B, 3, 4 or 7 of these regulations shall be referred to the Attorney General for investigation. Such referral shall not preclude additional sanctions by the Commission.

[11]/G.L. c. 268A,4(c) states:

> "If a preliminary inquiry indicates reasonable cause for belief that this chapter or said chapter two hundred sixtyeight A has been violated, the Commission may, upon a majority vote, initiate an adjudicatory proceeding to determine whether there has been such a violation ... (h) All adjudicatory proceedings of the Commission carried out pursuant to the provisions of this section shall be public, unless the members vote to go into executive session."

[12]/"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.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 356

IN THE MATTER
OF
WILLIAM E. TURNER, JR.

DISPOSITION AGREEMENT

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

On September 16, 1987, the Commission initiated a Preliminary Inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Turner, Chairman of the West Bridgewater Zoning Board of Appeals (Board of Appeals). The Commission concluded its inquiry and on February 3, 1988, found reasonable cause to believe that Mr. Turner violated G.L. c. 268A, §17.

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

Mr. Turner is the Chairman of the Board of Appeals and was a member of the Board of Appeals at all times relevant to this proceeding. As a member of the Board of Appeals, Mr. Turner is a municipal employee as that term is defined in G.L. c. 268A, §1(g).

At all times material herein, Mr. Turner has been a stockholder and member of the board of directors of the Turner Steel Company, Inc. (Turner Steel). Mr. Turner has also been a trustee and one-third beneficial owner of the Turner Industrial Park Realty Trust (TIPRT). TIPRT has owned the real estate, including the buildings, which houses Turner Steel, and has leased that property to the company.

On October 27, 1982, Mr. Turner presented a request to the Board of Appeals on behalf of TIPRT for a special permit to construct a new building. Mr. Turner did not act as a Board of Appeals member at the meeting. The permit was granted unanimously.

On September 16, 1985, an application was made to further extend the Turner Steel buildings. The building permit application was signed by Mr. Turner on behalf of TIPRT and was subsequently approved.

Prior to their reprinting in 1980, the West Bridgewater Zoning Bylaws read, concerning land and industrial zones, that "no building shall be erected, altered or placed within 50 feet of any street line, or within 40 feet of a sideline, nor within 40 feet of a rear lot line." (Site plans for the first extension of the Turner Steel facility, dated July 26, 1982, indicate the 40-foot setback line.) When the bylaws were reprinted for the town in 1980, the sideline setback requirement was omitted. The sideline setback requirement was reinstated in 1986, after its omission was brought to town officials' attention. The 1985 extension of the Turner Steel buildings brought the structures to within 40 feet of the sideline.

A complaint was submitted to the Board of Selectmen in January, 1986, asserting that Turner Steel had violated the sideline setback requirement. The chairman of the Board of Selectmen asked TIPRT to apply to the Board of Appeals for a variance. Mr. Turner, as a trustee on behalf of TIPRT, filed a request for a variance on January 24, 1986, pleading hardship and unintentional error. Shortly thereafter, and prior to any advertisement or notice to abutters, Mr. Turner withdrew his variance appeal.

On March 24, 1986, the West Bridgewater Building Inspector issued an occupancy permit for the expanded Turner Steel building.

On June 30, 1986, an appeal of the Turner Steel building permit was filed with the Board of Appeals.

The Board of Appeals held a public hearing on this

appeal on August 18, 1986. Mr. Turner appeared at this hearing as a trustee on behalf of TIPRT in order to answer questions addressed to him by the Board of Appeals. Mr. Turner was not there, nor did he act, as a member of the Board of Appeals.

On September 11, 1986, the Board of Appeals issued its decision on this appeal. The Board of Appeals determined that TIPRT must request a variance within 60 days of the decision. Mr. Turner, as a trustee on behalf of TIPRT, filed such a request on October 27, 1986.

On November 25, 1986, the Board of Appeals held a public hearing to consider TIPRT's request for a variance. Mr. Turner appeared at the hearing as a trustee on behalf of TIPRT. Mr. Turner requested that the Board of Appeals approve the variance and allow the building to stand due to financial hardship if the building had to be torn down.

The Board of Appeals issued its decision on January 7, 1987, granting TIPRT a variance on the 40-foot sideline restriction. The Board of Appeals cited its reasons for the decision as hardship and lack of knowledge of the sideline restriction by both the applicant for the variance and the building inspector.

General Laws c. 268A, §17 prohibits a municipal employee, otherwise than as provided by law for 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.

By appearing before the Board of Appeals as a trustee on behalf of TIPRT on October 27, 1982, August 18, 1986 and November 25, 1986, Mr. Turner acted, otherwise than in the proper discharge of his duties, as agent for TIPRT in connection with particular matters in which the town had a direct and substantial interest, thereby violating G.L. c. 268A, §17(c) on each of those occasions.

By filing the September 16, 1985 building permit application and the January 24, 1986 variance application on behalf of TIPRT, Mr. Turner acted, otherwise than in the proper discharge of his duties, as agent for TIPRT in connection with matters in which the town had a direct and substantial interest, thereby violating §17(c) on each of those occasions.

The Commission has found no evidence suggesting that Mr. Turner was aware that his actions violated the conflict of interest law.

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

1. that he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil penalty for his course of conduct in violation of §17(c); and

2. 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 proceeding to which the Commission is or may be a party.

DATE: May 27, 1988

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 357

IN THE MATTER
OF
DONALD P. ZERENDOW

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Donald P. Zerendow (Mr. Zerendow) 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 27, 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, involving Mr. Zerendow, the former Chief of the Medicaid Fraud Control Unit (MFCU) in the Department of the Attorney General. The Commission concluded its inquiry on December 9, 1987, finding reasonable cause to believe that Mr. Zerendow violated G.L. c. 268A, §5(b).

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

1. Mr. Zerendow was an Assistant Attorney General from January, 1975 until January, 1987. Mr. Zerendow was MFCU Chief from 1978 until January 29, 1987. On November 7, 1986, Mr. Zerendow informed the Attorney General of his intent to resign on or about January 20, 1987. On January 29, 1987, Mr. Zerendow did resign. Thereafter, he practiced law privately. While MFCU Chief, he was a state employee as that term is defined in G.L. c. 268A, §1(q).

2. As MFCU Chief, Mr. Zerendow had direct and intermediate administrative authority to approve, disapprove or otherwise direct all MFCU activities, including decisions such as whether and how to investigate a complaint, whether formally to open a case based on the initial information received and developed, and to whom such tasks should be assigned. In practice, with respect to some of these decisions, Mr. Zerendow delegated his authority to subordinates such as his Chief of Investigations, among others.

3. In early November, 1986, an investigator at MFCU received a telephone complaint that a certain podiatrist

(Podiatrist) had requested an allegedly unlawful supplemental payment from one of his patients (i.e., a payment beyond what Medicaid would cover). The initial complaint was reduced to writing in a memo dated November 3, 1986, and forwarded to the Chief Investigator. In a memo dated November 10, 1986, the Chief Investigator directed a second investigator to do a preliminary screening of the complaint. The Chief Investigator was concerned about the Podiatrist requesting supplemental payments from his patients as well as so-called upgrades in services (i.e., charging Medicaid for a more costly procedure than the one that was actually performed). On November 28, 1986, after the Chief Investigator and the aforementioned second investigator discussed the results of the additional investigative steps that had been taken, the Chief Investigator formally opened and assigned the case to that investigator. The Commission knows of no evidence which would indicate that Mr. Zerendow was ever made aware of the Podiatrist case while he was MFCU Chief. He was not personally involved in the decision to open the case, nor did he participate in any discussions or reviews regarding the case during his remaining two months as Chief (MFCU employment records reflect that Mr. Zerendow was on vacation between November 19 and December 2, 1986). At no time did any confidential information regarding the case come into his possession.

4. Little additional investigation was done on the Podiatrist's case until in or about February-March, 1987, when allegedly substantial billing abuses were discovered. After Mr. Zerendow's departure on January 29, 1987, the Podiatrist's case was assigned to an MFCU attorney (the MFCU attorney).

5. In mid-April, 1987, the MFCU attorney notified the Podiatrist's attorney of the foregoing allegations and disclosed to him the salient facts of the MFCU investigation. On April 21, 1987, the Podiatrist's attorney contacted Mr. Zerendow requesting that Mr. Zerendow act as co-counsel regarding the MFCU investigation of the Podiatrist. Mr. Zerendow informed the Podiatrist's attorney that before agreeing to act as co-counsel, he had to inquire of MFCU regarding any potential conflict of interest problem.

6. On April 22, 1987, Mr. Zerendow contacted the Acting Chief of the MFCU. Mr. Zerendow testified: that he told the Acting Chief that he had been contacted to represent the Podiatrist and was calling to determine if the Acting Chief saw any conflict problem in such representation; that the Acting Chief told Zerendow he did not see a problem and referred Mr. Zerendow's call to the MFCU attorney. The MFCU attorney told Mr. Zerendow that if the Podiatrist matter was there while Zerendow was Chief, then it took a new direction after he left state employ, that he knew nothing about the case, and that the MFCU attorney saw no conflict problem. After these conversations, Mr. Zerendow and the MFCU attorney discussed the salient facts of the MFCU's investigation.

7. The acting MFCU Chief testified that he could recall Mr. Zerendow checking with him on one occasion regarding whether he might have a conflict problem regarding a case where Mr. Zerendow was going to be private counsel in an MFCU matter, but the Acting Chief could not recall whether Mr. Zerendow checked regarding the Podiatrist case or another case.

8. The MFCU attorney testified that Mr. Zerendow did raise the conflict issue early in his contacts concerning the Podiatrist case but could not recall the precise date. He did recall it came up some time early in his contacts with Mr. Zerendow. When it did arise, according to the MFCU attorney, he told Mr. Zerendow that the case had been opened while Mr. Zerendow was Chief, that Mr. Zerendow had not participated in the case as Chief, and that the investigation had been relatively inactive until after Mr. Zerendow resigned. (Neither the MFCU attorney nor the Acting Chief testified that they told Mr. Zerendow that there was a conflict problem.)

9. On or about April 22, 1987, Mr. Zerendow informed the Podiatrist's attorney that he had contacted MFCU, was told he did not have a conflict problem, and then had discussed the Podiatrist's case with the MFCU attorney. Mr. Zerendow then agreed to act as co-counsel for the Podiatrist.

10. On April 29, 1987, Mr. Zerendow met with the MFCU attorney and investigator for approximately one hour. The MFCU attorney disclosed in more detail the facts, nature and scope of the investigation.

11. On May 1, Mr. Zerendow called the MFCU attorney and requested copies of all of the Podiatrist's records that the Podiatrist had submitted to MFCU investigators.

12. On May 8, 1987, Mr. Zerendow and the MFCU attorney had a telephone conversation regarding the Podiatrist and other podiatry providers' billing practices.

13. On May 29, 1987, Mr. Zerendow had a telephone conversation with the MFCU attorney regarding involvement of federal investigators in the Podiatrist case. Mr. Zerendow also requested that the MFCU attorney join with him in asking the Department of Public Welfare (DPW) to clarify certain Medicaid procedures. The MFCU attorney orally declined that request. On the same day, Mr. Zerendow wrote the MFCU attorney to offer further medical records of the Podiatrist and to request a second meeting. No additional meetings occurred between Mr. Zerendow and the MFCU attorney from that day to the present.

14. On June 4, 1987, the MFCU attorney wrote Mr. Zerendow confirming that he would not join in Mr. Zerendow's request to the DPW.

15. On June 5, 1987, Mr. Zerendow voluntarily disclosed his representation of the Podiatrist to the Commission and has had no further contact with MFCU personnel regarding the Podiatrist's case. Although Mr. Zerendow has to the present continued to act as counsel

for the Podiatrist except as described above, he has never appeared before a court, grand jury or any other state or federal administrative or investigative agency with respect to the Podiatrist's case.

16. Section 5(b) of G.L. c. 268A prohibits a former state employee, within one year after his last employment has ceased, from appearing personally before any agency of the commonwealth as attorney for anyone other than the commonwealth in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and which was under his official responsibility as a state employee at any time within a period of two years prior to the termination of his employment.

17. Based on the evidence discussed above, as of April 22, 1987, Mr. Zerendow was a former state employee.

18. The conduct which is the subject of this Agreement occurred between April 22, 1987 and May 29, 1987, i.e., within one year after Mr. Zerendow's last employment with the commonwealth ceased.

19. The investigation of the Podiatrist which began in November of 1986 and was still continuing as of May 29, 1987, involved a controversy, proceeding and/or charge(s) and was therefore a particular matter.[1]

20. Because Mr. Zerendow's subordinates received the complaint regarding the Podiatrist, did initial screening of the complaint, and decided to open formally an investigation into the Podiatrist's billing practices and assign an investigator to the case, all in November of 1986, the investigation of the Podiatrist was a particular matter which was under Mr. Zerendow's official responsibility as a state employee within a period of two years prior to his resigning on January 29, 1987.

21. By his telephone conversations and meeting, as described above between April 22, 1987 and May 29, 1987, and by his May 29, 1987 letter, Mr. Zerendow appeared personally before the MFCU in connection with the Podiatrist's criminal investigation, thereby violating G.L. c. 268A, §5(b).

22. The Commission acknowledges Mr. Zerendow's contention that he did not "appear personally" in the sense lawyers use that term, i.e., submitting oneself to the jurisdiction of a court or administrative tribunal. As the Commission has previously held, however, "appears personally" should not be equated with the term "appearance" as used in the law of jurisdiction, and involves more than one's physical presence before the agency. It can also involve telephone or written communications. EC-COI-87-27 (issued July 27, 1987).

23. The Commission also acknowledges Mr. Zerendow's contention that the Podiatrist matter in the spring of 1987 involved different allegations than those made while Mr. Zerendow was Chief. As indicated in §19-20, however, the matter on which Mr. Zerendow appeared personally in the spring of 1987 arose out of and was a continuing part of the original investigation begun in November of 1986. Therefore, it did involve the same particular matter.

24. The Commission is unaware of any evidence to indicate that Mr. Zerendow knew he was violating §5(b) when he acted as described above.[2] In addition, the Commission considers as a mitigating factor Mr. Zerendow's efforts to determine whether he had a conflict problem. Those efforts, however, do not provide a defense to this violation. The Commission will insist on careful and complete compliance with the law from former state employees. To accept anything less is to invite situations where, for example, former managers will be able to take advantage of their prior position when subsequently dealing in their private capacity with former colleagues and subordinates. Questions of preferential treatment inevitably will arise and result in a diminishing of public confidence that such matters are being handled strictly on their merits.

Mr. Zerendow should have known that since the Podiatrist case was opened within the two years preceding his resignation as chief of MFCU, he could not appear personally before any court or state agency, including MFCU, as counsel for the Podiatrist for one year after his resignation. Even if MFCU personnel told him he would have no problem, he cannot shift responsibility to others for his failure to comply with the law.[3] In order to protect himself from the risk that his own or others' analysis of the situation was incorrect, Mr. Zerendow was entitled to seek a written opinion from the Commission. Such an opinion, sought in advance and based on an accurate representation of the material facts, provides a complete defense against an alleged violation of the conflict of interest law.

In view of the foregoing course of conduct in violation of G.L. c. 268A, §5(b), 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. Zerendow:

(1) that he pay to the Commission the sum of one thousand dollars ($1,000.00)[4] as a civil penalty for violating G.L. c. 268A, §5(b); 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: May 27, 1988

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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]/ 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]/See In the Matter of John J. Hanlon, 1986 SEC 259, 255. But for the mitigating factors described above, the Commission would have insisted upon a higher fine. The Commission may impose a fine of up to $2,000 for each violation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 359

IN THE MATTER
OF
KENNETH CIMENO

DISPOSITION AGREEMENT

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

On June 8, 1987, the Commission initiated a Preliminary Inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Cimeno, a Dedham building inspector. The Commission concluded its inquiry, and on October 26, 1987 found reasonable cause to believe that Mr. Cimeno violated G.L. c. 268A, §19.

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

1. Kenneth Cimeno has been an assistant building inspector for the Town of Dedham since September 22, 1986. As such he was a municipal employee subject to the conflict of interest law, G.L. c. 268A.

2. Richard Cimeno is the father of Kenneth Cimeno and a former building inspector for the Town of Dedham. He and his wife founded CKC Realty Trust (Trust) in 1971 with their children, including Mr. Cimeno, as beneficiaries. On July 12, 1984, Mr. Cimeno joined his parents as a trustee of the Trust, and remained a beneficiary as well.

3. On August 15, 1986, the Trust purchased a vacant lot at 78 Bingham Avenue. On December 3, 1986, an application for a permit to build on the property was filed on behalf of the Trust by Rita G. Cimeno, Mr. Cimeno's mother. Mr. Cimeno submitted the application documents to the building inspector for approval.

4. On December 10, 1986, prior to the building permit application being reviewed by the building inspector, Mr. Cimeno signed his (Mr. Cimeno's) name approving the plans and application and granted a permit.

5. In 1970, the Trust purchased a property at 502 Sprague Street in Dedham. In 1972, the Trust constructed an 80'x 80' cement block building on the property. The Trust has rented the building since that time to Video Com.

6. Sometime during 1986, Video Com contacted Richard Cimeno (Mr. Cimeno's father) regarding the possibility of constructing a structure on the property designed to receive microwave transmissions.

7. Video Com submitted a building permit application for the structure in February, 1987. Mr. Cimeno issued a building permit for the structure on February 19, 1987.

8. Except as otherwise permitted in that 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, his immediate family, or a business organization in which he is serving as trustee has a financial interest.[1]

9. Decisions to issue building permits are particular matters as that term is defined in G.L. c. 268A, §1(k).

10. Mr. Cimeno's and his immediate family's ownership interest in the Trust and the Trust's ownership of 78 Bingham Avenue and 502 Sprague Street gave Mr. Cimeno and his family a financial interest in the issuance of the building permits for 78 Bingham Avenue and 502 Sprague Street.

11. By signing and issuing the building permits for construction of a single family residence at 78 Bingham Avenue and the microwave reception tower at 502 Sprague Street, Mr. Cimeno participated in particular matters in which both he and his immediate family had a financial interest and thereby violated §19.

12. The Commission has no evidence to suggest that Mr. Cimeno was aware that his actions violated G.L. c. 268A when he signed and issued the building permits for 78 Bingham Avenue and 502 Sprague Street.[2]

13. 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 conditions agreed to by Mr. Cimeno:

1. that he pay to the Commission the amount of five hundred dollars ($500.00) 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 contained in this agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: June 21, 1988

[1]/None of the exceptions in §19 is relevant here.

[2]/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).

Board of Directors
United States Trust Company
30 Court Street
Boston, MA 02108

RE: PUBLIC ENFORCEMENT LETTER 89-1

Dear Directors:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that United States Trust Company (USTC) entertained a number of Massachusetts municipal treasurers in the hope of obtaining or maintaining banking business, such entertainment involving paying expenses related to Florida golf trips, in-state golf excursions and numerous dinners, lunches and beverages.

The results of our investigation, discussed below, indicate that from 1983 through November, 1985 USTC appears to have violated the conflict of interest law in this case. Nevertheless, in view of certain substantial 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 USTC's continuing compliance with and understanding of the conflict law. By agreeing to this public letter as a final resolution of this matter, USTC does not necessarily admit to the facts and law as discussed herein. The Commission and USTC are agreeing that there will be no formal action against USTC and that USTC has chosen not to exercise its rights to a hearing before the Commission.

I. Facts

1. On November 23, 1985, the Office of the Inspector General, in a document entitled "Report on Municipal Banking Relations" (IG Report), disclosed its findings regarding a number of issues involving the manner in which municipal treasurers did business with banks. Included in the IG Report was the following:

> The records revealed that banks' municipal calling officers entertain public officials and their guests in a variety of ways, including meals, drinks, theatre performances, sporting events, and golf.
>
> Seven Boston-based banks — Bank of Boston, Bank of New England, Boston Safe Deposit & Trust, Patriot Bank, Shawmut Bank, State Street Bank, and U. S. Trust Company — gave to municipal treasurers and other public officials during the period August 1, 1982 through 1984 hundreds of gratuities worth in total approximately $138,000. Of this amount, the banks spent over $85,500 on gratuities given to identified municipal treasurers and other public officials, and an additional $52,500 on gratuities given to municipal treasurers and other public officials not identified in banks' entertainment records.

(IG Report, at xi)[1] The IG Report also found that of the seven banks identified, USTC, based on the records it had submitted, provided more gratuities to certain public officials than any other bank (a little over $40,000 for the period August, 1982 through December, 1984) (IG Report, at xi, chart). (The Commission's investigation, however, found that USTC maintained more complete records than did some other banks; as the IG Report stated, the incomplete and in some instances illegible records maintained by some other banks could "grossly understate the scope and value of banks' gratuities." (IG Report, at 70)) The IG Report also noted:

> During 1984 alone, 104 municipal treasurers, almost one-third of all treasurers, apparently accepted gratuities of substantial value from the seven reporting banks ... 24 municipal treasurers each were given gratuities totaling over $1,000. Half were given gratuities exceeding $2,000, seven were given gratuities exceeding $3,000, and one was given gratuities exceeding $7,000.

(IG Report, at xii).

2. As you know, on June 8, 1987, the Commission began a formal inquiry into allegations that USTC had violated the conflict of interest law in its dealings with certain municipal treasurers.[2]

3. In addition to reviewing the IG Report (along with substantial supporting documentation), we conducted an independent examination of USTC's records, and certain municipal records, and conducted numerous interviews under oath. Our investigation determined the following:

a. As indicated in the chart appearing immediately below, from 1983 through 1985 USTC paid the expenses of one or more of the five identified treasurers on 316 occasions involving a total amount of $11,267. These expenses included lunches, dinners, greens fees, and theatre tickets. The figures in the chart are minimums because, when a treasurer has disputed a USTC record showing an expense payment to him, we generally gave him the benefit of the doubt and deleted that item.

CHART

	Total $	Total # Grat.'s	Fla. Trips 83/84/85	Total $ Value Fla. Trip Exp
Collas	$4,253	138	83, 84, 85	$1,107

Scafidi	$2,599	78	83, 84, 85	$1,107
Brunelli	$1,772	37	83, 84, 85	$1,107
Lewis	$1,534	41	83 & 84	$743
Croatti	$1,109	32	84	$375
	$11,267	316		

b. Regarding the Florida trips, USTC paid for golf greens and carts fees, balls, in-state transportation, meals and liquor. The individual treasurers paid for their own transportation to and from Florida and for their hotel rooms. Meal expenses involved the payment of groceries, inasmuch as food was cooked by the treasurers in their hotel rooms.

c. For three of the five identified treasurers, USTC paid for expenses in connection with Massachusetts golf excursions where those expenses (greens and cart fees, and food and beverage expenses) exceeded $100 for a given event.[3]

d. USTC paid the foregoing expenses through expense accounts provided to its employees in its Municipal Services Department. Most of those expenses were authorized and paid through Richard Brown, Sr., a former vice president in charge of the department. All of these expenses were duly noted on monthly expense account reports submitted by Brown and each of his staff members, and reviewed by officials at the bank.

e. When asked why the bank provided these gratuities to municipal treasurers, Brown stated it was because all the banks were selling basically the same services and that each of his competitors was engaged in the same practice. It was USTC's goal to develop a personal rapport with the municipal treasurers to ensure obtaining and retaining their business. According to Brown, USTC was willing to spend a substantial amount a year having Brown out on the road developing these personal relationships in order to bring municipal money into the bank. Brown stated it was USTC's view that a municipal treasurer did not identify with a bank as much as it identified with the person representing a bank. Brown's way of handling this was to get to know the treasurers personally by taking them out for meals or golf or some other type of entertainment, according to Brown. Brown also noted that those municipal treasurers on whom he spent expense account money at dinners, golf, plays, and other entertainment more often than not did more business with USTC than treasurers who were not receiving such gratuities.

Brown stated that it was he who suggested the initial golf trip to Florida. He stated that the understanding he had with the treasurers was that USTC would pay for the golf and accompanying fees and the cost of dinner each night. He stated that USTC also covered the ground transportation costs in Florida. He admitted that the trips were strictly social, but asserted that there was no **quid pro quo** involved in the sense of any understanding that the treasurers would give any preferential treatment to USTC in exchange for the entertainment they received.

f. Each of the treasurers acknowledged that he was aware that the purpose of USTC paying for certain golf or meals expenses was that the bank was trying to obtain more of the town's or city's business. At the same time, each treasurer insisted that he always made his banking decisions on objective grounds and was not in fact influenced by his expenses being paid by USTC.

g. The amount of business that any one of these treasurers could and did give to USTC was substantial. For example, one treasurer estimated that he deals with receipts of approximately $100 million dollars a year, all of which have to be deposited in banks at his discretion, subject to fiduciary guidelines. From June, 1983 through January, 1987, his city purchased 54 certificates of deposit from USTC ranging in duration from 14 days to 205 days, with total average balances at USTC of approximately $2,000,000. In addition, the city (like other municipalities dealing with other banks) maintained a non-interest bearing account with USTC during that time period which had an average monthly balance of approximately $225,000.00 before December, 1985 (prior to the IG's Report) and approximately a $20,000.00 monthly balance from December, 1985 through June, 1987.

h. Prior to 1984 USTC had confirmed with its outside public accounting firm that the expenditures for entertainment by its Municipal Services Department were consistent with the entertainment expenses of other banks in this field. In 1984, after becoming aware of the ongoing Inspector General investigation, senior officials at USTC discussed the issue of the foregoing expense accounts. The bank reached no decision to change its course of conduct at that time. According to USTC officials, in the spring of 1985 USTC began to formulate a written Code of Conduct regarding the entertainment of public officials. After the IG Report was made public on November 23, 1985, the new Code of Conduct was reviewed for consistency with the recommendations in the Report. On December 5, 1985 the Code of Conduct was adopted by USTC and distributed to its employees. The USTC Code of Conduct directs its employees to be sensitive to conflict of interest concerns, and to keep their expenses in dealing with municipal officials to below $50 on any given occasion. It also states that such expenses should not be repetitive.

i. Based on the evidence the Commission has reviewed, it appears that USTC employees have complied with the December 5, 1985 Code of Conduct.

j. The Commission is not aware of any evidence indicating any of the foregoing treasurers has been offered or accepted any entertainment of substantial value

from USTC after the IG Report was issued on November 23, 1985.

k. Brown stated that one or more of the treasurers raised the issue of whether it was legal for USTC to pay for a portion of their expenses on the Florida trips. Brown stated that in 1985 he consulted with USTC officials, and then informed one or more of the treasurers that in USTC's view it was legal for USTC to pay these expenses.

II. Discussion

Section 3(a) of the conflict of interest law, G.L. c. 268A, in relevant part, prohibits anyone, otherwise than as provided by law for the proper discharge of official duties, from giving an item of substantial value to a municipal employee for or because of any official act performed or to be performed by such employee.

As the Commission stated **In the Matter of George Michael**, 1981 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 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do — a good job.

For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. It is sufficient that the gratuities are given to the official "in the course of his everyday duties for or because of official acts performed or to be performed by him and where he was in a position to use his authority in a manner which could affect the gift giver." **United States v. Standefer**, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978) (**aff'd on other grounds**, 447 U.S. 10 (1980)), citing **United States v. Niederberger**, 580 F.2d 63 (3rd Cir. 1978). **See also United States v. Evans**, 572 F. 2d 455 (5th Cir. 1978). As the Commission explained in **Advisory No. 8**:[4]

> In fact, even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver. In such a case, the gratuity is given for as yet unidentified "acts to be performed."

In **Commission Advisory No. 8** the Commission declared that gratuities to public officials such as tickets to theatre or sporting events which exceed $50 would be considered "substantial value." The Commission further stated that a gift of several tickets, each valued at less than $50, is a gratuity of substantial value if the total value of the tickets exceeds $50. Finally, the Commission noted,

> A §3 issue may arise if there is a standing offer to be accepted at any time for tickets. It is likely that any such offer would be deemed to involve substantial value. Similarly, if there is a matter of periodically giving a public official tickets, the course of conduct will be evaluated as to its value. This would be the case, for example, if someone gave a public official a ticket to an entertainment event each and every weekend.

The facts set forth in this letter, if proven, would appear to establish a violation of §3(a) by USTC. Thus, as no one disputes, USTC on numerous occasions paid for golfing expenses in Florida and Massachusetts for municipal treasurers where those expenses substantially exceeded $50. Indeed, for three treasurers those expenses exceeded $1,000. Consequently, USTC did provide municipal officials with items of substantial value.

In addition, the evidence would indicate that at least as to Treasurers Collas and Scafidi, USTC paid for their expenses on a sufficient number of instances within a short time period that even though each payment was less than $50 in value, the payments should be aggregated. Therefore, USTC gave these two treasurers items of substantial value in this respect as well. Thus, the Commission views USTC's having provided two treasurers with 138 and 78 gratuities in a two-year period as indicating either that those treasurers had a standing offer to have USTC pay for their expenses, or, alternatively, that the pattern of payments was such that it should be considered as a course of conduct within the meaning of **Advisory No. 8**.

That there was a standing offer is supported by Brown's statement that whenever he saw a treasurer, it was his standard procedure to invite the treasurer for lunch or dinner. One treasurer stated that he knew that he could have a lunch or dinner whenever bank officials visited him. It is also reasonably clear from the evidence that each of the treasurers knew that he could have Brown pay for a round of golf at USTC's expense at any time, including food and beverages afterwards.

The numbers are also probative. For example, 138 gratuities over a two-year period indicates that USTC was paying Treasurer Collas's expenses more than once a week. In addition, the total value of those 138 occasions was $4,253, a total which is again suggestive of a standing offer.

Alternatively, in light of the frequency of the expense payments for these two treasurers, the Commission would conclude that USTC was involved in a course of conduct with each treasurer which involved substantial value. Therefore, whether considered a standing offer or a course of conduct, USTC was giving these treasurers items of substantial value by virtue of the numerous occasions on which it paid for their entertainment expenses, even where those individual occasions did not exceed $50.[5]

The facts would also indicate that there was a clear connection between USTC paying for these expenses and USTC's objective that these municipal treasurers would either continue or expand their town's or city's business with USTC. Thus, former vice president Brown stated that by entertaining these treasurers, he could establish personal relations with them, which in turn would likely result in their doing more business with USTC. In other words, USTC's motive in expending these monies was to foster goodwill with these treasurers. That is precisely the motive or intent which lies at the heart of a §3 violation. Thus, the prohibited connection or nexus between these entertainment expenditures and the treasurers' duties would be established by these facts.

On the other hand, the Commission has not found any evidence that any of these treasurers provided USTC with preferential treatment as a result of these expenditures. In addition, there is no evidence that USTC made any personal loans to these five treasurers. Nor is there any evidence that any of these treasurers entered into any kind of corrupt agreement by which USTC would provide payments in exchange for specific official acts to be taken by the treasurer. Had the Commission found substantial evidence of preferential treatment or of a corrupt agreement, this matter would not have been resolved with a public enforcement letter.[6]

It could be argued that to the extent these expenses were necessary and appropriate to legitimate business transactions, such as a business lunch to discuss a banking proposal, then the expenditures should not be considered unlawful gratuities. There is some support for this view. **See, e.g., State v. Prybil**, 211, N.W. 2d 308 (Iowa 1973). The Commission, however, has taken the position that a public employee cannot accept private reimbursement for his business expenses. **See, e.g., EC-COI-88-5.**[7]

The Commission precedents, such as **EC-COI-88-5**, deal with vendors paying for business trip expenses, including transportation, lodging, meals and so forth. The Commission has not, however, addressed the specific issue of a meal **per se**, and, more specifically, the so-called "business lunch." For purposes of §3, there is no logical distinction between transportation and lodgings on the one hand and meals and beverages on the other, so long as "substantial value" is involved. Therefore, the Commission takes the position that vendors should not directly pay for <u>any</u> of the expenses of public officials whether or not in connection with conducting official business, if those payments involve substantial value. The potential for abuse is too great in those situations. Instead, either the public agency in question should pay for the official's expenses, or consideration should be given to whether the statutes and ordinances which apply allow for the vendor to pay for the public official's expenses by making a payment to the public treasury specifically earmarked for those expenses. In turn the public official can have his expenses paid for in the ordinary way. (**See, e.g.,** G.L. c. 41, §53A.)

In any event, there are several important mitigating factors which point to a public enforcement letter, rather than some more serious sanction, as being the proper resolution of this matter. One, prior to the IG Report, the practice of banks paying for public officials' entertainment expenses including meals, beverages, sporting events, theatre tickets, and golf was clearly a widespread practice, and one which remains acceptable in the private sector. That the practice was widespread is well-illustrated by the IG Report noting that 104 treasurers received such gratuities, and all seven banks which were contacted appear to have been involved in the practice.[8] Two, after the IG Report was issued in November of 1985, USTC promptly adopted a policy requiring its staff to comply strictly with the conflict of interest concerns articulated in that report. As far as the Commission is aware, USTC employees have complied with that stated policy. Three, until today, the Commission has not had the occasion to articulate a position regarding private parties paying for meals and beverages incidental to the transaction of business, nor had the Commission, prior to its May, 1985 **Advisory No. 8**, indicated it would aggregate items of value to meet the substantial value threshold.

The Commission's decision to allow USTC to resolve this matter with a public enforcement letter should not be construed as indicating it does not consider the issues raised by USTC's conduct to be serious. But for the mitigating factors just described, the Commission would have pursued this matter through adjudicatory proceedings. It is of critical importance that the public have complete confidence that municipal treasurers make investment decisions, often involving millions of dollars of public funds, in a manner which best serves the public interest. The public has a right not only to insist on actual impartiality and objectivity in the performance of such fiduciary duties, but also the right to expect that municipal treasurers will avoid even the appearance of impropriety in dealing with banking institutions.[9] When a bank pays for any of the personal expenses of a municipal treasurer, but particularly when those expenses climb into the thousands of dollars and involve payments occurring as frequently as once a week, then there is at least the appearance of impropriety, and enormous potential for real abuse. Based on the evidence, it appears that

USTC has stopped this practice. The Commission trusts that all other banks have done so as well.[10]

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure USTC's continued compliance with and understanding of the conflict law. This matter is now closed.

DATE: August 15, 1988

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[1]/The "gratuities" referred to in the IG Report are for the most part entertainment expenses.

[2]/The Commission's investigation of this matter was delayed while the Department of the Attorney General reviewed the issues raised by the IG Report. It was subsequently agreed that the matter should be resolved by the Commission. After careful consideration the Commission chose to focus its inquiry on those treasurers who allegedly received each of the following: (1) out-of-state golf expenses; (2) in-state expenses greater than $100; and (3) expenses paid on 50 or more instances occurring from 1983 through 1984. Application of these criteria resulted in the Commission investigating five municipal treasurers (Plymouth Treasurer Andrew Collas, Newton Treasurer Theodore L. Scafidi, Franklin Treasurer Albert R. Brunelli, Everett Treasurer Frank E. Lewis, and Framingham Treasurer Donald Croatti). Finally, the Commission chose to focus on the relationship between those five treasurers and USTC because (a) most of the expense payments involving those five treasurers were attributable to USTC, and (b) according to the IG Report, as discussed above, USTC by far paid more expenses for municipal treasurers than any other bank (Again, as stated above, apparently not all of the banks submitted adequate records.).

[3]/Treasurer Collas had such expenses paid by USTC on two occasions involving a total payment of $217 by USTC. Treasurers Scafidi and Brunelli each attended one Massachusetts golfing event where their expenses paid for by USTC exceeded $100 ($108 each).

[4]/Issued May 14, 1985.

[5]/Some treasurers have raised an issue as to whether the expenses of a treasurer's guest should properly be attributed to the treasurer for purposes of determining whether he received substantial value. Section 3 does require that the item of substantial value be for the municipal official as opposed to someone else. Compare 2 (bribes) which is not so limited. In the Commission's view, however, where presumably the treasurer would have had to pay for his guest's expenses if USTC did not pay for them, the value of USTC paying for the treasurer's guest can be attributed to the treasurer.

Certain treasurers have also raised an issue as to the unfairness of dividing a total meal cost by the number of people present to determine the value the treasurer received. Treasurers have stated that on some occasions they may not have eaten as much as the others present, or they may not have eaten anything but only had a drink, or where there was a large liquor bill, they may have only had soft drinks. In the Commission's view, it is appropriate to infer that when a group participates in an entertainment event, whether it be golf, a meal, or drinks, the expenses are generally shared equally. That inference, of course, could be overcome by the testimony of those present.

[6]/The Commission can impose up to a $2,000 fine for each violation of G.L. c. 268A. The Commission can also bring an action in Superior Court under G.L. c. 268A, 21(b) to seek to obtain up to three times the amount of any unjust enrichment derived by any party from having violated the conflict of interest law.
See also the Office of Governmental Ethics Memorandum dated October 23, 1987, stating in part, "In general, an Executive branch employee's acceptance of 'one-on-one' meals from someone who hosts that individual because of his or her government position is prohibited, regardless of the cost of the meal."

[7]/In singling out the five treasurers and USTC for public scrutiny, we are mindful that many others appear to have violated the gratuities section of the conflict law, and thus fairness considerations should play a role in the disposition of this matter.

[8]/As the Supreme Judicial Court said in Board of Selectmen of Avon v. Linden, 352 Mass. 581, 583 (1967): "The Legislature found it advisable to enact a conflict of interest law. This was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing. [T]he Legislature did not see fit to rely upon the restraints of decency, propriety and fair play, upon the law of libel, or upon the power of the electorate to eliminate unworthy office holders."

[9]/The Commission does not mean to imply that it would not investigate and take sterner action against a bank which was found to violate §3 after the IG Report was issued but before the date of this letter.

Andrew Collas
Town of Plymouth Treasurer
c/o George M. Matthews, Esq.
Kopelman & Paige, P. C.
77 Franklin Street, Suite 1000
Boston, MA 02110

Theodore L. Scafidi
City of Newton Treasurer
c/o Donald L. Conn, Jr., Esq.
Conn, Austin, Conn & Senior
USTC Building
331 Montvale Avenue, Suite 601
Woburn, MA 01801

Albert R. Brunelli
Town of Franklin Treasurer
c/o Paul A. Cataldo, Esq.
Bachner, Roche & Cataldo
55 West Central Street
Franklin, MA 02038

Frank E. Lewis
City of Everett Treasurer
c/o Richard J. O'Neil, Esq.
433 Broadway
Everett, MA 02149

Donald Croatti
Town of Framingham Treasurer
c/o Michael S. Gardener, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P. C.
One Financial Center
Boston, MA 02111

RE: PUBLIC ENFORCEMENT LETTER 89-2

Dear Sirs:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that United States Trust Company (USTC) entertained the five of you as municipal treasurers in the hope of obtaining or maintaining banking business, such entertainment involving paying expenses related to Florida golf trips, in-state golf excursions and numerous dinners, lunches and beverages.

The results of our investigation, discussed below, indicate that from 1983 through 1985 you appear to have violated the conflict of interest law in this case. Nevertheless, in view of certain substantial 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 understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not necessarily admit to the facts and law as discussed herein. The Commission and each of you are agreeing that there will be no formal action against you and you have chosen not to exercise your rights to a hearing before the Commission.

I. Facts

1. On November 23, 1985, the Office of the Inspector General, in a document entitled "Report on Municipal Banking Relations" (IG Report), disclosed its findings regarding a number of issues involving the manner in which municipal treasurers did business with banks. Included in the IG Report was the following:

> The records revealed that banks' municipal calling officers entertain public officials and their guests in a variety of ways, including meals, drinks, theatre performances, sporting events, and golf.
>
> Seven Boston-based banks — Bank of Boston, Bank of New England, Boston Safe Deposit & Trust, Patriot Bank, Shawmut Bank, State Street Bank, and U. S. Trust Company — gave to municipal treasurers and other public officials during the period August 1, 1982 through 1984 hundreds of gratuities worth in total approximately $138,000. Of this amount, the banks spent over $85,500 on gratuities given to identified municipal treasurers and other public officials, and an additional $52,500 on gratuities given to municipal treasurers and other public officials not identified in banks' entertainment records.

(IG Report, at xi.)[1] The IG Report also found that of the seven banks identified, USTC, based on the records it had submitted, provided more gratuities to certain public officials than any other bank (a little over $40,000 for the period August, 1982 through December, 1984) (IG Report, at xi, chart). (The Commission's investigation, however, found that USTC maintained more complete records than did some other banks; as the IG Report stated, the incomplete and in some instances illegible records maintained by some other banks could "grossly understate the scope and value of banks' gratuities." (IG Report, at 70))

The IG Report also noted:

> During 1984 alone, 104 municipal treasurers, almost one-third of all treasurers, apparently accepted gratuities of substantial value from the seven reporting banks ... 24 municipal treasurers each were given gratuities totaling over $1,000. Half were given gratuities exceeding $2,000, seven were given gratuities exceeding $3,000, and one was given gratuities exceeding $7,000. (IG Report, at xii).

2. As you know, on June 8, 1987, the Commission began a formal inquiry into allegations that each of you had violated the conflict of interest law in your dealings with USTC.

3. In addition to reviewing the IG Report (along with substantial supporting documentation), we conducted an independent examination of USTC's records, and certain municipal records, and conducted numerous interviews under oath. Our investigation determined the following:

a. As indicated in the chart appearing immediately below, from 1983 through 1985 USTC paid expenses of one or more of the five of you on 316 occasions involving a total amount of $11,267. These expenses included lunches, dinners, greens fees, and theatre tickets. The figures in the chart are minimums because, when one of you disputed a USTC record showing an expense payment, we generally gave you the benefit of the doubt and deleted that item.

CHART

	Total $	Total # Grat.'s	Fla. Trips 83/84/85	Total $ Value Fla. Trip Exp.
Collas	$4,253	138	83, 84, 85	$1,107
Scafidi	$2,599	78	83, 84, 85	$1,107
Brunelli	$1,772	37	83, 84, 85	$1,107
Lewis	$1,534	41	83 & 84	$743
Croatti	$1,109	32	84	$375
	$11,267	316		

b. Regarding the Florida trips, USTC paid for golf greens and carts fees, balls, in-state transportation, meals and liquor. The five of you paid for your own transportation to and from Florida and for your hotel rooms. Meals expenses involved the payment of groceries, inasmuch as food was cooked by you in your hotel rooms.

c. For three of you, USTC paid for expenses in connection with Massachusetts golf excursions where those expenses (greens and cart fees, and food and beverage expenses) exceeded $100 for a given event.[3]

d. USTC paid the foregoing through expense accounts provided to its employees in its Municipal Services Department. Most of those expenses were authorized and paid through Richard Brown, Sr., a former vice

president in charge of the department. All of these expenses were duly noted on monthly expense account reports submitted by Brown and each of his staff members, and reviewed by officials at the bank.

e. When asked why the bank provided these gratuities to municipal treasurers, Brown stated it was because all the banks were selling basically the same services and that each of his competitors was engaged in the same practice. It was USTC's goal to develop a personal rapport with the municipal treasurers to ensure obtaining and retaining their business. According to Brown, USTC was willing to spend a substantial amount a year having him out on the road developing these personal relationships in order to bring municipal money into the bank. Brown stated it was USTC's view that a municipal treasurer did not identify with a bank as much as it identified with the person representing a bank. Brown's way of handling this was to get to know the treasurers personally by taking them out for meals or golf or some other type of entertainment, according to Brown. Brown also noted that those municipal treasurers on whom he spent expense account money at dinners, golf, plays, and other entertainment more often than not did more business with USTC than treasurers who were not receiving such gratuities.

Brown stated that it was he who suggested the initial golf trip to Florida. He stated that the understanding he had with the treasurers was that USTC would pay for the golf and accompanying fees and the cost of dinner each night. He stated that USTC also covered the ground transportation costs in Florida. He admitted that the trips were strictly social, but asserted that there was no **quid pro quo** involved in the sense of any understanding that the treasurers would give any preferential treatment to USTC in exchange for the entertainment they received.

f. Each of you acknowledged that you were aware that the purpose of USTC paying for certain golf or meals expenses was that the bank was trying to obtain more of the town's or city's business. At the same time, each of you insisted that you always made your banking decisions on objective grounds and were not in fact influenced by your expenses being paid by USTC.

g. The amount of business that each of you could and did give to USTC was substantial. For example, one of you estimated that you deal with receipts of approximately $100 million dollars a year, all of which have to be deposited in banks at your discretion, subject to fiduciary guidelines. From June, 1983 through January, 1987, your city purchased 54 certificates of deposit from USTC ranging in duration from 14 days to 205 days, with total average balances at USTC of approximately $2,000,000. In addition, the city (like other municipalities dealing with other banks) maintained a non-interest bearing account with USTC during that time period which had an average monthly balance of approximately $225,000.00 before December, 1985 (prior to the IG's Report) and approximately a $20,000.00 monthly balance from December, 1985 through June, 1987.

h. Prior to 1984 USTC had confirmed with its outside public accounting firm that the expenditures for entertainment by its Municipal Services Department were consistent with the entertainment expenses of other banks in this field. In 1984, after becoming aware of the ongoing Inspector General investigation, senior officials at USTC discussed the issue of the foregoing expense accounts. The bank reached no decision to change its course of conduct at that time. According to USTC officials, in the spring of 1985 USTC began to formulate a written Code of Conduct regarding the entertainment of public officials. After the IG Report was made public on November 23, 1985, the new Code of Conduct was reviewed for consistency with the recommendations in the Report. On December 5, 1985 the Code of Conduct was adopted by USTC and distributed to its employees. The USTC Code of Conduct directs its employees to be sensitive to conflict of interest concerns, and to keep their expenses in dealing with municipal officials to below $50 on any given occasion. It also states that such expenses should not be repetitive.

i. Based on the evidence the Commission has reviewed, it appears that USTC employees have complied with the December 5, 1985 Code of Conduct.

j. The Commission is not aware of any evidence indicating any of you have accepted any entertainment of substantial value from USTC after the IG Report was issued on November 23, 1985.

k. Brown stated that one or more of you raised the issue of whether it was legal for USTC to pay for a portion of your expenses on the Florida trips. Brown stated that in 1985 he consulted with USTC officials, and then informed one or more of you that in USTC's view it was legal for USTC to pay these expenses.

II. Discussion

As municipal treasurers each of you is a municipal employee subject to the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268A, in relevant part, prohibits a municipal employee, otherwise than as provided by law for the proper discharge of official duties, from soliciting or accepting an item of substantial value from anyone for or because of any official act performed or to be performed by such employee.[4]

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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.

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On the other hand, the Commission has not found any evidence that any of you provided USTC with prefer-

ential treatment as a result of these expenditures. In addition, there is no evidence that any of you obtained personal loans from USTC. Nor is there any evidence that any of you entered into any kind of corrupt agreement by which USTC would provide payments in exchange for specific official acts to be taken by one of you. Had the Commission found substantial evidence of preferential treatment or of a corrupt agreement, this matter would not have been resolved with a public enforcement letter.[8]

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The Commission precedents, such as **EC-COI-88-5**, deal with vendors paying for business trip expenses, including transportation, lodging, meals and so forth. The Commission has not, however, addressed the specific issue of a meal **per se**, and, more specifically, the so-called "business lunch." For purposes of §3, there is no logical distinction between transportation and lodgings on the one hand and meals and beverages on the other, so long as "substantial value" is involved. Therefore, the Commission takes the position that vendors should not directly pay for <u>any</u> of the expenses of public officials whether or not in connection with conducting official business, if those payments involve substantial value. The potential for abuse is too great in those situations. Instead, either the public agency in question should pay for the official's expenses, or consideration should be given to whether the statutes and ordinances which apply allow for the vendor to pay for the public official's expenses by making a payment to the public treasury specifically earmarked for those expenses. In turn the public official can have his expenses paid for in the ordinary way. (**See, e.g.,** G.L. c. 41, §53A.)

In any event, there are several important mitigating factors which point to a public enforcement letter, rather than some more serious sanction, as being the proper resolution of this matter. One, prior to the IG Report, the practice of banks paying for public officials' entertainment expenses, including meals, beverages, sporting events, theatre tickets, and golf, was clearly a widespread practice, and one which remains acceptable in the private sector. That the practice was widespread is well-illustrated by the IG Report noting that 104 treasurers received such gratuities, and all seven banks which were contacted appear to have been involved in the practice.[10] Two, you assert, and the Commission has no evidence to the contrary, that you did not intentionally violate the law. Further, the evidence indicates that at some point you made an effort to determine whether these payments were legal, and you were told they were.[11] Three, until today, the Commission has not had the occasion to articulate a position regarding private parties paying for meals and beverages incidental to the transaction of business, nor had the Commission, prior to its May, 1985 **Advisory No. 8**, indicated it would aggregate items of value to meet the substantial value threshold.

The Commission's decision to allow you to resolve this matter with a public enforcement letter should not be construed as indicating it does not consider the issues raised by your conduct to be serious. But for the mitigating factors just described, the Commission would have pursued this matter through adjudicatory proceedings. It is of critical importance that the public have complete confidence that municipal treasurers make investment decisions, often involving millions of dollars of public funds, in a manner which best serves the public interest. The public has a right not only to insist on actual impartiality and objectivity in the performance of such fiduciary duties, but also the right to expect that municipal treasurers will avoid even the appearance of impropriety in dealing with banking institutions.[12] When a bank pays for any of the personal expenses of a municipal treasurer, but particularly when those expenses climb into the thousands of dollars and involve payments occurring as frequently as once a week, then there is at least the appearance of impropriety, and enormous potential for real abuse. Based on the evidence, it appears that you and USTC have stopped this practice. The Commission trusts that all other treasurers and banks have done so as well.[13]

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 compliance with the conflict law. This matter is now closed.

DATE: August 15, 1988

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[1]/The "gratuities" referred to in the IG Report are for the most part entertainment expenses.

[2]/The Commission's investigation of this matter was delayed while the Department of the Attorney General reviewed the issues raised by the IG Report. It was subsequently agreed that the matter should be resolved by the Commission. After careful consideration the Commission chose to focus its inquiry on those treasurers who allegedly received each of the following: (1) out-of-state golf expenses; (2) in-state expenses greater than $100; and (3) expenses paid on 50 or more instances occurring from 1983 through 1984. Application of these criteria resulted in the Commission investigating the five of you. Finally, the Commission chose to focus on the relationship between each of you and USTC because (a) most of the expense payments involving each of you were attributable to USTC, and (b) according to the IG Report, as discussed above, USTC by far paid more expenses for municipal treasurers than any other bank (Again, as stated above, apparently not all of the banks submitted adequate records.)

[3]/Treasurer Collas had such expenses paid by USTC on two occasions involving a total payment of $217 by USTC. Treasurers Scafidi and Brunelli each attended one Massachusetts golfing event where their expenses paid for by USTC exceeded $100 ($108 each).

[4]/Conversely, G.L. c. 268A 3(a), in relevant part, prohibits anyone, otherwise than as provided by law for the proper discharge of official duties,

from offering or giving an item of substantial value to a municipal employee for or because of any official act performed or to be performed by such employee.

[5]/Issued May 14, 1985.

[6]/Some of you have raised an issue as to whether the expenses of a treasurer's guest should properly be attributed to the treasurer for purposes of determining whether he received substantial value. Section 3 does require that the item of substantial value be for the municipal official as opposed to someone else. Compare 2 (bribes) which is not so limited. In the Commission's view, however, where the treasurer would have had to pay for his guest's expenses if USTC did not pay for them, the value of USTC paying for the treasurer's guest can be attributed to the treasurer.

Certain treasurers have also raised an issue as to the unfairness of dividing a total meal cost by the number of people present to determine the value the treasurer received. Treasurers have stated that on some occasions they may not have eaten as much as the others present, or they may not have eaten anything but only had a drink, or where there was a large liquor bill, they may have only had soft drinks. In the Commission's view, it is appropriate to infer that when a group participates in an entertainment event, whether it be golf, a meal, or drinks, the expenses are generally shared equally. That inference, of course, could be overcome by the testimony of those present.

[7]/These facts would also raise issues under G.L. c. 268A, 23 (the so-called "code of conduct" section). Section 23, in relevant part, prohibits a state employee from using or attempting to use his position to secure an unwarranted privilege of substantial value and/or 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. By accepting expense payments from a bank with which his city or town has an official business relationship, a municipal treasurer's conduct would run afoul of these §23 concerns.

[8]/The Commission can impose up to a $2,000 fine for each violation of G.L. c. 268A. The Commission can also bring an action in Superior Court under G.L. c. 268A, §21(b) to seek to obtain up to three times the amount of any unjust enrichment derived by any party from having violated the conflict of interest law.

[9]/See also the Office of Governmental Ethics Memorandum dated October 23, 1987, stating in part, "In general, an Executive branch employee's acceptance of 'one-on-one' meals from someone who hosts that individual because of his or her government position is prohibited, regardless of the cost of the meal."

[10]/In singling out the five of you and USTC for public scrutiny, we are mindful that many others appear to have violated the gratuities section of the conflict law, and thus fairness considerations should play a role in the disposition of this matter.

[11]/While these are mitigating factors, they are not defenses to the violation itself. Thus, the Commission has consistently made it clear that ignorance of the law is not a defense to a violation of G.L. c. 268A. In the Matter of C. Joseph Doyle, 1980 SEC 11, 13 See also Scola, 318 Mass. 1, 7 (1945).
In addition, the only advice on which a municipal employee may rely as a defense to a G.L. c. 268A violation is advice obtained from the Commission, or from town counsel where town counsel's opinion has been reviewed by the Commission pursuant to 930 CMR 1.03(3) See, e.g., In the Matter of Ernest LaFlamme, 1987 SEC 329.

[12]/As the Supreme Judicial Court said in Board of Selectmen of Avon v. Linden, 352 Mass. 581, 583 (1967): "The Legislature found it advisable to enact a conflict of interest law. This was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing. [T]he Legislature did not see fit to rely upon the restraints of decency, propriety and fair play, upon the law of libel, or upon the power of the electorate to eliminate unworthy office holders."

[13]/The Commission does not mean to imply that it would not investigate and take sterner action against anyone who was found to violate §3 in the respects outlined above after the IG Report was issued but before the date of this letter.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss

COMMISSION ADJUDICATORY
DOCKET NO. 360

IN THE MATTER
OF
PAUL NOWICKI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Paul Nowicki (Mr. Nowicki) 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 9, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Nowicki, the Collector/Treasurer of the Town of Adams. The Commission concluded its inquiry, and on April 13, 1988, found reasonable cause to believe that Mr. Nowicki violated G.L. c. 268A, §19.

The Commission and Mr. Nowicki now agree to the following findings of fact and conclusions of law:

1. At all times relevant to this matter, Mr. Nowicki was the elected Collector/Treasurer of the Town of Adams, and, accordingly, a municipal employee as defined in G.L. c. 268A, §1(g).

2. John Nowicki is Mr. Nowicki's brother and thus a member of Mr. Nowicki's immediate family as that term is defined by G.L. c. 268A, §1(e).

3. In August of 1986, Mr. Nowicki hired his brother, John, as Deputy Tax Collector for the Town of Adams. The position entitled John Nowicki to collect statutory fees for his services in collecting delinquent taxes.

4. General Laws c. 268A, §19 provides in relevant part that, except as permitted by §19, 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.[1]

5. By hiring his brother for the position of Deputy Tax Collector in the Town of Adams, Mr. Nowicki participated as the Collector/Treasurer of the Town of Adams in a particular matter in which his brother had a financial interest, thereby violating §19.

6. On or about August 25, 1987, Mr. Nowicki attended an annual meeting of Massachusetts Collectors/Treasurers at which he attended a seminar on the conflict of interest law, including a discussion of nepotism.

7. Following this meeting, Mr. Nowicki asked for and received his brother's resignation from the position of Deputy Collector.

8. Subsequently, Mr. Nowicki reported the foregoing §19 violation to the State Ethics Commission. The Commission was not aware of this violation from any other source.

9. Mr. Nowicki has stated, and the Commission has no evidence to the contrary, that he was unaware of the prohibitions of G.L. c. 268A, §19 at the time he hired his brother.[2]

10. Mr. Nowicki asserts in his defense that a number of town and state officials knew that he was hiring his brother and did not raise any objections. In support, he points out that the deputy tax collector position is a bonded position, and the bond application (which identified the person to be bonded as John Nowicki) had to be, and was, approved by the Town Administrator, signed by the Town Clerk and approved by the Commissioner of the Department of Revenue (DOR).

Assuming those officials were aware that Mr. Nowicki was appointing his brother,[3] their awareness is not a defense to Mr. Nowicki's §19 violation. **See, e.g., In the Matter of Edward Rowe, Jr.,** 1987 Ethics Commission 307.[4]

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 Paul Nowicki:

1. that he pay to the Commission the amount of five hundred dollars ($500.00) as a civil penalty for his violation of §19; 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: August 31, 1988

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[1]/None of the §19 exceptions applies to this case.

[2]/Ignorance of the law is no defense to a violation of G.L. c. 268A In the Matter of Joseph C. Doyle, 1980 Ethics Commission 11, 13 See also, Scola v. Scola, 318 Mass. 1, 7 (1945).

[3]/While the local officials probably understood from the bond or in other ways that Mr. Nowicki was appointing his brother, it is doubtful that DOR officials made that connection at the time Mr. Nowicki appointed his brother. Indeed, when DOR officials did make the connection in 1987, they notified Mr. Nowicki of the conflict issue.

[4]/In certain narrowly defined circumstances, a public official's awareness and approval of a municipal employee hiring a family member can prevent a §19(a) violation. Thus, §19(b)(1) 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...

This exception is not available to elected officials who, by definition, do not have an "appointing official" within the meaning of the law.

[5]/As a general rule, the Commission considers a fine of $1,000.00 or more to be appropriate for a nepotism/hiring violation See, e.g., In the Matter of Thomas J. Nolan, 1987 Ethics Commission 283. Given the mitigating factor of the Commission being made aware of the violation only through Mr. Nowicki, the Commission considers a reduction of the fine appropriate here.

Mr. Joseph Zeneski
P. O. Box 306
Uxbridge, Massachusetts 01569

RE: PUBLIC ENFORCEMENT LETTER 89-3

Dear Mr. Zeneski:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding information that, as the director of the Mansfield Department of Public Works, you may have reviewed work submitted by Dunn Engineering, Inc. (Dunn Engineering) while you had an offer of employment pending with that company. The results of our investigation (set forth below) indicate that the state conflict of interest law (G.L. c. 268A) appears to have been violated in this case. Nevertheless, in view of certain mitigating factors (also discussed below), the Commission does not feel that further proceedings in this matter are warranted. Rather, the Commission has determined 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 are the former Public Works Director and Town Engineer for the Town of Mansfield. You were appointed by the Mansfield Town Manager in April, 1983 and served until October, 1985, at a salary range of $30,000 to $32,000 a year. As the Public Works Director and Town Engineer, you were responsible for water, sewer, street design, maintenance and subdivision plan review for the Mansfield Planning Board (Planning Board). You resigned your municipal position effective September 30, 1985 and joined Dunn Engineering one week later.

2. Dunn Engineering is a civil engineering and surveying company based in Foxboro. You are presently employed by Dunn Engineering at its office in Uxbridge.

3. You have stated to us that you approached James Dunn (Dunn), the owner of Dunn Engineering, concerning employment on Labor Day, September 2, 1985. At that point, you and Dunn met for lunch to discuss the possibility of your employment with Dunn Engineering. You said that you received a formal offer of employment from Dunn Engineering on September 6, 1985. You signed Dunn Engineering's offer and returned it to Dunn on September 16, 1985, accepting the offer. According to you, on or about September 16, 1985, you submitted a letter of resignation to the Mansfield Town Manager that was effective September 30, 1985. The letter did not disclose your plans to join Dunn Engineering. You did not otherwise disclose to the Town Manager

or any other town officials, prior to your leaving municipal employment, your plans to join Dunn Engineering.

The Pratt Street Sewer Connection

4. According to you, in 1985 a family on Pratt Street, Mansfield (the family) desired to build a new wing on their home that would encroach upon their septic system's leaching field. Accordingly, the family planned to hook up to the town sewer. According to you, because the town sewer line which the family needed to connect with was not in front of their house, the family's sewer pipe had to leave their property at an angle, which presented some problems. Dunn Engineering did the engineering work on the family's project, and Dunn Engineering employee and vice-president John Parmentier (Parmentier) represented the family at meetings before town boards concerning the project.

5. You said that you originally approved the family's sewer connection on July 24, 1985.[1] You rescinded your approval of the proposed sewer connection permit application on September 4, 1985. You said that you initially did not give the family's connection much thought; but shortly thereafter, there were problems with other sewer connections in town, including one on Pratt Street. According to you, effluent was backing up into the cellar of a home on Pratt Street, and the owner charged that it was the town's responsibility to clean up the mess and repair the sewer connections. You said that, with these problems in mind, you rescinded the family's permit so you could give the project more thought. You said that when you began studying the family's hook-up, you noticed that there was a gas main running near the sewer pipe that did not allow the recommended 1% to 2% slope for the sewer pipe. You said you recommended that the family install a grinder-pump in the sewer line to overcome this slope problem. According to you, the grinder pump would have cost the family approximately $3,000. You said the family did not want to install the grinder pump and wanted the town to accept the liability for their sewer connection.

6. On September 4, 1985, the still-unresolved issue of the family's sewer connection was raised at the Selectmen's meeting, and it was decided that the Selectmen would meet with the family, town counsel and you at their next meeting to settle the matter. The Selectmen's next meeting was on September 11, 1985, and you attended. The family was represented at the meeting by Parmentier of Dunn Engineering. You stated at this meeting that your first concern about the proposed connection was the slope of the sewer pipe, and your second concern was the pipe's length. You told the Selectmen that you still, as previously, recommended the use of a grinder pump, which you said would be more expensive. After a recess to discuss a proposal that the family agree to maintain the connection and bear the cost of a second (replacement) connection to the main sewer line if it were extended to a point where a better connection could be made, Parmentier suggested that the family be allowed to use an .8% slope, with pea gravel around the pipe as insulation. According to the minutes, you felt the new slope (.8%) was close enough to the minimum to be allowed. You recommended that the family agree to have their engineer (Dunn Engineering) on site when the installation was done so that the engineer could certify that plans were followed. The Selectmen adopted this recommendation. In addition, the Selectmen conditioned their approval on the family agreeing to waive any claim against the town for the freezing of the sewer line and that they would hook up to the main sewer line if it were extended up Pratt Street. The Selectmen then voted four to one to approve the family's sewer connection.

7. According to Dunn, Dunn Engineering lost money on the family project because the negotiations that took place required the firm to perform revision work for the family for which the firm did not charge.

Hallet Crossing I Subdivision

8. On August 21, 1985, Dunn, as President of Dunn Engineering, submitted to the Planning Board, on behalf of the developer Walmark Corporation (Walmark), documents constituting an application for the approval of a residential subdivision off Fruit Street in Mansfield, subsequently designated as Hallet Crossing I. You thereafter reviewed this subdivision plan at the Planning Board's request as Mansfield Director of Public Works.

9. On September 3, 1985, Parmentier, as Vice President of Dunn Engineering, submitted to you, as Director of Public Works, a drainage plan for the Hallet Crossing I subdivision. You subsequently reviewed this drainage plan as the Director of Public Works.

10. On September 13, 1985, you sent a memorandum to the Planning Board in which you made four comments on the Hallet Crossing I subdivision. First, you recommended that the road for the subdivision use the street section approved by the Planning Board for use for "minor streets" (allowing a 24 rather than 30-foot width). Second, you observed that the plan should show that the sewer is existing. Third, you stated that the water main need only be eight inches in diameter. Fourth, you recommended the installation of a fence along the subdivision property line to prevent easy access to the subdivision by off-road vehicles. In a separate memorandum to the Planning Board, also dated September 13, 1985, you made recommendations concerning the drainage plan for Hallet Crossing I. You recommended that a "predevelopment/postdevelopment comparison of total runoff and rates should be presented" and that the board should consider the overall impact of the proposed project.

11. On September 25, 1985, there was a public hear-

ing before the Planning Board concerning the Hallet Crossing I definitive subdivision plan. Dunn personally made the presentation for Walmark at this hearing. You attended this hearing and commented on the rebuilding of Fruit Street, the length of the Hallet Crossing I subdivision road, and the location of the Hallet Crossing I subdivision. There apparently was no public opposition to Walmark's plan at the meeting. The Planning Board took no action on Hallet Crossing I at the September 25, 1985 hearing.

12. Subsequently, by letter dated October 4, 1985, the Planning Board informed Walmark that it had some concerns with the Hallet Crossing I definitive subdivision plan, including "[t]he comments from the DPW Director, dated September 13, 1985." A copy of your September 13, 1985 memorandum to the Planning Board was attached to the letter. The letter further informed Walmark that "[t]he Planning Board requests that you address these concerns and submit a revised plan to the Board for further review."

13. In response to the Planning Board's directive, Dunn Engineering made revisions to the Hallet Crossing I plan. On October 30, 1985, the Planning Board approved the subdivision plan. On November 23, 1985, Dunn Engineering billed Walmark an additional $2,355 for work on Hallet Crossing I, including $554 for "October 29-30, 1985, changes to subdivision plan prior to Planning Board signatures."

II. The Conflict Law

As the Director of the Mansfield Department of Public Works, you were a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A.

In pertinent part, G.L. c. 268A, §19(a) prohibits a municipal employee from participating[2] as such in any particular matter[3] in which he knows an organization with which he is negotiating or has any arrangement concerning prospective employment has a financial interest. Accordingly, your participation as a municipal employee in official matters concerning Dunn Engineering raised conflict of interest issues once you began negotiating with Dunn Engineering regarding prospective employment.

The evidence developed shows that, during the three-week period between your receiving a job offer from Dunn Engineering on September 6, 1985 and your leaving municipal employment on September 30, 1985, you took official action concerning projects on which Dunn Engineering had performed engineering services. Whether your actions violated §19 turns on whether your participation was "personal and substantial" as required by §1(j) and on whether Dunn Engineering had a financial interest in each particular matter in which you participated.

Your actions on September 11, 1985 concerning the Pratt Street sewer permit application related directly to Dunn Engineering's work and were substantial in nature. In making recommendations to the Selectmen as to the adequacy of the .8% slope proposed by Dunn Engineering and the conditions under which the permit application would be approved, you participated personally and substantially, as DPW Director, in the process by which the Selectmen decided to approve the family's permit request. The family's application's approval with conditions was a particular matter in which Dunn Engineering had a financial interest. Dunn Engineering's financial interest was clearly implicated by the approval condition (recommended by you and adopted by the Selectmen) that the family agree to have their engineer (Dunn Engineering) present while the sewer line was installed. This condition would (unless the family changed engineers) obviously result in Dunn Engineering performing additional services for the family, to the company's gain or loss (depending on whether it received payment for the services). Accordingly, you appear to have violated §19 on September 11, 1985.

Similarly, your September 13, 1985 recommendations to the Planning Board concerning the Hallet Crossing I subdivision amounted to personal and substantial participation by you in the Planning Board's consideration and approval of the subdivision. Acting as Public Works Director, you interjected yourself into the Planning Board's process of making a decision concerning the subdivision by making recommendations concerning substantive changes to the plans which you believed the board should require for their approval. Additionally, to the extent they were adopted by the Planning Board, your recommendations resulted in revisions and/or additions to the subdivision plans by Dunn Engineering for which Dunn Engineering charged its client. Thus, in making the recommendations regarding Hallet Crossing I, you participated personally and substantially in a particular matter in which Dunn Engineering had a financial interest. Accordingly, you appear to have violated §19 on September 13, 1985.

Although you appear to have violated G.L. c. 268, §19 on September 11 and 13, 1985, the Commission has decided that this case does not warrant the initiation of formal adjudicatory proceedings because:

1. Dunn Engineering's financial interest in the matters in which you participated on September 11 and 13, 1985, while sufficient for §19 purposes, was indirect and, under the circumstances, relatively small;

2. the facts do not show that the public interest was compromised by favoritism on your part towards Dunn Engineering;

3. there is no evidence that your motivation in acting as you did was other than to act in what you in good faith believed to be the public interest; and

4. you have fully cooperated in the Commission's investigation of this matter and have provided all infor-

mation requested.

The Commission's decision to allow you to resolve this matter with a public enforcement letter, however, should not be construed as indicating that it does not consider the issues raised by your conduct to be serious. Section 19 of G.L. c. 268A, like many other sections of the conflict law, is intended to prevent any questions arising as to whether the public interest has been served with the single-minded devotion required of public employees. This concern is compounded when, as was the case here, the employee does not disclose to his appointing official the private employment arrangements he has made. Had you made such a disclosure, the Town Manager, pursuant to the law, could have made a determination whether or not to permit you to continue to participate in matters concerning Dunn Engineering.

III. Disposition

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

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[1]/The minutes of the Selectmen's meeting on July 24, 1985 indicate that a condition of your approval of the connection was that a 1% minimum slope of the sewer line would be maintained. The minutes further show that the Selectmen did not approve the connection at this meeting but rather voted to table the matter in order to give town counsel the opportunity to review the legal issue of who would be responsible for the sewer connection in the event of future problems.

[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.

Mr. Byron Battle
23 Bernard Lane
Waban, MA 02168

RE: PUBLIC ENFORCEMENT LETTER 89-4

Dear Mr. Battle:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you used your state title of Undersecretary of Economic Affairs, your official letterhead, and other state resources to solicit Massachusetts business and trade leaders to join a privately-organized tour to the Soviet Union, knowing that if you could persuade enough people to go, your own trip plus an additional trip for a guest of your choice, valued at a total of approximately $8,000.00, would be free. The results of our investigation, discussed below, indicate that you appear to 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 the law, in the expectation that this 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, you do not necessarily admit to the facts and law as discussed below. The Commission and you have agreed 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

In January, 1984, you became Undersecretary for International Trade in the agency then known as the Massachusetts Department of Commerce. In that position, you were responsible for setting up a new Office of International Trade and Investment to promote Massachusetts exports to foreign countries and to lead trade missions of Massachusetts business leaders to Europe and Asia.

In August of 1987, you were asked to accept a transfer to the position of Commissioner of Commerce. Soon after, due to legislative action, the Department of Commerce merged with the Executive Office of Economic Affairs (EOEA). At that point your title changed to Undersecretary of Economic Affairs, but your position was not otherwise affected. You have held this position continuously to date.

As the Undersecretary of Economic Affairs, you are no longer responsible for foreign trade missions on a daily basis although you do from time to time conduct them. Your current position is promotional, with no regulatory responsibility, focused on domestic industrial development. Your primary function is to target specific sectors in the Massachusetts industrial community and provide them with assistance in developing and maintaining domestic markets. Your office concentrates on industries that do not have substantial export potential and, accordingly, foreign trade missions are no longer part of your work plan.

Part of your responsibility is to set various selection criteria for deciding which industries your office will promote, with the most significant factor being the number of in-state jobs involved. Based on your input, the EOEA Secretary makes the final selection, and you are presently working on behalf of the Massachusetts woodworking industry and manufacturers of plastics. In addition to its promotional responsibilities, your office also serves as a

"traffic cop" for Massachusetts industries, directing them to useful state agencies, sources of financial assistance, and other forms of development aid, but providing no direct aid.

Early in October, 1987, you received a promotional mailing from People To People, addressed to your predecessor as Commissioner of Commerce, soliciting delegation leaders for the People To People international tours. According to its literature, People To People was founded in 1956 by Dwight D. Eisenhower to promote international understanding through direct contact among citizens of different nations. The Goodwill People To People Travel Program is an officially-licensed program of People To People International providing escorted tour services. Since 1957, the Goodwill People To People Travel Program has been sending professional occupational delegations to all areas of the world to meet their counterparts and compare methods and techniques relative to their common interests. The opportunity for exchange on a personal level is intended to contribute to world peace. The actual travel arrangements are handled by a private travel agent.

Upon receiving the mailing, you contacted People To People for further information, although you considered it unlikely that you could participate, as you were aware that foreign travel was not in your current work plan, and the expense of it would not be included in your budget. You were then told by a representative of People To People that the leader of a People To People delegation did not pay his own way on the tour. You were told that if 20 people subscribed to your tour, you would travel free of charge. If from 30 to 37 people subscribed to your group, you would also be permitted to bring one additional person free of charge.

In the course of the conversation, you were encouraged to consider leading a tour of members of the Massachusetts business community to eastern Europe and the Soviet Union, due to your past experience with travel in the area and your current connection to the Massachusetts business community.

Following the telephone conversation with the representative of People To People, you decided to contact a number of business organizations in Massachusetts to determine if there would be any interest in the proposed trip. You subsequently called the heads of six business associations from your office during business hours. As a result of these exploratory telephone calls, the head of one such association volunteered to provide you with a mailing list of members to whom you might direct the invitations.

Having received what you considered to be a strongly favorable response to the proposed trip, on November 3, 1987 you wrote to People To People enclosing a delegation agreement, the first step in the clearance process for delegation leaders. You had at that time already obtained the mailing list, and you enclosed it in your letter. The mailing list contained approximately 300 names.

You stated to us that at the time you agreed to act as a delegation leader, you intended to take the trip on your vacation time, as a private venture of your own. You did not notify the EOEA Secretary of your intent to lead the tour.

You were subsequently approved as a delegation leader by People To People, and your responsibilities then became to submit a statement of purpose for the trip, a proposed itinerary, a draft invitation letter, a mailing list of 300 to 600 names, and stationery. You also received a substantial package of information and advice for delegation leaders for your review. You stated that you drafted two letters, made the six telephone calls referred to above, drafted a brief mission statement, and received and reviewed the package of information from People To People. Your secretary typed two letters, handled 12 calls seeking additional information, mailed invitations and stationery to the travel agent, and established a data base to track response cards as they came in. You also supplied People To People with a minimum of 300 sheets of state stationery and envelopes to accompany the mailing list. All the work done by you and your secretary in connection with organizing the trip took place on state time, utilizing state resources.

On or about January 2, 1988, the People To People travel agent mailed the invitations on the state letterhead to the 300 people on the mailing list you provided. The letters were signed by you using your EOEA title. You wrote and sent an additional six letters to the heads of the business associations with whom you had previously spoken. These letters, also on state letterhead, described the trip as an "official business mission" and were also signed by you using your EOEA title. You also proposed to People to People that your group be named "State Delegation - Trade and Industry."

At no time did you inform the EOEA Secretary of your involvement with this tour. On or about January 25, 1988, the EOEA Secretary and the EOEA General Counsel learned from other sources of your involvement with People To People. At that time, the Secretary ordered you to withdraw from your role as delegation leader, which you did. You also on January 25, 1988 wrote a clarifying letter to the six business association leaders you had originally contacted, explaining that the mission as you had described it was not, in fact, an official mission of the state and reported the matter to this Commission on January 28, 1988. The tour did not take place.

II. The Conflict Law

As Undersecretary for Economic Affairs, you are a state employee for the purposes of the conflict of interest law, G.L. c. 268A. In relevant part, §23(b)(2) prohibits a state employee from using his official position to secure for himself unwarranted privileges of substantial value.

For the purposes of G.L. c. 268A, "substantial value" has been determined to be anything valued at more than $50.00. **See, Commonwealth v. Famigletti**, 4 Mass App. 584, 587 (1979); Commission Advisory No. 8, Free Passes.

The facts set forth in this letter, if proven, would appear to establish a violation of §23(b)(2). Thus, you used the resources of your office, **i.e.**, your time, secretarial support, supplies, etc., as well as the appearance of state sponsorship, in an attempt to promote a free trip for yourself and possibly for another person, for a total value of close to $8,000.00. The Commission has already ruled that use of state resources in furtherance of a private interest of your own is a violation of the statute. **See, Public Enforcement Letter 78-1.** Accordingly your use of state resources to solicit participants for a private trip appears to violate §23(b)(2). Furthermore, you knew or should have known that your use of state letterhead and your otherwise making it appear that the trip was state-sponsored made it more likely that the necessary number of people would subscribe, so that you and your guest could go free. The Commission has also ruled that an unwarranted appearance of state sponsorship or endorsement violates §23(b)(2). **See, In the Matter of Elizabeth Buckley,** 1986 Ethics Commission (page 137). **See also, EC-COI-84-43; EC-COI-82-112; EC-COI-81-88.**

Nevertheless, due to certain mitigating factors, the Commission has determined that a public adjudicatory proceeding is not necessary to resolve this case. In choosing to resolve this case by means of a Public Enforcement Letter only, the Commission was mindful of the following mitigating factors:

1. you did not, in fact, obtain any financial benefit from your involvement in the People To People tour, other than the use of the state resources referred to above.

2. The value of the state resources you used in connection with the People To People tour was relatively small, and you have agreed to reimburse your agency for the resources used.

3. At the direction of the Secretary and General Counsel of your agency, you withdrew from the tour approximately three weeks after the solicitation went out, before any commitments to attend were made by any of the persons you solicited, and you wrote an explanatory letter to the six individuals you contacted directly in connection with the tour.

4. None of the persons you solicited were regulatees of your agency, and, accordingly, there was no actual or implied coercion in your solicitation.

5. Given the nature of the People to People organization, the tour which you proposed to lead had a quasi-public purpose, and thus you appeared to have some genuine confusion as to the propriety of acting in your official capacity with respect to the tour.

6. You self-reported your actions to this Commission and have cooperated fully throughout our investigation.

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.

DATE: October 6, 1988

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss — COMMISSION ADJUDICATORY DOCKET NO. 333

IN THE MATTER
OF
PETER J. CASSIDY

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Robert H. Quinn, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Jarvis, Pappalardo

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on May 28, 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, Peter J. Cassidy, Swampscott Police Chief, had violated G.L. c. 268A, §19[1] by his participation in the following matters:

(a) the 1983 appointment of his son Michael as a permanent reserve police officer;
(b) the 1984 appointment of his son Michael as a permanent full-time police officer;
(c) the 1985 appointments of his son John, son Reid and brother Francis as special police officers;
(d) the 1986 appointments of his son Timothy as a special police officer;
(e) the 1986 appointment of sons Timothy and John as permanent reserve police officers; and
(f) the assignment of his son Peter (1983) and son Michael (1986) to night shifts.

The Respondent filed an Answer admitting several of the factual allegations, denying the conclusory allegations, and raising several affirmative defenses. Following the pre-hearing conference and document discovery period, the Petitioner and Respondent stipulated to most of the relevant facts.

Pursuant to notice, adjudicatory hearings were conducted on October 7, 1987, November 9, 1987, December 2, 1987 and February 17, 1988 before Commission member Joseph J. Basile, Jr., a duly designated Commission presiding officer. The parties thereafter submitted post-hearing briefs and reply briefs and presented oral arguments before the Commission on August 25, 1988. In rendering this Decision and Order, each participating Commission member has considered the testimony, evidence and arguments of the parties.

II. Findings of Fact

Based on the stipulations of the parties, the testimony of witnesses and the evidence introduced at the adjudicatory hearings, the Commission makes the following findings:

1. The Respondent has served as Chief of the Swampscott Police Department (SPD) since 1980. He is a popular and well-regarded figure in the community.

2. The Swampscott Board of Selectmen (Board) acts as the appointing authority for the SPD, pursuant to G.L. c. 31. The Board has final authority with respect to the interviewing and hiring of SPD personnel. In practice, the Respondent recommends personnel decisions which are formally considered and adopted by the Board.

3. The Board is comprised of members who serve on a part-time basis. The Board has confidence in the Respondent's judgment and invariably defers to his recommendations in the operation of the SPD, including personnel appointments. The Board expects that the Respondent will have been involved personally in any recommendation which he makes to the Board.

4. For the purpose of this case, there are three types of SPD appointments made by the Board upon the recommendation of the Respondent:

(a) permanent full-time police officers who are selected from civil service eligible lists, paid by the town, and who are appointed to regular police shifts;

(b) permanent reserve police officers who are also selected from civil service eligible lists and paid by the town to supplement the permanent full-time police force and fill in on regular shifts as needed; and

(c) special police officers appointed annually but not paid by the town, who possess police powers; appointment as a special police officer entitles an officer to work on police details paid for by private parties using the detail.

Most permanent full-time police officers in Swampscott have started as either permanent reserve officers or special police officers.

5. The Respondent has five sons: Peter J. Cassidy, II (Peter), Michael R. Cassidy (Michael), John R. Cassidy (John), Timothy P. Cassidy (Timothy) and Reid J. Cassidy (Reid). Peter, Michael, John and Timothy are, respectively, either full-time or permanent reserve SPD police officers. The Respondent's son Reid and brother Francis J. Cassidy (Francis) are SPD special police officers.

(a) 1983 Appointment of Michael as Permanent Reserve Police Officer

6. Sometime prior to April 21, 1983, with the approval of the Board, Respondent wrote to the state Department of Personnel Administration (DPA) stating that there were seven permanent reserve openings on the SPD, to be paid at the rate of $46.16 per day, and requesting the issuance of a civil service list of eligible candidates. At the time he requisitioned the list, the Respondent knew that his son Michael had previously taken the statewide civil service examination prerequisite to appointment as a police officer and knew that Michael had expressed an interest to serve in Swampscott. Michael's name appeared seventh, according to examination score, on the civil service list, dated April 21, 1983, which DPA issued in response to the Respondent's requisition. Ten of the sixteen candidates listed on the civil service list, including Michael, signed the list affirming that they would accept appointment as SPD reserve officers. Six of those signing were listed above Michael.

7. Upon receipt of a requisition for a civil service list, DPA prepares a list of names adequate for the number of vacancies. The list ranks candidates according to their score, residence and veteran status. On the April 21, 1983 civil service list, Michael was the lowest ranked of seven Swampscott residents listed.

8. Prior to September 15, 1983, on which day the Board considered the appointment of reserve police officers, the Respondent participated in an official SPD selection process whereby it was determined that six of the ten candidates who had signed the civil service list, including Michael, would be recommended for appointment. As part of this selection process, the Respondent reviewed the background information questionnaires that the reserve candidates had filled out and filed with the SPD. He also discussed with SPD Captain Toomey, who has supervised the background investigations which the SPD conducted as to each candidate, the results of the background investigations. In addition, the Respondent formally interviewed at least two of the candidates, Dennis E. Hamson and Michael McNelley, and asked them questions about their background and interest in working for the SPD.[2] The Respondent also met with two

other candidates, Kevin Calnan and Stephen Picone regarding the position.

9. Subsequent to these meetings, the Respondent personally decided that, from the civil service list of candidates, of the ten who signed the list, six, including Michael, would be recommended for appointment, and four would not be. The Respondent personally evaluated how the candidates compared to each other in their qualifications and decided the order in which the candidates would be recommended for appointment by the Board. Because he thought Dennis Hamson was the best qualified candidate, the Respondent ranked him first, although he was twelfth on the civil service list. The Respondent ranked his son Michael fourth, ahead of John R. Donahue, who had received a higher score on the civil service examination and was listed on the civil service list ahead of Michael, and whom the Respondent had ranked sixth. Having personally decided this ranking, the Respondent further determined, for seniority purposes, to recommend that the Board appoint the candidates, in order of their rank, effective on successive days and wrote a letter, dated September 15, 1983, to the Board making that recommendation. The order of appointment determined the order in which the reserve officers would be listed on the civil service list from which permanent full-time police officers would ultimately be appointed. All SPD full-time appointments are made from the list of permanent reserve SPD officers.

10. During the relevant period, DPA regulations required an appointing authority making appointments from the civil service list to make its first appointment from among the top three people on the list willing to accept, the second appointment from among the top five, etc. As far as DPA was concerned, however, the appointing authority was free to appoint the candidates in any order of seniority it chose and did not need to make the highest civil service listed candidate among those appointed the most senior appointed.

11. At the Board meeting on September 15, 1983, the Respondent recommended the appointment of Michael and five others as reserve officers, and the Board voted unanimously to appoint the recommended candidates. The appointments were to take effect on six separate days from September 16 through September 22, 1983, as recommended by the Respondent in his September 15, 1983 letter. Michael's appointment was effective September 20, 1983. The order of the effective dates of the appointments did not follow the order of the candidates's names on the civil service list, but rather the order in which the Respondent had recommended the candidates.

12. Because the reserve appointments made by the Board at the Respondent's recommendation had bypassed several candidates who were willing to be appointed, DPA regulations and G.L. c.31, §27 required that the appointments would not be approved by DPA and become effective until the DPA received a letter stating reasons why the candidates appointed were the best candidates for the position. On October 19, 1983, the Respondent sent a letter to the DPA informing it of the September 15, 1983 appointments and stating as to those appointed:

> The above individuals were appointed as the result of a total evaluation and observation by myself and other department superior officers. Our feelings are in that comparison to other nominees and their evaluations, the above appointments are the best selections for the Swampscott Police Department at this time.

On March 5, 1984, the Respondent again wrote to DPA concerning the September 15, 1983 appointments, providing the effective date of each appointment and stating as to each candidate that the candidate "... upon interview, background investigation and overall evaluation by myself and other superior officers of the Department appears to be the best selection for the [SPD] at this time ..."

(b) 1984 Appointment of Michael as Permanent Full-Time Police Officer

13. Some time prior to December 6, 1984, with the approval of the Board, the Respondent sent a requisition to the DPA for a civil service list of candidates eligible to fill three permanent full-time SPD officer positions. In response, the DPA issued a civil service list, dated December 6, 1984, of six names, including Michael's, listed according to their SPD reserve police officer appointment dates. Four of the six persons listed on the list, including Michael, signed the list affirming their willingness to accept a permanent full-time SPD appointment. Two of the candidates so signing were listed ahead of Michael.

14. Prior to December 13, 1984, on which day the Board considered the appointment of permanent full-time SPD police officers, the Respondent participated in an official SPD selection process in which it was determined that Michael and one other candidate would be recommended by the Respondent for appointment. The Respondent participated in the review of interviews, background screenings and physical and psychological evaluations of the candidates, and formally interviewed at least one of the four candidates, John Dube, concerning, among other things, his interest in becoming a police officer and what benefit he could provide the community. As a result of these activities, the Respondent made the determination that, of the four candidates, Michael and John Dube were fit to be recommended for appointment as full-time police officers.

15. At the Board meeting on December 13, 1984, the Respondent recommended that Michael and John Dube be appointed as permanent full-time police offi-

cers, and the Board unanimously voted to appoint the recommended candidates. Prior to voting, the Board asked if all applicants had been tested medically, physically and psychologically, and the Respondent stated that they had been. The Respondent also confirmed that, on his recommendation, Michael and Dube were the best suited of the candidates for the positions.

16. In appointing Michael and Dube, the Board bypassed Dennis Hamson, who was listed ahead of them on the civil service list and who had signed the list signifying his willingness to be appointed as a full-time police officer. On December 19, 1984, the Respondent wrote a letter to DPA stating respectively as to Michael and Dube that "... upon interview, background and overall evaluation by myself and other superior officers of the Department [he] appears to be the best selection for the [SPD] at this time."

(c) 1985 Appointment of John, Reid and Francis as Special Police Officers

17. On or before June 11, 1985, the Respondent interviewed and updated a list of SPD special police officers. Included on the list were the names of the Respondent's sons, John and Reid, and his brother, Francis. At a June 11, 1985 meeting of the Board, the Respondent submitted the aforementioned list of names to the Board for appointment. The Board unanimously voted, without discussion, to appoint the listed special police officers as submitted. As special police officers, Francis, John and Reid were each eligible to work paid private details.[3]

(d) 1986 Appointment of Timothy as Special Police Officer

18. At a Board meeting on January 23, 1986, the Respondent submitted a list of the names of nine persons, including his youngest son, Timothy, for appointment as special police officers. The Respondent told the Board, in asking for the appointments, that he was trying to build up the force and that the appointments were needed. Upon questioning by the Board as to why special police officers were needed, the Respondent stated that the new appointees would be unpaid volunteers and would be used for traffic, parades and similar duties. The Board voted unanimously to appoint those named on the list submitted by the Respondent.[4]

19. At no time prior to his participation in the procedures leading to the appointment of his son Michael, first as permanent reserve, then permanent full-time police officer, or the appointments of his sons, John, Reid and Timothy and his brother Francis as special police officers, did the Respondent make a written disclosure to the Board that he would be participating in matters in which members of his immediate family had financial interests or seek or receive in advance of his participation a written determination by the Board that his immediate family members' financial interests in their respective appointments were not so substantial as to affect the integrity of the services the Town might expect from him in his participation in the appointment process.

(e) 1986 Appointment of John and Timothy as Permanent Reserve Police Officers

20. Prior to June 24, 1986, on the vote of the Board, the Respondent sent a requisition to the DPA for a civil service list of candidates from which ten SPD permanent reserve police officer positions would be filled. In response, the DPA issued a list, dated June 27, 1986, of thirty-five names, arranged by civil service examination score, on which John was listed fifth and Timothy twelfth. The Respondent was aware at the time that he submitted the requisition that John and Timothy had previously taken the statewide civil service examination prerequisite to appointment for police officer and knew that they had expressed an interest in serving Swampscott.

21. Between June 27, and September 18, 1986, the SPD conducted background screenings and so-called general psychological interviews of the reserve officer candidates. This activity took place under a program prepared by the Respondent, adopted by the Board and approved by DPA. The Respondent took part in directing the background screenings and determined, or took part in the determination of, what would be inquired into in those screenings. The Respondent also participated in the selection of the persons making up the Oral Boards Panel, which conducted the general psychological interviews of the candidates, and in the choice of the psychological consultant hired to assist the SPD in the police officer selection process.

22. The SPD Oral Boards Process interviewed twenty-seven of the thirty-five persons on the civil service list, including John and Timothy. The Respondent's highest ranking subordinate, Senior Captain Toomey, was one of three members of the Oral Boards Panel. The Panel recommended both John and Timothy, along with seven others, without reservations. The Panel also recommended nine candidates with reservations and judged nine other candidates to be unacceptable.

23. Sometime on or before September 18, 1986, the Respondent compiled a list of candidates which he would recommend that the Board appoint as permanent reserve officers. The list included the names of the Respondent's sons, Timothy and John, did not include the names of three candidates recommended without reservation by the Oral Boards Panel, and included the names of four candidates whom the Oral Boards Panel recommended with reservations.

24. At a meeting of the Board on September 18, 1986, the Respondent recommended ten candidates

from the civil service list requisitioned, including John and Timothy, for appointment as permanent reserve officers. The Board approved the appointment of the ten recommended candidates, noting the fact, after both John's and Timothy's names, that they were the Respondent's sons.

25. At no time prior to his participation in the procedures leading to the Board's appointment of his sons John and Timothy as permanent reserve officers did the Respondent make a written disclosure to the Board that he would be participating in matters in which his sons had financial interests, or receive in advance of his participation a written determination by the Board that his sons' financial interests in their respective appointments were not so substantial as to affect the integrity of the services Swampscott might expect from him in his participation in the appointment process.

26. At the meeting on September 18, 1986, the Board voted to approve a letter dated September 18, 1986 and addressed to the Respondent, which acknowledged that the Respondent had advised the Board that his sons, John and Timothy, were "on the list for appointment to the position of Reserve Police Officer" and to inform the Respondent of the Board's determination that the Respondent's "financial interest in either or both [sons] being selected [by the Board]" was "not so substantial that it would be deemed [by the Board] likely to affect [the Respondent's] integrity in whatever involvement or participation, if any, that [the Respondent] might have in the process of [the Board] selecting candidates from [the] list." The letter was signed by the Chairman of the Board.

(f) Night Shift Assignments of Peter and Michael

27. SPD police officers assigned to night shifts are paid a shift differential amounting to a couple of hundred dollars per year. The Respondent, as SPD Chief, supervises shift assignments. That supervision includes deciding who works each shift and does not require approval of the Board. In addition, as Chief, the Respondent signs the duty roster, prepared by a subordinate, on which shift assignments are set forth and which is ineffective without his signature.

28. Since August, 1983, the Respondent has assigned or renewed the assignment to the night shift of his son Peter, who has been a permanent full-time SPD officer since February, 1983. Peter receives a shift differential for working the night shift. In addition to receiving the night shift differential, working the night shift accommodates Peter's commercial fishing schedule.

29. Sometime during 1986, the Respondent assigned his son Michael to the night shift. Michael received a shift differential for working the night shift.

30. At no time prior to making the decisions to assign his sons Peter and Michael to the night shift did the Respondent make a written disclosure to the Board that he would be participating in matters in which his sons had financial interests, or seek or receive in advance of his participation, a written determination by the Board that his sons' financial interests in their respective assignments to night duty were not so substantial as to affect the integrity of the services Swampscott might expect from the Respondent in his making shift assignments.

III. Decision

For the reasons which follow, we conclude that the Respondent violated G.L. c. 268A, §19 as alleged in substantial part in the Order to Show Cause, and that no exemptions apply, either as a matter of law or affirmative defense.

Under G.L. c. 268A, §19, with certain exceptions, a municipal employee is prohibited from participating[5] in any particular matter[6] in which, to his knowledge, a member of his immediate family[7] has a financial interest. The financial interests covered by §19 are those which are reasonably foreseeable, **EC-COI-84-96**, and include the interest which immediate family members have in their appointments to paid positions. **Sciuto v. City of Lawrence**, 389 Mass. 939 (1983) (city alderman found to have violated G.L. c. 268A, §19 by the appointment of his brother to positions in the police department); **Commission Advisory No. 11 (Nepotism)** (1986).

At the outset, it is undisputed that the Respondent has been, at all relevant times, a municipal employee within the meaning of G.L. c. 268A, §1(g). It is also undisputed that the Board, as the appointing authority, makes the final decision regarding the appointment of permanent reserve police officers, permanent full-time police officers and special police officers. The conclusion that the Board makes the final appointment decision does not rule out, however, findings of prior participation in the same appointment by other municipal employees. The definition of participate in G.L. c. 268A, §1(j) includes recommendation and anticipates that intermediate participants in a chain of command may be found to have participated under §1(j) in a decision finally approved by higher level officials. While peripheral or preliminary involvement may lack, in certain circumstances, the degree of substantiality required by §1(j), **see, EC-COI-87-32, 81-113**, the making of recommendations to the final decision maker has customarily been regarded as substantial participation. **See, In the Matter of James Craven**, 1980 SEC 17, aff'd **sub nom Craven v. State Ethics Commission**, 390 Mass. 191 (1983); **EC-COI-85-26; 83-174; 81-108.**

1. Substantive Violations

(a) 1983 Appointment of Michael as a Permanent Reserve Officer.

We conclude that the Respondent participated in the appointment of his son Michael as a permanent reserve police officer in 1983, in violation of G.L. c. 268A, §19. The appointment of Michael was a particular matter in which a member of the Respondent's immediate family had a financial interest of which the Respondent was aware. The Respondent personally and substantially participated in the appointment through his activities as Police Chief leading up to the Board's acceptance of his recommendation.

Specifically, the Respondent interviewed candidates for the appointment, weighed the merits of the candidates, made formal recommendations to the Board and personally presented his recommendations before the Board.[8] Given the deference which the Board customarily accorded the Respondent in the operation of SPD, any personnel recommendation made by the Respondent would be ratified and formally approved by the Board. The Respondent's role in the appointment process was substantial because the Board would not have appointed Michael as a permanent reserve officer unless the Respondent had recommended the appointment. In light of the influential impact of the Respondent's recommendation, together with the Respondent's prior interview and evaluative activities leading up to the recommendation, we do not regard the Respondent's activities in connection with Michael's appointment as peripheral or preliminary.

(b) The 1984 Appointment of Michael as a Permanent Full-time Police Officer.

The legal analysis supporting a finding of a §19 violation in the 1984 appointment of Michael as a permanent full-time police officer is nearly identical to the analysis of the 1983 appointment. The record documents the personal and substantial involvement of the Respondent in personally interviewing and ranking candidates and making recommendations and presentations to the Board. Although for §19 purposes it may not be relevant that the Respondent passed over a candidate ranked higher than his son, this fact will be relevant in considering an appropriate penalty.

(c) The 1985 Appointment of John, Reid and Francis as Special Police Officers.

It is undisputed that the Respondent recommended and personally presented to the Board the appointment of sons John and Reid and brother Francis as special police officers. Although the appointment and reappointment of special police officers appears to be more pro forma than the selection of permanent reserve or regular police officers, the record reflects the discretion which the Respondent exercised in determining whether to include names in his periodic recommendations to the Board. The discretion, coupled with his recommendation activities, support a finding that his participation was personal and substantial.

We have closely examined whether the Respondent's family members had a financial interest in their appointments. The special police officers positions are unpaid, and the Respondent informed the Board that he was attempting to build up the special force and that the specials would be unpaid volunteers used for traffic and parades. These facts merely demonstrated, however, that the Respondent was aware that his family members would not receive Town funds for their services.

The practical reality of appointment as a special police officer, a reality known to both the Respondent and his family members, was that appointment as a special police officer qualified his family members to work on paid, private details. In effect, the appointment was a license to earn money on private details, and, therefore, his family members had a reasonably foreseeable financial interest in their appointments. The foreseeability of this financial interest is supported by evidence documenting the additional private detail income earned by John in 1986.

On the other hand, his brother Francis did not have had a reasonably foreseeable financial interest in his appointment. He testified that he had served as a special police officer for thirty years, that he regarded the appointment as honorary, and that he had never earned any money as a special police officer. Assuming that the Respondent was aware of his brother's limited use of the position as an honorary title, the presumption that Francis had a foreseeable financial interest in his annual appointment in 1985 was rebutted. Accordingly, the Respondent's appointment of his brother in 1985 did not violate §19. **See, In the Matter of Dana Chase**, 1983 SEC 153, 156; **EC-COI-87-1**. The record is less clear with respect to the foreseeability of Reid's financial interest in his appointment. Because the special police officer appointment entitled Reid to earn compensation from private details, we presume that the potential for such earnings is a sufficient financial interest for §19 purposes, absent evidence to the contrary. While we are persuaded by the evidence that Francis had, in effect, renounced any financial interest in his appointment, there is no such evidence supporting a similar finding with respect to Reid. Accordingly, we conclude that the Respondent's participation in the appointment of John and Reid violated §19, whereas his participation in the appointment of Francis was not a matter in which Francis had a foreseeable financial interest.

(d) The 1986 Appointment of Timothy as a Special Police Officer.

The Respondent's participation in the 1985 special police officer appointment process for Timothy is similar

to the activities which constituted personal and substantial participation in his other family members' appointments as special police officers in 1985. Specifically, we conclude that the Respondent participated in Timothy's appointment by his submitting and recommending Timothy's name to the Board and by his discussing the reasons for the appointment with the Board. Timothy's financial interest in the appointment is supported by Timothy's earning substantial private detail income during that year.

(e) The 1986 Appointment of John and Timothy as Permanent Reserve Officers.

The evidence supports our conclusion that the Respondent personally and substantially participated in the appointment of sons John and Timothy as permanent reserve police officers. Prior to making any presentation to the Board, the Respondent initiated the background screening and psychological evaluation process for the candidates, evaluated the merits of each candidate and prepared a written recommendation to the Board which included the appointment of his two sons. Therefore, the Respondent's conduct prior to his personal presentation to the Board on September 18, 1986 constituted personal and substantial participation in their appointment.

By September, 1986, the Board was made aware that it could permit the Respondent to participate in matters affecting his family members' financial interest by making a written determination tracking the exemption language of §19(b)(1). Accordingly, the Board approved a written exemption for the Respondent with respect to his presentation at the September 16, 1986 meeting. While the language of the exemption was not entirely consistent with the exemption language of §19(b)(1), we find that the determination was sufficient to permit the Respondent to participate thereafter in the recommendation of his sons for appointment. We do not believe, however, that the determination was sufficient to insulate the Respondent from violations which had previously occurred with respect to his sons' appointments because such an exemption can only be granted in advance of participation and must be based on a disclosure of all relevant facts. While the Board was apparently attempting to assist the Respondent in avoiding violating §19, there is no evidence that it was aware of the Respondent's specific conduct which led up to his appearance in support of the recommendations.

(f) Night Shift Assignments of Peter and Michael.

The Respondent's son Peter was appointed as a permanent full-time police officer in February, 1983. In August, 1983, the Respondent assigned Peter to the night shift, thereby providing Peter with an additional night shift salary differential as well as a schedule accommodation for Peter's commercial lobster business.[9] The Respondent also assigned his son Michael, a permanent full-time police officer, to a night shift in 1986, thereby entitling Michael to a night shift salary differential. The shift assignment authority rests with the Respondent and does not require formal approval by the Board. In making the shift assignments, the Respondent's actions constituted personal and substantial participation within the meaning of §1(j). **See, Commission Advisory No. 11 (Nepotism)** (1986).

The Respondent's night shift assignments, therefore, constituted participation in matters in which his family members had a financial interest. The violations, however, are largely the consequence of the fact that the Respondent was supervising his sons and would inevitably participate in matters which would have a financial impact on them.

2. Exemptions

Under §19(b)(1) had the Respondent notified the Board of the several matters before him in which his family members had financial interests, he could have received written determination permitting his participation and thereby providing him with a complete defense to his violations. The exemption would have applied not only to his personal presentations before the Board but also his participation in the process leading up to his recommendations. With the exception of his recommendations regarding John and Timothy to the Board, in September, 1986, the Respondent did not follow the statutory procedure. By not disclosing the relevant facts to the Board and by not receiving from the Board advance written permission to participate, the Respondent failed to qualify for any exemption under §19(b)(1). **See, In the Matter of William G. McLean**, 1982 SEC 75, 78.

To be sure, the Board was aware of the fact that the Respondent was recommending the appointment of his family members, and the Respondent did not conceal the relationships in his presentations. Moreover, given the trust and deference which the Board accorded the Respondent as Chief, it is likely that, if called upon, the Board would have granted the Respondent written permission to participate in all matters relating to the appointment of his family members. Nonetheless, the Respondent's participation was not exempted under the required conditions of §19(b)(1). The nature of these omissions is a relevant consideration, however, in the assessment of appropriate penalties.

3. Other Defenses

In his Answer, the Respondent asserted that the allegations in the Order to Show Cause were time-barred by a two-year statute of limitations. In effect, the Respondent has challenged the propriety of the Commission's three-year statute of limitations, established by regulation in 1984. **See, 930 CMR 1.02(10).** During the pendency of these hearings, we fully addressed an identical challenge in **the Matter of Robert Sullivan**, 1987 SEC 312, 313 (October 30, 1987). In light of our recent affirmation of the propriety of the three-year limitations period in that decision, we will not restate those reasons here. We have reviewed the Respondent's contentions supporting a shorter limitations period but remain persuaded by the validity of the three-year statute of limitations regulation.

The Respondent's brief also challenges the Commission's proceedings on several constitutional grounds. Because we assume the constitutionality of the Commission's statute and procedure, we do not customarily address the constitutional challenges at the administrative level.We would add, however, that in our view, none of the Respondent's challenges appears to have any merit, either with respect to the statute on its face or with respect to how the statute is applied to the Respondent. To the extent that most of the challenges are grounded on the assertion that Commission proceedings are criminal, as opposed to civil in nature, the Supreme Judicial Court has previously resolved this point in the Commission's favor. **See, Craven v. State Ethics Commission**, 390 Mass. 191 (1983); **Quinn v. State Ethics Commission**, 401 Mass. 210 (1987) **Opinion of the Justices**, 375 Mass. 795 (1978).

IV. Sanctions

Although G.L. c. 268B, §4 authorizes our assessment of civil penalties of up to $2,000.00 for each violation of G.L. c. 268A, we are not inclined to assess the maximum penalty for each of the Respondent's nine distinct violations of G.L. c. 268A, §19. In some ways, the Respondent makes a strong case for mitigation of fines. The Respondent made no effort to conceal the fact that he was recommending his family members. Moreover, Town officials who could have taken preventative action were aware of the Respondent's situation and chose not to raise any objection. On the other hand, all of his §19 violations occurred after the 1983 **Sciuto** decision, and his ignorance of the prohibition of §19 is not a defense.[10] His violations were widespread and reasonably raised questions in the SPD about presumed favoritism towards his family members, particularly in the bypassing of qualified outsiders. While there is no evidence that the Respondent's family members were unqualified for the positions to which they were appointed, compliance with the §19 exemption procedure could have made the Board more aware of the Respondent's conflicting loyalties in the matters in which he was participating. Compliance could have also enabled the Board to determine whether additional safeguards were necessary to preserve the integrity of the appointment process.

We have weighed these aggravating and mitigating factors and conclude that a civil penalty of $200.00 is appropriate for each appointment process in which the Respondent's participation violated G.L. c. 268A, §19. Specifically, we assess a $200.00 civil penalty for his participation in each of the following matters:

(a) the 1983 appointment of his son Michael as a permanent reserve police officer;
(b) the 1984 appointment of his son Michael as a permanent full-time police officer;
(c) the 1985 appointments of his son John and son Reid as special police officers;
(d) the 1986 appointment of his son Timothy as a special police officer; and
(e) the 1986 appointments of his son Timothy and son John as permanent reserve police officers.

We are not inclined to impose additional penalties on the Respondent for his night shift assignments of Peter and Michael in 1986.

V. Order

Based on the foregoing, we conclude that the Respondent violated G.L. c. 268A through his participation in the appointment and shift assignment of his sons, and we order the Respondent to pay to the Commission a civil penalty of $1,000.00.

Date Authorized: October 19, 1988

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[1]/G.L. c. 268A, 19 provides as follows:

(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

(b) 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]/Although the record contains some discrepancy regarding the precise number of candidates personally interviewed by the Respondent, we find that the Respondent did participate in the interview process which led to the decisions as to whom to recommend to the Board.

[3]/Francis had served as a special police officer for thirty years, regarded the position as honorary, and had never earned money from the private details as a special police officer.

[4]/Between August 29 and November 1, 1986, John was paid at least $1,771.21 for his SPD special police officer duties. Between May 23 and No-

vember 2, 1986, Timothy was paid at least $4,990.54 for his services as a SPD special police officer. These monies were earned by John and Timothy by working paid private details.

[5]/"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).

[6]/"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).

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

[8]/The record contains conflicting testimony regarding whether the Respondent personally attended a psychological evaluation of Michael. The Respondent initially stipulated that he had attended such an evaluation but later recanted the testimony. The Petitioner has not pressed this point, and, in any event, there is ample additional evidence to support a finding of participation.

[9]/Peter testified that he had requested a later shift to accommodate his lobster business but that his father had assigned him to the night shift for the needs of the department.

[10]/Following Sciuto, it was incumbent on the Respondent to initiate an advisory opinion request with either the Town Counsel or the Commission seeking prospective guidance over the propriety of his recommending the appointment of his immediate family members. His failure to initiate this process cannot insulate him from liability for violations of G.L. c. 268A.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 332

IN THE MATTER
OF
NORMAN McMANN

Appearances: Stephen P. Fauteux, Esq.
Diane W. Paschall, Esq.
Counsel for Petitioner

Richard Knott, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Jarvis, Pappalardo

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 28, 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 Norman McMann (Respondent), Honeydew Donut Shop owner, violated G.L. c. 268A, §19[1] and 20[2] by:

1. voting 18 times as a member of the Bristol-Plymouth Regional School Committee (School Committee) to approve payment of a cafeteria warrant which included payments to McKee Enterprises (McKee); and
2. having a direct or indirect financial interest in the daily contract made by the Bristol-Plymouth Regional Technical School District (School District), from April, 1984 to January, 1986, a municipal agency of the same municipality where Respondent serves on the School Committee.

Respondent filed an Answer on May 19, 1987 in which he raised two affirmative defenses:

1. that the statute of limitations or laches barred the proceedings; and
2. that the Commission denied Respondent's right to due process by not permitting Respondent to present his side of the case to the Commission at the time it found reasonable cause.

The parties stipulated that, during the relevant time, Respondent was a member of the School Committee and the owner of the donut shop. Respondent's Answer denied all other material allegations contained in the Order.

An adjudicatory hearing was held on October 29, 1987 before Commission Chairman Colin S. Diver, a duly designated presiding officer. At the close of Petitioner's case, the Respondent moved to dismiss on the grounds that Petitioner did not establish there was a contract with the School District and that Respondent had no financial interest in the School District's payments to McKee. The hearing officer denied the motion inasmuch as only the full Commission may grant such a motion. 930 CMR 1.01(6)(d). Respondent's grounds for dismissal are repeated in his brief opposing the Petitioner's allegations in the Order to Show Cause. Accordingly, this Decision and Order addresses those grounds.

The parties filed post-hearing briefs and presented oral argument before the Commission on September 14, 1988. In rendering this Decision and Order, the Commission has considered the testimony, evidence and arguments of the parties.

II. Findings of Fact

1. Respondent was, at all relevant times, a member of the School Committee and, therefore, a municipal employee.

2. The School Committee was responsible for approving payment of bills from vendors who supply goods to the School cafeteria.

3. A cafeteria warrant includes cafeteria expenses for the month and a line item for each vendor who provided supplies. Supporting documentation for the warrant, including individual bills or receipts, was available to the School Committee.

4. When the School Committee approved the warrant, it was thereafter submitted to the School District treasurer who would in turn pay the vendor.

5. At all relevant times, Respondent was president and part owner of Silver City Donut, Inc., a corporation which owned and operated a Honeydew donut franchise (the Donut Shop) in Taunton, MA. Brenda Dean (Dean) was also a part owner of the corporation. Respondent was also, at all applicable times, an employee of the corporation.

6. Prior to Respondent's election to the School Committee, the School purchased donuts from the Donut Shop. The cafeteria manager testified that she purchased all the food, that she turned all her bills into the business manager, and that the School Committee had to approve whether or not to pay the bills. The donuts were then delivered to the School by Respondent, Wilbur McKee or Dean. The donuts were delivered in boxes with a Honeydew logo.

7. The sale of donuts to the School represented 10% of the Donut Shop's business.

8. In 1984, the School Committee raised a question of conflict of interest if Respondent continued to sell donuts to the School. The School Committee requested a legal opinion on this issue from the School Committee attorney, David Gay.

9. In a letter dated January 25, 1984, Respondent requested an opinion from Attorney Gay "if it is legally permissible for [Respondent] to continue any business transaction with the School."

10. On February 15, 1984, Attorney Gay wrote an opinion to Respondent that stated "[I]n my opinion, your election to the Bristol-Plymouth School Committee requires that your business corporation cease its contractual relationship with the School." In a separate cover letter of the same date to Respondent, Attorney Gay stated "I am sorry that there is no method to allow the business to continue ..."

11. After Respondent was notified to stop selling donuts to the School, he had a conversation with his baker, Wilbur McKee, informing him of the conflict of interest.

12. McKee asked Respondent if McKee could legally sell the Donut Shop donuts to the School. Respondent stated that he would ask Attorney Gay if this solution was permitted. Respondent later told McKee that it was permitted.

13. Respondent informed the cafeteria manager that Respondent would no longer sell donuts to the School but that, if she wanted, the cafeteria manager could purchase donuts from McKee Enterprises. Respondent did not pressure the cafeteria manager to buy from McKee. Respondent informed the manager of McKee's name and address for purposes of school payment.

14. McKee then delivered the donuts to the School in plain, white boxes. Donut Shop donuts were delivered to another school and wholesale account in Honeydew logo boxes.

15. Prior to this arrangement with Respondent, McKee did not sell donuts to customers although he did provide a few dozen a week to his wife (at no cost) and to his cousin.

16. McKee had no permit to make wholesale sales. He had no letterhead as McKee Enterprises. The checks he issued to pay the Donut Shop for the School's donuts were drawn on his personal account. McKee Enterprises was a name McKee used only for his business with the School.

17. When Respondent and McKee arranged that McKee would sell the Donut Shop donuts to the School, the donuts were ordered the same way they had been ordered when the Donut Shop sold the donuts to the School directly. The cafeteria manager placed the orders and someone at the Donut Shop, Respondent, Dean or any of the other employees, took the order. McKee baked the donuts nightly and the delivery slips were filled out by Dean.

18. After Respondent and McKee arranged that McKee would sell donuts to the School, Respondent rather than McKee, kept records of the School sales and delivery slips. Respondent also arranged with McKee that he would give McKee 10% of whatever the sale was going to the School. When the School paid McKee for the donuts, McKee either signed the check over to Respondent who gave him 10% back or McKee wrote Respondent a check for 90% of the total he received from the School.

19. The 10% amount retained by McKee was given by Respondent to McKee in exchange for the service of delivering donuts to the school.

20. The Donut Shop would receive payment from McKee when and if McKee received his check from the School.

21. Respondent decided what price to charge the School for donuts, both before and after McKee was selling the donuts to the School.

22. On September 3, 1985, Respondent gave a deposition under oath in the **Honeydew Associates, Inc. v. Silver City Donut, Inc.** (Bristol Sup. Ct. No. 18498) where he testified that, as of that date, the Donut Shop had one wholesale account, the Bristol-Plymouth School. He did not mention McKee Enterprises as a wholesale account.

23. From March, 1984 to December, 1985, the School purchased $13,782.00 in donuts from McKee Enterprises. These purchases involved a total of 319 separate orders and deliveries. During that time, McKee paid $12,403.80 to the Donut Shop.

24. From April, 1984 to January, 1986, Respondent voted 18 times as a School Committee member to approve cafeteria warrants each of which included payment to McKee Enterprises. The total amount approved in these warrants for McKee Enterprises for donuts was $13,782.00. Respondent knew that the payments to

McKee were for donuts sold by the Donut Shop and that Respondent would receive 90% while McKee would receive 10%.

25. Respondent's testimony that he thought that if he sold to another person he would not violate the law is not credible. Respondent specifically arranged to use McKee as a "straw" to conceal his §19 and 20 violations.

III. Decision

For the reasons stated below, the Commission concludes that the Respondent violated G.L. c. 268A, §19 on 18 separate occasions by participating in 18 votes involving particular matters in which he had a financial interest and that the Respondent violated G.L. c. 268A, §20 on 319 separate occasions by having a financial interest in a contract with the School District. The Commission further concludes that these violations were willful and involved a course of conduct constituting both the §19 and 20 violations as well as an effort to conceal these violations.

A. Statute of Limitations

The Commission has promulgated a regulation concerning the assertion of a statute of limitations defense. 930 CMR 1.02(10)(c) [3] Where a statute of limitations defense has been asserted, Petitioner has the burden of showing that a disinterested person learned of the violation no more than three years before the Order was issued. Petitioner has submitted the affidavits of Dan Curhan, Richard Krant and William Durette to satisfy this burden. We find these sufficient to satisfy the burden found in 930 CMR 1.02(10)(c).

B. Due Process

Respondent contends that his due process rights were violated because he was not allowed, at the time the Commission found reasonable cause, to present his side of the case. This defense was fully addressed by the Commission in a 1980 case indicating that an Order to Show Cause, valid on its face, would not be set aside on the ground that evidence presented to the Commission was inadequate or insufficient, since the adequacy and sufficiency of the evidence could and should be tested, in the first instance, at the administrative hearing. **See, In the Matter of John R. Buckley**, 1980 Ethics Commission 2.

C. Substantive Violations

1. Section 20

Municipal employees are prohibited by §20 of G.L. c. 268A from having a direct or indirect financial interest in contracts made by the municipality. The Commission has previously concluded in **EC-COI-82-25** that a "regional school district is considered an independent 'municipal agency' for purposes of G.L. c. 268A." **See also, EC-COI-83-74.** Respondent was clearly holding office in and performing services for an independent municipal agency within the meaning of G.L. c. 268A, §1(g) and therefore was a municipal employee.

Respondent contends that, even if he was a municipal employee of an independent municipal agency when he served on the School Committee, the express language of §20 indicates that its prohibition applies only to a municipal employee who has a financial interest in a contract made by a municipal agency and does not extend to a financial interest in a contract made by an independent municipal agency. This reading of §20 contradicts the Commission's determination that a regional school district is a municipal agency for the purposes of the conflict law, as well as the Commission's mandate to give the statute a workable meaning. **See, EC-COI-82-25; Graham v. McGrail**, 370 Mass. 133, 140 (1976). **EC-COI-82-25** reflects the Commission's affirmation of the Attorney General's determination that school districts perform municipal functions under municipal control and are, therefore, municipal agencies. **See, A.G. Conflict Opinion No. 98.** Respondent's argument is also rebutted by the general intent of G.L. c. 268A's drafters to produce comprehensive legislation. Respondent advances no reason why the drafters would have chosen to exclude independent municipal agencies from the broad prophylactic rule articulated in §20. Indeed, the School Committee's own counsel offered the Respondent an opinion on the legality of his direct contract with the School District that interpreted §20 consistent with this Commission precedent.

Respondent contends that there was no contract made by a municipal agency in this case because:

(a) The parties stipulated that the municipal agency alleged to have made the contract is the Bristol-Plymouth Regional Technical School District and a district cannot be a municipal agency;
(b) The cafeteria manager did not have statutory authority to bind the School District to a contract; therefore, there was no contract;
(c) Section 20 of G.L. c. 268A only addresses contracts for personal services;
(d) The cafeteria manager and the superintendent did not believe there was a contract to purchase donuts.

None of these contentions has merit.

The Commission concluded in **EC-COI-82-25** that a "regional school district is considered a 'municipal agency' for purposes of G.L. c. 268A."

Whether the cafeteria manager had statutory authority to bind the School District to a contract is irrelevant.

The fact is that, based on her testimony, the cafeteria manager routinely bound the School District to contracts for the purchase of cafeteria goods. When there is "a bargained-for exchange, offer, acceptance, and consideration," there is a contract. **See, Quinn v. State Ethics Commission**, 401 Mass. 210, 216 (1987). Here, the Donut Shop (either Respondent or McKee) offered to sell donuts to the School, the cafeteria manager accepted that offer on behalf of the School and the School paid money, consideration, for the donuts. We credit the testimony of the cafeteria manager that she purchased the cafeteria food, turned all bills in to the business manager, and it was then left to the School Committee to pay the bills or not. In every instance of the sale of donuts, the School Committee voted to approve of payment and the School District did pay for the donuts. **See, Conley v. Ipswich**, 352 Mass. 194, 204 (1967) (each time a sale is made, there is a separate contract). Therefore, even if the cafeteria manager had no actual authority to bind the School Committee to purchase donuts she had apparent authority to purchase donuts which authority was subsequently ratified.

It is well settled that §20 of G.L. c. 268A applies to contracts for the sale of goods as well as personal service contracts. Section 20 applies to all municipal contracts. There is no language in §20 which exempts contracts for the sale of goods. Sections 7 and 20 have been interpreted to include the sale of goods consistently since prior to 1965. **See**, Buss **Conflict of Interest Law: An Analysis**, 45 B.U.L. Rev. 299, 368 (1965):

> The Company which sells office supplies, no less than the company which plies bulldozers makes state contracts...

Respondent's final argument that the superintendent and cafeteria manager do not believe a contract existed neither reflects the actual testimony nor has any relevance as a legal argument.

The Commission has consistently recognized that a person who is not a party to a contract may still fairly be said to have a financial interest in it. **See, EC-COI-83-125** (contractual financial interest of spouse may be imputed to state employee, where there is shared control of contract); Buss, **infra** (§7 applies not only to contracts awarded to the employee's own company but companies with which his company does business. **Id.**, at 374). More recently, in **EC-COI-87-14**, the Commission found that a state employee was prohibited from participating in a Home Ownership Opportunity Program of EOCD where EOCD's contract was not with the developer but with participating lending institutions. In that case, the Commission's conclusion rested on the fact the price which the employee charged for the unit was dependent on EOCD's contractual relationship with the participating lending institutions.

In this case, Respondent had a financial interest in McKee's delivery of donuts to the school. The total amount of money McMann received from McKee depended on a percentage of whatever the sale was going to be to the school. Further, Respondent made the decisions about price changes regarding the contract price of the donuts to the school.

Section 19

Section 19 of G.L. c. 268A prohibits Respondent from participating as a municipal employee in a particular matter in which, to his knowledge, he or a business organization in which he is associated in certain ways has a financial interest. Respondent is a municipal employee. Each decision by the School Committee to approve a cafeteria warrant which included a line item for McKee Enterprises was a particular matter. For the same reasons as stated in the discussion of §20, Respondent and the corporate entity of which he was 50% owner and employee had a financial interest in the sale of donuts by the corporation. Since the decision by the School Committee to approve the cafeteria warrant was necessary in order for McKee to be paid for donuts sold and for Respondent to receive his 90% share, Respondent had a financial interest in the decision to approve the cafeteria warrant.

Respondent admits knowing that on each occasion when the School Committee approved a cafeteria warrant including a McKee Enterprises line item, he was aware of the same and knew that ninety per cent of those proceeds would be going to the Donut Shop. Consequently, the evidence satisfies the "to his knowledge" requirement in §19.

Respondent's votes to approve the cafeteria warrants constitute personal and substantial participation as well. These roles involved a decision making role, despite the fact that they involved little controversy. **See, In the Matter of James Geary**, 1987 SEC 305. We find Respondent's actions distinguishable from conduct which we found peripheral in **EC-COI-87-32**. In that opinion, the municipal employee's conduct was limited to signing an undisputed payroll warrant, where the correctness of the hours had been approved previously by the police chief over whom the employee exercised no active supervision. We expressly limited the opinion to those facts and declined to extend the holding to the Respondent. Here the Respondent's personal involvement commenced long before the warrant approval vote. In view of the 1984 Town Counsel opinion, the propriety of the Respondent's donut sales, which formed the basis of the warrant approval, was already in dispute. The safeguards which the Commission regarded as sufficient in **EC-COI-87-32** to protect the integrity of the underlying contract are therefore not present here.

IV. Sanction

There is substantial evidence that Respondent willfully attempted to evade detection of his §19 and 20 violations in this case. On February 15, 1984 Respondent received an emphatic letter from Town Counsel which said he could not sell donuts to the School. Less than three weeks later, on March 1, 1984, McKee started delivering donuts. Respondent has offered no legitimate business purpose to justify his change in the way donuts were sold to the school.

McKee did not previously have a wholesale business, nor is there any evidence he intended to establish one independent of the Respondent and the School. He had no other wholesale customers except the 319 deliveries to the School. Even though Respondent was on notice that donut sales to the School were prohibited, he did not check out the new arrangement with Town Counsel, the School Committee, or this Commission.

In addition, this Commission has specifically found not credible Respondent's testimony that he thought that if he sold to another person, he would not violate the law.

This was a significant series of contracts and a series of votes on cafeteria warrants involving significant amounts of money. The total gross receipts from illegal sales was $12,000.00 to $14,000.00. There is an entire course of conduct and not just an isolated incident at issue here as well. Respondent's continued financial interest in the contract after he was put on notice by Attorney Gay and the cover up are serious aggravating factors here. The Commission has noted elsewhere that attempts to conceal violations show a clear awareness of impropriety. **See, In the Matter of James M. Collins**, 1985 Ethics Commission 228. A fine reflecting these aggravating factors is appropriate.[4]

V. Order

On the basis of the foregoing, pursuant to its authority under G.L. c. 268B, §4, the Commission orders Respondent to pay ten thousand dollars ($10,000.00) to the Commission as a civil penalty for 18 violations of G.L. c. 268A, §19 and 319 violations of G.L. c. 268A, §20.

DATE AUTHORIZED: October 24, 1988

[1]/Section §19, in pertinent part, states that:

(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

[2]/Section 20, in pertinent part, states that:

(a) A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

[3]/930 CMR 1.02(10)(c) states:

(c) When a statute of limitations defense has been asserted, the Petitioner will have the burden of showing that a disinterested person learned of the violation no more than three (3) years before the order was issued. That burden will be satisfied by: 1. an affidavit from the investigator currently responsible for the case that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before an order was issued, and 2. with respect to any violation of M.G.L. c. 268A other than §23, affidavits from the Department of the Attorney General and the appropriate Office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the order was issued, or 3. with respect to any violation of M.G.L. c. 268A, §23, an affidavit from the Respondent's public agency was not aware of any complaint relating to the violation more than three (3) years before the order was issued.

[4]/Although we are not inclined to impose a maximum fine for each of Respondent's 337 individual violations of G.L. c. 268A, a fine which recognizes the seriousness with which we view the Respondent's course of conduct is appropriate.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 349

IN THE MATTER
OF
WILLIAM T. GRIFFIN

Appearances: Freda K. Fishman, Esq.
Robert A. Levite, Esq.
Counsel for Petitioner

Andrew C. J. Meagher, Esq.
Counsel for Respondent

Commissioners: Diver, Ch., Basile, Epps, Jarvis, Pappalardo

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on January 11, 1988 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 William T. Griffin (Respondent), Chairman of the Executive Committee of the Worcester County Advisory Board, violated G.L. c. 268A, §13 on January 18, 1987 by voting to approve a Reserve Fund transfer request, and by signing the approval of the transfer, that would be used to fund salary increases for promoted employees of the Worcester County Jail, including his son, Dennis Griffin.

Respondent filed an Answer on February 8, 1988 in which he agreed that, on January 18, 1987, he looked at the names of the personnel that would be affected by the transfer and was aware that his son, Dennis Griffin, was on that list. Respondent denied many of the other material allegations found in the Order and raised the following

defenses:

1. Respondent's defense has been prejudiced by the Commission's advance knowledge of the facts upon which it based its vote to issue the Order to Show Cause.
2. Respondent's due process rights have been violated by the fact that the Ethics Commission is represented by both the Petitioner and Presiding Officer in this matter;
3. Respondent's offense, if any, was a less serious violation of the statute and should have been handled confidentially;
4. Respondent did not know, on January 18, 1987 or at any time, that Dennis Griffin would receive a salary increase and promotion when the alleged transfer request was approved;
5. Dennis Griffin did not receive any benefit from the January 18, 1987 Executive Committee vote;
6. Dennis Griffin did not have a financial interest in the January 18, 1987 Executive Committee vote;
7. The reserve fund transfer request was not a particular matter within the meaning of the statute; and
8. Respondent was not a county employee in that the Executive Committee of the Worcester County Advisory Board is not a county agency;

An adjudicatory hearing was held on May 3, 1988 before Commissioner F. Washington Jarvis, a duly designated presiding officer. See, G.L. c. 268B, §4(c). The parties thereafter filed post-hearing briefs and presented oral argument before the full Commission on September 14, 1988. Based upon a review of the evidence and arguments presented by the parties, the Commission makes the following findings and conclusions.

II. Findings of Fact

1. Respondent was Chairman of the Worcester County Advisory Board's Executive Committee and a member of the Advisory Board at all relevant times.

2. Respondent's son, Dennis Griffin, was an employee of the Worcester County House of Correction from February 14, 1983 to May 1, 1987. From February 26, 1987 until the date of his resignation, Dennis Griffin took an unpaid leave of absence from his position.

3. Dennis Griffin was unhappy with his job at the Worcester County House of Correction and had been so since 1983. As of January 18, 1987, Dennis Griffin continued to be unhappy with his employment but had not offered his resignation or notice.

4. On January 15, 1987, the County Commissioners voted to request the approval of the County Advisory Board for a transfer of $17,754.30 from the Reserve Account to the Jail and House of Correction budget to be used to fund salary increases for employees to be promoted under Sheriff-elect Flynn's proposed reorganization of the Jail and House of Correction. The request form which the County Commissioners sent to the County Advisory Board referred to a copy of the Sheriff-elect's request, which was attached to it.

5. On January 18, 1987, the Executive Committee of the Advisory Board voted to approve the transfer request. Respondent was present, voted in favor of the transfer and signed the approved request on behalf of the Advisory Board. Prior to voting, Respondent had read the Sheriff-elect's transfer request and, at the time he voted, knew his son would receive a salary increase and promotion once the transfer request was approved.

6. On February 9, 1987, Respondent called the Legal Division of the Commission and asked if he could recall the Executive Committee of the Advisory Board to revote the transfer. He was advised that "participation" for §13 purposes includes a request for reconsideration and revote and that he ought not to take such action.

7. On February 10, 1987, the County Commissioners voted to reconsider the Reserve Fund transfer request on February 17, 1987.

8. On February 17, 1987, the County Commissioners rescinded their January 15, 1987 vote and voted to reapprove the transfer request.

9. On March 18, 1987, the Advisory Board voted 7-0 to approve the second request for the transfer. Respondent was not present at this meeting.

III. Decision

For the reasons stated below, the Commission concludes that the Respondent violated G.L. c. 268A, §13 on January 18, 1987 by voting to approve a Reserve Fund transfer request, and by signing the approval of the transfer, that would be used to fund salary increases for promoted employees of the Worcester County Jail, including his son, Dennis Griffin.

A. Due Process

In his Answer, Respondent contends that his due process rights under the federal and Massachusetts constitutions are violated by virtue of the organization and procedures of the Commission, in which the investigatory, prosecutorial and adjudicatory functions are combined. He also alleges that this combination deprives him of an impartial factfinder.

We have held elsewhere that we find no constitutional defect in the statutory scheme. **In the Matter of George A. Michael**, 1981 SEC 59; **In the Matter of James J. Craven**, 1980 SEC 17, **aff'd sub nom, Craven v. State Ethics Commission**, 390 Mass. 191 (1983).

B. Enforcement Discretion

The Commission properly exercised its discretion in deciding to resolve this matter publicly. Section 4 of G.L. c. 268B governs the investigations and "appropriate proceedings" conducted by the Commission and establishes the scope of the Commission's remedial and punitive powers. A 1980 case has made it clear that the Commission has discretion to determine whether sufficient cause exists to warrant action under §4. **In the Matter of John R. Buckley**, 1980 SEC 2.

Accordingly, we concur with the Presiding Officer's denial of Respondent's Motion for a Confidential Resolution. We note that the motion would have more appropriately been made before the issuance of the Order to Show Cause. Also, we find nothing in Commission Advisory No. 11 on Nepotism inconsistent with the proper exercise of discretion in the decision to pursue this matter publicly.

C. Section 13 Substantive Violation

1. The Worcester County Advisory Board is a "county agency" and William T. Griffin, a member and Chairman of its Executive Committee, was a "county employee."

General Laws chapter 268A, §1(d) defines a county employee as a person performing services for or holding an office, position, employment, or membership in a county agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis.

Respondent contends that the Executive Committee of the Worcester County Advisory Board is not a county agency because his membership results from his status as a member of the Leicester Board of Selectmen, whose interests he was representing on the Executive Committee.

The Commission has noted, however, that "where any agency possesses characteristics of more than one level of government, the Commission will review the interrelation of the agency with these levels to determine the agency's status under G.L. c. 268A." **EC-COI-83-157** at 2. The name of a government agency is not determinative but, rather, "the level of government to be served by the agency in question." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. L. Rev. 299, 310 (1965). Just as regional school districts, which have a field of operations which extend beyond their constituent localities, are independent municipal agencies, **see, EC-COI-82-25,** the Executive Committee of the Worcester County Advisory Board has a county agency status because its field of operations extends beyond its members' constituent localities. The financial judgments that are involved in the operation of the county hospital, registry of deeds, courthouse and correctional facilities are of concern to more than the residents of one city or town in the county. This is true despite the fact that Respondent is also a municipal employee in his position as a Leicester Selectman. Since the Executive Committee of the Worcester County Advisory Board is primarily concerned with the operation of county facilities and the expenditure of county funds, it is a county agency for the purposes of G.L. c.268A. Since Respondent was performing services for and holding office in a county agency, he was a county employee for the purposes of the conflict law, **see**, G.L. c. 268A, §1(d).

2. The Reserve Fund Transfer Request was a "Particular Matter."

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

We conclude that a fund transfer request is a particular matter within the meaning of §1(k). Respondent contends that §1(k)'s express exclusion of the enactment of general legislation by the general court from this definition indicates that the Reserve Fund transfer request was not a particular matter within the meaning of the statute. We are not persuaded that the submission and approval of the fund transfer can be reasonably regarded as the enactment of general legislation by the General Court. As we understand it, the fund transfer approval process is entirely within the jurisdiction of the Advisory Board and does not require further approval by the General Court. Given the express language of §1(k), we cannot assume that the General Court meant to exempt the Executive Committee of the Worcester County Advisory Board's approval of reserve fund transfer requests.

Respondent also argues that because he participated only in a consolidated vote on the entire transfer request, he did not participate in a particular matter in violation of the statute. Respondent misconstrues **Graham v. McGrail**, 370 Mass. 133 (1976) when he interprets it to exclude consolidated votes from the definition of particular matter. The **Graham** court, in fact, specifically outlined a line item vote process that must be undertaken before a consolidated vote is permissible. No line item votes were involved on January 18, 1987.

The Commission has stated, in **EC-COI-87-25**, that where a city council may vote only on the overall budget and is statutorily precluded from line item votes, city council members may vote on the bottom line, even when the financial interest of an immediate family member is implicated despite the **Graham** holding.

Although Respondent has asserted, in his brief, that the Worcester County Advisory Board Executive Committee's powers were similarly limited, he has presented, and we can find, no support for this assertion in the pertinent legislation or by-laws. **See**, G.L. c. 35,§32, By-laws of the Worcester County Advisory Board. **EC-COI-87-25** was premised on a specific factual showing that Respondent has not made.

3. Dennis Griffin had a Financial Interest in the January 18, 1987 Vote.

It is not disputed that the transfer of funds from the County Reserve Fund to the budget of the Worcester County House of Correction would have resulted in the funding of a $500.00 salary increase, attendant upon a promotion for Dennis Griffin. Respondent argues, rather, that this fact is irrelevant because Dennis Griffin did not receive any benefit from the January 18, 1987 vote because it was quickly rescinded and not revoted until after Dennis Griffin took an unpaid leave of absence from his position, only to resign several months later. In addition, Respondent contends that he knew of Dennis Griffin's impending departure from his county job, because of job dissatisfaction, and so knew that his son would not see any financial benefit from the vote at issue.

We conclude that, at the time of the vote, Dennis Griffin's financial interest in his salary increase was present and reasonably foreseeable. **See, EC-COI-84-98.** Although Dennis Griffin apparently was dissatisfied with his work, he had been so almost from the beginning of his employment at the Worcester County House of Correction, several years earlier. No resignation had been tendered or notice given. Moreover, the Respondent was aware of his son's financial interest in the transfer approval. It was reasonably foreseeable, at the time of the vote, that Dennis Griffin had a financial interest in the vote. The fact that Dennis Griffin would never actually receive this financial benefit was not reasonably foreseeable at the time of the vote. Dennis Griffin was unhappy with his job, but the weight of the evidence was that Dennis Griffin would continue in his job as he always had, despite several years of dissatisfaction.

Finally, Respondent argues that Dennis Griffin did not violate §19 in the January 18, 1987 transfer request vote because other county officials had made the salary and promotion recommendation involved and because Respondent's vote did not finalize the promotion since approval by the Personnel Board was still required. In substance, he asserts that his participation was not personal and substantial both because it involved little discretion and because it involved a decision that was not the final decision on Dennis Griffin's promotion and pay-raise. Although not every action by a public official will satisfy the substantiality requirement, **In the Matter of John R. Hickey**, 1983 Ethics Commission 158 at 159, the Commission has made it clear that participation in a necessary step of a promotion for an immediate family member is forbidden. **See, Commission Advisory No. 11 on Nepotism** at 8. In addition, "participation" is not limited to discretionary and/or final decisions for §19 purposes, **In the Matter of George Najemy**, 1984 Ethics Commission 223 at 224, and should not be so limited for §13.

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. 268B, §4(j)(3). Although the potential maximum fine in this case is $2,000.00, we believe that the imposition of the maximum fine is not warranted. This violation involved an annual salary increase of $547.50, a not insignificant amount of money, **see, In the Matter of Paul X. Tivnan**, 1988 SEC 348, although smaller than the amount of money involved in some other Commission cases, **see, In the Matter of Paul A. Bernard**, 1985 SEC 226. The fact that Respondent had only one child affected by the transfer request makes a $500.00 fine no less appropriate. **See, In the Matter of Marjorie Goudreault**, 1987 SEC 280.

V. Order

On the basis of the foregoing pursuant to its authority under G.L. c. 268B, §4, the Commission orders Respondent to pay five hundred dollars ($500.00) to the Commission as a civil penalty for his violation of G.L. c. 268A, §13.

DATE AUTHORIZED: October 26, 1988

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 364

IN THE MATTER
OF
JOHN R. STONE, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John R. Stone, Jr. (Mr. Stone) 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 6, 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, involving Mr. Stone, a member of the Gill Board of Health. The Commission concluded its inquiry and, on October 26, 1987, found reasonable cause to believe that Mr. Stone violated G.L. c. 268A.

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

At all times material herein, Mr. Stone was a member of the Gill Board of Health. As such, Mr. Stone is a municipal employee as that term is defined in G.L. c. 268A, §1(q).

Stone is also a self-employed contractor; and, as such, he provides a number of different services to private parties such as interior and exterior work on homes.

On March 24, 1986, the Gill Board of Health received a letter from Robert P. Bishop, supervising sanitarian for the state Department of Public Health, in which Bishop stated that his office had received a complaint about sanitary conditions at 5 Cross Street in Gill (the property).

On April 3, 1986, Mr. Stone, Bishop and another Gill Board of Health member inspected the property. There appeared to be multiple violations of the sanitary code.

Mr. Stone sent a letter dated April 3, 1986 to the owner of the property. The letter set out the violations and stated that the building was condemned.

In September, 1986, the local realtor for the property contacted Mr. Stone. The realtor asked Mr. Stone to make the necessary repairs to the building.

Subsequent to being retained by the realtor, but before beginning repairs, Mr. Stone met with Selectwoman Geraldine Johnson to ask if he would have any problems when he did the work on the property. Ms. Johnson told Mr. Stone that she did not see any problem with his performing the work as long as he was not involved with the reinspection of the property or the lifting of the condemnation order.

Shortly thereafter Mr. Stone began renovating the property. He did sheetrocking, painting, wallpapering and other renovations on the interior which took care of the problems listed on the Board of Health condemnation order.

Mr. Stone received approximately $3,500 as payment for his work on the property.

On March 9, 1987, with work on the house completed, the Gill Board of Health issued a certificate of habitation for the property. Two members of the Board of Health other than Mr. Stone participated in the reinspection of the property.

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.

12. Both the condemnation order and the reinspection are particular matters for purposes of the conflict of interest law.

13. In light of the town's extensive regulation of local health matters, any work done pursuant to a condemnation order and/or in anticipation of a subsequent reinspection is work done "in relation to" matters of interest to the town.[1]

14. The $3,500 Mr. Stone received for doing the repairs was not received in the course of his discharging any official duties.

15. By receiving $3,500 for work done to make repairs on the property, Mr. Stone received compensation from someone other than his town in relation to both the condemnation order and the subsequent reinspection, thereby violating G.L. c. 268A, §17(a).

16. The Commission is unaware of any evidence to indicate that Mr. Stone knew he was violating §17(a) when he acted as described above.[2] In addition, the Commission has given consideration to the fact that Mr. Stone showed sensitivity to the conflict issue by obtaining advice in advance from a Selectman. Mr. Stone cannot rely on such advice as a defense, however.[3] In order to protect himself from the risk that his own or others' analysis of the situation was incorrect, Mr. Stone was entitled to seek a written opinion from the Commission. Such an opinion, sought in advance and based on an accurate representation of the material facts, would provide a complete defense against an alleged violation of the conflict of interest law.[4]

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. Stone:

1. that he pay to the Commission the amount of two hundred fifty dollars ($250.00)[5] as a civil penalty for his violation of §17(a); and
2. 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: November 22, 1988

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[1]/See EC-COI-87-31.

[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]/See In the Matter of John J. Hanlon, 1986 SEC 253, 255.

[4]/Mr. Stone could also have sought a written opinion from Town Counsel. Such an opinion, once reviewed and concurred with by the

Commission pursuant to 930 CMR 1.03, would also have provided a complete defense.

[3]/But for the mitigating factors described above, the Commission would have insisted on a higher fine. The Commission may impose a fine up to $2,000 for each violation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 212

IN THE MATTER
OF
ROBERT N. SCOLA

DISPOSITION AGREEMENT

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

On March 22, 1983, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the Conflict of Interest Law, G. L. c. 268A, involving Judge Scola, presiding justice of the Spencer District Court. The Commission concluded that preliminary inquiry and on May 5, 1983, found reasonable cause to believe that Judge Scola violated G. L. c. 268A, §23(§2)(3). The parties now agree to the following findings of fact and conclusions of law:

1. Judge Scola is a district court judge and presiding justice of the Spencer District Court. He is therefore a "state employee" as defined in G. L. c.268A, §1(q).

2. In August 1982, a Spencer court probation officer brought to Judge Scola's attention an educational program for criminal defendants offered by a recently organized non-profit corporation, MAP, Inc. This program, know as SAAP (the Social Attitude and Alcohol Awareness Program), was a single, hour-and-a-half session aimed at young persons charged with less serious misdemeanors related to alcohol and controlled substance abuse, such as possession of alcohol or marijuana, transporting alcohol, disturbing the peace or trespassing. The charge for SAAP was $20. Judge Scola had previously expressed his interest to other alcohol programs, without success, in a relatively short educational program for such less serious offenses as a sentencing alternative, and SAAP sounded like something that might meet his requirements. As a result, he met with the probation officer and the two principals of MAP, Inc. to discuss SAAP. Further meetings among Judge Scola and MAP, Inc. representatives followed.

3. Judge Scola approved SAAP in the latter part of August and began using it as a sentencing alternative after trial and a finding of sufficient facts: if the offender agreed to complete the program and proof was submitted that he or she had, the court would dismiss the charges on a pre-set date at the end of a three-month period of probation without the defendant having to appear. Other judges sitting in both Spencer and Dudley district courts also used SAAP as a sentencing alternative.

4. MAP, Inc. also offered an educational program, known as MAP (Massachusetts Alcohol Program), which was longer and more expensive than SAAP. MAP was a program designed for repeat offenders arrested for driving under the influence; it was offered in either a 14-, 20- or 32-week format and cost from $180 to $300, depending on which format was chosen. The two principals of MAP, Inc. were marketing MAP at various district courts in the Worcester area and discussed it with Judge Scola in Spencer.

5. Judge Scola's daughter took a job and started work at MAP, Inc. on September 14, 1982. Hers was the only paid position, and her salary was derived from MAP and SAAP referral income. In January, 1983, MAP, Inc. was forced to let her go because the new Massachusetts drunk driving laws had severely curtailed MAP, Inc.'s income from MAP referrals. As a result, MAP, Inc. was forced to reduce its operating expenses.

6. During the four-month period his daughter worked at MAP, Inc., Judge Scola continued to refer offenders to SAAP. These referrals totalled approximately 75 during this period and represented a significant portion of MAP, Inc.'s SAAP income. In addition, Judge Scola directed at least two offenders to the corporation's MAP program while his daughter was employed there; these referrals occurred in the second half of September, but ended in October as a result of the new drunk driving law.

7. Judge Scola had no program similar to SAAP available to him as a sentencing alternative during this period, although alternatives to some, but not all, MAP programs were available.

8. Section 23(§2)(3) forbids a public official from giving reasonable basis, by his conduct, for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is unduly affected by the kinship, rank, position or influence of any party or person.

9. By continuing to assign offenders to attend programs given by the corporation employing his daughter, Judge Scola gave reasonable basis for the impression that MAP, Inc. and his daughter could improperly influence or unduly enjoy his favor in the performance of his official duties or that he was unduly affected by the fact that MAP, Inc. employed his daughter; Judge Scola thereby violated §23 (§20)(3).

10. In assessing the penalty here, the Commission

has taken into consideration that Judge Scola's MAP and SAAP referrals do not appear to have been motivated by his daughter's interest in them or by a desire to benefit his daughter.

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

1. that he pay the Commission the sum of $250 forthwith as a civil penalty for violating G. L. c. 268A, §23(§2)(3), because he assigned offenders to programs offered by an organization employing his daughter; 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 and/or judicial proceedings.

Date: June 20, 1986

The following are footnotes omitted from **The Matter of John J. Hanlon**, issued 2/6/86.

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

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

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

Included are:

Summaries of all Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1988.

SUMMARIES OF ENFORCEMENT ACTIONS (1988)

In The Matter of Paul X. Tivnan
(January 11, 1988)

In a Disposition Agreement reached with the Ethics Commission, Paul X. Tivnan, Worcester County Commissioner, was fined $500 for voting to approve then Sheriff-elect John Flynn's transfer request to fund promotional changes for House of Correction employees.

Tivnan's son, Michael, and his daughter, Maureen Anderson, are employees at the Worcester County House of Correction. They were two of seventeen individuals who received promotions and salary increases under Flynn's proposed re-organization of the Jail and House of Correction.

Section 13 of the conflict law prohibits county officials from participating in promotion or salary decisions which will affect the financial interest of their children. In the Disposition Agreement, Tivnan admitted he violated this section of the conflict law when he voted and signed the request form to fund Flynn's suggested salary increases.

In The Matter of Robert Egan
(February 11, 1988)

The Commission fined Robert Egan, Natick Zoning Board of Appeals (ZBA) member, $1,000 for representing a private client before the ZBA while he served on the ZBA and again shortly after he resigned.

On November 13, 1985, Egan represented Sharrat Associates before the ZBA in support of their appeal. On November 20, 1985, Egan again appeared before the ZBA on the issue of off-street parking.

By representing the developers before the ZBA concerning their special permit application, Egan violated §17 and 18 of the conflict law.

In the Matter of Clarence D. Race
(February 24, 1988)

Clarence D. Race, Egremont Board of Selectmen Chairman, was fined $250 by the Ethics Commission for sending a letter under his official signature as Chairman of the Board to the Department of Environmental Quality Engineering (DEQE) in November of 1983 concerning a parcel of land he owned.

Race was in the process of selling the parcel of land, which was located in a watershed area. He wrote to DEQE in his official capacity to ask for their review of the engineer's plans for a septic system on the site.

Section 19 of the conflict law prohibits a municipal employee from officially acting on any particular matter which affects his own financial interest.

In the Matter of Michael Riley
(February 24, 1988)

The Commission ordered Michael Riley, Boston Public Library and Boston School Department Custodian, to give up one of his jobs within 30 days. The Commission found Riley in violation of the conflict law by holding the two paid municipal positions.
Section 20 of the conflict law generally prohibits a municipal employee from holding more than one paid job with the same city or town.

The Commission said in its Decision and Order that if Riley did not resign one of his jobs within the 30 days, he would be fined $1,000.

In the Matter of Frank Magliano
(March 3, 1988)

The Commission fined Frank Magliano, Brockton Building Inspector, $1,000 for hiring his son in 1986 as a storekeeper in the Public Property Department, in violation of the conflict of interest law.

Section 19 of the conflict law prohibits municipal officials from participating in the hiring of an immediate family member. Immediate family is defined as the municipal official and his or her spouse and both of their children, parents, brothers and sisters. This section of the law also prohibits municipal officials from participating in salary or promotion decisions or from supervising immediate family members.

The Disposition Agreement stated that the proposed position of storekeeper was approved by the City Council in the spring of 1986. Magliano subsequently made a provisional appointment of his son, Daniel, to the position effective June 30, 1986.
After media inquiries and reports of possible conflict of interest, Daniel Magliano resigned his position effective April 1987.

In the Matter of William Highgas, Jr.
(March 14, 1988)

The State Ethics Commission issued a Ruling denying Massachusetts Probate Court Judge William Highgas Jr.'s motion to dismiss a case against him. The respondent asked for dismissal of the case on the grounds that the Commission's jurisdiction over members of the judiciary violated the separation of powers provision of the Massachusetts constitution.

The jurisdictional question raised by Highgas, Associate Justice of the Probate and Family Court Department of the Trial Court of Massachusetts, was whether the Commission has the authority to enforce section 23 of the conflict law against judges. The Commission affirmed its jurisdiction to proceed in the Highgas matter.

The Commission's decision states that it "finds that its exercise of jurisdiction is statutorily sound and constitutionally permissible as applied in this case."

(The Ethics Commission case against William Highgas was dismissed in January 1989, after the judge was publicly censured by the Supreme Judicial Court of Massachusetts for the same conduct that was the basis for the Commission investigation.)

In the Matter of Rev. Benjamin Lockhart
(May 16, 1988)

In a Disposition Agreement reached with the Commission, Reverend Benjamin Lockhart, Agawam Town Councillor, admitted to having violated the conflict law by voting on a pay raise ordinance that included a salary increase for his son. Reverend Lockhart was fined $250 for the violation.

Reverend Lockhart voted on a salary increase package for the Agawam Fire Department that included a pay increase of more than $1,000 for a position held by Reverend Lockhart's son.

In the Matter of Paul H. Sullivan
(May 23, 1988)

The Commission fined Paul H. Sullivan, Tewksbury Selectman, $500 for violating the Massachusetts conflict of interest law by representing a local development firm in a matter of direct and substantial interest to the town.
In a Decision and Order, the Commission ruled that Sullivan acted as agent for FIC Associates when he spoke on the firm's behalf at Town Planning Board meetings on September 24 and 26, 1984, thereby violating §17 of the conflict law.

Section 17 prohibits municipal officials from acting as the "agent" or attorney for a private party before town boards.

The Commission also cleared Sullivan of alleged violations of §19 of the conflict law, which bars a municipal official from participating in matters which are of financial interest to an immediate family member. Sullivan's father, Kevin, is a partner in FIC Associates.

In the Matter of Joseph D. Cellucci
(May 23, 1988)

Joseph D. Cellucci, Cambridge Inspectional Services Department (CISD) Director, was ordered to pay $1,000 in fines for three violations of the state's conflict of interest law. The Commission found that Cellucci attempted on three separate occasions to control jurisdiction over inspection and enforcement of the state's sanitation code for a property owned by members of his immediate family.

In a Decision and Order, the Commission stated Cellucci tried to secure exclusive jurisdiction over a two-family dwelling at 150 Holworthy Street in Cambridge, first for his own department and then for the state. At all times relevant to the investigation, the property was owned by members of Cellucci's immediate family.
Section 19 of the conflict law prohibits municipal officials from participating in particular matters in which they or their immediate family members have a financial interest.

In the Matter of William Turner
(May 27, 1988)

In a Disposition Agreement reached with the Commission, William Turner, West Bridgewater Zoning Board of Appeals (ZBA) Chairman, admitted he violated the conflict law by acting as agent for a real estate trust for which he was a trustee, and by asking the ZBA to grant permits for that trust. He was fined $1,000.

Turner appeared before the ZBA on behalf of Turner Industrial Park Realty Trust (TIPRT) on three occasions between 1982 and 1986, and filed building permit and variance applications on behalf of TIPRT in 1985 and 1986, the Agreement said.

At all times pertinent to the Commission's investigation, Turner was a trustee and one-third beneficial owner of TIPRT, as well as chairman of the ZBA, the Disposition Agreement said.

Section 17 of the conflict law prohibits a municipal employee from acting as agent or attorney for anyone other than the municipality in connection with a particular matter that is of direct and substantial interest to the town.

In the Matter of Donald P. Zerendow
(May 27, 1988)

In a Disposition Agreement, the former chief of the Medicaid Fraud Control Unit (MFCU) in the Office of the Attorney General was fined $1,000 by the Commis-

sion for violating the conflict of interest law, §5(b), by personally appearing before the MFCU in connection with a criminal investigation that was within his official responsibility while he was a state employee.

Mr. Zerendow admitted he violated §5(b) of the conflict law by having a meeting, telephone conversations and written correspondence with an MFCU attorney and investigator in connection with an alleged Medicaid fraud case that was opened while he was still head of the MFCU.

In the Matter of Kenneth Cimeno
(June 21, 1988)

Kenneth Cimeno, Dedham Assistant Building Inspector, was fined $500 for violating the conflict of interest law by signing and issuing building permits for two sites owned by a realty trust for which he and his parents served as trustees.

In a Disposition Agreement reached with the Commission, Cimeno admitted to having violated §19 of the conflict law and agreed to pay the fine. Section 19 prohibits municipal officials from acting in their official capacity on any matter in which they or members of their immediate family have a financial interest.

In the Matter of United States Trust Company, Albert Brunelli, Andrew Collas, Donald Croatti, Frank Lewis and Theodore Scaffidi
(August 15, 1988)

The State Ethics Commission issued a Public Enforcement Letter concluding its formal investigation into alleged violations of the conflict of interest law by five municipal treasurers and a Boston-based bank. The Commission probe stemmed from a 1985 report from the Inspector General's Office regarding municipal banking practices. The IG's report cited records from seven Boston-based banks.

In resolving its case against the five treasurers — Albert Brunelli of Franklin, Andrew Collas of Plymouth, Donald Croatti of Framingham, Frank Lewis of Everett and Theodore Scaffidi of Newton — and the United States Trust Company, the Commission established strict limitations on the receipt of meals and entertainment expenses by public officials.

The Commission found reasonable cause to believe that the bank and treasurers violated §3 of the conflict law when USTC paid for and the treasurers accepted frequent lunches, dinners, theater tickets and golfing expenses totalling more than $11,200 between 1983 and 1985.

Section 3(a) prohibits anyone with whom a public employee does official business from giving anything of substantial value to said employee. Section 3(b) prohibits public employees from accepting such gifts.

The Public Enforcement Letter indicates the Commission decided against taking formal action against the bank and treasurers because of several mitigating factors. Included among these was that prior to the IG report, the practice of banks paying for public officials' entertainment expenses was widespread, as illustrated by the IG's citing of 104 treasurers receiving such gratuities in 1984, and all seven banks named in the report appearing to be involved in the practice.

In addition, the Commission also found no evidence that the treasurers or USTC intentionally violated the conflict law, or that the treasurers provided USTC with preferential treatment as a result of the expenditures; nor was there any evidence that USTC made any personal loans to the treasurers or entered into any kind of corrupt agreement by which USTC would provide payments in exchange for specific official acts. The Commission also considered as mitigation the fact that it has not previously had occasion to articulate its position regarding private parties paying for meals and beverages incidental to the transaction of business, nor, prior to its May, 1985 Advisory No. 8 ("Free Passes"), had it indicated it would aggregate items of value to meet the substantial value threshold.

In the Matter of Paul A. Nowicki
(August 31, 1988)

Adams Treasurer/Collector Paul A. Nowicki was fined $500 by the Commission for violating the state conflict of interest law by hiring his brother as a deputy tax collector for the town.

In its decision, the Commission indicated that although it would usually levy a fine of $1,000 or more for a nepotism/hiring violation, the fact that Nowicki himself brought the situation to the Commission's attention warranted a reduction of the fine in this case.

According to a Disposition Agreement reached with the Commission, Nowicki acknowledged that he violated §19 of the law, which prohibits municipal employees from participating in their official capacity in any matter in which a member of their immediate family has a financial interest.

Nowicki hired his brother, John, as a deputy tax collector for Adams in August of 1986, the Disposition Agreement said. One year later, Nowicki attended an annual meeting of the Massachusetts Collectors and Treasurers Asso-

ciation, where he attended a seminar on the conflict of interest law, which included a discussion of nepotism. Following this meeting, Nowicki asked for and received his brother's resignation, and subsequently reported the violation to the Commission.

In the Matter of Joseph Zeneski
(September 2, 1988)

The State Ethics Commission issued a Public Enforcement Letter to Mansfield Department of Public Works Director Joseph Zeneski, resolving its probe of alleged violations of the conflict law by Zeneski.

The Commission found Zeneski violated the conflict law on two occasions in 1985 by reviewing work submitted by an engineering firm he had agreed to work for after leaving his DPW job.

Section 19 of the conflict law prohibits municipal employees from participating in their official capacity in any particular matter in which an organization with which they are negotiating or have any arrangement for future employment has a financial interest.

In the Matter of Byron Battle
(October 6, 1988)

The State Ethics Commission issued a Public Enforcement Letter to Massachusetts Undersecretary of Economic Affairs Byron Battle, formally concluding the agency's probe of Battle's alleged violation of the state's conflict of interest law by use of his state title, official letterhead, and other state resources to solicit participants for a privately sponsored tour of the Soviet Union. The Enforcement Letter states that Battle appears to have violated §23 of the conflict law by making the solicitations, knowing that if he persuaded enough people to go on the tour, he and a guest could go on the trip free of charge (an estimated $8,000 value); however, the Commission stated it felt adjudicatory proceedings were not warranted in this case because of certain mitigating factors.

Section 23(b)(2) of the conflict law prohibits state employees from using their official position to secure unwarranted privileges of substantial value for themselves or others. The courts and the Commission have set "substantial value" at $50 or more.

The Commission decided against taking further action against Battle because of several mitigation factors, the Enforcement Letter said. Battle did not obtain any financial benefit from his involvement with People To People other than the use of the state resources named, for which he agreed to reimburse his agency, according to the letter.

In addition, Battle withdrew from the tour approximately three weeks after the solicitation went out, before any commitments to attend were made by any of the individuals solicited; he also wrote the explanatory letter to the six individuals originally contacted about the tour, and appeared to have "some genuine confusion" as to the propriety of acting in his official capacity with respect to the tour because it had a quasi-public purpose, the Enforcement Letter said. Finally, the Commission also considered as mitigation the fact that none of the persons solicited by Battle were regulatees of the EOEA, and accordingly, there was no actual or implied coercion in the solicitation, the letter said.

In the Matter of Peter J. Cassidy
(October 19, 1988)

The Ethics Commission ordered Swampscott Police Chief Peter J. Cassidy to pay a $1,000 fine for violating the state's conflict of interest law by recommending four of his sons to positions on the Swampscott police force.

In a Decision and Order, the Commission said Cassidy's actions violated §19 of the law on nine occasions between 1983 and 1986. However, the agency decided against imposing the maximum fines due to mitigating factors, the Decision states. Cassidy was also cleared of an alleged conflict violation involving the appointment of his brother, Francis, who was found not to have a financial interest in his special police officer appointment, the Decision said.

Section 19 of the law prohibits municipal employees from participating in any particular matter in which a member of their immediate family has a financial interest.

An exemption to §19 allows appointed municipal officials to participate in matters of financial interest to their immediate family members provided they make a written disclosure to their appointing authority before participating, and also receive prior written approval from that authority to become involved in the matter. Cassidy made no attempt to receive such exemptions in compliance with the law, the Decision said.

In the Matter of Norman McMann
(October 24, 1988)

Bristol-Plymouth Regional School Committee member Norman McMann was fined $10,000 for violating the state's conflict of interest law by selling more than $12,000 worth of donuts to the Bristol-Plymouth Technical School illegally and voting to approve the improper payments. In a Decision and Order, the Commission found McMann

violated §19 and 20 of G.L. c. 268A, the conflict of interest law, from April, 1984, to January, 1986, by voting to approve payment of school cafeteria warrants that included payments to a "straw" for the donut shop of which McMann was half-owner, and for having a financial interest in a daily contract with the school while simultaneously serving on the school committee.

Section 19 of the law prohibits municipal employees from participating in their official capacity in any particular matter that affects their own financial interest. Section 20 prohibits municipal employees from knowingly having a financial interest in any contract (other than their own employment contract) made with the municipality.

In the Matter of William T. Griffin
(October 26, 1988)

The State Ethics Commission ordered Worcester County Advisory Board Chairman William T. Griffin to pay a $500 fine for violating the state's conflict of interest law by voting to approve a Reserve Fund transfer request that included a salary increase for his son, Dennis.

Griffin's actions violated Section 13 of the conflict law, which prohibits county employees from participating in particular matters in which members of their immediate family have a financial interest, according to the Decision and Order issued by the Commission.

The Commission ruled that the maximum $2,000 fine in this case was not warranted. The violation involved an annual salary increase for Dennis Griffin of $547.50, a not insignificant amount of money, but smaller than the amount involved in some other Commission cases, the Decision said. The Decision also noted that Dennis Griffin resigned his position after the raise was authorized, but prior to the date it took effect.

In the Matter of John R. Stone
(November 22, 1988)

Gill Board of Health (BOH) member John R. Stone was fined $250 for violating the state's conflict of interest law by condemning a building and subsequently being hired to do the repair work on it.

In a Disposition Agreement reached with the Commission, Stone admitted he violated §17 of the conflict law by doing the repair work. Section 17 prohibits municipal officials from receiving or requesting compensation from anyone other than the town in relation to particular matters in which the town has a direct and substantial financial interest.

The Commission stated there was no evidence Stone was aware his actions violated the conflict law; in addition, Stone showed sensitivity to the conflict issue by obtaining advice from a selectman. Although ignorance of the law is not considered a defense, the Commission considered these facts as mitigation in determining the amount of the fine.

Included are:

1. All Advisory Opinions issued in 1988, page 186.

2. Commission Advisory 13, issued in 1988, page 219.

Cite Advisory Opinions as follows:

EC-COI-88-(number)

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

CONFLICT OF INTEREST OPINION
EC-COI-88-1

FACTS:

You are a part-time Assistant City Solicitor. Your position as Assistant City Solicitor has been designated by the City Council (and in your employment contract) as a "special municipal employee."[1]/ In your capacity as Assistant City Solicitor, you give legal advice to the City Council.

You also maintain a private law practice. A potential client is a corporation which receives part of its funding from a municipal block grant.

You also are a principal stockholder and officer in two corporations which propose to enter into contractual arrangements with the City Redevelopment Authority (CRA).

QUESTIONS:

1. Does G.L. c. 268A permit your corporation to contract with the CRA?
2. Does G.L. c. 268A permit you to represent privately a corporation which receives half of its funding from private sources and half from a municipal block grant?
3. Does G.L. c. 268A permit you to represent privately an applicant before the City Council for a zoning variance or special permit?

ANSWERS:

1. Yes.
2. Yes, if you are paid by the corporation's private funding or qualify for an exemption to the law.
3. No.

DISCUSSION:

1. Contract with CRA

Section 20 generally prohibits a municipal employee from having a direct or indirect financial interest in a contract made by a municipal agency. The CRA is a municipal agency. G.L. c.121B, §7. If corporations in which you hold one percent or more of the stock[2]/ contract with the CRA, you would have a prohibited financial interest in the contract unless you qualified for an exemption. Because your position as Assistant City Solicitor has been designated as a "special municipal employee," you may qualify for the exemption discussed below.

The conflict of interest law provides that a special municipal employee may have a financial interest in a city contract provided that she "does not participate in or have official responsibility for any of the activities of the contracting agency ..." (which in this case is the CRA) and she files with the clerk of the city a statement making full disclosure of her interest in both her employment contract and the contract with the CRA. G.L. c. 268A, §20(c). As Assistant City Solicitor you do not participate in or have official responsibility for the activities of the CRA;[3]/ therefore, you qualify for this exemption to the law and should file the written disclosure statement with the City Clerk.

2. Representation of Private Corporation

You propose to represent a private corporation which receives half of its funding from a municipal block grant. A grant is considered a contract for purposes of the conflict of interest law. **EC-COI-82-75; 81-172; 81-64; 81-7.** You would have a prohibited financial interest in the corporation's receipt of this block grant money if the company used this money to compensate you as its attorney. You may not have a financial interest in this contract (i.e., the grant money) unless you qualify for an exemption to the law.[4]/

A §20(d) exemption allows a special municipal employee, who discloses with the city clerk her interest in municipal contracts, to have a financial interest in such contracts if the city council exempts her interest from the conflict law. Thus, you may request the City Council to review this situation and, if they approve of this exemption, you may represent the private corporation and be paid by public money to do so.[5]/

If you comply with the restrictions of the conflict of interest law and are eligible for an exemption to the law so that you may be paid (in part by public money) to represent the private corporation, you are still required to observe the prohibitions of §17. Section 17 addresses permissible "after hours" employment for municipal employees; it states that a municipal employee may not act as the attorney for a private party "in connection with any particular matter in which the ... city ... has a direct and substantial interest." G.L. c. 268A, §17(c).[6]/ For example, any litigation which implicated the City's rights and liabilities would be of direct and substantial interest to the City, whereas a lawsuit between two private parties generally would not be of direct and substantial interest.

3. Representation of Applicant for Zoning Variance

As set forth above, you may represent a private party, provided the representation is not "in connection with any particular matter in which the ...city ... has a direct and substantial interest." The only available exemption is for a special municipal employee who has not participated in the matter as a municipal employee and has not had official responsibility for the matter, provided that the matter is not pending in the municipal agency in

which the employee works.

The City Solicitor's Office is responsible for providing the City Council legal advice concerning the granting or denying of a zoning variance and defending the Council's actions if there is an appeal. Consequently, this matter is pending in the City Solicitor's Office, the municipal agency where you work. Thus, you may not represent a private party on this matter.

DATE AUTHORIZED: February 3, 1988

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[1]/"Special municipal employee," is defined as "a municipal employee who is not a mayor, a member of a board of aldermen, a member of a city council or a selectman in a town with a population in excess of five thousand persons, and whose position or employment has been expressly classified by the city council, or board of selectmen as that of a special employee under the terms and provisions of this chapter. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless she occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days." G.L. c. 268A, §1(n).

[2]/The prohibitions of 20 do not apply if the " ...financial interest consists of the ownership of less than one percent of the stock of a corporation." G.L. c. 268A, §20 (2).

[3]/You have stated that the CRA retains its own legal counsel, separate and distinct from the City Solicitor's Office.

[4]/An exemption is available to a special municipal employee who has a financial interest in a municipal contract provided that the employee does not participate in or have official responsibility for any of the activities of the contracting agency and files a disclosure statement with the city clerk. The city block grant is awarded by the City Council. As Assistant City Solicitor, you do participate in the activities of the City Council (to the extent that you advise the City Council on the legality of its actions).Therefore, you are ineligible for a §20 (c) exemption.

[5]/If the corporation compensates you entirely from private funds (i.e., the block grant money is used for other purposes), you will nonetheless be subject to the §17 (c) limitations described above.

[6]/An exemption to the law allows special municipal employees to act as the attorney for private parties unless the subject of the representation is one (a) in which the employee has participated, (b) is, or within one year was,the subject of the employee's official responsibilities, or (c) is pending in the municipal agency in which the employee works. Because you are an Assistant City Solicitor, any legal matter which is of direct and substantial interest to the City will necessarily be pending in the City's Law Department. Therefore, this exemption would not appear to change the results set forth above unless you work as Assistant City Solicitor less than 60 days for any period of 365 consecutive days.
See, EC- COI-85-49.

CONFLICT OF INTEREST OPINION
EC-COI-88-2

FACTS:

You are the First Vice Chairperson of the ABC Democratic City Committee (Committee). The Committee is composed of individuals who are all Democrats and who are all residents of ABC. Committee members are elected every four years at the time of the presidential primary election. The Committee would like to establish a scholarship to be awarded to a child or relative of one of its members. You are concerned about how the conflict of interest law would affect the Committee as it seeks to establish this scholarship.

QUESTION:

Is the ABC Democratic City Committee a governmental entity for the purposes of G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

The scope of the restrictions on the members of the Committee depends upon whether the Committee is a governmental agency for the purposes of G.L. c. 268A. Municipal agency is defined by the conflict of interest law as "any department or office of a city or town government and any council, division, board, bureau, commission...or other instrumentality thereof or thereunder", G.L. c. 268A, §1(f). State Agency is defined by the conflict of interest law as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town."

In its previous determinations concerning the public status of an entity for the purpose of c. 268A, the Commission has focused on the following four factors:

(1) the means by which it was created (e.g. legislative or administrative action);
(2) the entity's performance of some essentially governmental function;
(3) whether the entity receives and/or expends public funds; and
(4) the extent of control and supervision exercised by government officials or agencies over the entity.

EC-COI-85-22; EC-COI-83-74. None of these factors alone is dispositive. The Commission has considered, in each case, whether a particular combination of factors suffices to render an entity a governmental entity. For example, in **EC-COI-84-65**, the Commission concluded that a permanent charitable trust fund established to fund important civic improvements aimed at benefitting the residents of Boston, although subject to a certain amount of municipal control, was a private entity. In addition, the Commission has concluded that local private industry councils are municipal agencies within the meaning of G.L. c. 268A, §1(f) because of the role they play in the implementation of the Federal Job Training and Partnership Act; namely in the decision-making role they share with local elected officials in the development of job training plans, the selection of grant recipients and the expenditure of public funds. **EC-COI-83-74.**

Although the great majority of individuals elected by

voters at municipal elections are municipal employees for the purposes of G.L. c. 268A, we find that this conclusion will not apply when individuals elected at municipal elections are not expected to perform public service. In this case, the Committee does not possess sufficient indicia of a government agency. The Committee was created solely by members of the party interested in party politics. The function of the Committee is to organize the party on the local level. The Committee does not receive or expend public money to achieve its goal. ABC has no control over the actions of the Committee, which has no City approval or sponsorship. The mere fact that the state regulates the Committee, pursuant to G.L. c. 52, is insufficient to render the Committee a municipal or state agency.[1]/.

Based on the foregoing, for the purposes of G.L. c. 268A, the Committee is considered a private entity, rather than a government agency.[2]/ Accordingly, the Committee is not within the jurisdiction of G.L. c. 268A.

DATE AUTHORIZED: February 3, 1988

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[1]/Indeed, the Supreme Court has set limits on the permissible range of regulation of these kinds of entities by the government. **Tashjian v. Republican Party of Connecticut**, 107 S. Ct. 544 (1986). **See also, San Francisco County Democratic Central Committee v. Eu** 826 F. 2d 814 (9th Cir. 1987).

[2]/The Supreme Judicial Court, in another context, has noted that members of these political committees do not hold public office. **Attorney General v. Drohan**, 169 Mass. 534, 535, 48 N.E. 279 (1897)

CONFLICT OF INTEREST OPINION
EC-COI-88-3

FACTS:

You are a member of a Town Board of Selectmen and are interested in applying for a full-time position as Project Manager for the Town Local Assessment Committee (LAC). The Town LAC was organized by the Chairman of the Board of Selectmen, pursuant to the Hazardous Waste Facility Siting Act, St. 1986, c. 508 (Act). The Act was intended to resolve local resistance to the proposed siting of hazardous waste facilities by creating a local assessment committee comprised of officials and residents of the host community.

Under G.L. c. 21D, a developer who proposes the construction of a solvent recovery facility must file a Notice of Intent with the State Hazardous Waste Facility Council (Council). The Council may designate the proposal as "feasible and deserving of state assistance." The LAC is thereafter empowered to negotiate with the facility sponsor the terms and conditions of a siting agreement to protect the local public health, the local public safety and environment, and promote the fiscal welfare of the local community through special benefits or compensation. The exclusive authority to negotiate rests with the LAC. The LAC in a municipality may request technical assistance from the Council for review of a proposal, but this does not detract from the LAC's authority to negotiate. No facility may be established without a siting agreement between the sponsor and the LAC. The siting agreement is a non-assignable contract binding the sponsor and the community, enforceable against the parties in court. The Council is not a party to the agreement. If, despite the technical or financial assistance of the Council, there is an impasse between the LAC and the facility sponsor in negotiating a siting agreement, the Council may utilize binding arbitration to resolve the impasse.

The thirteen member Town LAC, organized following the filing of a Notice of Intent, is comprised of the chairmen of the Town Board of Selectmen, Board of Health, Conservation Commission, and Planning Board, and the Fire Chief. Of the remaining eight members, six are Town residents; the Board of Selectmen has also approved the appointment of two residents from neighboring communities to fill the two remaining seats.[1]/ Funding for the LAC expenses has originated with the Council and has been paid through the Town account authorization process.

QUESTION:

Are you currently eligible for appointment as Town LAC Project Manager?

ANSWER:

You are ineligible for appointment while you serve as a member of the Board of Selectmen and for six months thereafter.

DISCUSSION:

As a member of the Town Board of Selectmen, you are subject to a six-month waiting period following the completion of your Selectman duties before you are eligible for appointment to a paid position in a municipal agency of the Town. G.L. c. 268A, §20; **EC-COI-87-35; 82-107; 83-1.** 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. The six-month waiting period applies only to additional positions in the same municipality, and does not limit the eligibility of a selectman for appointment to a position with the commonwealth, a county, another municipality, or a regional municipal agency.

Based on the information you have provided, we conclude that the Town LAC is a municipal agency of the Town and that you are therefore subject to a six-month waiting period prior to eligibility for appointment to a Town LAC position.

In **EC-FD-87-1**, we reviewed the status of the Town

LAC in the context of the state financial disclosure law, G.L. c. 268B. We concluded that the LAC was not a "governmental body" within the meaning of G.L. c. 268B, §1(h) because the membership, control and objectives of the LAC were entirely local. We observed, however, that LAC members are covered by the provisions of G.L. c. 268A applicable to municipal employees. Our conclusion that the Town LAC is a municipal agency of the Town is supported by the fact that (1) G.L. c. 21D requires the LAC to represent the interests of the host community, in this case, the Town of Town, in connection with the proposed facility siting in the Town; (2) the LAC is controlled by elected and appointed representatives of the Town; and (3) the LAC's expenses are paid through the Town.

We do not find sufficient vestiges of shared control and responsibility with neighboring communities so as to conclude that the LAC is an independent regional municipal agency. **Compare, EC-COI-82-25** (statutorily created regional school district under which communities share costs and responsibilities is an independent municipal agency). The appointment by the Town Board of Selectmen of two residents of abutting communities was not mandated by G.L. c.21D and appears to have been made as a courtesy to the neighboring communities rather than pursuant to a statutory requirement to share responsibility with other communities. Moreover, G.L. c. 21D, §14 establishes a procedure through the Council under which abutting communities may seek compensation from the developer for any demonstrably adverse impacts imposed by the siting. The availability of this statutory avenue to protect the interests of abutting communities suggests that the Town LAC is not intended to represent the broad interests of the affected region but rather the interests of the Town. Because the Town LAC is a municipal agency of the Town, you are therefore subject to a six-month waiting period under G.L. c. 268A, §20.

DATE AUTHORIZED: February 3, 1988

[1]/ C. 210D, §5 provides that the LAC "... shall be comprised of (1) the chief executive officer, who shall serve as its chairman; (2) the chairman of the local board of health or his designee; (3) the chairman of the local conservation commission or his designee; (4) the chairman of the local planning board or his designee; (5) the chief of the fire department or his designee; (6) four residents of said city or town appointed by a majority vote of the aforementioned city or town officials, three of whom shall be residents of the area of the city or town most immediately affected by the proposed facility; and (7) not more than four members nominated by the chief executive officer and approved by a majority vote of the city council, board of aldermen, or board of selectmen of said city or town. Alternate members shall serve on said committee in the absence of members appointed in accordance with clauses (6) and (7) who, in each instance, shall be appointed in the same manner as those members appointed pursuant to said clauses (6) and (7). Said four members nominated by the chief executive officer may include representatives of abutting communities; each representative of an abutting community shall be approved by a majority vote of the city council, board of aldermen or board of selectmen of said abutting community."

CONFLICT OF INTEREST OPINION
EC-COI-88-4

FACTS:

You are counsel to a non-profit organization that sells certain products to municipalities. Most of the directors and most of the trustees of your organization are municipal officials of the municipalities which are members of your organization. The directors and trustees of the organization are unpaid for this work.

QUESTION:

Does G.L. c. 268A, §19 permit municipal officials who are directors or trustees of this organization to participate in their municipality's decision to contract with this organization?

ANSWER:

No, unless they are appointed officials who receive an exemption under §19.

DISCUSSION:

Municipal officials are municipal employees as defined in the conflict of interest law and, as a result, are subject to the provisions of that law. G.L. c. 268A, §1(g). Section 19 of c. 268A[1]/ prohibits municipal employees from participating[2]/ as such in any particular matter[3]/ in which a business organization in which they are serving as an officer or director has a financial interest.[4]/

Non-profit corporations, like this organization, are business organizations for the purposes of §19, and the decision to contract with this organization is a particular matter in which the organization has a financial interest. Accordingly, a municipal employee who is a director or officer of the organization may not participate in their municipality's decision to contract with the organization.

We base this conclusion on longstanding Commission precedent that non-profit corporations that conduct business are business organizations for the purposes of the conflict of interest law. **See, e.g., EC-COI-82-25; 81-56.** Although early opinions of the Attorney General construing §6 of the statute (the parallel provision involving state officials) indicated that §6 did not apply to non-profit organizations, a long line of Attorney General and Commission precedent extending forward from **Conflict Opinion No. 613** (February, 1974) concludes that a non-profit organization is a business organization. In particular, organizations engaged in the buying and selling of commodities or services have been found to be business organizations.[1]/ The General Court, in St. 210, §24 indicated that **Conflict Opinion No. 613** and its progeny shall remain valid and shall be binding on the Commission

until and unless reversed or modified by the Commission. We decline to reverse or modify this precedent.

This long-standing precedent reflects Attorney General Quinn's and, subsequently, the Commission's conclusion that §19's purpose is, as one commentator has noted, to target certain kinds of financial interests which may be presumed to "undermine the employee's ability to perform his public function disinterestedly and which are likely to undermine the confidence of the public in the employee's governmental service." Buss, **supra**, at 301. Such a conclusion is reflected in a reading of §19 that acknowledges that the pressure to perform public service in favor of a business organization, of which the municipal employee is a trustee or a member of the board of directors, is not lessened by the internal structural characteristics of that business organization. There is no distinguishing characteristic peculiar to non-profit business corporations or even to non-profit business corporations whose membership is limited to public entities, or a majority of whose board of directors or trustees are municipal officials, that convinces us that the prohibitions of §19 should not apply. To rule otherwise would produce anomalous results. Buss, **supra**, at 357. If the purpose of an organization is to conduct business, it is within the terms of the statute. The fact that this business organization's constituency is a group of municipalities is irrelevant to this analysis, particularly where the organization is competing with other entities for municipal contracts.

You have conceded the financial interest of the organization in obtaining contracts with municipalities. There is nothing about the non-profit structure of the organization that lessens the risk that a municipal employee serving as a trustee or a member of the board of directors of the organization would not be disinterested in the continued existence of the organization or influenced, as municipal employees, to put the business organization's interests before that of the municipality.

There is no §19 violation inherent when a municipal official serves the organization as a trustee or a member of the board of directors. The conflict law targets only those of the above described officials who wish to participate as municipal employees in their municipality's decision to contract with the very business organization they serve.

You should also note that §19(b) contains an exemption for those of the above described municipal officials who are appointed. Those individuals, by advising their appointing authorities of the nature and circumstances of the particular matter at issue and their financial interest in it, may receive a written determination from that authority that the interest involved is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. The exemption does not apply to elected officials.

DATE AUTHORIZED: February 3, 1988

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[1]/(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both. (b) 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]/"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]/You have already agreed that municipal officials who are trustees or members of the Board of Directors of one or more of the Associations may not act as agents or spokespersons for the Associations before any municipal agencies. **See, e.g., ECCOI8476.** We note that the policy reflected in §17(c) is that of protecting the public interest in situations where there is potential for divided loyalties, influence peddling, the use of insider information, or favoritism. See generally, Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law Rev. 299 (1965); **Town of Edgartown v. State Ethics Commission**, 391 Mass. 83 (1984).

CONFLICT OF INTEREST OPINION
EC-COI-88-5

FACTS:

You are a state official and oversee the procurement process. You state that it is common practice for the commonwealth, as part of the request for proposal (RFP) for some high-technology procurements, to reserve the right to have the bidder demonstrate the operation of the product. The bidder agrees, by responding to the RFP, to bear all costs of transporting state employees who comprise the selection committee, or a designated sub-group thereof, to the demonstration site. You indicate that the bidders usually pay for all transportation, meals and lodging associated with the demonstration. The selection committee visits only those bidders who have been determined to be within the competitive range. Those bidders who do not meet the technical specifications of the RFP and those who do not rank high in the combined cost and technical ranking are eliminated from the demonstration step.[1]/

You have stated that certain high-technology products need to be demonstrated to be assessed intelligently. You have also stated that, as you understand it, the practice of bidder-subsidized selection committee visits is

a common practice in the private sector for all procurements, not merely those that could be characterized as "high technology."

QUESTION:

Does G.L. c. 268A, §3 permit state employees to use bidder-subsidized travel to visit demonstration sites?

ANSWER:

No, unless such permission is authorized by statute or regulation.

DISCUSSION:

Selection committee members, as employees of the procuring agency, are state employees as defined in the conflict of interest law. G.L. c. 268A, §1(q). Section 3(b) of G.L. c. 268A prohibits state employees from, otherwise than as provided by law for the proper discharge of official duty, seeking or receiving anything of substantial value, for or because of any official act or acts within their official responsibility. A selection committee's work on behalf of a procuring agency of the commonwealth to evaluate prospective vendors would clearly constitute the performance of an official act. Receipt of anything "of substantial value"[2]/ for such travel would generally constitute a violation of §3(b). **EC-COI-87-29; 82-99. Commonwealth v. Famigletti**, 4 Mass. App. 584 (176). This subsidized travel is available to selection committee members precisely for or because of their official acts. The fact that the commonwealth would be soliciting the subsidized travel does make this kind of bidder subsidized travel an open subsidy, but it does not make the subsidies lawful. Although the bidding process outlined above would eliminate many of the problems that would normally arise in a situation of bidder subsidized travel under G.L. c. 268A, §23, **see, EC-COI-87-37**, travel expenses which are paid by the manufacturer would be of substantial value in most, if not all, situations and would violate §3(b) of the statute.[3]/ While it may be contended that the privilege of substantial value accrues here to the state and not to the individual travelers, Commission precedent indicates that the privilege of substantial value here does not accrue to the state, but rather to the individual traveler. **See, In the Matter of Carl D. Pitaro**, 1986 Ethics Commission, 271 (where the Commission held that the travel privilege of substantial value accrued to Mayor Pitaro and not to the City of Brockton). Section 3(b) clearly applies if the official received anything of substantial value for her or himself. **See, EC-COI-87-23.**[4]/

There are no distinguishing characteristics about "high technology" procurements that persuade us that a narrow exception carved out solely for these kinds of procurements would be appropriate. The need for "user friendly" or "user sensitive" equipment is not peculiar to high technology equipment and we are not convinced that the use of printed matter, manuals and shared reports are any less reasonable an alternative here. **See, EC-COI-82-99** at 2. An exception for particularly expensive procurements is similarly inadvisable.

Although gifts "provided by law for the proper discharge of official duty" are exempt from §3, we find no express statutory language or duly promulgated regulation which authorizes state employees to accept travel expenses from an interested vendor. Were there any such statute or regulation, §3(b) would not be implicated here.

DATE AUTHORIZED: February 3, 1988

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[1]/No Commission advice was sought about the propriety of this practice before its initiation.

[2]/It has been held that $50 in cash is "of substantial value". **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[3]/This Advisory Opinion in no way is meant to prohibit commonwealth subsidized visits by selection committees to potential vendors.

[4]/If the arrangement were structured such that the employee's expenses were reimbursed in the normal course by the Commonwealth, and the Commonwealth was subsequently reimbursed by the vendor, the employee would not be receiving anything of substantial value from the vendor.

CONFLICT OF INTEREST OPINION
EC-COI-88-6

FACTS:

You are Town Counsel for the Town of ABC. The Enforcement Division of the State Ethics Commission (Commission) has alleged that one of the selectmen violated the state conflict of interest law by voting on a salary increase in which a family member had a financial interest. The vote for the salary increase was unanimous. You state that you did not advise the selectmen on the application of the conflict of interest law to this situation prior to the vote. You were present when the vote was taken.

The Commission has found reasonable cause to believe that the selectman violated §19 of G.L. c. 268A by his participation in the vote on the salary increase. The selectman now wishes to retain you as his legal representative.

QUESTION:

May you, consistent with the conflict of interest law, be retained privately by the selectman to represent him in connection with the case against him before the Commission?

ANSWER:

No, as the representation will inevitably involve matters of direct and substantial interest to the Town.

DISCUSSION:

As Town Counsel, you are a municipal employee within the meaning of the G.L. c. 268A, the conflict of interest law. Section 17 of the conflict of interest law, which governs a municipal employee's "after-hours" employment, is relevant to your inquiry.

Section 17

Section 17 of the conflict of interest law provides that a municipal employee, such as a town counsel, may not act as the attorney for anyone other than the municipality "in connection with any particular matter[1]/ in which the [municipality] is a party or has a direct and substantial interest." G.L. c. 268A, §17(c). Thus, your private representation of the selectman is only appropriate if the subject matter of the representation (the charge of a conflict of interest), the proceedings before the Commission, and the Commission's ultimate decision are not matters in which the Town "has a direct and substantial interest." G.L. c. 268A, §17. Whether the Town has a direct and substantial interest in a selectman's alleged violation of the conflict of interest law will depend on the specific circumstances of the case. In this case, the conflict of interest allegations and Commission proceedings and decision will inevitably affect the Town's interest in a number of ways.

A decision by the Commission concerning whether the selectman illegally participated in the vote in favor of the salary increase will provide direction to the Town's elected officials concerning similar votes in the future.[2]/ Beyond that, it is possible that if the vote were taken illegally, an action for recession of the vote may be advanced.

Furthermore, the Town itself might be subject to litigation as a result of a potentially prohibited action by one of its elected officials.

In addition, the board of selectmen may take action to censure publicly a selectman if he is found to have violated the conflict law. **See, e.g., May v. Hall,** Worcester Superior Court Action No. 86-34501 (February 26, 1987) (where two Lunenberg Selectmen censured the third Selectman for a violation of §23 of the conflict law). Thus, under these circumstances, the Town will inevitably have a direct and substantial interest in the proceedings of the Commission to determine whether one of its officials violated the law.

DATE AUTHORIZED: February 3, 1988

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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.

[2]/ The decision could also address the role of town counsel in such situations, particularly where you were present during the vote in question.

CONFLICT OF INTEREST OPINION
EC-COI-88-7

FACTS:

You are considering accepting appointment to the position of Assistant City Solicitor for a City. The City has not designated the position of Assistant City Solicitor as a special municipal employee within the meaning of §1(n) of G.L. c. 268A. You are also an experienced criminal defense attorney. You indicate that if appointed Assistant City Solicitor, you would not represent any criminal defendant who was charged with the violation of any City ordinance, by-law or code. Furthermore, you state that you would not represent any criminal defendant in those matters in which the City would have a direct and substantial interest in the disposition of the case. For example, where a criminal defendant arrested for disorderly conduct files a civil rights complaint against the arresting officer charging unlawful arrest and brutality, you recognize that the City would have a direct and substantial interest in the criminal prosecution because its resolution might be dispositive of the potential liability of the police officer and/or the City. You wish to continue, however, representing criminal defendants arrested by the Beverly Police in suppression hearings which are commenced by a motion to suppress statements or evidence. The motion would be based on alleged violations of a defendant's federal or state constitutional rights.

QUESTION:

Does G.L. c. 268A, §17 permit you to represent for pay a criminal defendant arrested by the Beverly Police in connection with a motion to suppress hearing?

ANSWER:

No.

DISCUSSION:

Section 17(a) prohibits a municipal employee from receiving compensation from a client in connection with a case or controversy in which the municipality is a party or has a direct and substantial interest. We conclude that the City would have a direct and substantial interest in a

motion to suppress evidence obtained by the Beverly Police Department.

A motion to suppress is based on allegations that the police have unlawfully searched and/or seized evidence in violation of the defendant's rights under the Fourth Amendment of the United States Constitution or Article 14 of the Massachusetts Declaration of Rights. Due to the complexity of law in the area of Fourth Amendment and the speed with which the law changes and develops, motions to suppress evidence are a basic element of most criminal defense strategies. Ringel, **Searches and Seizures, Arrests and Confessions**, §20.01 (Vol. 2, 1983).

A search and/or seizure of evidence which fails to conform to Fourth Amendment standards gives rise to a claim under the Civil Rights Act, 42 U.S.C. §1983, and may, in limited circumstances, state a claim against the city which employs the police officer who conducted the search.[1]/ **Monroe v. Pape**, 360 U.S. 167 (1961). **Schiller v. Strangis**, 540 Fed. Supp. 605 (D. Mass. 1982). In those cases which are limited to naming a police officer as a defendant, the municipality has potential monetary responsibility under G.L. c. 258, §§12, 13, the commonwealth's indemnification statute.

Criminal defendants and prisoners customarily bring civil rights cases based on the same evidence and allegations applicable to the suppression hearing. In large part, the success of any civil rights case depends on the nature, scope and result of the suppression hearings. The findings of a suppression hearing are admissible in a subsequent civil rights case. If, for example, the motion to suppress were allowed, the plaintiff can introduce that fact to the jury and argue the value of the finding in his closing. Although in the Federal District Court of Massachusetts a jury is not bound to agree with the conclusion of the motion judge that there had been a civil rights violation, such a finding can be persuasive to a jury. In other jurisdictions, suppression findings may be binding in a subsequent §1983 case. For example, a denial of a motion to suppress may foreclose a subsequent successful civil rights case as a matter of law, and thereby preclude any potential monetary responsibility or liability of the City. See Cook and Sebieski, **Civil Rights Action:** The Preclusive Effect of Prior State Court Adjudications, §3.22 (Vol. 2, 1987). In other words, there is the potential that a motion to suppress hearing will lead to a civil rights complaint, and that the result of the motion will be critical or dispositive to the resolution of the complaint.

We do not believe that prior case law is inconsistent with our conclusion that the City has a direct and substantial interest in a suppression hearing. In the case of **Commonwealth v. Mello**, 11 Mass. App. Ct. 70 (1980), the Massachusetts Appeals Court held that a criminal defendant did not meet his burden of establishing that he had been denied effective assistance of counsel based on proving a "genuine conflict of interest" or a "tenuous conflict of interest accompanied by a showing of material prejudice." **Id.** at 71. **In dicta** in the case the Court interpreted §17 of the conflict law. The Court held:

> the language of §17 requires that the City have a direct and substantial interest in a matter allegedly involved in a conflict of interest. G.L. c. 268A, §17, as appearing in St. 1962, c. 779, §1. Whatever interest the City of Taunton had in the prosecution of the defendant for the violation of state law was not separate and distinct from that of citizenry of the Commonwealth as a whole. Criminal prosecution is conducted in the interest of the Commonwealth. The interest of the City was not sufficiently direct to meet the §17 standard.

Later in the same opinion, however, the Court left open the possibility that in particular types of situations or cases, a city may have a direct and substantial interest in a criminal prosecution. The Court noted, for example, (at 74), that in the case at bar, the testimony of the police was related to "routine police work", thus suggesting the conclusion that where police testimony was more critical in the case, the city may have a direct and substantial interest in the prosecution. Thus, the Appeals Court recognized the possibility that in certain types of situations, a city or town may have a direct and substantial interest in a criminal prosecution or a specific aspect of that prosecution.

We recognize that in practice a successful motion to suppress will not ordinarily result in a civil rights complaint.[2]/ In **EC-COI-88-6**, the Commission held that it is the possibility that the "town itself might be subject to litigation as a result of a potentially prohibited action by one of its elected officials" that results in the conclusion that the municipality has a direct and substantial interest in a particular case. As stated in **Edgartown v. State Ethics Commission**, "the legislature's concern about conflict between private interests and public duties may reasonably have motivated it to prohibit involvements that might present potential for such conflicts." 391 Mass. 82, 89 (1984). The Commission's interpretation precludes any potential conflict before they become a reality in a specific case, and before damage, even unwittingly, has been done. **Id.**

In conclusion, since the City may incur monetary liability to a police officer whose conduct is successfully challenged in a suppression hearing, and the City itself might be subject to litigation or liability as a result of prohibited activities by one of its officials, the City has a direct and substantial interest in the proceeding. **EC-COI-88-6**. Therefore, you may not receive pay for representation of a criminal defendant in a motion to suppress hearing if you accepted appointment as an Assistant City Solicitor.[3]/

DATE AUTHORIZED: March 23, 1988

[1]/The limited circumstances appear to be where a municipality has purposely established a policy or procedure which results in the civil rights violation. This is the so-called "official policy or custom" standard first enunciated in **Monell v. New York City Dept. of Social Services**, 436 U.S. (1978). See also, **Oklahoma City v. Tuttle**, 471 U.S. (1985) in which the court found cognizable a cause of action alleging failure by municipal officials to act to correct the pattern of police misconduct evidenced by police raids and illegal searches and seizures, such failure being tantamount to a ratification of this customary practice of the police. The court noted, however, that the municipal conduct must reflect at least willful or reckless disregard of the necessity of corrective action; mere negligence or deliberate indifference is insufficient to hold liable a municipality failing to provide adequate instructions or guidelines to its employees.

[2]/There are a variety of reasons for this, including but not limited to: the fact that criminal defendants do not make particularly attractive plaintiffs in civil cases, the lack of availability or access to the civil judaical system by criminal defendants, and the need to prove substantial actual damages in order to make a complex civil rights case worth pursuing.

[3]/If the position of Assistant City Solicitor were designated as a special municipal employee within the meaning of G.L. c. 268A, §1(n), and the position has no official responsibility for advising the police department in the conduct of its investigations or arrests, you may renew your request for an opinion based on those facts. See, §17, ¶3 applicable to special municipal employees.

CONFLICT OF INTEREST OPINION
EC-COI-88-8

FACTS:

You served as a member and employee of a Board of Registration (Board) which regulates certain companies. The Board is generally responsible for, among other things, licensing companies and investigating complaints against them.

While you were associated with the Board, you owned and operated several of these companies. You now wish to hold an interest in a general partnership (Partnership) which will operate a company regulated by the Board. You want to sell the assets of one of your other companies (Company X) to the Partnership. The Partnership will apply to the Board for approval of a change in ownership of Company X. The Board may conduct a hearing to determine the merits of the Partnership's application. If the application is approved, the licenses held by Company X will be relinquished to the Board which would then issue new licenses to the Partnership.

QUESTION:

Does the state conflict of interest law, G.L. c. 268A, §5 prohibit you or your partners from representing the Partnership on its application with the Board?

ANSWER:

No.

DISCUSSION:

While you were a Board member and employee, you were considered a state employee within the meaning of the conflict of interest law. G.L. c. 268A, §1(q). Because you resigned your state position, you are now considered a former state employee and are subject to the provisions of G.L. c. 268A, §5.

The conflict law prohibits you from acting as the agent for, or receiving compensation from a private entity in connection with a particular matter[1]/ in which the state is a party or has a direct and substantial interest if you participated[2]/ in the matter while employed by the state. G.L. c. 268A, §5(a).[3]/ Therefore, you may not represent the Partnership on a matter which is of direct and substantial interest to the state (such as an application with the Board for a license) if you participated in this matter while you were employed by the state. Participation requires personal and substantial action on your part. **Compare, EC-COI-81-113** (where action taken did not constitute "participation" under the conflict law because it was at a preliminary stage and was limited in scope); **In the Matter of John R. Hickey**, 1983 SEC 158 (where a ministerial act is not considered personal and substantial participation).

The Partnership's application to the Board is a particular matter. **See**, G.L. c. 268A, §1(k); **EC-COI-84-31** (a determination of need application filed by a hospital with the Department of Public Health is a particular matter). Because this application has never been previously filed (the Partnership did not even exist during your tenure with the Board), this is not particular matter in which you participated while a state employee. **See, EC-COI-84-14** (where a new property assessment is a different particular matter from a prior assessment). Therefore, we conclude that you may be compensated by or represent the Partnership in connection with its application before the Board.[4]/

In light of the fact that there are no restrictions in G.L. c. 268A, §5(a) which will prohibit you from representing the Partnership, there are similarly no restrictions on your partners. See, G.L. c. 268A, §5(c).[5]/

DATE AUTHORIZED: April 13, 1988

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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.

[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]/G.L. c. 268A, §5(a) states that a former state employee who knowingly acts as agent or attorney for, or receives compensation directly or indirectly from anyone other than the commonwealth or a state agency, in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which he participated as a state employee while so employed ... shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

[4]/Section 5(b) prohibits a former state employee from personally appearing before any agency of the Commonwealth within one year after leaving state service if (1) the appearance is in connection with any particular matter in which the state or a state agency is a party or has direct and substantial and (2) that matter was under the official responsibility of the employee within two years prior to the termination of such state employment. A personal appearance may include telephone calls and written communications as well as physically appearing. **ECCOI8727.**

A matter would have been under your "official responsibility" if you had "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i). These principles should be considered if you intend to communicate with your former board. For purposes of the Partnership's application, however, these restrictions are not relevant because the application was not a matter under your official responsibility while you were employed by the state.

³/Section 23(b)(2) restricts former state employees from improperly disclosing confidential material gained in their state jobs or using such information to further their personal interests. You should conform your conduct to these principles. In addition, although in this case the conflict law does not restrict your appearance before your former agency, your former colleagues are prohibited from using their positions to obtain an unwarranted privilege for you or the Partnership. G.L. c. 268A, §23(b)(2).

CONFLICT OF INTEREST OPINION
EC-COI-88-9

FACTS:

You are a part-time building inspector for a town (Town), and as such are a regular municipal employee.[1]/ You are also a carpenter. You wish to receive compensation from private parties to do occasional carpentry work in town. Specifically, you wish to accept small contracting jobs such as building a deck.

QUESTION:

May you receive compensation from private parties to do carpentry work in the town in which you are an employee?

ANSWER:

You may receive compensation in exchange for carpentry services which do not require an application for a building permit or subsequent inspection or approval by the Town. You may not, however, receive compensation for work which does require a permit.

DISCUSSION:

An examination of the State Building Code, 780 CMR 100 et. seq.[2]/ indicates that residential carpentry work falls into three categories. First is ordinary or non-structural repairs which do not require an application for a building permit. 780 CMR 102.1. The second category is work which includes an addition to, alterations to or replacement of, or relocation of water supply, sewer, drainage, drain liter, gas, soil, waste, vent or similar piping, and electrical wiring or mechanical work, all of which requires a permit under all circumstances. This work is customarily referred to as "structural." 780 CMR, Article 21,[3]/ §R-109.2 The third category of work is work which is not "structural" but which nevertheless requires a permit within the discretion given to the town pursuant to the State Building Code. Id. The Town, pursuant to its discretionary authority, requires an application for a building permit to build a deck or porch. The Town will require such building permit applications to ensure that the footprint of the deck conforms to the local setback and side requirements of the local zoning code, and to notify the assessing department of a possible change of value.

The State Building Code requires inspections by the building official to determine whether construction in progress is in conformance with the Code. Inspections are required regarding certain types of work specified in the Code, including foundations, plumbing, mechanical, electrical, frame and masonry, lathe and/or wallboard. 780 CMR, Article 21, §R-111. Other inspections are discretionary with the building official. Id., §R-111.1.5. For example, although the Town requires a permit to build a deck, it is uncommon for the deck to be inspected subsequent to completion.

Section 17 of the conflict law generally prohibits a municipal employee from acting as agent for, or being paid by, anyone other than the town, in relation to any decision, determination, or other particular matter in which the town is a party or has a direct and substantial financial interest.

Carpentry work which requires a building permit is affected by this section because the town has a direct and substantial interest in the application for and the issuance of the permit, which is a determination by the town that the work conforms to the requirements of law, and because work done pursuant to a permit is presumptively "in relation to" the permit.

The Commission concludes that the Town has a direct and substantial interest in an application for, and issuance of, a building permit because the issuance of a permit is the local building official's decision or determination that the work complies with all relevant codes, laws, ordinances, rules and regulations. Even in the case of a comparatively small construction project, such as the building of a deck, the building official has the responsibility to determine the appropriate use of materials and that the design meets the minimum side yard and setbacks of the local zoning law.

The Town's interest is direct and substantial even if no inspection is required. The fact that the town chooses not to exercise its discretionary right to inspect in a particular case or category of cases does not negate the interest of a town to ensure compliance with the State Building Code and other relevant laws, ordinances or regulations. There is nothing in the State Building Code which would prohibit a town from using its discretionary authority to inspect specific non-structural work if for any reason the lawfulness of that work were called into question. A town always retains jurisdiction to determine that work is in accordance with the specifications stated on the application for a building permit, and may issue a cease and desist order if the work does not so comply. 780

CMR 122.1. Therefore, there is no substantial basis for distinguishing between work pursuant to a required permit which results in a subsequent inspection from work for which the town requires a permit but does not routinely inspect. The direct and substantial interest of the town is determined by the requirement of issuing a permit, and not by the practice of inspection.

The more difficult issue is whether carpentry work done pursuant to the permit is "in relation to" the permit, and thus prohibited under §17. In **EC-COI-87-31**, the Commission concluded that a municipal official could not be paid privately to install septic systems because the installation was in relation to the septic permit and subsequent inspection. We held that where the official operated his own septic business and was the only installer on the job, there was a presumption that the work he performed was in relation to the permit. In that opinion, however, we recognized that certain facts may overcome the presumption that all work done pursuant to a 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.

Applying the principles of 87-31 to your situation leads to the conclusion that §17 would not permit you to engage in the carpentry work you contemplate. You have indicated that you would not be part of a crew but would be doing the work yourself. While it might not be necessary for you to pull the permit yourself, you presumably would be the person who would have to deal with any town official who raised an issue with the permit on the work done pursuant to the permit. Therefore, it is highly unlikely you could overcome the presumption established in 87-31.

The Commission is aware that the General Court has permitted certain trade persons to engage in licensed work within their own towns irrespective of their own status as municipal employees. See, e.g., G.L. c. 66, §32 - municipal inspector, wires; G.L. c. 142, §13 - plumbing and gas fitting inspector. However, the General Court has not promulgated any similar legislation pertaining to part-time local building inspectors.[4]/

Therefore, we conclude you may not receive compensation for carpentry work in your town if the town requires an application for a building permit for the structure you intend to work on. This prohibition will continue to apply to you until and unless you are able to structure any private employment arrangement in a way that eliminates any possibility of having to deal with town officials in connection with the work performed.

DATE AUTHORIZED: July 6, 1988

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[1]/If the position of part-time building inspector were designated as special the result herein would be the same inasmuch as a part-time building inspector has official responsibility for the enforcement and administration of the State Building Code and permits issued pursuant to that Code.

[2]/The Code, comprised of 22 articles, is the set of comprehensive regulations to which all construction must adhere. It stipulates requirements for structural loads, materials, lighting, ventilation, fire protection, egress, energy conservation, and many other building topics, including responsibilities for administration and enforcement and procedures to be followed in filing appeals. Local building officials enforce the code as it applies to all buildings within their jurisdictions with the exception of state-owned buildings which are the responsibility of state building inspectors.

[3]/Article 21 is referred to as The One and Two Family Dwelling Code and is published separately.

[4]/We note that §107.5 of the State Building Code precludes a full-time building inspector from engaging in construction work within their own community. While the section does not specifically address part-time building inspectors, it goes on to state: "Nor shall any officer or employee associated with the building department engage in any work which conflicts with his official duties or with the interests of the department." We believe the application of §17 of G.L. c. 268A to your situation, as indicated in this opinion, conforms to the principles stated in §107.5.

CONFLICT OF INTEREST OPINION
EC-COI-88-10

FACTS:

You are a teacher in the town of ABC. Your employment with the School Department is governed by the 1987-1990 ABC Collective Bargaining Agreement (Agreement). In addition to setting forth the teacher salary schedule, the Agreement states that:

> Teacher participation in extra-curricular activities shall be voluntary and teachers will be compensated for participation in extra-curricular activities established by the Committee.

The ABC School Committee has determined that, under the Agreement,

> extracurricular activities established by the School Committee include scholarly writing and producing of curriculum materials for publication which would result in compensation through royalties to the professional staff members (provided that materials are ordered and purchased).

You have written and have had published certain scholarly materials, including a textbook on problem-solving skills, and the School Department is interested in purchasing your textbook. You state that you do not participate in the selection of books purchased by the school department.[1]/

QUESTION:

Does G.L. c. 268A permit you to receive royalties from the sale of your book to the ABC School Department?

ANSWER:

Yes.

DISCUSSION:

You are an ABC public school teacher, and therefore, a municipal employee pursuant to your employment contract with the ABC School Department. G.L. c. 268A, §1(g). The conflict of interest law prohibits municipal employees from having a financial interest, directly or indirectly, in contracts (other than their employment contracts) made by a municipal agency of the same town. G.L. c. 268A, §20. The receipt of income from a contract made by the School Department would constitute a financial interest in a contract made by a municipal agency. Accordingly, if you are to be compensated for providing additional services or for selling a publication to the School Department, you would violate §20 unless the arrangement was contemplated in your employment agreement with the School Department.

The Commission has previously held that the multiple contract restrictions of G.L. c. 268A do not apply when an employee's additional services and compensation are an expansion of the employee's primary employment contract. **See, EC-COI-84-148** (where one who serves on a state advisory committee may also be employed and paid by the state for another job provided the responsibilities for both originate with the employee's one contract of employment). Therefore, if it is "by virtue of [a teacher's] employment arrangement" that a teacher receives compensation for performing additional responsibilities, this compensation will be permitted. **Id. See also, EC-COI-84-147** (where state university employees may also serve on the board of directors of a state university controlled company and will not have a prohibited financial interest in multiple state contracts; the Commission concluded that "service as state employees for the company and the university is connected to only one state contract, their original university contract"); **83-83** (where one contract contemplates the services provided by an employee in two positions, §7 [the state counterpart to §20] is not violated); **82-57** (where a city employee's duties are expanded under one contract of employment, the employee is considered to have a financial interest in only one contract made by the city and, therefore, does not violate §20).

In light of these precedents, we regard the performance of extracurricular activities by a teacher to be tied to and contemplated by the teacher's primary employment contract, and, therefore, not in violation of G.L. c. 268A, §20.

We also find that the receipt of royalties from the sale of books to the School Department appears to be a permissible, compensable extracurricular activity under the agreement. We defer to the School Committee's interpretation that the teachers' collective bargaining agreement permits teachers to be paid for their publications in the event the department purchases them. We conclude that the construction of the contract is reasonable and that it is within the scope of legitimate extracurricular activities that a teacher would publish and receive royalties from the sale of scholarly writings, particularly those writings which may be used in the classroom.[2]/

DATE AUTHORIZED: June 14, 1988

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[1]/Section 19 of G.L. c. 268A prohibits a municipal employee from participating in any particular matter in which, among others, the employee has a financial interest. Thus, a teacher is prohibited from participating in the school department's selection of a book which he or she authored, as this would lead to the teacher's receipt of royalties and would, accordingly, affect the teacher's financial interest. This prohibition is not applicable to this case as you had no participation in the school department's selection and purchase of your book. However, those school officials who do participate in the selection of classroom texts must be guided by the principles of §23(b)(2) of the conflict law; i.e., they may not use their public positions to secure an unwarranted privilege or benefit of substantial value for another when such a privilege is unavailable to similarly situated people. Thus, there must be objective criteria and standards employed to aid in the unbiased selection of textbooks, and your book may not be selected merely as a favor to you.

[2]/Our willingness to defer to the School Committee rests on the fact that the preparation of written materials for educational purposes is an endeavor which is traditionally undertaken by teachers and which often is relevant to the evaluation of teacher performance. Thus, while under normal circumstances receipt of royalties could not reasonably be characterized as additional compensation contemplated by the employment contract, this important component of a teacher's professional activity is deserving, in the Commission's view, of particular consideration in interpreting the terms of the collective bargaining agreement and the requirements of G.L. c. 268A, §20.

CONFLICT OF INTEREST OPINION
EC-COI-88-11*

FACTS:

You recently completed a five year term as undersecretary of the Executive Office of Environmental Affairs (EOEA). As undersecretary, you had no specific statutory responsibilities and were assigned responsibilities by the EOEA Secretary. See, G.L. c.21A, §1 ("[s]aid undersecretary ... shall perform such duties as may be assigned by the secretary.")

Your responsibilities generally involved policy development and service as liaison between EOEA and its agencies, external constituencies such as the legislature and general public, and interested groups. From time to time, you were assigned responsibility for working with an EOEA agency on development of specific policy for example, development of state policies on low level radioactive waste, source reduction, solid waste capacity and response to the hazardous waste initiative petition.

Specific application of policy to a particular situation was most often the responsibility of the agency, particularly in the instance of application of rules and regulations. Depending on the issue, the EOEA Secretary would assign official responsibility for a particular issue to other staff in the office. For example, although you had responsibility for supervising EOEA staff, you were not specifically assigned responsibility for overseeing the budget preparation for the various agencies.

You are now a former state employee and seek guidance regarding the application of G.L. c. 268A to the following employment opportunities.

1. Fall River Harbor Development

The City of Fall River (City) is developing a master plan for the Fall River Harbor. You have been offered an opportunity to advise the City for up to fifty days per year on issues concerning the use of the state pier, the relevance of Coastal Zone Management (CZM) policies on designated ports, and the impact of Department of Environmental Quality Engineering (DEQE) waterways regulations under G.L. c. 91. Although the Fall River Harbor master plan will not require approval by state agencies, any specific projects developed under the plan will require state approval. You state that the City has recently sought DEQE consultation and assistance in preparing the master plan, but that no consultations have yet taken place. In carrying out your advisory responsibilities for the City, you expect to meet with staff from state agencies within EOEA.

You state that, with one exception, you have had no prior involvement with the subject of the development of a Fall River Harbor master plan. In late 1986, the Mayor of Fall River indicated to you in a telephone conversation that the City was interested in developing property on the state pier in Fall River. You responded that the state pier was not currently developable and could only be developed in the context of a plan. The gist of your conversation, which lasted for five to ten minutes, was that the City needed a process to develop property on the state pier.

2. Browning Ferris Industries(BFI)

BFI, a waste management company, has offered you a contract to advise it on regulatory issues regarding landfill expansions and the development of new landfill capacity. While employed as EOEA undersecretary, you discussed disposal capacity issues with BFI and other waste companies, but were not involved in DEQE or Massachusetts Environmental Protection Act Unit (MEPA) determinations of landfill site assignments or plan approvals. While such determinations were within the jurisdiction of the particular state agencies within EOEA, you assisted in expediting certain environmental impact reports (EIR's) which were under consideration by MEPA.

3. ORFA

You have been offered a contract with ORFA, a resource/recovery recycling company, to manage its Northeast projects. ORFA currently has received EIR approval for a Somerville project, and since 1985 has submitted requests to MEPA for examination of a transfer station on the same site. You state that you had no involvement or review responsibility for the MEPA review for the ORFA Somerville project.

You may also be assigned by ORFA to work on a project in the Holyoke area. Previously, you participated as Undersecretary in discussions about the suitability of a Holyoke site for resource recovery in connection with an incinerator project proposal submitted by HERCO, a different company. Following a DEQE hearing, the initial HERCO project proposal was denied. ORFA now intends to submit a new proposal on either a Chicopee or Granby site. ORFA's proposal would propose a resource recovery/recycling technology, as opposed to the "mass burn" technology proposed earlier by HERCO.

4. Law Firm

You intend to join the law firm of McCormack and Putziger (Firm) as "of counsel." You will be identified as "of counsel" on the Firm's letterhead and will be provided the use of an office and a secretary. You will not participate in any partnership distributions and will receive revenues derived only from cases in which you provide legal services. As "of counsel", you will not be required to participate in any matter in which the Firm is involved nor can you require the Firm to become involved in any of your cases.

During your EOEA tenure, you worked with MEPA in examining a proposed expansion of a Framingham shopping center which allegedly intruded into wetlands. MEPA denied the proposal and determined that no mitigation would be acceptable in connection with the proposed expansion. The Firm did not appear before MEPA or you in connection with the matter because the Firm had doubts about the ownership of the project. The Firm now wishes to represent a client in connection with the project. You state that you will not participate as "of counsel" in any of the Firm's activities representing the client.

QUESTION:

How does G.L. c. 268A apply to your prospective employment opportunities?

ANSWER:

You will be subject to the limitations described below.

DISCUSSION:

Upon your departure from EOEA, you became a former state employee. As a former state employee, three paragraphs of G.L. c. 268A will apply to you.

1. Section 5(a)

This paragraph prohibits you from receiving compensation from or acting as attorney or agent for anyone other than the commonwealth in connection with any particular matter[1]/ in which you previously participated[2]/ as EOEA Undersecretary.

2. Section 5(b)

This paragraph prohibits you from personally appearing, during a one year period following the completion of your EOEA services before any state court or state agency, in connection with any particular matter which was under your official responsibility[3]/ during a two year period prior to your departure from EOEA.

For the purposes of §5(b), we will assume, as you represent, that you possessed no authority to direct, approve or disapprove action by any EOEA agencies, and that your official responsibility was limited to those matters expressly assigned to you by the EOEA secretary.[4]/ If the scope of your official responsibility were greater than you represent, the one year appearance bar of §5(b) would also be greater.

3. Section 23(c)

This paragraph prohibits you from disclosing confidential information which you acquired as an EOEA employee, or from engaging in professional activities which would require your disclosure of such confidential information.

Applying these principles to your four employment opportunities, we advise you as follows.

1. Fall River Harbor Development

Based on the information you have provided, we conclude that §5 does not prohibit your accepting an appointment by the City to provide advice on the application of state law and regulations to particular proposals considered for inclusion in a master plan. While §5 would place restrictions on your working on proposals or other matters in which you previously participated or had official responsibility for at EOEA, none of your proposed activities is in connection with matters which were the subject of your previous participation or official responsibility, or were pending in EOEA during your tenure. Your brief conversation with the Mayor in 1986 does not affect this conclusion. Your advice to the Mayor regarding the need for a plan to develop the state pier was not "personal and substantial" participation in the City's decision to develop a master plan for the entire harbor, G.L. c. 268A, §1(j), nor is your advisory role for the City "in connection with" any matter in which you did participate or had official responsibility for. As we understand it, your advice will be offered in connection with the feasibility under state law of particular proposals. As long as these proposals were not matters in which you previously participated or had official responsibility for, §5 will not prohibit your activities in connection with these proposals.

We would also add that once you have been hired by the City, you will become a municipal employee for the purposes of G.L. c. 268A. Your outside activities will be governed primarily by G.L. c. 268A, §17. If the City Council classifies your position as a "special municipal employee" and you serve in your advisory capacity for less than sixty days in any 365 day period, §17 will restrict only those outside activities which relate to matters in which you participate or have official responsibility for as a municipal employee. If your position is not classified as a "special municipal employee," §17 prohibits your receiving compensation from or acting as agent for any non-City party in relation to any particular matter in which any City agency is either a party or has a direct and substantial interest. We are available to assist you with the application of §17 to particular fact situations as they occur.

2. BFI

Your proposed advisory contract with BFI will be permissible under §5 as long as the particular proposals or controversies for which you will be advising BFI are new matters in which you did not previously participate or have official responsibility for as an EOEA employee. The restrictions of §5(a) would apply, for example, with respect to any EIR which you assisted in expediting with MEPA, as well as with respect to your challenge of the validity of any EOEA agency regulations which you assisted in drafting. **EC-COI-81-34.**

3. ORFA

Your proposed management consultation activities for ORFA appear to be permissible under §5. The ORFA Somerville project does not involve matters in which you previously participated or had official responsibility for as an EOEA employee. Further, the ORFA resource recovery proposal in western Massachusetts is a different particular matter from the HERCO Holyoke proposal in which you did previously participate. Because the ORFA

proposal is a new submission involving a different technology in a different location from the initial HERCO proposal, your ORFA activities would be regarded as in relation to a different particular matter for the purposes of G.L. c. 268A. **Compare, EC-COI-84-31; 8414.**

4. Law Firm

The restrictions of §5(a) also apply to partners of former state employees. For example, with respect to those decisions, determinations and other particular matters in which you participated at EOEA, your partners are subject to a one year bar on their receiving compensation from or representing clients in relation to these same matters. Based upon the information you have provided, you will not be considered as having "partners" in the Firm for the purposes of §5(c). This result will continue to apply long as your "of counsel" status continues as you have described it. **See, EC-COI-80-43.** Of course, §5(a) will continue to apply to you with respect to matters in which you previously participated, for example, the proposed expansion of the Framingham shopping center.

DATE AUTHORIZED: April 13, 1988

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

[4]/In light of your representation, we do not reach the question of whether the EOEA Secretary possessed "official responsibility" for all particular matters pending within his secretariat.

CONFLICT OF INTEREST OPINION
EC-COI-88-12*

FACTS:

You recently resigned your position as Executive Director of the Massachusetts Energy Facilities Siting Council (Siting Council) in the Executive Office of Energy Resources (EOER) in order to accept a position as Commissioner of the Department of Public Utilities (DPU). When you were Executive Director of the Siting Council, there were, among other things, three cases pending with that agency. Your past involvement in these matters as well as your potential, prospective involvement as DPU Commissioner is summarized below.

1. DPU Docket No. 86-36

This matter is a generic rulemaking investigation concerning the electric utility industry. You did not participate[1]/ in or have official responsibility[2]/ for this matter as Executive Director of the Siting Council. The Secretary of Energy Resources did. Although you generally serve as the Secretary's advisor on many matters, you did not serve as the advisor on this matter. You propose to participate as DPU Commissioner in DPU Docket No. 86-36.

2. DPU Docket No. 85-178

This matter is a generic rulemaking investigation concerning the gas utility industry. As Executive Director of the Siting Council you gave oral testimony and written comment to the DPU in 1986. An interim order has been issued, but the case is still open to resolve certain remaining issues. You propose to participate as DPU Commissioner in the remaining phases of DPU Docket No. 85-178.

3. DPU Docket No. 87-169

This case is a two-phase investigation of matters pertaining to the state's electric utility companies. You have participated in the first phase of the matter in your position as Executive Director of the Siting Council. You testified as an expert witness in 1987 and 1988, and advised the EOER Secretary and the Attorney General on strategy and policy concerning the matter. You also participated in drafting the briefs submitted by the EOER Secretary and the Attorney General. You do not propose to act as DPU Commissioner on Phase One because an order from DPU on that phase is imminent. You do propose to participate as DPU Commissioner in the remaining phase of the investigation.

QUESTION:

Does your participation as DPU Commissioner in the matters described above comply with the conflict of interest law?

ANSWER:

Yes.

DISCUSSION:

The Commission has addressed a very similar question raised by a former employee of EOER who subsequently became a DPU Commissioner. In **EC-COI-82-31**, the Commission concluded that

> As an employee of the EOER and as Commissioner at the DPU you were and are a state employee, G.L. c. 268A, §1(q), and are subject to the conflict of interest law. Section 5(a) of that statute prohibits a former state employee from receiving compensation from or acting as agent or attorney for anyone other than the Commonwealth in relation to a particular matter in which the state or a state agency is a party or has a direct and substantial interest and in which he participated while a state employee. The provisions of §5(a), however, do not apply to a state employee who resigns to accept employment with a second state agency. **EC-COI-81-60**...
>
> > This is also true for §5(b) restricting activities of the former state employee acting as agency or attorney for a non-state party in relation to matters within his official responsibility.
> >
> > **EC-COI-82-31** at 3, fn.3.

We conclude that this same reasoning applies with equal force to your case. The "former state employee" prohibitions articulated in the conflict of interest law do not apply to one who resigns one state job in order to accept another. Our opinion in **EC-COI-82-31** was affirmed by the Supreme Judicial Court in **Attorney General v. Department of Public Utilities and another**, 390 Mass. 208, 215 (1983) (where the court concluded that, notwithstanding the participation of Commissioner Selgrade in a matter while he was an EOER employee, his further participation in the matter as a DPU Commissioner did not taint the proceedings "with unfairness justifying the reversal of the department's decision"). Accordingly, your proposed participation as a DPU Commissioner in DPU Docket Nos. 87-169, 85-178 and 83-36 is not prohibited by §5 of the conflict of interest law.

The "standards of conduct" contained in §23 of the conflict law apply in addition to all other sections of the law. **See, EC-COI-82-31** (discussing §23(e) of the conflict law). These provisions were amended in 1986 so that the current parallel section to §23(e) is §23(b)(3). The amended §23 is more flexible than its predecessor; now, in the event of the appearance of a conflict, a public official is **not** disqualified from participating but rather is required to make a public disclosure. Section 23(b)(3) provides that, absent a public disclosure, a state employee may not act so as to give the reasonable impression that the employee may be improperly influenced, that one can unduly enjoy the employee's favor or that he or she is likely to act as a result of position or undue influence. G.L. c. 268A, §23(b)(3).[3]/

Based on our review of the information which you have supplied concerning the three DPU matters at issue, it appears that a public (i.e., in writing and filed with your appointing authority) disclosure would be appropriate before you participate in DPU Docket No. 87-169. This is so because of your active participation in the first phase on the matter (drafting briefs and taking a significant advocacy role). We conclude that the same disclosure is required before you participate in DPU Docket No. 85-178 where an interim order has terminated the phase of the rulemaking investigation in which you had prior limited but official participation. Even your limited connection with this case could give the appearance of a conflict which would be remedied by disclosure. Because you had no participation or official responsibility for any phase of DPU Docket No. 86-36, there is no requirement of a public disclosure.

You should also be aware that §23(b)(2) of the conflict law prohibits the knowing or attempted use of your official position to secure for yourself or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals. Accordingly, you may not use you DPU position to secure an unwarranted privilege, for example, for an agency with which you have had a prior association. If a public official makes a recommendation or decision which is not based on objective standards, but is rather based entirely on a prior relationship, this may constitute securing an unwarranted privilege for another in violation of §23(b)(2).

We must emphasize that, as we did in **EC-COI-82-31**, the question of the application of common law principles of bias has not been reviewed in this opinion. We are limited to addressing matters strictly within our jurisdiction, i.e., interpreting and applying G.L. c. 268A and 268B.

DATE AUTHORIZED: May 25, 1988

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

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

CONFLICT OF INTEREST OPINION
EC-COI-88-13*

FACTS:

You are the Corporation Counsel for the City of Fall River. You state that some time prior to October 23, 1986 Michael Niewola, the Sealer of Weights and Measures for the City of Fall River, was arraigned on the charges of willful and malicious burning of personal property, false reporting of a stolen motor vehicle, and accessory before the fact to larceny of a motor vehicle. On October 23, 1986, Michael Niewola was suspended pursuant to G.L. c. 268A, §25. The written notice of that suspension listed the arraignment on the above three charges as the reason for the suspension pursuant to §25. Michael Niewola was indicted, on November 14, 1986, on all three of the above charges as well as the charge of operating under the influence of alcohol. He was subsequently found not guilty of the charges cited in the written notice of October 23, 1986, but was found guilty of operating under the influence of alcohol.

You have also stated that Niewola, as Sealer of Weights and Measures, was assigned a City of Fall River vehicle which he was permitted to take to his home in Fall River at the end of each workday. This permission was conditioned on the understanding that city vehicles are to be used solely for city business. Michael Niewola's charge of driving under the influence of alcohol involved his operating his city vehicle after hours while under the influence of alcohol.

QUESTION:

Is Michael Niewola, the Sealer of Weights and Measures for the City of Fall River, entitled to receive all compensation or salary due him for the period of his suspension pursuant to G.L. c. 268A, §25?

ANSWER:

Yes, subject, however, to the resolution of any administrative action by his appointing official under G.L. c. 268A, §23(b)(2).

DISCUSSION:

Michael Niewola, as Sealer of Wights and Measures for the City of Fall River, is a municipal employee as defined in the conflict of interest law. G.L. c. 268A, §1(g). Section 25 of G.L. c. 268A, in pertinent part, states that:

> An officer or employee of a county, city, town or district, howsoever formed, including, but not limited to, regional school districts and regional planning districts, or of any department, board, commission or agency thereof, may during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment, at any time held by him, be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner. Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered and sent shall automatically suspend the authority of such person to perform the duties of his office or employment until he is notified in like manner that his suspension is removed. A copy of any such notice together with an affidavit of service shall be filed as follows: In the case of a town, with the town clerk; in the case of a regional school district, with the secretary of the regional school district; and in the case of all other districts, with the clerk of the district.
>
> If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, this suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement.

It requires that the officer or employer suspended under this section must be under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by that individual. The phrase "without a finding or verdict of guilty on any of the charges on which he was indicted" refers to the "indictment for misconduct in such office or employment" found earlier in the section. To read this language otherwise would be to broaden the scope of permissible basis for a §25 suspension to any indictable offense. It has been noted that c. 30, §59, (a parallel provision for state employee or officers) is by its terms inapplicable to offenses that have no relation to the office or position held by the indicted individual at the time the criminal acts in question allegedly were committed. The statute specifies misconduct in **such** (emphasis in original) office or employment, thus indicating it cannot simply be applied indiscriminately to all offenses committed by an individual while he is an official, or employed by the Common-

wealth." (A.G. Op. 3/30/64). We read the language of G.L. c. 268A, §25 in the same way. The real question, as a result, is whether Michael Niewola's indictment and conviction for driving while under the influence of alcohol is properly considered being under indictment for misconduct in his office as Sealer of Weights and Measures for the City of Fall River.[1/]

The breadth of the term "misconduct in office" hinges on the establishment of a direct relationship between the misconduct and the office. **Perryman v. School Committee of Boston**, 17 Mass. App. Ct. 346, 348 (1983). No such relationship has been established in Michael Niewola's case. The fact that he was operating a city vehicle after hours while under the influence of alcohol is not in and of itself sufficient to make the offense misconduct in office within the meaning of the statute. In **Tobin v. Sheriff of Suffolk County**, 377 Mass. 212 (1979) the Supreme Judicial Court held that a court officer could not be suspended under §25 because courthouse business was not involved in allegations of involvement in a kick-back scheme tied to the awarding of city contracts where the offensive conduct occurred on the premises of the courthouse. Similarly, City of Fall River business was not involved in the allegations of Michael Niewola's having driven under the influence of alcohol, despite his use of a city vehicle to do so. Indeed, Michael Niewola was off-duty when the offense occurred. In addition, we do not find the position of Sealer of Weights and Measures to be sufficiently analogous to that of a public school teacher or police officer or any other position of special public trust so as to support the conclusion that any off-duty conduct resulting in indictment constitutes misconduct in office. **See e.g. Dupree v. School Committee of Boston**, 15 Mass. App. 535 (1983).

Michael Niewola's indictment and conviction for driving while under the influence of alcohol is not properly considered as being under indictment for misconduct in his office as Sealer of Weights and Measures for the City of Fall River. Accordingly, Michael Niewola is entitled to receive all compensation of salary due him for the period of his suspension pursuant to G.L. c. 268A, §25.

We note that this opinion is limited to the issue of compensation under G.L. c. 268A, §25. Under G.L. c. 268A §23(b)(2), a municipal employee may not use his official position to secure for himself an unwarranted privilege of substantial value. In a recent Commission action, a Boston fire department employee was fined $500 by the Commission and also was required to repay $500 to the city for the economic advantage derived by his use of a city vehicle for personal purposes in violation of §23. See, **In the Matter of Dennis Flynn**, 1985 Ethics Commission 245. If the City of Fall River determines that Mr. Niewola's use of a city vehicle was an unwarranted use in violation of §23(b)(2), appropriate administrative action as is warranted may be taken by the head of the municipal agency. See, G.L. c. 268A, §23(e).

DATE AUTHORIZED: June 14, 1988

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

[1/]Although the facts in the case also raise two procedural questions about the adequacy of the §25 notice given (omitting the driving while under the influence of alcohol charge) and the timing of the §25 notice given (postarraignment but, apparently, preindictment) we need not address these issues since, as a matter of substantive law, we find Michael Niewola's offense, in this context, does not amount to misconduct in the office within the meaning of G.L. c. 268A, §25.

CONFLICT OF INTEREST OPINION
EC-COI-88-14

FACTS:

You formerly served as manager a state agency ABC. In that capacity, you were involved in an application by DEF for a grant. Specifically, you contacted DEF officials to encourage their application for a grant. Following the receipt of the DEF application, you spent several weeks on this project researching information relating to the grant. You coordinated an independent review committee evaluation of the application; the committee's recommendations were generally favorable. Prior to your departure from ABC, you recommended that ABC grant the DEF an award under the program. ABC subsequently approved the grant.

You now wish to work for a consulting firm in connection with the grant awarded by ABC to DEF. As we understand it, if the firm is selected as consultant to write the construction bid specifications, and to make the project bidder recommendations for DEF, you would be interested in working for the firm to write the specifications.

QUESTION:

Does G.L. c. 268A permit you to work for the firm in connection with the grant?

ANSWER:

No.

DISCUSSION:

Upon your departure from ABC, you became a former state employee for the purposes of G.L. c. 268A. Under G.L. c. 268A, §5(a), a former state employee is prohibited from receiving compensation from a non-state party in connection with any contract, decision or other particular matter[1/] in which he previously partici-

pated[2]/ as a state employee and in which the state is a party or has a direct and substantial interest.

The ABC grant award to DEF is a particular matter under G.L. c. 268A, §1(k), and if the firm is selected as consultant, your work for the firm would provide you compensation in connection with that grant award. Specifically, you would be preparing specifications for a construction bid to DEF in the implementation of the same grant award in which you were previously involved at ABC and would be performing services which were contemplated in the award. **See, EC-COI-87-31.** These design phase requirements were envisioned in ABC's drafting of the grant proposal, and ABC officials will be reviewing the implementation of the grant by DEF, including the firm's performance in carrying out the design phase work. The critical question for G.L. c. 268A, §5 purposes is whether your previous involvement in the grant award prior to your departure constituted "personal and substantial participation" in the grant award. We conclude that it did.

In prior rulings, the Ethics Commission has distinguished conduct which is ministerial, pro-forma or preliminary from conduct which is deemed substantial. See, **In the Matter of James Geary**, 1987 Ethics Commission; **In the Matter of John Hickey**, 1983 Ethics Commission 158. What is clear from the Commission's rulings is that an employee need not have given final approval to a grant in order to have participated in the grant.

It is also well-settled that a state employee who has recommended awarding a grant may not be paid in relation to the same grant. **EC-COI-79-18; 79-34; 79-69; 81-172.** On the other hand, if an employee had no involvement in the development of grant specifications or in the planning and preparation, or if the preparation work was insignificant or too preliminary, the employee will not be regarded as having participated. **See, EC-COI-79-4; 79-85; 81-159.**

Upon reviewing these principles and applying them to your facts, we conclude that you participated as an ABC employee in the grant award to DEF. This conclusion is based on the substantive role which you played in initiating the DEF proposal, in personally reviewing the DEF application and independent review committee process, and in recommending that ABC grant an award to DEF.

While it is true that you did not make the final decision, your recommendation, together with your prior activities in connection with the process, lead us to conclude that your previous participation was personal and substantial in the grant award. Consequently, you may not consult for the firm in connection with the same grant award. This does not mean that the firm cannot apply for the contract, but rather that you may not work for the firm under the DEF grant award.[3]/

DATE AUTHORIZED: July 6, 1988

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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. 268, §1(k).

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

[3]/The Commission has recognized that "Section 5 is grounded on several policy considerations. The undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. Moreover, §5 precludes a state employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others." **In the Matter of Thomas Wharton**, 1984 Ethics Commission, 182, 185.

CONFLICT OF INTEREST OPINION
EC-COI-88-15

FACTS:

You are an employee of state agency ABC. You are also a partner in a private development company, and have on occasion represented the development company.

The development company plans to solicit funding from certain state agencies regarding various funding programs relating to affordable housing requirements of a project sponsored by the DEF Redevelopment Authority (DEF), a municipal agency. One such program, the SHARP new construction program, is funded and administered by the Massachusetts Housing Finance Agency (MHFA). Another program, the so-called c. 707 residential rental subsidy program, is administered by the Executive Office of Communities and Development (EOCD) and local housing authorities.[1]/ ABC has no official responsibility with respect to either the SHARP program or the 707 program.

Eligibility for funding under the SHARP program involves a competitive process which is advertised in the real estate sections of ten or more newspapers, and legal notices. MHFA maintains a computerized mailing list of developers, prepares literature, and conducts a number of public work shops. EOCD also advertises and maintains a mailing list for the c. 707 program.

QUESTION:

Does G.L. c. 268A preclude your company's participation in the affordable housing funding programs in connection with the DEF project?

ANSWER:

No, but you are subject to certain restrictions discussed below.

DISCUSSION:

In your ABC position, you are a "state employee" within the meaning of G.L. c. 268A, §1(q). Three sections of the law are relevant to your situation.

1. Section 4

Section 4 prohibits you from receiving compensation from or acting as agent or attorney for a non-state party in relation to any particular matter which the commonwealth or a state agency is a party or has a direct and substantial interest. For example, if your development company were preparing an application to a state agency, you could neither appear before the agency on behalf of the entity as an agent or attorney, nor receive compensation for your services in connection with the application. The prohibitions of §4 will apply to your activities on behalf of the company in connection with the SHARP and c. 707 programs, inasmuch as the commonwealth is a party to, and has a direct and substantial interest in, both the SHARP program and the c. 707 residential programs. Because the MHFA is a state agency, §4 will also prohibit your involvement in matters before the MHFA relating to the issuance of bonds and other financial determinations.

2. Section 7

Section 7 generally prohibits you from having a financial interest in a contract made by a state agency. As a partner in a development company, you will be deemed to have a financial interest for §7 purposes in any state contracts made by the company. The Commission has previously concluded that the arrangement by which MHFA provides programmatic funding pursuant to the SHARP program, and the arrangement by which EOCD provides programmatic funding pursuant to the c. 707 program, results in a contract between the state agency and the development entity for purposes of §7. **See, EC-COI-87-14.**

There is an exemption, however, which would permit the development company to receive the specific program funding provided certain conditions are satisfied. Specifically, §7(b) permits a state employee to have a financial interest in a state grant provided that developer selection is made after public notice and provided further that the state employee files with the Commission a statement making full disclosure of his interest and the interest of his immediate family in the funding. In the SHARP and c. 707 programs, the developer selection process is sufficiently publicized to result in fair and open competition. **See, EC-COI-83-37; 83-35.** Therefore, the development entity may compete for the funding necessary to make the project financially feasible, provided that you file a disclosure pursuant to this section and avoid working for the company in connection with the funding application.[2]/

3. Section 23

Section 23 provides general standards of conduct applicable to all public employees. Section 23(b)(3), for example, prohibits you from appearing to be unduly influenced in the performance of your official actions as an ABC employee as a result of your private dealings with the development entity. To the extent that you might have overlapping public and private dealings with DEF, MHFA, or EOCD officials, you should disclose to your appointing official your private relationship with the development entity so as to dispel any appearance of undue influence or favoritism. This disclosure must be in writing.

Further, §23(b)(2) prohibits a state employee from using his official position to secure for himself an unwarranted privilege or exemption of substantial value. You will comply with this paragraph by keeping your private development company activities separate from your ABC work schedule, and by refraining from using ABC resources for your company's benefit. If you have any questions as to the applicability of this subsection, or any other subsection of §23, you may write to the legal division for further verification.

DATE AUTHORIZED: June 15, 1988

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[1]/You state that the company with which you are associated will not solicit program funds from the Department of Public Welfare or the Department of Social Services regarding the operation of transitional housing and child care components of the DEF project. Since you will not be associated with soliciting of program funds from these programs, it is unnecessary to discuss the application of the conflict law regarding these funds. If the situation changes and your development company intends to solicit such funds, you should write for further clarification.

[2]/We assume that your financial interest under §7 will accrue by virtue of your ownership interest in the company. If you plan to perform personal services under these state contracts, additional conditions will apply to you under G.L. c. 268A, §7(b), and you should therefore renew your opinion request with us.

CONFLICT OF INTEREST OPINION
EC-COI-88-16*

FACTS:

You anticipate appointment as a member of the Massachusetts Museum of Contemporary Art Cultural Development Commission (MOCA Commission). The MOCA Commission will be established by the City of North Adams (City) to act on behalf of the City in entering into contracts for the design, construction and operation of a museum of contemporary art. See, St. 1988, c. 8. As proposed, the MOCA Commission will consist of s ven members representing the public inter-

est without compensation. Appointments will be made by the Mayor, with the consent of the City Council. The City Council envisions that the establishment of a museum will involve collaboration with Williams College (College), a private higher education institution which currently operates a museum. It is also likely that employees of the College will contract with the MOCA Commission for the design and operation phases of the museum's development.

You have served as the Director of the College Museum of Art and will continue to hold that position until July 1, 1988. After that date you will become an adjunct professor and you will teach courses at the College and receive compensation from the College for your teaching activities. You state that your College compensation will be limited to your teaching and will not be attributable to any contracts between the College and MOCA Commission. Your primary employment will be as a Guggenheim Foundation Director in New York City.

QUESTION:

Does G.L. c. 268A permit you to serve as a MOCA Commission member while also serving as a teacher at the College and as the Director of the Foundation?

ANSWER:

Yes, subject to the limitations described below.

DISCUSSION:

A. Jurisdiction

The MOCA Commission was established pursuant to St. 1988, c. 8, an Act Assisting the City of North Adams in the Development of the Massachusetts Museum of Contemporary Art. Under c. 8, the Commonwealth is authorized to grant 35 million dollars to the City to acquire land and buildings to be used for the construction of the Museum. The City, in turn, has created and appointed members to the MOCA Commission to act on its behalf in carrying out the purposes of the act, pursuant to St. 1988, c. 8, §1. In view of the accountability of the MOCA Commission to the City, and the authority which the Commission will exercise on behalf of the City, the MOCA Commission is a municipal agency of the City for the purposes of G.L. c. 268A. **See, EC-COI-83-74.** Upon your appointment as one of the seven members of the MOCA Commission, you will be subject to the four provisions of G.L. c. 268A which apply to municipal employees.

B. Substantive Restrictions

1. Section 19

As a municipal employee, you must abstain from participating in any contract, decision, application or other particular matter in which a business organization which employs you has a financial interest. As a visiting teacher at the College, you will be employed by a business organization for the purposes of G.L. c. 268A, §19. **See, EC-COI-88-4** (corporations, whether established on a for-profit or non-profit basis, are business organizations under §19). Therefore, absent qualification for an exemption to §19, you are required to abstain from participating as a MOCA Commission member in any particular matter in which the college has a financial interest.

One exemption available to you which would permit your participation in matters affecting the College is contained in G.L. c. 268A, §19(b)(1). Following your disclosure of the relevant financial interests to your appointing official, that official may determine that the College's interest is not so substantial as to be deemed likely to affect the integrity of the services which the city expects from you.[1]/ The same exemption procedure would also be required if matters affecting the financial interests of the Guggenheim Foundation came before you on the MOCA Commission.

2. Section 17

This section places restrictions on your activities on behalf of non-City parties. Specifically, §17 prohibits you from receiving compensation from or acting as agent of the College in connection with any particular matter in which either the MOCA Commission or any agency of the City is a party or has a direct and substantial interest. In view of your statement that your activities for the College will be limited to teaching, and that you will not be working for the College on any aspect of the MOCA Commission, this section should not pose problems for you. You should keep the principles of §17 in mind, however, with respect to your Guggenheim assignments should those assignments involve the MOCA Commission. For example, you may not assist the Foundation in applying for contracts with the MOCA Commission.

3. Section 20

Under §20, a municipal employee may not have a financial interest, directly or indirectly, in a contract made by any agency of the same municipality. As applied to you, §20 prohibits you from having a financial interest in any contract awarded by the MOCA Commission. For example, if the College were awarded MOCA Commission contracts, your college compensation could not be attributable to those contracts. For similar reasons, your Guggenheim compensation may not be attributable to contracts which the Foundation may have with the MOCA Commission.

4. Section 23(b)(2)

This section establishes standards of conduct for municipal employees. Under §23, a municipal employee may not use his official position to secure for anyone an unwarranted privilege of substantial value. To the extent that current or former college employees may be performing services for the MOCA Commission, issues under §23 may come into play in your exercising your official responsibilities as a MOCA Commission member. To comply with §23(b)(2), you may not accord such employees special treatment, and you must evaluate their work by the same objective standards by which other employees and applicants are evaluated.

DATE AUTHORIZED: June 14, 1988

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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]/We understand that the City Council, in its proposed ordinance relating to the MOCA Commission, intends to grant written determinations on a limited basis to College employees pursuant to G.L. c. 268A, §19, thereby permitting your participation in some matters affecting the College. We would note, however, that the determination, in order to be effective, must be made by your appointing official. **See, EC-COI-87-41.** Because it appears that your appointing official under the proposed ordinance is the Mayor, rather than the City Council, we believe that the Mayor is the appropriate official to grant exemptions under §19(b)(1).

CONFLICT OF INTEREST OPINION
EC-COI-88-17

FACTS:

You are a full-time state employee of state agency ABC. ABC has the provision of services to the homeless as one of its priorities. When you began your employment in this position, your supervisor requested that you become a member of the Board of Trustees of an organization for the homeless and represent ABC in this organization. The organization has a contract with a state agency for funding of shelter expenses in operating a shelter for homeless families. You have become an unpaid member of the organization's Board of Trustees and, in that capacity, you are chairperson and a member of various committees.

QUESTIONS:

1. Does G.L. c. 268A permit you to be a member of the organization's Board of Trustees?
2. Does G.L. c. 268A permit you to be a member of the organization?

ANSWERS:

1. Yes, subject to the limitations discussed below.
2. Yes, subject to the limitations discussed below.

DISCUSSION:

Section 4

Section 4(c) generally prohibits a state employee, otherwise than in the proper discharge of her official duties, from acting as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter[1]/ in which the Commonwealth or a state agency is a party or has a direct and substantial interest. As long as you do not act as the organization's representative or spokesperson before a state agency in relation to any particular matters in which the state has a direct and substantial interest, you will not violate §4(c). **See, EC-COI-83-145.** The work that you describe that you would currently like to do for the organization as a member of the Board of Trustees, and as a committee member, involves matters internal to the Board and to the organization. It is permissible for a state employee to participate in internal Board of Trustees discussions relating to matters in which the state has a direct and substantial interest. **See, EC-COI-85-21; EC-COI-85-16.** However, you may not appear before any state officials or agencies on behalf of the organization by signing in your capacity as a member of the Board of Trustees, documents or correspondence directed to state officials or agencies, or by acting as a spokesperson for the organization in its dealings with the state.

You have also asked us whether these appearances before any state officials or agencies on behalf of the organization would be permissible as acts done in the proper discharge of of your official duties. Were your duties as a member of the Board to expand or change, the §4(c) exemption for acts done in the proper discharge of official duties would not be applicable to your situation. Your official job description requires that you serve as office community liaison for the agency but does not specifically authorize you to serve on the Board of Trustees of a state vendor or state vendors in order to meet these responsibilities. Section 4(c)'s exemption is best applied in the case where a written job description specifically authorizes the acts in question. **See, EC-COI-84-145; EC-COI-83-20.** Although the statute provides some latitude to an employee's appointing official to determine what would constitute the proper discharge of official duties, and the Commission will customarily defer to the appointing official's discretion, **see, EC-COI-81-89; EC-COI-80-96; see also, EC-COI-88-10** (where the Commission deferred to a school committee's construction of a teacher's contract in the context of a §20 issue), an appointing official's discretion under §4 is not unlimited. **EC-COI-83-137; Commission Compliance**

Letter 81-21. Your appointing official has indicated that she considers your service on the organization's Board of Trustees to be part of the proper discharge of your official duties within the meaning of §4(c). She bases this on reading your job responsibilities that includes Board membership in your mandate to work with the community. There is nothing in this responsibility that requires, however, that you join the Board of Trustees for the organization in order to fulfill it.

Whether any particular determination by an appointing official would so far exceed the customary job requirements for an employee as to frustrate the purposes of the statute is a judgment which ultimately rests with the Commission. **EC-COI-83-137.** In view of the absence of a distinct institutional interest of your state agency in having you act as the spokesperson for the Board of Trustees of the organization, in light of the fact that the general institutional interest of your state agency, ABC, in providing services to the homeless can be fulfilled completely without your assuming this position on the Board of Trustees, and in light of the purpose of §4,[2]/ we conclude that the §4(c) exemption would not be applicable to you were you to act as agent or spokesperson with the state for the organization.

Section 6

You should also know that, were you to serve on this organization's Board of Trustees, G.L. c. 268A, §6 would also apply to your situation. Section 6 prohibits a state employee from participating[3]/ as a public official in any particular matter in which she, her immediate families or a partner or a business organization[4]/ which she is serving as an officer, director trustee, partner or employee, or any person with whom she is negotiating or has any arrangement concerning prospective employment, has a financial interest. Under this section, you may not participate as a state employee in any particular matter in which the organization has a financial interest so long as you sit on the organization's Board of Trustees.

Under §6, however, an exemption is available. The provision is available to:

Any state employee whose duties would otherwise require her to participate in such a particular matter shall advise the official responsible for appointment to her 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 a 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.

Were you to receive such a written exemption you could participate, as a state employee who sits on the organization's Board of Trustees, in particular matters in which the organization had a financial interest.

We reiterate that membership on the organization's Board itself is not prohibited, provided that your activities in that role comply with G.L. c. 268A, §4 and provided that you are guided in your state work as a state employee by G.L. c. 268A, §6. Similarly, general membership in the organization itself is not prohibited, provided that your activities in that role comply with G.L. c. 268A, §4.[5]/

DATE AUTHORIZED: August 25, 1988

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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]/"Section 4, prohibiting assistance to outsiders, is the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law. Rev. 299, 322 (1965).

[3]/"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).

[4]/A nonprofit organization is a business organization within the meaning of the statute. **See, ECCOI884.**

[5]/This opinion is limited to a discussion solely of the application of G.L. c. 268A to your situation. Your agency may well have its own rules and policies on this matter which you should investigate.

CONFLICT OF INTEREST OPINION
EC-COI-88-18

FACTS:

You are a member of the General Court and Chairman of a particular committee. You have been asked by the an association of manufacturers to attend its 1988 conference for state legislative leaders. You and 35 other legislative leaders from around the country would be the guests of the association. The association would pay for your transportation and expenses. As we understand it, association members have a direct interest in matters before the committee.

QUESTION:

May you attend the convention and accept the provision of transportation, hotel, food and related expenses from the association?

ANSWER:

No.

DISCUSSION:

In your capacity as a member of the General Court, you are a state employee for the purposes of the conflict law. See, G.L. c. 268A, §1(q).

Section 3(b) of G.L. c. 268A prohibits a state employee from soliciting or accepting anything of substantial value[1]/ for or because of any official act performed or to be performed. "Official act" is defined in the statute to include "any decision or action in a particular matter or in the enactment of legislation."[2]/ The receipt of something of substantial value violates §3 even if given out of a desire to maintain a public employee's goodwill. You should be aware that the Commission has determined that even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Certainly where, as here, the donor has a special interest in actions taken by your legislative committee and where your position as Chairman would permit you to act distinctly and directly to the benefit of the association's members, §3 would be implicated.[3]/ **See, EC-COI-83-37; 83-19.**

The Commission has noted that if such a subsidized trip is not being made for a legitimate speaking engagement, §23 of the statute would also be violated. **EC-COI-83-87 at 3.** This section prohibits a state employee from using his official position to secure for himself unwarranted privileges, or from engaging in conduct which gives reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the position or influence of any party or position. Longstanding Commission precedent indicates that the acceptance of expenses or fees by a legislator is permissible only where these items are either for, or made necessary by, a legitimate speaking engagement. **Commission Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements** at 1. Where, as here, the provision of transportation, hotel, food, and related expenses is not for or because of a speaking engagement, the receipt of these expenses is not permissible.

Accordingly, you may not attend this convention by accepting the provision of transportation, hotel, food and related expenses by the association.

DATE AUTHORIZED: August 25, 1988

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[1]/Substantial value has been determined by the Commission to be anything of $50 or more in value.

[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/While §3(b) does contain an exemption where acceptance of a gift is "provided by law for the proper discharge of official duty", this exemption is not applicable to your situation. **Compare, In the Matter of Louis L. Logan,** 1981 SEC 40.

CONFLICT OF INTEREST OPINION
ECC-OI-88-19

FACTS:

A Cable Company (Cable) and the Mayor of a city (Mayor), as the issuing authority, executed an agreement whereby Cable was granted the renewal cable television license for the City. Among other provisions, Cable agreed to make available channels for public, educational and local municipal access programming. License Agreement (hereinafter L.A.) Cable also agreed to provide the City or its designated access agent with a onetime cash grant in acknowledgement of the City's acceptance of responsibility for all access and local programming responsibilities. In addition, Cable provided the City with a onetime equipment facilities grant.

The agreement provided that either the City or a designated nonprofit access corporation[1]/ be responsible for the management and operation of the access channels. Cable agreed to cooperate with both the City and the corporation in the operation of the access channels. **Id.**

Articles of Organization were filed with the Secretary of State forming XYZ, a nonprofit corporation. The Mayor chose the initial board of directors and the executive director. A new board was elected by the standing board, pursuant to the corporate bylaws. The corporate purposes as set forth in the Articles include assisting in the provision of public and educational access on the cable system in the City. Upon XYZ's incorporation, the City transferred to it the two Cable grants for use in setting up and operating the public and educational access channels. You are the attorney for XYZ.

QUESTION:

Is XYZ a "municipal agency" as defined by Chapter 268A, §1(f)?

ANSWER:

No.

DISCUSSION:

The conflict of interest law defines municipal agency as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, §1(f)(1986 ed.). The Commission has previously concluded that the application of the conflict of interest law cannot be conditioned on the organizational status of an entity. **In the Matter of Louis L. Logan**, 1981 Ethics Commission 40, 45. Thus, XYZ's corporate structure is not enough to exempt it from the definition of municipal agency. Previously, the Commission has focused on the following four factors in determining an entity's status for the purposes of Chapter 268A:

(1) the means by which it was created (e.g., legislative or administrative action);
(2) the entity's performance of some essentially governmental function;
(3) whether the entity receives and/or expends public funds; and
(4) the extent of control and supervision exercised by government officials or agencies over the entity. **EC-COI-88-2; EC-COI-85-22; EC-COI-84-65.**

Based on the following consideration of these factors, we find the indicia of government insufficient to render XYZ a municipal agency as defined in §1(f).

1. Creation:

Balancing several factors, we conclude that XYZ was not governmentally created. The Mayor's selection of the Board of Directors and the Executive Director suggests a degree of municipal involvement in XYZ's organization. Also, the status of XYZ as a permanent entity distinguishes it from those temporary, **ad hoc** advisory committees which the Commission has regarded as exempt from the definition of state or municipal agencies.[2]/ **Compare EC-COI-82-81** (taskforce formed with guidelines outlining goals and timetables); **EC-COI-80-49** (advisory committee organized to complete objective within 60 days). However, these factors go to the composition of XYZ, rather than the impetus for its creation. As stated, the agreement contemplated the City's designation of a nonprofit corporation to manage the access channels. Toward that end, XYZ was organized. Thus, the corporation stemmed from a contract between Cable and the Mayor. The Commission has previously addressed the status of entities created by several methods, although never one created pursuant to contract.

We exercised jurisdiction over entities formed pursuant to an Act of Congress, state legislation, resolution, and Executive Order. **EC-COI-83-74; EC-COI-88-16; EC-COI-84-147; EC-COI-84-55. Compare EC-COI-84-65** (beneficial trust created pursuant to an individual's will determined to be private, rather than public, entity); **EC-COI-83-3** (task force established by Executive Office determined private entity). Thus, the presence of a law, rule or regulation is necessary. **EC-COI-82-81**. We do not find that an entity stemming from a private contract rises to that level, notwithstanding the participation of governmental officials in organizational efforts.

2. Governmental Functions:

We conclude that XYZ does not perform functions inherently governmental in nature. Previously, the Commission found governmental functions where those functions were contemplated by either state or federal legislation. **See EC-COI-83-74** (implementation of the Federal Job Training and Partnership Act); **EC-COI-84-55** (implementation of National Health Planning and Resources Development Act); **EC-COI-85-147** (functions required by Act establishing the University of Massachusetts). XYZ's activities are the fulfillment of an obligation undertaken by the City through contract, rather than one imposed by constitutional or legislative authority. Indeed, Cable supplied the funds in acknowledgement of the acceptance by the City or its agent of all programming responsibilities. Thus, there is a strong argument that XYZ is performing Cable's, rather than the City's, functions.

XYZ assists in the provision of public and educational access in the City's cable television system. "Access" is defined as the right of any City resident to use designated facilities, equipment and/or channels of the system. The corporation provides information and instruction to City citizens, coordinates and schedules production and transmission on the access channels, and implements new programming as the need arises. In the first few months of programming, XYZ broadcast various municipal meetings and hearings, school sporting events, Memorial Day ceremonies, and civic award banquets.

While broadcasts of such municipal activities can be characterized as a public service, they are not mandated activities. The fact that a private entity performs a function which serves the public does not make its acts governmental functions. **See RendellBaker v. Kohn**, 457 U.S. 830, 842 (1982) (in deciding a claim under 42 U.S.C. 1983, court held that performance of public function does not render entity a governmental actor). At the federal level, governmental action is found when the challenged entity performs functions that have been traditionally the exclusive prerogative of the federal government. **San Francisco Arts and Athletics, Inc. v. Olympics Committee**, 107 S. Ct. 2971, 2985 (1987) (U.S. Olympic Committee's performance of public service does not render it a governmental actor, as coordination of amateur sports not a traditional governmental function). Public television scheduling and production are neither traditional nor exclusive roles of government.

3. Public Funds:

XYZ is currently funded by the two Cable grants outlined above.[3]/ Upon execution of the agreement, Cable paid the funds to the City, which held same until the incorporation of XYZ. Thus, the City was a conduit for the transfer of private funds to XYZ.[4]/

In addition, Cable paid other monies in the form of license fees to the Issuing Authority under the Agreement. Those fees can be likened to similar monies paid in exchange for governmental privileges, the proceeds of which are public funds. **See e.g.** G.L. c. 156B, §114(a) (fee for incorporation); G.L. c. 159A, §9 (fee for driver's license). The Cable grants were paid, not to the government to obtain a privilege, but to a nonprofit corporation in exchange for services. Thus, the grants are distinguishable from monies more typically regarded as representing public funds. **See** 47 U.S. c. 562(g)(b) (Federal Communications Act defining cable "franchise fees" and providing that such fees do not include payments made in support of public access).

4. Municipal Government Control:

There is little, if any, evidence of municipal governmental control over XYZ's operations. The Mayor's appointment of the original board of directors does not in and of itself indicate that he has a supervisory role in the activities of the corporation. The corporate bylaws provide that subsequent directors and officers shall be elected annually by the current Board. XYZ has full discretion in the operation and management of the access channels. The scope of the corporation's powers and purposes are delineated in its Articles of Organization, which do not provide for reporting requirements to the Mayor. Likewise, both the bylaws and the agreement itself make no reference to government supervision of the corporate activities. No formal contract or agreement between XYZ and the City exists.[5]/ XYZ does not use municipal staff or facilities in its daily operations.

In summary, we find that XYZ was neither governmentally created or publicly funded. Moreover, there is no exercise of governmental control or performance of inherently governmental functions. Therefore, XYZ is considered a private entity for the purposes of G.L. c. 268A and does not come within the jurisdiction of the State Ethics Commission.

DATE AUTHORIZED: September 14, 1988

[1]/The corporation is defined as "the independent nonprofit corporation established to manage public access in the City and funded by licensee."

[2]/Although XYZ was organized without a termination date, the lease term is ten years.

[3]/After depletion of grant funds, XYZ will generate its own operating costs through promotions and advertising.

[4]/Although the City was in initial receipt of the grants, there is no indication of commingling. **Compare EC-COI-81-77** (where monies from private funds are commingled and are by statute under control and management of a governmental entity, they are to be treated as governmental funds). Evidence that the City used the funds in the interim may lead to a different result.

[5]/Were there in fact XYZ/City correspondence which suggests a degree of control over XYZ in exchange for transfer of the grants, our finding as to governmental control may be altered.

CONFLICT OF INTEREST OPINION
EC-COI-88-20

FACTS:

You are the manager of ABC Mental Health Center. ABC Mental Health Center is a nonprofit mental health clinic whose staff is composed of private employees and "01" or "02" staff employed by either of two state agencies. ABC Mental Health Center has a partnership agreement with a state agency.

ABC Mental Health Center has a cashbased productivity incentive system for its own employees and would like to create an incentive system for state employees assigned to work there. ABC Mental Health Center proposes to credit each state employee with $23.00 for each hour in excess of 824 hours spent in direct service. These credits could be used for four things: 1) payment of conference fees and travel expenses, 2) books, 3) journals, and 4) office furnishings. The ownership of the books, journals, and office furnishings would be retained by ABC Mental Health Center. The goal of this program is to increase the direct service hours attributable to the clinic through increased productivity during the normal workday by ABC's state employees.

QUESTION:

Does G.L. c. 268A, §3 permit a state agency partnership clinic to offer or a state employee to accept these productivity incentive credits for increased direct service work during the normal workday and to apply them toward the cost of conference fees and conference travel expenses for the individual state employee or toward the cost of books, journals, and office furnishings to be used for official state business?

ANSWER:

ABC Mental Health Center may offer and a state employee may accept these credits for use in acquiring the use of books, journals, and office furnishings for state work but may not accept these credits for application toward the expenses of conference fees and conference travel expenses for the individual state employee.

DISCUSSION:

State agency employees assigned to ABC Mental Health Center are state employees within the meaning of

G.L. c. 268A, 1(q). Section 3(a) of G.L. c.268A prohibits anyone from giving anything of substantial value to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such an employee. Section 3(b) reverses the prohibition and indicates a public official may not accept an item of substantial value for or because of an official act performed or to be performed.

The purpose of §3 is to prevent the giving or receiving of items of value to public employees in addition to their salaries for performing their official duties. **EC-COI-84-101** at 2. All that is required to bring §3 into play is a relationship between the motivation for the gift and the employee's public duties. Commission precedent indicates that this section will not permit multiple remuneration for what state employees are already obliged to do a good job. **In the Matter of George A. Michael**, 1981 SEC 59, 68. In that the productivity incentive credit awards you propose to give are clearly intended to provide state employees with multiple remuneration for doing a good job and in that it is clear that these awards involve items of substantial value, **compare, Commonwealth v. Famigletti**, 4 Mass. App, 584 (1976) ($50 is something of substantial value under §3(b)), it would appear to be a violation of 3 for you to offer and for a state employee to accept such an award. **See, EC-COI-84-101; EC-COI-81-120** at fn. 3.

Not all of the proposed credit uses implicate this section of the statute, however. In that the Commission has indicated that gratuities given to state employees for official use only do not fall within this prohibition, see, **EC-COI-84-114**, the use of these credits by state employees to obtain the use of books, journals, and office furnishings (title to all of these to be retained by ABC Mental Health Center) to further their state business would not be prohibited. Use of these credits toward the payment of conference fees and travel expenses would be prohibited, however. The Commission has indicated, in the context of travel, that the privilege of substantial value does not accrue to the state, but rather to the individual traveller. **See, EC-COI-88-5** at 2; **In the Matter of Carl D. Pitaro**, 1986 SEC 271.[1]/

DATE AUTHORIZED: September 14, 1988

[1]/Although gifts "provided by law for the proper discharge of official duty" are exempt from §3, we find no express statutory language or duly promulgated regulation which authorizes individual state employees to accept conference and travel expenses from a state agency partnership clinic where they have been assigned. Were there any such statute or regulation, §3 would not be implicated here.

CONFLICT OF INTEREST OPINION
EC-COI-88-21

FACTS:

You are an attorney with a state agency. You also currently serve as a conservation commissioner for a city. This position does not have special municipal employee status. You are considering leaving state service and becoming an associate in a private law firm that represents clients before municipal agencies of the city you serve and that represents clients before state agencies on matters involving the city.

QUESTIONS:

1. May you, consistent with the conflict of interest law, appear before the city's conservation commission or other municipal agencies on behalf of private clients?
2. May you, consistent with the conflict of interest law, appear before state agencies such as the Appellate Tax Board, the Alcoholic Beverages Control Commission, or the Massachusetts Housing Appeal Commission on behalf of private clients who are appealing decisions of the city's municipal agencies?
3. Would the conflict of interest law constrain the partners or other employees of the firm that would employ you in their representation of clients before the municipal agencies or before state agencies on behalf of private clients on matters involving the city?

ANSWERS:

1. No, as the representation would inevitably involve matters of direct and substantial interest to the city.
2. No, as the representation would inevitably involve matters of direct and substantial interest to the city.
3. No, as the restrictions found in G.L. c. 268A, §§5 and 18 extend only to the partnership relationship.

DISCUSSION:

1. Current Municipal Employee

In your capacity as a member of the city's conservation commission, you are a municipal employee for the purposes of the conflict law. **See**, G.L. c. 268A, §1(g). Sections 17, 19 and 23 would apply, therefore, to your situation.

Section 17

This section prohibits you, in relevant part, from directly or indirectly receiving or requesting compensation from anyone other than the city in relation to any particular matter[1]/ in which the city is a party or has a direct and substantial interest. For example, you may not represent clients before the city's conservation commission since those matters would be particular matters in which the city is a party or has a direct and substantial

interest. This prohibition effectively precludes any case work you might like to do, on behalf of anyone other than the city, before city's boards and agencies or any case work on behalf of private entities you might like to do before state agencies such as the Appellate Tax Board, the Alcoholic Beverage Control Commission, or the Massachusetts Housing Appeal Commission where a decision of a municipal agency would be in controversy. "It is hard to hypothesize a 'particular matter' involving municipal action in which it can be said with assurance that the municipal interest is indirect or insubstantial." Braucher, **Conflict of Interest in Massachusetts**, in Perspectives of Law: Essays for Austin Wakeman Scott 1, 16 (1964); **EC-COI-84-117**. In addition, this section of the statute would require you to guard against the indirect receipt, through your associate's salary, of compensation in these matters. **See, EC-COI-83-128; EC-COI-81-12.**

Section 19

Under §19, you are prohibited, in relevant part, from participating[2]/ as a municipal employee in a particular matter in which you, your immediate family[3]/ or a business organization in which you are serving as an officer or employee has a financial interest. This section would be implicated if members of the law firm that employs you represented parties before the conservation commission while you were a member of the Commission. **See, In the Matter of Henry A. Brawley**, 1982 Ethics Commission 84.

One of the §19(b)'s exemptions may be available to you, however, if you advise your appointing authority of the nature and circumstances of the particular matter and disclose your financial interest. Your appointing official may then 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 municipality may expect from you. You must abstain from all matters covered by this section unless and until such a determination is made.

2. Current State Employee

For the purposes of the conflict of interest law, as a full time attorney with a state agency, you are a state employee. **See**, G.L.c. 268A, §1(q). Accordingly, §4 is applicable to your situation. This section indicates that you may hold elective or appointive office in the city provided that, in that office, you do not vote or act on any matter which is within the purview of the state agency by which you are employed or over which you have official responsibility. **See, EC-COI-8-62.** You may not, for example, participate in city's conservation commission decisions on G.L. c. 61 land in the city in that the state is involved in the classification of forest lands and the removal of lands from that classification.

3. Former State Employee

Once you terminate your state employment, you will be a former state employee for the purposes of G.L.c. 268A.

Section 5(a)

Section 5(a) prohibits a former state employee from acting as an agent for or receiving compensation directly or indirectly from anyone other than the state in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and the matter was one in which the employee officially participated. This section focuses on matters in which you participated as a state employee. A particular matter may include a recommendation, decision, or determination. For example, under this section, if prior to leaving the state agency, you recommended litigation in a particular case, you would be forever barred from participating in any aspect of that matter. In addition, this section of the statute would require you to guard against the indirect receipt, through your associate's salary, of compensation in these matters.

Section 5(b)

Section 5(b) prohibits a former state employee from personally appearing before any court or agency of the Commonwealth within one year after leaving state service in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and that matter was under the official responsibility of the employee within two years prior to the termination of such state employment. In other words, the date you terminate from state service would determine the two year period in which particular matters under your official responsibility would count for the purposes of this section. **See, EC-COI-82-138.** You would be prohibited from personally appearing, for one year, as an agent of anyone other than the state, before any court or state agency in connection with any particular matter which was under your responsibility at the state agency for the two years prior to your leaving state employment. For example, if you had official responsibility for several attorneys or paralegals who made litigation decisions, you may not receive compensation from anyone other than the state and you may not personally appear before any state agency for one year after you terminate state service, in connection with these matters.

Section 23

Section 23, the standards of conduct provision, would also apply to you as a former state employee. Section 23(c) prohibits a former state employee from disclosing

confidential information which was acquired in his state position or from using such information to further his personal interest. **EC-COI-85-23.**

You should also be aware that issues under the standards of conduct provision might be raised by your appearance before your former agency. Section 23(b)(3) applies to a current state employee who deals with you if that employee's actions could reasonably appear to be improperly affected by a prior business relationship. For example, this section might present issues for any state employee who was your co-worker or subordinate if that employee unduly favors you in his or her official acts.

4. Employer of a Current Municipal Employee and a Former State Employee

Although G.L. c. 268A, §18 places restrictions on the partners of a former or current municipal employee, none of these restrictions are applicable to the **employer** of a former or current municipal employee. The relationship you would have to this firm appears to have none of the characteristics of partnership and, as a result, §18(d)'s restrictions are not implicated in this situation. Similarly, although G.L. c. 268A, §5 places restrictions on the partners of a former state employee, they would not be applicable here.[4]/

DATE AUTHORIZED: September 14, 1988

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

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

[4]/You should note that partnership status may be easily acquired if, for instance, a group creates a public appearance of a partnership. **See, e.g., EC-COI-84-78; EC-COI-80-43.**

CONFLICT OF INTEREST OPINION
EC-COI-88-22

FACTS:

State agency ABC, as the operator of the XYZ transportation facility, is the landlord for several major car rental companies. Each of these car rental tenants offers some type of discount program for corporate travellers. These programs are available to all business organizations, both public and private, on a nationwide basis.

Discount programs for corporate travellers involve central corporate billing services, express rental and return procedures, a modest reduction in the daily rental rate charged the business[1]/, unlimited free mileage and a modest bonus of frequent flyer mileage. All but the last of these is offered or given to the corporate client as an entity. The frequent flyer mileage award can only be awarded to the individual traveller.

ABC was approached recently by one of the car rental companies and invited to participate in that company's corporate program. ABC is aware that most, if not all, of the car rental company's competitors offer similar programs. ABC is attracted to the savings and convenience participation in such a program would produce. ABC would need to investigate all the available programs, and not just this particular car rental company's, to determine which company to choose as the exclusive ABC car rental company, in order to seek the maximum volume discount.

QUESTIONS:

1. Do G.L. c. 268A, §§3 and 23 permit ABC to enroll as an entity in the corporate traveller car rental discount program of one of its car rental tenants and to use that car rental company as ABC's exclusive car rental company?
2. Do G.L. c. 268, §§3 and 23 permit ABC's employees to accept as individuals and have credited to their personal accounts the frequent flyer bonus points that accompany state-funded car rentals where the point recipient is not the chooser of the car rental company?

ANSWERS:

1. Yes.
2. No.

DISCUSSION:

1. ABC State Agency enrollment in a selected corporate traveller car rental discount program

Section 3(b) of G.L. c. 268A prohibits anyone from giving anything of substantial value to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such an employee. Section 3(b) reverses the prohibition and indicates a public official may not accept an item of substantial value for or because of an official act performed or to be performed.

The Commission has determined that an item of substantial value is anything valued at $50 or more.[2]/ Although each individual corporate traveller car rental discount would be worth only a few dollars a day per rental, the cumulative value of all of these discounts would quickly exceed $50. The Commission has indicated that regular, periodic gratuities that are not in and of themselves "substantial value" will be evaluated in the cumulative and found to constitute "substantial value"

where a course of conduct is involved. **Commission Advisory No. 8 on Free Passes** at 2. This would be such a situation.

Although the cumulative value of the discount would constitute something of substantial value, §3 would not be applicable to this situation because the Commission has held a gift from a private party for use by a government agency does not violate §3. **See, EC-COI-88-20; EC-COI-84-114.** In addition, we note that the discount's availability is based upon ABC's organizational status rather than its landlord/tenant relationship with a given car rental tenant.

Similarly, although §23(b)(2) of the conflict law prohibits a public employee from using or attempting to use his or her position to secure for his or herself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals, a gift from a private party for use by a government agency does not violate §23. **See, EC-COI-87-38; EC-COI-84-114.** Since the discount is not aimed at an individual, there is no opportunity and no incentive for an individual employee to use his or her position to secure the award for individual benefit.[3]/

2. ABC State Agency's employees' acceptance of frequent flyer bonus points produced by state-funded car rentals

Section 3(b) of G.L. c. 268A, as indicated above, prohibits a state employee from accepting or receiving anything of substantial value, otherwise than as provided by law for the proper discharge of official duty, for or because of official acts or acts within that employee's official responsibility. Section 3(b) is designed to prevent the receipt of items of substantial value to public employees in addition to their salaries for performing their official duties. Although the typical corporate car rental frequent flyer bonus award has no immediate cash value, ten such awards may be worth a first-class upgrade on a domestic flight. We think that "substantial value" in its cumulative sense might quickly be reached by the genuinely frequent state-financed car renter. "While the term 'substantial value' has been frequently interpreted in the context of cash payments to public employees, the Commission has also held that the scope of §3 includes gifts which lack an immediately ascertainable cash value but which nonetheless possess substantial prospective worth and utility value." **EC-COI-83-70** at 2. This is such a case. The cash value of these points, in the cumulative as they are paid out in frequent flyer bonus certificates, is undisputed as witnessed by the flourishing coupon broker industry and the litigation surrounding that industry.

It is clear, however, that ABC state agency's severance of the relationship between the rental car company chooser and the prospective bonus point recipient serves to make the grant of the bonus points completely beyond the control of the recipient. The "official act" to be targeted here is car rental company selection and those employees who have done the choosing will not be the recipients. In short, the manner in which the bonus points are awarded vitiates the authority the state agency travellers may have in their state positions in connection with the car rental companies.[4]/ **See, EC-COI-83-39.** Accordingly, §3 of G.L. c. 268A is not implicated here.

Section 23(b)(2)'s prohibition on the use or attempted use of official position to secure unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals is applicable here, however. Although these points are available to a large number of, although by no means all,[5]/ private employees who travel on business, they are not routinely available to large numbers of public sector employees. Employees of the federal government, for example, may not accrue for their personal use airline promotional awards, frequent flyer points or frequent flyer bonus points earned on official government business. **Discount Coupons and Other Benefits Received in the Course of Official Travel**, 63 Comp. Gen. 229 (1984); B-215826, January 23, 1985.

Although the phrases "similarly situated individuals" and "unwarranted privilege" are not defined in the conflict of interest law, the Commission has defined these terms by looking to "industry-wide practice" and "large private and public sector employees." **See, EC-COI-87-37.** Although the Commission acknowledges that car rental agencies in offering these bonus points, are engaging in an industry-wide practice, it is not, by any means, universal practice to permit public or private business travellers to accrue these points for personal use.[6]/ Therefore, we conclude that it would be an unwarranted privilege of substantial value not properly available to similarly situated individuals within the meaning of §23(b)(2) of the conflict law to permit state employees to accept as individuals and have credited to their personal accounts the frequent flyer bonus points that accompany state-funded car rentals.[7]/

DATE AUTHORIZED: November 21, 1988

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[1]/The amount saved varies from rental to rental depending upon location and duration but the corporate rate, in general, is only a few dollars different from the rate available to the general public.

[2]/**See, Commonwealth v. Famiglietti**, 4 Mass. App. 584 (1976).

[3]/Were an individual ABC state employee to abuse his or her access to the corporate rate program membership number to gain discounts on personal travel falsely portrayed as business travel, this section of the law would be implicated.

[4]/Section 3 would be implicated by the receipt of these points by those ABC state agency employees who actually choose the car rental company that ABC will use as its exclusive car rental company or those ABC employees who determine the frequency with which travel will be undertaken. The enormous potential for abuse of state travel by genuinely frequent travellers who could manipulate the timing, frequency and route of their travel in order to accrue these points is apparent.

[5]/Although a large number of private sector employers permit their employees to accrue these points for personal use, some of the largest private sector employers in the Commonwealth specifically prohibit this practice.

[6]/Certain states, Florida and Minnesota, for example, expressly prohibit

state employees from accruing these points for personal use.

[2]/Nothing in this opinion is intended to discourage ABC state agency from continuing to spend its travel budget in an economically efficient manner. Agencies of the federal government and certain states, for example, maintain governmental travel offices where all arrangements for official travel are made through one central location. These offices work closely with airlines, railroads, hotels and motels, car rental companies and travel agencies to ensure that the lowest possible prices are obtained and that volume discounts are awarded; ABC state agency could explore this alternative. If ABC state agency decided to continue with decentralized travel planning, it could require its government frequent flyers to retain government generated frequent flyer points and coupons for later government travel use by that employee or by other ABC state agency employees. The latter possibility is dependent upon the express terms of some frequent flyer program agreements and Federal Aviation Administration regulations.

CONFLICT OF INTEREST OPINION
EC-COI-88-23

FACTS:

You are a full-time police officer with a state agency. For a number of years, you have held the position of traffic reporter. In this capacity, it has been your responsibility to gather traffic information and to provide commuter traffic information to the local media. Specifically, for the past year, you have been providing, consistent with the station's agreement with your state agency, a local television station with traffic reports for their evening newscast.[1]/ Your compensation for the position of state agency traffic officer consists solely of your pay as a state agency police officer. You work a split shift as a traffic reporter, so that you are off duty for several hours in the middle of the day. The local television station that airs your reports has now offered you a part-time job as a traffic analyst where you would use your off-duty time to gather information on and to produce reports for broadcast on matters such as major construction projects in the Boston area and the effect they would have on traffic. You propose to use your name in producing these reports as well as to use only private vehicles, materials and equipment in your private work.

QUESTIONS:

Does G.L. c. 268A permit you to accept this offer of part time employment as a private individual and traffic analyst for this local television station?

ANSWER:

Yes, subject to certain limitations set forth below.

DISCUSSION:

In your capacity as a state agency police officer, you are a state employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q); **EC-COI-84-124**. Three sections of G.L. c. 268A are relevant to your question.[2]/

1. **Section 4**

Section 4(a) generally prohibits a state employee, otherwise than as provided by law for the proper discharge of his official duties, from directly or indirectly receiving or requesting compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter[3]/ in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Although the local television station is someone other than the state, the compensation which you would receive from the station would not be in relation to a particular matter in which the state has a direct and substantial interest. The compensation, rather, would be in relation to the reporting you would do on general traffic issues in the area. The Commission has held that general policy issues, **EC-COI-85-16**, and entire construction projects are not particular matters within the meaning of the statute. **EC-COI-85-22**. Indeed, although the state agency police department that employs you has a direct interest in traffic information, as a result of its traffic supervision function, we conclude that the interest of the state agency in general traffic stories is not substantial. Although the Commission has held that certain matters which the state extensively regulates or supervises are of direct and substantial interest to the Commonwealth, e.g., cable television licenses (**EC-COI-79-6**) and local liquor licensing (**EC-COI-79-6**), the production of general traffic stories is not one of these matters. In addition, Commission precedent indicates that radio broadcasts are not particular matters of direct and substantial interest to the Commonwealth merely because they are subject to state regulation. **EC-COI-82-47**. Therefore, §4(a) does not apply.

2. **Section 6**

Section 6 prohibits a state employee from participating[4]/ as a public official in any particular matter in which he, his immediate family[5]/ or partner or business organization in which he is serving as officer, director, trustee, partner or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. Under this section, you would be prohibited from participating as a state agency traffic reporter in any particular matter in which the local television station had a financial interest. Were a contract, submission or other particular matter affecting the station's financial interest to come before you in your state agency position, you would have to advise your appointing official and this Commission in writing of the nature and circumstances of the particular matter and make full disclosure of the financial interest involved. You may not thereafter participate in the mat-

ter unless your appointing official makes a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from you.

3. Section 23

Two provisions in G.L. c. 268A, §23 are also relevant to your question. First, §23(c) prohibits a state employee from disclosing confidential information which he has acquired in his state position or from using such information to further his personal interest. **See, EC-COI-85-23.**

Section 23(b)(2) prohibits a state employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value[6]/ which are not properly available to similarly situated individuals. To comply with this provision, you must keep your private traffic analyst duties separate from your state agency work schedule and not use state resources to assist you in your capacity as a local television station's traffic analyst. You must also avoid giving preferential treatment to the local television station vis-a-vis other television and radio stations who enter into agreements with the state agency for your services as traffic reporter. **See, EC-COI-87-13.** Finally, you must avoid using your status as a state agency police officer to gain access to information or to individuals which would be unavailable to you as an employee of a local television station.

DATE AUTHORIZED: November 21, 1988

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[1]/You also, at the direction of your agency, provide traffic reports to a local radio station under the same stage name.

[2]/So long as your private employment with the local television station is not intended to compensate or reward your prior state agency traffic reporter work and is intended to compensate you for separate traffic analysis work you will do for the local television station, §3 of G.L. c. 268A is not implicated despite the fact that your private work would reflect the expertise you have acquired as a state agency traffic reporter. **See, EC-COI-81-154.** Your proposed salary is, as we understand it, comparable to what other similarly situated individuals earn for these services.

[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]/"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).

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

[6]/An item of substantial value is anything valued at $50 or more. **See, Commonwealth v. Famiglietti, 4 Mass. App. 584 (1976).**

CONFLICT OF INTEREST OPINION
EC-COI-88-24

FACTS:

The City Redevelopment Authority (Authority), in order to further its urban renewal goals, has created ABC Associates, Inc. (ABC) in conjunction with various community leaders. Three individuals from the financial community, three community leaders and three Authority board members constitute the uncompensated ABC board. ABC's Executive Director is also the Deputy Executive Director of the Authority. The ABC Board meets rarely; decisions are generally accomplished through the efforts of its project manager, an Authority employee who polls directors by telephone. The ABC and the Authority share the same offices. ABC does not employ a staff but rather borrows employees from both the Authority and the City's Planning Board, and occasionally uses consultants.

ABC was created in part because, as a non-profit corporation, it is not subject to certain restrictions imposed upon the Authority. For example:

* The Authority is limited to using one contractor, while ABC may use several.
* Financing organizations which may be prohibited from funding redevelopment authorities are permitted to fund a non-profit corporation.
* ABC can manage properties for longer periods of time than the Authority.

In addition, the Authority can expedite the homesteading process by using ABC as an interim owner of blighted property, thereby allowing construction to begin. The Authority also directs ABC to submit proposals for certain projects as a way to ensure proposal quality.

QUESTIONS:

1. Is ABC a "municipal agency" as defined in G.L. c. 268A, §1(f)?[1]/
2. How does the conflict of interest law apply to Authority/ABC employees?

ANSWERS:

1. Yes.
2. The conflict of interest law applies as discussed below.

DISCUSSION:

1. Municipal Agency

In considering whether a particular entity is a municipal agency subject to our jurisdiction, the Commission focuses on the following four factors:

1. the means by which it was created (e.g., legislative or administrative action);
2. whether the entity performs some essentially governmental function;
3. whether the entity receives and/or expends

public funds; and

4. the extent of control and supervision exercised by government officials or agencies over the entity. **EC-COI-88-2; 85-22; 84-65.**

Certainly, municipal officials were responsible for ABC's incorporation. However, in making a determination as to governmental creation, the Commission looks to the impetus for the creation, rather than merely the affiliation of the entity's organizers. **EC-COI-88-19.** Previously, governmental creation was found where a state agency, on its own initiative, resolved to form a non-profit corporation to further its legislatively mandated functions. **EC-COI-84-147.** On the other hand, no governmental creation was found where a municipality created a non-profit corporation to fulfill obligations imposed by a contract. **EC-COI-88-19.** The current situation more closely resembles the former example than the latter. The Authority's administrative decision to create ABC was prompted by a desire to administer more effectively its statutory mandate. Redevelopment authority powers include the planning of workable programs for the development of the community, general neighborhood renewal plans and community renewal plans. G.L. c. 121B, §46. ABC was incorporated to promote public and private participation in the revitalization of blighted City neighborhoods. Thus, it can be fairly said that ABC is performing functions traditionally performed by a redevelopment authority.

ABC receives funding from the Authority. Moreover, use of Authority employees and facilities constitutes further substantial use of public funds. Finally, three Authority board members are on the ABC board and it is clear that all directors take action only upon instruction from Authority personnel. For example, proposals are submitted and withdrawn at the instruction of the Authority, and board consensus is reached through the efforts of an Authority employee.

Upon consideration of the impetus for creation, similarity of purpose, use of public funds, as well as the substantial amount of governmental control, we conclude that ABC is a municipal agency and its Board members are municipal employees for the purposes of the conflict of interest law.

2. Application of the Conflict of Interest Law

ABC's municipal agency status obviates several potential conflict of interest violations which might ensue from its dealings with the Authority. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than a municipal agency in relation to any particular matter in which the City has a direct and substantial interest. As ABC's employees receive compensation only from other municipal agencies, most frequently the Authority, in connection with municipal matters, §17(a) is not violated. Conversely, as Authority employees receive no compensation from ABC, no violation occurs. Section 17(c) prohibits a municipal employee from acting as agent for anyone other than the municipality in connection with any particular matter in which the municipality has a direct and substantial interest. ABC and Authority employees do not violate this provision as they act only on behalf of the municipality in their respective capacities.

Section 20 prohibits a municipal employee from having a financial interest in a contract made by a municipal agency. Authority employees have no financial interest in ABC municipal contracts; thus, there is no violation. ABC employees, however, do have a financial interest in their Authority employment contracts. However, all Authority-affiliated ABC employees are serving in that capacity by virtue of their Authority positions. We find that their service as municipal employees for both ABC and the Authority is connected only to their Authority employment contracts. Therefore, §20 is not applicable to ABC/Authority employees. **See EC-COI-84-147** (similar result reached with respect to state agency and agency-created non-profit corporation).[2]/

DATE AUTHORIZED: October 13, 1988

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[1]/"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. Although, the Commission previously reviewed conflict of interest provisions with respect to a similar entity in 1985, **EC-COI-85-58**, municipal agency jurisdiction was not considered at that time in light of the representations made by the opinion filer.

[2]/Although the abstention requirements of §19 will not apply to official dealings by Authority members in matters in which the ABC, a municipal agency, has a financial interest, Authority members must observe the safeguards of §23. Specifically, they may not use their official positions to secure unwarranted privileges or exemptions of substantial value to the ABC, and may not create a reasonable appearance of undue favoritism towards the ABC.

CONFLICT OF INTEREST OPINION
EC-COI-88-25

FACTS:

You are a full-time employee of the District Court Department. You have recently been offered a part-time position as an instructor with a driver alcohol education program at a private facility in the Commonwealth. The position would require instruction of two classes, one evening per week. This facility is one of several private agencies which contracts with the Commonwealth to service first offender "operating under" clients referred by the Court, pursuant to G.L. c. 90, §24(d). You would be paid with private funds and not from funds generated by the state contract. Your class would be comprised of clients referred from the District Court Department, but not from the specific court where you are employed. Your work as a program instructor at the facility would include teaching the course, recording the attendance informa-

tion that yields the pass or fail grade for the course, and forwarding to the facility's director any information on the facility's clients that should be forwarded to the District Court Department.

QUESTION:

Does G.L. c. 268A permit you to accept this offer of part-time employment as an instructor in a driver alcohol education program where the class membership would be composed of clients referred by state courts excluding the division of the District Court Department where you are employed?

ANSWER:

No, as the instruction would inevitably involve participation in matters of direct and substantial interest to the state.

DISCUSSION:

In your capacity as a full-time employee of one division of the District Court Department, you are a state employee for the purposes of the conflict of interest law. **See**, G.L. c. 268A, §1(q); **EC-COI-87-41**. Section 4 of the conflict of interest law is applicable to your situation.

Section 4(a) generally prohibits a state employee, otherwise than as provided by law for the proper discharge of his official duties, from directly or indirectly receiving or requesting compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter[1]/ in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Long-standing Commission precedent indicates that referrals from a state agency like the state court system are particular matters in which the Commonwealth has a direct and substantial interest. **See, EC-COI-85-28; 83-101, 81-105.**

The District Court Department is a state agency. **EC-COI-84-127**. The division of the District Court Department that employs you is part of that agency. **See, EC-COI-84-53**. Accordingly, your §4(a) problem is not cured by the elimination of referral clients from the district court that employs you from the classes you propose to teach at this private education program.

The state has a direct and substantial interest in referrals from all the divisions of the District Court Department. **See, EC-COI-82-42**. This is because the agency made the referrals, the agency will be supervising the referrals and the agency will be evaluating the outcome of the referrals. Your role as instructor would require your assistance in the attendance and cooperation tracking of individual state court referred clients. The state has a direct and substantial interest in the information you would forward, through the facility's program director, to the District Court Department's probation officers on the compliance or non-compliance of various individuals with the program. In short, your compensation from the education program would be in connection with the referral. **Compare, EC-COI-82-176** (indicating that a state RMV inspector could be a classroom instructor for a driving school because his compensation was only in connection with his teaching and not with the state exam, the particular matter at issue). Your §4(a) problem is also not cured by the fact that the education program facility proposes to compensate you out of private funds and not out of funds received from the Commonwealth.[2]/ Section 4(a)'s restrictions specifically target private compensation in relation to particular matters like these in which the state has a direct and substantial interest.

DATE AUTHORIZED: October 13, 1988

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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]/Section 7 of G.L. c. 268A is not implicated in your situation because you would not be compensated from funds received under the facility's contract with the state.

COMMISSION ADVISORY NO. 13
AGENCY

INTRODUCTION

Municipal employees may not act on behalf of private parties in matters which concern the municipality. More specifically, section 17 of G.L. c. 268A, the conflict of interest law, prohibits a municipal employee from acting as the agent for a private party regarding any particular matter in which the municipality has a direct and substantial interest. The intent of this provision of the conflict of interest law is to eliminate the potential for divided loyalties when a municipal employee serves two masters, the municipality and a private party.

This restriction on serving two masters is a commonly misunderstood part of the law because it prohibits municipal officials from representing private parties not only before their own board or agency, but also before other boards or agencies in their municipality. The restriction also applies to proceedings before state or federal agencies if the municipality is a party to or has a direct and substantial interest in the proceedings. During the course of recent investigations, it has become evident that many people do not appreciate what constitutes acting as agent in violation of the conflict of interest law. The purpose of this advisory is to assist municipal employees and officials to recognize those situations where it is impermissible to act as the representative for another and to enumerate the exceptions to the law

where they exist.

MUNICIPAL EMPLOYEES MAY NOT BE THE AGENTS FOR PRIVATE PARTIES.

An agent is one who acts on behalf of another. A municipal employee acts as agent when he or she appears before or otherwise communicates with a municipal board or agency on behalf of another, submits an application, petition or other documentation for another, or merely attends a municipal meeting and answers questions for another. One does not necessarily have to be paid in order to be acting as an agent.

For example, a municipal official may not prepare and submit an application to the zoning board of appeals for his neighbor because he is more familiar with the application procedures than she is. This action would constitute acting as an agent, even if it is done merely as a favor and for free.

The Commission has ruled in several instances that municipal employees may not represent certain organizations or other entities before municipal boards and departments if they are associated with those organizations. For example, the Commission has stated that a municipal employee may not act as the agent for his or her own partnership. Because actions which a partner takes binds the other partner(s), the municipal employee will necessarily be acting on behalf of another (either the other partner(s) or the legal entity of the partnership).

The Commission has also decided that a municipal employee may not act as the agent for a corporation of which the employee is an owner. Any action which the municipal employee takes on behalf of the corporation for example, appearing before a town board is prohibited.

A municipal employee also may not represent a trust before a town board; this restriction applies even when the employee is the trustee of a family trust (unless the employee has received an exemption). Representing any private party before town or city boards is prohibited unless one of the exemptions to the law, described below, applies.

MUNICIPAL EMPLOYEES MAY REPRESENT THEIR OWN INTERESTS AND PERSONAL POINTS OF VIEW.

A municipal employee may represent his or her own interests or points of view before municipal boards because acting for yourself is not considered acting as agent. One can only be the agent for someone else.

Thus, municipal employees may always act on their own behalf. For instance, a school committee member is permitted to present his own application to the zoning board for a variance to build an addition to his house. Municipal employees may also represent themselves before their own boards. Of course, an employee may not take action as a board member on his or her own petition. For example, if a ZBA member applied for a variance to build an addition to her home, she may not participate as a Board member on this petition.

Municipal employees may also express their personal points of view concerning a matter pending before municipal boards. The official may intend the comments to be made strictly in his or her capacity as a concerned citizen. Nevertheless, such comments could be construed to constitute acting as the agent for someone else who shares the official's point of view. A municipal employee will not be restricted from stating his or her personal opinion merely because the comments are consistent with the views of other (non-municipal) entities or people. However, in such a case, the municipal official should clarify the situation by explaining that his or her comments are not made on behalf of another but rather constitute a personal opinion. Without such a clarifying statement or disclaimer, the circumstances surrounding the official's comments might be interpreted to constitute acting as an agent. (Of course, a false disclaimer made by a municipal employee will never protect that employee from a charge that he or she was acting as agent and from being found in violation of the law.)

For example, if a selectman attends a planning board meeting to speak in favor of a new zoning bylaw which would permit increased commercial development and a zoning board of appeals member speaks against that bylaw, neither municipal official will necessarily be acting as the agent for those who share the official's views, such as the local developer or local antidevelopment citizens' group. However, to avoid encountering problems under the conflict law, officials who attend municipal meetings (other than their own board meetings) should make it clear in the first instance that their actions are not taken in the capacity as agent for another. When speaking at their own meetings, municipal employees must also observe the conflict law restriction that they may not participate on matters which affect the financial interests of themselves, their immediate family or businesses with which they are closely associated.

EXCEPTIONS TO THE LAW: WHEN A MUNICIPAL EMPLOYEE MAY ACT AS THE AGENT FOR A PRIVATE PARTY.

There are several specific exceptions to the general prohibition that municipal employees may not act as the agent for private parties in matters of concern to the town. The first allows appointed municipal employees to act as the agent for their immediate family or for anyone with whom they have a "fiduciary" relationship (if they get permission from their appointing authority first). The second exemption generally allows "special municipal employees" to appear before town or city boards other than their own. Third, municipal employees are permitted to act as the agent for non-municipal parties if their municipal job authorizes it. This applies to both appointed and elected officials performing constituency work.

1. Appointed Municipal Employees May Represent Immediate Family

The conflict of interest law recognizes that municipal employees may be asked to assist members of their immediate family in dealing with town or city related matters. Immediate family includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits appointed municipal employees to act as the paid or unpaid agents for members of their immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, so long as the employee does not participate in, and does not have responsibility over, the matter involved. (A fiduciary is one whose duty is to act primarily for the benefit of another and who owes that person a high standard of care. An example of a fiduciary is someone who manages money for another, such as receiver who takes over the assets of a bankrupt company to distribute them to creditors.)

A municipal employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship): 1.the municipal employee must be appointed (not elected); 2.the municipal employee must be representing a family member or one for whom the employee is a fiduciary on a matter in which the employee did not participate (as a municipal official) or had official responsibility for; 3.the municipal employee must receive written permission from the official who appointed the employee to his or her position before the action occurs.

For example, the town health director may represent his mother in her application for a building permit if the health director first receives written permission from his appointing authority, the town manager. This exemption is available because the building permit is not a matter in which the health director has participated or for which the director has official responsibility.

2. "Special" Municipal Employees May Act as Agent for Private Parties

A municipal employee's position may be designated as a "special municipal employee" by the board of selectmen or city council if the position meets certain requirements (such as being unpaid or part-time). (See the Commission's Fact Sheet on "Special Municipal Employees" for eligibility criteria and the process of designation). If a municipal employee has the "special" designation, the employee may represent private parties on matters of direct and substantial interest to the municipality if: 1.the employee has not participated at any time as a municipal employee or special municipal employee in the matter; 2.the matter is not and has not been the subject of the employee's official responsibility; and 3.the matter is not pending in the municipal agency or board for which the employee works.

For example, a finance committee member who is a special municipal employee may represent a private party before the liquor license commission as long as the application for the license is not within the finance committee member's responsibility, the finance committee member has not participated in the determination whether to grant the license and the application is not pending in the finance committee's agency (which a liquor license would not be).

There is one narrow instance where a special municipal employee may represent a private party before his or her own board. This occurs when the special municipal employee works less than 60 days in any 365 day period, and has neither participated in the matter nor had official responsibility for it. Thus, if an engineer consults with the town planning board on revising zoning bylaws for 45 days spread out over a year and her position is designated as a "special", the engineer may act as the agent for a private party on a subdivision proposal before the board as long as that proposal is not under her official responsibility and she did not officially participate in it.

3. A. Municipal Employees May Represent Private Parties if Their Jobs Authorize it

Certain municipal jobs authorize employees to act as the agent for private parties concerning matters of interest to the municipality. For example, a town housing authority employee's responsibility may include advocating on behalf of low income citizens to increase the number of local affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low income citizen).

The Commission has ruled that a municipal attorney's obligation to defend a municipality also includes the authority to represent employees whose acts are the basis for the legal action against the municipality. This is another case where it is "in the proper discharge of official duties" for a municipal employee, town counsel or the city solicitor, to represent someone other than the municipality.

4. Permitted Constituency Work

It may be difficult for elected officials, such as city councillors and selectmen, to determine what is permissible constituency work and what is a prohibited act of agency. Although it is impossible to give advice about every conceivable situation, the following guidelines should be considered.

An elected municipal official who acts on behalf of a

private citizen will be considered to be performing constituency work if the official receives no compensation beyond his or her regular salary, the official has no financial interest in the matter, the constituent is not a relative, business associate, or corporate officer or director of a business with which the official is associated, the constituent lives or does business in the elected official's district and the official is not taking action as the constituent's attorney. On the other hand, if a municipal official represents a relative, his employer or a business associate before municipal agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will not be considered legitimate constituency work and are prohibited.

The guidelines above also apply to municipal employees who are appointed. It is important for both appointed and elected employees to realize that constituency work includes only those activities "within the proper discharge of [the official's] duties." Therefore, an appointed town planner is not performing permissible constituency work when she calls the assessors to lobby for her neighbor's tax abatement. The tax abatement issue has nothing to do with the town planner's official duties. Alternatively, if a selectman pursues a citizen's complaint against the building inspector, this is a permissible constituency service where the inspector is hired and ultimately supervised by the board of selectmen.

The Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude...to determine what constitute[s] the proper discharge of official duties ..." **EC-COI-83-137.** Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties," the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ..." Id.A

In those instances where it is unclear to the official whether his or her action on behalf of a constituent is in "the proper discharge of official duties," the official should seek legal advice from the municipal attorney or the Legal Division of the State Ethics Commission.

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their town counsel or city solicitor or the Legal Division of the State Ethics Commission at (617) 7270060.

DATE AUTHORIZED: January 6, 1988

Included are:

Summaries of all Advisory Opinions and Commission Advisory No. 13, issued in 1988.

SUMMARIES OF ADVISORY OPINIONS (1988)

EC-COI-88-1: A part-time assistant city solicitor may not represent, in his private capacity, an applicant in connection with matters pending in the city solicitor's office. His private corporation may enter into a contract with the city redevelopment authority since his financial interest qualifies for an exemption under §20(c).

EC-COI-88-2: A Democratic city committee is not a state or municipal agency for the purposes of G.L. c. 268A because its members do not perform services for the public.

EC-COI-88-3: A local assessment committee is a municipal agency for the purposes of G.L. c. 268A. Accordingly, a member of the Board of Selectmen who wishes to accept a paid position with the committee is subject to a six-month waiting period following the member's resignation as a selectman.

EC-COI-88-4: A non-profit organization which sells certain products to municipalities is a business organization for the purposes of G.L. c. 268A. Accordingly, a selectman who serves as a member of a board of directors of a non-profit organization must abstain from official participation in matters in which the organization has a financial interest.

EC-COI-88-5: State employees who are assigned to evaluate a prospective vendor may not accept free or subsidized transportation arrangements from the prospective vendor in connection with the evaluation.

EC-COI-88-6: A town counsel may not privately represent a selectman in defense of an enforcement action by the Commission, since the town will inevitably have a direct and substantial interest in the outcome of the Commission proceedings.

EC-COI-88-7: An assistant city solicitor may not privately represent a criminal defendant arrested by the city police department in connection with a motion to suppress hearing, because the city has a direct and substantial interest in the outcome of the hearing.

EC-COI-88-8: A former member of a state board may represent his partnership in connection with an application before the board inasmuch as the former member neither participated in nor had official responsibility for the application while serving on the board.

EC-COI-88-9: A part-time building inspector who is a municipal employee is prohibited under §17 from performing privately paid carpentry work in his town which requires a permit from or is subject to inspection or approval by a town agency. This opinion is based on principles discussed in opinion EC-COI-87-31.

EC-COI-88-10: A municipal school teacher may be paid by the school department for extra-curricular education-related activities which are authorized and contemplated by the teachers' primary employment contract.

EC-COI-88-11: A former undersecretary of a state agency is a former state employee who is subject to §5(a) and (b) and §23(c) with respect to future employment opportunities. The former state employee's brief discussion advising a city official of a need for a plan to develop a pier was not personal and substantial participation in the city's decision to develop a master plan for the harbor. The constraints of §5(a) will not apply to partners in the law firm as long as he is "of counsel" status in that firm.

EC-COI-88-12: A former employee of a state agency who has recently become a state official in a second state agency must comply with the safeguards of §23, including public disclosure, prior to his participation as a state official in matters in which his former state agency is now involved.

EC-COI-88-13: A municipal employee suspended under §25 is entitled to receive full compensation or salary for that suspension period upon the resolution of any administrative action by his appointing authority under §23(b)(2). A §25 suspension requires that the public officer or employee be under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by that individual. An indictment for driving under the influence of alcohol is not an indictment for misconduct in public office.

EC-COI-88-14: A former state employee is prohibited by §5(a) from accepting a position with a consulting firm because he would be compensated in connection with the same grant in which he participated as a state employee. As a state employee, the individual's participation in the grant was personal and substantial even though he did not make the final decision to award the grant.

EC-COI-88-15: A state employee who also is a partner and a part owner of a private development company is subject to the following provisions: (1) Under §4 the employee cannot act as an agent for or receive compensation from the company in relation to any applications for funds from state programs; (2) an exemption under §7(b) must be filed with the Ethics Commission if the company wishes to apply for funding under state programs; and (3) under §23(b)(3) the employee must not be unduly influenced by his private business in his official actions.

EC-COI-88-16: Members of the Massachusetts Museum of Contemporary Art (MOCA) Commission are considered municipal employees of the City of North Adams because the Commission is an agency of the City. A MOCA Commission member is thus subject to §§17, 19, and 23 with respect to his private positions as adjunct professor at Williams College and as Director of the Guggenheim Foundation.

EC-COI-88-17: A full-time state employee may become an unpaid board of trustees member for an organization for the homeless subject to certain restrictions. Section 4(c) would prohibit the employee from acting as an agent or representative for the organization before state agencies on matters in which the state has a direct and substantial interest. This section would not prohibit the employee from participating in internal board of director discussions including matters in which the state has an interest.

An exemption from §4(c) would not be available since the employee's official duties do not specifically authorize membership on the Board of trustees. If the state employee's duties require her to participate in a matter which would financially affect the Board, she must comply with a §6 exemption to avoid a violation of that section.

EC-COI-88-18: A member of the General Court and also a committee chairman may not attend a conference where the transportation, food, lodging and expenses would be paid for by an association of companies who have a direct interest in matters before his committee.

EC-COI-88-19: A non-profit corporation which was created to manage and operate cable television access channels is not considered a "municipal agency" under §1(f) of the conflict law. In determining whether an entity is within the jurisdiction of c. 268A, the Commission has in past decisions considered the following factors:

(1) the means by which it was created (e.g., legislative or administrative action);
(2) the entity's performance of some essentially governmental function;
(3) whether the entity receives and/or expends public funds; and
(4) the extent of control and supervision exercised by government officials or agencies over the entity. **EC-COI-88-2; EC-COI-85-22; EC-COI-84-65.**

In balancing these factors, the Commission concluded that the corporation was neither governmentally created nor publicly funded and exercised no governmental functions.

EC-COI-88-20: A non-profit mental health clinic that has a partnership arrangement with the state may, subject to §3, offer to state employees who work at the clinic productivity incentive credits for increased work during a normal weekday for use towards acquiring books and other items limited to their official state use but not for conference fees or travel expenses for individual employees. However, where the incentive credit awards are of substantial value and intended to provide multiple remuneration for a state employees' good job, it would normally be a violation of §3.

EC-COI-88-21: A state employee who is an attorney and also serves as a city conservation commissioner is subject to several provisions of c. 268A. Section 4 allows the state employee to hold a municipal position provided that he does not vote or act on any matter within the purview of his state agency or over which he has official responsibility. As a municipal employee under §17 he may not represent private clients: (1) before other municipal agencies or (2) on appeals of municipal decisions to state agencies. Section 19 prohibits him from participating as a commissioner in any matter which could directly or indirectly affect the financial interest of his law firm. Once he leaves his state job he would be subject to §§5 and 23 as a former state employee. His law firm would not be subject to §18(d) and §5(c) since he would be an associate attorney in the firm.

EC-COI-88-22: A state agency that operates a transportation facility would not violate §3 or §23 by: (1) enrolling the agency in a corporate car rental discount program where the car rental company is a tenant of the agency and would be the only car company used by the agency because the discount would not be an item of substantial value given to an individual employee and would be available because of the agency's organizational status rather than because of any landlord-tenant relationship. (2) The agency's employees would violate §23(b)(2) by accepting "frequent flyer bonus points" accruing from their state-funded car rentals because the cumulative value of such points could constitute an item of substantial value and would constitute an unwarranted privilege not available to similarly situated individuals.

EC-COI-88-23: A full-time police officer traffic-reporter in a state agency whose official duties include gathering and providing commuter traffic data to the local media, including a local television station, may accept a part-time private consulting position with the television station as a traffic analyst on major construction projects in the Boston area. The private work will be done during the officer's private hours, using only private vehicles, equipment and materials and would not under §4(a) be in connection with particular matters in which his state agency has a direct and substantial interest. The state employee would also be subject to the provisions of §6

and cannot participate as a state employee in any matter which could affect the television station's financial interest.

EC-COI-88-24: A non-profit corporation created by a city redevelopment authority is considered a "municipal agency" within the meaning of §1(f). In balancing the factors stated in 88-19, above, the Commission concluded that the corporation was primarily created to help the authority in performing its functions, used public funds, and was subject to substantial government control. Employees of the authority who work for the corporation are therefore subject to §§17 and 23.

EC-COI-88-25: A full-time state court employee is prohibited under §4(a) from accepting part-time employment with a private alcohol education program because the referrals of clients to the program would come from the state courts. Section 4(a) prohibits the employee's receipt of compensation in connection with matters in which the state has a direct and substantial interest.

COMMISSION ADVISORY NO. 13
AGENCY

When Municipal Officials May Represent Themselves/ Others Before the Town. Summary

The Commission's Advisory on Agency explains Section 17 of the conflict law which generally prohibits municipal officials from representing private parties before the town they serve. Following is a summary of the Advisory.

The restrictions:

You may not act on behalf of individuals (friends, neighbors, clients, etc.), corporations (even if you are an owner), partnerships (including your own partnerships) and trusts (even family trusts) before the town by:

1. appearing personally before a town board or agency or communicating with the board or agency in writing or by phone;
2. submitting an application, petition or other documentation for a private party to a town board; or
3. attending a meeting and answering questions on behalf of the private party. For example, a municipal employee may not prepare and submit an application to the ZBA for his neighbor, even if he is not paid.

Exception:

There is one major exception to these restrictions. If your position is designated as a special municipal employee, you may represent private parties before town boards and agencies if:

1. you have not participated at any time in the matter;
2. matter is not and has not been the subject of your official responsibility; and
3. the matter is not pending in the agency or board you work for.

For example, a finance committee member who is a special municipal employee (and a lawyer in private practice) may represent a client before the liquor license commission. (See the Commission's Fact Sheet "Special Municipal Employees" for eligibility criteria and the process of designation.) In addition, you may:

1. represent yourself before municipal boards, including your own board. For example, a ZBA member may apply to the ZBA for a variance to build an addition to her home. (Of course, she may not take action as a ZBA member on her own petition.)
2. represent your own personal point of view before other town boards. When you do represent your own point of view, make sure you explain that your comments are not made on behalf of another but rather constitute a personal opinion. For example, a selectman may attend a Planning Board meeting to speak in favor of (or against) a new zoning bylaw which would permit increased commercial development.
3. act on behalf of a private party if your job requires it. For example, a town housing authority employee's responsibility may include advocating on behalf of low income citizens to increase the number of affordable housing units.
4. act on behalf of a constituent. You will be considered to be performing legitimate constituency work if you receive no pay, you have no financial interest in the matter, the constituent is not a relative, business associate, or corporate officer or director of a business you are associated with, the constituent lives or does business in your district and you are not acting as the constituent's attorney. Constituency work includes only those activities "within the proper discharge" of your "official duties." For example, a selectman may pursue a citizen's complaint against the building inspector because the inspector is hired and ultimately supervised by the board of selectmen. An appointed town planner, however, is not performing permissible constituency work when she calls the assessors to lobby for her neighbors tax abatement because the abatement has nothing to do with her "official duties."
5. represent members of your immediate family or any person with whom you serve as guardian, executor or administrator only if you are an appointed municipal employee and if you receive written permission from your boss. You may never, however, represent your family on matters which you, as an official, participate in or have official responsibility for. Elected officials may never represent immediate family members (spouses, brothers, sisters, children and parents) before the town. For example, the appointed town health director may represent his mother in her application for a building permit;

however, the elected selectman may not represent her mother in a request for a zoning variance. The Commission periodically issues Commission Advisories to interpret various provisions of the conflict of interest law. Advisories respond to issues which arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. Copies of this Advisory and other Advisories are available from the Commission office.