STATE ETHICS COMMISSION

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1989

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TABLE OF CASES

(By Subject or Respondent from 1979 through 1989)

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APPROVED BY: RIC MURPHY, PURCHASING AGENT

1989 TABLE OF CASES

(By Subject or Respondent)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 366

IN THE MATTER
OF
GEORGE MUNYON, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and George Munyon, Jr. (Mr. Munyon) 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 April 6, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Munyon. The Commission concluded its inquiry, and on May 25, 1988, found reasonable cause to believe that Mr. Munyon violated G.L. c. 268A, §19.

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

1. Mr. Munyon is the superintendent of the Lunenburg Highway Department (Highway Department), a full-time paid municipal position. Accordingly, Mr. Munyon is a municipal employee as defined in G.L. c. 268A, §1(g).

2. Mr. Munyon was appointed superintendent by the Lunenburg Board of Selectmen (Selectmen) approximately twelve years ago. As superintendent, Mr. Munyon supervises a Highway Department staff of two foremen and approximately six laborers.

3. Mr. Munyon has a son, Christopher Munyon (Christopher). Christopher is, thus, a member of Mr. Munyon's immediate family as defined in G.L. c. 268A, §1(e).

4. In early 1985, there was an opening for a laborer in the Highway Department. The opening was not posted or otherwise advertised. The Highway Department relied upon "word of mouth" to inform potential candidates of the opening.

5. By July, 1985, three or four qualified candidates had applied for the laborer's position, including Christopher. Mr. Munyon, as superintendent, reviewed the respective qualifications of the candidates and determined that Christopher was the best-qualified for the position.

6. At a meeting of the Selectmen on July 29, 1985, Mr. Munyon recommended to the Selectmen that they appoint Christopher to fill the laborer vacancy. Mr. Munyon told the Selectmen that Christopher was the best-qualified person available for the position. The Selectmen voted unanimously to hire Christopher for the position, to be paid at an hourly rate of $6.93.

7. Shortly before Christopher's appointment, Mr. Munyon spoke with the then chairman of the Selectmen, Ann P. Hall, and asked her if she had any problem with Christopher applying for the laborer position. Chairman Hall responded in the negative. Mr. Munyon then asked Chairman Hall to pose the same question to Selectman Lance May. Chairman Hall did as asked, and Selectman May did not object to Christopher's being a candidate. Mr. Munyon asserts that he also asked Selectman Walter Keeler the same question and that Selectman Keeler did not have any problem with Christopher's applying for the position; Selectman Keeler, however, was unable to confirm or deny Mr. Munyon's assertion.

8. Mr. Munyon neither sought nor received any legal counsel regarding his participation in the appointment of his son prior to that appointment being made.

9. On or before April 8, 1987, Mr. Munyon was notified that the Commission had authorized a preliminary inquiry into the legality of his participation in the appointment of Christopher.

10. On July 20, 1988 Christopher resigned from his municipal position.

11. Section 19 of G.L. c. 268A provides, in relevant part, that, except as permitted by §19(b), 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 selection and appointment of Christopher to a position with the Highway Department were particular matters within the meaning of §19. Mr. Munyon participated, as superintendent, in those particular matters by determining that Christopher was the best-qualified candidate for the position and by recommending his appointment by the Selectmen. Because the position was a paid position, Christopher had, at the time of the appointment, a financial

interest in the appointment. Mr. Munyon was aware at the time that he participated in the selection and recommendation of his son for appointment to the position with the Highway Department that his son would receive compensation for his services as a Highway Department employee.

13. By participating in the selection and appointment of his son to be a Highway Department employee, as described above, Mr. Munyon participated, as superintendent, in particular matters in which his son had a financial interest, thereby violating G.L. c. 268A, §19.

14. Under G.L. c. 268A, §19(b), a municipal official can avoid violating §19 if the employee advises his appointing authority of the nature and circumstances of the particular matter in which he would participate and the financial interest involved, and receives in advance a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from him. While Mr. Munyon showed some sensitivity to the conflict of interest problems created by his son's selection as a Highway Department employee by asking the Selectmen whether they had any problem with Christopher applying for the laborer position, his actions fell short of what was required to secure the benefits of a §19(b) exemption. Neither Mr. Munyon's disclosure nor the Selectmen's response to Mr. Munyon's inquiry were put into writing, as required by G.L. c. 268A, §§19 and 24. As a result, the nature and extent of the disclosure are not clear. Further, given the clear problem that Mr. Munyon's conduct created under §19 of the conflict law, it might well have been that, had Mr. Munyon and the Selectmen followed the proper §19(b) procedures, the Selectmen would have determined that Mr. Munyon's participation was unwise and, therefore, either the Selectmen themselves or someone other than Mr. Munyon would have handled the selection of the person to be appointed to the laborer position. If, on the other hand, the Selectmen had authorized Mr. Munyon to proceed, that authorization would have been a matter of public record. It is for these reasons that the Commission has, as a matter of practice, insisted on strict compliance with the written disclosure and authorization provisions of §19(b).

Nonetheless, the Commission has given consideration to Mr. Munyon's having made some disclosure to his appointing authority. Accordingly, while the Commission can impose up to a $2,000 fine for each violation of §19, it has determined that a relatively small fine here properly reflects those mitigating factors.[1/]

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. Munyon:

1. that he pay to the Commission the amount of two hundred and 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 contained in this agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: January 18, 1989

[1/]As a general rule, barring exacerbating circumstances the Commission considers a fine of $1,000.00 and the resignation of the family member hired to be an appropriate remedy for a nepotism/hiring violation. **See, e.g., In the Matter of Thomas J. Nolan**, 1987 Ethics Commission 283. Given that Mr. Munyon made an attempt, albeit inadequate, to alert the Selectmen to his situation, the Commission considers a reduction of the fine appropriate here.

Charles Smith
c/o Michael McCarthy, Esq.
70 Allen Street
Pittsfield, MA 01201

RE: PUBLIC ENFORCEMENT LETTER 89-5

Dear Mr. Smith:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as the Mayor of Pittsfield, you traveled at the expense of the ServiceMaster Company, a private custodial services company, to Chicago to view the ServiceMaster home offices and laboratories, subsequent to which the City of Pittsfield entered into a contract with ServiceMaster for school custodial services. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further

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

I. The Facts

1. At all relevant times, you were the Mayor of Pittsfield and, by virtue of that position, a voting member of the Pittsfield School Committee, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). ServiceMaster is a private company, based in Chicago, Illinois, which provides cleaning supplies and maintenance and custodial management services to its clients.

2. During the summer of 1986, ServiceMaster approached the City of Pittsfield and proposed conducting a survey of the city's buildings in order to assess maintenance problems and to propose a custodial management plan. (Until that time, city custodial personnel had handled all janitorial duties in city buildings.) ServiceMaster's "sales pitch" in making their proposal centered on the claim that their proposed local operations would have the support and backup of the corporate offices in Illinois. Pursuant to their claims, ServiceMaster repeatedly extended invitations to city officials, in particular School Committee members, to visit its corporate headquarters.

3. You felt that the trip was necessary in order to determine the accuracy of ServiceMaster's representations and what the city would be purchasing were they to accept ServiceMaster's proposal. You allowed ServiceMaster to pay the expenses of the trip so that city funds could be preserved.

4. On Monday, August 11, 1986, you and the Superintendent of Schools met at the school administration building and drove to the Albany airport. You boarded a 5:00 P.M. flight to Chicago, paid for by ServiceMaster at a cost of $540 for each round trip ticket. Upon your arrival in Chicago, you went to dinner at the Ninety Nine Restaurant, which was paid for by ServiceMaster in an amount totaling $261.09 ($52.22 per person). You were then taken to the Sheraton Naperville Hotel where you were provided with a room at ServiceMaster's expense, costing $74.12.

5. The next morning, five of you had breakfast at the hotel, paid for by ServiceMaster in an amount of $32.66 ($6.53 per person). You were then driven to ServiceMaster's corporate headquarters where you spent the day touring the facilities and speaking with ServiceMaster personnel. Lunch was served at the headquarters in a private dining room and was followed by more tours of various ServiceMaster departments. At the end of the day, you went directly to the airport and flew back to Albany, New York.

6. In September, 1986, the City Council voted not to recommend hiring ServiceMaster for city buildings (other than school buildings). The School Committee, however, maintained an interest in ServiceMaster's proposal.

7. In the fall of 1986, you appointed a committee to study the issues of maintenance in the public schools. This committee was to study the feasibility of having city personnel continue handling custodial management of the school buildings, rather than contracting the services out to a management company.

8. During the late fall of 1986 and early winter of 1987, the School Committee considered three options for custodial management: ServiceMaster's proposal, a proposal by the Crothall-American Company, and local proposals. In February, 1987, the mayoral committee voted that, with minor modifications and an upgrading of equipment, the existing system of building custodial maintenance for the city schools was sufficient. In February, 1987, however, the Superintendent of Schools recommended that the School Committee award ServiceMaster the contract.

9. On March 4, 1987, the School Committee, acting on the Superintendent's recommendation, approved the ServiceMaster proposal. You voted for such approval. This is a three-year agreement, contingent on annual renewal by the School Committee, with a total cost of $1,496,222.00 (which includes the payroll for all school department custodial employees).

10. The trip to Chicago was a "no frills" trip. There were no gifts or lavish entertainment. Thus, the only benefits enjoyed by you consisted of the direct payments for your travel, lodging and meals as described above.

11. The Commission finds no corrupt intent on your part in connection with the above-described

conduct.

12. The Commission knows of no evidence that you were aware that these payments may have violated the law. In fact, there appears to be a widespread misconception among public employees that such payments are permissible.

II. The Conflict Law

As Mayor and, therefore, a member of the Pittsfield School Committee, you were a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from requesting or accepting for himself anything of substantial value for or because of official acts performed or to be performed.

Your acceptance of ServiceMaster paying for your trip expenses as described above raises serious concerns under §3(b). As the Commission said in EC-COI-88-5 (issued on February 3, 1988),

> 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"[1/] for such travel would generally constitute a violation of §3(b) [citations omitted]. This subsidized travel is available to selection committee members precisely for or because of their official acts ....[T]ravel 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 [footnotes omitted].

The Commission also made clear in EC-COI-88-5 that it rejects the contention that the value of the trip expenses in cases like this accrues to the municipality and not to the individual traveler. In the Commission's view the value is a benefit to the individual traveler. See, 1986 EC 271.

There are good public policy reasons for prohibiting these kinds of payments. As the Commission stated in EC-COI-82-99 (dealing with members of a state board of registration traveling to view types of equipment proposed by a manufacturer for approval by the board where travel expenses were to be paid by the manufacturer),

> A system wherein the manufacturers of products pay for trips by state employees is clearly open to abuse by the state employees as well as the manufacturers. State employees could exploit this system in order to procure unwarranted privileges. And the public impression that state employees were improperly influenced in their decisions could arise. Manufacturers, on the other hand, may view the quality of the accommodations and accouterments on these trips as more important than the quality of their product.

We would note that G.L. c. 44, §53 may provide a statutory vehicle by which a private party may pay travel expenses for public officials. This section of the municipal finance law would appear to allow a city to accept grants or gifts of funds from a charitable foundation, private corporation or an individual and, in turn, the city may expend such funds for the specific purpose intended with the approval of the mayor and the board of aldermen. Chapter 44, §53A also states that such funds shall be deposited with the treasurer of such city and held in a separate account. In other words, if ServiceMaster desired to pay the travel expenses of members of the School Committee to attend a fact-finding trip to ServiceMaster's headquarters, ServiceMaster probably could do so by providing the necessary amount to the city Treasurer stating that the "gift" is to be used to pay such travel expenses.[2/] This mechanism provides for scrutiny by the city treasurer/auditor as to the reasonableness of the expenses incurred by public employees. Presumably, the use of such a mechanism would substantially reduce the potential for abuses described in EC-COI-82-99.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law.[3/] This matter is now closed. If you have any questions, please contact me at 727-0060.

DATE: February 14, 1989

[1/] It has been held that $50 in cash is "of substantial value." **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[2/] The application of G.L. c. 44, §53A to trips such as these is ultimately a matter of municipal finance law. Before the School Committee were to rely on this section, it probably should review the issue with

corporation counsel. (Alternatively, the city presumably could reimburse an employee for trip expenses in the normal course, then bill ServiceMaster for those costs. Again this alternative should be reviewed with corporation counsel.)

3/The Commission could have directed the staff to commence adjudicatory proceedings in which, if you were found to have violated §3, fines of up to $2,000 for each violation could be imposed. The Commission chose to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among public employees that such payments are permissible; (2) there were no "frills" involved in these trips; and (3) the Commission knows of no evidence that you were aware that these payments violated the law.

Robert LaFrankie
c/o Michael McCarthy, Esq.
70 Allen Street
Pittsfield, MA 01201

RE: PUBLIC ENFORCEMENT LETTER 89-6

Dear Mr. LaFrankie:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as Superintendent of the Pittsfield schools, you traveled at the expense of the ServiceMaster Company, a private custodial services company, to Chicago to view the ServiceMaster home offices and laboratories, subsequent to which the City of Pittsfield entered into a contract with ServiceMaster for school custodial services. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were the Superintendent of the Pittsfield schools, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). ServiceMaster is a private company, based in Chicago, Illinois, which provides cleaning supplies and maintenance and custodial management services to its clients.

2. During the summer of 1986, ServiceMaster approached the City of Pittsfield and proposed conducting a survey of the city's buildings in order to assess maintenance problems and to propose a custodial management plan. (Until that time, city custodial personnel had handled all janitorial duties in city buildings.) ServiceMaster's "sales pitch" in making their proposal centered on the claim that their proposed local operations would have the support and backup of the corporate offices in Illinois. Pursuant to their claims, ServiceMaster repeatedly extended invitations to city officials, in particular School Committee members, to visit its corporate headquarters.

3. You felt that the trip was necessary in order to learn more about the company and to assess the credibility of ServiceMaster's sales pitch.

4. On Monday, August 11, 1986, you and the Mayor met at the school administration building and drove to the Albany airport. You boarded a 5:00 P.M. flight to Chicago, paid for by ServiceMaster at a cost of $540 for each round trip ticket. Upon your arrival in Chicago, you went to dinner at the Ninety-Nine Restaurant, which was paid for by ServiceMaster in an amount totaling $261.09 ($52.22 per person). You were then taken to the Sheraton Naperville Hotel where you were provided with a room at ServiceMaster's expense, costing $74.12.

5. The next morning, five of you had breakfast at the hotel, paid for by ServiceMaster in an amount of $32.66 ($6.53 per person). You were then driven to ServiceMaster's corporate headquarters where you spent the day touring the facilities and speaking with ServiceMaster personnel. Lunch was served at the headquarters in a private dining room and was followed by more tours of various ServiceMaster departments. At the end of the day, you went directly to the airport and flew back to Albany, New York.

6. In September, 1986, the City Council voted not to recommend hiring ServiceMaster for city buildings (other than school buildings). The School Committee, however, maintained an interest in ServiceMaster's

proposal.

7. In the fall of 1986, the Mayor appointed a committee to study the issues of maintenance in the public schools. This committee was to study the feasibility of having city personnel continue handling custodial management of the school buildings, rather than contracting the services out to a management company.

8. During the late fall of 1986 and early winter of 1987, the School Committee considered three options for custodial management: ServiceMaster's proposal, a proposal by the Crothall-American Company, and local proposals. In February, 1987, the mayoral committee voted that, with minor modifications and an upgrading of equipment, the existing system of building custodial maintenance for the city schools was sufficient. In February, 1987, however, you recommended that the School Committee award ServiceMaster the contract. Your recommendation was based upon a written detailed financial analysis of the various proposals which had been submitted.

9. On March 4, 1987, the School Committee, acting on your recommendation, approved the ServiceMaster proposal. This is a three-year agreement, contingent on annual renewal by the School Committee, with a total cost of $1,496,222.00 (which includes the payroll for all school department custodial employees).

10. The trip to Chicago was a "no frills" trip. There were no gifts or lavish entertainment. Thus, the only benefits enjoyed by you consisted of the direct payments for your travel, lodging and meals as described above.

11. The Commission finds no corrupt intent on your part in connection with the above described conduct.

12. The Commission knows of no evidence that you were aware that these payments may have violated the law. In fact, there appears to be a widespread misconception among public employees that such payments are permissible.

II. The Conflict Law

As the Pittsfield Superintendent of Schools, you were a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from requesting or accepting for himself anything of substantial value for or because of official acts performed or to be performed.

Your acceptance of ServiceMaster paying for your trip expenses as described above raises serious concerns under §3(b). As the Commission said in EC-COI-88-5 (issued on February 3, 1988),

> 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"[1/] for such travel would generally constitute a violation of §3(b) [citations omitted]. This subsidized travel is available to selection committee members precisely for or because of their official acts ....[T]ravel 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 [footnotes omitted].

The Commission also made clear in EC-COI-88-5 that it rejects the contention that the value of the trip expenses in cases like this accrues to the municipality and not to the individual traveler. In the Commission's view the value is a benefit to the individual traveler. See, 1986 EC 271.

There are good public policy reasons for prohibiting these kinds of payments. As the Commission stated in EC-COI-82-99 (dealing with members of a state board of registration traveling to view types of equipment proposed by a manufacturer for approval by the board where travel expenses were to be paid by the manufacturer),

> A system wherein the manufacturers of products pay for trips by state employees is clearly open to abuse by the state employees as well as the manufacturers. State employees could exploit this system in order to procure unwarranted privileges. And, the public impression that state employees were improperly influenced in their decisions could arise. Manufacturers, on the other hand, may view the quality of the accommodations and accouterments on these trips as more important than the quality of their product.

We would note that G.L. c. 44, §53 may provide a statutory vehicle by which a private party may pay travel expenses for public officials. This section of the municipal finance law would appear to allow a city to accept grants or gifts of funds from a charitable

foundation, private corporation or an individual and, in turn, the city may expend such funds for the specific purpose intended with the approval of the mayor and the board of aldermen. Chapter 44, §53A also states that such funds shall be deposited with the treasurer of such city and held in a separate account. In other words, if ServiceMaster desired to pay the travel expenses of members of the School Committee to attend a fact-finding trip to ServiceMaster's headquarters, ServiceMaster probably could do so by providing the necessary amount to the city Treasurer stating that the "gift" is to be used to pay such travel expenses.[2/] This mechanism provides for scrutiny by the city treasurer/auditor as to the reasonableness of the expenses incurred by public employees. Presumably, the use of such a mechanism would substantially reduce the potential for abuses described in EC-COI-82-99.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law.[3/] This matter is now closed. If you have any questions, please contact me at 727-0060.

DATE: February 14, 1989

[1/]It has been held that $50 in cash is "of substantial value." **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[2/]The application of G.L. c. 44, §53A to trips such as these is ultimately a matter of municipal finance law. Before the School Committee were to rely on this section, it probably should review the issue with corporation counsel. (Alternatively, the city presumably could reimburse an employee for trip expenses in the normal course, then bill Service Master for those costs. Again this alternative should be reviewed with corporation counsel.)

[3/]The Commission could have directed the staff to commence adjudicatory proceedings in which, if you were found to have violated §3, fines of up to $2,000 for each violation could be imposed. The Commission chose to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among public employees that such payments are permissible; (2) there were no "frills" involved in these trips; and (3) the Commission knows of no evidence that you were aware that these payments violated the law.

Angel Ramirez
c/o Michael McCarthy, Esq.
70 Allen Street
Pittsfield, MA 01201

RE: PUBLIC ENFORCEMENT LETTER 89-7

Dear Mr. Ramirez:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as a member of the Pittsfield School Committee, you traveled at the expense of the ServiceMaster Company, a private custodial services company, to Chicago to view the ServiceMaster home offices and laboratories, subsequent to which the City of Pittsfield entered into a contract with ServiceMaster for school custodial services. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were a member of the Pittsfield School Committee, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). ServiceMaster is a private company, based in Chicago, Illinois, which provides cleaning supplies and maintenance and custodial management services to its clients.

2. During the summer of 1986, ServiceMaster approached the City of Pittsfield and proposed conducting a survey of the city's buildings in order to assess maintenance problems and to propose a custodial management plan. (Until that time, city custodial personnel had handled all janitorial duties in city buildings.) ServiceMaster's "sales pitch" in making their proposal centered on the claim that their proposed local operations would have the support and backup of the corporate offices in Illinois. Pursuant to their claims, ServiceMaster repeatedly extended invitations to city officials, in particular School

Committee members, to visit its corporate headquarters.

3. You agreed to go on the trip because it was the best way to determine whether ServiceMaster's sales pitch was credible.

4. On Monday, August 25, 1986, you and another member of the School Committee were picked up at your homes by a ServiceMaster representative. You went to the Albany airport where you were met by a second representative from ServiceMaster. You boarded a 5:00 P.M. flight to Chicago, paid for by ServiceMaster at a cost of $550 for each round trip ticket. Upon your arrival in Chicago, you went to dinner at LaFlamme Restaurant, which was paid for by ServiceMaster in an amount totaling $140.60 (an average of $35.15 per person). You were then taken to the Sheraton Naperville where you were provided with a room at ServiceMaster's expense, costing $74.12.

5. The next morning, the four of you had breakfast at the hotel, paid for by ServiceMaster in an amount of $21.08. You were then driven to ServiceMaster's corporate headquarters where you spent the day touring the facilities and speaking with ServiceMaster personnel. Lunch was served at the headquarters in a private dining room and was followed by more tours of various ServiceMaster departments. At approximately 4:15 P.M., you were taken to the airport where you were told that your 4:45 P.M. flight had been canceled. The ServiceMaster representatives then offered you dinner at the airport restaurant, which ServiceMaster paid for in an amount totaling $128.08 ($32.02 per person). At approximately 10 P.M., you succeeded in boarding a flight on standby, arriving at Albany airport at approximately 12 A.M. You were then driven home by the ServiceMaster representative.

6. In September, 1986, the City Council voted not to recommend hiring ServiceMaster for city buildings (other than school buildings). The School Committee, however, maintained an interest in ServiceMaster's proposal.

7. In the fall of 1986, the Mayor appointed a committee to study the issues of maintenance in the public schools. This committee was to study the feasibility of having city personnel continue handling custodial management of the school buildings, rather than contracting the services out to a management company.

8. During the late fall of 1986 and early winter of 1987, the School Committee considered three options for custodial management: ServiceMaster's proposal, a proposal by the Crothall-American Company, and local proposals. In February, 1987, the mayoral committee voted that, with minor modifications and an upgrading of equipment, the existing system of building custodial maintenance for the city schools was sufficient. In February, 1987, however, the Superintendent of Schools recommended that the School Committee award ServiceMaster the contract.

9. On March 4, 1987, the school committee, acting on the Superintendent's recommendation, approved the ServiceMaster proposal. You voted for such approval. This is a three-year agreement, contingent on annual renewal by the School Committee, with a total cost of $1,496,222.00 (which includes the payroll for all school department custodial employees).

10. The trip to Chicago was a "no frills" trip. There were no gifts or lavish entertainment. Thus, the only benefits enjoyed by you consisted of the direct payments for your travel, lodging and meals as described above.

11. The Commission finds no corrupt intent on your part in connection with the above described conduct.

12. The Commission knows of no evidence that you were aware that these payments may have violated the law. In fact, there appears to be a widespread misconception among public employees that such payments are permissible.

II. The Conflict Law

As a member of the Pittsfield School Committee, you were a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from requesting or accepting for himself anything of substantial value for or because of official acts performed or to be performed.

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such travel would generally constitute a violation of §3(b) [citations omitted]. This subsidized travel is available to selection committee members precisely for or because of their official acts ....[T]ravel 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 [footnotes omitted].

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There are good public policy reasons for prohibiting these kinds of payments. As the Commission stated in EC-COI-82-99 (dealing with members of a state board of registration traveling to view types of equipment proposed by a manufacturer for approval by the board where travel expenses were to be paid by the manufacturer),

> A system wherein the manufacturers of products pay for trips by state employees is clearly open to abuse by the state employees as well as the manufacturers. State employees could exploit this system in order to procure unwarranted privileges. And the public impression that state employees were improperly influenced in their decisions could arise. Manufacturers, on the other hand, may view the quality of the accommodations and accouterments on these trips as more important than the quality of their product.

We would note that G.L. c. 44, §53 may provide a statutory vehicle by which a private party may pay travel expenses for public officials. This section of the municipal finance law would appear to allow a city to accept grants or gifts of funds from a charitable foundation, private corporation or an individual and, in turn, the city may expend such funds for the specific purpose intended with the approval of the mayor and the board of aldermen. Chapter 44, §53A also states that such funds shall be deposited with the treasurer of such city and held in a separate account. In other words, if ServiceMaster desired to pay the travel expenses of members of the School Committee to attend a fact-finding trip to ServiceMaster's headquarters, ServiceMaster probably could do so by providing the necessary amount to the city Treasurer stating that the "gift" is to be used to pay such travel expenses.[2/] This mechanism provides for scrutiny by the city treasurer/auditor as to the reasonableness of the expenses incurred by public employees. Presumably, the use of such a mechanism would substantially reduce the potential for abuses described in EC-COI-82-99.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law.[3/] This matter is now closed. If you have any questions, please contact me at 727-0060.

DATE: February 14, 1989

[1/]It has been held that $50 in cash is "of substantial value." **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[2/]The application of G.L. c. 44, §53A to trips such as these is ultimately a matter of municipal finance law. Before the School Committee were to rely on this section, it probably should review the issue with corporation counsel. (Alternatively, the city presumably could reimburse an employee for trip expenses in the normal course, then bill Service Master for those costs. Again this alternative should be reviewed with corporation counsel.)

[3/]The Commission could have directed the staff to commence adjudicatory proceedings in which, if you were found to have violated §3, fines of up to $2,000 for each violation could be imposed. The Commission chose to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among public employees that such payments are permissible; (2) there were no "frills" involved in these trips; and (3) the Commission knows of no evidence that you were aware that these payments violated the law.

James M. Boyle
c/o Francis Spina, Esq.
29 Wendell Avenue
Pittsfield, MA 01201

RE: PUBLIC ENFORCEMENT LETTER 89-8

Dear Mr. Boyle:

As you know, the State Ethics Commission has

conducted a preliminary inquiry regarding an allegation that as a member of the Pittsfield School Committee, you traveled at the expense of the ServiceMaster Company, a private custodial services company, to Chicago to view the ServiceMaster home offices and laboratories, subsequent to which the City of Pittsfield entered into a contract with ServiceMaster for school custodial services. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were a member of the Pittsfield School Committee, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). ServiceMaster is a private company, based in Chicago, Illinois, which provides cleaning supplies and custodial management services to its clients.

2. During the summer of 1986, ServiceMaster approached the City of Pittsfield and proposed conducting a survey of the city's buildings in order to assess maintenance problems and to propose a custodial management plan. (Until that time, city custodial personnel had handled all janitorial duties in city buildings.) ServiceMaster's "sales pitch" in making their proposal centered on the claim that their proposed local operations would have the support and backup of the corporate offices in Illinois. Pursuant to their claims, ServiceMaster repeatedly extended invitations to city officials, in particular School Committee members, to visit its corporate headquarters.

3. You expressed concerns about ServiceMaster's proposal from the first time that it was put before the School Committee. Because you were so opposed and concerned about the proposal, you were urged by other School Committee members to go to Chicago, and you finally acquiesced.

4. On Monday, August 25, 1986, you and another member of the School Committee were picked up at your homes by a ServiceMaster representative. You went to the Albany airport where you were met by a second representative from ServiceMaster. You boarded a 5:00 P.M. flight to Chicago, paid for by ServiceMaster at a cost of $550 for each round trip ticket. Upon your arrival in Chicago, you went to dinner at LaFlamme Restaurant, which was paid for by ServiceMaster in an amount totaling $140.60 (an average of $35.15 per person). You were then taken to the Sheraton Naperville where you were provided with a room at ServiceMaster's expense, costing $74.12.

5. The next morning, the four of you had breakfast at the hotel, paid for by ServiceMaster in an amount of $21.08. You then drove to ServiceMaster's corporate headquarters where you spent the day touring the facilities and speaking with ServiceMaster personnel. Lunch was served at the headquarters in a private dining room and was followed by more tours of various ServiceMaster departments. At approximately 4:15 P.M., you were taken to the airport where you were told that your 4:45 P.M. flight had been canceled. The ServiceMaster representatives then offered you dinner at the airport restaurant, which ServiceMaster paid for in an amount totaling $128.08 ($32.02 per person). At approximately 10 P.M., you succeeded in boarding a flight on standby, arriving at Albany airport at approximately 12 A.M. You were then driven home by the ServiceMaster representative.

6. You stated that you have since demanded a breakdown of expenses incurred by ServiceMaster so that you might have ServiceMaster reimbursed for your expenses. You have not yet received an answer to your request.

7. In September, 1986, the City Council voted not to recommend hiring ServiceMaster for city buildings (other than school buildings). The School Committee, however, maintained an interest in ServiceMaster's proposal.

8. In the fall of 1986, the Mayor appointed a committee to study the issues of maintenance in the public schools. This committee was to study the feasibility of having city personnel continue handling custodial management of the school buildings, rather than contracting the services out to a management company.

9. During the late fall of 1986 and early winter of 1987, the School Committee considered three options for custodial management: ServiceMaster's proposal, a proposal by the Crothall-American Company, and local proposals. In February, 1987, the

mayoral committee voted that, with minor modifications and an upgrading of equipment, the existing system of building maintenance for the city schools was sufficient. Despite this recommendation, the Superintendent of Schools recommended that the School Committee award ServiceMaster the contract.

10. On March 4, 1987, the School Committee, acting on the Superintendent's recommendation, approved the ServiceMaster proposal. You voted against approving the proposal. This is a three-year agreement, contingent on annual renewal by the School Committee, with a total cost of $1,496,222.00.

11. The trip to Chicago was a "no frills" trip. There were no gifts or lavish entertainment. Thus, the only benefits enjoyed by you consisted of the direct payments for your travel, lodging and meals as described above.

12. The Commission finds no corrupt intent on your part in connection with the above-described conduct.

13. The Commission knows of no evidence that you were aware that these payments may have violated the law. In fact, there appears to be a widespread misconception among public employees that such payments are permissible.

II. The Conflict Law

As a member of the Pittsfield School Committee, you are a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 3(b) of G.L. c. 268A prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from requesting or accepting for himself anything of substantial value for or because of official acts performed or to be performed.

Your acceptance of ServiceMaster paying for your trip expenses as described above raises serious concerns under §3(b). As the Commission said in EC-COI-88-5,

> 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"[1/] for such travel would generally constitute a violation of §3(b) [citations omitted]. This subsidized travel is available to selection committee members precisely for or because of their official acts ....[T]ravel 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 [footnotes omitted].

The Commission also made clear in EC-COI-88-5 that it rejects the contention that the value of the trip expenses in cases like this accrues to the municipality and not to the individual traveler, notwithstanding the fact that the School Committee urged you to go on the trip. In the Commission's view the value is a benefit to the individual traveler. (**See, e.g., In the Matter of Carl D. Pitaro**, 1986 EC 271 (where the Commission held that the travel privilege of substantial value accrued to Mayor Pitaro and not to the City of Brockton).

There are good public policy reasons for prohibiting these kinds of payments. As the Commission stated in EC-COI-82-99 (dealing with members of a state board of registration traveling to view types of equipment proposed by a manufacturer for approval by the board where travel expenses were to be paid by the manufacturer),

> A system wherein the manufacturers of products pay for trips by state employees is clearly open to abuse by the state employees as well as the manufacturers. State employees could exploit this system in order to procure unwarranted privileges. And, the public impression that state employees were improperly influenced in their decisions could arise. Manufacturers, on the other hand, may view the quality of the accommodations and accouterments on these trips as more important than the quality of their product.

We would note that G.L. c. 44, §53 may provide a statutory vehicle by which a private party may pay travel expenses for public officials. This section of the municipal finance law would appear to allow a city to accept grants or gifts of funds from a charitable foundation, private corporation or an individual and, in turn, the city may expend such funds for the specific purpose intended with the approval of the mayor and the board of aldermen. Chapter 44, §53A also states that such funds shall be deposited with the treasurer of such city and held in a separate account. In other words, if ServiceMaster desired to pay the travel expenses of members of the School Committee to attend a fact-finding trip to ServiceMaster's headquarters, ServiceMaster probably could do so by providing the necessary amount to the city Treasurer stating that the "gift" is to be used to pay such travel expenses.[2/] This mechanism provides for scrutiny by

the city treasurer/auditor as to the reasonableness of the expenses incurred by public employees. Presumably, the use of such a mechanism would substantially reduce the potential for abuses described in EC-COI-82-99. Although the School Committee asked you to go to Chicago, more is required under the law. Public employees must clearly distance themselves from valuable consideration which flows from contractors or potential contractors.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law.[3/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: February 14, 1989

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COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NOS. 350 and 351

IN THE MATTER
OF
JOSEPH ZORA, JR.
AND
JOSEPH ZORA, SR.

Appearances:

Freda K. Fishman
Robert A. Levite
Counsel for Petitioner

Donald J. Fleming
Counsel for Respondents

Commissioners:

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

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on December 9, 1987 by filing Orders to Show Cause pursuant to the Commission's Rules of Practice and Procedure, 930 CMR 1.01(5)(a). The Orders alleged that Joseph Zora, Jr. (Zora Jr.) had violated G.L. c. 268A, §17(c) on six separate occasions and that Joseph Zora, Sr. (Zora Sr.) had violated G.L. c. 268A, §17(c) on four separate occasions.

Specifically, the Order to Show Cause alleges that Zora Jr. violated §17(c) of the conflict law by:

1. on April 10, 1985, appearing at a meeting of the Marion Conservation Commission (MCC) and acting as agent for Zora Enterprises, Inc.;

2. on April 10 and 12, 1985 making telephone calls, as the agent of Zora Sr., to the chairman of the MCC regarding the MCC's failure to post legal notices of the time and place of its meetings on the Rider Notice of Intent;

3. on April 12, 1985, acting as agent for Zora Enterprises while walking lot #45 with the MCC and a representative from the Department of Environmental Quality Engineering (DEQE);

4. on April 19, 1985, acting as agent for Zora

Enterprises in discussions before the MCC regarding lot #45; and

5. on April 24, 1985, acting as agent for Zora Enterprises in a discussion regarding lot #45 by suggesting to the MCC that it needed to review some of its procedures regarding its requirements for issuance of a decision on a pending application.

Specifically, the Order to Show Cause alleges that Zora Sr. violated §17(c) of the conflict law by:

1. on April 19, 1985, appearing at a MCC meeting as an agent for Zora Enterprises and the Riders, and substantially participating in discussions regarding whether or not the MCC had jurisdiction to make decisions regarding percolation tests on lot #45 and submitting a written memorandum expressing 13 concerns relating to the hearing process;

2. authorizing his son on two occasions to contact the Chairman of the MCC regarding the MCC's failure to post legal notices of the time and place of its meetings on the Rider Notice of Intent; and

3. on April 24, 1985, acting as agent for Zora Enterprises and the Riders at a MCC meeting by participating in a discussion involving the procedural aspects of the MCC's hearing requirements in connection with the Rider Notice of Intent and by submitting a letter from an engineer regarding a percolation test performed on lot #45.

Each of the Respondents filed an Answer on February 12, 1988.

Zora Jr. raised the following defenses:

1. Article 15 Part I of the Declaration of Rights to the Massachusetts Constitution guarantees a right to trial by jury in proceedings before the State Ethics Commission;

2. that the speech complained of is protected under the Massachusetts and Federal constitutions;

3. that this action is barred by the applicable statute of limitations and his due process rights are violated by the Commission's proceedings in light of this;

4. that he was not a regular municipal employee as a member of the MCC;

5. that he abstained from any MCC activity on March 24, 1985 and resigned on that date;

6. that the MCC's meeting on April 19, 1985 was not lawful and so he could not, as a matter of law, have violated §17 at that meeting; and

7. that a percolation test is not a "particular matter" within the meaning of the statute since the MCC does not have the legal authority to conduct a percolation test.

Zora Sr. raised the followings defenses:

1. Article 15 of Part I of the Declaration of Rights to the Massachusetts Constitution guarantees a right to trial by jury in proceedings before the State Ethics Commission;

2. that the action is barred by the applicable statute of limitations and his due process rights are violated by the Commission's proceedings;

3. that the speech and acts complained of is protected under the Massachusetts and Federal constitutions;

4. that his due process rights have been violated by ex parte proceedings in the reasonable cause determination;

5. that he was a special municipal employee as a member of the Marion Board of Selectmen and that he was not a Selectman at times pertinent to the Order to Show Cause;

6. that he and the MCC at all times treated the land owned by Zora Enterprises as land owned by the Respondent individually;

7. that in March and April of 1985, lot #45 was not under any written purchase and sale agreement, nor had any title passed to Rider;

8. on April 19, 1985 there was no scheduled meeting of the MCC;

9. on April 19, 1985 he was not acting as agent for another;

10. he did not authorize his son on two occasions to contact the Chairman of the MCC regarding the MCC's failure to post legal notices of the time and place of its meetings on the Rider petition;

11. on April 24, 1985 he did not act as an agent for the Riders; and

12. in that the MCC is not authorized by law to conduct percolation tests on his land, that act cannot be a "particular matter" within the meaning of the statute.

Both Respondents denied all other material allegations contained in the Orders.

Prior to the hearings, Respondents moved to dismiss on the grounds of statute of limitations and denial of jury trial. Zora Jr. moved for summary judgment on first amendment grounds. Zora Sr. also moved for summary judgment on this ground as well as on the ground that his acts were permissible under G.L. c. 268A, §17(c)'s fiduciary exemption. Commissioner Archie Epps, who was designated as Presiding Officer, denied these motions.

These cases were consolidated on March 29, 1988 following separate Motions to Consolidate filed by all parties. A pre-hearing conference was held on April 13, 1988 and adjudicatory hearings were held on April 22, 29, May 13 and 30, 1988. The parties filed post-hearing briefs and presented oral arguments before the Commission on February 8, 1989. Respondent's grounds for summary judgment and dismissal are renewed in their briefs.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties.[1/]

II. Findings of Fact

1. At all times relevant to this case, Joseph P. Zora, Sr. was a Selectman for the Town of Marion. The members of the Marion Board of Selectmen, at all times relevant to this case, were regular municipal employees.

2. At all times relevant to this case, Joseph P. Zora, Jr. was a member of the MCC.[2/] The MCC members, at all times relevant to this case, were regular municipal employees.

3. The respondents are father and son.

4. In the early 1960's, Zora Sr. and his wife purchased approximately 75 acres of land in the Town of Marion.

5. Subsequent to that time, but prior to 1985, they acquired additional land in the Town.

6. Zora Sr. intended to develop the land for single family housing.

7. On or about January 12, 1972, Zora Enterprises was incorporated pursuant to G.L. c. 156B, "to carry out the business of developing and improving real property." Zora Sr. was named president and treasurer of the corporation, his wife, Glenna M. Zora, was named clerk, and their children were named directors.

8. By June of 1983, the title to the land previously held by Zora Sr. et ux had been transferred to Zora Enterprises, Inc.

9. In June of 1983, Zora Enterprises, Inc. filed a subdivision plan at the Plymouth County Registry of Deeds for a hundred acre subdivision divided into 45 lots.

10. In late 1984 or early 1985, Roy and Sheila Rider approached Zora Sr. to express an interest in buying Lot #45 in the subdivision owned by Zora Enterprises, Inc.

11. Zora Enterprises, Inc. and the Riders entered into a Purchase and Sale Agreement on Lot #45 for the sum of twenty-five thousand dollars on or about February 6, 1985. The Agreement was conditioned on the performance of a percolation test or tests to be performed on or before February 20, 1985 with the buyers having the option to terminate the agreement and recover the deposit "[i]f said tests do not meet the minimum standard set forth in 310 CMR 15.00 et seq."

12. Sometime prior to March 27, 1985, the Riders filed a Notice of Intent under G.L.c. 131, §40 (the Massachusetts Wetlands Protection Act) with the MCC with respect to Lot #45. A Notice of Intent seeks a permit, otherwise known as an Order of Conditions, to perform work on the land subject to §40.

13. The Riders were seeking an Order of Conditions from the MCC to construct a house, fill part of the property to accommodate a subsurface sewage disposal system and install a swimming pool on Lot #45.

14. Lot #45 was subject to the jurisdiction of the MCC because it lies lower than 14.5 feet above sea level. G.L. c. 131, §40. The MCC reviews plans for construction on land within its jurisdiction for impact on ground water supply, shellfish and fisheries, flood control, wetland alteration or replication, storm damage control and pollution.

15. On March 27, 1985, the MCC held a public hearing on the Rider's Notice of Intent.

16. At the hearing, Zora Jr. announced that he would not participate in the Rider's public hearing because of his father's financial interest in the property. However, he was present during the hearing.

17. After Roy Rider presented his Notice of Intent to the MCC, MCC member John Rockwell informed the MCC that he had gone out to the property himself a few days previously and had dug some holes in the land, and the property seemed very wet to him and he was concerned that the water table was in fact higher than that reported. He suggested to the MCC that a second percolation test be done on the lot. Due to the fact that the Riders had already paid for a test, the MCC voted to conduct a second test at Town expense, and subsequently voted to continue the hearing until the additional information was submitted.

18. Zora Sr. subsequently learned of the MCC's actions with respect to Lot #45 and was angered at the outcome of the meeting. He regarded the MCC's actions as an attack on his integrity.

19. Sometime prior to the next scheduled meeting of the MCC on April 10, 1985, Zora Sr. telephoned Janice Mendes, MCC Chair, and threatened the MCC with a lawsuit if anyone set foot on Lot #45.

20. On April 10, 1985, Zora Jr. attended the scheduled meeting of the MCC as a result of a discussion with his father, who complained that he was unable to get information about the hearing continuance on the Rider Notice of Intent. Zora Jr. told his father that he would obtain the information.[3/]

21. At the meeting, Zora Jr. stated that he was there as agent for Zora Enterprises, Inc..[4/] His presence as "agent" and not as "member" was noted in the minutes.[5/]

22. Zora Jr. stated that with respect to the Rider Notice of Intent, the MCC did not have the authority to order a second percolation test; the percolation test was the obligation of the applicant. He also stated that the MCC did not have the right to dig on Lot #45.

23. MCC Chair Mendes told Zora Jr. that the Rider's Notice of Intent could not be processed without a site inspection which she was now unwilling to perform without written permission from Zora Sr. due to his threats of litigation.

24. Zora Jr. stated that Zora Sr. had already given them permission to go on the property. He further stated that he himself was reiterating permission for the members of the MCC to on the property.

25. Subsequently, Mendes spoke by telephone with Zora Sr. who stated that the MCC could go on the land as long as his representative was present and the MCC dug no holes. On April 12, 1985, a site inspection of Lot #45 took place. MCC members John Rockwell, Janice Mendes, Joyce West, Jack Taliaferro and Ann Chismare participated. Also present were Arthur Thompson, whose firm had conducted the original percolation test, Joseph Hartley, DEQE Wetlands Division Section Chief and Zora Jr.

26. Zora Jr. had been authorized by his father to represent the interests of Zora Enterprises as Zora Sr. was not available to attend.

27. The group convened at the Town Hall, where Zora Jr. first objected to the presence of a DEQE representative stating that contacting DEQE was an official action of the MCC which had not been duly voted. He did, however, give permission for the DEQE representative to enter the property.

28. The MCC conducted a site inspection. If the inspection resulted in a determination that the land was wetlands, the value of the land would substantially diminish.

29. Zora Jr. accompanied the group during their inspection. He expressed disagreement that 50% of the lot contained wetlands vegetation and stated that the observations of some of the MCC members were "baloney" or "bull__."

30. The MCC met on April 19, 1985 to continue the public hearing on the Rider's Notice of Intent.

31. Zora Jr., Zora Sr., and Roy Rider attended the meeting. Rider authorized Zora Sr. to speak on his behalf with respect to the way the MCC was administering the Wetlands Protection Act in relation to the Rider Notice of Intent because Rider felt Zora Sr. had more expertise in this area.[6/]

32. Zora Sr. proceeded to address the MCC at length, criticizing various aspects of their procedures.

33. Zora Sr. also submitted a memorandum detailing his objections to the MCC's conduct.

34. The memorandum was addressed to the MCC from Joseph P. Zora, President of Zora Enterprises, Inc. Prior to submitting the memorandum, Zora Jr.

and Zora Sr. discussed its contents.

35. Among other things, the memorandum stated that after Zora Jr. withdrew from sitting on the MCC due to the pending Rider Notice of Intent, he was present to represent Zora Enterprises, Inc. before the MCC "clarify[ing] and protest[ing] actions taken against Zora Enterprises concerning Lot #45" and "on behalf of Zora Enterprises," granting permission to the MCC for a site inspection.

36. Following the Zora presentation, the MCC discussed the question of the deadline for its decision on the Rider Notice of Intent. The MCC was of the opinion that it had 21 more days in which to issue its ruling under the applicable regulation.

37. Zora Jr. disputed this, stating that the 21 day period ran from the date of the originial hearing and that the MCC had run out of time and had to render its decision that day.

38. The discussion concluded with the MCC voting to issue an Order of Conditions on the Rider Notice of Intent after the Zoras had left the meeting.

39. On April 24, 1985, both Zora Jr. and Zora Sr. accompanied by an attorney, again appeared at the MCC meeting.

40. Zora Sr. provided the MCC with a letter from an engineer who had performed a second percolation test on Lot #45.

41. Zora Jr. and Zora Sr. were informed that the Order of Conditions had already been voted on at the previous meeting.

42. As the Zoras left, Zora Jr. commented that "you guys have a lot of work to do knowing what your procedures are."

43. Following the resolution of the Rider matter, Zora Jr. resumed his participation as a member of the MCC.

III. Decision

Respondents Zora Jr. and Zora Sr. have been charged with six and four separate violations of G.L. c. 268A, §17(c), respectively. Before turning to the alleged violations, however, we will discuss certain preliminary issues.

A. Procedural

1. Statute of Limitations

Both Zora Jr. and Zora Sr. contend that the Commission has violated their due process rights by proceeding on matters where the statute of limitations has run.

This Commission has, by regulation, codified a three-year statute of limitations pursuant to its regulatory authority, 930 CMR 1.02(10). The Orders to Show Cause in this case were issued on December 9, 1987. All of the acts at issue in this case took place in the spring of 1985. The facts alleged in these Orders to Show Cause all occurred, therefore, within the applicable statute of limitations. The issue of the applicability of G.L. c. 260, §5 which establishes a two-year statute of limitations in actions for penalties to be given to the Commonwealth has been raised and rejected elsewhere. **See, In the Matter of Robert P. Sullivan**, 1987 SEC 312.

2. First Amendment and Due Process Rights

Respondents have filed a memorandum arguing that the speech and acts involved in the Orders to Show Cause are protected under the state and federal constitutions. Because we customarily assume the constitutionality of G.L. c. 268A, and Commission procedures, we do not usually address the constitutional challenges at the administrative level. We would note, however, that §17(c), as applied in this case, does not abridge Respondents' freedom of speech, does not punish the contect of their speech, and does not limit their access to the corporate form. Section 17(c), as applied, only limits their right to act as agent for others, a limitation well within the authority of the legislature. **See, e.g.**, G.L. c. 221, §43 (agents prohibited from soliciting clients on behalf of attorney). Similarly, Respondents' rights to due process before the MCC are not harmed in any way by G.L. c. 268A, §17(c), as applied.

3. Right to Trial by Jury

Respondents have filed a memorandum arguing that they have a right to a trial by jury under Article 15 of Part I of the Declaration of Rights to the Massachusetts Constitution. The Supreme Judicial Court, however, has previously determined that our proceedings do not implicate the right to trial by jury. **See, Opinion of the Justices of the Senate**, 375 Mass. 795, 820 (1978).

B. **Substantive Violations**

The relevant 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 municipality or an agency of the same municipality is a party or has a direct and substantial interest.

1. **Status as Municipal Employees**

General Laws chapter 268A, §1(g) defines "municipal employee" as a "person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement whether serving with or without compensation on a full, regular, part-time, intermittent or consultant basis." There is no dispute that both Zora Jr. and Zora Sr. were municipal employees within the meaning of the statute during March and April of 1985 when Zora Sr. was a member of the Marion Board of Selectmen and Zora Jr. was a member of the Marion Conservation Commission. What was disputed was whether the respondents were regular or special municipal employees.

G.L. c. 268A, §1(n) defines "special municipal employee" 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 aldermen if there is no city council, or the 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 he 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. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.

General Laws Chapter 268A, §17 indicates, in pertinent part, that the prohibitions of §17(c) shall not apply to a special municipal employee if the particular matter at issue is neither before his own agency, nor within his official responsibility, nor one in which he has ever participated in his official capacity. As "special" status is an affirmative defense to a §17(c) violation, the burden of proof lies with respondents. **See, In the Matter of Joseph Cellucci**, 1988 SEC 346 (Adjudicatory Docket No. 335). Respondents have failed to meet this burden.

Zora Jr. asserted in his brief that G.L. c. 268A, §1(n) requires that he be classified as a special municipal employee. The statute expressly provides, however, that there is no automatic special municipal employee status. Certain categories of employees are eligible for classification but, absent classification, are to be deemed regular municipal employees. Zora Jr. offered no evidence of such designation or status for the times relevant to this case. He offered no evidence of the vote that would have created the status, and no evidence as to the date of the vote that would have created the status.

Similarly, Zora Sr. claimed he was a special municipal employee. He testified credibly that he believed he was a special municipal employee, although he did not understand with any accuracy how the status was obtained. His claim to this status is dependent upon a reading of the May 28, 1985 Board of Selectmen minutes and attachments that assume that an undocumented designation took place prior to May 28, 1985 and that the May 28, 1985 minutes memorialize that vote. We do not find this evidence adequate to find that the Board of Selectmen voted to designate itself special status at any point. The March 28 minutes evidence of genuine awareness in Marion of special municipal employee status and of a genuine attempt to confer it. Zora Sr.'s good faith belief that he was a special municipal employee, however, is a mitigating factor and not evidence that G.L.c. 268A, §1(n) was satisfied. We also reject Zora's argument that he automatically became a special municipal

employee, as a member of the Marion Board of Selectmen, because in another position he held had special municipal employee status. Special municipal employee status attaches to the position and not to the person. See G.L. c.268A, §1(n). In short, the record indicates that the Zoras were regular municipal employees at all times relevant to the Orders to Show Cause.

2. Particular Matter

General Laws chapter 268A, §1(k) defines a "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."

It is not disputed that a Notice of Intent like the one submitted by the Riders to build on their chosen design on Lot #45 is a particular matter. Respondents argue, rather, that of the particular matters Petitioner is targeting here (all meetings, discussions, votes, surveys, correspondence relating to the Rider Notice of Intent) the MCC's decision to conduct a percolation test on Lot #45 and the April 19, 1985 meeting of the MCC are not particular matters within the meaning of the statute. Respondents argue that the former is not a particular matter because the MCC exceeded its authority when it ordered the test. Similarly, they contend that the April 19, 1985 meeting is not a particular matter because it was not a meeting conducted in accordance with the Open Meeting Law. We decline to inquire into the strict legality of every particular matter involving the handling of an application of a permit in order to enforce the conflict of interest law. A federal courts considering the same argument in relation to the interpretation of 18 U.S.C. 203, has concluded that lack of authority is no defense in a gratuity case. U.S. v. Evans, 572 F2d 455 (5th Cir. 1978). The Rider Notice of Intent for an Order of Conditions is clearly a particular matter, something Zora Jr.'s own §19 abstention highlights.

We also find that each of these matters was of direct and substantial interest to the Town of Marion, and the Respondents have not asserted otherwise. We regard the Town's interest in the MCC proceedings, particularly in the maintenance of an unpolluted water supply and in protection from flood and storm damage, to be direct and substantial.

3. Agency - Zora Jr.

The term "agent" is not defined in G.L. c. 268A, but the Commission has indicated that it includes merely speaking or writing on behalf of a non-government party. EC-COI-84-6. "[T]he 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, negotating, signing documents and submitting applications [citation omitted]." In the Matter of Robert P. Sullivan, 1987 SEC 312, 314. Zora Jr.'s appearance as self-described "agent" at the April 19, 1985 MCC meeting where he questionned the MCC's authority to conduct a second percolation test on Lot #45 clearly falls within this definition.

His April 12, 1985 appearance at the site inspection review, where he once again declared himself the agent of another, authorized the entry of a DEQE representative on the land, and commented on the site inspection review, also indicates an occasion where he was acting on behalf of another. Finally, his April 19, 1985 appearance at the MCC hearing, where he told the MCC that a statutory time period for completing its review on the Rider Notice of Intent had lapsed and they were obligated to issue the permit that night, also indicates an occasion where he was acting on behalf of another.

We have indicated previously that if the conduct of a 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. Sullivan, supra at 315. There can be little doubt that such an inference was warranted on these occasions because of Zora Jr.'s self-identification, the manner in which he presented himself, and the public knowledge that his father considered him an agent of Zora Enterprises, Inc. There is no evidence that Zora Jr. was acting on behalf of his own interests. Further, the fact that Zora Jr. was acting on behalf of a corporation whose owners were immediate family members does not insulate Zora Jr. from liability although, as indicated below, it is relevant consideration for disposition purposes.

4. Agency - Zora Sr.

At the time the Riders' Notice of Intent was taken up by the MCC, negotations for the purchase of the lot had concluded and a Purchase and Sale Agreement executed. It is undisputed that one condition of the sale was that the lot satisfy state percolation standards. A decision that the land did not "perc" would

effectively render it unsaleable. Accordingly, the indication by the MCC on March 27, 1985 that it was not satisfied with the perc test the Riders submitted, was a direct threat to the consummation of the deal. The seller of the land had a direct financial interest in the proceedings of the MCC with respect to the Rider's Notice of Intent. It is undisputed that the seller was not Zora Sr. but the corporate entity, Zora Enterprises, Inc., of which Zora Sr. was the president.

It is also undisputed that Zora Sr. appeared before the MCC. What is disputed is whether his appearance was "in connection with" Rider Notice of Intent. The facts are clear, however, that although Zora Sr.'s motives were mixed, all of his acts in question were directly in connection with issues that arose under the Rider Notice of Intent application. His integrity was questionned only in that context. Zora Sr.'s attempt to draw a line between his concern with his integrity and his concern with the Rider Notice of Intent application fails. All of his concerns, as expressed in the memorandum submitted at the April 19, 1985 MCC meeting, arose in the context of the application and were in relation to the processing of and the MCC decisions to be made on that application.

Respondent's argument that no agency can be established here since his interests were identical to the interests of the family corporation, Zora Enterprises, Inc. also fails. The Commission has indicated elsewhere that, as a family trust was a distinct legal entity, a municipal employee who was also a trustee would be acting on behalf of another in seeking occupancy permits for buildings owned by the trust, even if he and immediate family members were the sole beneficiaries of the trust. **EC-COI-84-117.** The same rule applies to the family corporation found here. Just as the Commission declined in **Sullivan, supra,** to rule that a president, director or stockholder of a closely held corporation was not an agent of a corporation in all situations for the conflict of interest law purposes, we follow a similar reasoning here. We conclude that such an officer is an agent of the corporation in the ordinary scope of carrying out its business before a municipal agency on the facts of this case.

Finally, Zora Sr. and Rider confirm that at the April 19, 1985 MCC meeting Zora Sr. spoke on behalf of Rider as well as himself. This role of spokesman was clearly in relation to the Rider Notice of Intent as well.

IV. Conclusion

Zora Sr. violated §17(c) on two occasions, at the April 19 and 24, 1985 MCC meetings, by acting as agent for Zora Enterprises and the Riders in connection with the Rider application for an Order of Conditions in which the Town of Marion was a party or had a direct and substantial interest. Section 17(c)'s fiduciary exemption, by its express language, is not available to an elected official. **EC-COI-84-117.** We find that the Petitioner has not sufficiently established on the record the factual basis for allegations that Zora Sr. authorized his son to contact the MCC Chair. Consequently, we find no violation of §17(c) with respect to these additional allegations.

Zora Jr. violated §17(c) on four occasions at the April 10, 19 and 24, 1985 MCC meetings and on the April 12, 1985 site inspection of Lot #45. A finding that two §17(c) violations occurred based on Zora Jr.'s phone calls to the MCC Chair as agent of his father was not substantiated in the record.

V. 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 on Zora Jr. is $8,000.00 and on Zora Sr. is $4,000.00, we believe that the imposition of fines in this case is not warranted.

With regard to Zora Sr., this is because all of his violations would have been avoided had he in fact obtained the special municipal employee status. Zora Sr. was particularly credible on the point of his belief that he had this status at all times. The evidence also indicates that, equally important, the Marion Selectmen thought he had special status and had wanted him to have special status. Simply, no evidence was entered that he had been properly designated. In light of this genuine confusion as to special municipal employee status and the evidence that those with the authority to confer this designation intended to confer this status (and believed that they had conferred this status), the Commission declines to impose a fine.

With regard to Zora Jr., several factors persuade us that a fine should not be imposed. These include the evidence that he made an effort to comply with G.L. c. 268A by not participating as a municipal employee in particular matters in which Zora Enterprises, Inc. had a financial interest, see, G.L. c. 268A, §19, the lack of evidence that Zora Jr.'s acts of agency had any determinative effect on the outcome of decisions made by the MCC, and the fact that Zora Jr. made no effort to conceal his involvement in these matters. More importantly, we note Zora Jr.'s actions as agent for Zora Enterprises were on behalf of a corporation the

owners and officers of which were all family members. While Zora Jr. is clearly not entitled to the protection §17 provides for municipal employees who act as agent for immediate family members,[7/] his actions, viewed in the context of the family corporation, do not merit the imposition of a fine.

DATE AUTHORIZED: April 12, 1989

[1/]Respondents' concern that G.L. c. 30A, §11(7) be complied with has been noted. A majority of those signatory to this Decision and Order have either heard or read the official record in this matter.

[2/]Zora Jr. raised a defense alleging his March 24, 1985 resignation in his Answer but then abandoned it. It is not addressed here both because of its abandonment and because of the facts found to the contrary. See page 10 infra.

[3/]The .Commission specifically credits Janet Mendes' testimony as well as Zora Jr.'s and Zora Sr.'s depositions as found in Exhibits P9 and P10.

[4/]Janet Mendes was credible on this point and on the point that Zora Jr. gave every appearance of acting as agent for Zora Sr. and Zora Enterprises, Inc.

[5/]This finding of fact uses Marion Town minutes that were entered into evidence over Respondents' objection -- an objection they reiterate in their brief. These certified minutes were ruled admissible under the standards of 930 CMR 1.01(9)(f)2. Respondents were given considerable leeway in their attempts to prove that the minutes were forged or incorrect, but offered no substantial evidence on these points beyond the undisputed fact that the minutes were misplaced for some period of time.

[6/]See the discussion "in connection with" requirement found on page 15 infra.

[7/]Paragraph 6 of §17 does not provide protection under the facts of this case because (1) Zora Jr. was legally acting on behalf of a corporation, not individual family members; (2) the particular matters involved were the subject of his official responsibility as a member of the MCC; and (3) there is no evidence that he sought or received prior approval for his actions from his appointing authority. See, G.L. c. 268A, §17, ¶6.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 368

IN THE MATTER
OF
GEORGE COLELLA

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and George Colella (Mr. Colella) 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 January 11, 1989 the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Colella, the Mayor of the City of Revere. The Commission concluded its inquiry and, on May 10, 1989, found reasonable cause to believe that Mr. Colella violated G.L. c. 268A, §19.

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

1. At all times relevant to this matter, Mr. Colella was the elected Mayor of the City of Revere, and, accordingly, a municipal employee as defined in G.L. c. 268A, §1(g).

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

3. In February of 1984, Mr. Colella hired his daughter, J. Elizabeth, as a part-time junior clerk-typist for the City of Revere. She was paid the hourly salary prescribed by city ordinance, was supervised by Mr. Colella and his senior staff, and was never promoted to any higher position. She earned $2,909.26 in 1984, $1,562.09 in 1985, $4,935.24 in 1986, $8,372,57 in 1987, and $8,103.67 in 1988.

4. General Laws, c. 268A, §19 provides in relevant part that, except as permitted by §19, municipal employees are prohibited from participating in particular matters in which, to their knowledge, a member of their immediate family has a financial interest.[1/]

5. By hiring his daughter for the position of junior clerk-typist in the City of Revere, and by thereafter supervising her in that position, Mr. Colella participated as the Mayor of Revere in particular matters in which his daughter had a financial interest, thereby violating §19.

6. On or about November 28, 1988, Mr. Colella received a phone call from the State Ethics Commission, informing him of the allegations described above. On or about November 29, 1988, Mr. Colella suspended his daughter's employment, pending the results of this investigation.

7. Mr. Colella has stated, and the Commission has no evidence to that contrary, that he was unaware that G.L. c. 268A, §19 prohibited him from hiring his daughter for the position she held.[2/] He believed that, because of the unique requirement of personal rapport between the Mayor and his direct staff, §19 did not apply to these positions.

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 George Colella:

1. that he pay to the Commission the amount of five hundred dollars ($500.00)[3/] as a civil penalty for his violation of §19;

2. that J. Elizabeth Colella resign her position; and

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

DATE: May 12, 1989

[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/]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 that J. Elizabeth Colella's work was part-time, the Commission considers a reduction of the fine appropriate here.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 369

IN THE MATTER
OF
ARTHUR TUCKER

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Arthur Tucker (Mr. Tucker) 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 January 6, 1988, 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. Tucker. The Commission has concluded that inquiry and, on November 21, 1988, found reasonable cause to believe that Mr. Tucker violated G.L. c. 268A, §19.

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

1. Mr. Tucker is and at all material times herein was the building inspector for the Town of Oakham, commencing November, 1983. Mr. Tucker is, therefore, a municipal employee as defined in §1(g) of G.L. c. 268A. Mr. Tucker is also the full-time building inspector for the Town of Spencer.

2. Since 1977, Mr. Tucker has owned and resides year-round on Lots 16 and 17 on Pine Lane in Oakham. The area is a summer camp area next to a lake. Mr. Tucker's house on Lot 17 contains three bedrooms and has been converted to year-round use. Mr. Tucker's Lot No. 17 directly abuts Lot No. 18, owned by Mr. John Lane.

3. Mr. Lane has owned Lots 18, 19, 26 and 27 on Pine Lane in Oakham (hereafter referred to collectively as the Property) since 1966. Mr. Lane's house, which straddles Lots 18 and 19, is the only one

in the neighborhood that has not been converted to year-round use. There is a well on Lot 18.

4. Mr. Tucker can see Mr. Lane's house from his own, as the Lane house is less than 40 feet from Mr. Tucker's.

5. Until sometime in 1983, a tenant resided in the house on the Property. During this time, while an open cesspool leeched into the surrounding ground, neither Mr. Tucker nor anyone else reported this condition to the Oakham Board of Health. From 1983 until January, 1986, the Property remained vacant.

6. In January, 1986, Mr. Tucker learned that Mr. Lane was selling the Property. Mr. Tucker approached Mr. Lane and expressed interest in purchasing the Property so that he could use the well water, as his present well was shallow and had limited water supply.[1/] When Mr. Lane explained that he was considering selling off the Property in two pieces (Lots 18 and 19 together, and Lots 26 and 27 together), each as buildable lots, Mr. Tucker told Mr. Lane that he could have problems if he did that (presumably because the lots would not satisfy the zoning requirements).[2/] Mr. Tucker did not approach Mr. Lane as the building inspector. No offer was made, and there was no further discussion about a possible arrangement between the two after that date.

7. On or about January 30, 1986, Mr. Lane sold Lots 18 and 19 to a Mr. Alfred LaPrade.

8. Mr. Tucker learned of the sale, and, in his capacity as Building Inspector,[3/] on or about February 10, 1986, told the Oakham Board of Selectmen (Selectmen) at their meeting that he believed the sale to Mr. LaPrade had involved an illegal subdivision. At that time, Mr. Tucker did not tell the Selectmen of his having discussed purchasing the property with Mr. Lane. (The Selectmen did not learn of this until a meeting on March 24. See ¶14, below.) Mr. Tucker states, and the Commission has no information to the contrary, that, because he was Mr. Lane's abutter, he requested that someone other than he should issue the zoning enforcement order.

9. Because Oakham is such a small town, the Selectmen knew the proximity of Mr. Tucker's property to Mr. Lane's, although they may not have known precisely how close Mr. Tucker's house was to Mr. Lane's.

10. By letter dated February 17, 1986, the Selectmen notified Mr. Lane that the sale to Mr. LaPrade violated Oakham zoning regulations.

11. At a Selectmen's meeting on or about March 3, 1986, Mr. Tucker, striving not to be directly involved because of the reasons mentioned in ¶8, requested that the Selectmen visit Mr. Lane's house on Pine Lane to see the condition of the property.

12. At a Selectmen's meeting on or about March 17, 1986, Mr. Tucker explained that the house at Pine Lane appeared to have been gutted and was being reconstructed, even though it remained an illegal subdivision, in violation of the Selectmen's order, and non-conforming use. He also told the Selectmen that no building permit had been applied for. As a result of this report, the Selectmen asked Mr. Tucker to issue a stop-work order to Mr. LaPrade, which Mr. Tucker did on or about March 20, 1986.

13. On March 21, 1986, Mr. Tucker sent a letter, at the request of the Selectmen, to Mr. LaPrade and Mr. Lane, stating that the owner was violating the building code by beginning reconstruction without a building permit, that the zoning problems remained, and that the stop-work order would be in effect until a building permit was obtained.

14. On or about March 24, 1986, in response to that stop-work order, Mr. Tucker and Mr. Lane attended the Selectmen's meeting. During the meeting, Mr. Lane told the Selectmen of his conversation with Mr. Tucker in January, 1986 during which Mr. Tucker inquired about buying Mr. Lane's property. The March 24, 1986 meeting was the first time the Selectmen were told of Mr. Tucker's interest in buying Mr. Lane's property.

15. On or about June 20, 1986, Mr. LaPrade deeded back Lots 18 and 19 to Mr. Lane because the lots, even when combined, were not buildable.

16. By letter dated July 21, 1986, Mr. Tucker, as a private citizen, wrote to the Board of Health, requesting that it inspect the Property because it had been abandoned and left dangerous, unsafe and unsanitary. Mr. Tucker mentioned problems with the septic system, electrical and plumbing systems, bare interior walls, unboarded windows and doors, scattered debris with nails protruding, and with Mr. Lane's lack of effort to make the property safe and secure.

17. On or about September 8, 1986, Mr. Tucker posted the Property as being dangerous and unsafe, and notified Mr. Lane, in writing, that he could receive a building permit to remodel the Property, but must first receive Board of Health approval for his existing septic system, repairs to it, or approval of a design for a new system; otherwise he would have to demolish

the structure. The letter demanded that Mr. Lane obtain a disposal works construction permit and a building permit by December 31, 1986.

18. By letter dated December 17, 1986, Mr. Tucker explained to Mr. Lane that his request to postpone the approval of a plan for an existing or a new septic system until June, 1987 was merely an attempt to stall.

19. By letter dated December 22, 1986, Mr. Tucker informed Mr. Lane that Mr. Tucker had been informed of the Board of Health's decision to allow him until June 1, 1987 to have a suitable sub-surface sanitary disposal system designed, approved and installed. Mr. Tucker, therefore, granted Mr. Lane an extension until June 1, 1987 to make the structure safe. By letter dated December 26, 1986, the Board of Health informed Mr. Lane that, based on a December 6, 1986 inspection, the Board of Health wanted to see engineer-prepared septic systems before March 1, 1987.

20. By letter dated March 6, 1987, in accordance with M.G.L. c. 143, §8, Mr. Tucker asked the department heads of the Oakham Fire Department, Planning Board and Board of Health to convene an impartial survey board to survey the house on the Property, to determine if it was unused, uninhabited, abandoned, or especially unsafe in case of fire, and to serve a report of the survey's findings on Mr. Lane. Mr. Tucker suggested to the Selectmen that the committee work independently of him.

21. Section 19 of G.L. c. 268A provides in relevant part that, except as permitted by §19,[4/] municipal employees may not participate as such in particular matters in which they have a financial interest.

22. The particular matters were: (1) the decision that the sale by Mr. Lane to Mr. LaPrade was an illegal subdivision, (2) the decision as to whether renovations could proceed without a disposal works permit, and (3) the decision as to whether the property was a public nuisance.

23. Mr. Tucker participated in these matters by, as the building inspector, bringing them before the Selectmen, asking the Selectmen to inspect the Property, issuing stop-work orders, writing letters to the owners concerning conditions on the Property, convening a survey board, and posting the Property as being dangerous and unsafe.

24. Mr. Tucker had an initial financial interest as a potential purchaser and an ongoing financial interest as an abutter in these matters.

25. Therefore, by participating as the building inspector in the foregoing decisions while he had a financial interest in those decisions, Mr. Tucker violated §19.

26. While the Commission can impose up to a $2,000 fine for each violation of §19, it has determined that a relatively small fine is appropriate for the following reasons:

the Commission staff found credible Mr. Tucker's assertions that (1) because he was an abutter, he obtained the Selectmen's approval for his actions as building inspector regarding the property; (2) at all times subsequent to the March 24, 1986 Selectmen's meeting, the Selectmen knew the full extent of Mr. Tucker's interest in the Lane property; and (3) he was unaware that he was violating G.L. c. 268A, §19.[5/]

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. Tucker:

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;

2. that he refrain from participating as a municipal employee in any matter in which he has a financial interest; and specifically, that he refrain from participating, as a municipal employee, in any matter that affects either the Lane property on Pine Lane or any other property abutting Mr. Tucker's property unless he follows the procedure outlined in §19(b) and receives the written permission provided for therein; 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 a judicial civil proceeding in which the Commission is a party.

DATE: June 2, 1989

[1/] In fact, since March of 1986, Mr. Tucker has had to drill down about 65 feet to get more water from his well, at a cost of approximately $2,500. Mr. Tucker

believed, on the other hand, that Mr. Lane's well was only six feet below the surface.

2/Under the zoning statute, c. 40A, each of the two resulting lots would be too small. Indeed, the Property, consisting of all four lots, was too small to qualify as a buildable lot under the current zoning. Consequently, its grandfathered nonconforming status could not be exacerbated by the sale of any portion of the Property.

3/Unless otherwise specified, Mr. Tucker's actions were performed in his official capacity as Oakham Building Inspector.

4/None of the §19 exceptions applies to this case.

5/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.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 370

IN THE MATTER
OF
ROBERT GILLIS

DISPOSITION AGREEMENT

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

On June 8, 1987, the Commission initiated, 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. Gillis while he was the Chief of the Brockton Police Department (BPD). The Commission has concluded its inquiry and, on November 21, 1988, found reasonable cause to believe that Mr. Gillis violated G.L. c. 268A, §19.

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

1. At the times here relevant, Mr. Gillis was the Chief of the BPD. Mr. Gillis was appointed as BPD Chief by Brockton Mayor Carl D. Pitaro, with the confirmation of the Brockton City Council, and served as BPD Chief from January, 1984 until November, 1987. Mr. Gillis was, therefore, during the period here relevant, a municipal employee as defined in §1(g) of G.L. c. 268A. Prior to becoming BPD Chief, Mr. Gillis was a BPD Sergeant.

2. Mr. Gillis has a son Andrew Gillis (Andrew). In 1986, Andrew applied for a civilian telephone operator (CTO) position with the BPD. Prior to Andrew's formally applying for the CTO position, Mr. Gillis communicated with Mayor Pitaro concerning Andrew's seeking the position. In a letter dated September 12, 1986, Mr. Gillis wrote to Mayor Pitaro,

> May I have an opportunity to discuss with you the filling of vacancies in the Telephone Operator's area? I have at least one vacancy coming up this month, and two to four weeks are required for training. A Civil Service list will be available shortly, but in the meantime the slot must be filled. (We have four permanent positions and ten provisional.)

3. On or about September 12, 1986, Mr. Gillis met with Mayor Pitaro in the Mayor's office and discussed with the Mayor Andrew's applying for the CTO position. Subsequently, in a letter dated September 16, 1986, Mr. Gillis wrote to Mayor Pitaro,

> In accordance with my talk with you, and in the absence of a Civil Service list, I enclose herewith a copy of [sic] resume of my son, Andrew A. Gillis, who has requested consideration for the position of Civil Telephone Operator in this Department. With your approval, I should like to start his employment when Kevin Smith's resignation is effective.

4. Shortly thereafter, on or about September 21, 1986, Andrew was hired as a CTO for the BPD. Andrew was appointed to the CTO position by Mayor Pitaro. Mr. Gillis, as Chief, signed the "Notification of Personnel Action" (NPA) form for his son's hiring, authorizing Andrew's placement on the BPD payroll (the NPA form was also signed by Mayor Pitaro and Brockton Personnel Director Marge Donovan).

5. Andrew worked the 4:00 P.M. to midnight shift as a CTO and was paid $6.40 an hour for his services. Andrew resigned his CTO position in May, 1987, when questions concerning the propriety of his appointment were raised.

6. Section 19 of G.L. c. 268A 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.

7. The appointment of Andrew as a CTO was a particular matter for §19 purposes. Mr. Gillis participated in that particular matter by communicating (by letter and in person) with Mayor Pitaro concerning that appointment. Because the CTO position was a paid position, Andrew had, at the time of the appointment, a financial interest in the appointment. Mr. Gillis was aware at the time he discussed his son's appointment with Mayor Pitaro that his son would receive compensation for his services as a CTO, should he be appointed.

8. By participating in the appointment of his son as a CTO, as described above, Mr. Gillis participated as BPD Chief in a particular matter in which his son had a financial interest, thereby violating G.L. c. 268A, §19.

9. Pursuant to §19(b)(1),[1/] Mr. Gillis could have received a written determination from his appointing authority, Mayor Pitaro, permitting his participation in matters in which his son, Andrew, had a financial interest, including those described above. Provided this written determination was filed with the city clerk and made a matter of public record, it would have exempted Mr. Gillis from the restrictions of §19(a) and permitted his participation as above-described. Here, however, there was no written determination by Mayor Pitaro that Mr. Gillis could participate in matters in which Andrew had a financial interest.

Nonetheless, the Commission has given some consideration to the fact that Mr. Gillis' appointing authority was aware of his actions concerning his son. Accordingly, while the Commission can impose a fine of up to $2,000 for each violation of §19, it has determined that the relatively small fine imposed here properly reflects this mitigating factor. That the Commission has insisted on a public resolution and a fine reflects the importance the Commission places on proper compliance with §19's disclosure and exemption provisions.[2/]

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. Gillis:

1. that Mr. Gillis pay to the Commission the sum of two hundred fifty dollars ($250.00) as a civil penalty for violating G.L. c. 268A, §19; and

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

DATE: June 2, 1989

[1/]Section 19(b)(1) provides: (b) It shall not be a violation of this section (l) 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, ...

[2/]**See, e.g., In the Matter of John J. Hanlon**, 1986 SEC 253, 255, where the disposition agreement between the subject and the Commission stated, regarding similar disclosure and exemption provisions in the state counterpart to §19,

> These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure - particularly that the determination be in writing and a copy filed with the Commission - are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision. Imposing a fine also should act as a deterrent in making clear that ultimately the primary responsibility for compliance with these provisions rests on the public employee seeking the exemption.

(At the local level the written exemption would be filed with the town clerk rather than with the Commission.)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 361

IN THE MATTER
OF
THOMAS H. NOLAN

Appearances:

Irene Scharf, Esq.
Counsel for the Petitioner

Commissioners:

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

RULING ON MOTION FOR SUMMARY DECISION

On December 30, 1988, the Petitioner filed a Motion for Summary Decision, pursuant to the Commission's Regulations, 930 CMR 1.01 (6)(f)(2).[1/] For the reasons stated below, we grant the Petitioner's Motion and order the Respondent Thomas Nolan to pay a civil penalty of two thousand dollars.

Under 930 CMR 1.01 (6)(f)(2), the Commission may enter a summary decision in favor of the Petitioner when the record discloses the Respondent's failure to file required documents, to respond to notices or correspondence, to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the adjudicatory proceeding. The record in this case amply warrants the entry of a summary decision in favor of the Petitioner. Despite notice, the Respondent has failed to file an answer to the October 1988 order to show cause, has failed to respond either orally or in writing to any of the subsequent requests, notices or orders of the Petitioner or Presiding Officer[2/] and has failed to appear at a hearing to show cause why summary judgment should not be entered against him.

The order to show cause alleges that the Respondent, a mayor and municipal employee for the purposes of G.L. c. 268A, violated G.L. c. 268A, §§2 [3/] and 3 [4/] by promising city firefighters that he would not schedule a promotional civil service examination in November 1987 if the firefighters agreed to support him in his reelection campaign.[5/] The Respondent's failure to defend or otherwise respond to the allegations constrains us to conclude that the Respondent has violated G.L. c. 268A, §2 and 3.

In light of the seriousness with which we view these violations, we conclude that a maximum statutory fine of two thousand dollars ($2,000.00) is appropriate. Accordingly, pursuant to G.L. c. 268B, §4(j)(3), we hereby order the Respondent, Thomas Nolan, to pay to the Commission a civil penalty of two thousand dollars ($2,000.00) within thirty days of receipt of this ruling.

DATE AUTHORIZED: June 12, 1989

[1/] 930 CMR 1.01(6)(f) provides as follows:

> 1. Any Party may with or without supporting affidavits move for summary decision in his favor, as to all or part of a matter. If the motion is granted as to part of the matter and further proceedings are necessary to decide the remaining issues, a hearing shall be so held. Such a motion may be granted only by the Commission.
>
> 2. When the record discloses the failure of the Respondent to file documents required by these Rules, to respond to notices or correspondence, or otherwise indicates a substantial failure to cooperate with the Adjudicatory Proceeding, the Presiding Officer may issue an order requiring that the Respondent show cause why a summary decision should not be entered against him. If the Respondent fails to show such cause, a summary decision may be entered in favor of the Petitioner. Any such summary decision shall be granted only by the Commission, shall be a Final Decision, and shall be made in writing as provided in §9(m) of these Rules.

[2/] See, e.g., January 20, 1989 letter from Presiding Officer to Respondent; March 20, 1989 Order issued by Presiding Officer to Respondent.

[3/] G.L. c. 268A, §2(b) prohibits a municipal employee from directly or indirectly corruptly soliciting anything of value for himself or for any other person in return for being influenced in his performance of any official act or act within his official responsibility.

[4/] G.L. c. 268A, §3(b) prohibits a municipal employee from directly or indirectly soliciting for himself anything of substantial value, otherwise as provided by law for the proper discharge of official duties, for or because of any official act performed or to be performed by him.

[5/] In particular, ¶13 of the Order to Show Cause

asserts:

> On July 14, 1987, ten of the foregoing eleven lieutenants and Mayor Nolan met. The lieutenants raised their fairness concern about a November exam. During this meeting Mayor Nolan promised the lieutenants that there would be no November exam if the lieutenants would support him in the upcoming election. One of the lieutenants then accused Mayor Nolan of political blackmail, and Mayor Nolan asked the following question: if he could give lieutenants what they wanted, why could they not give him what he wanted? The meeting concluded with no agreement as to whether a captains' exam would be conducted in November, 1987.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 372

IN THE MATTER
OF
ROCKLAND TRUST COMPANY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and the Rockland Trust Company (Rockland) 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 April 13, 1988, 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 the Rockland Trust Company. The Commission concluded its preliminary inquiry and, on May 12, 1989, found reasonable cause to believe that Rockland Trust Company had violated G.L. c. 268A, §3.

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

1. Rockland is a Massachusetts Trust Company chartered under the laws of Massachusetts to engage in the business of banking. Its principal place of business is in Rockland, Massachusetts. Among its clients are a number of municipalities located in Plymouth County and elsewhere throughout the Commonwealth of Massachusetts.

2. As the Commission previously had occasion to note in Public Enforcement Letter 89-1 (United States Trust Company), prior to November of 1985, there was a widespread practice among banks of paying for the entertainment of public officials who managed municipal funds. However, on November 23, 1985, the Office of the Inspector General issued a document entitled "Report on Municipal Banking Relations" that was widely circulated throughout the Commonwealth, warning that conduct of this type raised serious issues of conflict of interest. Subsequently, the Commission conducted an investigation into these practices by the United States Trust Company and five municipal treasurers, concluding that the entertaining of municipal treasurers and collectors by the bank did constitute a violation of §3 of G.L. c. 268A. The Commission stated at that time that it had decided not to impose any fine on the bank due to the mitigating factors that, up until 1985, the practice had been widespread and generally accepted within the industry, and that United States Trust Company had ceased its practice of paying for the entertainment expenses of municipal employees as soon as the Inspector General's report had issued. The Commission specifically reserved the question of an appropriate remedy if a bank were shown to have continued the practice of providing entertainment to municipal officials after the Inspector General's report became public in 1985.

3. Beginning at some point in the late 1960's, Rockland annually sponsored a summer outing (usually including a harbor cruise) to which it invited all of the members of the Plymouth County Collectors and Treasurers Association and all of the Rockland employees who serviced municipal accounts. The purpose of the cruise was to generate and maintain good will and good customer relations between Rockland and municipal officials with control over the placement of substantial sums of public money. This practice continued up until the issuance of the Inspector General's report in 1985.

4. Following the publication of the Inspector General's report, officials of the Rockland Trust Company Marketing Department met to determine the impact the report should have on their annual summer outing. Without consulting the Inspector General or the State Ethics Commission, they concluded that the Inspector General's report did not apply to their function. Accordingly, on August 13, 1986, Rockland held its summer outing, to which it invited all 52

members of the Plymouth County Collectors and Treasurers Association and treasurers from towns outside of Plymouth County in which Rockland either had a branch banking facility or an account relationship. Approximately 26 collectors and treasurers attended the function, which included a cruise, cocktails, dinner and entertainment. Most of those who attended brought a guest, as they were invited to do. In addition to these municipal officials and their guests, at least 35 bank employees attended the outing, bringing the total in attendance to approximately 90. The cost of the function was $6,943.00, or about $77.00 per person.

5. On August 25, 1987, Rockland held its 1987 summer outing, again inviting all 52 members of the Plymouth County Collectors and Treasurers Association and additional treasurers from other communities either being serviced by a Rockland branch or maintaining a municipal account with the bank. The number of collectors, treasurers and their guests attending the outing was approximately the same in 1987 as it had been in 1986; the number of bank employee guests, however, increased to bring the total in attendance to approximately 95. The cost of the function was $5,801.00 for a cost-per-person of approximately $56.00.

6. In the spring of 1988, the State Ethics Commission contacted Rockland and asked for the production of all records relating to these outings and any other entertainment or gifts which Rockland might have provided to public officials over the previous two years. As a result of this request, Rockland cancelled its summer outing for 1988.

7. Section 3 of G.L. c. 268A prohibits, other than as provided by law, the giving of anything of "substantial value" to any municipal employee "for or because of any official act performed or to be performed by such employee." The Commission may impose a fine of up to $2,000.00 for a violation of §3.[1/]

8. By providing a harbor dinner cruise in 1986 and 1987 for the municipal treasurers with the intent to generate and maintain good will and good customer relations with municipal officials in control of substantial sums of public money, Rockland violated G.L. c. 268A, §3.

In view of the foregoing violation of G.L. c. 268A, §3, 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 Rockland:

1. that it pay to the Commission the amount of four thousand dollars ($4,000.00) as a civil penalty for its violations of §3; and

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

DATE: July 24, 1989

[1/] In the past, the Commission has considered entertainment expenses in the amount of $50.00 to constitute "substantial value." **P.E.L. 88-1.** See, **Commission Advisory No. 8** issued May 14, 1985. Further, 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:

> 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."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 371

IN THE MATTER
OF
JOHN P. O'BRIEN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John P. O'Brien (Mr. O'Brien) 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 January 11, 1989, the Commission initiated a preliminary inquiry into possible violations of the Financial Disclosure Law, G.L. c. 268B, by Mr. O'Brien.[1/] The Commission concluded its inquiry and, on June 19, 1989, found reasonable cause to believe that Mr. O'Brien violated G.L. c. 268B, §7 by failing to disclose certain real estate transactions and loans on his 1986 and 1987 Statements of Financial Interests (SFIs).

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

1. Mr. O'Brien is the elected Hampden County Register of Probate. As such, he is a state employee as that term is defined in G.L. c. 268A, §1(q) and is required to file an annual Statement of Financial Interests (SFI) pursuant to G.L. c. 268B, §5.

2. Mr. O'Brien has conducted a real estate business under the name of O'Brien Real Estate for 28 years. Up until 1986, he was engaged through O'Brien Real Estate in the listing and selling of real estate.

In 1987 Mr. O'Brien joined with Audrey O'Connor in the business of O'Brien & O'Connor Real Estate, which conducted a real estate brokering business at 42 Harkness Street, East Longmeadow, Massachusetts. During the reporting period that followed, O'Brien Real Estate concentrated in renovating dilapidated homes.

3. On April 15, 1987, Mr. O'Brien timely filed his 1986 SFI.[2/] He failed to identify the following transactions:

(A) his purchase (with James A. O'Connor) of 72 and 86 Lancaster Street in Springfield from Charlotte A. Carlson, Executrix of the Estate of Emma Carlson, and the assessed values by category of these properties. This information was reportable under §K.2 (Investment and Rental Properties) and §K.3 (Real Property Transfers);

(B) six loans with values ranging from $1,000 to $10,000. Information pertaining to these loans was reportable under §L. (Other Creditor Information).

4. On March 15, 1988, Mr. O'Brien timely filed his 1987 SFI.

Mr. O'Brien failed to report:

(A) his ownership and resale of 72 and 86 Lancaster Street;

(B) his son's purchase of 64 Carnavon Circle from Robert Bonetti, Executor of the Estate of Mary Bransfield;[3/]

(C) his son's purchase of 37 Pennsylvania Avenue from Benedict Nowakowski, Executor of the Estate of Jane Haggerty;

(D) his purchase of 160-162 Alden Street from David Burgess;

(E) two 90-day notes from the Chicopee Cooperative Bank, each valued in Category F, ($60,000 - $100,000). This information was reportable under §K.4 (Mortgage Loan Information) which requires identification of each mortgage loan, including second mortgage loans and home equity loans, greater than $1,000 outstanding on December 31, 1987 for which the filer or a family member was obligated.

(F) four loans secured by various life insurance policies, three with values in Category A ($1,001 - $5,000), and one valued in Category B ($5,001 - $10,000). This information was reportable under §L. (Other Creditor Information), which requires that filers report each debt, loan or other liability greater than $1,000 owed by the filer or a family member on December 31, 1987. The filer must report the original amount of the loan, the amount owed as of the end of the reporting year, the loan collateral, and terms of repayment.

5. Mr. O'Brien did not prepare his 1986 and 1987 SFIs personally, but delegated this task to his executive assistant. Mr. O'Brien instructed the assistant to use the previous year's SFI in preparing

the current SFI. Mr. O'Brien, however, did not provide the assistant with the documents or other information necessary to fully complete the 1986 and 1987 SFIs.

6. On December 29, 1988, Mr. O'Brien amended his 1986 SFI and reported his purchase of 72 and 86 Lancaster Street from the Estate of Emma Carlson. He reported himself and James P. O'Connor as the Record Owner(s) of these properties and their respective assessed values by category.[4/] Under §L. (Other Creditor Information), Mr. O'Brien reported a 90-day loan from the Chicopee Cooperative Bank valued in Category A ($1,001 - $5,000). This loan was outstanding as of December 31, 1986 and was, therefore, reportable under §L. as a "debt, loan or other liability in excess of $1,000 owed by you or any FAMILY MEMBER" on December 31st of the reporting year.

7. Mr. O'Brien also amended his 1987 SFI on December 29, 1988. He reported his purchase of 160-162 Alden Street from David Burgess. He also reported his son's purchases of 37 Pennsylvania Avenue and 64 Carnavon Circle and identified the Estate of Jane Haggerty and the Estate of Mary Bransfield as the sellers of these respective properties. He also reported two 90-day notes from the Chicopee Cooperative Bank with values in Category F ($60,001 - $100,000). These loans were used to finance John Peter's purchases of 37 Pennsylvania Avenue and 64 Carnavon Circle.

8. On May 9, 1989, Mr. O'Brien filed supplemental amendments to his 1986 and 1987 SFIs which disclosed certain loans with values in the smaller categories (i.e., Category A ($1,001 - $5,000) and Category B ($5,001 - $10,000), which were not identified by the prior amendments. By this amendment, Mr. O'Brien corrected each nondisclosure identified above.

9. General Laws, chapter 268B, §7 prohibits the filing of a false SFI. A false filing need not be willful nor intentional to violate G.L. c. 268B, §7. The statute requires a commitment to a reasonable degree of care and diligence in filing SFIs. **See In the Matter of Louis Logan**, 1981 SEC 40, 49. The question of whether a filer has exercised a reasonable degree of care and diligence must be decided on the facts of each case.

10. In a private compliance letter issued to former Senator Martin Reilly by the Commission on or about July 20, 1987,[5/] the Commission stated its intent to impose public sanctions for negligent SFI filings.

A memorandum accompanied the 1987 SFI instructions which states, "FILERS ARE RESPONSIBLE FOR EXERCISING CARE AND DILIGENCE TO ENSURE THAT THE INFORMATION PROVIDED IN THEIR SFIs IS COMPLETE AND ACCURATE. SIGNIFICANT OMISSIONS AND/OR INCORRECT INFORMATION CAN RESULT IN THE IMPOSITION OF BOTH CIVIL AND CRIMINAL PENALTIES." This memorandum accompanies all SFI forms and instructions when the Commission mails them each year.

11. Certain omissions are minor and, as such, are best handled through the amendment process without any sanction. In effect, the public suffers little or no harm from the absence of this information on the form. Thus, for example, if a mortgage loan is identified, including the creditor, amount owed, and the terms of repayment, but the filer neglects to also indicate the original amount owed, that is a minor oversight which should be dealt with by an amendment. The Commission is satisfied to have these dealt with through the amendment process.[6/]

12. Omissions which will be deemed to reflect a lack of reasonable care and ordinary diligence, and thus, warrant a public sanction, are omissions which (1) involve a party or transaction over which the filer could exercise official responsibilities as a public employee; (2) are total omissions in that there is no way to identify the transaction from the information appearing on the SFI form; or (3) in number and amount, are material to the filer's overall real estate holdings. **Reilly Compliance Letter**, July 20, 1987.[7/]

13. The omissions of reportable information relating to Mr. O'Brien's purchases of 72 and 86 Lancaster Street and 160-162 Alden Street and his son's purchases of 37 Pennsylvania Avenue and 64 Carnavon Circle were material because (1) each involved a purchase from a probate estate pending in Hampden County, over which Mr. O'Brien was in a position to exercise official responsibilities,[8/] (2) the omissions were total in that there was no way to identify these transactions from other information on the SFI forms, (3) the number and amount of these omissions are material to Mr. O'Brien's overall real estate holdings. Thus, the omissions establish negligence in the filing of Mr. O'Brien's 1986 and 1987 SFIs.[9/]

14. Mr. O'Brien's delegating the task of preparing his SFIs to an assistant, without giving that assistant the means to properly prepare them nor the full and complete information required to be reported on the

SFIs, is further evidence of his failure to exercise a reasonable degree of care and diligence in filing his 1986 and 1987 SFIs.[10/] Moreover, in reviewing and signing the SFIs, Mr. O'Brien failed to identify the omissions.

15. The Commission has found no evidence that Mr. O'Brien intentionally violated the Financial Disclosure Law. Mr. O'Brien cooperated fully with the Commission's preliminary inquiry.

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. O'Brien:

1. that he pay to the Commission the amount of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268B, §7 by negligently filing his 1987 SFI;[11/] 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: September 6, 1989

[1/]The Commission did not initiate a preliminary inquiry into alleged violations of G.L. c. 268A, the Conflict of Interest Law, because insufficient facts were reported in support of the allegations. **Compare, In the Matter of Fred Langone**, P.E.L. 84-1, 1985 SEC 187.

[2/]Elected officials must file their SFIs for the previous year by May 31st.

[3/]The SFI form and instructions require that filers report the investment and rental properties, and real property transfers of "family members," which include, among others, "dependent children" who reside in the filer's household and receive more than half of their support from the filer. Where Mr. O'Brien's son, John Peter, was identified as a dependent child on Mr. O'Brien's 1987 SFI, all real estate transfers and investments in John Peter's name were reportable. See footnote 10, infra.

[4/]The SFI form requires filers to report categories of value for their income and investments, and does not require specific dollar values to be identified. Thus, Mr. O'Brien reported the assessed value of 72 Lancaster Street as Category B ($5,001 - $10,000) and the assessed value of 86 Lancaster Street in Category E ($40,001 - $60,000).

[5/]While compliance letters are private resolutions, under the Commission's regulations, "should the subject make a public disclosure concerning the disposition of an inquiry or staff review by the Commission, the Commission may confirm the existence of the inquiry or staff review and, in its discretion, make public any documents which were issued to the subject or which stated the resolution of the matter." 930 CMR 3.01(7). Numerous newspaper reports of the Commission's action in the **Reilly** case indicate that Mr. Reilly held a press conference publicizing the results of the Commission's investigation on July 21, 1987. See **Springfield Union News**, July 22, 1987, August 6, 1987; **Jewish Weekly News**, July 30, 1987; **Transcript Telegram**, July 22, 1987. Accordingly, the Commission will treat the confidentiality accorded to the **Reilly Compliance Letter** as having been waived.

[6/]Thus, Mr. O'Brien had reported partially his purchases of 138, 139 and 140 Marsden Street when he first filed his 1987 SFI, and was contacted by the Commission's Financial Control Analyst in July, 1988 and asked to amend the 1987 SFI to identify the name and address of the transferor of these properties. As the transaction was partially reported, the omission of the identity of the seller was minor, and remedied through the amendment process without sanction.

[7/]None of these factors standing alone is necessarily dispositive. The Commission considers the cumulative effect produced by the extent of each factor's applicability to a given situation, analyzing each factor in light of the purpose of the Financial Disclosure Law.

[8/]The Financial Disclosure Law complements the Conflict of Interest Law in that it is the purpose of the former to identify potential violations of the latter. **In the Matter of John R. Buckley**, 1982 SEC 2. Toward that end, an SFI omission may be deemed material if the information is potentially indicative of a c. 268A violation, even if the Conflict of Interest Law has not, in fact, been violated. Neither the original allegations, nor the evidence adduced during this inquiry, establish a violation of the Conflict Law.

[9/]The total omissions of smaller loans from §L. (Other Creditor Information) are further evidence of negligence.

[10/]During the course of this preliminary inquiry,

Mr. O'Brien argued that his son's transactions were not reportable on his 1987 SFI because John Peter filed tax returns as a non-dependent for tax year 1987, and Mr. O'Brien did not claim a deduction for John Peter for that tax year.

This issue should have been raised before Mr. O'Brien filed his 1987 SFI. It is the filer's responsibility to ensure that the SFI is complete and accurate and to raise any questions concerning whether certain information is reportable before filing the SFI. The Commission's Chief Financial Officer and the members of the Commission's Legal Division are available to advise filers on any questions they may have regarding their SFIs.

The evidence adduced during this inquiry indicated that John Peter resided with Mr. O'Brien and did not pay room or board during the relevant time period, and that Mr. O'Brien financed the real estate transactions John Peter engaged in. However, in 1987, John Peter was employed and filed tax returns as an independent. The Commission staff routinely advises filers that they need only report the transactions of family members who are claimed as dependents on the filer's tax returns. Where the evidence in this case raises a question as to whether that test is appropriate under all circumstances, the Commission will issue regulations or clarifying instructions addressing this question in the future. Thus, the Commission declines to impose a sanction for Mr. O'Brien's failure to report John Peter's transactions. It is unnecessary to determine whether John Peter was a dependent.

[11/] Where Mr. O'Brien filed his 1986 SFI before the Commission issued the **Reilly Compliance Letter**, the Commission declines to impose a fine for the 1986 omissions.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 373

IN THE MATTER
OF
ANTHONY RIZZO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Anthony Rizzo (Mr. Rizzo) 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 August 25, 1988 the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Rizzo, a member of the Revere School Committee. The Commission concluded its inquiry and, on July 19, 1989, found reasonable cause to believe that Mr. Rizzo violated G.L. c. 268A, §19.

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

1. At all times relevant to this matter, Mr. Rizzo was an elected member of the Revere School Committee, and, accordingly, a municipal employee as defined in G.L. c. 268A, §1(g).

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

3. In October of 1986, Mr. Rizzo participated in hiring his son, Richard Rizzo, as a security guard for the Revere School Department. Specifically, Mr. Rizzo:

a. presided over a special School Committee meeting on the morning of October 6, 1986;[1/]

b. moved and voted to "accept the recommendation of Mr. Edward Manganiello, Principal of the High School, and Dr. John Losco, Assistant Superintendent, re security at the Roland Merullo Field House." The School Committee (absent Mayor Colella and Donald Goodwin) voted in favor of this motion.[2/]

4. While not expressly stated in Mr. Manganiello's recommendation or Mr. Rizzo's motion, Mr. Rizzo knew that the School Committee was creating a position that his son would occupy.

5. Richard Rizzo was employed as a special police officer for the Revere School Department from October 6, 1986 until he resigned effective April 7, 1989. He earned $3,840 in 1986, $19,048.49 in 1987, and $19,148.46 in 1988.

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

municipal employees are prohibited from participating in particular matters in which, to their knowledge, a member of their immediate family has a financial interest.

7. The appointment of Richard Rizzo to the security position was a "particular matter." Anthony Rizzo "participated" in that matter by moving and voting to create the position on October 6, 1986. While the School Committee's vote during the open session of the October 6, 1986 meeting did not refer to Richard Rizzo, Mr. Rizzo knew that his son would occupy the position.

8. Before October 6, 1986, a "special school police officer" position did not exist within the Revere School Department. No one other than Richard Rizzo has ever occupied this position.

9. By participating in the creation of the security position with knowledge that his son was to occupy it, Mr. Rizzo participated as a School Committee member in a particular matter in which his son had a financial interest, thereby violating §19.

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

1. that he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil penalty for his violation of §19;

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

DATE: September 6, 1989

1/The agenda for this meeting identified an R.T.A. Grievance as the sole subject for consideration.

2/On October 3, 1986, Edward Manganiello, Principal of the Revere High School, sent a letter to Assistant Superintendent John Losco recommending that a senior citizen be hired as a security person for the Roland Merullo Field House. The School Committee voted on this recommendation pursuant to Mr. Rizzo's motion. Richard Rizzo filled the position. A senior citizen was not hired.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 374

IN THE MATTER
OF
LAWRENCE J. CIBLEY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Lawrence J. Cibley (Mr. Cibley) 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 12, 1989, the Commission initiated a preliminary inquiry into a possible violation of the conflict of interest law, G.L. c. 268A by Mr. Cibley, the chairman of the Bellingham Board of Selectmen. The Commission concluded its inquiry, and on May 31, 1989, found reasonable cause to believe that Mr. Cibley violated G.L. c. 268A, §23(b)(2) and (3).

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

1. At all material times herein, Mr. Cibley was the chairman of the Bellingham Board of Selectmen. Accordingly, Mr. Cibley is a municipal employee as defined in G.L c. 268A, §1(g).

2. On February 19, 1989, at approximately 1:00 A.M., Patrolman Allan W. Graham, Jr. and Officer Paul Lynch were conducting a stationary radar at a certain site in Bellingham. The area was posted at 25 miles per hour. Officer Graham stopped Alfred DaPrato (Mr. DaPrato) in his vehicle, having clocked him at 50 miles per hour and issued him a ticket with a fine of $200.

3. Shortly after Mr. DaPrato received this speeding ticket, he called Mr. Cibley and said that he had been stopped and issued a speeding ticket for traveling 50 miles per hour in a 25 miles per hour zone. According to Mr. Cibley, Mr. DaPrato told him that he asked the arresting officer if he could see the radar unit, and the officer refused.

According to Mr. Cibley, he called the Police Department and was referred to Officer Graham. Mr. Cibley's call was on the Department's recorded line.

According to a transcript of the taped telephone conversation, the following conversation took place between Mr. Cibley and Allan Graham:

Cibley: Who's this?

Graham: Officer Graham.

Cibley: You just stopped my buddy.

Graham: Did I? O.K.

Cibley: Freddie DaPrato, D, small A, capital P-R-A-T-O.

Graham: All right.

Cibley: Will you take care of it for me?

Graham: Sure.

Cibley: He's a real good friend?

Graham: O.K.

Cibley: I mean a very special friend, all right?
Graham: Uh huh.

Cibley: I appreciate it, I owe you one.

Graham: All right.

Cibley: Thanks pal.

Graham: O.K.

4. Mr. Cibley acknowledges the accuracy of the foregoing tape. He also acknowledges that in effect he was attempting to "fix" Mr. DaPrato's ticket.

5. Officer Graham did not "take care of" the ticket. Instead, on February 21, 1989, he filed an incident report regarding the above speeding ticket and conversation.

6. General Laws, chapter 268A, §23(b)(2) prohibits a municipal employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions that are of substantial value and that are not properly available to similarly situated individuals.

7. General Laws, chapter 268A, §23(b)(3) prohibits a municipal employee from acting in a manner that 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.

8. By attempting to "fix" a $200 speeding ticket, Mr. Cibley attempted to use his position as selectman to obtain an unwarranted privilege of substantial value for Mr. DaPrato. In addition, such conduct would cause a reasonable person knowing all of these facts to conclude that either Mr. DaPrato and/or Officer Graham could unduly enjoy Mr. Cibley's favor in the performance of his official duties.

In view of the foregoing violation of G.L. c. 268A, §23(b)(2) and (3), 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. Cibley:

1. that he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil penalty for his violation of §23(b)(2) and (3);

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

DATE: September 6, 1989

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 326

IN THE MATTER
OF
RICHARD L. REYNOLDS

Appearances:

Freda K. Fishman, Esq.
Counsel for Petitioner

Robert E. McLaughlin, Esq.
Counsel for Respondent

Commissioners:

Hennessey, Ch., Basile, Epps, Jarvis[1/]

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on March 12, 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 had violated G.L. c. 268A, §17(c) on two occasions. Specifically, the Petitioner alleged that the Respondent acted as an agent for the Periwinkle Field Trust by personally appearing before the Saugus Planning Board (Board) on September 19 and October 3, 1985 in connection with the Board's approval of the definitive subdivision plan for Periwinkle Park, a matter in which Saugus was a party and had a direct and substantial interest.

The Respondent filed his Answer to the Order to Show to Cause on April 10, 1987, admitting that, at all times relevant, he was a member of the Saugus Board of Selectmen (Selectmen) and the trustee of Periwinkle Field Trust, but denying that he appeared as the agent of the trust before the Board on September 19, and October 3, 1985.

Prior to the hearings, the Respondent submitted a motion that Presiding Officer, A. John Pappalardo, recuse himself and a motion that the Commission disqualify Commissioner Pappalardo on grounds of conflict of interest. The motion to recuse was denied by the Presiding Officer. The Commission denied the motion to disqualify.[2/]

An adjudicatory hearing was held on February 15, 1989. At the close of the Petitioner's case, the Respondent moved, pursuant to 930 CMR 1.01(6)(d), for a directed finding on the grounds that the Petitioner had failed to prove that the Respondent acted as an agent or attorney for anyone in connection with the subdivision approval and that the Town of Saugus had a direct and substantial interest in the subdivision plan application. The motion was taken under advisement by Commissioner Pappalardo for consideration by the full Commission. The Respondent then presented his case.

The parties filed post hearing briefs and presented oral arguments before the Commission on September 20, 1989. In his post hearing brief and at oral argument, the Respondent raised the additional contention that he was entitled to an exemption under §17 [3/] and that the Petitioner had failed to meet its burden of proof that said exemption was not applicable. In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.

II. Findings of Fact

1. From April, 1983 to November, 1985, the Respondent was a member of the Saugus Board of Selectmen (Selectmen).

2. The Respondent is an attorney and civil engineer.

3. In early August, 1982, the Respondent purchased a piece of property at 170 Hamilton Street in Saugus.

4. After purchasing the property, the Respondent sought guidance from the Saugus Planning Board regarding development of the property. The Planning Board expressed concern about the extent of blasting that would be required in order to develop the property into single family dwellings.

5. At the suggestion of the Planning Board, the Respondent developed a plan for multi-density housing on the Hamilton Street site. The plan envisioned thirty townhouses and was a multi-million dollar project. The Respondent considered this real estate development to be a substantial investment.

6. Prior to becoming a Selectman, the Respondent made presentations to the Planning Board and to the Town Meeting regarding zoning changes for the development project.

7. In March, 1983, a vacancy arose on the Saugus Board of Selectmen due to a resignation. The Respondent accepted appointment to the vacant position.

8. In April, 1983, the Respondent transferred the property at 170 Hamilton Street to a family trust, the Periwinkle Field Trust, of which the Respondent is a trustee and his family members are the beneficiaries.

9. In May, 1984, a complaint was received by the Ethics Commission regarding the Respondent's participation before various boards while he was a Selectman.

10. As a result of the May, 1984 complaint, the Respondent, on August 29, 1984 requested a written advisory opinion from the Ethics Commission regarding whether he could, while a Selectman, appear before the Town and Town boards on behalf of Periwinkle Field Trust.

11. The Ethics Commission authorized and issued to the Respondent formal opinion EC-COI-84-117 on October 16, 1984. The Commission concluded that the Respondent could not appear as trustee of Periwinkle Field Trust before the Town and Town boards without violating G.L. c. 268A, §17. As a Selectman, the Respondent was not eligible for any §17 exemptions.[4/]

12. On September 17, 1985, the Town Clerk's Office received an application for approval of a definitive subdivision plan for Periwinkle Park, 170 Hamilton Street, Saugus.

13. The owner of the property and the applicant of the plan was Periwinkle Field Trust.

14. The plan was submitted by the Respondent as trustee of Periwinkle Field Trust.

15. On September 19, 1985, the Saugus Planning Board held a public hearing on the subdivision application of Periwinkle Field Trust.

16. The Respondent and his daughter, Jane, were present at the hearing.

17. At the September hearing, the Respondent intended that Jane would make the presentation of the subdivision plan to the Board.

18. Prior to 1985, Jane was minimally involved with the development of Periwinkle Park. At all times relevant, she was not an attorney.

19. The Planning Board regarded the Respondent, not Jane, as the most knowledgeable person at the hearings regarding the plan.

20. At the September hearing, members of the Planning Board addressed questions directly to the Respondent regarding the proposed road, parking, hydrants, water mains, and the opinions of other Town departments about the project. They asked the Respondent to provide further information from other Town boards. The Respondent answered the Board's questions.

21. At the September hearing, abutters and citizens expressed their concerns about the project and raised questions regarding traffic safety, drainage, the proposed road and proposed blasting. The Respondent answered the questions, agreed to install a catchbasin, agreed to obtain a pre-blasting survey and to obtain insurance to cover any damage from blasting, and agreed to install stop signs.

22. The Respondent was present at the September 19, 1985 meeting as a trustee of Periwinkle Field Trust.

23. On October 3, 1985, the Planning Board held a further public hearing on the Periwinkle Park plan.

24. At both hearings, the Planning Board was concerned about problems that neighbors were voicing about the Periwinkle Park project.

25. The Planning Board utilized the hearings as a public forum to express clearly what conditions the Board wanted included in the definitive plan.

26. The Respondent and his daughter, Jane, were present at the October 3, 1985 Planning Board meeting.

27. On October 3, 1985, the Respondent presented the Planning Board with a letter regarding potential traffic safety at the development that the Saugus safety officer had delivered to the Respondent at the Respondent's office.

28. At the October 3, 1985 meeting, the Planning Board requested the installation of a flashing light at Periwinkle Park. The Respondent agreed.

29. At the October hearing, the Respondent agreed to include a traffic island at the entrance of Periwinkle Park.

30. During the October hearing, at the request of an abutter, the Respondent agreed to install a concrete curb.

31. At the October hearing, the Respondent and the Planning Board discussed the requirements and conditions that the Planning Board wanted to be included in the covenant agreement.

32. The Respondent was present at the October 3, 1985 meeting as a trustee of Periwinkle Field Trust.

III. Decision

The Respondent has been charged with two separate violations of G.L. c. 268A, §17(c). Prior to addressing the substantive allegations, we will address the motion for a directed finding.

A. Motion for a Directed Finding

The Respondent contends that he is entitled to a directed finding on the grounds that the Petitioner

failed to produce sufficient evidence to support a **prima facie** case of a §17(c) violation. To prove a §17(c) violation, the Petitioner is required to show that the Respondent: (i) at all relevant times was a municipal employee; (ii) otherwise than in the proper discharge of his official duties acted as agent for someone; (iii) in connection with any particular matter in which the same municipality is a party or has a direct and substantial interest.

Having considered the evidence submitted by the Petitioner, in the light most favorable to the Petitioner, the Commission concludes that the evidence is adequate to support an inference imposing liability on the Respondent. **See, Mullins v. Pine Manor College**, 389 Mass. 47, 56 (1983); **Sahagan v. Commonwealth**, 25 Mass. App. Ct. 953 (1988); **O'Malley v. Putnam Safe Deposit Vaults, Inc.**, 17 Mass. App. Ct. 332, 333 (1983). It is undisputed that the Respondent was a municipal employee at all relevant times and that the subdivision application was a particular matter[5/] before the Board. The documentary evidence demonstrates that the Town had a direct and substantial interest in the contents of the subdivision plan in order to determine whether the plan complied with local regulations.[6/] The meeting minutes indicate that the Board was concerned with the placement of hydrants, utilities, public safety, traffic patterns and the installation of roads in the subdivision plan. Furthermore, the covenant between the Town and the applicant trust addressed issues of traffic safety, fire protection, road construction, placement of utilities, street lighting, parking and maintenance. All of these issues are of direct and substantial interest to the Town, and the Town was a party to the covenant. See, G.L. c. 41, §81U.

Finally, a reasonable inference can be drawn from the documentary evidence that the Respondent, as trustee of the applicant trust, was acting as an agent for the trust before the Board in order to gain approval for the application. The application before the Board was on behalf of Periwinkle Field Trust, the owner of the property, and was filed by the Respondent, not in his personal capacity, but as trustee. Also, the September Board minutes identify the Respondent as trustee of the trust. From the minutes, it may be reasonably inferred that the Board questioned the Respondent regarding the plan and negotiated with the Respondent to obtain suitable conditions in the plan to meet public safety and traffic concerns. In order for the Planning Board to obtain the conditions it was seeking, the Board needed to bind the applicant/trust and sought agreements from the Respondent as the trust's representative. The Respondent participated by answering questions, agreeing to conditions and discussing the covenant. Therefore, the Commission concludes that sufficient evidence was presented on each element to support an inference that the Respondent violated §17 on two occasions. The motion for a directed finding is therefore denied.

B. Substantive Violations

The relevant portion of §17(c) applicable to this case provides 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 city or town is a party or has a direct and substantial interest. It is uncontested that, at all relevant times, the Respondent was a Selectman and, thus, a municipal employee. **See, District Attorney for the Hampden District v. Grucci**, 384 Mass. 525, 528 (1981). The Respondent also agrees that the Periwinkle Park subdivision application was a particular matter within the meaning of G.L. c. 268A. The issues in dispute are whether the Town was a party to or had a direct and substantial interest in the subdivision application and whether the Respondent acted as an agent on behalf of the Periwinkle Field Trust before the Board.

1. Particular Matter of Direct and Substantial Interest to Saugus

The Respondent argues that the subdivision approval does not implicate a direct and substantial interest of the Town because the ultimate obligation of the Board is the ministerial act of signing off on the application if it fulfills the requirements of Town regulations. We conclude that this argument fails because the Town possesses substantial authority to require alterations and amendments to plans in order to promote the health, welfare and general safety of the community. See, G.L. c. 41, §81K-81GG. Among other things, the Board has the power to adopt rules and regulations pertaining to subdivision control, to amend subdivision plans, to request conditions, covenants and bonds. G.L. c. 41, §§81Q, 81U, 81W. The Planning Board must exercise its powers

> with due regard for the provisions of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water,

sewerage, drainage, underground utility services, fire, police and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. G.L. c. 41, §81M.

See, e.g. North Landers Corp. v. Planning Board of Falmouth, 382 Mass. 432, 437-438 (1981); **Costanza and Bertolino, Inc. v. Planning Board of North Reading**, 360 Mass. 677, 679 (1971).

Therefore, the Board has the obligation to insure that a subdivision plan complies with all local health and safety regulations. This Commission has stated in analogous cases 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." **EC-COI-88-9; see e.g., In the Matter of Robert P. Sullivan**, 1987 SEC 312 (release from bond; occupancy permits) **EC-COI-87-31** (application, decision to issue and permit for installation of septic systems); **EC-COI-84-76** (zoning matters and revenue bonding); **EC-COI-83-153** (town permits and approval required for building construction). Accordingly, the Commission finds that the Town has a direct and substantial interest in the Periwinkle Park subdivision plan application. **See, Commonwealth v. Canon**, 373 Mass. 494, 498 (1977); Braucher, **Conflict of Interest in Massachusetts in Perspectives of Law, Essays for Austin Wakeman Scott** (1964), p.16.

Moreover, the evidence presented in this case confirms the legal conclusion that the Town has a direct and substantial interest. The documentary evidence and the testimony in this case demonstrate that the Saugus Planning Board reviewed the Periwinkle Park plan in light of its statutory mandate, as well as its rules and regulations. Among the issues addressed were blasting in the area, traffic flow, road construction, street lighting, utilities, removal of trash and snow, and public safety. Mr. Long, Chairman of the Board, testified that the Board was sensitive to the neighbors' concerns and that there were certain conditions the Board wanted included in the plan and the covenant for the benefit of the Town. Accordingly, the Commission concludes that the Town's interest in the subdivision application was direct and substantial, and that the obligation of the Town in its review of the application was not ministerial.

2. Agency

The term "agent" is not defined in G.L. c. 268A, and the Commission is charged with interpreting the term in light of the overall remedial purpose and intent of the conflict of interest law. **See, e.g., United State v. Evans**, 572 F.2d. 455, 480 (5th Cir. 1978); **Everett Town Taxi, Inc. v. Board of Aldermen of Everett**, 366 Mass. 534, 536 (1974). Section 17 is premised on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, **The New Federal Conflict Law**, 76 Harv.L.Rev. 1113, 1120 (1963). As Buss has noted, [t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. L.Rev. 299, 322 (1965). **See also, Town of Edgartown v. State Ethics Commission**, 391 Mass. 83, 88-89 (1984).

In light of the underlying purpose of §17, the Commission has adopted the approach of the federal courts which have utilized an expansive definition of the term "agent" within the federal counterpart of §17(c) and which have stated that the definition is not limited to its strict common law interpretation. **See, In the Matter of Robert Sullivan**, 1987 SEC 312; **In the Matter of James M. Collins**, 1985 SEC 228; and **United States v. Sweig**, 316 F.Supp 1148, 1157 (S.D.N.Y. 1979). **In the Matter of Robert P. Sullivan**, the Commission 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." **Sullivan, supra** at 314-315. **See also, In the Matter of James M. Collins, supra** at 228, 231; **EC-COI-84-116**. Thus, the keystone is that one is acting in a representational capacity.[7/] See, Perkins, **The New Conflict of Interest Law**, Harv.L.Rev. 1113, 1146 (1963). Participation in the form of "merely speaking or writing on behalf of a non-state party would be acting as agent." Buss, **supra**, at 326.

In **EC-COI-84-117**, the Commission issued an opinion to the Respondent which concluded that the Periwinkle Field Trust was a distinct legal entity and that, due to the fiduciary relationship between the trustee and trust, the Respondent would be acting as

the legal representative of the trust in any appearances before municipal boards. The Commission's conclusion was based upon the distinguishing legal characteristics of a trust relationship.[87] The Commission now reaffirms this opinion. Further, the evidence in this case does not warrant disregard of the trust as a separate legal entity.

The Respondent submitted the subdivision application as the trustee of Periwinkle Field Trust. The September meeting minutes identify the Respondent as trustee. The applicant and owner of the property was the trust. The covenant reviewed by the Respondent and the Board at the October meeting was a covenant between the Town and the owner/trust.

As trustee, Reynolds owed strict duties of loyalty and good faith to the trust. A trustee, similar to other fiduciaries, is prohibited from advancing his own personal or business interests at the expense of the trust. **See, Ball v. Hopkins**, 268 Mass. 260, 266-269 (1929). Given these fiduciary duties, it cannot be assumed that the Respondent was advancing his own personal interest in his discussions with the Board. It can be reasonably inferred that Respondent was acting on behalf of, and with the knowledge and consent of, the beneficiaries because if he was not, he would be in violation of his fiduciary duties. **See, In the Matter of Robert P. Sullivan, supra** at 312, 315. The Commission has previously indicated that "if the conduct of the parties 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. **In the Matter of Robert P. Sullivan, supra** at 315; **In the Matter of Joseph P. Zora, Sr. and Joseph P. Zora, Jr.**. 1989 SEC 401; **Choates v. Board of Assessors of Boston**, 304 Mass. 298, 300 (1939).

Upon reviewing the facts, the Commission concludes that the Respondent was acting on behalf of Periwinkle Field Trust. The Commission finds that the Board wanted particular conditions included in the development plan which resulted in negotiations between the parties and in which the Respondent actively participated. The Board sought a commitment from the trust regarding these conditions which only the representative of the trust was able to do. The record is devoid of evidence that the Respondent acted other than in a representative capacity or that the Respondent informed the Board that he was present in his personal capacity and not as a representative of the applicant trust. It would reasonably appear to members of the Board that the Respondent was representing the interests of the trust and had authority to bind the trust. **See, In the Matter of Paul H. Sullivan**, 1988 SEC 340, 343. Further, the covenant ran between the Town and the trust, not to the Respondent personally. The subdivision approval was given to the trust, not to the Respondent personally, as the application was submitted by the trust.

The Respondent argues that he did not intend to be the trust's representative at the public hearings, but rather, had assigned this task to his daughter, Jane, in order to comply with the Commission's opinion in **EC-COI-84-117**. Although the Respondent's intention is a mitigating factor for purposes of disposition, it does not insulate him from liability. The Commission has indicated that the presence of a recognized spokesperson may dispel the appearance of agency. **In the Matter of Robert P. Sullivan, supra**, n.7. However, the Commission does not find adequate evidence to support a finding that Jane acted as the representative of the trust for purposes of the subdivision application. The record does not indicate that Jane was publicly recognized as the spokesperson or representative of the trust or that she had authority to make commitments with the Board. The Commission credits the testimony of Long, the Chairman of the Planning Board, who stated that he did not consider Jane to be the representative who could bind the trust and that, throughout the history of the project, the Respondent had been the driving force. Further, the evidence does not indicate that Jane participated in answering the Board's questions or negotiating conditions in the plan, or that the Respondent deferred the Board's questions to his daughter. In spite of the Respondent's good intentions, he exercised poor judgment in his attempt to comply with the 1984 advisory opinion. The prudent course for a public official to avoid an appearance of a conflict of interest under G.L. c. 268A, §17 is to designate a spokesperson who has authority to negotiate on behalf of and to bind the trust. This spokesperson should be publicly recognized so that all parties are knowledgeable about the status of the designated agent.

Even assuming for the sake of argument that Jane did act as spokesperson for the trust, the Respondent could also be found to be acting as an agent for the trust. The Commission has stated that "[t]he mere presence of a recognized spokesperson, without more, does not prevent a finding that someone else is also acting as agent." **In the Matter of Paul H. Sullivan, supra** at 344 (citing 2A C.J.S. Agency §31 (1985) at p. 593). The evidence in this case demonstrates that it was the Respondent, not Jane, who possessed the authority to act on behalf of the trust.

An additional affirmative defense argued by the Respondent is that even if the Commission finds that he acted on behalf of the trust, he is exempt by the provisions of §17, ¶9. The witness exemption states that §17 does not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt." The legislative intent underlying this exemption is to facilitate the administration of justice by permitting government employees to honor a subpoena and to provide sworn testimony in judicial proceedings pertaining to claims or other transactions involving the government. See, Manning, **Federal Conflict of Interest Law**, 97 (1964); **Buss, supra** at 344. The Commission has applied this exemption in situations where state employees are required to provide uncompensated testimony in lawsuits in which the state is a party. **EC-COI-83-69; 83-45**; Braucher, **supra** at 18-19.

The Commission does not agree with the Respondent that the Petitioner bears the burden of proof to establish ineligibility for the witness exemption. The Commission previously determined that the burden of proof lies with the Respondent claiming the exemption, not with the Petitioner. **In the Matter of Joseph D. Cellucci**, 1988 SEC 346, 349. To allocate the burden of proof of exemption to the Petitioner contradicts 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 [Special] 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. Because the Special Commission, within the context of criminal proceedings, placed the burden of proof of an exemption on the public official who claims it, we do not find it unfair to allocate this burden of proof to the public official during civil proceedings.

The Commission concludes that the Respondent did not plead or prove his eligibility for the exemption. 930 CMR 1.01(5)(b). The Respondent raised the exemption issue in his post hearing brief and at oral argument, after the adjudicatory hearing had ended. He did not present any evidence that he either testified under oath, made statements under the penalty of perjury before the Board, or was required to provide such testimony. Therefore, the exemption is not applicable to him.[9/]

IV. Conclusion and Sanction

In conclusion, the Commission finds, by a preponderance of the evidence, that the Respondent violated G.L. c. 268A, §17(c) on September 19, 1985 and October 3, 1985 by acting as agent of Periwinkle Field Trust in connection with the Periwinkle Park subdivision application which was a particular matter in which the Town of Saugus was a party and had a direct and substantial interest.

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 $4,000.00, we believe that the imposition of a fine is not warranted. We find that the Respondent was credible in his testimony that he had not intended to act as the representative of the trust but had felt compelled to respond to the Board when he was addressed by it. The Respondent sought advice regarding the propriety of representing the trust while he remained a Selectman, and he made a good faith, albeit ineffectual, attempt to comply with our opinion in **EC-COI-84-117**. Further, we note that, in a recent similar adjudicatory decision construing G.L. c. 268A, §17, we did not impose a fine where one of the mitigating factors was that the Respondents' actions as agent were on behalf of a corporation whose owners and officers were all family members. **In the Matter of Joseph Zora, Jr. and Joseph Zora, Sr.**, 1989 SEC 401. While the Respondent is not entitled to any §17 exemptions as a matter of law, his actions, reviewed in the context of a fiduciary relationship to a family trust, do not merit the imposition of a fine.

DATE AUTHORIZED: November 9, 1989

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

[2/]The Respondent did not brief these issues, nor did he present any evidence of bias. The Respondent did not press this argument in his post hearing brief or at oral argument. The Commission finds no evidence of bias at any point during the course of these proceedings.

[3/]Section 17 ¶9 states: "This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

4/The Commission notes that, in March, 1983, the Respondent may have received incomplete oral advice from the Attorney General or the Legal Division of the Ethics Commission concerning his representing the trust in a fiduciary capacity before Town boards. The Commission does not find this advice controlling as the Respondent had received the formal written opinion of the full Commission one year prior to the violations in this case. All of the events which form the basis of the violations in this case occurred after the date the Commission issued **EC-COI-84-117.**

5/"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.

6/A full discussion of the "direct and substantial interest" requirement is provided in Section B(1) infra.

7/The Commission summarized its past precedent regarding the phrase "acting as agent" in **Commission Advisory No. 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."

8/These characteristics are: (1) a trust is a relationship; (2) it is a relationship of a fiduciary character; (3) it is a relationship with respect to property, not one involving merely personal duties; (4) it involves the existence of equitable duties imposed upon the holder of the title to the property to deal with it for the benefit of another; and (5) it arises as a result of a manifestation of an intention to create the relationship. **1 Scott on Trust**, §2.3 (4th Ed. 1987).

9/The Respondent does not qualify for any exemption under §17. As a Selectman, he is not eligible for special municipal employee status. G.L. c. 268A, §1(n). Section 17 also contains an exemption which permits a municipal employee to act as an agent for parties with whom he has a fiduciary relationship. However, this "fiduciary exemption" is only available to appointed officials. G.L. c. 268A, §17 ¶7. As an elected official, the Respondent is ineligible for this exemption.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 376

IN THE MATTER
OF
JOHN DeOLIVEIRA

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John DeOliveira (Mr. DeOliveira) 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 possible violations of the conflict of interest law, G.L. c. 268A, by Mr. DeOliveira of Berkley. The Commission has concluded that inquiry and, on January 11, 1989, found reasonable cause to believe that Mr. DeOliveira violated G.L. c. 268A, §19.

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

1. At the time here relevant, Mr. DeOliveira was a selectman of the Town of Berkley. Mr. DeOliveira was elected as a Berkley selectman on May 6, 1986 and served until June 27, 1987. Mr. DeOliveira was, therefore, during the period here relevant, a municipal employee as defined in §1(g) of G.L. c. 268A.

2. Mr. DeOliveira's wife, Elaine DeOliveira (Elaine), is employed full-time by the Town of Berkley as a police dispatcher and was employed as such while Mr. DeOliveira was a selectman. The terms and conditions of employment for police dispatchers are negotiated between the selectmen and the bargaining unit representing the dispatchers.

3. In 1986, contract negotiations occurred between the selectmen and the bargaining unit representing the dispatchers. Mr. DeOliveira was

present at at least some of these negotiations but did not participate in the discussions.

4. At a selectmen's meeting on November 26, 1986, the selectmen were presented with the individual contracts for each of the employees who were represented by the bargaining unit, including the dispatchers. In all, there were about twenty contract sheets for the selectmen to sign that evening. Mr. DeOliveira, along with the other selectmen, signed all twenty of the contract sheets, including that of his wife Elaine. At the next selectmen's meeting, approximately one week later, Mr. DeOliveira went to the selectmen's files and pulled out the copy of his wife's contract that was stored there. Mr. DeOliveira then crossed out his signature on the copy he removed from the file and returned the copy to the file.

5. Section 19 of G.L. c. 268A provides in relevant part that, except as permitted by §19,[1/] 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.

6. The approval of Elaine's contract sheet was a particular matter within the meaning of §19. Mr. DeOliveira participated in that matter by signing the contract sheet. Because the contract sheet determined the terms and conditions of Elaine's employment, Elaine had, at the time of the signing of the contract sheet, a financial interest in the selectmen's approval of the contract sheet. Mr. DeOliveira was aware at the time he signed the contract sheet that the approval of the contract sheet would affect the financial interests of Elaine.

7. By signing his wife's contract sheet, as described above, Mr. DeOliveira participated as a selectman in a particular matter in which his wife 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 agreed to by Mr. DeOliveira:

1. that Mr. DeOliveira pay to the Commission the amount of two hundred fifty dollars ($250.00)[2/] as a civil penalty for violating G.L. c. 268A, §19; and

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

DATE: December 13, 1989

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

[2/] While the Commission can impose a fine of up to $2,000 for each violation of §19, it has determined that the relatively small fine imposed here is appropriate where the actions constituting the §19 violation consisted of Mr. DeOliveira's participating in only the formal acceptance and execution of an employment contract (i.e., Mr. DeOliveira's wife's), in the actual negotiation of which Mr. DeOliveira did not participate.

In the Matter of George Munyon, Jr.
(1/18/89)

The State Ethics Commission fined Lunenburg Highway Department Superintendent George Munyon Jr. $250 for violating the state's conflict of interest law by recommending his son for a job with his department.

In a Disposition Agreement reached with the Commission, Munyon admitted he violated Section 19 of the conflict law, and agreed to pay the fine. Section 19 prohibits municipal officials from participating in any particular matter in which members of their immediate family have a financial interest.

According to the Disposition Agreement, in 1985 Munyon reviewed several candidates for a position as a laborer with the Highway Department. Munyon's son, Christopher, was among those who applied for the job, and Munyon determined his son was the best-qualified person for the position, the Agreement said. At a meeting of the Lunenburg Selectmen on July 29, 1985, Munyon recommended his son for the job, and the Selectmen voted unanimously to hire Christopher Munyon.

Shortly before his son's appointment, the Agreement said, Munyon asked the Selectmen (at different times) if they had any problem with Christopher applying for the laborer position, and at least two of three responded in the negative.

Although an exemption to Section 19 allows municipal officials to participate in matters of a financial interest to immediate family members if they first advise their appointing authority in writing and receive a written clearance from that authority to participate, Munyon made no such effort to comply with the conflict law, the Disposition Agreement said. While Munyon showed some sensitivity to the conflict of interest problems created by his son's selection as a Highway Department employee, his actions fell short of what was required to secure the benefits of a Section 19 exemption. However, the Commission did consider Munyon's disclosure, albeit incomplete, as mitigation in determining the resolution of the case.

In the Matter of Charles Smith/Robert LaFrankie/ Angel Ramirez/James Boyle
(2/15/89)

The State Ethics Commission issued Public Enforcement Letters to four Pittsfield officials in connection with their acceptance of travel and accommodation expenses from a potential vendor for a trip to the company's Chicago headquarters, thereby allegedly violating the state's conflict of interest law.

Pittsfield Mayor Charles Smith, Superintendent of the Pittsfield Schools Robert LaFrankie, and Pittsfield School Committee members Angel Ramirez and James Boyle all allegedly violated Section 3 of the conflict law in August of 1986 by travelling to Chicago at the expense of the Service Master Company to view the custodial service provider's home offices, the Enforcement Letters said. The city subsequently entered into a contract with the company. The contract was supported by Smith, LaFrankie and Ramirez, and opposed by Boyle.

Section 3 of the conflict law prohibits public officials from accepting any item of substantial value for or because of any official act done or to be done by them.

Although the Ethics Commission probe indicated the conflict law may have been violated in this case, because of mitigating factors the Commission felt the matter would best be resolved without further adjudicatory proceedings. The issuance of the Enforcement Letters therefore concludes the Commission's investigation into the matter.

The Commission cited as mitigation the fact that the trips did not involve any "frills" or evidence of wining and dining the Pittsfield officials, the Agreement said.

The Commission cited its recent advisory opinion EC-COI-88-5 in the Letters, stating that the value of trip expenses in situations such as the Pittsfield matter accrue to the individual traveler and <u>not</u> to the municipality. In addition, the Enforcement Letters said, there are "good public policy reasons" for prohibiting these kinds of payments.

The Commission also noted that Massachusetts General Laws c. 44, Section 53 may provide a statutory vehicle by which a private party could pay travel expenses for public officials. This section of the municipal finance law would apparently allow a city to accept grants or gifts of funds from a charitable foundation, private corporation or an individual and, in turn, the city could expend such funds for the specific purpose intended with the approval of the mayor and the board of aldermen, the Enforcement Letters said.

Thus, if a company wanted to pay for the travel expenses of public employees to attend a fact-finding trip to the business' headquarters, the company could

probably do so by providing the necessary monies to the city treasurer, stating that the "gift" was to be used to pay such travel expenses.

In the Matter of Joseph P. Zora, Sr. and Joseph P. Zora, Jr.
(4/19/89)

The State Ethics Commission ruled that Marion Selectman Joseph P. Zora, Sr., and his son, former Marion Conservation Commission member Joseph P. Zora, Jr., violated the conflict of interest law on several occasions in 1985 by appearing before the Marion Conservation Commission (MCC) on behalf of their family-owned developing business. The Commission declined to impose a fine against either of the Zoras.

In a Decision and Order, the Commission stated Zora Sr. violated Section 17(c) of Massachusetts General Laws c. 268A, the conflict law, on two occasions in April, 1985, when he represented both Zora Enterprises, Inc., and Roy and Sheila Rider, who purchased a subdivision from Zora Enterprises, before the MCC. Zora Sr. serves as president and treasurer for Zora Enterprises. Zora Jr. violated Section 17(c) by representing Zora Enterprises on four occasions: at three MCC meetings and one site inspection of the Rider's subdivision, all occurring in April of 1985, the Commission said. Zora Jr. serves as a director of Zora Enterprises.

Section 17(c) of the conflict law prohibits municipal employees from acting as agent or attorney for any outside party in a matter of direct and substantial interest to the town. Representing business partners or corporations before town boards is prohibited conduct under this section of the law.

The levying of fines was not warranted in this case, the Commission said.

"With regard to Zora Sr.," the Decision and Order said, "all of his violations would have been avoided had he in fact obtained special municipal employee status. Zora Sr. was particularly credible on the point of his belief that he had this status at all times... (and) equally important, the Marion Selectmen thought he had special status and had wanted him to have special status."

Municipal employees designated as "special" have fewer restrictions than "regular" municipal employees under the conflict law. They are allowed to represent private parties before town boards as long as they have not participated or had official responsibility for the same matters as public employees, and as long as any such matters are not pending before their own board or agency.

With regard to Zora Jr., the Decision and Order indicated that the principal reason no fine was imposed was that his actions were on behalf of a corporation wholly owned by family members.

In the Matter of George Colella
(5/12/89)

The State Ethics Commission fined Revere Mayor George Colella $500 for violating the Massachusetts conflict of interest law by hiring and supervising his daughter.

In a Disposition Agreement reached with Colella, the Commission said the mayor violated Section 19 of the law in February of 1984, when he hired his daughter, J. Elizabeth, as a part-time junior clerk-typist for the city. Colella also violated the law by acting as his daughter's direct supervisor, the Commission said. Section 19 of the conflict law prohibits city employees from participating in particular matters that affect the financial interest of their immediate family members.

Colella admitted to violating the law, and agreed to pay the fine and have his daughter resign her city job, the Disposition Agreement said.

The mayor stated, and the Commission has no evidence to the contrary, that he was unaware that the conflict of interest law prohibited him from hiring his daughter; however, ignorance of the law is not considered a defense. The Disposition Agreement said that although the Commission usually levies a fine of $1,000 or more in nepotism/hiring violations, the agency considered the fact that J. Elizabeth Colella was working part-time to be a mitigating factor warranting a reduction of the fine in this case.

In the Matter of Robert Gillis
(6/2/89)

The State Ethics Commission fined former Brockton Police Chief Robert Gillis $250 for participating in the appointment of his son and Andrew to a position with the Brockton Police Department (BPD) in violation of the state's conflict of interest law.

In a Disposition Agreement reached with the Commission, Gillis agreed to pay the fine and admitted he violated Section 19 of Massachusetts General Laws c. 268A, which prohibits municipal employees from participating in any particular matter that affects the

financial interest of a member of their immediate family.

In 1986, the Disposition Agreement said, Andrew Gillis applied for a position as a civilian telephone operator with the BPD. Chief Gillis communicated with Brockton Mayor Carl Pitaro concerning his son seeking the position, and after both written and verbal correspondence with the Mayor, hired Andrew as a Civil Telephone Operator for the police department. Andrew Gillis resigned his position in May, 1987, when questions concerning the propriety of his appointment were raised.

An exemption to Section 19 would have allowed Gillis to participate in the hiring of his son, provided that he made a written disclosure to his appointing authority (Mayor Pitaro), received written permission from that authority to participate in the matter, and filed the determination with the city clerk. However, there was no written determination by the mayor that Gillis could participate in matters in which his son had a financial interest.

The Commission considered as mitigation the fact that Gillis' appointing authority was aware of his actions concerning his son. Accordingly, while the Commission generally imposes a $1000 fine for nepotism/hiring violations, a lesser fine was warranted in this case, the Disposition Agreement said.

In the Matter of Arthur Tucker
(6/2/89)

The State Ethics Commission fined Oakham Building Inspector Arthur Tucker $250 for participating in his official capacity in a dispute over alleged building code, property subdivision and safety violations involving a house that abutted his own property, and that he had expressed an interest in buying.

In a Disposition Agreement reached with the Commission, Tucker admitted he violated Section 19 of Massachusetts General Laws c. 268A. Tucker agreed to pay the fine and to refrain from participating as a town employee in any particular matter that affects his own financial interest, absent a specific exemption.

Section 19 of the conflict law prohibits town employees from participating in matters that affect their own financial interest or the financial interest of members of their immediate family, business partner(s) or associates.

The Commission found Tucker violated Section 19 by bringing the matters of the abutting property before the Board of Selectmen, and by later asking the Selectmen to inspect the property, by issuing stop-work orders in his capacity as Building Inspector, by writing letters concerning the property, by asking that a survey board be convened and by posting the property as being dangerous and unsafe.

In the Matter of Thomas H. Nolan
(6/12/89)

The State Ethics Commission issued a summary decision against former Chelsea Mayor Thomas Nolan for allegedly offering not to schedule a fire captains' promotional exam in exchange for the support of 10 Chelsea firefighters in his 1987 re-election campaign. Nolan was ordered to pay the maximum $2000 fine to the Commission within 30 days.

Nolan failed, despite notice, to answer the Commission's October, 1988, Order to Show Cause in connection with his alleged violations of the conflict of interest law. Under the Commission's regulations (930 CMR 1.01 (6)(f)(2)), the Commission may issue a summary decision when the record shows a Respondent's substantial failure to cooperate with the Commission's adjudicatory proceeding.

"(Nolan's) failure to defend or otherwise respond to the allegations constrains us to conclude that (he) has violated General Laws c. 268A, Sections 2 and 3," the Commission said in its summary decision. "In light of the seriousness with which we view these violations, we conclude that a maximum statutory fine of $2000 is appropriate."

Section 2 of the conflict law prohibits municipal employees from directly or indirectly corruptly soliciting for themselves or others anything of substantial value in return for being influenced in the performance of their official duties.

Section 3 (b) of the conflict of interest law prohibits municipal employees from directly or indirectly soliciting for themselves anything of substantial value for or because of any official act performed or to be performed by them.

In the Matter of Rockland Trust Company
(7/25/89)

The State Ethics Commission fined Rockland Trust Company $4000 for continuing to sponsor a summer cruise for municipal treasurers despite a published report from the Inspector General indicating that such behavior raised serious conflict of interest concerns.

According to a Disposition Agreement reached with the Ethics Commission, Rockland Trust admitted to violating Section 3 of Massachusetts General Laws c. 268A in both 1986 and 1987, and agreed to pay the fine. The bank was fined $2000 for each of the two cruises.

Section 3 of the conflict law prohibits the giving of anything of substantial value ($50 or more) to public employees for or because of their official position, or because of anything done or to be done by them in their official capacity. This prohibition includes providing meals, entertainment, or any other item of substantial value to a public employee in an attempt to foster good will.

Prior to November of 1985, the Agreement said, there was a widespread practice of banks paying for entertainment of public officials who managed municipal funds. However, on November 23, 1985, the Office of the Inspector General (IG) issued a document entitled "Report on Municipal Banking Relations," which among other things warned that conduct of this type raised serious concerns under the conflict law.

Following the publication of the IG's report, officials in the marketing department of Rockland Trust Company discussed what, if any, impact the report should have on their annual summer outing, to which it invited all members of the Plymouth County Collectors and Treasurers Association (PCCTA). Without consulting the Inspector General or the State Ethics Commission, they concluded the report did not apply to their function, the Disposition Agreement said.

The annual dinner cruise was held on August 13, 1986, and all members of the PCCTA, as well as treasurers from towns outside Plymouth County, were invited to attend. Rockland Trust held its next summer outing on August 25, 1987, and again invited all members of the PCCTA and treasurers from other communities, the Agreement said.

The bank cancelled its 1988 summer outing after being contacted and questioned by the Ethics Commission regarding the previous cruises.

In the Matter of Lawrence Cibley
(9/6/89)

The State Ethics Commission fined Lawrence J. Cibley, chairman of the Bellingham Board of Selectmen, $1000 for violating the state's conflict of interest law by trying to "fix" a speeding ticket given to a friend.

In a Disposition Agreement reached with the Commission, Cibley admitted to violating Section 23 of Massachusetts General Laws c. 268A, the conflict of interest law, and agreed to pay the fine.

Section 23 prohibits public employees from using their official position to garner an unwarranted privilege for themselves or others. It also prohibits public employees from acting in a manner that would cause a reasonable person to conclude they will act with bias in their official capacity.

On February 19, 1989, Bellingham Police Officer Allan Graham, Jr. stopped Alfred DaPrato in his vehicle, having clocked DaPrato's car at 50 miles per hour in a 25 miles per hour zone, according to the Disposition Agreement. DaPrato was issued a $200 speeding ticket.

Shortly after receiving the ticket, DaPrato called Cibley and told him he had been issued a speeding ticket, had asked to see the radar unit and the officer refused, the Disposition Agreement said. Cibley then called the Police Department and was referred to Officer Graham. The call took place on the Department's recorded line.

Cibley acknowledged the accuracy of the tape, and that he was in effect trying to "fix" DaPrato's ticket.

Graham did not "take care of" the ticket. Instead, he filed an incident report regarding the ticket and conversation on February 21, 1989, the Disposition Agreement said.

In the Matter of John P. O'Brien
(9/6/89)

The Massachusetts State Ethics Commission fined Hampden County Register of Probate John P. O'Brien $500 for his failure to disclose certain real estate transactions and loans on his 1986 and 1987 Statements of Financial Interests (SFIs).

In a Disposition Agreement reached with the Commission, O'Brien agreed to pay the fine and admitted he violated Section 7 of Massachusetts General Laws c. 268B, the state's Financial Disclosure Law, by omitting reportable information on his SFIs relating to his purchase and resale of several Springfield properties, and to loans taken out on behalf of his son.

Section 7 of the Financial Disclosure Law prohibits the filing of a false SFI. A false filing need not be willful

nor intentional to violate the law; the statute requires a commitment to a "reasonable degree of care and diligence in filing the forms," and the Commission determines whether an individual filer has exercised such care on a case by case basis, the Disposition Agreement said.

Omissions that the Commission deems to reflect a lack of reasonable care and ordinary diligence are omissions that either involve a party or transaction over which the filer could exercise official responsibilities as a public employee, involve total omissions of required information, or are material in number and amount to the filer's overall real estate holdings, the Disposition Agreement said.

O'Brien did not prepare his 1986 and 1987 SFIs personally, but delegated the task to his executive assistant, the Disposition Agreement said. O'Brien instructed the assistant to use the previous year's SFI in preparing the current SFI. However, O'Brien both failed to provide his assistant with the documents and other information necessary to fully update the Statements, and, in reviewing and signing the SFIs, failed to identify the omissions.

In the Matter of Anthony Rizzo
(9/6/89)

The State Ethics Commission fined former Revere School Committee member Anthony Rizzo $1000 for voting to create a school security guard position that he knew his son would occupy.

In a Disposition Agreement reached with the Commission, Rizzo admitted to violating Section 19 of the conflict of interest law, Massachusetts General Laws c. 268A, and agreed to pay the fine. Section 19 prohibits municipal employees from participating in any particular matter that affects the financial interests of their immediate family members. "Immediate family" is defined under the conflict law as the public employee, his or her spouse, and each of their parents, children, brothers and sisters.

The Disposition Agreement said that in October of 1986, Rizzo presided over a special School Committee meeting and moved and voted to accept a recommendation from Revere High School principal Edward Manganiello regarding security at the Roland Merullo Field House. The School Committee voted in favor of this motion, although the matter was not on the scheduled agenda. Manganiello had recommended that a senior citizen be hired as a security person for the Field House; however, Richard Rizzo was given the job, and a senior citizen was not hired.

While not expressly stated in Manganiello's recommendation or Rizzo's motion, Rizzo admitted he knew that the School Committee was creating a position that his son would occupy. Richard Rizzo was employed as a special police officer for the Revere School Department from October 6, 1986, until he resigned effective April 7, 1989. He earned $3,840 in 1986, $19,048.49 in 1987, and $19,148.46 in 1988, according to the Disposition Agreement.

In the Matter of Richard L. Reynolds
(11/15/89)

The Massachusetts State Ethics Commission found that former Saugus Selectman Richard L. Reynolds violated the state's conflict of interest law on two occasions in 1985 by acting as the agent of a family trust before the town's Planning Board in connection with a subdivision plan. The Commission declined to impose a fine in the case.

In a Decision and Order, the Commission said Reynolds violated Section 17 of Massachusetts General Laws c. 268A, which prohibits municipal officials from acting as agent or attorney for anyone other than the municipality they serve in matters of direct and substantial interest to the municipality. The Commission did not fine Reynolds because it found he made "a good faith, albeit ineffectual, attempt" to comply with a formal legal advisory opinion issued to him by the Commission before the violations occurred.

In discussing its decision not to impose a fine against Reynolds, the Commission said it found Reynolds was credible in his testimony that he had not intended to act as the representative of the trust but felt compelled to respond to the Board when he was addressed by it. He sought advice regarding the propriety of representing the trust while he remained a selectman, and he made a good faith, albeit ineffectual, attempt to comply with the Commission's legal opinion. While Reynolds is not entitled to any Section 17 exemptions as a matter of law, his actions, reviewed in the context of a fiduciary relationship to a family trust, do not merit the imposition of a fine, the Agreement said.

In the Matter of John DeOliveira
(12/13/89)

The Massachusetts State Ethics Commission fined former Berkley Selectman John DeOliveira $250 for violating the state's conflict of interest law by signing his wife's employment contract for her job as a Berkley police department dispatcher.

In a Disposition Agreement reached with the Commission, DeOliveira admitted to violating Section 19 of Massachusetts General Laws c. 268A, and agreed to pay the fine. Section 19 prohibits municipal employees from participating in particular matters that affect the financial interest of their immediate family members. "Immediate family" is defined in the conflict of interest law as public employees themselves, their spouses, and both the employee's and spouse's parents, children and siblings.

The Commission imposed the relatively small fine here in view of the fact that the violation of Section 19 consisted of DeOliveira participating in only the formal acceptance and execution of Elaine DeOliveira's employment contract rather than in the actual negotiation of the contract.

CONFLICT OF INTEREST OPINION
EC-COI-89-1

FACTS:

The Board of Trustees of a state institution passed a resolution to assist in establishing a holding company (the Company) for a system of non-profit and for-profit entities which would help produce revenues for the state institution. The Board of the Company would be selected by the institution's Board of Trustees, and would include four (4) institution or subsidiary trustees and two (2) persons specifically identified by their institution positions. The Commission, in EC-COI-84-147, indicated that board members of the Company would be considered state employees within the meaning of G.L. c. 268A.

The Board of Trustees now proposed to adopt the following changes in its organizational structure:

1. Eliminate the Company bylaw provision that empowers the chairman of the Board of Trustees to select Company directors, instead empower the members of the Company (same persons who serve as Company directors) to elect the directors;

2. Eliminate the Company bylaw requirement that the vice-chairman of the Board of Trustees serve, ex-officio, as chairman of the Company Board of Directors; instead empower Company directors to elect Company Board chairman by vote of two-thirds of all voting directors;

3. Eliminate the Company bylaw requirement that four members of the Company Board of Directors must also be members of the state institution's Board of Trustees;

4. Add a Company bylaw requirement that state institution-affiliated persons will always comprise at least one-third of the Company voting directors, but may never comprise one-half or more of the Company voting directors;

5. Amend the Company bylaws to allow all corporate actions to be taken by the vote of a majority of the Company's voting directors present at any meeting at which a quorum exists, except for actions to initiate any new program that impacts certain activities of the state institution or to amend the Company bylaws, which would require a vote of two-thirds of all voting directors.

6. Effect, upon implementation of the proposed Company bylaw requirements, actual changes in the composition of the Company board in order to comply with the new restrictions on board composition described in paragraph 4 above.

The Company would not change its corporate purposes.

QUESTION:

If the organizational changes listed above were adopted, would the Company continue to constitute a state agency for the purposes of G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

A 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." G.L. c. 268jA, §1(p).

In our 1984 opinion, EC-COI-84-147, we found that Company constituted a state instrumentality based on the cumulative effect of its finding that: (1) "the impetus for the formation of the Company came from" the Board of Trustees, (2) the Company performs a governmental function by seeking out and developing new sources of revenue subject to the state institution's control and, (3) that both the selection process and composition of the Company's Board of Trustees were state dominated.

The organizational changes the Board of Trustees proposes to adopt would affect only the third of these factors, but you have asked us to consider all three of these factors in light of these proposed organizational changes and in light of Commission precedent since 1984. Our analysis of all three factors follows.

a. Creation

We decline to revise our conclusion, found in EC-COI-84-147, that the impetus for the formation of the holding company came from the members of the state institution Board, who are state employees, in the form of a resolution to assist in the establishment of a holding company to help produce revenues for the institution. Governmental creation is appropriately found where a state agency, on its own initiative,

resolves to form a non-profit corporation to further its legislatively mandated functions. See EC-COI-88-24. Since 1984, we made it explicit that the status of an entity created in this manner is distinct from one created, for example, pursuant to contract, see EC-COI-88-19, or private will, see EC-COI-84-65.

b. Governmental Function

Similarly, we decline to alter our conclusion, found in EC-COI-84-147, that the holding company performs an essentially governmental function. [The underlying function of searching out new revenue producers for the institution is a government function because this part of the state entity is included within a state institution.] The Legislature has delegated to the Board of Trustees the responsibility for financing and managing the state institution, which includes this entity. Efforts to protect the financial viability of this entity are required by this statutory responsibility. An obligation imposed by legislative authority, such as this one, to advance the public purpose behind the development of new sources of revenue is within the domain of state responsibility. See EC-COI-88-19. The fact that no statute or regulation specifically requires the creation of the holding company is irrelevant so long as the holding company assists in the performance of a function that is statutorily mandated. See EC-COI-84-66. The statutory mandate to raise money is clear.

The holding company will participate in decisions regarding the searching out of new revenue producers for this entity and it is exactly this participation in the state institution's statutory responsibility to protect the financial viability of this entity which distinguishes the holding company from those entities which serve as outside resources to an agency but which are not delegated any authority by the agency they are associated with. See, e.g., EC-COI-85-6; 83-21. The holding company is an entity which is assisting in the work product of a state agency. See EC-COI-86-4. In short, part of the statutorily defined work product of the Board of Trustees includes responsibility for financing and managing this entity and the Company was created out of a desire to fulfill this statutory mandate. See EC-COI-88-24.[1/]

c. Governmental Control Exercisable Over the Company

In concluding that sufficient government control was exercisable over the Company, this Commission in EC-COI-84-147 looked to the state-dominated selection process and composition of the Company's Board of Trustees. Although the organizational changes the Company has proposed would lessen the amount of state control over the selection and composition of the company's Board of Trustees, the degree of control to be retained, as specifically supplemented by other proposed changes in the Company Board's organizational structure, creates a Board where the state institution affiliated members will always number between one-third and one-half of those serving and where that one-third to one-half has control, through the requirement of a two-thirds vote of all voting directors, over any attempts to initiate any new program that impacts the teaching or research activities of the state institution facility or to amend the Company by-laws. Thus, these organizational changes propose not to alter control over precisely those matters that represent the holding company's participation in an essentially governmental function.

Just as we have previously found the fact that a majority of an entity's board of trustees are public officials or employees is not conclusive evidence that an entity is public, see, e.g., EC-COI-84-65, we have also previously found that the fact that a majority of an entity's board of trustees must be selected from the private sector is not conclusive evidence that an entity is not public, see EC-COI-83-74. On these facts, the amount of government control over matters involving the activities of this state entity would be substantial -- a fact not apparent from a cursory look at the affiliations of the total composition of the Board.

Upon consideration of the impetus for creation, governmental purpose, and the substantial amount of governmental control involved, we conclude that the Company would continue to be a state agency were the proposed organizational changes to be adopted and that the application of G.L. c. 268A to the Company Board members and the Board of Trustees of the state institution would continue to be as outlined in EC-COI-84-147.

DATE AUTHORIZED: January 11, 1989

[1/]Even were we to find that, on balance, the Company does not perform functions that are inherently governmental in nature, the governmental origin of and governmental control over this entity would render it a state agency for the purposes of G.L. c. 268A, §1(p).

CONFLICT OF INTEREST OPINION
EC-COI-89-2

FACTS:

You are a full-time employee for the Town (Town). You have also been elected to serve as one of the three commissioners of a Water District (District). The District was created as a body corporate and comprises an area within the Town, although not coextensive with the boundaries of the Town. The District was created to supply water for public safety and domestic purposes and to establish a water distribution system within the District area. The District is managed by a three-member elected board of commissioners who are authorized to act on behalf of the District. Following the recent approval by the voters of the District and the Town Meeting, the District has assumed from the Town the assets, liabilities, contract rights and leases which previously belonged to the Town Water Department. In turn, the District has reimbursed the Town for costs expended for the planning and development of a water supply and distribution system and for the creation of the District.

QUESTION:

Does G.L. c. 268A permit you to serve both as a Town employee and as an elected commissioner of the District?

ANSWER:

Yes, subject to the limitations described below.

DISCUSSION:

As a member of the District, you are a municipal employee for the purposes of G.L. c. 268A. **In the Matter of Norman McMann**, 1988 SEC 379 (Decision and Order, October 24, 1988); **EC-COI-87-2; 82-25.** Three sections of G.L. c. 268A are relevant to your question.

The first, G.L. c. 268A, §19, places certain abstention requirements on you as a District member. Specifically, §19 requires your abstention from participation as a District member in any "particular matter"[1/] which affects the financial interest of a business organization which employs you. Because the Town is a municipal corporation and therefore a business organization for the purposes of G.L. c. 268A, **see, EC-COI-80-111; Attorney General Conflict Opinion** No. 613, you must abstain from participation in any contract, decision, controversy or other particular matter in which the Town has a financial interest.[2/] Because the Town has a direct financial interest in any agreement implementing the transfer of the water distribution system to the District, you must comply with the abstention requirements of §19 in connection with any such agreements. You must also abstain from participation as a District member in matters in which the Town has a foreseeable financial interest. **EC-COI-84-96.**

The abstention requirements of §19 will apply to all acts of participation including your discussion of the merits of a particular matter with other District members, as well as your voting on the matters. **Graham v. McGrail**, 370 Mass. 133 (1976). While §19(b)(1) provides an exemption procedure under which appointed municipal employees may receive permission from their appointing official to participate in a matter, the exemption is not available to you as an elected District official. **District Attorney v. Grucci**, 384 Mass. 525 (1981).

Aside from §19, you are also required to observe the limitations of G.L. c. 268A, §23(b)(2). Under this section, you are prohibited from using your official District position to secure unwarranted privileges or exemptions of substantial value to the Town. Conversely, you may not use your official Town position to secure unwarranted privileges or exemptions of substantial value to the District. In particular, you must keep your Town work schedule separate from your District work schedule.

The law also places certain restrictions on your activities as Town employee. Under G.L. c. 268A, §17, you may not be paid by the Town or act as the Town's agent in connection with any matter in which the District is a party or has a direct and substantial interest. To the extent that the implementation of the water system transfer to the District may require official dealings between your Town Office and the District, you may not perform such duties as a Town employee.[3/]

DATE AUTHORIZED: January 11, 1989

[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/]The abstention requirement applies because of the Town's financial interest, rather than because of any particular financial interest which may apply to you or your immediate family.

[3/]G.L. c. 268A, §20 prohibits you, as a District member, from having a financial interest in an employment contract made by the same District. Based on the information you have provided, however, we conclude that your Town employment contract is not with the District but, rather, is with a different municipal agency. In particular, we find that the enabling legislation created an independently managed and financed entity to provide water to certain Town residents. **See, EC-COI-87-2.**

CONFLICT OF INTEREST OPINION
EC-COI-89-3*

FACTS:

You are the Executive Director of the Group Insurance Commission (GIC), an eleven member state agency which administers the program for group life and health insurance for state, county and municipal employees pursuant to G.L. c. 32A and 32B. The GIC recently selected the John Hancock Mutual Life Insurance Company (Hancock) to serve as the plan administrator for the state's indemnity insurance plan under a competitively bid contract covering a five year period ending on June 30, 1993. The GIC will be conducting periodic evaluations of Hancock's performance as plan administrator during the contract period.

Under recently enacted legislation, St. 1988, c. 164, the GIC is required to conduct an actuarial evaluation of the state's obligations for post-retirement health and insurance benefits for retired state employees, under G.L. c. 32A. The GIC staff does not have the actuarial expertise to carry out this evaluation, which you estimate would cost at least $30,000.00 if performed by an outside consultant. Hancock has volunteered to provide these valuation services to the GIC on a no-cost pro bono basis.

QUESTION:

Does G.L. c. 268A permit you to accept Hancock's offer to provide the actuarial evaluation services on a pro bono basis?

ANSWERS:

Yes, subject to certain conditions.

DISCUSSION:

The GIC is a state agency for G.L. c. 268A purposes, G.L. c. 32A, §3, and its members and employees are state employees within the meaning of G.L. c. 268A, §1(q). Two sections of G.L. c. 268A are relevant to your inquiry.

1. Section 3(b)

Under this section, no employee or member of the GIC may accept for himself anything of substantial value given for or because of any official act performed or to be performed. While Hancock's offer of consulting services to GIC would constitute something of substantial value, **Commission Advisory No. 8**, the acceptance of the offer will not violate §3(b) because the offer will be accepted for use by the agency, rather than for the personal use of an employee. This result is consistent with **EC-COI-84-114**, in which the Commission held that a gift of artwork donated for permanent exhibition in a government agency and not for the personal use of any employee does not violate §3. **See, also, EC-COI-87-23** (no violation where state employee insulates himself from any personal benefit attributable to a gift received for or because of acts performed as a state employee). While §3 might be applied differently where gifts to a government agency also confer a personal benefit to individual employees (such as the donation of telephones for use in an employee's personal vehicle), the Hancock offer appears to confer a benefit solely to the GIC rather than to any employee personally.

2. Section 23

Under this section, a state employee may not use his official position to secure unwarranted privileges of substantial value for himself or others and must also avoid creating the appearance of undue favoritism. Issues under this section will arise for GIC members and employees in connection with their monitoring and evaluation of Hancock's performance as plan administrator. In its evaluation, the GIC may not grant to Hancock any unwarranted treatment and must keep independent the fact that Hancock is providing free consultant services. For example, questions under §23 would arise if, without justification, the GIC overlooked Hancock's failure to perform its obligations under the plan administrator contract. As long as the GIC continues to monitor Hancock's performance under the same objective standards by which it

monitors other contracts, the GIC will not violate §23(b)(2). Further, to dispel any appearance of undue favoritism, the GIC should publicly disclose the fact that it has received free consulting services from Hancock in implementing St. 1988, c. 164.

Finally, §23(c) requires GIC members and employees to abstain from disclosing to Hancock any confidential information, aside from materials which Hancock will need to carry out its actuarial evaluation work.

DATE AUTHORIZED: January 11, 1989

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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.

CONFLICT OF INTEREST OPINION
EC-COI-89-4

FACTS:

You are a member of the General Court. In both your current legislative capacity and in your professional capacity, you have been an actively involved member of a particular profession.

You have been invited to serve as the official speaker on behalf of the state at an out-of-state conference relating to your profession. You will be accompanied by your spouse who will also participate with you in the professional activities. Neither you nor your spouse will receive compensation for your speaking engagements.

Transportation company ABC will provide round-trip transportation for the representatives from Massachusetts at a reduced price. Under an arrangement common with ABC and all other major carriers, ABC sets aside promotional tickets for individuals in the public and private sector who are engaging in activity geared towards your profession. ABC also has the discretion to offer a similar promotional ticket to the spouse or guest of the speaker. That decision depends primarily on the type of trip and the area's social expectations. For example, ABC will provide a promotional ticket for a spouse where social custom during the speaking tour would require an escort or spouse. A trip which requires attendance at only one event, however, might not warrant the issuance of a promotional pass to a spouse. ABC also expects that any spouse who attends an event under a promotional ticket will actively participate in the events and will engage in professional activities on behalf of the region. ABC offered a promotional ticket for your spouse because it determined that the events which you would be attending and hosting required you to be accompanied by your spouse as a matter of social custom in those areas.

QUESTION:

Does G.L. c. 268A permit you to accept promotional rate tickets for you and your spouse to attend the conference?

ANSWER:

Yes.

DISCUSSION:

As a member of the General Court, you are a state employee for the purposes of G.L. c. 268A. Issues under sections 3 and 23 of G.L. c. 268A [1/] are raised whenever state officials accept travel discounts. As a general rule, travel discounts or free trips offered by vendors to state officials who will have official dealings involving those vendors will face close scrutiny under either §3 or §23. See, **EC-COI-82-99; 83-17; 87-7; 88-22; Public Enforcement Letter to Municipal Treasurers 89-1 and 89-2.** Special rules also apply to legislators. As applied to you, we conclude that G.L. c. 268A permits your acceptance of a discounted fare ticket for your promotional activities at the conference.

In 1983, the Commission issued Advisory No. 2 **Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements.** Under these guidelines, a legislator who participates in a legitimate speaking engagement [2/] may receive from the sponsor expenses necessary to making the speech, including transportation to and from the site. On the other hand, if a legislator is not a scheduled speaker but merely a member of the audience, the travel expenses may not be paid by the sponsor. **EC-COI-88-18.**

Based on the information you have provided, we conclude that your speaking engagements are legitimate and that your acceptance of a travel discount from ABC is permissible under the Advisory guidelines. You appear to play a significant role in the representation of the state at the conference. Your presentation and speeches will significantly contribute to the events and are formally scheduled along with other speakers.

The Advisory Guidelines also caution legislators to not accept expenses for a guest in connection with a speaking engagement. These guidelines were based on the language of §§3 and 23 as it appeared in 1983. While the principles of these guidelines remain sound, a 1986 amendment carved out a statutory exemption to §23 permitting discounts and other privileges of substantial value which are "properly available to similarly situated individuals." St. 1986, c.12. In light of this amendment, we reaffirm that legislators may not accept travel discounts for their guests, with a proviso that the guest travel discount may be permitted if offered pursuant to an industry-wide practice. Because the ABC discount was made available to your spouse pursuant to an industry-wide practice available to spouses of officials in the public and private sector, we conclude that your spouse's receipt of a discount will not place you in violation of §23(b)(2). **Compare, EC-COI-88-22** (use of frequent flyer bonus points for personal use found not be available to similarly situated individuals); **87-37** (broad-based computer discounts found to be available to similarly situated individuals); **87-29** (receipt of tax preparation services found to be available to similarly situated individuals); **86-14** (receipt of car discount limited to particular employees found not to be available to similarly situated individuals).

DATE AUTHORIZED: February 8, 1989

[1/] In relevant part, §3(b) prohibits a state employee from accepting anything of substantial value for himself given for or because of any official act or act to be performed. Section 23(b)(2) prohibits a state employee from using his official position to secure for himself or others unwarranted privileges of substantial value and which are not properly available to similarly situated individuals.

[2/] A legitimate speaking engagement is one which is:

1. formally scheduled on the agenda of the convention or conference;

2. scheduled in advance of the legislator's arrival at the convention or conference; and

3. before an organization which would normally have outside speakers address them at such an event. Moreover,

4. the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

CONFLICT OF INTEREST OPINION
EC-COI-89-5*

FACTS:

You were recently appointed as Chairman of the Massachusetts Board of Regents (Board). You have also resigned as a partner of Foley, Hoag & Eliot (Firm) and have become "Of Counsel" to the Firm.[1/] In that capacity, you are a salaried, contractual employee of the Firm and have forfeited the tenure and benefits which you previously enjoyed as a partner. As "Of Counsel", you are ineligible to participate in the Firm's five-member executive committee or the seven-member distribution committee, which make the major management and financial decisions for the Firm. You are also ineligible to vote regarding the Firm's hiring decisions, including whether to accept new partners. Your compensation is fixed and you are ineligible to receive a share of the Firm's profits, discretionary distribution bonuses or deferred compensation. You are not eligible for continued membership in the Firm's Keough plan, and your partnership contribution will be returned to you following the Firm's calculation of the value of your former share.

You will retain the location of your current office, which is located on a floor with partners and associates, and will share the same access to office support resources which is available to all Firm partners and associates. The change in your status has been confirmed internally in the Firm and has been communicated to the news media. Your name appears on the Firm's letterhead as "Of Counsel" and you are not held out by the Firm as a partner.

The Firm has altered its accounting practices to insure that you will receive no portion of any revenue the Firm receives either from state agencies within the official responsibility of the Board or from any of the Firm's private educational institution clients on matters within the official responsibility of the Board. The Firm has a special payroll account out of which employees, but not partners, are paid. The payroll account is segregated from the account into which Firm receipts are paid. You will be paid from the special payroll account. In addition, all receipts from public and private institutions on matters within the responsibility of the Board will be deposited in a

separate account, further segregated from the general accounts of the Firm.

The Firm does represent, and has represented, a number of private educational institutions, including, at various times, Boston University, Newbury College, Boston College, Berklee College of Music, Suffolk University, Williams College, Northeastern University, Harvard University, Curry College, Regis College, Worcester Polytechnical Institute and the Association of Independent Colleges and Universities. The Firm also represents the University of Massachusetts. On occasion, the Firm has represented other institutions which may have an interest in obtaining degree granting authority from the Board. In addition, one of the Firm's partners serves as a member of the Board of Trustees of Mass. Bay Community College (MBCC), an institution within the official responsibility of the Board.

QUESTION:

Does G.L. c. 268A permit you to serve as Chairman of the Board and also as "Of Counsel" to the Firm?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

1. Jurisdiction

Upon your commencing services as a Board member and chairman, you became a "state employee" for the purposes of G.L.c. 268A. In view of the part-time, uncompensated nature of your position, you are also considered a "special state employee" under G.L. c. 268A, §1(o). As a special state employee, you are eligible for certain exemptions, thereby permitting you more opportunities for outside dealings with state agencies than would otherwise apply if you were a full-time state employee.

2. Limitations on Your Private Law Practice

a. Section 4

This section prohibits you from receiving compensation[2/] from or acting as agent or attorney for any non-state party in connection with any decision, contract, or other particular matter[3/] in which you have either participated[4/] or have official responsibility[5/] for as a Board member.[6/] For example, if the Firm were asked to represent a private university client in connection with an accreditation or licensure proceeding from the Board, you could neither represent the client nor receive compensation from the client in connection with the representation.

Because the definition of compensation includes fees received by you for the services of others in the Firm, you will be required to segregate your compensation from the fees which the Firm receives for its representation of clients in Board matters. The payroll accounting steps which you and the Firm have adopted to segregate your income appear sufficient to avoid your indirectly receiving compensation in connection with matters under your official Board responsibility. See EC-COI-85-21.

b. Section 7

This section generally prohibits a state employee from having a financial interest in a contract made by a state agency. As a special state employee, however, you may have a financial interest in contracts made by a state agency in whose activities you neither participate nor have official responsibility for as a Board member, following your submission to the Commission of a disclosure of the financial interest pursuant to §7(d). Although your opinion request does not specify whether you intend to consult to or represent any state agencies in your private practice, the exemption conditions, including disclosure, will need to be observed whenever such opportunities arise for you. The fact that the Firm may represent state agencies under the Board's jurisdiction will not place you in violation of §7 as long as you have no financial interest in those contracts and refrain from working for the Firm under those contracts. In this regard, the Firm's maintenance of its payroll account segregation procedure will avoid your indirectly receiving fees derived from the Firm's contracts with state agencies within and outside of the Board jurisdiction.

3. Limitations on Your Official Activities as a Board Member

a. Section 6

This section, in relevant part, prohibits your official participation as a Board member in any particular matter in which either you or the Firm has a financial interest. Included within the matters requiring your abstention will be all matters in which the Firm is representing a private or public sector client before the Board. The abstention requirement will also apply to matters in which the Firm has a reasonably foreseeable financial interest. EC-COI-84-96. For example, if the Board is considering a decision which will generate

additional legal work for the Firm in its representation of a public sector institution, §6 will require your abstention from that decision.[7] Two limited exemptions to §6 do not appear to be relevant, inasmuch as you state that you intend to abstain from any discussion or vote on Board matters in which the Firm represents a client. The first, §6(3), permits your participation in such matters following the receipt of written permission of your appointing official. The second, contained in G.L. c. 15A §2, permits participation by Board members in certain matters affecting educational institutions with which such members are affiliated. As long as you continue to abstain officially from matters involving the Firm, these exemptions will not come into play.

b. Section 23

As a state employee, you are subject to certain standards of conduct appearing in G.L.c. 268A, §23. Specifically, you may not use your official Board position to secure for yourself or others unwarranted privileges or exemptions of substantial value, and you must avoid creating the reasonable appearance of undue favoritism. Issues under this section could arise in light of the fact that one of the firm's partners sits as an unpaid member of the Board of MBCC, an institution within the Board's official responsibility. Your intention to abstain from official participation in any matter in which the partner has participated as trustee will avoid your exercising any actual or apparent favoritism toward MBCC in violation of §23. You must also bear in mind the confidentiality restrictions of §23(c) and refrain from disclosing to the Firm any confidential information which you have acquired as a Board member.

4. Limitations on Firm Partners

Prior to your appointment as Board chairman, you were a partner of the Firm. Were you to retain your partnership while serving on the Board, your partners would share the restrictions which G.L.c. 268A places on your private law practice. Specifically, §5(d) would prohibit your partners from receiving compensation from or acting as agent or attorney for any non-state client in connection with any particular matter in which you have participated or which is within your official responsibility as a Board member.

Based on the information you have provided, we conclude that you are no longer a partner of the Firm for the purposes of §5(d) following your resignation as a partner and your assuming "Of Counsel" status to the Firm. To be sure, the Commission has recognized that a change in title does not avoid creating the appearance of partnership status if an individual retains the attributes of partnership and is held out by the Firm to be a partner. See EC-COI-80-43. Because arrangements such as "Of Counsel" do not have a uniformly accepted meaning among law firms, the Commission will examine the substance of the relationship between an attorney and a firm to determine whether the appearance of a partnership exists. See EC-COI-83-81; 82-68. Our conclusion that no actual or apparent partnership between you and the Firm exists is based on:

1. your public announcements that you were resigning your partnership;

2. the appearance of your "Of Counsel" status on the Firm's letterhead; and

3. the terms of your new arrangement under which you will forfeit the benefits available to partners, including the sharing of profits and voting at firm management and financial committee meetings.

This conclusion is consistent with Commission opinions which have found other "Of Counsel" arrangements to lack the attributes or appearance of partnership. See EC-COI-89-7; 86-11. Should your relationship with the Firm change in any material way during your tenure as Board chairman, however, this conclusion will need to be re-examined in light of those changes.[8]

5. Post-State Employment Limitations

Following the completion of your membership on the Board, you will be considered a former state employee. Section 5 of G.L. c. 268A places certain limitations on the post-employment activities of former state employees and their partners. As applied to you, §5(a) will prohibit your receipt of compensation from or acting as agent or attorney for a non-state party in connection with any particular matter in which you previously participated as a Board member. Should you return to your partnership status with the Firm during the one-year period following the completion of your Board services, the restrictions of §5(a) will also apply to your partners during that one-year period. G.L. c. 268A, §5(c). These restrictions will not apply, however, if your retain your "Of Counsel" relationship during the one-year period following the completion of your Board services.

Aside from §5(a), you will also be prohibited from appearing personally before any state court or agency in connection with any particular matter which was within your official responsibility as a Board member (whether or not you abstained from participating in the

matter) during the two-year period prior to the completion of your Board services. G.L. c. 268A, §5(b). This prohibition, which will last for one year following the completion of your Board services, applies to your oral and written communications, EC-COI-87-27, but does not apply to Firm partners or employees.

DATE AUTHORIZED: March 8, 1989

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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/At the time of your advisory opinion request, you were aware that if you were to retain your partnership status, Firm partners would be precluded from representing private clients in connection with matters within the official responsibility of the Board. Therefore, you choose to resign as a partner.

2/"Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

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/"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).

6/If you serve for more than 60 days in any 365-day period, the §4 restrictions apply to all matters pending in the Board. For the purposes of this opinion, the matters within your official responsibility are co-extensive with matters pending in the Board.

7/We will presume that the Firm has a financial interest in all matters in which it represents clients for a fee.

8/The fact that you may one day apply to return to the Firm as a partner does not, without more, make you a continuing partner for G.L. c. 268A purposes during the period of your "Of Counsel" status. If you were on leave of absence from the partnership and were granted Firm benefits comparable to partners during your leave, however, we might be inclined to reach a different result. Cf. EC-COI-84-46 (status as a state employee continues during a leave of absence in which an employee retains certain state employment benefits). We do not reach such a result in your case, inasmuch as you have resigned from the partnership and have no right to return to your former status, and you do not receive the same benefits which are available to Firm partners.

CONFLICT OF INTEREST OPINION
EC-COI-89-6

FACTS:

Recently, the City Facility Committee (Committee) and ABC, a non-profit corporation, entered into a consultantship agreement, whereby ABC agreed to design, staff and execute a study of the facilities of the City, and the Committee agreed to pay ABC a specific fee. Pursuant to the consultantship agreement, ABC presented the Committee with a comprehensive plan.

ABC and the Committee are currently negotiating a second agreement which will implement the plan. Although the final terms of this agreement have not yet been determined, a draft contract (Contract) outlines the undertakings of the parties and represents the basic structure by which both parties seek to revitalize facilities of the Committee.

The terms of the contract can be summarized as follows: The Committee will delegate to ABC all of its authority and responsibility for the management, supervision and oversight of the city facilities. ABC will develop curriculum and instruction, including the training, supervision, and evaluation of all personnel. In addition, ABC will conduct hearings; set compensation for employees, subject to all applicable laws and agreements; have authority to recruit, hire, appoint, evaluate, promote, assign, fire, suspend and dismiss employees and consultants; and conduct collective bargaining. The Committee will also delegate to ABC its powers, functions and duties

relating to city finances, including the authority to determine expenditures within the total appropriation. Also, ABC will have authority to accept and expend gifts and grants, to prepare budgets, incur liabilities, and make expenditures for the facilities. Furthermore, ABC will prepare the annual budget, apply for and seek funds in the name of the Committee, and make contracts and agreements on behalf of the Committee. Except as provided for in the contract, no vote of the Committee shall be required in order for ABC to exercise any powers delegated to it in the contract.

ABC will provide appropriate resources to undertake the training of employees and will be solely responsible for determining which ABC personnel and resources will be utilized in the implementation of the contract. ABC will provide monthly reports to the Committee and semi-annual reports to the governing body of the city. The Committee will be informed of funding goals, income projections, and budgetary changes.

The Committee retains the following powers in the contract, although it is understood that the final agreement may give the Committee somewhat expanded powers to override certain ABC decisions. The Committee will receive timely reports from ABC in the implementation of the system. By majority vote, the Committee can require ABC to reconsider (1) the adoption of policies affecting the facilities as a whole, (2) the adoption and submission of the annual budget, (3) the adoption of employee collective bargaining agreements, and (4) new appointments of the administrative officers. ABC shall then reconsider its decision and report its decision after reconsideration, which will be final, except if it involves a matter subject to override.

By two-thirds vote, the Committee will have the power to override acts of ABC regarding the adoption of policies affecting the facilities as a whole; the adoption and submission of the annual budget; and the adoption of collective bargaining agreements. Thus, the Committee will be able to require reconsideration of new appointments but shall not be empowered to override ABC decisions on such matters.

Currently, the contract states that the Committee will indemnify and hold harmless ABC, its officers, trustees, employees and agents from and against all losses, damages, liabilities, costs and expenses. It is our understanding, however, that this clause is subject to change. The Contract as it now stands also provides that ABC employees will not be subject to, among other statutes, the conflict of interest law, G.L. c. 268A.

The parties acknowledge that improvement of the facilities is one of the highest priorities of the city and commit themselves to a good faith effort to increase the available financial resources. If either party believes that insufficient funds will be available in order to carry out the project, they will have the right to terminate the contract upon timely notice and the performance of certain conditions.

The contract will take effect upon its execution and upon adoption of local ordinances and revisions of the city charter. In addition, the General Court must enact enabling legislation.

No individual employed by ABC is specifically named in either the contract or the draft legislation. ABC is empowered to perform the wide variety of functions contemplated in the contract. It is expected that the entire program will be administered by an ad hoc committee. No ABC personnel will assume roles within the facilities. Each ABC employee who works on the project will receive compensation from ABC. Facility employees will receive their compensation from the city.

QUESTION:

On the basis of the foregoing facts, are ABC employees "municipal employees" or "special municipal employees" under G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

We note at the outset that the arrangement envisioned by the contract and accompanying legislation is unique in that it delegates virtually all management powers of a municipal agency to a private entity. Because of that uniqueness, the consequent uncertainty as to how the contract will ultimately be performed, and the fact that contract provisions are still subject to change, we stress that this opinion is based solely upon the facts given to us in your recent letters and the contract.

"Municipal employee" is defined as "a person performing services for a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation on a...consultant basis..." G.L. c. 268A, §1(g). Thus, it is not necessary to be a paid, full-time, city worker in order to fall within the statutory definition of "municipal employee." Even uncompensated

consultants to city government are "municipal employees" under the conflict law. For example, an architect or engineer who renders professional services directly to a city or town agency would be a "municipal employee." Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U. Law Rev. 299, 311 (1965).

The Commission has long recognized that a consultant contract between a municipality and a corporation will not render the corporation a "municipal employee." In most instances, employees of such corporations will not come within the statutory definition of "municipal employee." **See EC-COI-87-8** (most corporate employees are "too remote" from the municipality to be considered municipal employees); **EC-COI-83-129** (employees of corporate consultants not generally considered "municipal employees"). If the municipality specifically targets a certain individual within the corporate structure to perform the services, however, that individual will be considered a government employee under G.L. c. 268A. **See, EC-COI-86-21** (state agency specifically requested corporate employee), **83-129** (state specifically contemplated corporate employee's services and had contractual right to approve replacement). In practical terms, specifically designated employees of a corporation are treated as if they are consultants to a governmental agency and therefore covered by G.L. c. 268A.

The contract in this instance mentions no ABC personnel; however, that fact will not always operate to exempt from "municipal employee" status individuals who are nevertheless targeted by the municipality. **See EC-COI-87-8** (individual not specified in agreement found to be "municipal employee" as city impliedly contracted for his specific services). Therefore, we must examine the following factors before determining whether a corporate employee not specifically designated in a municipal consulting contract can be considered a "municipal employee":

1. Whether the individual's services are expressly or impliedly contracted for;

2. The type and size of the corporation. For example, an individual who is president, treasurer and sole stockholder of a closely held corporation may be deemed a public employee if the corporation has made a contract with a public agency;

3. The degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to the agency;

4. The extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or services provided thereunder and;

5. The extent to which the person has performed similar services for the public entity in the past.

EC-COI-87-19; 87-8.

Applying these criteria to the facts as outlined above, we conclude that ABC personnel working on the plan are not "municipal employees."[1/]

ABC employs many individuals and operates on a substantial budget. Given the size of ABC and the variety of services which will be provided, there is little likelihood that ABC employees are attempting to hide behind corporate employee status in order to be exempt from the conflict law. **Compare EC-COI-87-8** (sole owner and officer of corporation employing three individuals held to be state employee as his services were impliedly contracted for by the state agency). As this is the first time that the city has contracted for the services contemplated in the agreement, there is no history of actual services rendered upon which the Committee can rely in order to target specific ABC personnel. Although Committee members have developed relationships with certain high-ranking ABC officials through the consultantship agreement, we do not find that the Committee has impliedly targeted the services of those particular individuals through the contract. The choice of ABC personnel is within the sole province of ABC; the Committee has no right to override those choices or to demand the services of any specific ABC personnel. Thus, the Committee has not impliedly contracted for the services of any ABC employee.

Although the facts here are unique, the Commission has previously decided one similar question which involved a public entity's delegation of management authority to an outside corporation. We examined the five factors listed above in finding that the facility manager was a governmental employee. **EC-COI-87-19**. However, that finding was grounded on the fact that the manager had a history of previous service in the same position with the public entity, that he provided a high degree of specialized service, and that the government had specifically contracted for his services. Thus, we require the presence of a number of factors before asserting jurisdiction. The sole factor present in this instance is the high degree of

specialized services which will be performed by as yet undetermined personnel. We do not find that this fact alone will render those individuals "municipal employees."

With this opinion, we do not comment on the wisdom of the plan or its constitutional permissibility. We answer only your immediate question, and use our standard of the need for either an express or implied governmental request for services. Applying that standard to the facts in this case, we find that the Committee has not and cannot designate specific ABC employees for work on the plan. Rather, the Committee has delegated authority to ABC as a corporate entity. Therefore, we conclude that ABC personnel will not be considered municipal or special municipal employees under the conflict law. As stated, this opinion is based on the facts contained in the contract and your earlier letters. Should the performance of the contract lead to results materially different from those contemplated therein, we advise that you renew your request for an opinion based on those facts.[2/]

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[1/]By extension, they cannot be considered "special municipal employees," as that term necessarily encompasses only "municipal employees." G.L. c. 268A, §1(n).

[2/]For example, if it has been the expectation of the parties that the plan will be administered by specific individuals, we would need to reconsider our result with respect to those individuals. In such or similar event, we will consider the present opinion as preliminary.

CONFLICT OF INTEREST OPINION
EC-COI-89-7*

FACTS:

You recently completed a five-year term as Secretary of the Executive Office of Environmental Affairs (EOEA). As Secretary of EOEA, a cabinet-level agency, you had responsibility for implementing and overseeing all state policies aimed at preserving, protecting and regulating the natural resources and the environmental integrity of the Commonwealth, and for supervision of all departments that comprise EOEA -- the Metropolitan District Commission (MDC), the Massachusetts Water Resources Authority (MWRA), the Department of Environmental Quality Engineering (DEQE), the Department of Environmental Management (DEM) (including the Division of Water Resources and the Water Resources Commission), the Department of Food and Agriculture (DFA), and the Department of Fisheries, Wildlife and Recreational Vehicles (DFW&RV) -- as well as the three operating units within EOEA that reported directly to the Secretary: the Division of Conservation Services (DCS), the Massachusetts Environmental Policy Act and Review Unit (MEPA), and the Office of Coastal Zone Management (CZM).

During your term as EOEA Secretary, you regularly met and worked with all of these agencies on the development of their rules and regulations and of specific environmental policies, including policies with respect to the disposal of solid, hazardous and radioactive wastes. In connection with the work of the three EOEA operating units, you personally participated in one way or another in the decisions on most of the particular matters which came before them. In the case of the departments, however, the specific application of rules, regulations and policies to particular situations was typically the responsibility of and performed by the department heads themselves, with little or no participation by you.

The most significant exception to this departmental pattern was the MWRA, on whose Board of Directors you served, by virtue of its enabling act, as ex officio member and Chairman from its creation in January, 1985 through December 2, 1988. In that capacity, you participated in the decisions regarding all of the MWRA's activities, particularly its operation of the wholesale water and sewer functions for forty-three cities and towns, including the City of Boston, in eastern Massachusetts, the launching of its multi-billion dollar Boston Harbor clean-up program, and the development of short and long-term plans for protecting and augmenting the water supply for eastern Massachusetts.

As of January 3, 1989, you became Of Counsel to the law firm of Choate, Hall & Stewart (the firm), at 53 State Street, Boston, Massachusetts. The firm, a general partnership consisting of fifty-five partners, three of counsel and eighty-five associates, is engaged in the general practice of law, with emphasis on litigation and on corporate, securities, banking, creditors' rights, tax, real estate, health care, trust, probate, labor, land use and environmental law. You will not be described or held out by the firm as a partner of the firm. Your financial arrangement with the firm will involve an annual fixed salary, with a

prospect of a possible merit bonus (not measured by profits) at the end of each year's employment. You will have no "equity" interest of share in the profits of the firm (including any profits from business which you may originate); will not be responsible for contributing to any losses or to any capital or operating expenses; will not have any interest in the assets of the firm; and will not have a vote on partnership decisions, although it is anticipated that you will attend most partnership meetings and functions and participate in discussions of matters affecting the area of practice in which you will be involved. As is the firm's policy with respect to lawyers who become "Of Counsel" to the firm, after a period of anywhere from one to three years, you shall, if you choose to remain with the firm, become eligible to request consideration for partnership on the same basis as all other candidates for partnership. No promises or guarantees of partnership have, however, been made to you.

As "of counsel" to the firm, you shall be engaged full-time in assisting and advising the firm's Land Use and Environmental Law Practice Group, under the direction of its Chairman, Donald L. Connors. This group's practice involves all aspects of the regulation of the use and development of land and other natural resources and consists of advising public and private clients on local, state and federal laws, assisting them in obtaining required licenses and permits for their desired activities, assisting them in complying with applicable laws and regulations, and assisting them with respect to environmental policy analysis, initiatives, and legislation/regulation. It is presently anticipated that your legal efforts will concentrate on assistance to lients concerning solid waste management and facility operations but will also involve advice to clients regarding compliance with land use and environmental legal requirements and assistance with the firm's land use and environmental consulting practice. Because of your concentration in this area of practice, it is likely that your official title will be "environmental counsel" to the firm, rather than merely "of counsel."

You are now a former state employee and seek guidance regarding the application of G.L. c. 268A to the work you propose to do for the firm's Land Use and Environmental Law Practice Group.

QUESTION:

What are the general principles and definitions under G.L. c. 268A that would apply to you as a former state employee?

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, five paragraphs of G.L. c. 268A are relevant to your situation.

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 Secretary of EOEA.

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.

A "particular matter" includes any application, submission, request for ruling, decision or determination. G.L. c. 268A, §1(k). The environmental impact review process on a particular project, culminating in an environmental impact report, is a particular matter within the meaning of the statute. Although the Secretary makes several different decisions at different stages in the process of producing the report, each of these decisions is not a different particular matter in that each is a related step in the development of the final environmental impact report. We have indicated that an entire project is not one particular matter where the different phases of the project are distinct and distinguishable, see EC-COI-85-22, but we decline to extend that analysis to the various stages of development of an environmental impact report where the decisions made, although technically distinct, clearly involve the same particular matter. See EC-COI-84-31.

Participate is defined in G.L. c. 268A, §1(j) as to participate in a particular matter "personally and substantially." Not all participation by a government employee will be deemed personal and substantial. "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." **In the Matter of John Hickey**, 1983 SEC 158, 159.

We have indicated that participation that is ministerial and after the fact is not substantial. The forwarding of a letter, for example, is not personal and substantial, **In the Matter of Paul H. Sullivan**, 1988 SEC 340 (Commission Adjudicatory Docket No. 319), and that providing general information to decision-makers may not constitute personal and substantial participation in the decision eventually made, **EC-COI-82-82.** Participation that is superfluous, non-determinative, or not part of the decision-making process is more likely to be deemed ministerial. **See, e.g. EC-COI-82-138; EC-COI-82-46.**

Participation in discussions involving a particular matter is not ministerial, however. **See Graham v. McGrail**, 370 Mass. 133 (1976). Approving a recommendation made by a subordinate is not ministerial. **See EC-COI-86-6; EC-COI-86-3.** The act of merely assigning complete responsibility for reviewing and approving or responding to filings by parties involved in the environmental impact review process to one of your undersecretaries would not be deemed personal and substantial participation in that matter on your part in that you would play no role in the decision-making process. Similarly, the fact that the undersecretary would prepare and sign, over your typewritten name, the responsive document without any further involvement or oversight by you is not enough for you to be deemed to have participated in the matter. Your typewritten name, in this context, would only indicate that you had authorized them to respond. Were you to play an active oversight role, however, your awareness of and tacit approval of the work of your direct subordinates could then constitute participation within the meaning of the statute. **See, EC-COI-79-57.**

You would have had official responsibility for all MEPA matters assigned to your undersecretary, however. We have indicated that something a subordinate does may still be within your official responsibility. **See, e.g. EC-COI-85-11; In the Matter of Donald P. Zerendow** 1988 SEC 352 (Commission Adjudicatory Docket No. 357). Official responsibility turns on the authority to act, and not on whether that authority is exercised. **EC-COI-84-48; EC-COI-83-37;** Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. Law Rev. 299, 321 (1965). The fact that these comments would be signed over your name would be further evidence that the matter was within your official responsibility as were all particular matters filed in the EOEA and the departments that comprise EOEA, including the independent agencies like the MDC and the MWRA, during your tenure as Secretary. This is consistent both with the broad legislative mandate the Secretary receives to supervise the entire EOEA, see G.L. c. 21A, §1, and the general intent of the conflict law that section 5(b)'s restrictions become greater, the greater the authority found in the former state employee's position.

To summarize the restrictions placed on you by paragraphs 5(a) and (b), then, you are forever barred from acting as agent or attorney for anyone other than the state in connection with particular matters in which you personally participated as the Secretary, and you are barred for one year from appearing before the state in connection with those particular matters that were within your official responsibility, i.e., all matters pending within EOEA and its departments, during your last two years of service as the Secretary.

Section 5(e)

This paragraph prohibits you from acting as legislative agent[3/] for anyone other than the Commonwealth or a state agency before any EOEA agency or unit within one year of the time you left EOEA. **See EC-COI-85-52.** You may, as a result, act as legislative agent for someone other than the Commonwealth before any non-EOEA agency, provided that the other provisions of section 5 are not violated. You should note that the Commission has indicated that acting as a legislative agent includes any act done to promote, oppose or influence legislation. **In the Matter of Cornelius J. Foley, Jr.**, 1984 SEC 172. This broad definition of lobbying promotes section 5(e)'s purposes whether or not the former state employee involved is a former legislator or legislative staff member. The potential for abuse of special knowledge of or access to a state agency is not limited to former legislators or legislative staff members.

Section 5(c)

This paragraph prohibits any partner you might have, for one year period following the termination of your employment by the Commonwealth, from engaging in any activity in which you are prohibited from engaging by section 5(a) of the statute. In that you will not be a partner of the firm, the partners of the firm will not be constrained by this section of the statute.

Although the term "partner" is not restricted to those who enter into formal partnership agreements, **EC-COI-80-43**, we find nothing in the "of counsel" or "environmental counsel" relationship you describe that

would cause us to impute partnership status to you. In particular, the receipt of a merit bonus of the size normally awarded to an associate and your non-voting attendance and participation in partnership meetings (a role consistent with that played by senior associates at the firm) will not, without more, trigger partnership status. Your identification as "of counsel" or "environmental counsel" on firm documents and your salary arrangement indicate that section 5(c) does not apply to the firm. See EC-COI-88-11.

Section 23(c)

This paragraph prohibits you from disclosing confidential information which you acquired as the Secretary, or from engaging in professional activities which would require your disclosure of such confidential information. We have previously defined "confidential information" as information that is unavailable to the general public. EC-COI-85-23. This is to be distinguished from information that, although not well known, is a matter of public record.

DATE AUTHORIZED: February 8, 1989

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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. 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/"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i).

4/The statutory definition of legislative agent contained in G.L. c. 3, §39 includes "any person who for compensation or reward does any act to promote, oppose or influence legislation."

CONFLICT OF INTEREST OPINION
EC-COI-89-8

FACTS:

You are a member of the General Court. An immediate family member owns a retail business near a particular site. Although he has closed the business, your family member may be interested in reopening if other businesses are located at the site. Legislation is pending before the General Court which, if enacted, would notwithstanding any general or special law to the contrary, require a specified state agency to relocate its offices to the site. Your family member would likely benefit from the relocation and the resulting consumer patronage should he re-open the business.

QUESTION:

Does G.L. c. 268A permit you to pursue your co-sponsorship, advocacy or vote on behalf of the legislation?

ANSWER:

No.

DISCUSSION:

As a member of the General Court, you are a state employee for the purposes of G.L. c. 268A. As a state employee, you must abstain from official participation[1/] in any particular matter[2/] in which a member of your immediate family[3/] has a financial interest. The propriety of your continued sponsorship, advocacy, voting and participation in connection with the enactment of the legislation will turn on (1) whether the bill is a particular matter within the meaning of §1(k) and (2) whether your family member has a financial interest in the enactment of the bill.

1. Particular Matter

Each decision or determination made by a state agency, including the General Court, is a particular matter unless an exemption applies. With respect to the legislative enactment process, the definition of particular matter expressly excludes the enactment of general legislation and implicitly retains the inclusion of special legislation. It has therefore been well-

established under Commission and Attorney General precedent that the enactment of special legislation is a particular matter for the purposes of §1(k). **EC-COI-82-169; Attorney General Conflict Opinion No. 578.**

The feature which distinguishes special from general legislation is the particularity of the scope and purposes of the act's provisions. See, Sands, 2 **Sunderland Statutory Construction** §40.01 **et seq.** (4th ed., 1973). For example, in **EC-COI-85-69**, the Commission concluded that proposed comprehensive legislation creating a permanent development bank to provide assistance to all cities, towns and counties as well as to the Commonwealth was general legislation, in light of the permanence and general application of the act's provisions. The Commission reached a similar result in **EC-COI-82-153** with respect to a proposed bill permitting the State Racing Commission to conduct off-track betting in those communities which accepted the provisions of the act. As a general rule, legislation which is intended to be permanent, which amends the General Laws, and which establishes rules which are uniformly applicable to all individuals or organizations similarly situated will be regarded as general legislation.

On the other hand, legislation which is temporary, which does not amend the General Laws, and which creates an exception or special rule which does not apply to other similarly situated individuals or organizations will be regarded as special legislation. For example, in **EC-COI-85-69**, the Commission concluded that a bill increasing the bonding authorization for a state authority and creating an exemption from the existing bond authorization process was a special bill, given the limited scope and purpose of the legislation. Similar results have been reached in **EC-COI-80-46** (legislation transferring state-owned land in a municipality), **80-9** (annual budget approval for line item in county budget), **82-175** (home rule legislation affecting the payment by one municipality of retirement supplements to its retired employees). Moreover, legislation which practically affects a single community is regarded as special legislation, even where the act is drafted in more general terms, see, **Belin v. Secretary of the Commonwealth**, 362 Mass. 530, 534-535 (1972) or where it is inserted as a condition restricting the receipt of local aid funds by a particular community. **Mayor of Boston v. Treasurer and Receiver General**, 384 Mass. 718, 722-724 (1981).

Based on these principles, we conclude that the legislation is a special legislation and therefore a particular matter. The bill does not amend the General Laws but instead creates an exception to those laws by providing that its provisions will apply "notwithstanding the provisions of any general or special law to the contrary." More significantly, the practical effect of the bill is to require a particular state agency to relocate its offices to a specific address. The particularity of the state agency and the proposed relocation address make a special bill which, by its purpose and effect, can be distinguished from bills which the Commission has found to be general legislation. **See, EC-COI-85-69; 82-153.**

2. Financial Interest

In order to invoke the abstention requirements of §6, the particular matter must be one in which your immediate family member has either a direct or reasonably foreseeable financial interest. **EC-COI-84-96.** Financial interests which are too remote or speculative do not require disqualification under G.L. c. 268A. **EC-COI-87-16; 87-1.**

We conclude that your family member has a reasonably foreseeable financial interest in the enactment of the legislation. His decision to close the shop was the direct result of the departure from the area of a business which could provide patronage. The viability of his business, whether for the purposes of deciding to reopen or to sell out, is dependent on the existence of a property tenant with employees. The enactment of the bill would increase the number of the shop's potential customers and foreseeably affect the value of his business.

Because your immediate family member has a financial interest in the legislation, you must abstain from participation in the legislative consideration of the bill. The prohibition will cover your continued co-sponsorship, legislative advocacy and voting in connection with the bill. We are aware of no exemptions under §6 which are available to you as an elected official and which would permit your participation. **EC-COI-82-91.**[4/]

DATE AUTHORIZED: March 8, 1989

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

[2/] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination,

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

3/"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. The father of your spouse is an immediate family member.

4/This opinion addresses the application of G.L. c. 268A to your prospective activities and does not constitute a review or evaluation of conduct which has already occurred.

CONFLICT OF INTEREST OPINION
EC-COI-89-9

FACTS:

You are a newly elected member of the General Court. Prior to January 1, 1989, you were the co-owner and president of ABC, a family owned company. You purchased the business in 1983, and you and your wife served as co-owners until 1989. Both of you worked in the business, which operates out of an office located at your residence which you and your wife jointly own. The business was incorporated in 1987 with you serving as president and your wife as treasurer.

In 1988, you turned the business over to your wife for no consideration and relinquished your corporate presidency. Since January, 1989 you no longer receive compensation for any services for ABC. You are frequently in the ABC office, however, and answer questions from customers and your wife. You continue to assist your wife in making business decisions relating to the operation of ABC. Although you are not present in the office during most working hours, you participate in the management of the business, albeit not as the company president.

You indicate that in March, 1989, you and your wife may jointly purchase a building in which you would relocate the operation of the ABC business. ABC provides pest control services to somel state, county and municipal agencies.

QUESTIONS:

1. Do you have a financial interest in contracts made by ABC?

2. Assuming that you do, does G.L. c. 268A permit you to retain your financial interest in contracts made by ABC with state, county and municipal agencies?

ANSWERS:

1. Yes.

2. The propriety of your retaining your interest in these contracts is subject to the discussion set forth below.

DISCUSSION:

1. Financial Interest

As a member of the General Court, you are a state employee for the purposes of G.L. c. 268A. As a state employee, you are subject to the restrictions of G.L. c. 268A, §7 which, with certain exceptions, prohibits a state employee from having a financial interest in a contract made by a state agency. Until 1989, you had a financial interest in contracts made by ABC with state agencies in light of your relationship with ABC as a co-owner and president who received income for your services. Notwithstanding your recent divestiture to your wife of your interest in ABC, we conclude that you retain a financial interest in ABC and, therefore, in any contracts made by ABC. In effect, the financial interest which your wife may have in contracts made by ABC will continue to be attributable to you.

In determining whether the financial interest of a non-state employee spouse is attributable to the state employee spouse, the Commission will examine the divesture and subsequent relationship to ascertain whether the employee can fairly be said to still have a financial interest in the spouse's contract. Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U. Law Review, 299, 375 (1965). Where, notwithstanding divestiture, a state employee retains either a role in the management or control of the spouse's company, or an unliquidated financial stake in the company, the Commission will attribute the spouse's financial interest to the state employee. On the other hand, where the spouse's business is independently capitalized, and where the spouse does not look to the state employee to share in the management or control of the business, the Commission will not deem attribution warranted. See, EC-COI-83-111 (attribution found where state employee transferred to his spouse for no consideration land to be sold to employee's state agency); 83-37 (attribution found where state employee transferred partnership interest to spouse for no

consideration and spouse had no prior experience in partnership business); 83-125 (attribution found where state employee capitalized spouse's company, operating out of their home, and where employee regularly participates in company's financial decisions); 85-24 (attribution found where employee shares in management and control of spouse's business); 83-123 (no attribution found where state employee transfer was based on an arm's length transaction and asset liquidation to spouse who had independent experience in business).

In light of these principles, we conclude that you retain a financial interest in your spouse's company and that her financial interest in contracts made by the state will be attributed to you for the purposes of §7. Our conclusion is based on the fact that

(a) no money passed hands in your transfer of the business to your wife;

(b) your initial investment in the company was not liquidated;

(c) you continue to participate in the management and control of the company; and

(d) you continue to own the property from which the business operates, and would continue to do so under your proposed relocation plans.

While a restructuring of your relationship with ABC might lead to a reconsideration of this conclusion, EC-COI-84-13, any restructuring would have to remove you from any continuing financial or managerial relationship with ABC.

2. **Application of G.L. c. 268A**

In light of the foregoing, you have a financial interest in any contract made by ABC. To the extent that ABC contracts with state agencies such as a community college and a state correctional facility, your financial interest in those contracts will violate §7. No exemption is available to you because the propriety interest of you and your family in ABC exceeds 10%. G.L. c. 268A, §7(c). Under §7(a), you will have thirty days from receipt of this opinion to divest your financial interest in these contracts.

Nothing in G.L. c. 268A prohibits you from serving as a member of the General Court and having a financial interest in a contract made by a county or municipal agency such as a housing authority. Should matters came before you in your legislative capacity involving any of the county or municipal agencies with which ABC contracts, you should observe the safeguards and limitations of G.L. c. 268A, §23. In particular, prior to your legislative participation in such matters, you should publicly disclose the relevant facts. G.L. c. 268A, §23(b)(3). You may satisfy the disclosure requirement with either a letter to the Commission or a notice of the Clerk of the House of Representatives to be inserted in the House Journal.[1/]

DATE AUTHORIZED: March 8, 1989

[1/]We understand that you also serve as a member of a municipal agency. While G.L. c. 268A, §20 would limit your having a financial interest in a contract made by the municipal housing authority, a municipal agency, your financial interest may be eligible for an exemption under §20(b). We suggest that you review the enclosed §20(b) exemption conditions, particularly the public advertising or competitive bid requirements, and renew your request with us regarding this contract once you have ascertained the relevant facts.

CONFLICT OF INTEREST OPINION
EC-COI-89-10

FACTS:

You are currently Commissioner for a county and your present term expires in 1990. You expect to join a consulting firm as a consultant in the near future and will represent clients in real estate and health care issues before municipal, state and federal agencies. You also may act as legislative agent for private clients before the General Court. You have previously served as a member and employee of the General Court, and as a consultant to a state agency.

QUESTION:

What limitations does G.L. c. 268A place on your proposed activities?

ANSWER:

You will be subject to the limitations set forth below.

DISCUSSION:

In your capacity as a County Commissioner, you are a county employee for the purposes of G.L. c. 268A.[1/] Three sections of G.L. c. 268A are relevant to your question.

1. Section 11

This section limits your activities on behalf of the firm. Under §11 you may neither be paid by the firm or a client nor represent the firm or a client in connection with any decision, contract, claim or other "particular matter"[2] in which the county or a county agency is either a party or has a direct and substantial interest. Prohibited matters under §11 would include decisions regarding the use of county retirement funds, **In the Matter of James Collins**, 1985 Ethics Commission 228, 230; county insurance contracts, **EC-COI-83-150**, and civil actions in which the county is a party, **EC-COI-80-42**. On the other hand, where the interest of a county agency is too remote or tenuous, the prohibition of §11 does not apply. See, **EC-COI-85-46**, (filing of documents with County Registry); **EC-COI-81-21** (criminal prosecutions by district attorneys); **EC-COI-81-166** (campaign manager activities on behalf of state office candidate). Accordingly, you will need to examine each matter you are assigned by the firm to ascertain the degree of interest of which the county has in the matter. To the extent that you do not intend to appear before county agencies on a regular basis, the restrictions of §11 should not unduly limit your representational activities.

2. Section 13

This section places limitations on your official County Commissioner activities. Under §13 you must abstain from participating in any particular matter which affects the financial interests of either you, your immediate family, your partner, a business organization for which you are serving as an officer, director, trustee, partner or employee, or any person or organization with whom you are negotiating or have an arrangement for future employment. For example, should a determination foreseeably affecting the consulting firm's financial interest came before you as a County Commissioner, you must abstain from discussing, voting or otherwise participating in that matter. While §13 provides an exemption avenue under certain conditions for appointed county officials, that avenue is not available to you as an elected official. **District Attorney for the Hampden District v. Grucci**, 384 Mass. 525 (1981).

3. Section 23(b)(2) and (b)(3)

This section prohibits you from using your official County Commissioner position to secure unwarranted privileges of substantial value for yourself or others. It also prohibits your creating the appearance of undue favoritism towards anyone. To comply with these provisions, you must keep your County Commissioner duties separate from your consulting firm work and refrain from using county resources such as telephones, stamps, word processors and office support for your consulting work.

You must also bear in mind the safeguards of §23 should a client of the firm appear before the County Commissioners. At a minimum, to dispel any appearance of undue favoritism, you should publicly disclose the fact that the individual or organization is a client of your firm.[3]

DATE AUTHORIZED: April 12, 1989

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[1]Certain provisions of G.L. c. 268A apply less restrictively to special county employees under G.L. c. 268A, §1(m). As a paid, elected county official, however, you do not qualify for special county employee status. **EC-COI-83-150.**

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

[3]Inasmuch as more than one year has passed since the completion of your legislative duties, the restrictions in §5(e) on your acting as legislative agent before the General Court will not apply to you. The remaining restriction which will apply to you as a former state employee is §5(a). Under §5(a), you may not work for the firm or a client in connection with any particular matter in which you previously participated at a state agency or the General Court. Should you need clarification of this restriction in connection with a specific matter, you may renew your opinion request with us.

CONFLICT OF INTEREST OPINION
EC-COI-89-11

FACTS:

You are an administrative employee for state agency ABC. In your current capacity, you are responsible for the administration of certain claims, including the determination of acceptance or rejection of claims, payment of claims, monitoring of claims and

representing ABC in state administrative hearings on contested claims.

With respect to recent claims, ABC has contracted, pursuant to a competitive bid process, with an outside law firm to administer these claims. The firm's current two-year contract will expire in 1989. You are interested in resigning and in entering into a contract with ABC to perform claim administration services for ABC under a successor contract to take effect later this year.

QUESTION:

Does G.L. c. 268A permit you to apply for and perform services for ABC under a claims administration services contract?

ANSWER:

Yes, subject to certain conditions described below.

DISCUSSION:

As an ABC employee, you are considered a state employee for the purposes of G.L. c. 268A. Were you to resign and accept employment with ABC handling claims, you would retain your status as a state employee. See, G.L. c. 268A, §1(q). While nothing in G.L. c. 268A outright prohibits your changing your status with a state agency from full-time employee to consultant, the law places certain restrictions on your official activities.

1. Section 6

This section prohibits you from participating[1/] as an ABC employee in any particular matter[2/] in which you have a foreseeable financial interest. Your application to ABC to perform services for ABC would be a particular matter in which you have a financial interest. Following your submission of such an application, you may not participate as an ABC employee in any discussions or decisions relating to your application. For example, since you would customarily be part of a chain-of-command in the ABC interview and selection process, you must file a written disclosure of your interest to both your ABC appointing official and the Commission, and you must abstain from any participation in the selection process unless otherwise directed by your appointing authority.[3/]

The prohibition of §6 applies to all matters in which you have a financial interest. Currently, you participate as an ABC employee in claims matters which are handled by an outside law firm pursuant to an existing contract. To the extent that the firm's performance under the contract will presumably be an important consideration in the ABC's decision as to whether to renew the firm's contract, your status as a likely competitor gives you a financial interest in determinations with respect to the firm's current contract. We therefore advise you to notify promptly your appointing official of your intentions and seek a determination under G.L. c. 268A, §6. Your appointing official has a number of options, including granting you written permission to continue participating in determinations relating to the firm's current contract. Absent receipt of such written permission, your continued participation in matters relating to the firm's current contract will place you in violation of §6.

2. Section 4(c)

Under this section, a state employee may not act as the agent or attorney for any non-state party in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Your application to the ABC for the claims contract is a particular matter in which a state agency is a party. As long as you are filing and pursuing the application on your own behalf as a solo practioner, you will not be regarded as the agent or attorney of a non-state party for the purposes of §4. See, Commission Advisory No. 13, Agency. On the other hand, §4 would prohibit your representing a law partnership, or other association comprised of you and other attorneys in connection with the application.[4/]

3. Section 23

This section applies to both you and ABC officials. Under §23(b)(2), a state employee may not use or attempt to use his official position to secure for himself or others unwarranted privileges of substantial value and which are not properly available similarly situated individuals. Where the ABC has previously awarded the workers compensation contract based on a competitive bid process, it might very well be an unwarranted privilege for you if the ABC were to disregard that process for your benefit. Similarly, your seeking such an exemption might also place you in violation of §23(b)(2). By retaining the competitive process, the ABC will also avoid creating the appearance of undue favoritism towards you. See, G.L. c. 268A, §23(b)(3).

DATE AUTHORIZED: May 10, 1989

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

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

3/Your §6 disclosure has been received and is a public document. G.L. c. 268A, §24.

4/It is unclear whether, following your resignation, you will have partners in your law practice. If so, your partners will be subject to certain restrictions in their private practice. See, G.l. c. 268A, §5(c), (d); we are available to render further advice construing these paragraphs if either you or your partners wish.

CONFLICT OF INTEREST OPINION
EC-COI-89-12

FACTS:

You are a member of the Judiciary. You recently received an invitation to become a member of the board of advisors of a hospital (Hospital) which treats patients with chemical and alcohol dependencies. Patients are voluntarily referred to the Hospital, and their fees are funded primarily through third-party insurers. Although the Hospital will receive no direct patient referrals from the courts, Hospital staff may occasionally be called upon to prepare patient reports for submission to a probation officer in connection with a court proceeding involving a patient.

The Hospital is a corporation headed by a president, corporate officers, and a six-member paid executive committee which serves as the corporate board of directors. The Hospital is also organizing a fourteen-member board of advisors comprised of professionals and citizens from community-based organizations. The board of advisors will be unpaid and will meet three or four times annually to provide suggestions and general advice to the Hospital and its board of directors.

QUESTION:

Does G.L. c. 268A permit you to accept membership on the Hospital board of advisors?

ANSWER:

Yes, subject to certain conditions set forth below.

DISCUSSION:

As a member of the Judiciary, you are a state employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q). Upon acceptance of membership on the Hospital board of advisors, you will be subject to certain limitations in both your judicial and board of advisor capacities.

1. Limitations on Your Hospital Activities

Section 4(c) places restrictions on the outside activities of state employees. Specifically, §4(c) prohibits a state employee from acting as the agent or attorney for a non-state party in connection with any application, proceeding, determination or other particular matter[1/] in which any state agency is either a party or has a direct and substantial interest. For example, if the Hospital has a licensure application pending before the state Department of Public Health, you may not act as the Hospital's agent or spokesperson in connection with that application. You would not be regarded as the Hospital's agent by participating in in-house discussions as a member of the board of advisors. See, EC-COI-83-145; 82-45. On the other hand, you must avoid appearing before state officials or agencies on behalf of the Hospital and also avoid signing, in your representative capacity, any documents or correspondence directed to state agencies or officials.

2. Limitations on Your Judicial Activities

Initially, the Commission advises you that you will not be prohibited by G.L. c. 268A, §6 from officially participating in matters in which the Hospital has a financial interest. The abstention requirements of §6 will come into play whenever a state employee is called upon to participate in a matter which affects the financial interest of a "business organization in which he is serving as officer, director, trustee, partner or employee ... ". As a member of the Hospital board of advisors, your relationship with the Hospital is not that of an officer, director, trustee, partner or employee. Cf., EC-COI-82-145 (hospital corporator is not officer, director or trustee for the purposes of §6).

The Commission has previously stated that it will not be bound by the title of the position one holds within a business organization, but rather will examine the substance of the position. For example, in EC-COI-87-10, the Commission concluded that a savings bank corporator exercised management functions sufficiently similar to a director so as to be regarded as a director for G.L. c. 268A purposes. See, also, EC-COI-80-43 (relationship between attorneys will be treated as partnership where attorneys share ownership assets and liabilities, even absent a formal partnership agreement). Based on the information you and the Hospital have provided, however, we conclude that your board of advisor responsibilities are not comparable to those of a corporate officer or director. This conclusion is based on the fact that those corporate officer and director functions are already performed by other individuals, and on the Hospital's intent to establish the board of advisors as a community-based sounding board, rather than as a decision-making management board.

Should a matter come before you in which the Hospital has an interest, the provisions of G.L. c. 268A, §23 will apply.[2/] Under §23, a state employee may not use his official position to secure unwarranted privileges or exemptions of substantial value for others, and must also avoid creating the reasonable appearance of undue favoritism towards others due to the existence of private relationships. To dispel any appearance of undue favoritism towards the Hospital, you must publicly disclose to your appointing authority the relevant facts concerning your official and private dealings with the Hospital.[3/]

DATE AUTHORIZED: May 10, 1989

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

[2/]In addition to G.L. c. 268A, you are also subject to the restrictions of the Canons of Judicial Conduct, Supreme Judicial Court Rule 3:09. You may pursue any questions concerning the application of the Canons with the Committee on Judicial Ethics, pursuant to Rule 3:11.

[3/]For the purposes of G.L. c. 268A, your appointing authority is the Chief Justice of the Supreme Judicial Court. See, EC-COI-83-116.

CONFLICT OF INTEREST OPINION
EC-COI-89-13*

FACTS:

You are about to be sworn in as a member of the Boston Redevelopment Authority (BRA), which is currently considering a Kingston Bedford-Essex/Parcel 18 parcel to parcel linkage project (Project). You are currently the managing general partner and $1000 investor in Campana Development Limited Partnership (Campana), a limited partnership which owns 7500 shares of Class A stock or 1.4% in Ruggles Bedford Associates (Ruggles). Ruggles is a joint venturer in Columbia Plaza Metropolitan Structures in the Project. You state that your stock ownership in Campana will give you less than 1% of the share in the entire project. Although you are eligible to be compensated by the limited partners for your services as managing general partner, no such payments have been made to you.[1/]

Upon becoming a BRA member, you intend to resign from your managing general partner position and to limit your role in the Project to a passive investor and limited partner. You intend to retain your $1000 investment in Campana.

QUESTIONS:

Does G.L. c. 268A permit you to retain your investment and limited partnership with Campana while serving on the BRA?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

As a BRA member, you will be considered a municipal employee and a special municipal employee for the purposes of G.L. c. 268A. See, G.L. c. 121B, §7.

1. Limitations on your official BRA activities

Under G.L. c. 268A, §19, you must abstain from participating[2/] as a BRA member, in any contract, decision or other particular matter[3/] in which either you or your partners has a foreseeable financial

interest. Despite the comparatively small financial interest which you have in the Project, you must abstain from any BRA discussions or votes relating to matters arising out of the Project. EC-COI-84-96. By abstaining from participation in Project-related matters, you will also avoid creating any appearance of undue favoritism. G.L. c. 268A, §23(b)(3). We would also add that your BRA appointing authority may grant you written permission to participate in Project-related matters under the conditions of G.L. c. 268A, §19(b)(1). Unless and until those conditions have been satisfied, however, you must continue to abstain from participation in these matters.

2. **Limitations on your private activities**

Under G.L. c. 268A, §20, a municipal employee may not have a financial interest in a contract made by a municipal agency, unless an exemption applies. While you would have a financial interest in any BRA contract relating to the Project, your financial interest of $1000 is less than 1% of the ownership interests under the Contract. See, EC-COI-83-147. Accordingly, §20 will not prohibit your retention of your investment with Campana.

Aside from §20, you are also subject to §17. Under this section you may not receive compensation[4/] from Campana or act as agent for Campana in connection with any contract or other matter within the official responsibility of the BRA. Because you will not be providing services for Campana in connection with the Project once you become a BRA member, your potential receipt of investment income from Campana does not constitute compensation under §17. You may receive compensation from Campana for services which you performed prior to your becoming a BRA member, as long as the value of these services is ascertained and liquidated within a reasonable period of time. EC-COI-87-29.

3. **Limitations on the Activities of your Partners**

As long as you retain your limited partnership with Campana, other Campana limited and general partners will be subject to G.L. c. 268A, §18(d). Specifically, your partners may not act as agent or attorney for any non-City party in connection with any particular matter which is within your official responsibility as a BRA member. While the scope of your partners' prospective activities is as yet undetermined, your partners can avoid violating this section by arranging to have the partnership represented by an independent agent or attorney who is not a partner in connection with any matter within your official BRA responsibility. We would add that §18(d) restricts only the representational activities of G.L. c. 268A, §17(a) (receipt of compensation and/or representational activity prohibited for municipal employee.) Buss, **The Massachusetts Conflict of Interest Law: An Analysis** 45 B.U. L. Rev. 299, 345.

DATE AUTHORIZED: May 10, 1989

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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/ You are currently negotiating for a specific liquidated amount for the compensation attributable to your prior services as managing general partner.

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/ "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another G.L. c. 268A, §1(a).

CONFLICT OF INTEREST OPINION
EC-COI-89-14

FACTS:

Early in 1988, after a state agency received authorization to acquire certain property, the agency identified a parcel of land in the Commonwealth as a priority acquisition. This property was previously proposed by its owners as a site for future development.

Upon researching title to the property, the agency discovered that it was owned by a general partnership. You, a state employee, own a significant part of that

general partnership. Because of certain proscriptions contained in the conflict of interest law, the state agency realized that it might be prohibited from acquiring the property directly from the general partnership because of your ownership interest in that partnership. As a consequence, shortly before Thanksgiving 1988, the state agency contacted a private third-party in order to make other arrangements.

The third-party is a tax-exempt, not-for-profit entity whose corporate purpose is to identify, acquire and ultimately transfer property that it believes is threatened by development. Its usual practice is to initiate transactions by first identifying property it seeks to acquire and then contacting a conservation minded entity (or governmental agency) in the hope of persuading that entity to acquire the property from it subsequent to the acquisition. Generally, the greater the risk that the entity will not acquire the property, the less likely that the third party will acquire the property in the first place. Since 1984, the third party and the state agency have completed a series of transactions whereby the third party has acquired property which was later re-conveyed to the state agency. In those previous transactions, ultimate acquisition by the state agency has taken approximately one and a half to two years.

According to the state agency's supervisory department, it is apparently standard practice in the commonwealth for a state agency and a third party to enter into a "memorandum of understanding" to set forth their agreement that the agency will purchase the property from the third party upon the acquisition of title by the third party.[1/]

The third party and the state agency have stated that no such understanding, oral or written, exists in this matter. The state agency's supervisory department at first concluded that such an understanding did exist between the state agency and the third party. After conferring with state agency officials, however, the supervisory department confirmed to the Commission that no such formal agreement existed in this case. The supervisory department stated, however, that such an omission is a departure from standard practice.

In the present matter, the third party had not previously identified the property as a potential acquisition. The state agency, however, shared with the third party its desire to acquire the property on a priority basis. Apparently, the agency did not, at first, reveal to the third party its reasons for not acquiring the property directly from the general partnership. Because the property was considered a state agency priority acquisition, the agency informed the third party that it would expedite the acquisition from the third party (approximately six months). The third party shared the agency's concern for the property and agreed to make arrangements to purchase it.

Sometime in January 1989, state agency officials asked the third party to contact you for the purpose of beginning the transfer. Third party officials met with you two weeks later. The first time that this series of transactions was proposed to you, you expressed your concern that the transactions could violate §7 of the conflict of interest law. The state agency thereupon contacted the State Ethics Commission for an opinion as the whether the series of transactions were permitted under G.L. c. 268A. The Commission responded by informing the state agency that any such opinion request had to come from the subject person (i.e. yourself). Several weeks later, you contacted the Commission for such an opinion.

Although the third party has expressed its belief that it would be free later to sell the property to any party after it acquires title, it told the Commission that it would not initiate such an action barring extreme circumstances. Both the state agency and the third party have an understanding and an expectation that the state agency will acquire the property from the third party in the next few months once it acquires the property from you. A state agency official stated her belief that the third party would be surprised and "angered" by a reversal of the state agency's decision not to purchase the property from the third party. The third party, for its part, cannot contemplate any transferee except the state agency.[1/]

QUESTION:

Does G.L. c. 268A §7 permit you to transfer your interest in the property to the third party under the circumstances described above?

ANSWER:

No, for the reasons described below.

DISCUSSION:

As a member of the General Court, you are a state employee for purposes of G.L. c. 268A. As a state employee, you are subject to the restrictions of G.L. c. 268A, §7 which, with certain exceptions, prohibits a state employee from having a financial interest in a contract made by a state agency. Based upon the facts presented, we conclude that, were you to proceed with the sale of the land, you would be in violation of §7

because you would be acting upon the financial interest you have in the contract between the state agency and the third party for the subsequent transfer of the property. In effect, the financial interest which the third party would have in its contract with the state agency would be attributable to you.

In determining whether the financial interest of a transferee is attributable to a state employee, the Commission, to date, has examined both the divestiture and the subsequent relationship to ascertain whether the public employee can fairly be said to retain a financial interest in the transferee's contract. Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U. Law Rev. 299, 375 (1965). Such attribution cases have arisen primarily in connection with spousal relationships. In resolving such cases, the Commission has looked at a number of factors to determine whether the spousal transferee is independent of the state employee, including, among other things, adequacy of consideration paid by the transferee, liquidation of the state employee's interest and prior independent business experience of the transferee. **See, EC-COI-83-123** (no attribution found where state employee transfer was based on arm's-length transaction and asset liquidation to spouse who had independent experience in the business); **89-9** (attribution found where: (1) no money passed hands in the transfer of the business to the spouse, (2) the state employee's initial investment was not liquidated, (3) the state employee continued to own the property transferred, and (4) the state employee continued to participate in the management and control of the business).

Consideration of these factors is necessitated by the obvious fact that any purported transfer could easily be a contrivance to evade the reach of the conflict of interest laws. The same risk exists with respect to other third-party transferees, where the potential for abuse is less obvious but no less real. In general, a transferee would not be considered independent of a state employee where the former is, in effect, acting as a conduit for the latter pursuant to some contractual, agency/principal, or other established relationship.

In the present case, the facts weigh heavily against finding that the transfer to the third party would be anything more than a pass-through or a conduit relationship prohibited by the broad scope of G.L. c. 268A, §7. The state agency initiated the transactional structure as a way to avoid the application of §7. The transaction is also not typical from both the state agency perspective and from the third party perspective. First, it is unusual because the third party admits that it typically initiates the land acquisition process by identifying the land it seeks to acquire and then contacting an agency that might be interested in ultimately acquiring the land. Second, it is unusual because the Commonwealth's standard practice is to enter into a written understanding prior to the original acquisition of title, which in this case would have been prohibited by G.L. c. 268A. Here, not only did the state agency initiate the transaction by contacting the third party and requesting that the third party acquire the property, but also the normal agreement policy of the supervisory department was altered. While no written agreement may exist, however, there remains an expectation and an understanding among the parties regarding the timing, purpose and ultimate outcome of this transaction, and that understanding obtains the same result as if the formal written agreement had been entered into.[3/] The Commission finds that the actions of the third party and the state agency, whether intended or not, rise to the level of a contract for purposes of c. 268A.

The Commission cannot ignore the circumstances surrounding the relationship between certain of the parties where the ultimate outcome of that relationship results in a violation of G.L. c. 268A. **See, EC-COI-83-111.** If the third party were an entity created solely for this transaction, there is no doubt that it would be considered a "straw" entity. A contract with this "straw" entity would violate §7. The fact that the third party is an established entity does not affect the result where, as here, some of the parties have agreed in advance to accomplish a certain goal but have not formalized their relationship in writing, despite established practice, and execution of such agreement would result in a violation of G.L. c. 268A.[4/]

This conclusion is consistent with an analogous finding made by the Supreme Judicial Court. In **Perkins v. Hilton**, 329 Mass. 291 (1952), a veteran (Hilton) entitled to benefits under the GI Bill of Rights had an understanding with his parents that he would take title to a house, execute a mortgage on it pursuant to the terms of his GI bill benefits and subsequently convey the house to his mother. This arrangement, which resulted in a trust relationship between Hilton and his mother,[5/] was constructed by them in order to secure the benefits of a GI loan (lower interest rates and a longer term). Hilton was entitled to receive these benefits but Hilton and his mother were both aware that his mother would not have been so entitled had she taken title in her own name. Subsequently, Hilton transferred the property to his mother while he was insolvent.

The Court held that "it would be a strange

construction of the [serviceman's] act that would allow a non-veteran to secure its benefits by using a veteran as a mere "straw"... the intent to benefit and protect only veterans is plain throughout that act." **Id.** The Court could not "escape the conclusion that the trust for the mother's benefit was illegal and invalid" as it was devised to circumvent the law in an attempt to obtain special benefits for the mother of a veteran to which she was not otherwise entitled. This contrivance was, in effect, a fraud upon the serviceman's act and upon public policy. **See, Id.** The Court, therefore, refused to give effect to this type of straw arrangement.

The Commission is not now articulating a rule that would prohibit transactions which involve independent third party transferees. Rather, the timing, purpose and ultimate transfer of the property indicate that the parties are, in reality, acting pursuant to an arrangement prohibited by the broad scope of the conflict of interest law and which is not permitted by any exemption. As in **Perkins**, nothing here would have prevented the arrangement between the third party and the state agency had the third party first acquired the property from you and then subsequently, even if immediately thereafter, entered into negotiations with the state agency.[6/]

Accordingly, the proposed sale of the property is prohibited by §7 unless some exemption is applicable. The only exemption available to you under §7 would be a divestment of all but 10% of your interest in the general partnership. See G.L. c. 268A, §7(c). However, any such liquidation of your investment in the general partnership must be based on its currently appraised value (as determined by an independent appraiser without reference to the state agency's or third party's interest in the property), not on a post-transfer valuation. Upon divestment of most of your interest in the general partnership there would be no attribution of the third party's financial interest back to you as a result of the transfer of the property because of the exemption in G.L. c. 268A, §7(c).

DATE AUTHORIZED: July 19, 1989

[1/]The third party involved here has informed the Commission that it is not its practice "to formalize land acquisition relationships with agencies until [it] owns or otherwise controls the property in question."

[2/]These facts were supplied to the Commission by you, the third party, the state agency and by the supervisory department. Because of the number of interested parties in this matter and the complicated fact situation, this statement of facts was submitted by the Commission staff to each of the parties for comment and review as to its accuracy.

[3/]Although the Commission has not yet articulated a comprehensive standard applicable to all third party transferee attribution cases, consideration of these factors, given the circumstances surrounding the initiation of this series of transactions, was warranted and critical to the Commission's conclusion in this case. **See, e.g., Ec-COI-83-111** (purpose and timing of transaction); Buss, p. 375 (consideration of likely interaction between state agency and state employee).

[4/]For purposes of the conflict statute, a contract need not be in writing. **See, EC-COI-85-79** (for purposes of c. 268A, the term "contract" refers "not only to a formal written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of promises made by the other(s) constitutes a contract.") **See also, Conley v. Ipswich**, 352 Mass. 201 (1967). It is also of no consequence that the understanding in this case is for an interest in land because the Statute of Frauds prevents action of a contract but does not void the contract. **ABC Auto Parts, Inc. V. Moran**, 359 Mass. 327 (1971); **Witherington v. Eldredge**, 264 Mass. 166 (1928). A contract for an interest in land is a contract for c. 268A purposes even if it is not in writing.

[5/]Although such a trust relationship resulted in the **Perkins** case because Hilton had supplied no consideration, a trust will also result where, at the time the grantee contracts for property, he has an understanding with an ultimate transferee that payment of consideration will take place later in accordance with that understanding. **See, Blodgett v. Hildreth**, 103 Mass. 484 (1870). The courts will look to the manner in which the transaction is subsequently treated by the parties to understand the true nature of the transaction. **See, Kennedy v. Innis**, 339 Mass. 195 (1959).

[6/]The Commission, by its decision here, does not address the merits or goals of the series of transactions initiated by the state agency. The Commission's conclusion is, however, necessitated by the requirements and goals of c. 268A, among which is the avoidance of even the appearance of impropriety. **Quinn v. State Ethics Commission**, 401 Mass. 210 (1987).

CONFLICT OF INTEREST OPINION
EC-COI-89-15

FACTS:

You are currently under consideration for appointment to a state authority (Authority). Some of the Authority's powers include issuance of bonds and loans to participating institutions. In your private capacity, you currently serve on the board of overseers (Board) of an institution (ABC), a corporation which falls within the jurisdiction of the Authority. The Board is comprised of over 100 members who are elected by the ABC board of trustees. The Board meets annually and is expected to provide service through participation in ABC committees; to seek to increase community support and understanding of ABC's mission and to maintain a close familiarity with the goals and progress of ABC. Board membership is intended to be broadly representative of the communities and groups served by ABC. The Trustees have the general management and control of overall property affairs and funds of ABC, and are also responsible for the election of officers and trustees of ABC. Members of the Board may participate in advisory subcommittees established by the Board of Trustees but do not exercise management authority.

QUESTION:

Does G.L. c. 268A permit you to serve as a member of the Authority while also retaining your membership on the ABC Board?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

1. Jurisdiction

We conclude that the Authority is a "state agency" within the meaning of G.L. c. 268A, §1(p)[1/] and you will become a state employee within the meaning of G.L. c. 268A, §1(q)[2/] through your membership. The definition of state agency includes "any independent state authority ... [or] instrumentality ... but not an agency of a county, city or town." G.L. c. 268A, §1(p). The Authority's enabling statute expressly identifies the Authority as a public instrumentality and states that the exercise of the Authority's powers shall be deemed to be the performance of an essential public function. Although the enabling statute and the legislative history surrounding the enactment of the Authority are silent as to the proper characterization for G.L. c. 268A purposes, we regard the Authority as a state agency under G.L. c. 268A. This conclusion is based on the fact that the Authority members are appointed by the governor and exercise a statewide jurisdiction over institutions throughout the Commonwealth. This result is consistent with the Commission's application of state agency status to other independent state authorities and instrumentalities. See, EC-COI-81-119 (regional transportation authority); **In the Matter of Henry Doherty**, 1982 State Ethics Commission 115 (Massachusetts Bay Transportation Authority); **In the Matter of Louis Logan**, 1982 State Ethics Commission 40 (Massachusetts Technology Park Corporation). It is the commonwealth, rather than any county or municipality, which appears to be the "level of government to be served by the agency in question." Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U.L. Rev. 299, 310 (1965); EC-COI-83-63.

In view of your uncompensated status as an Authority member, you are also considered a special state employee under G.L. c. 268A, §1(o). As a special employee, you remain subject to many prohibitions under G.L. c. 268A but are eligible for exemptions permitting your private dealings with certain state agencies.

2. Limitations on Your Official Activities

Under G.L. c. 268A, §6, a state employee must abstain from official participation[3/] in any particular matter[4/] in which "a business organization in which he is serving as officer, director, trustee, partner or employee ... has a financial interest." Based on the information you have provided, we conclude that §6 will not require your abstention from participation as an Authority member in matters affecting ABC's financial interest because your status as a member of the Board does not rise to the level of officer, director, trustee, partner or employee of ABC. See, EC-COI-89-12 (member of board of advisors is not a relationship covered by §6); and 82-145 (hospital corporator is not an officer, director, trustee, partner or employee). In EC-COI-89-12, the Commission observed

> The Commission has previously stated that it will not be bound by the title of the position one holds within a business organization, but rather will examine the substance of the position. For example, in EC-COI-87-10, the Commission concluded that a savings bank corporator exercised management functions sufficiently similar to a director so as to be regarded as a director for G.L. c. 268A

purposes. See also, EC-COI-80-43 (relationship between attorneys will be treated as partnership where attorneys share ownership assets and liabilities, even absent a formal partnership agreement). Based on the information you and the Hospital provided, however, we conclude that your board of advisor responsibilities are not comparable to those of a corporate officer or director. This conclusion is based on the fact that those corporate officer and director functions are already performed by other individuals, and on the Hospital's intent to establish the board of advisors as a community-based sounding board, rather than as a decision-making management board.

The principles expressed in EC-COI-89-12 are equally applicable to members of the Board because ABC's corporate officer and director functions are performed by other individuals, and the overseers are primarily a community-based sounding board.

Should a matter come before you in which ABC has an interest, the provisions of G.L. c. 268A, §23 will apply. Under §23, a state employee may not use his official position to secure unwarranted privileges or exemptions of substantial value for others, and must also avoid creating the reasonable appearance of undue favoritism towards others due to the existence of private relationships. To dispel any appearance of undue favoritism towards ABC, you must disclose in writing to your appointing authority the relevant facts concerning your official responsibilities and private relationship with ABC whenever a matter involving ABC comes before Authority. Of course, should you decide to abstain from any participation in such matters, no such disclosure is required.

3. **Limitations on Your ABC Activities**

Section 4(c) places restrictions on the outside activities of state employees. Specifically, §4(c) prohibits a state employee from acting as the agent or attorney for a non-state party in connection with any application, proceeding, determination or other particular matter in which any state agency is either a party or has a direct and substantial interest. As a special state employee, however, the restrictions of §4 apply only to matters within your official responsibility at the Authority. For example, if ABC has an application pending before the Authority, you may not act as ABC's agent or spokesperson in connection with that application. You would not be regarded as ABC's agent by participating in in-house discussions as a member of the board of overseers. See, EC-COI-83-145; 82-45. On the other hand, you must avoid appearing before the Authority on behalf of ABC, which would include signing, in your representative capacity, any documents or correspondence directed to Authority officials, or making phone calls to Authority members or employees.[5/]

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[1/]"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such departments and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

[2/]"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.

[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.

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

governmental organizations, powers, duties, finances and property.

5/You have indicated that, aside from your ABC work, you are involved in private development. While none of the restrictions of §4 would appear relevant to your real estate development work, you may renew your opinion request with us if you wish to receive further guidance on this point.

CONFLICT OF INTEREST OPINION
EC-COI-89-16

FACTS:

You are a member of a state board (Board). Included in the petitions before you is one by a developer/manager (Petitioner) who was formerly a member of an athletic club of which you were also a member more than ten years ago. You have neither seen nor have been associated with the Petitioner for ten years, except for three chance social meetings, and have no current financial or personal relationship with him.

QUESTION:

Does G.L. c. 268A prohibit your participation as Board member in the matter affecting the above described Petitioner?

ANSWER:

No.

DISCUSSION:

As a member of the Board, you are a state employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q). Two sections of G.L. c. 268A regulate the scope of official participation by state employees.

1. Section 6

Under §6, you are required to abstain from participating as a Board member in any Board proceeding affecting the financial interest of either you, a member of your immediate family, a partner, an organization in which you serve as an officer, director, trustee, partner or employee, or any person or organization with whom you are negotiating or have an arrangement concerning prospective employment. The abstention requirement recognizes that a state employee cannot be expected to remain loyal to the public interest when matters affecting the financial interest of certain personal relationships come before him for decision.

On the other hand, we note that the General Court did not extend the §6 abstention requirements beyond matters affecting those core relationships listed in §6. See, St. 1986, c.12, §1 (" ...[citizens who serve in government cannot and should not be expected to be without any personal interest in the decisions and policies of government ...[s]tandards of conduct should separate those situations of conflicting interest which are inherent in a free society from those which are unacceptable]"). Accordingly, the Commission has determined that §6 does not apply to matters affecting personal or business relationships which fall outside of the relationships listed in §6. See, EC-COI-83-12 (spouse of state employee's sister-in-law is not an immediate family member); EC-COI-83-34 (occasional attorney services do not create an employee relationship); EC-COI-89-12 (hospital overseer is not an officer, director, trustee or employee of the hospital). This same conclusion would also apply to matters which affect friends or former friends of a state employee. Assuming that you have no ongoing or prospective business relationship with the Petitioner, the mere fact that you were once friends does not require your abstention from matters in which the Petitioner may have a financial interest.

2. Section 23(b)

Section 23 prohibits a state employee from using his official position to secure unwarranted privileges or exemptions of substantial value to anyone, G.L. c. 268A, §23(b)(2), and from creating the appearance that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties, G.L. c. 268A, §23(b)(3). These provisions place certain safeguards on your official dealings with past or current friends.

To dispel any possible appearance of undue favoritism towards the Petitioner, you should publicly disclose to your appointing official the relevant facts surrounding you relationship with him.1/ You must also be guided by the standards of G.L. c. 268A, §23(b)(2) and treat the Petitioner's petition according to the same objective procedural and substantive standards by which the Board treats other similar petitions.

Insofar as the substantive provisions of G.L. c. 268A are concerned, then, you may participate in the Board matter involving the Petitioner's company. Whether Board members should be subject to

abstention standards stricter than those contained in c. 268A is a policy question which is beyond the scope of this opinion and could only be addressed through legislative amendment or through the implementation of supplementary standards of conduct by the Board pursuant to G.L. c. 268A, §23(e). We would also note that, irrespective of the application of G.L. c. 268A, the alleged bias of a state official can be addressed in the context of a petition for judicial review of the agency's decision. **See, Attorney General v. Department of Public Utilities**, 390 Mass. 208 (1983); **EC-COI-82-31.**

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[1]/We note that you have previously disclosed to the parties in the Board proceeding these relevant facts.

CONFLICT OF INTEREST OPINION
EC-COI-89-17*

FACTS:

The Boston Water and Sewer Commission (BWSC) was created by the Boston Water and Sewer Reorganization Act of 1977, c. 436 (Act). Pursuant to the Act, the water and sewer divisions of the Department of Public Works of the City of Boston (City) were abolished and the powers and duties thereof transferred to BWSC. BWSC is charged with improving and maintaining the water and sewer systems for the benefit of the residents of the City in order to increase their commerce, welfare and prosperity and to improve their living conditions. The Act empowers BWSC to charge and collect fees for the provision of its local services. BWSC is authorized to exercise all of the powers and privileges of, and is subject to the limitations upon, cities and towns as provided by the laws of the commonwealth.

BWSC Commission members are appointed by and may be removed by the Mayor of the City, subject to approval by the City Council. Although the Act does not specify whether BWSC employees are municipal employees, the Act does provide that BWSC members are deemed to be "special municipal employees" for purposes of G.L. c. 268A. The Act also provides that all BWSC employees are subject to the residency and voting registration requirements as would apply to such employees if employed by the City. In the event of the dissolution or termination of BWSC, title to all funds and other properties held by BWSC vest in the City.

QUESTIONS:

1. Are BWSC employees "state employees" or "municipal employees" for the purpose of G.L. c. 268A?

2. Are BWSC employees subject to the financial disclosure requirements of G.L. c. 268B, §5?

ANSWERS:

1. BWSC employees are "municipal employees" for the purposes of G.L. c. 268A.

2. No.

DISCUSSION:

1. Jurisdiction under G.L. c. 268A

G.L. c. 268A, the Massachusetts conflict of interest law, is applicable to all public employees whether they serve at the municipal, county, or state level. We conclude that BWSC is a municipal agency as that term is defined in c. 268A, §1(f).[1]/ This conclusion is based primarily upon: (i) the essentially local character of BWSC's power and the services it provides;[2]/ (ii) the City's control of BWSC;[3]/ (iii) BWSC's power to collect local revenues;[4]/ (iv) the fact that BWSC's yearly surpluses, if any, must be paid over to the City to appropriate as it deems necessary (Section 7(f)); and (v) the fact that title in BWSC's property vests in the City upon BWSC's dissolution (Section 19).

Also significant are the Act's designation of BWSC members as "special municipal employees" (Section 19), the fact that BWSC's original employees were transferred from the City (Section 5), and the residency requirements applicable to BWSC's current employees (Section 4). Given BWSC's essentially local character, and the nature of BWSC's statutory responsibilities, the Commission concludes that BWSC is a municipal agency for purposes of G.L. c. 268A. Accordingly, BWSC's employees are municipal employees[5]/ subject to the conflict of interest provisions of c. 268A.[6]/ This conclusion is consistent with **In the Matter of Edward G. Brooks**, 1981 State Ethics Commission 149, in which a BWSC collection clerk was found to be a "municipal employee" for purposes of G.L. c. 268A because of BWSC's essentially local character.

2. **Jurisdiction under G.L. c. 268B**

The mandatory financial disclosure requirements of G.L. c. 268B apply to any individual who holds a major policy-making position in a "governmental body." G.L. c. 268B, §1(h) defines a "governmental body" as any state or county agency, authority, board, bureau, commission, council, department, division or other entity. Section 1(h) excludes from the statutory definition of governmental body any city, town or municipal agency. For the reasons stated in section one of this opinion, we conclude that BWSC is a municipal agency and therefore is not a governmental body under G.L. c. 268B. See, e.g., EC-COI-FD-87-1; 86-1; 79-3. Accordingly, because BWSC is not a governmental body for purposes of c. 268B, BWSC employees are not subject to the financial disclosure requirements of G.L. c. 268B, §5.

DATE AUTHORIZED: June 19, 1989

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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/"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.

2/The Act provides that BWSC shall have the powers and privileges of a city or town of the commonwealth. In addition, Section 1 of the Act established BWSC for the purpose of providing essential services to residents of the City. These services had previously been provided by the City's public works department.

3/Section 3 of the Act, for example, authorizes the appointment of commission members by the Mayor of the City (who also designates its chairperson). Commission members may also be removed for cause by the Mayor at any time.

4/Section 7(e) of the Act, for example, grants BWSC all of the powers and privileges of the City to collect and enforce fees, rates, rents and other charges.

5/"Municipal employee," a person performing services for or holding an office, position, employment, or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

6/This opinion is limited to finding that BWSC employees are municipal employees for purposes of statutory jurisdiction under G.L. c. 268A. It should not be construed as determining the status of BWSC employees for any other purpose. The Commission must address any other matters raised by BWSC regarding the application of G.L. c. 268A on a case-by-case basis as requested by BWSC employees. The Commission is enclosing herewith its published Guide to the Conflict of Interest Law for Municipal Employees for general guidance as to how c. 268A applies to BWSC employees.

CONFLICT OF INTEREST OPINION
EC-COI-89-18*

FACTS:

You are employed by the Perini Corporation (Perini), a company which provides construction services. Perini intends to bid at some future date on the planning and reconstruction work on the Central Artery, the Third Harbor Tunnel or adjacent access roads.

You have recently been invited to provide services on a voluntary basis for the Artery Business Committee (ABC), a private non-profit corporation established and funded by major Boston businesses to provide advice and information to the Boston business community in connection with the Third Harbor Tunnel and Central Artery construction projects. You expect to engage in meetings with state, municipal and federal agencies in connection with these projects on behalf of the ABC.

QUESTIONS:

1. By performing advisory services to the ABC, will you be considered a state employee for the purposes of G.L. c. 268A?

2. By performing advisory services to the ABC, will you be considered a public employee for the purposes of G.L. c. 268B?

3. What limitations on your ABC activities will arise under G.L. c. 268A if Perini is hired to perform planning and/or reconstruction work?

ANSWERS:

1. No.

2. No.

3. You will be subject to certain limitations described below.

DISCUSSION:

1. **Jurisdiction under G.L. c. 268A**

In order to be considered a state employee for G.L. c. 268A purposes, you must either hold a position in or provide services for a "state agency."[1/] Based on the information we have received, we conclude that the ABC is not a state agency for the purposes of G.L. c. 268A. The ABC has been privately established and funded, and represents the interests of its corporate membership, rather than any state agency. In summary, your loyalty in performing your services on behalf of the ABC will be to the ABC, and not to any particular government agency. Accordingly, you will not be considered a state employee through your performance of voluntary services on behalf of the ABC. **See, EC-COI-84-65; 83-3; 83-21.**

We note that the definition of "state employee" in §1(q) does contain restrictions on subsequent construction work for individuals who have performed engineering or environmental analysis for major construction projects either as a state consultant or as part of the consultant group for the state. Because the services which you provide for the ABC do not appear to be as state consultants or as part of a state consultant group, the restrictions of §1(q) will not place limitations on your construction work based on your services for the ABC. **See, EC-COI-83-165.**

2. **Jurisdiction under G.L. c. 268B**

The mandatory financial disclosure requirements of G.L. c. 268B apply to any individual who holds a major policy-making position in a governmental body. G.L. c. 268B, §1(h) defines a "governmental body" as "any state or county agency, authority, board, bureau, commission, council, department, division or other entity." Based on the information we have received, the ABC does not appear to qualify as a governmental body under G.L. c. 268B. In particular, the membership, control, objectives and responsibilities of the ABC are consistent with organizations which the Commission has previously found to be excluded from the definition of governmental body. **See, EC-COI-FD-87-1; 86-1; 79-3.** Accordingly, the ABC is not a governmental body for G.L. c. 268B purposes. Moreover, even if the ABC were treated as a governmental body, the fact that you perform the services for the ABC on an uncompensated basis would exempt you from G.L. c. 268B. See, G.L. c. 268B, §1(o) (uncompensated individuals are not considered public employees for the purposes of G.L. c. 268B).

3. **Application of G.L. c. 268A Following Hiring of Perini**

Should Perini be a successful bidder on the prospective planning and reconstruction work for the Third Harbor Tunnel and Central Artery, the provisions of G.L. c. 268A could potentially apply to you or to certain other Perini employees. While the Commission cannot render advice concerning hypothetical situations, you should be aware that the Commission has previously addressed the application of G.L. c. 268A to employees of corporations which contract with public agencies. **See, EC-COI-87-8; 86-22; 86-21; 83-129.** As applied to Perini, these opinions hold that, while Perini would not be considered a "state employee" through its contracts with state agencies, key Perini employees who are either specifically named in the state contracts or whose specialized services the state is expecting to be performed under the contract will be considered state employees for G.L. c. 268A purposes.

At this time, it would be premature to speculate on the effect, if any, which any such "state employee" status would have on those individuals who are performing advisory services for the ABC. While G.L. c. 268A, §4(c) does prohibit a state employee from representing non-state parties in connection with matters of direct and substantial interest to a state agency, §4(c) might not restrict activities on behalf of the ABC while holding state employee status, depending on whether the employee is a "special state employee" under G.L. c. 268A, §1(o) and the extent of the employee's activities on behalf of the ABC. We therefore suggest that you renew your opinion request with us when and if Perini enters into a contract status in connection with these state projects.[2/]

DATE AUTHORIZED: June 19, 1989

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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/]"State agency," any department of a state government including the executive, legislative or

judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such departments and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

2/We would also note that, under G.L. c. 268A, §23(b)(3), should you be considered a state employee in the planning or construction process, you should disclose to your state appointing official the fact that you have previously provided services for the ABC in connection with these construction projects. By such disclosure, you will dispel any appearance of improper influence in the performance of your duties under the state contract.

CONFLICT OF INTEREST OPINION
EC-COI-89-19

FACTS:

You are an elected municipal council (Council) member. Your spouse is employed by a corporation (Corporation) in your community as a middle-management, non-executive position, receives a regular salary and participates in an employee stock ownership program.

To date, several hundred shares of common stock have been allocated to your spouse's account under the Corporation's Plan (Plan). These shares of common stock are held by a trustee and are not readily available to your spouse for sale until he/she retires or leaves the employ of the Corporation. He/she does not receive dividends on these shares. In addition to the employee stock program, your spouse owns other shares of common stock outright. The combined total number of shares of stock held by your spouse equals less than 1% of the total outstanding stock of the Corporation.

The planning board (Board) in your municipality has proposed temporary zoning changes and intends to propose to your Council a permanent zoning ordinance for this area.

The proposed zoning ordinance will restrict future development and land use in the area. At present, the land may be used for business, office, educational, research and development and heavy industrial uses. The new business uses would include business, office, educational, retail, research and development, but not heavy industrial use. Parking capacity will be restricted by two-thirds. Currently, the building height is not restricted. Under the proposed ordinance, building height will be restricted to a range of 40 to 120 feet, depending on the relationship of the building to nearby residential areas. Size of the floor area will also be decreased. Neither you nor your spouse owns any property in this area or any property abutting this area.

The Corporation is one of approximately five major landowners in this district and operates a portion of its business in this district. The Corporation's use is consistent with the proposed land uses in the new ordinance. The Corporation has not indicated any future development plans in this district or when any plans may be implemented.

QUESTION:

Does G.L. c. 268A permit you to participate as a member of the Council in the decision on the proposed zoning ordinance where your spouse holds common stock in the Corporation which could be affected by the proposed ordinance?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

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

1. **Section 19**

Section 19(a) provides in pertinent part that no municipal employee may participate as such an employee in any particular matter[1/] in which she or a member of her immediate family[2/] has a financial interest. Proposed zoning amendments are considered to be particular matters for purposes of G.L. c. 268A. See, EC-COI-84-76 (zoning matters before a city council); 85-22 (zoning amendments to town's protective zoning by-law). The definition of participation includes participating in the formulation of a matter for a vote, as well as voting on the particular matter. See, Graham v. McGrail, 370 Mass. 133, 138 (1976).

Therefore, you must abstain from official participation in the proposed zoning decision if your spouse has a direct or reasonably foreseeable financial interest in the enactment of the ordinance. EC-COI-

84-96; 84-98. Section 19 encompasses any financial interest without regard to the size of said interest. However, the financial interest must be direct and immediate or reasonably foreseeable. See, EC-COI-86-25 (city councillor required to abstain from participating in school committee appointment as school committee reviewing specific provisions that may affect councillor's employer); 82-34 (financial interest in pending lawsuit that may include money damages); 84-96 (financial interest where municipal employee's land abuts and opposite to land to be developed). Financial interests which are remote, speculative, or not sufficiently identifiable do not require disqualification under G.L. c. 268A. EC-COI-84-98; 87-16.

Since neither his/her position or salary would be affected by the zoning ordinance, a determination of the foreseeability of your spouse's financial interest involves his/her status as an investor and thus hinges upon the effect of the ordinance on the Corporation. Your spouse would have a foreseeable and sufficiently identifiable financial interest if the potential impact of the ordinance on the Corporation's business would be such that a reasonable investor would consider it material in determining whether to buy, sell or hold stock. See, **Basic Inc. v. Levinson**, 108 S.Ct. 978, 983 (1988); **TSC Industries, Inc. v. Northway, Inc.** 426 U.S. 438, 449 (1976); **Securities and Exchange Commission v. Texas Gulf Sulphur**, 401 F. 2d 833, 849 (2d Ct. 1968) (material investor information includes facts affecting the probable future of the company). The Commission's standard of materiality regarding securities investments is consistent with that enunciated by the United States Supreme Court, in the context of withheld information under the securities laws. The Supreme Court recently stated that, "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." **Basic Inc. v. Levinson, supra** (citing **TSC Industries, Inc. v. Northway, supra**).

For example, the zoning ordinance would probably affect the future of the Corporation's business if the real estate involved was their only business location or if the Corporation announced intentions to build a significant new facility in the area. Similarly, an investor's financial interest would be implicated if the Corporation expressed plans for a new use or new technology and the ordinance restricted said use.[3/] In EC-COI-89-8, the Commission considered the financial impact of legislation on a family member's business. Abstention was warranted where the family member's decision to open his business depended on the enactment of the legislation. The potential effect of the legislation was to increase the number of people (i.e., customers) in the area of the business and to enhance the viability of the business.

The Commission concludes that your spouse's financial interest is not reasonably foreseeable because the effect of the proposed zoning changes on the Corporation's financial interest is not sufficiently identifiable. The proposed ordinance is not directed solely at the Corporation nor does it restrict any of the Corporation's present business uses. Further, the proposed ordinance restricts but does not prohibit development. The Corporation has not stated its future development plans or its ideas for the area, so any impact on future business is unknown, nor has it expressed any plans to sell its property in the area.

2. Section 23

Section 23 contains general standards of conduct which are applicable to all public employees. It prohibits a public employee from

> (2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

Section 23 focuses not only on actual conflict of interest but also on appearances of conflicts. Therefore, you may not use your official position to secure an unwarranted privilege of substantial value for yourself, your spouse, or the Corporation, or to act in a manner which would create a reasonable conclusion that you are likely to act as a result of your relationship with your spouse or the Corporation which employs your spouse. To avoid violating these restrictions, you must[4/]

(a) publically disclose, prior to your participation in the zoning ordinance, your spouse's stock ownership and employment with the Corporation, and

(b) base your evaluation and vote on the merits of the ordinance, using the same objective standards which the Council applies to other ordinances.

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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/"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. Your spouse is an immediate family member.

3/The Commission does not suggest that these examples are the only instances where an investor's financial interest would be sufficiently identifiable.

4/The Commission advises that public disclosure of your spouse's employment and stock interest is mandatory under these circumstances as the Corporation is one of a small number of landowners affected by the proposed ordinance. You should be careful that any action you take is impartial and that there is no basis for any perception that it is not. The proper procedure is to disclose in writing all of the relevant facts and to file the disclosure with the municipal clerk. Further, you should make a verbal public disclosure for inclusion in the meeting minutes prior to any official participation or action.

CONFLICT OF INTEREST OPINION
EC-COI-89-20*

FACTS:

The MASSJOBS Council (Council) was recently established by the Legislature to create policies for and to coordinate all employment, training and employment-related education programs within the Commonwealth, including, but not limited to, training sponsored under the federal Job Training Partnership Act (JTPA), 29 U.S.C. §1512. St. 1988, c. 164, §77. The Council is responsible for the establishment of policies and goals, the coordination of planning and funding, as well as recommending changes and reviewing programs within the system.

Additionally, the Legislature established a system of regional employment boards (REBs). Id., §105. The REBs, subject to the Council's policies, are intended to expand the scope of the private industry councils (PICs) under the JTPA. PICs are partnerships composed of private and public members who are responsible for providing guidance and oversight for job training plans within a service delivery area. 29 USC §1513. Composition of the REBs will follow that of the PICs under 29 USC §1512(d)(1), (2) and (f). Similar to the PICs, REB members will be selected by the chief elected official of the local government.

The REBs will provide policy guidance and oversight for all training and placement programs and all employment-related educational programs within their jurisdiction. Other duties for the REBs include:

(a) establishment of standards and objectives for consideration, approval or recommendation of training, placement and employment-related educational programs;

(b) review and approval of all job training and placement programs and service plans;

(c) review and approval of state, federal and other grants falling within the purview of federally authorized Private Industry Councils;

(d) review, prior to implementation, of all federally, state or locally funded employment-related educational programs; and

(e) promotion of working partnerships with private employers and client groups in the development, design and funding of training, employment and employment-related educational programs.

In essence, REBs will eventually assume the PIC's JTPA responsibilities and structure, and will have additional duties under state law as defined by the Council.

QUESTIONS:

1. Are REB members subject to G.L. c. 268A?

2. Must REB members file statements of financial interest under G.L. c. 268B?

ANSWERS:

1. Yes.

2. No.

DISCUSSION:

1. Status of REBs

The provisions of G.L. c. 268A generally apply to individuals who provide services to state, county or municipal agencies. See, §1(q), (c) and (f). Where a regional entity possesses the attributes of more than one level of government, the Commission examines the relationship between the entity and various governmental levels to determine which status is appropriate for the purposes of G.L. c. 268A. See, EC-COI-87-2; 83-157; 82-25.

The jurisdictional issues presented by REBs are nearly identical to those previously considered by the Commission with respect to PICs in EC-COI-83-74. In that opinion, we concluded that PICs are municipal agencies within the meaning of §1(f) and therefore, PIC employees are considered "municipal employees" under §1(g) of G.L. c. 268A. The conclusion that PICs are municipal agencies was based on: (1) the role that local elected officials selected PIC members; (2) the joint role that PICs share with those local officials under the JTPA in developing job training plans the selection of grant recipients; and (3) the PICs expenditure of public funds. Id at p. 5.

The similarities between the REBs and the PICs are evidenced by the following: (1) REB members will be selected from the public and private sector by a local elected official under the same federal guidelines as the PICs; (2) the REBs will cover the same service delivery areas as the PICs; (3) the REBs will, in addition to other duties, eventually assume the PICs' responsibilities under the JTPA; and (4) REBs will expend public funds. Despite the expanded scope of the REBs, the similarities between the PICs and REBs are numerous. The constituency served by the REBs, although somewhat expanded by the Council, will remain local in nature. Therefore, we conclude that REBs are municipal agencies within the meaning of §1(f) and thus, REB members are "municipal employees."[1/]

2. Status of REB Members under G.L. c. 268B

Statements of Financial Interests (SFIs) must be filed annually with the Commission by "public employees" as defined under G.L. c. 268B, §1(o). The filing requirement is limited, however, to those persons who hold policy-making positions in a governmental body. G.L. c. 268B, §1(o). In light of our earlier conclusion that REBs are municipal agencies, we similarly conclude that REBs are exempt from the definition of governmental body, which is limited to state or county agencies. G.L. c. 268B, §1(h). Moreover, individuals who receive no compensation, other than reimbursements for expenses, are excluded from the definition of a public employee. See also, 930 CMR 2.02 (15). Thus, if REB members are unpaid (except for reimbursement for expenses) they are not required to file SFIs. See, EC-COI-83-30 (the Commission determined that PIC and state Job Coordinating Council members, if unpaid, are not required to file SFIs).

DATE AUTHORIZED: June 19, 1989

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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 note that in EC-COI-83-74, the Commission did not conclude that PIC employees are automatically special municipal employees within the meaning of §1(n). The special municipal employee status of a particular PIC must be specifically designated by the local elected officials responsible for the appointment of that entity.

CONFLICT OF INTEREST OPINION
EC-COI-89-21

FACTS:

You are a state employee required to file a Statement of Financial Interest (SFI). You have asked the Commission to provide an opinion as to whether "tax shelters" are reportable on SFIs pursuant to G.L. c. 268B, §5.

QUESTIONS:

1. Is a "tax shelter" (a venture created to generate tax losses for the purpose of offsetting income) reportable on an SFI pursuant to c. 268B, §5?

2. Does a tax shelter become reportable on an SFI if it begins to produce revenue instead of tax losses?

3. Is a tax shelter, which is structured as an assumption of a pre-existing debt of another person, reportable on an SFI if losses are generated? Is it reportable if revenue is generated?

4. Would the answers to the above questions

differ if the shelters are owned by a spouse?

ANSWERS:

1&2."Tax shelters" are reportable on SFIs for purposes of G.L. c. 268B, §5 either as an investment (if in excess of $1,000) or as a business entity.

3. Yes to both questions if the debt or revenue is in excess of $1,000.

4. No.

DISCUSSION:

1&2.A "tax shelter" is any "device used by taxpayers to reduce or defer payment of taxes."[1/] A tax shelter is reportable on an SFI because it must be characterized in one of only two ways: (i) as a business, or (ii) as an investment.[2/]

If the tax shelter is organized as a business,[3/] it would be reportable on an SFI under Question D [4/] if the filer or a Family Member (as defined therein) owns more than 1% of the equity in the business.

If the tax shelter is held as an "investment"[5/] it is reportable on an SFI under Question G [6/] if the fair market value of the investment is greater than $1,000 and the interest is owned beneficially by the filer or a Family Member. Tax shelters are reportable on SFIs even if they do not generate income because disclosure, for purposes of either Question D or G, is based on an equity ownership test, not an income test.

In the present case, you have posed a series of hypothetical situations. One example cited by you is whether the acquisition of office equipment, not evidenced by any documents, is reportable. Under the arrangement, an individual would not take possession of the equipment but, for purposes of the example, would be permitted by tax rules to claim a deduction. That situation, although presumably not characterized as a business, would be characterized as an investment because the person would be holding the equipment primarily to generate tax losses. It would therefore be reportable under Question G.

3. Another example cited by you is the assumption of a pre-existing debt for the purpose of generating tax losses. That too would be reportable as an investment under Question G if its fair market value[7/] is in excess of $1,000. It is also reportable under Question L [8/] if the debt or other liability is in excess of $1,000 and the assumed debt is owed by the filer or a Family Member.

4. The answers to each of the above questions would remain the same if a spouse is the exclusive owner of a shelter, whether by pre-nuptial agreement or other ownership, because SFI Questions D, G and L each require disclosure of financial information in connection with the filer and his or her Family Members. For purposes of c. 268A, §5, a spouse is a Family Member whose financial interests must be disclosed under Questions D, G, and L.

The Commission intends that this opinion is to be applied prospectively only. In response to recent changes in the tax code, the Commission expects to undertake a review of the SFI filing instructions to incorporate, among other things, the issues addressed here.

DATE AUTHORIZED: July 19, 1989

[1/] Black's Law Dictionary, Fifth Edition, 1979.

[2/] The ultimate purpose of either a business or an investment is the same, namely, the attainment of some economic advantage in exchange for the contribution of something of value. In the case of tax shelters, someone has contributed something of value (usually money) in exchange for generating tax losses which are then used to offset, reduce or defer taxes on other income accruing to the taxpayer. Just as the generation of income results in an economic advantage, the generation of such tax losses also results in an economic advantage to the taxpayer.

[3/] For example, as a corporation, a general or limited partnership or other unincorporated association. For purposes of G.L. c. 268B, §5, a "business" is defined as "any entity organized for profit, non-profit or charitable purposes."

[4/] "Business Ownership/Equity."

[5/] There is a wide variety of items which may be reported as an "investment" and the Commission has not attempted to create an exhaustive list. As a general guideline, an "investment" for purposes of the conflict of interest law would be any tangible or intangible property held primarily for the purpose of attaining an economic advantage, whether directly (as in the case of income) or indirectly (as in the case of tax shelters). Excluded from this definition are, among other things, items held chiefly for enjoyment.

[6/] "Securities and Investments." Alternatively, if the tax shelter is an investment in real property, the investment may have to be disclosed in Question K2

("Investment and Rental Property").

7/This is an interest for which a value can be determined pursuant to an independent appraisal. Cf. EC-COI-FD-87-2 (value of certain trust assets too speculative to be reportable).

8/"Other Credit Information."

CONFLICT OF INTEREST OPINION
EC-COI-89-22

FACTS:

You were elected as a Town (Town) Selectman earlier this year. You are also the sole stockholder and an officer (but are not otherwise an employee) of an ambulance services company (Company), a Massachusetts corporation which is engaged in providing various types of ambulance services in the southern part of the Commonwealth. Less than 50% of the Company's gross income and business concerns a contract with the Town to provide emergency ambulance service. That portion of the business serving the Town consists of approximately two ambulance vehicles and approximately ten employees. The remaining 50% or so of the Company's business is otherwise engaged primarily in other towns offering services pursuant to private contracts.

In April, 1989, Town Counsel wrote to this Commission seeking advice on your behalf as to the best way to divest your ownership and interest of that portion of the business "within the time constraints of G.L. c. 268A, §20." In response to Town Counsel's request, a commission staff letter was sent on June 7, 1989 advising you that c. 268A, §20 prohibits your contract with the Town while simultaneously serving as a Selectman. As no §20 exemption was deemed to apply based upon the facts presented, and based upon your desire to retain your elected position, the letter advised Town Counsel that your only alternative was divestment of your interest in the Company. The letter advised that the divestment could occur in one of two ways: (i) divestment of that portion of the Company doing business with the Town by transferring the assets used therefor (including the contract) to an independent third party for adequate consideration, or (ii) divestment of all but 1% of your interest in the Company. Either of these would be permitted under §20.

You have now requested a formal Commission opinion, by letter dated October 10, 1989. You state that you disagree with the conclusion of the staff letter primarily for policy reasons. You state that the voters of the Town were aware of your involvement with the Company before they elected you to the office of Selectman. You also ask whether the §20(f) (or some other) exemption applies to you. You advise us that the Commission may rely on the factual representations made in Town Counsel's request letter of April 1989.

QUESTIONS:

1. Does G.L. c. 268A, §20 require you to dispose of your interest in the Company because of its contract with the Town while you are also serving as a Town Selectman?

2. Does the G.L. c. 268A, §20(f) exemption apply to your situation permitting you to continue your ownership interest in the Company while serving as a Selectman? Is there any other exemption available?

3. How long do you have to terminate or dispose of your interest in the Company?

4. Is that termination necessary if you received a special exemption in light of the policy arguments advanced by you?

5. If you do divest your interest in the Company, may you, consistent with §20, hold a repurchase option for the portion of the business divested?

ANSWERS:

1. Yes.

2. No to both questions.

3. Pursuant to c. 268A, §20, you have thirty (30) days to terminate your interest from the time you receive this opinion.

4. No special exemption can be granted to you without action by the General Court.

5. No.

DISCUSSION:

Section 20

1. Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested

party, of which financial interest he has knowledge or has reason to know, unless some exemption applies.

The Company has a contract with the Town to provide ambulance services. You are the sole stockholder of the Company. You therefore have a direct financial interest in a contract with the Town. As a Selectman, you are a municipal employee for purposes of c. 268A. Therefore, unless some §20 exemption applies, you are prohibited from continuing your ownership in that portion of the business contracting with the Town while you are also serving as a Selectman.[1/]

2. Section 20(f) would permit a municipal employee to have such a financial interest if "the contract is for personal services in a part-time, call, or volunteer capacity with the police, fire, rescue or ambulance department of a town or any city with a population of less than thirty-five thousand inhabitants" (emphasis added). As your previous attorney acknowledged in March 1988, in a letter to this Commission, you are not an employee of the Company. You are, however, its sole stockholder. Accordingly, your financial interest in the contract with the Town, through the Company, is not for personal services but rather the provision of ambulance services. You are not personally obligated to do anything, hence no personal services contract exists that would permit the §20(f) exemption.

Whether a contract is for personal services depends upon the nature of the services to be provided. For example, a personal service contract terminates upon the death of the person obligated to perform. **See, Corbin on Contracts** §1335, Volume 6, page 378 (1962). You, as a stockholder and as an officer of the Company, are not obligated to perform any services to the Town under the contract. The Company is the contractually obligated party. Your death will not terminate the Company's obligation. Accordingly, your services are not for personal services to the Town as envisioned by the §20(f) exemption. **See also, Kowal v. Sportswear by Revere, Inc.,** 351 Mass. 541, 544 (1967) (contracts are generally held to survive the death of one of the parties. Contracts which involve acts and services which can only be performed personally by the promisor or some other particular person, however, are an exception to this general rule. Such contracts terminate when death renders the personal performance impossible).

This conclusion is consistent with §20(b)(1), another conflict section which includes a "personal services" reference. The issues addressed by that section indicate that the personal service guidelines were established to permit employment services of individuals only at certain specified times. Section 20(b)(1) first sets apart personal service contracts from other potential municipal contracts under §20 generally and then requires that the personal services be "provided outside the normal working hours of the municipal employee." The services provided also must not be "required as part of the municipal employee's regular duties." These guidelines would be superfluous to a corporation or other entity providing services to a town or city pursuant to a contract. Although one may contend that §20(f) only requires that someone provide personal services, and not necessarily the contracting party (for example, it can be argued that the Company's employees provide the required personal services to the Company which, in turn, holds the contract), such a reading would effectively undercut the meaning of the §20(f) exemption and also does not seem justified by the restrictions of §20 or by the legislative history of §20(f). See 1983 House Doc. No. 6030 and 1983 House Doc. 6529. **See also EC-COI-87-2** (a narrow construction of §20(f) is appropriate).[2/]

This personal service exemption would have been available to you if you were providing your services to the ambulance department of the Town, on a part-time, call or voluntary basis. For example, actually driving the ambulance to or from a call would qualify under this exemption.

Other than the divestment exemption of which you have been previously advised, no §20 exemption applies to you. The contract does not qualify for a §20(b) exemption because (i) there is no indication that the contract was awarded pursuant to either public notice or competitive bidding (neither your attorney's letter of March 1988, Town Counsel's letter of April, 1989, nor your letter of October 10, 1989, indicates that this exemption was met although you had previously been made aware of its provisions), and (ii) as a Selectman, you have official responsibility for the activities of the contracting agency.

3. Section 20(a) indicates that both the disclosure and the termination of the interest must take place within thirty days after learning of an actual or prospective violation of §20. Accordingly, you will have thirty days from the date of receiving actual or constructive notice of this opinion to dispose of your interest in the Company's contract or to resign as Selectman of the Town.

4. Any special legislative exemption would necessarily have to be granted by the General Court, regardless of the policy reasons cited by you. Amendments to §20 indicate that several policy

exemptions have already been built into its provisions. This Commission cannot create additional exemptions without authority from the General Court.

5. Consistent with §20, you may not hold an option to repurchase any portion of the Company once you have "disposed" of your interest because §20 also prohibits indirect financial interests. The repurchase option would be an indirect financial interest prohibited by §20.

DATE AUTHORIZED: November 9, 1989

[1/]For purposes of c. 268A, §20, your ownership of the Company does not also make you a "municipal employee" such that, as a Selectman, you would be eligible for the §20 Selectman's exemption for additional municipal appointments. See **EC-COI-82-107.** That exemption would permit a Selectman to hold an additional municipal appointment provided that the additional appointment was held first and provided further that the Selectman chooses only one compensation. Assuming, for the sake of argument, that the Company is considered a municipal employee because of its contract with the Town (although that designation in itself is unlikely) you, as owner of the Company, do not become a municipal employee solely because of your ownership interest. See e.g., **EC-COI-85-1** (an employee of a vendor agency that contracts with the state is not customarily considered a state employee. If however, the contract's terms call for a particular individual's services, that individual is a state employee). The Company's contract with the Town does not indicate that your services were specifically contracted for. Because the additional position must have been held first, the Company cannot now retroactively amend the contract to provide for your specific services. Accordingly, you do not hold an additional municipal appointment as a result of your ownership of the Company. You are therefore not eligible for the §20 Selectman's exemption.

[2/]In any event, even if the Company's services were somehow able to fall within the definition of "personal services," §20(f) states that the contract must be with "the police, fire, rescue, or ambulance department of a town or any city." The Company's contract was made by and between the Company and the Town, not the rescue or ambulance department of the Town. Accordingly, the intent of §20(f) (that is, to permit a person to provide personal services directly to an individual rescue or ambulance department) is not met here because a corporate entity is providing contractual services to the Town as a whole.

CONFLICT OF INTEREST OPINION
EC-COI-89-23

FACTS:

You are a director of a special office within a state agency (ABC). A private software company (XYZ), recently presented a seminar to ABC employees arranged by a supervisor within your office. At the conclusion of the seminar an XYZ representative presented this supervisor with a demonstration model software package for use by your office. The package, which you estimate to be worth in excess of $100, contains a program and manual for statistical analysis which you believe would be useful to your office and compatible with your current system.

XYZ is not currently a software vendor to ABC but is interested in becoming a ABC vendor in the future.

QUESTION:

Does G.L. c. 268A permit you to accept XYZ's software gift to your agency?

ANSWER:

Yes, subject to certain limitations.

DISCUSSION:

ABC is a state agency for G.L. c. 268A purposes, G.L. c. 14, §1, and its members and employees are state employees within the meaning of G.L. c. 268A, §1(q). Two sections of G.L. c. 268A are relevant to your inquiry.

1. **Section 3(b)**

Under this section, no state employee may accept for himself anything of substantial value given for or because of any official act performed or to be performed by the employee. While XYZ's offer of consulting services to ABC would constitute something of substantial value, **Commonwealth v. Famigletti,** 4 Mass. App. Ct. 584 (1976), the acceptance of the offer will not violate §3(b) because the offer will be accepted for use by the agency, rather than for the personal use of an employee. This conclusion is consistent with **EC-COI-89-3,** in which the Commission recently advised another state agency that it could accept a gift of services from a current vendor. See **also, EC-COI-84-114** (a gift of artwork donated for permanent exhibition in a government agency and not for the personal use of any employee does not violate

§3); EC-COI-87-23 (no violation where state employee insulates himself from any personal benefit attributable to a gift received for or because of acts performed as a state employee). While §3 might be applied differently where a gift to a government agency also confers a personal benefit to an individual employee (such as the donation of telephones for use in an employee's personal vehicle), the XYZ offer appears to confer a benefit solely upon ABC rather than upon any employee personally.

2. Section 23

Under this section, a state employee may not use his official position to secure unwarranted privileges of substantial value for himself or others. Issues under this section may arise for you and other ABC employees in connection with your evaluation of any prospective contract application from XYZ. In evaluating the application, you may not grant to XYZ any unwarranted treatment and must keep independent the fact that XYZ has provided a free software package. As long as ABC employees evaluate the XYZ application under the same objective standards by which it considers other contract applications, they will not violate §23(b)(2).[1/]

DATE AUTHORIZED: July 19, 1989

[1/]This opinion is limited to the application of G.L. c. 268A and is not intended to constitute a review of the application of your agency's internal code of conduct to the facts which you have presented.

CONFLICT OF INTEREST OPINION
EC-COI-89-24

FACTS:

ABC state college is an institution of higher education with a statutory purpose to "provide, without discrimination, education programs, research, extension and continuing education services in the liberal arts and sciences and in the professions." G.L. c. 75, §2. Two faculty members of an academic department (Department) have organized a non-profit corporation known as the Institute, Inc. (Institute). The Institute has been provisionally approved by the head of ABC.

According to its by-laws, the major purpose of the Institute is to "support, enhance and extend the research program of the Department." Other purposes include:

(a) To consider and act on problems regarding computer science and computer engineering research and graduate education;

(b) To foster interaction and affect technology transfer between ABC and non-college computer science and computer engineering research communities;

(c) To interact with and inform public and private groups about computing research and education; and

(d) To research and develop technological applications in the field of computer science.

The nature of the non-profit corporation's work is to transform basic research developed by Department faculty into useful industrial applications and to market the resulting products. Thus, the Institute will collaborate with industry and government to provide technical and educational services to companies, facilitate product development, furnish technical consulting and license technology. For example, a new design for a computer chip is invented in the Department labs. The Institute would pay the legal and administrative costs to obtain a US patent in the name of ABC. The Institute would also market the new technology to industry. Excess revenues generated by the sale or licensing of the chip would be returned to the Department and ABC. Similarly, the Institute may take computer software developed in the Department lab, adapt the software for use in industry, market the software and instruct industry in its use. It is anticipated that information gained from the Institute will enhance the Department's basic research program and that the availability of the Institute will assist in attracting faculty to ABC.

The Institute's Board of Directors (Board) consists of Department faculty and two members of the ABC administration appointed by the head of the college. It is the intention of ABC to interact closely with the Institute. The officers of the Institute are elected by the Board from the Board. The Chairman of the Institute is the Chairman of the Department.

It is anticipated that the Board will direct all of the activities of the Institute but daily management will be provided by an administrative staff. Board decisions will be made by a majority vote except that by-law changes will require a two-thirds vote. It is also anticipated that the Department faculty members will serve as consultants to the Institute and that some faculty members who work part-time or are on sabbatical may be employed on the Institute staff.[1/] Consulting activities will be governed by a trustee

document limiting each faculty member to one day per week of outside consulting.

The Institute does not utilize ABC facilities and will lease space, off campus, for its labs and offices. The Institute will permit the Department to utilize the Institute's research facilities. Presently, the Institute does not have funding but it is anticipated that the Institute's sources of funding will be loans, possibly from state supported development programs, fees for services, licensing fees, product sales and industry donations.

QUESTION:

For purposes of G.L. c. 268A is the Institute considered a state agency?

ANSWER:

Yes.[2/]

DISCUSSION:

G.L. c. 268A, §1(p) defines a state agency as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission or agency, but not an agency of a county, city or town." Prior opinions of the Commission have identified several criteria useful to an analysis of whether a particular entity is a public instrumentality for the purposes of G.L. c. 268A. These factors are:

(a) the impetus for the creation of the entity (e.g., legislative or administrative action);

(b) the entity's performance of some essentially governmental function;

(c) whether the entity receives and/or expends public funds; and

(d) the extent of control and supervision exercised by government officials or agencies over the entity.

None of these factors standing alone is dispositive. The Commission considers the cumulative effect produced by the extent of each factor's applicability to a given entity, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. With these precedents in mind, the Commission concludes that the Institute is a state agency within the meaning of G.L. c. 268A, §1.

a. Creation

As a private, non-profit corporation, the Institute was created by filing its articles of organization and by-laws with the Secretary of State. Though the Institute's organizational structure is that of a corporation rather than a traditional public sector agency or department, the Commission has not conditioned the application of G.L. c. 268A on the organizational status of an entity. **In the Matter of Louis Logan**, 1981 SEC 40, 45. Rather, the Commission examines the impetus for the creation of the entity. The Commission has found governmental creation where a state agency, on its own initiative, resolved to form a non-profit corporation to further its legislatively mandated functions. **EC-COI-89-1; 84-147; 88-24** (governmental creation found where municipal agency formed non-profit to further its statutory mandate). In comparison, no governmental creation was found where a municipality created a non-profit corporation to fulfill obligations imposed by a contract or where an entity was created by a private will. **EC-COI-88-19; 84-65.**

In the present situation, the legislative mandate of ABC includes the provision of educational programs and research in the liberal arts, sciences and professions. To fulfill its mandate, ABC has established various academic departments, including the Department.

The major purpose of the Institute, pursuant to its by-laws, is to support, enhance and extend the Department's research program. The Institute will serve its purposes by linking the Department with the industrial sector. The Institute's purpose comports with ABC guidelines (Guidelines) which require that any ABC/industry agreements relate to the purposes of ABC. According to the Guidelines,

> as a state college, ABC has specific responsibilities and obligations in the fulfillment of its tripartite mission of teaching, research and public service. The creation of new knowledge, the dissemination of knowledge, and the application of knowledge for the public good are the purposes of ABC. ABC has an obligation to fulfill its purpose in concert with other sectors of the intellectual, political, racial and financial life of the Commonwealth in accordance with state law.

The Commission concludes that the impetus for the creation of the Institute is to further ABC's

legislatively mandated functions of education and research. In addition, the permanent character and formal organization of the non-profit corporation distinguishes it from temporary ad hoc advisory committees which the Commission has regarded as exempt from the definition of state agency. See, EC-COI-87-28 (neighborhood council with fluid membership, lack of organizational requirements and discretionary power not municipal agency); 85-6 (ad hoc body serving as outside resource to agency and not delegated any authority by agency not a state agency).

b. Governmental Function

For the reasons stated above, the Commission finds that the Institute will perform an essentially governmental function. ABC is required by statute to provide education and research and to disseminate knowledge for the public good. The principal purpose of the Institute is to support and extend one of the academic departments at ABC in its pursuit of education and research. As an extension of the Department's research program, the non-profit corporation will actively participate in the work product of the Department. See, EC-COI-89-1. It is anticipated that the Institute will provide a system by which basic research developed at ABC can be processed for industrial application. During this process the Institute will also provide educational experiences for the Department's doctoral students, research facilities and ideas for further Department research.

Lastly, the Institute will serve a governmental function of producing revenue to support the Department and ABC. EC-COI-89-1; 84-127 (development of new sources of revenue for University hospital within domain of state responsibility). All of the Institute's purposes serve to facilitate ABC's statutory purposes.

c. Public Funds

The Institute's funding sources are uncertain at this time. Even if they obtain private funding for its activities, the Commission concludes that the Institute is benefiting from public funding by the use of ABC facilities, ABC resources and ABC faculty in the development of the initial product for the Institute. See, EC-COI-88-24 (use of agency employees and facilities by non-profit corporation constitute substantial use of public funds).

d. State Agency or Governmental Control Exercisable Over the Non-profit Corporation

Presently the entire Board of Directors is college-affiliated, either as Department faculty or as representatives of the ABC administration. The Commission recognizes that the two administrative representatives would not constitute a majority for purposes of Board decisions. However, the Commission finds that, under the circumstances, the faculty board members' interests are so closely aligned with the administrative interests of ABC that the Board and the Institute are effectively controlled by ABC. The Board members share an interest in directing the non-profit corporation for the benefit of one of the academic departments of ABC. Further, as the officers of the corporation are selected by the Board of Directors from the Board, ABC control is self-perpetuating.

In summary, we find that the Institute is a state agency for purposes of G.L. c. 268A because it is created to further legislatively mandated purposes, it performs inherently governmental functions, it benefits from public resources and it is controlled by ABC employees.

DATE AUTHORIZED: August 29, 1989

[1/] As the Commission concludes that the Institute is a state agency, G.L. c. 268A will apply to ABC faculty members who serve as consultants, board members or employees of the Institute. The pertinent sections of the statute are §§4, 6, 7, and 23. See, e.g., EC-COI-84-113 (professor prohibited from being compensated by non-state parties in relation to matters submitted to data bank developed by him at university); EC-COI-84-95 (university attorney's private activities limited to §§4, 7 and 23). Faculty members involved in the Institute are advised to seek an opinion from the Ethics Commission regarding how G.L. c. 268A applies to their particular situation.

[2/] This advisory opinion is based on the facts as you relate them to be at the present time. It does not preclude the possibility of a different result should these facts change.

CONFLICT OF INTEREST OPINION
EC-COI-89-25

FACTS:

You represent the College Alumni Association, Inc.,

(Association) a private, non-profit corporation formed to promote the interests of the state college and its alumni and to provide services and programs that benefit and develop the student, faculty, staff and student bodies. According to its bylaws, the Association operates independently in its goal to further the interest of the alumni, and the Commonwealth. Eligibility for membership in the Association is available to alumni and others who were enrolled for two years and whose classes have graduated.

The Association wishes to invite a college coach "to address and participate in meetings and events of [the Association's] membership." Specifically, the Association would like the coach to speak at alumni functions located off campus. The Association wishes to provide the coach with honoraria for these formal presentations. Funds for the honoraria would be derived solely from private sources. An agreement between the Association and the coach would provide honoraria for each speaking engagement for four years. The Association maintains that the coach's speaking fee comports to fees that would be paid to a similarly qualified individual. The preparation and delivery of the speeches will be accomplished outside of the coach's regular working hours.

The coach states that he has no official duties concerning the Association. He states that any formal speaking engagements he presents to the Association would be outside of his college duties. For example, he would not give a formal presentation while he is out of town for a school athletic event.

The Legal Counsel that the state college has provided his opinion that the proposed series of speaking engagements would "not fall within the scope of the coach's official duties." He concludes that the coach's duties "would allow and perhaps require, the coach to make informal presentations to local groups in the immediate campus area during regular working hours as he determines. This is distinctly different from the proposed program which involves formal presentations on the coach's personal time off campus without the involvement of college resources and at a time and place determined by the Association." Additionally, the Counsel states that the speaking program would not be connected to any fundraising activity by the Association. The coach joins the Association's request for this opinion.

QUESTION:

May the Association offer to the coach and may he accept honoraria for four engagements per year, for four years in exchange for the coach's formal speaking presentations off campus as arranged by the Association?[1/]

ANSWER:

The honorarium may be offered and accepted only if the speeches meet the standards enumerated below.

DISCUSSION:

In his capacity as a college coach, the coach is considered a "state employee" within the meaning of the conflict law, G.L. c. 268A, §1(q).

Section 3(a) prohibits an offeror of an item of substantial value from giving anything valued at $50 or more to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such employee.[2/] A corresponding provision under §3(b) prohibits the public employee from accepting an item of substantial value for or because of his official duties. The Commission has previously stated that §3 prohibits the offering of a gift of substantial value to a public employee where there is a connection between the motivation for the gift and the employee's duties. **See, In the Matter of George Michael**, 1981 SEC 59. Section 3 also prohibits additional compensation to a public employee for or because of his official duties. The preventative purpose of §3 is to preclude public employees from "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." **Id.** at p. 68. **See also, EC-COI-88-20; 84-101.**

Under §3, the Association would be prohibited from offering and the coach would be prohibited from accepting honoraria of substantial value for speaking engagements if such speeches were considered as part of his official college duties. Under the facts presented, however, the coach states he has no official duties with respect to the Association. The college Legal Counsel has also determined that the Coach's proposed formal presentations to the Association would fall outside the scope of his official college duties. While Counsel notes that the Coach's official position may well require him to "make informal presentations" to local groups during his normal working hours, he concludes that this differs from the Coach's presentations to the Association because they would be formal speeches presented off campus and on his own private time.

The Commission will ordinarily defer to an appointing official's interpretation of a public employee's job description unless it is unreasonable or it would frustrate the purposes of c. 268A. See, EC-COI-88-17; 83-137. The Commission thus defers to the counsel's interpretation that coach's official duties do not include formal presentations on his private time off campus. See, EC-COI-88-10.[3/]

Section 23, the standards of conduct provision, applies to a public employee's actions which create the appearance of a conflict of interest. Section 23(b)(2) prohibits a state, county or municipal employee from using his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. The Coach would violate this section by using his official position to obtain the series of Association's speaking engagements, worth more than $50, if it is unwarranted and not available to similarly situated individuals.

Under §23, the Commission has on numerous occasions considered issues pertaining to speaking engagements given by public employees and the receipt of honoraria. See, Commission Advisory No. 2; EC-COI-80-28 (pertaining to members of the general court giving speeches) EC-COI-86-11 (judge would violate §23(b)(2) if he accepted honoraria of substantial value while also receiving his regular state compensation). In EC-COI-82-43, the Commission enumerated four criteria which must be met in order for a speaking engagement to be permissible under §23. The four requirements are:

1. state supplies or facilities not available to the general public are not used in the preparation or delivery of the address;

2. state time is not taken for the preparation or delivery of the address;

3. delivering the speech is not part of the state employee's official duties; and

4. neither the sponsor of the address nor the source of the honorarium, if different, is a person or entity with which the state employee might reasonably expect to have dealings in his official capacity.

Under the facts presented, the Coach appears to meet all four criteria.

An additional issue remains, however, whether the series of speeches by the coach to the Association would be legitimate. As outlined in Commission Advisory No. 2, the Commission considers several factors in determining whether a speaking engagement is legitimate. See, EC-COI-83-87. In order for a speaking engagement to be considered legitimate, it must be:

1. formally scheduled on the agenda of the meeting or conference;

2. scheduled in advance of the speaker's arrival at the meeting or conference;

3. before an organization which would normally have outside speakers address them at such an event; and

4. the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

If these four factors are not satisfied, no fees or expenses may be received.

In drafting your proposed speaking arrangements with the coach, you may have been unaware that the legitimacy of the speeches would be a factor in determing whether the honoraria would be permitted under G.L. c. 268A. If this is so, the Commission anticipates that you will take the opportunity to evaluate the proposed honoraria in light of the considerations enumerated above.[4/]

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[1/]The Commission presumes, for the purposes of this opinion, that the Association is a private, non-profit corporation which is not considered a state entity for the purposes of the conflict law. See, EC-COI-89-18.

[2/]See, Commission Advisory No. 8.

[3/]To the extent that the coach's proposed activities may be considered as outside employment, no state agency would appear to be a party to or have a direct and substantial interest in the matters for which he will be receiving compensation. G.L. c. 268A, §4.

[4/]We note that the advice contained in this opinion is limited to the application of G.L. c. 268A to the facts presented. Additional rules or regulations, such

as those promulagated by the athletic associations to which the college belongs, may also be applicable.

CONFLICT OF INTEREST OPINION
EC-COI-89-26

FACTS:

Until recently, you served as a member of a committee (Committee), which is generally responsible for the supervision of investments for certain state agencies.

You are currently a Vice President at a firm XYZ and you held this position while you served on the Committee. XYZ provides investment management services to institutional investors. One of the services offered by XYZ is an annuity contract. The state agencies are considering hiring XYZ as a money manager for such an annuity contract. The annuity contract assets would be held in an investment account which is managed by XYZ. XYZ would manage the investment account with the goal of providing a return at a higher yield than the bond market index. The funds for this annuity contract will be derived from cash reserves which are currently uninvested state agency funds. You state that you did not participate in or approve any decision made by other state officials to invest these funds into any annuity contract for which XYZ may be considered.

The evaluation of applicants to manage the state agency funds is conducted by state officials. Submissions of prospectus are evaluated by the officials year round. If a proposal meets certain criteria, the company is invited to interview with the officials. Each member rates the company's interview and a file is maintained for each interviewee. As the need arises, the officials will select a company. All potential companies selected to manage state agency funds are referred to an independent company for its evaluation and opinion of the proposed investment product. If a positive report is received, a contract is issued to the company.

Advisors from XYZ were interviewed by these state officials as a potential money manager for the state agencies. The state agencies were considering whether to invest funds into the XYZ product prior to your resignation from the Committee.

QUESTION:

If XYZ is selected to be money managers for the state agencies' annuity contract, may you participate in the management of the agencies' funds?

ANSWER:

Yes, subject to the restrictions of §5(b).

DISCUSSION:

As a former member of the Committee, you are considered a former state employee for the purposes of G.L. c. 268A. Accordingly, the provisions of §§5 and 23(c) presently apply to you.

Section 5

Section 5(a) prohibits a former state employee from knowingly acting as an agent or attorney for, or receiving compensation directly or indirectly from anyone other than the commonwealth or a state agency[1/], in connection with any particular matter[2/] in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which he participated[3/] while he was a state employee. If you approved an investment decision made by other state officials, you "participated" in that decision for the purposes of §5. More than one person may participate in a particular matter. **See, EC-COI-86-23.** Furthermore, as a Committee member, your active oversight of and tacit approval of any of the state officials' actions regarding the state agency's funds may be considered personal and substantial participation in those matters. **See, EC-COI-89-7.** On the other hand, mere authorization given by the Committee to answer a letter may not constitute personal and substantial participation. **Id.** Additionally, the prohibitions of §5 extend only for the duration of the particular matter in which you participated. **See, EC-COI-81-114; 88-14.** For example, if, as a Committee member, you approved or recommended that a certain amount of uninvested state agency funds be invested into an annuity contract, that approval or recommendation would be considered a particular matter. Under §5(a), as a former state employee you could not then be paid by or act as a representative of XYZ in connection with that recommendation. **See, EC-COI-88-14.**

Under §5(a), we conclude that you would not be precluded from acting as a money manager for XYZ on a potential annuity contract for the state agencies. We base this conclusion on your representations that you did not participate in any Committee approval or determination in connection with the state officials' decision to invest those cash reserves.

Section 5(b), on the other hand, pertains to

particular matters which were the subject of your official responsibility as a Committee member. Section 5(b) prohibits you as a former state employee, for one year after leaving state service, from personally appearing on behalf of someone other than the commonwealth before any court or state agency in connection with any particular matter in which the state is a party or has a direct and substantial interest and where the particular matter was under your official responsibility[4/] within the two years preceding your termination from state service. Your official responsibility as a Committee member would include particular matters which the Committee delegated to others to perform. See, EC-COI-85-50; 89-7. The Commission has previously stated that the "keynote of official responsibility is the 'potentiality' of directing agency action and not the actual exercise of power." See, EC-COI-87-17 (discussing the application of official responsibility under §4). Thus, matters under your official responsibility would include particular matters which the Committee has delegated others to perform. See, EC-COI-85-50; In the Matter of Donald Zerendow, 1988 SEC 352 (disposition agreement under §5(b)). For the purposes of this section, a personal appearance would include any telephone calls or correspondence made by you on behalf of XYZ to any state agency in connection with the investments which were pending under your official responsibility during the last two years of your Committee position. See, EC-COI-87-27; 89-7.

The decision as to whether the state agencies should invest in XYZ's annuity contract was under consideration while you were a Committee member. Even though you did not participate in the process leading to this decision, by statute you nonetheless had official responsibility for that particular matter. See, §23(d). Since this matter was pending under your official responsibility, you are barred under §5(b) from appearing, for one year, before any state agency in connection with the XYZ annuity contract. While §5(b) would not preclude you from working for XYZ on in-house matters on the annuity, you may not make personal phone calls or write letters concerning that investment. See, EC-COI-88-17; 85-21. If the restrictions placed on you by §5(b) cannot be implemented practically, then you may not act as the money manager for the state agencies funds.

In addition, the provisions of §23(c) apply to you as a former state employee. That section prohibits you from disclosing or using confidential information which you learned in your Committee position to further your personal interests. For the purposes of this section, confidential information is that which is exempted from the definition of a public record under G.L. c. 4, §7.

While under these facts you are not prohibited under §5 from contacting your former state agency on other matters, you should be aware of the fact that your former Committee colleagues and individuals who remain state employees are prohibited under §23 from granting you any preferred or favored treatment in their dealings with XYZ.

In addition, the members of the state agencies are subject to the provisions of §23(b)(3).[5/] Therefore, if the state officials make a determination to invest in this product they should comply with the §23(b)(3) requirements by filing a public disclosure. By doing so, they would remove any inference of undue favoritism or improper influence affecting their decision.

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[1/]"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such departments and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

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

[3/]"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.

[4/]"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.

[5/]Section 23(b)(3) states: "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, disclose in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

CONFLICT OF INTEREST OPINION
EC-COI-89-27

FACTS:

You are employed by a municipal sewer department in a city (City). You are a tenured permanent civil service employee.

You also operate a private business in the City. The function of this business is to install and repair sewer lines and sewer connections. You are required to obtain a City permit in order to enter the sewer and the City sewer inspector inspects your company's work upon completion.

You have been injured while working in the employ of the City and, pursuant to c. 152, §34, you have been collecting workman's compensation benefits in the amount of two-thirds of your average weekly wage at the time of your injury. To date you have not returned to employment with the City. You have not applied for disability retirement pursuant to G.L. c. 32, nor has it been determined that you are totally and permanently disabled pursuant to G.L. c. 152 such that you are permanently unable to return to work. While you have been collecting workman's compensation, you have not been placed on lack of work status by the City. In general, if a municipal employee who is collecting workman's compensation submits a physician report certifying that he is able to perform his prior job duties, he will be able to return to work.

The City is self-insured for purposes of c. 152, and compensation payments are generally paid by the personnel department from City funds. The City also continues to pay its share of your health insurance benefits. You remain liable for the co-payment at the City rate provided to all City employees. You do not accrue sick time, vacation time and retirement benefits while you are on workman's compensation but you are credited with the benefits you had accrued prior to your injury. Although an employee may use accrued sick leave pay to supplement his weekly compensation check, you have not done so.[1/]

QUESTIONS:

1. For purposes of G.L. c. 268A are you a municipal employee during the time in which you collect workman's compensation benefits?

2. If you remain a municipal employee, may you receive compensation from private parties to install and repair sewer lines in the City in which you are employed?

ANSWERS:

1. Yes.

2. No.

DISCUSSION:

1. Municipal Employee Status

G.L. c. 268A, §1(g), defines a municipal employee "as a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution." The issue of whether you retain your municipal employee status depends upon whether you continue to hold employment in the City while receiving workman's compensation benefits.

In a determination of whether one continues to hold employment within a municipal agency, the Commission will examine the characteristics of the relationship between the employee and the agency. The Commission will consider whether a previously compensated employee continues to receive compensation from the municipal agency, whether the employee continues to receive the same retirement, insurance, collective bargaining, sick leave and other benefits available to municipal employees, whether the parties have a reasonable expectation that the employee will return to his municipal position and what actions have been taken by the parties to terminate the employment relationship. No one factor

is dispositive, as the Commission considers the cumulative effect produced by each factor, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. See, EC-COI-84-46; 84-17; N.L.R.B. v. Economics Laboratory, Inc., 758 F.2d 931 (3rd Cir. 1988) (for purposes of union voting employment status continues until there is a manifestation of intent to terminate clearly communicated to other party); N.L.R.B. v. Newlyweds Foods, Inc., 758 F.2nd 4 (1st Cir. 1985) (same).

For example, within the context of a leave of absence situation, the Commission has stated that state employee status does not continue during a leave of absence where the employee received no compensation, no fringe benefits and no retirement credit attributable to the state position during the leave of absence. EC-COI-84-17. However, a period of absence due to vacations, holidays, illness, or personal time does not terminate state employee status as the employee continues to receive state benefits such as retirement, insurance, collective bargaining and sick leave benefits attributable to the leave period. EC-COI-84-46. The Commission finds that you remain a municipal employee while collecting workman's compensation benefits because you continue to receive compensation and employment benefits from the municipality and no action has been taken to terminate your employment relationship with the municipality.

a. Compensation

For purposes of G.L. c. 268A, compensation is defined as "any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." The definition of compensation is broadly construed and is not limited to salary or wages. See, Springfield v. Director of the Division of Employment Security, 398 Mass. 786, 790 (1986). In Springfield v. Director of the Division of Employment Security, 398 Mass. 786 (1986), unemployment compensation benefits payable under G.L. c. 151A constituted compensation for purposes of G.L. c. 268A. The Commission concludes that receipt of workman's compensation benefits also constitutes compensation for purposes of c. 268A.

Workman's compensation benefits, similar to unemployment benefits, are economic benefits provided by the employer to compensate for lost wages. Locke, 29 Massachusetts Practice, §3 (1981). The underlying policy of the Workman's Compensation Act is to provide "adequate financial protection to the victims of industrial accidents. . . With workman's compensation the employee and the employee's family acquire a limited, although substantial right to be insured against the grievous financial impact that may result from injury in the workplace." LaClair v. Silberline Manufacturing Co., Inc., 379 Mass. 21, 27 (1979); see also, Ahmed's Case, 278 Mass. 180 (1932) (compensation is relief from inability to earn; employee beneficiary of contract between employer and insurer). Further, the obligation to pay workman's compensation benefits accrues within the employment relationship as a result of and in return for services rendered.[2/] An employee may collect workman's compensation benefits only if he sustains a personal injury arising out of and in the course of his employment. See, Madden's Case, 222 Mass. 487, 493 (1916). Compare, Springfield, 398 Mass. at 790-791 (employer not obligated to pay employment security benefits except as result of employee having provided wage earning services).

Finally, in addition to receiving an economic benefit in the form of workman's compensation payments, you also continue to receive the same health insurance benefits from the City as you received before your injury. You do not earn additional vacation or sick time while receiving compensation benefits but you continue to hold the benefits which had accrued until your injury. See, School Committee of Medford v. Medford Public School Custodians Association, 21 Mass. App. Ct. 947, 948-949 (1986) (c. 152 contemplates payment for vacation earned but not taken at time of injury); Rein v. Town of Marshfield, 16 Mass. App. Ct. 519, 523 (1983) (under c. 41, §111F injured officer does not accumulate vacation or sick pay during period of injured on duty leave).

b. Reasonable Expectation to Return to Work

Retention of municipal status will also depend upon whether the parties have a reasonable expectation that the employee will return to his municipal position. Relevant factors include whether the employee has been replaced; whether the employee has retained seniority; and whether the employee's medical status will allow a return to work. See, e.g., N.L.R.B. v. Economics Laboratory, Inc., 857 F. 2d 931, 936 (3rd Cir., 1988); N.L.R.B. v. Newlyweds Foods, Inc., 758 F. 2d 4, 7 (1st Cir., 1985); see generally, Annot. 85 ALR Fed. 188. For example, when a municipal employee collecting workman's compensation has been declared to be totally and permanently disabled or been replaced or resigned or retired on a disability or other pension, his municipal employee status will cease. See, EC-COI-83-84 (Housing Authority member on temporary leave of absence continues to hold position as his position is not being filled by another).

The Commission finds that there remains a

reasonable expectation that you will return to your position. You have not retired, resigned or applied for disability retirement. No determination has been made that you are totally and permanently disabled, nor has the City instituted civil service proceedings to remove you from your position pursuant to c. 31, §41. If you receive the appropriate medical clearance you may return to your position. In conclusion, because your position has not been terminated and you receive economic benefits from the City you continue to hold your municipal position.

2. **Private Business**

As the Commission concludes that you are a municipal employee, you are subject to G.L. c. 268A. In particular, G.L. c. 268A, §17 is pertinent to your private business. Section 17 generally prohibits a municipal employee from acting as agent for, or being paid by anyone other than the City, in relation to any decision, application, contract or other particular matter[3/] in which the City is a party or has a direct and substantial interest.

The construction, alteration, inspection and use of sewer connections are matters which the Legislature has delegated to the cities and towns for regulation. G.L. c. 83 **et. seq.** The City permits that you must obtain prior to commencing sewer work and the inspection of your company's work upon completion are particular matters in which the City has a direct and substantial interest. The Commission has previously stated that a city or town has a direct and substantial interest in the application for and issuance of a permit as the issuance of a permit represents the local official's determination that the work complies with all relevant codes, laws, ordinances, rules and regulations and because work done pursuant to a permit is presumptively "in relation to" the permit. **EC-COI-88-9** (town has direct and substantial interest in carpentry work which requires building permit); **EC-COI-87-31** (town has direct and substantial interest in installation of septic system pursuant to permit).[4/]

Therefore, the Commission concludes that, while you are a municipal employee, you may not receive compensation in your private business for work performed in the City, whether you perform the work or whether you subcontract the work. Also, you may not obtain permits on behalf of other contractors or private parties because you would be acting as the agent for these parties. **See, In the Matter of Robert P. Sullivan**, 1987 SEC 312, 315.

DATE AUTHORIZED: August 29, 1989

[1/] In rendering this opinion, the Commission has relied on the facts as stated by you and City officials. The advice provided in this opinion is intended to guide your prospective conduct and does not purport to review the propriety of your prior activities.

[2/] The Commission notes that the employer ultimately pays for the benefits, either through insurance premiums or payments as a self-insurer, such as the City does.

[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/] The Commission has suggested that the presumption that all work done pursuant to a permit is "in relation to" that permit may be overcome under certain circumstances. For example, if a municipal employee was one of many independant contractors on a major project and had no responsibility for any dealings with the town on any matters, he might not be considered to be privately compensated "in relation to" the permit. **See, EC-COI-87-31.** Under the circumstances you represent it is highly unlikely that you can overcome this presumption as the work your company performs is specific to the permit and is regulated and inspected by the department in which you are employed. **EC-COI-88-4; 87-31.**

CONFLICT OF INTEREST OPINION
EC-COI-89-28

FACTS:

You are a municipal police officer employed the ABC Police Department (Department), and also serve as president of an employee organization which represents non-supervisory police officers employed by the Department. You are contemplating seeking election to the city council (Council) of the same municipality.

QUESTION:

Does G.L. c. 268A permit you to serve on the Council while also maintaining your employment as a police officer in the same municipality?

ANSWER:

No.

DISCUSSION:

If you are elected to the Council, you will be considered a municipal employee for the purposes of G.L. c. 268A. **In the Matter of Kenneth Strong**, 1984 SEC 195; **EC-COI-87-16; EC-COI-87-25; EC-COI-86-19.** As a municipal employee, you will be subject to the restrictions of G.L. c. 268A, §20, which prohibits you from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same municipality. By virtue of your compensated employment as a police officer, you have a financial interest in your employment contract with the Department. **See, EC-COI-80-89** (municipal teacher has a financial interest in employment contract as teacher); **In the Matter of Kenneth Strong, supra** (maintenance worker for a housing authority has a financial interest in his employment contract with the authority). **Cf. Quinn v. State Ethics Commission**, 401 Mass. 210 (1987) (state bail commissioner has a financial interest in his contract with the judicial department). Accordingly, your maintaining compensated employment as a police officer in the Department while also serving as a member of the Council will place you in violation of G.L. c. 268A, §20.[1/]

Although there are exemptions to the prohibition in §20, none is applicable to you. As a member of the Council, you would be statutorily ineligible for classification as a special municipal employee under G.L. c. 268A, §1(n) and an exemption under §20(d). Because you serve for more than five hundred hours annually as a police officer, the exemption under §20(b) is not available. Finally, although §20 was recently amended to permit housing authority employees to run for and hold elective municipal offices, the exemption does not extend to municipal agencies other than housing authorities. St. 1987, c. 374.

The fact that you are prepared to abstain from participation as a member of the Council in Department matters, while consistent with G.L. c. 268A, §19, does not suffice for §20 purposes. Section 20 is preventative and is designed to avoid any perception that a municipal employee will enjoy undue influence or favoritism in the acquisition or maintenance of a municipal contract. **EC-COI-85-66.** If you believe that the statute is excessive or unfair as applied to you, your only recourse will be to seek a remedy with the General Court. We would note, however, that the General Court has thus far not extended any exemptions under §20 allowing municipal police officers to hold elective city office.[2/]

DATE AUTHORIZED: September 20, 1989

[1/]An employee's financial interest in his or her own employment contract, standing alone, is not prohibited under §20. See, Buss, **The Massachusetts Conflict of Interest Law: An Analysis**, 45 B.U.L. Rev. 299, 372 n. 377; **EC-COI-87-19.** The prohibition comes into play when, independent of the employment contract, an individual holds municipal employment under G.L. c. 268A.

[2/]We see no conflict between G.L. c. 268A and the implementation of municipal collective bargaining laws. In our view, G.L. c. 268A was intended to apply to all contracts, whether written or oral, express or implied. We find nothing in G.L. c. 150E from which we can conclude that the General Court intended to exclude collective bargaining agreements from contracts subject to §20.

CONFLICT OF INTEREST OPINION
EC-COI-89-29

FACTS:

You are a member of state agency ABC. You are also a private attorney and have represented Mr. X and his company in real estate transactions. Although at one time you served as clerk for Mr. X's company, you have resigned from that position.

Recently, the ABC purchased some property from Mr. X's company. You did not represent Mr. X's company in the transaction and received no remuneration in connection with the transaction. You state that the transaction was a straight purchase with no mortgages or other interests retained by Mr. X or his company.

Pending before the ABC is an offer from Mr. Z to purchase the same property. Neither Mr. X or his company has any financial connection with Mr. Z. You have filed a letter and documents with your appointing official pursuant to G.L. c. 268A, §23(b)(3) disclosing your prior relationship with Mr. X.

QUESTION:

Does G.L. c. 268A permit you to participate as an ABC member in the sale of this property?

ANSWER:

Yes, subject to certain restrictions.[1/]

DISCUSSION:

1. Jurisdiction

We conclude that the ABC is a "state agency" within the meaning of G.L. c. 268A, §1(p)[2/] and you are a state employee within the meaning of G.L. c. 268A, §1(q)[3/] through your membership in the ABC. The definition of state agency includes "any independent state authority ... [or] instrumentality ... but not an agency of a county, city or town." G.L. c. 268A, §1(p). The ABC's enabling statute expressly identifies the ABC as a public instrumentality, and we have previously regarded the ABC to be an agency subject to G.L. c. 268A. (citations omitted). Although the ABC's enabling statute preceded the enactment of G.L. c. 268A and is silent as to the proper characterization of the ABC for G.L. c. 268A purposes, we have consistently treated agencies similar to the ABC as state agencies for G.L. c. 268A. (citations omitted). While there are organizational provisions in the ABC's enabling statute which could arguably suggest that the ABC is analogous to a regional municipal district, and therefore a municipal agency, EC-COI-82-25, we deem controlling the fact that the commonwealth is required under the enabling statute to assume any deficit incurred by the ABC.

In view of your uncompensated statute as an ABC member, you are also considered a special state employee under G.L. c. 268A, §1(o). As a special employee, you remain subject to prohibitions under G.L. c. 268A but are eligible for exemptions permitting your private dealings with certain state agencies.

2. Limitations on Your Official Activities

Under G.L. c. 268A, §6, a state employee must abstain from official participation[4/] in any particular matter[5/] which affects the financial interest, in relevant part, of either the employee or any business organization for which the state employee serves as officer or employee. Based on the information you have provided, we conclude that §6 does not require your abstention from participation as an ABC member in the proposed sale of this property to Mr.Z. The proposed sale is between the ABC and Mr. Z and does not affect the interests of Mr. X's company. Inasmuch as the previous sale by Mr. X's company to the ABC was a straight sale with no mortgages or other interests retained by Mr. X, as a prior owner he does not have a financial interest in the subsequent proposed sale. Moreover, even assuming that Mr. X's company could be regarded as having a financial interest in the sale, your relationship with Mr. X does not appear to be one which is covered by §6. As long as you refrain from serving as clerk, you are not an officer of the corporation.[6/]

Although your prospective participation in the conveyance is permissible under G.L. c. 268A, §6, you must observe the safeguards of §23 to avoid any actual or apparent undue favoritism. Specifically, to dispel any appearance of favoritism, you must disclose to your appointing officials the relevant facts concerning your relationship with Mr. X and the property in question. G.L. c. 268A, §23(b)(3).[7/] You must also avoid using your official position to grant any unwarranted privileges of substantial value to anyone in connection with the conveyance decision. G.L. c. 268A, §23(b)(2). To satisfy the provisions of §23(b)(2), you should base your decision as an ABC member on objective standards, as opposed to your personal connections with respect to the property.[8/]

3. Limitations on your private activities

While not directly posed by your opinion request, G.L. c. 268A, §4 places some restrictions on your activities as private attorney. Specifically, §4 prohibits your either representing or receiving compensation from a non-state party in connection with any matter which is within your official responsibility as an Authority member. For example, if Mr. X has any matters pending before the ABC, you must continue to refrain from representing Mr. X or receiving compensation from Mr. X in connection with those matters.

DATE AUTHORIZED: September 20, 1989

[1/]This opinion is intended to provide prospective guidance to you and is not intended to evaluate the propriety of conduct which has already occurred.

[2/]"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such departments and any independent state authority, district, commission, instrumentality or agency, but not

an agency of a county, city or town.

3/"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.

4/"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

5/"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.

6/Your status as attorney performing legal services for Mr. X does not appear to make you an "employee" of Mr. X for G.L. c. 268A, §6 purposes. See, EC-COI-83-34. Should you find that your attorney duties for Mr. X increase and comprise a more substantial part of your time, you should seek and receive written permission from your appointing official to participate in matters affecting Mr. X pursuant to G.L. c. 268A, §6(3).

7/We note that you have complied with the §23(b)(3) disclosure requirement. Contrary to your wish that the disclosure be confidential, however, G.L. c. 268A, §24 requires that your disclosure be open for public inspection. You must therefore notify your appointing official accordingly.

8/Because your participation is permissible, there is no need to address whether a "rule of necessity" could be invoked to permit your participation where one of the ABC members is sick. **Compare, EC-COI-82-10.**

Conflict of Interest
EC-COI- 89-30

will be found after page 287

CONFLICT OF INTEREST OPINION
EC-COI-89-31

FACTS:

You are a member of the General Court and also an attorney. Outside of your legislative schedule, you are interested in pursuing the private practice of law as "of counsel" to a large law firm. The firm either currently or potentially represents clients before state, county and municipal agencies.

QUESTIONS:

1. How does G.L. c. 268A apply to your activities as an attorney?

2. How does G.L. c. 268A apply to the activities of other attorneys in a law firm for which you serve on an "of counsel" basis?

ANSWERS:

You and the other law firm attorneys will be subject to the limitations set forth below.

DISCUSSION:

1. Application of G.L. c. 268A to You

a. Section 4

As a member of the General Court, you are a state employee for the purpose of G.L. c. 268A. Section 4 of G.L. c. 268A generally prohibits state employees from receiving compensation from private clients in relation to any particular matter[1/] in which the Commonwealth or a state agency is a party. For example, §4 applies to all criminal proceedings in which the Commonwealth is a party and to all civil matters in which the Commonwealth or a state agency is a named party or has a direct and substantial interest. Section 4 also applies to certain proceedings before municipal agencies such as special education determinations where the state extensively regulates the subject area. As a member of the General Court, however, you are subject to §4 in the following limited way:

> A member of the General Court shall not be subject to paragraphs (a) or (c). However, no member of the General Court shall personally appear for any compensation other than his legislative salary before any state agency, unless:

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

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

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

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

(1) the action of the state agency is adjudicatory in nature; and

(2) the action of the state agency is appealable to the courts; and

(3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

G.L. c. 268A, §4(¶5).

In construing the provisions of §4 as they apply to members of the General Court, three points should be noted:

(1) The restrictions of §4 apply to compensated outside activity. Uncompensated representational activities, such as representing constituents in their dealings with government agencies, are not prohibited under §4. **EC-COI-79-68.**

(2) The restrictions of §4 apply to personal appearances, as opposed to receiving of compensation in connection with a matter. In **EC-COI-87-27**, the Commission concluded that conduct proscribed under personal appearance included any oral and written communication intended to influence a governmental body.

(3) The restrictions of §4 apply only to certain categories of matters, depending on the forum of the legislator's personal appearance, the nature of administrative proceeding and the degree of discretion which must be exercised in connection with the matter. Because you have posed your question in general terms, we cannot provide specific advice to you. By way of example, however, the Commission has deemed the following matters to be subject to the §4 prohibition for legislators: **EC-COI-86-12** (appearance before state parole board); **EC-COI-85-40** (representing client in sale of land to a state agency); **EC-COI-83-59** (representing applicant for a common carrier license before the state Department of Public Utilities).

On the other hand, the Commission has held that the following matters are not subject to the §4 legislative restrictions: **EC-COI-85-82** (representing client in adjudicatory proceedings before the state Industrial Accident Board); **EC-COI-82-137** (representing plaintiff in court action against MBTA); **EC-COI-79-86** (filing license or permit applications on behalf of a client before a state agency). Once you have identified the specific matters on which you intend to make a personal appearance, we will provide guidance to you with respect to those matters.

b. Section 7

If you were to consult for or represent for compensation a state agency in your private law practice, you would have a financial interest in an employment contract made by a state agency. Under G.L. c. 268A, §7, a state employee is prohibited from having a financial interest in a contract made by any state agency, unless an exemption applies. As a member of the General Court, you are eligible for an exemption under G.L. c. 268A, §7(¶c).[2/] The §7(¶c) exemption is restricted, however, to certain contracts in which the legislator's proprietary interests in the contracting corporation do not exceed 10% of the total proprietary interests therein, and which are awarded through competitive bidding. While §7(c) would appear to be appropriate for permitting minority shareholder legislators to have a financial interest in contracts for the sale of goods by their companies to a state agency, the exemption does not appear to extend to personal service contracts with state agencies. **See, EC-COI-84-108.**

Further, you will need to establish safeguards with the firm to insure that your firm compensation as "of counsel" is not attributable to contracts which the firm has with any state agency. **EC-COI-85-9; 89-5.**

c. Section 23

You also ask how G.L. c. 268A applies to your

announcement of your relationship with the law firm. Under G.L. c. 268A, §23(b)(2), you may not use your legislative position to secure for yourself or others any unwarranted privilege or exemption of substantial value. For example, you may not use resources provided to you as a legislator such as word processors and legislative support staff to conduct your private law firm activities. EC-COI-85-29. Additionally, you should not use legislative resources to announce your relationship to the firm. By issuing a legislative press statement announcing your relationship with the firm, you may risk creating the appearance that your practice of law is a governmentally endorsed or supported activity. See, EC-COI-84-127; In the Matter of Byron Battle, Public Enforcement Letter 89-4; In the Matter of Elizabeth Buckley, 1983 SEC 157. We therefore recommend that you arrange for your announcement to be made on law firm stationery, rather than through an official legislative press statement. We see no violation of §23 in your firm's announcing accurately your status as a member of the General Court.

2. **Application of G.L. c. 268A to Law Firm Attorneys**

For the purposes of this opinion, we will assume that, in your capacity as "of counsel" to the firm, you will not be a partner for G.L. c. 268A purposes. You should be aware that we recently stated in EC-COI-89-5, "[b]ecause arrangements such as "Of Counsel" do not have a uniformly accepted meaning among law firms, the Commission will examine the substance of the relationship between an attorney and a firm to determine whether the appearance of a partnership exists. See, EC-COI-83-81; 82-68." EC-COI-89-5. The Commission conclusion will rest on such factors as the terms of public announcements, the appearance and designation of an attorney's name on the firm's letterhead, and the terms of the "of counsel" arrangement with the firm. As long as you do not have "partners" in the firm by virtue of your affiliation with the firm, the partners will not be subject to the restrictions of G.L. c. 268A, §5(d). Under §5(d), your partners are prohibited from representing clients in particular matters in which you either participate or which are within your official responsibility as a member of the General Court.

To the extent that G.L. c. 268A, §4 prohibits you from engaging in certain personal appearances, the restrictions of §4 do not apply to other firm attorneys. In EC-COI-85-40, the Commission advised a legislator that

> "... [t]he relevant restrictions of §4 apply only to your compensated personal appearances before state agencies, and not to appearances by your employees. The limitation of the §4 legislator restrictions reflects a concern over potential influence which the legislator could exercise in face-to-face dealings with state agencies over which the legislator has budgetary and legislative power. The potential for such influence is diminished, however, when an employee of the legislator, as opposed to the legislator himself, makes a personal appearance, and the statutory scheme under §4 does not extend the legislator prohibitions to others. Therefore, your associate's paid representation of your client would not place you in violation of §4.
>
> EC-COI-85-40, p. 3.

The same result would apply to firm attorneys, irrespective of your status within the firm.[3/]

DATE AUTHORIZED: November 9, 1989

[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 prohibition of §7 does not apply "(c) to the interest of a member of the general court in a contract made by an agency other than the general court or either branch thereof, if his direct and indirect interests and those of his immediate family in the corporation or other commercial entity with which the contract is made do not in the aggregate amount to ten percent of the total propriety interests therein, and the contract is made through competitive bidding and he files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family ..."

[3/]We note that none of the restrictions discussed in this opinion are affected by the geographic location of clients of the firm.

CONFLICT OF INTEREST OPINION
EC-COI-89-32

FACTS:

You are a part-time, special police officer in a Town (Town). Special police officers have been designated special municipal employee positions by the Board of Selectmen. You are appointed to the special police officer position each year by the Board of Selectmen and you serve in that position approximately a maximum of four hours per month or not more than twenty days in a year.

Recently you opened your own garage in Town specializing in truck and heavy equipment repair as well as customizing four wheel-drive vehicles. You are the sole owner and employee of the garage. Your business owns the only towing truck in Town. Occasionally, you receive calls from the Town to tow vehicles although you state that towing is a very minor part of your business. If you are unavailable, a wrecker is called from another Town. As a special police officer, you are not authorized to call a wrecker and you may not, in your official capacity, call your own tow company nor solicit business for your company. A police sergeant or other officer in charge must authorize a call for towing a vehicle. According to information provided by the Town, you have complied with the requirements of a §20(d) exemption.[1/] In addition, you repair Town fire trucks.

As a tower of motor vehicles, you are licensed by the state Department of Public Utilities (DPU) as a "common carrier of motor vehicles." G.L. c. 159B, §3(a),(b). DPU sets the maximum allowable rates for towing and storage ordered by the police or other public authority or during snow removals. **Id.** at §6C and §6B. You have also filed a business certificate with the Town Clerk as is required for anyone doing business under a title other than the operator's real name. G.L. c. 110,§5.[2/]

The Town Police Chief states that the Police Department has no formal policy on the use of tow operators and that no rotation list is in effect as that type of arrangement has been unsuccessful. He states there are five tow operators on the Department's list and all are located within a ten-mile radius of the Town. A tow operator is placed on the Department's list by request. There is no application or bid process. According to the Chief, the Department generally calls you first since you are the closest tower. If you are unavailable to do a police tow, the next company on the list is called. A tower may refuse a police tow, for instance if he has a private tow request. Tow operators may charge more money for private tows. The procedure for towing vehicles requires the patrolman to call the Police Chief who then authorizes a tow.

Towing for the State Police is a separate matter. In order to do so, a tow operator must register with the State Police and generally guarantee towing availability at all hours of the day. Once you register with the State Police, you would be placed on a rotational list for your area and called whenever the need arises.

QUESTIONS:

1. May you continue to be as a Town special police officer in view of your ownership of a garage in Town which has the only towing truck in Town?

2. May you repair Town fire trucks?

ANSWERS:

1. Yes, subject to the provisions of §§20 and 23 of 268A.

2. Yes, subject to §20.

DISCUSSION:

As a Town part-time police officer, you have been classified as a "special municipal employee" within the meaning of the conflict law, G.L. c. 268A, §1(n).[3/]

Section 20

Section 20 of G.L. c. 268A prohibits a special municipal employee from having a direct or indirect financial interest in a contract made by any municipal agency of the same town. The purpose of this section is to avoid the perception that Town employees enjoy an "inside track" on Town contracts or employment.

Despite the general prohibition of §20, there exists in §20(c) an exemption which permits you to repair fire trucks. Section 20(c) would exempt you as a special municipal employee if your police duties do not include matters concerning the fire department and you file a written statement with the Town Clerk's Office disclosing your interest in your paid arrangement to repair Town Fire Department vehicles. With respect to your towing vehicles in response to a Town Police Department request, however, the Commission finds that you have a financial interest in a contractual arrangement with your own municipal department, and thus you must comply with the requirements of a §20(d) exemption.

The Commission has articulated through established precedent a broad view as to what constitutes a contract for the purposes of the conflict law. **See, EC-COI-85-5.** It is well-settled that the Commission does not require a contract to be formalized in writing for it to result in a violation of c. 268A. **See, EC-COI-89-14; 85-79.**[4/] The Police Department by virtue of its police powers is charged with the responsibility of protecting the public and ensuring that the Town's public ways are safe. A police-ordered vehicle tow is performed at the direction of the Police Department. The Police Department currently has a list of five tow companies in the area. The companies have submitted their names to the Police Department to be placed on the towing call list. The Department has accepted their services by placing them on the list. You are one of the companies on the towing list. You are the sole employee of your garage. You therefore have an arrangement with the Police Department to provide towing services. You have a financial interest in that contractual arrangement each time you perform a police-ordered tow. It does not matter that the source of your compensation comes from the private vehicle owner. **See, Quinn v. State Ethics Commission,** 401 Mass. 210 (1987).

The fact that you are licensed by DPU, a state agency, to be a tower, does not affect our conclusion under §20. Your contractual arrangement with the Police Department to provide towing services is not a license from the Town. Rather, your DPU license allows you to engage in a contractual arrangement with the Police Department as well as to perform towing for private parties.

Therefore, in order to avoid a violation of §20 by virtue of your police position and your towing agreement with the Police Department, §20(d) requires you to file a written disclosure with the Town Clerk's office, stating your garage's financial interest in towing for the Town, and the Selectmen must approve your exemption from §20. According to the Town, you have complied with this requirement.

Section 23

Section 23, the standards of conduct provision, is a supplemental section to the other provisions of c. 268A. Section 23(b)(2) prohibits you from using your official position to secure for yourself or someone else, any unwarranted privilege or exemption of substantial value which is not available to similarly situated individuals. An item of substantial value has been interpreted by the Commission as anything worth $50 or more.[5/] For example, this section would prohibit you from conducting any private business during the hours you serve as a Town police officer. Similarly, this section would prohibit your official endorsement of your garage either by handing out your garage's business card to individuals with whom you have official dealings or by making recommendations to such individuals. **See, EC-COI-81-87; 84-127.**

Section 23(b)(3) prohibits you from engaging in activity which would cause a reasonable person to believe that your official actions are unduly or improperly influenced because of the kinship, rank, position or undue influence of any person. In other words, this subsection prohibits you from engaging in activity creating the appearance of a conflict of interest. For example, if you have official dealings with a private client of your garage, issues under §23 may be raised where it could reasonably appear that your official actions may be improperly influenced by that prior business relationship. An exemption from this section is available to you, however, if you disclose in writing to your appointing authority the facts of the situation creating the appearance of a conflict. This disclosure should be made in advance of your activity proscribed by this section.

Furthermore, you should be aware that §23(e) provides that additional standards of conduct may be promulgated by your Town or Town department. **See, EC-COI-85-12; 88-17.** You should check with your town counsel to determine whether any such rules or regulations could apply to your circumstances.[6/]

DATE AUTHORIZED: November 9, 1989

[1/]The exemption in G.L. c. 268A, §20(d) applies to

"... a special municipal employee who files with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the city council or board of aldermen, if there is no city council, or the board of selectmen approve the exemption of his interest from this section ..."

[2/]You are aware of no other rules or regulations pertaining to the operation of your towing business. For the purposes of this opinion, the application of G.L. c. 40, §22D would not change any conclusions contained herein. Upon acceptance of c. 40, §22D, a municipality may authorize its police officers either to tow vehicles or to have the towing performed by an independent contractor.

3/You also would be considered a "municipal employee" in your performing towing services for the Town since you would be a person performing services for a municipal agency by appointment, or contract of hire or engagement, and serving with compensation on a part-time or intermittent basis. The definition of a "municipal employee" has broad application. **See, Buss, The Massachusetts Conflict of Interest Law: An Analysis,** 45 B.U. Law Rev. 299, 311 (1965).

4/This analysis is distinguishable from **Central Tow Co., Inc. v. City of Boston,** 371 Mass. 341 (1976). **Central Tow** involved a towing company which sought recovery of unpaid towing and storage fees from the City where owners failed to claim their vehicles which had been towed under police order. The court held that the City had no contractual obligation to pay such fees where they had not been expressly contracted for in accordance with the relevant statutes. This decision did not reach the issue of the tower's authorization to collect towing fees from the owner of the towed vehicle.

5/**See, Commission Advisory No. 8.**

6/Under the facts you have presented, the conduct of your towing business does not present inherently incompatible employment with your part-time police position under §23(b)(1). Your special police duties do not include towing assignments, nor are you working for a company which has substantial needs for the police department's services. **Compare, In the Matter of John DeLeire,** 1985 SEC 236.

CONFLICT OF INTEREST OPINION
EC-COI-89-33

FACTS:

You are a member of the ABC Conservation Commission. You wish to know whether you may act on a filing made pursuant to G.L. c. 131, §40 (the Wetlands Protection Act), where the filing involves property which is located "two lots away from [your] property, around the cul-de-sac, but not directly opposite the public way." The filing in question concerns the building of a residence and a permit for a subsurface sewage system involving a "coastal wetland."

You have been previously informed by this Commission that a financial interest is always presumed whenever a person owns property directly abutting the property in question and that the Commission has previously determined that a financial interest arises whenever a person is a so-called "party in interest," as defined by G.L. c. 40A, the Commonwealth's zoning statute.1/

You have now requested a formal opinion on whether you have any financial interest in the matter before the conservation commission because (i) the matter does not implicate the zoning statute (and you are not, therefore, a statutorily defined "party in interest"), (ii) your property does not directly abut the property in question (thereby precluding the automatic presumption), and (iii) you are not a "person aggrieved" for purposes of the Wetlands Protection Act. You also seek guidance as to how the Wetlands Protection Act applies to your situation for §19 purposes.

QUESTION:

Does a financial interest arise for §19 purposes even if the matter does not implicate either (i) the "party in interest" test, (ii) the "automatic presumption" test, or (iii) the "person aggrieved" test?

ANSWER:

A financial interest is presumed in matters affecting real property where a party is (i) a direct abutter, (ii) a party in interest, or (iii) a person aggrieved. A financial interest may also be found even if no such rebuttable presumption arises, depending upon other factors in a given case. No presumptions arise in your case and we are aware of no such other factors to indicate a reasonably foreseeable financial interest.

DISCUSSION:

Section 19

Section 19 of the conflict of interest law prohibits a municipal employee2/ from participating3/ in a particular matter4/ in which to his knowledge he has a financial interest.

As a conservation commission member, you are a municipal employee for c. 268A purposes. Whether you have a "financial interest" in a particular matter depends on whether your interest can be quantified in monetary terms.5/ This broad definition is limited, however, in at least two important ways.

First, a financial interest does not arise where the interest is one which "involves a determination of general policy and the interest of the municipal employee ... is shared with a substantial segment of the

population of the municipality."[6] This exemption would apply, for example, where town selectmen must vote on a matter that would affect the collection of revenue from all town residents, including themselves.

Second, this Commission has determined that the §19 financial interest test only applies to those interests which are either direct, or, if indirect, reasonably foreseeable. EC-COI-89-19.It is established Commission policy that §19 will apply to every financial interest regardless of size and regardless of whether the interest affects the municipal employee favorably or adversely.[7] However, if the interest is not direct or reasonably foreseeable (that is if it is "remote, speculative or not sufficiently identifiable"), §19 will not prohibit participation. EC-COI-89-19 (municipal employee may participate in zoning matter where husband holds minor stock interest in a corporation affected by zoning change); 84-98; 84-96 (financial interest arises where municipal employee's land abuts and opposite to land to be developed). While a direct financial interest is usually obvious, whether a given financial interest is reasonably foreseeable must be determined on a case-by-case basis. The Commission will, among other things, seek guidance from other applicable statutes to assist in the determination of whether a financial interest is reasonably foreseeable in a given situation.

This Commission has previously determined that a financial interest will always be presumed in zoning matters where a property owner has property which directly abuts the property in question. See **Public Enforcement Letter 88-1; EC-COI-84-96.** As with any legal presumption, individual facts and circumstances can be presented to rebut this presumption. To date, because Commission cases concerning financial interests in real property have always implicated some aspect of the zoning statute, the Commission has always looked to the zoning statute for guidance on §19. This Commission has not yet had an opportunity to address directly how activities falling outside of c. 40A interact with §19.

In **EC-COI-84-96**, however, the Commission stated that a financial interest could arise even where a party is not a statutorily defined "party in interest" (as defined in the zoning statute) where one's property rights stand to be "significantly affected." Although the facts of that case implicated the statutory scheme of c. 40A, **EC-COI-84-96** (and its definition of a "party in interest") need not be limited strictly to zoning applications.

Whether you would have a reasonably foreseeable financial interest in the matter in question depends, therefore, on what effects the proposed act or acts will have on your property. The Wetlands Protection Act recognizes those instances where a financial impact will be felt by property owners whose property is near the proposed activity. Consequently, regulations promulgated under the Wetlands Protection Act establish the "person aggrieved"[8] test which, in effect, is designed to vest certain rights in those persons, who would have an interest in the proposed activity, with a mechanism by which to act. The necessary implication of this test is that "persons aggrieved" may financially suffer as a result of the activity in a way not likely felt by others. By its own terms, a "person aggrieved" is, therefore, unlike the person who might otherwise be eligible for a §19 participation exemption[9] because the interest is different in either "kind" or "magnitude" from that of other property owners.

Accordingly, this Commission will presume that a reasonably foreseeable financial interest arises in connection with matters involving the Wetlands Protection Act where a party is a "person aggrieved" (as defined therein). Further, if any party could be considered a "party in interest" (that is, if the party is an abutter, an owner of land directly opposite on any public or private street, or an abutter to an abutter within three hundred feet of an activity affecting real estate), the Commission will also presume a financial interest regardless of whether the zoning statute or the Wetlands Protection Act is implicated, because of the likely significant affects of the proposed activity on a property owner.[10] Finally, a direct abutter will be presumed to have a financial interest in any matter affecting real estate, regardless of whether it implicates the zoning statute, the Wetlands Protection Act, or any other statutory scheme.

You have informed us that in the present matter, the wetlands filing concerns an application for "coastal" property as opposed to "inland" property. "Inland" property is regulated by the Wetlands Protection Act such that any activity which would likely increase flooding potential in the surrounding areas must meet specific guidelines to minimize the problem, that is, an applicant would need to provide "compensatory flood storage" such that his lot has no "net runoff." "Coastal" property, on the other hand, is not subject to these same guidelines. Presumably, no such coastal requirements exist because there is little or no increased potential for such flooding damage to any but a direct abutter, thereby eliminating the presumption that surrounding neighbors will suffer damage different in "magnitude" or "kind" from anyone else (insofar, at least, as to flooding damage).[11]

In any event, you have informed us that the matter

in question has become moot because of the time constraints involved. You have also informed us that you did not participate in the matter while awaiting this opinion. We can inform you that no automatic presumption will arise in future matters based on similar facts because you have represented to us that you are not (i) a direct abutter, (ii) a "party in interest," or (iii) "a person aggrieved." Beyond that, however, a final determination as to any financial interest you might have in a particular filing would require additional facts not presented here.12/

DATE AUTHORIZED: December 21, 1989

1/A party in interest, for purposes of c. 40A, includes "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner."

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

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.

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

5/See **Graham v. McGrail**, 370 Mass 133, 139 (1976) (although the term "financial interest" is not defined in c. 268A, it is any interest "capable of evaluation in financial terms.")

6/G.L. c. 268A, §19(b)(3).

7/See, **Public Enforcement Letter 88-1** (even participation in a way which is contrary to one's own financial interest is prohibited by §19).

8/A "person aggrieved," for purposes of the Wetlands Protection Act, means any person who may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of the Act. **See 310 CMR 10.04.**

9/Because here the interest is not shared with a "substantial segment" of the municipal population.

10/Wetlands protection is, in effect, a type of zoning regulation. **See, e.g., Golden v. Board of Selectmen of Falmouth**, 358 Mass. 519 (1970).

11/This would result in a municipal employee being able to rely upon the §19(b)(3) exemption for certain coastal, as opposed to inland, filings.

12/This Commission would consider, among other things, reasonably foreseeable increases or decreases in the value of your property, or upward or downward revisions in property tax assessments resulting from the filing in question. **See, EC-COI-84-96.**

CONFLICT OF INTEREST OPINION
EC-COI-89-34

FACTS:

For several years until 1987, you served as a manager for state agency, ABC. In that capacity, you participated in the preparation and presentation of a report relating to pending legislation which proposed the transfer of certain state property.

Pending in the current legislative session is a redraft of this bill. The bill establishes a comprehensive master plan for the development of the state land. The redraft represents a substantial change from any of the prior legislative proposals regarding the reuse of the property.

You have engaged in the private practice of law. You have recently been asked by a developer who would be interested in submitting a development proposal to monitor the progress of the redraft and to make recommendations for drafting changes, if appropriate.

QUESTION:

Does G.L. c. 268A permit you to assist and represent the potential developer in connection with the enactment of this land use bill?

ANSWER:

Yes.

DISCUSSION:

Following the completion of your services for the ABC, you became a former state employee for the purposes of G.L. c. 268A. In light of the passage of more than one year since the completion of your services, you are subject only to the restrictions of G.L. c. 268A, §5(a).[1/]

Under §5(a), you are prohibited from either receiving compensation from or acting as agent or attorney for any non-state party if your activities are in connection with any particular matter[2/] in which you previously participated[3/] as a state employee. We conclude that your proposed activities in connection with the land use bill will not be in connection with the same particular matter[4/] in which you previously participated as a state employee.

Initially, we note that your previous participation as a state employee occurred in prior legislative sessions. It is well-established that the duration of proposed legislation is the length of the legislative session in which it is considered, and no longer. Under Article X of the amendments to the state constitution, each legislative year begins on the first Wednesday of January, and the General Court may proceed to conduct its business until the session is dissolved automatically on the first Wednesday of January of the next year. "The language of Article X ... contemplates that the business of each annual session of the General Court is to be separate and distinct from that of each other session ... If action on a particular matter has not been completed by the end of the legislative year, that matter - if it is to be treated at all - must be considered ab initio in the following session." **Opinion of the Attorney General**, January 7, 1966.

The annual legislative consideration of a bill relating to the disposition of the land therefore involves a deliberation which is separate and distinct from preceeding sessions. Stated differently, the two prior proposals relating to this land are not continuing particular matters but rather are matters whose duration was limited to the session in which the proposals were considered. Your proposed activities in connection with the enactment of the current bill are therefore not considered to be in connection with the same legislation in which you participated in earlier sessions. **Compare, EC-COI-79-34** (each annual renewal of a grant is considered to be a separate particular matter, and the §5 prohibition ceases upon termination or renewal of that grant).[5/]

DATE AUTHORIZED: December 21, 1989

[1/]While other restrictions in §5(b), (c) and (e) applied to you or your partners for a one-year period following your resignation, the one-year period expired in 1988.

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

[3/]"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.

[4/]For the purpose of this opinion, we will assume that each legislative proposal relating to the disposition of the property is sufficiently specific so as to be regarded as special legislation and therefore, a "particular matter" under §1(k). **See, EC-COI-89-8.**

[5/]Even assuming, for the sake of argument that the earlier legislation has a continuing status as a particular matter, we would conclude that the current house bill is so substantially different from proposals which you reviewed as a state employee that the particular matters would be considered different for §5 purposes. **Compare, EC-COI-84-31; 84-14.**

CONFLICT OF INTEREST OPINION
EC-COI-89-35

FACTS:

ABC and DEF are two of the principals in A&D, a corporation involved in health care management,

specializing in public sector work. According to their resumes, ABC and DEF have expertise in the area of health care delivery and health care financing. ABC directed a Commonwealth health care program, has performed consulting work for numerous health facilities and was the founding chairman of a non-profit corporation operating a broad range of ambulatory and residential programs in the area of mental health and retardation. DEF has also performed consulting activities for numerous health agencies and was the manager of a state health care program.

ABC and DEF hold the offices of Treasurer and President, respectively, in A&D. ABC's wife is the Clerk of the corporation. The stock ownership is divided as follows: each of ABC's five children own 10% of the corporation's stock, DEF owns 45% of the stock and a third person owns 5% of the corporation's stock. Currently A&D employs thirteen full-time employees and six part-time employees. Additionally, A&D utilizes the part-time hourly services of twenty-two consultants, such as internists, dentists and nurses and subcontracts with thirty five psychiatrists.

In 1985, ABC through A&D, was hired to consult to a Mental Health Center (AMHC) regarding the management and delivery of mental health services at that institution. Particularly, AMHC was interested in ABC's expertise in the area of recruitment and retention of physicians at DMH facilities. During this consultant contract, ABC conceived of a health care delivery model to improve psychiatric services and to facilitate the recruitment of psychiatrists through use of a private physician group to provide services. ABC theorized that the provision of services through a private psychiatric group would produce a qualified, loyal physician staff because physicians would benefit from partnership in a professional corporation where fringe benefit and compensation packages could be individually tailored, rather than from straight employment as a DMH employee. DEF, in a separate contract, was instrumental in successfully developing and managing the AMHC physician group. Subsequently, utilizing the AMHC delivery system model as the basis for its RFP, A&D was awarded three DMH contracts to improve health care and psychiatric services at RST hospital, UVW hospital and XYZ DMH area. These contracts total over $4,000,000, of which $400,000 is to pay indirect overhead expenses, including consulting work.

1. RST Contract

In FY 1989 A&D received a DMH contract[1/] to provide comprehensive psychiatric services and general medical services at RST hospital. This contract was renewed for FY 1990. The program goal is "to provide optimal medical care for mentally ill patients, in a manner which integrates medical and psychiatric care and provides linkages to community health services." RST Contract p.1. Under the contract A&D recruits and provides physicians to work under the clinical direction of the hospital medical director, but the medical director has final hiring approval. Similar to the AMHC concept, the physicians are members of a private physician group managed by A&D. As envisioned by the contract, "A&D will be the primary source of contract accountability to the medical director and the Chief Operating Officer. A&D will be the single administrator responsible to them. A&D will subcontract for physicians, and as a condition of that subcontract, the physicians will be clinically responsible to the medical director and administratively responsible to the Chief Operating Officer." RST Contract p.19.

In addition to psychiatrists, A&D also recruits other professionals, such as internists, nurses and podiatrists to provide medical care. The RST contract addresses a broad spectrum of health care delivery issues, such as cost innovations, program innovations, improved data systems, collection of third party billing revenues, and a general restructuring of the provision of health care.

The RST contract contemplates a close working relationship between A&D and RST. According to the contract, a senior person in A&D will assume day-to-day responsibility for the contract and a senior management person will be on site part time. Contract management includes two facets: high level management which "conceives, implements and monitors" the program and administrative support. According to the FY 1989 contract "The principals of A&D are dedicated, hands-on managers, always available for matters relating to the physician group and often consulted on other matters as well." RST Contract, p.5.

2. UVW Contract

A&D was awarded a second FY 1990 DMH contract to provide the oversight of medical services as well as to provide comprehensive psychiatric services at UVW Hospital. In addition to physician recruitment, the UVW contract addresses other health care delivery issues such as new revenue sources, cost shifting to other sections of the health care system and the development of program innovations. For example, the UVW contract states:

> We are unusually skilled at billing, including maintaining an auditable trail of supportive documentation. For several years we have been successfully billing for certain services at AMHC. (ABC and DEF were once managers of a state health program). UVW Contract p.34.

The UVW contract is markedly similar to the RST contract in areas pertaining to the concept of a physician group, the delegation of authority and management responsibility, and the manner in which service will be provided within the institution. Unlike the RST contract, the UVW contract specifies that senior staff at A&D will perform the management functions. Indirect expenses within the budget include consultant activities of senior A&D corporate management. UVW Contract, p. 46 ABC, DEF and three other A&D employees constitute the senior staff at A&D.

3. **XYZ Contract**

The third FY 1990 DMH contract awarded to A&D pertains to the provision of physician services to the DMH XYZ area. This contract is virtually identical to the other contracts in the type of services offered and the organizational plan, which is based on the health care delivery service model ABC and DEF developed at AMHC.

The XYZ Contract states that the senior staff of A&D will be available for consulting activities pertaining to health care delivery problems and that A&D "was prepared to make a major commitment of senior staff resources to the development of the programmatic innovation and third-party billing arrangements necessary to make this program successful." XYZ Contract, pp. 19, 30, 31, 33. Included in the indirect overhead budget in the XYZ contract are the services of the Chief Financial Officer of A&D on a limited weekly part-time basis, and other senior staff at A&D who will be available for consultation. You state that the senior staff referred to throughout the XYZ contract are ABC, DEF and three other A&D employees. ABC spends less than four hours per week at XYZ while DEF only works intermittently on this contract.

Under all three contracts ABC and DEF, with assistance from other A&D staff, play a significant role in the recruitment of physicians and other clinicians. This includes outreach, advertising, interviewing potential candidates, working out relationships with academic institutions and dealing with licensure matters. Additionally they work with outside vendors relating to the physician contracts and other employee matters, and they supervise the A&D employees who are providing the administrative and management services under the contracts. ABC and DEF periodically meet with the Medical Director and Chief Operating Officer of each institution to discuss implementation of the contracts, as well as a variety of financial, administrative and personnel matters. Occasionally ABC, DEF and other senior staff provide advice on third party reimbursement issues and on the use of innovative management techniques.

While ABC, DEF and other A&D employees function as a team in providing services under the contracts, their functions may vary at the three institutions. For example, at RST, ABC has hired an account manager for the contract so that ABC and DEF's personal time commitment under the RST contract is very limited. At UVW Hospital, particularly during the initial phases of the contract, DEF has spent considerable time implementing said contract. In comparison, ABC is at XYZ on a weekly basis, whereas DEF is only intermittently involved.

QUESTION:

Are ABC and DEF state employees under G.L. c. 268A, §1(q), by virtue of the FY 1990 contracts between A&D and DMH?

ANSWER:

Yes. ABC and DEF are state employees under G.L. c. 268A §1.[2/]

DISCUSSION:

In the enactment of G.L. c. 268A, the Legislature established an expansive definition of the term "state employee." "A state employee" is

> any person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.

This definition covers not only individuals who hold full-time employment with a state agency, but also consultants who provide services on an intermittent basis, whether or not they receive any compensation. See, e.g., EC-COI-87-19 (hospital administrator employed by private corporation to administer county hospital a county employee); 86-21 (private artist state employee where specific services contracted for); 85-

4 (president of consulting group state employee where services being provided are within his expertise). However, the fact that a corporation contracts with the state, without more, does not confer state employee status on all of the employees of the corporation. See, **e.g. EC-COI-86-21** (project manager without more not state employee by virtue of his employer's contract with state agency) **83-89** (contract calls for services of firm as a whole, not individuals); **84-5** (same); **82-134** (agency contracted for services of corporation not individual).

The Commission has established certain factors it will weigh in determining whether an individual who is an employee or officer of a private corporation which contracts with a public entity should be deemed to be a public employee. **EC-COI-87-19, 87-8.** These factors include:

1. whether the individual's services are expressly or impliedly contracted for:

2. the type and size of the corporation;

3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;

4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and

5. the extent to which the person has performed similar services to the public entity in the past.

No one factor is dispositive, rather the Commission will balance all of the factors based on the totality of the circumstances. **Compare, EC-COI-87-8** (jurisdiction) with **EC-COI-89-6** (no jurisdiction where only one factor present). Under the circumstances presented in this case the Commission concludes ABC and DEF, by virtue of A&D's contracts with DMH, are state employees[3/] for purposes of G.L. c. 268A.

The Commission finds that all of the DMH contracts at issue address broad health care delivery issues in addition to the recruitment of physicians. Among the issues covered are: program innovations to improve cost effectiveness and direct care; improved hospital data systems; academic affiliations and the collection of third party billing revenues. It can be reasonably inferred that DMH, in these contracts, was seeking a restructuring of health care delivery within these state institutions.

ABC and DEF each have specialized expertise in the area of health care management and finance. References to this expertise can be found throughout the contracts. For example, in the UVW contract, when addressing issues of billing, ABC and DEF indicate that they were the heads of state health care programs. DMH could reasonably infer that it was obtaining the principals' expertise in this area under the contract. Similarly, in a discussion of potential academic affiliations at UVW and XYZ, ABC and DEF specify their affiliations with academic institutions, raising a reasonable inference that DMH bargained for the principals' connections in the contract. Also, there are numerous references in the contracts to the "network of relationships" within the medical community developed by ABC and DEF in the area of physician recruitment. These relationships were cultivated by the individuals, not the corporation, and both individuals acknowledge that they play a significant role in the recruitment of physicians. The contract contemplates that DMH will receive the benefit of these personal relationships in the establishment of a quality psychiatric staff within each institution.

Of significance is the fact that ABC and DEF have a long history with DMH through their individual consulting activities at AMHC and other state facilities. **EC-COI-87-8; 83-165.** Each contract proposal emphasized the consulting activities at AMHC. At the time of the AMHC proposal, A&D mainly consisted of ABC and DEF. Because of this history, DMH is knowledgeable about the individual expertise of the principals in the area of health care management and the individuals' standing within the psychiatric/medical community.

Additionally, both the UVW and XYZ contracts expressly call for the consulting services as well as the contract management by the senior staff of A&D. These consulting services are covered by indirect overhead in the budget. Although A&D has grown, the specialized management skills rest in a small senior staff, of which ABC and DEF are the two leaders. The Commission has previously stated that where a state contract specifically contemplates that all of the partners in a firm would work on a project, each partner would be considered a special state employee.[4/] **EC-COI-80-84.**

This case is unlike the situation where the officers of a corporation enter a contract with the state and provide no further services other than general oversight

of their employees, or where a contract specifies a generic program manager. See EC-COI-89-6. Viewing the totality of each contract, it is apparent that DMH is expressly and impliedly bargaining for the expertise of the principals and senior management of A&D to provide a restructuring of health care at each institution. The contracts seek the specialized expertise of ABC and DEF to find innovative solutions to mental health care delivery problems, to use their relationships to build a quality physician staff and to develop innovations in third party billing and other financial matters. Given the past experience of DMH with the skills, innovations and physician relationships that ABC and DEF have fostered, the Commission concludes that each contract award was based on their expertise and experience as individuals as much as on the reputation of the corporation. EC-COI-87-8. Further, the contracts contemplate that ABC and DEF will apply their expertise to the particular problems confronting each institution.

For all of the above reasons the Commission finds that ABC and DEF are special state employees for purposes of the conflict of interest law.[5/]

DATE AUTHORIZED: December 21, 1989

[1/]Each of the contracts to be discussed was signed by DEF as President of A&D.

[2/]This advisory opinion is based on the facts as you relate them to be at the present time. It does not preclude the possibility of a different result should these facts change.

[3/]Due to the limited time commitment of ABC and DEF under the contracts they will be deemed to be special state employees. G.L. c. 268A §1(o) G.L. c. 268A generally applies less restrictively to special state employees.

[4/]The Commission notes that this decision may have ramifications for other senior staff at A&D who are performing services under more than one state contract. Senior staff are advised to seek an opinion from the Commission regarding how G.L. c. 268A applies to their particular situation.

[5/]The Commission will address the consequences of ABC and DEF's special state employee status for purposes of G.L. c. 268A, particularly §§4, 6, 7, and 23, in a subsequent opinion, should they so desire.

Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-89-30

FACTS:

You are the appointed Police Chief in a Town. Your regular work hours are Monday-Friday, 8 a.m. - 4 p.m. You have the weekends off. When you are out of town, a designated police officer assumes your duties.

You have been asked by a new private resort XYZ in Town to oversee their private unarmed security force. No alcohol is served on the grounds. XYZ employs more than 300 people and has its own security staff. XYZ has its own internal security policies which are similar to those used at another XYZ location out of state.

According to your consulting employment agreement with XYZ, you would work 15 hours per week. Your responsibilities would include evaluating the performance of the security force's work as well as conducting "nightly checks with the shift supervisor, checking the incident log, and (being) available for questions relative to security inquiries." XYZ has provided additional information on your proposed employment arrangement. XYZ view you as a consultant-independent contractor rather than an employee. You would be responsible for paying your own taxes on income from XYZ and your salary would be fixed. You would not be eligible for any bonus, overtime compensation, or benefits from XYZ. While there is no written job description for your consulting position, XYZ states that your responsibilities would include ongoing performance reviews of the private security force members and their adherence to XYZ's policies and procedures. XYZ states that you would report directly to the Director of Security (Director) who is on the premises of XYZ in excess of sixty hours per week and is on call around the clock. Although the Director has no background in security matters, he has access on a daily basis to an experienced security director at XYZ's other location.

According to the Director, your direct contact with security force members would be minimal. You would help to interview and evaluate applicants for security force positions as well as discuss security issues and procedures with staff members and answer their questions. Additionally, your consulting position would include reviews of XYZ's security logbook and internal incident reports. If necessary, for example, you would review and discuss an incomplete incident report with a staff member. According to the Director, if an incident or crime occurs, an internal incident report is completed. Depending on the nature of the incident, the resort may also notify the police. If a crime is in progress, XYZ would call the officer on duty at the Police Department whether or not you are on the premises of the resort. It is understood that you would never be the officer on duty at the Police Department. There is no direct line between XYZ and the Police Department.

The Director understands that as Police Chief, you would not be involved in any police matters relating to XYZ or its employees. For example, as Police Chief, you would delegate any non-emergency matter involving XYZ to another police officer. Furthermore, the Town Board of Selectmen voted to agree to allow you to engage in outside employment at XYZ for a maximum of 15 hours per week with the provision that you would remain available to respond to any Town Police Department emergency matter. The Selectmen's vote also states that your outside employment is subject to a six and twelve month review.

You state that your private work would be performed outside of your regular Police Chief hours. XYZ is willing to provide in writing that any Police Department matters which arise while you are at XYZ would take precedence over your private employment. You do not foresee any circumstances where the resort will need to hire Town policemen for detail work.

QUESTION:

May you accept the paid private employment with XYZ to provide ongoing consulting services involving the supervision of the resort's private unarmed security force?

ANSWER:

Yes, provided that you comply with § §3, 17, 19 and 23, as described below.

DISCUSSION:

Section 19

Section 19 prohibits you from participating[1/] officially in a particular matter[2/] in which you, your immediate family[3/] or partner, a business organization in which you serve as officer, director. Trustee, partner or employee or any person or organization with whom you are negotiating prospective employment has a financial interest.

Under this section, you may not participate as the Police Chief on any particular matter, including any recommendation or decision, where it is reasonably foreseeable that the financial interest of XYZ would be affected. See, EC-COI-86-13; 87-31. You will remain subject to the provisions of §19, so long as you are an "employee" of XYZ. Although the language of §19 does not expressly include "independent contractors," the Commission is not bound to a formal name for a position to determine whether the requirements of §19 apply. See, EC-COI-87-10 (abstention provisions of §19 applied to a bank corporator whose position was analogous to a corporate director). In EC-COI-83-34, the Commission concluded that a state employee who also worked part-time as a bank conveyancer was <u>not</u> a bank employee for the purposes of §6 (a parallel provision to §19 applying to state employees). The Commission stated that its decision

was based on the "comparatively small portion of (his) income attributable to services which (he) perform(s) for the Bank and the relative infrequency of those services(s)." Id. at p.2. The Commission also noted that the individual's increased Bank work could place him within the scope of § 6. In applying these factors to your consulting arrangement with XYZ, we conclude that for the purposes of § 19 you would be considered an "employee" of XYZ. We base this conclusion on several factors, including the significant number of regular hours per week that you would be "consulting" to XYZ, the fact that you report directly to a director,and the important nature of your consulting services. Furthermore, your employment agreement lacks a specified period of time or a particular objective for your consulting services. These factors indicate that you would be considered an XYZ employee under §19.

Therefore, absent the exemption described below, under §19 you may not participate in any Police Department determinations on matters such as the enforcement of health code violations or police investigations involving XYZ, its employees or guests, where such determinations would foreseeably have a financial impact on that business entity. Again, this prohibition will continue so long as you are employed by XYZ. See, In the Matter of Charles Lawrence, 1987 SEC 284 (Disposition Agreement). This section would also preclude you from arranging or supervising Town Police detail at XYZ. See, In the Matter of John A. DeLeire, 1985 SEC 236, 237.

You may seek an exemption from the provisions of §19 if you advise your appointing authority, in writing, of the nature and circumstances of your employment at XYZ, and you disclose any matters which may foreseeably affect XYZ's financial interest and are likely to fall within your official responsibility. In addition, you must receive, in advance, a written determination made by your appointing official that XYZ's financial interest in any such matters is not so substantial as to be deemed likely to affect the integrity of the services which the Town may expect from you. See, Commission Advisory No. 10 at p. 3.

In order to ensure your total compliance with §19, it would be necessary for you to make additional §19 disclosures whenever a <u>new</u> matter you did not previously disclose arises under your official responsibility and that matter could foreseeably affect XYZ,s financial interest. Exemptions under §19(b)(1) must be granted <u>in advance</u> of the activity proscribed by §19.[4/]

Section 17

Section 17(a) and (c) prohibit you, otherwise than as provided by law for the proper discharge of your official duties, from directly or indirectly receiving compensation from, or acting as agent for, anyone other than the Town in relation to any particular matter in which the Town is a party or has a direct and substantial interest. The purpose of §17 reflects the maxim that an "individual cannot serve two masters" and thus serves to ensure that your private interests are separate from your public duties to the Town. See, Edgartown v. State Ethics Commission, 391 Mass. 82 (1984).[5/]

For example, under §17(c) you cannot act as a representative on behalf of XYZ on any permit, application, or other matter submitted to the Town. You may not personally appear nor make phone calls or written communications on behalf of XYZ to any municipal agency of the Town on such matters, including, but not limited to, Town permits, licenses, applications, inspections or investigations. See, EC-COI-87-27 (a personal appearance includes telephone calls made by a public employee on behalf of another). You must avoid acting as XYZ's "agent" on matters of direct and substantial interest to the Town. See, In the Matter of Paul Sullivan, 1987 SEC 312, 314-315; EC-COI-87-31; 88-9.

Even if you avoid any role as agent or spokesperson for your private employer, under §17(a) you may not be paid by XYZ in connection with particular matters of direct and substantial interest to the Town. For instance, §17 would prohibit you as a paid consultant to XYZ from performing or overseeing an internal investigation of a crime at XYZ which is also the subject of an investigation by the Town. Similarly, you may not be paid to advise XYZ on how best to proceed at Town hearings and meetings. See Commission Advisory No. 13; EC-COI-85-59; 84-116. See also, EC-COI-87-31; 88-9.

Thus, under the provision of §17(a) and (c) we conclude that you may work for XYZ only if your consultant duties are restricted to matters which are not in relation to any particular matter in which the Town has a direct and substantial interest. In particular, you must refrain from participating in criminal matters which occur at XYZ as they would inevitably involve the Police Department. For example, if XYZ would be required by the Police Department to submit a summary or a report on an incident or a crime, not only would you be required to abstain from participation as Police Chief (pursuant to §19), you would also be prohibited under this section from begin privately compensated in connection with that submission. You could not be paid by XYZ to check the completeness or veracity of such reports nor to prepare a written summary which is required by the Police Department. If you cannot practically arrange your job to accommodate these restrictions, you cannot accept the private work.

Section 23

Section 23(b) (1) prohibits you from accepting other employment of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of your public office.[6/] In 1985, the Commission found this section was violated by a municipal police lieutenant who simultaneously held a private job which overlapped with his official duties. See, In the Matter of Adam DiPasquale, 1985 SEC 239. In that case, the police officer was responsible for police personnel on certain shifts. His private employment, as "assistant security chief" for a racetrack, involved his supervision of an internal security force and its operations at the track as well as dealing with violations of internal safety and conduct rules. The track also maintained a "direct security line" to the police department and utilized police detail for patrolling the track and to control traffic at special events. The Commission found the racetrack had "substantial need" for the track's substantial needs for police department services and the nature of the

lieutenant's official duties, the Commission concluded his private employment at the track "necessarily impair(ed) the independence of his judgement in the performance of his official duties" - thereby, violating §23 (¶2) (1) [a prior version of §23(b)(1)].

A similar case, involving c. 268A violations by a police department chief, was considered In the Matter of John A. DeLeire, 1985 SEC 236. The police chief violated § 23 (¶2) (1) by accepting a private consulting arrangement with a racetrack in his municipality which had "substantial needs for his department's services, especially where that private consulting arrangement involve(d) the same area of expertise for which he (was) responsible in his public position as chief..." Id. at 237

The facts you have presented to the Commission involving private, paid security consulting work which you propose to undertake in the municipality where you also serve as the Police Chief, raise fundamental questions as to the compatibility of your public and private positions under §23(b)(1). These concerns are not dissimilar to those discussed in the DeLeire and DiPasquale agreements where violations of §23(b)(1) were found because the private security work "necessarily impaired" the official judgment of the Police Chief and lieutenant. On balance, the Commission finds that §23(b)(1) does not currently prohibit your private employment with XYZ. This finding is based in part on the Board of Selectmen's approval of your employment arrangement with XYZ. The line dividing your situation from DeLeire and DiPasquale is, however, tenuous. Should any material changes in the conditions of your XYZ employment occur, or should XYZ's security needs change, we would need to re-examine our conclusion under §2(b)(1) in light of those changed facts.[7/]

Even though §23(b)(1) does not prohibit your private employment, other provisions under the standards of conduct, §23, are relevant to your circumstances. Section 23(b)(2) prohibits you from using your official position to secure for yourself or anyone else, an unwarranted privilege or exemption of substantial value which is not available to similarly situated individuals. Issues would arise under this section were, for example, you to use your official position to endorse the resort's security system. See, EC-COI-84-127. This section also prohibits you from using town personnel, telephones, equipment or time to prepare or conduct your private work for XYZ. See, EC-COI-81-87. Section 23(b)(2) also prohibits you from using your official position to gain access to town officials and information which is unavailable to the general public for the benefit of XYZ. See, EC-COI-85-23. See also, 87-7. This section would prohibit you from, for example, screening XYZ employee applicants through computerized records search or background check available to the Police Department.

Section 23(b)(3) prohibits you from acting in a manner which would lead a reasonable person to believe that you are unduly or improperly influenced in the performance of your official duties because of the kinship, rank, position or undue influence of any party or person. Issues under this provision may arise because it could appear that <u>any</u> official dealings you would have with XYZ (even if permitted under §19, as discussed above, because XYZ had no identifiable financial interest in any such dealings) would be influenced by your employment arrangement with that entity. An

exemption from this section is available, however, if you disclose in writing to your appointing authority (the Board of Selectmen) the nature of your employment arrangement with XYZ and the official action you are being called upon to take. You may also wish to file the written statement from XYZ stating that your police duties take precedence over your private work.

Section 23(c)(1) and (2) prohibit you from accepting employment or engaging in a business or professional activity which will require you to disclose confidential information of which you have learned as Police Chief. For the purposes of this section, confidential information is that which is exempt from the definition of a public record under G.L. c. 4, §7. For example, this section prohibits you from divulging any internal Police Department policies or procedures which are confidential in nature.

Additionally, §23(e) provides that heads of agencies may establish and enforce additional standards of conduct. See, EC-COI-85-12. Under this provision, you should check with Town Counsel to determine whether any Town regulation or by-law applies to your situation.

CONCLUSION:

In sum, you may accept the consulting position with XYZ only if you are able to meet the substantial restrictions of § §17, 19, 3 and 23 as outlined above. As indicated above, the Commission considers this a close question, and should your relationship with XYZ change in any material way, or if there is a change in XYZ's security needs, this conclusion will need to be re-examined in light of those changes.

DATE AUTHORIZED: December 21, 1989

[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.

[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, power, duties, finances and property.

[3/] " Immediate family," the employee and his spouse, and their parents, children, brothers and sister.

[4/] Although you have indicated that the Town Board of Selectmen have allowed your private employment with XYZ, the Selectman's vote of August 11, 1989, is not sufficient to exempt you from the provisions of §19 should you be called upon to act as Chief in any matter affecting the interests of XYZ. Should you desire to participate in any such matter, the Selectmen must provide to you in writing a statement that XYZ's financial

interest is not so substantial as to affect the integrity of your services as Police Chief. See, EC-COI-86-13; 87-31.

5/ A corresponding provision contained in §17(b) prohibits a private party compensating a municipal employee in connection with a matter of direct and substantial interest to the town. Your private employer, XYZ would be subject to this provision. See, Public Enforcement Letters 87-5 and 4.

6/ The Commission has previously determined that an item of substantial value is anything worth $50 or more. See, Commission Advisory No. 8.

7/ Another issue which arises under §23 is whether your official position requires you to be on duty as Police Chief around the clock. In Commission Advisory No. 10, "Police Chiefs Doing Privately Paid Detail Work," the Commission states, "The position of police chief is generally considered a twenty-four -hour-a-day job, carrying with it, the ultimate responsibility for the operation and activities of the police department." Id at p. 2; see also, EC-COI-85-83; 85-65. We conclude that the advice contained in Advisory No. 10 only pertains to private detail work, paid by either a private party or a town, and which is performed by a police chief. Your circumstances are distinguishable. Your normal work hours are Monday through Friday 8:00 A.M. to 4:00 P.M. and your Department provides other coverage during your off duty hours. In addition, your private consulting position with XYZ is not be considered private detail work. Thus, Advisory No. 10 does not apply to your circumstances.

EC-COI-89-1: A holding company created by the board of trustees of a state institution will be considered an instrumentality of a state agency for the purposes of G.L. c. 268A where the company was created to fulfill a governmental purpose and is substantially controlled by the state institution.

EC-COI-89-2: An employee of a town may also serve as an elected member of an independent water district within the town, subject to certain conditions. In particular, the district member must abstain from participating in any contract, decision or other matter in which the town has a financial interest.

EC-COI-89-3: The executive director of the state group insurance commission may accept, for official use by the commission, a donation of consultant services from to a life insurance company which currently holds a contract with the commission. The Commission must observe the safeguards of 23 in connection with its monitoring of the company's performance under the contract.

EC-COI-89-4: A member of the General Court may accept promotional rate tickets for himself and his spouse to conduct a series of substantial speaking engagements. The spouse promotional rate is permissible under an established industry-wide practice available to similarly situated individuals.

EC-COI-89-5: The chairman of the board of regents of higher education may also serve as "of counsel" to a law firm which represents clients in matters within the official responsibility of the board of regents, subject to certain conditions. He must abstain from participating as chairman in any matter in which his firm represents s client, and must arrange to have the firm segregate from his compensation any fees connected with representation in board-related matters. Because his of counsel relationship does not have the attributes of a partnership, the firm's partners may represent private clients in matters within the official responsibility of the board.

EC-COI-89-6: Employees of a non-profit corporation are not municipal employees by virtue of an agreement between the corporation and a city facility committee to manage a city facility, inasmuch as the city has not identified specific individuals to perform work under the contract.

EC-COI-89-7: The former secretary of the executive office of environmental affairs must comply with the restrictions of 5 and 23(c) in his new "of counsel" position with a law firm. In particular, he must refrain from representing a client in any matter in which he previously participated as secretary. Because, as secretary, he had official responsibility for all matters within the executive office, 5(b) requires that he refrain from personally appear before any state court or state agency in connection with those matters.

EC-COI-89-8: A member of the general court must abstain from sponsoring, advocating or voting on special legislation in which his immediate family member has a foreseeable financial interest.

EC-COI-89-9: A member of the general court may not have a financial interest in his family's business contract made with a state agency prior to his election. Notwithstanding his transfer of ownership of his business to his spouse, he retains a financial interest in the business and, therefore, in the contract with the state.

EC-COI-89-10: A county commissioner may also represent clients in real estate and health care issues before municipal, state and federal agencies, inasmuch as these matters are not of direct and substantial interest to the county.

EC-COI-89-11: A state employee who wishes to resign and accept a consultant contract with the same state agency must comply with the conditions of 4, 6 and 23. In particular, he may not currently participate in any determinations relating to the performance of the present consultant nor in matters relating to the agency's decision recording his consultant application.

EC-COI-89-12: A member of the judiciary may accept membership on the board of advisors to a hospital, subject to certain limitations. He must avoid appearing on behalf of the hospital before any state agencies and must dispel any appearance of undue favoritism as a judge towards the hospital.

EC-COI-89-13: A member of a municipal authority may retain her investment as well as limited partner status in a project that is pending before her municipal authority, provided her investment is less than 1% of the entire project and she abides by the rules of M.G.L. c. 268A, §§19 and 20.

EC-COI-89-14: A state employee cannot transfer property to an independent third-party where: (i) the third party had a previously established contractual arrangement to transfer the property to a state agency; (ii) the state agency had initiated the series of transfers solely as a way to circumvent the §7 restrictions, and (iii) all of the parties knew, in advance of the original transfer, that the property would be conveyed from the state employee to the third party to the state agency.

The series of transactions was, in effect, a prohibited pass-through.

EC-COI-89-15: An unpaid member of a state authority is a special state employee. He may retain his membership on the board of overseers of an institution that falls under the jurisdiction of his state authority because, in this case, the overseers do not have management authority over the institution, but instead have advisory authority. Therefore, the employee's status as a board member does not require his abstention under §6, although proper disclosures under §23 could be necessary in certain instances. As a special state employee, he must avoid acting as agent or attorney for the institution in connection with anything under his official responsibility at the authority.

EC-COI-89-16: A state employee may participate in a matter involving a person who was, 10 years ago, a member of the same athletic club as the state employee, and whom the state employee has not seen in 10 years with the exception of three chance social occasions. To dispel the appearance of favoritism, however, the employee should make a public disclosure to his appointing authority of his past friendship, and be guided by the Standards of Conduct set forth in §23.

EC-COI-89-17: Employees of an agency created by a legislative act are considered "municipal employees" within the meaning of §1(g) because of the agency's essentially local character. Among the factors considered by the Commission were: (i) the services the agency provides; (ii) the local control over the agency; (iii) the collection of local revenues; (iv) the fact that surplus agency funds accrued to the local municipality; and (v) the fact that title in the agency's property vests in the local municipality upon the agency's dissolution. As a municipal agency, its employees are not required to file Statements of Financial Interests.

EC-COI-89-18: An employee of a private construction firm will not be considered a state or public employee if he performs advisory services for a private, non-profit corporation that was established to provide advice to the Boston business community regarding the Third Harbor Tunnel and Central Artery construction projects. If his construction company is hired to do planning and/or re-construction work on the project, the employee should contact the Commission for further advice.

EC-COI-89-19: A municipal official may participate in a local zoning amendment decision where the municipal official's spouse does not have a reasonably foreseeable financial interest in the decision because it is unknown how the decision will affect the real estate of a corporation in which the spouse owns stock.

EC-COI-89-20: Regional Employment Boards (REB) established by the Legislature to expand the scope of private industry councils operating under the federal Job Training Partnership Act (JTPA) are considered municipal agencies, and their employees are considered municipal employees, for purposes of the conflict of interest law. REB employees are not required to file Statements of Financial Interests because the filing requirement is limited to those people holding policy-making positions at the state and county levels of government.

EC-COI-89-21: Tax shelters are reportable on Statements of Financial Interests, pursuant to G.L. c. 268B, §5, as either "investments" or "businesses" if the fair market value of the shelter is greater than $1,000, regardless of whether the shelter produces tax losses or income.

EC-COI-89-22: A Selectman would violate §20 by holding a direct financial interest in a contract to provide ambulance services to his own Town. The §20(f) exemption for certain "personal services" contracts is not applicable because the contract is not for the provision of "employment-type" services to the Town police, fire, rescue, or ambulance department.

EC-COI-89-23: A state agency may accept a gift of a demonstration model software package worth more than $100 from a private software company because the gift is being made to the agency rather than to one or more employee for his or her personal use. However, employees at the agency may not grant any unwarranted privileges or special consideration to the private company because of the gift to the agency.

EC-COI-89-24: A non-profit corporation formed by faculty at a state institution is a state agency for purposes of G.L. c. 268A where the purpose of the corporation is to enhance and support the faculty department, the non-profit corporation furthers the state institution's legislative mandate, and the corporation's Board of Directors is controlled by university employees.

EC-COI-89-25: An athletic coach employed by a state college may receive an honorarium from a college alumni association for legitimate speaking engagements outside of his regular work schedule and work responsibilities. In order for speaking engagements to be considered legitimate, they must be:

1. formally scheduled on the agenda of the meeting or conference;

2. scheduled in advance of the speaker's arrival at the meeting or conference;

3. before an organization which would normally have outside speakers address them at such an event; and

4. the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

EC-COI-89-26: A former member of a committee which supervises investments for certain state agencies is prohibited by §5(b) from appearing for one year before any state agency in connection with an investment in an annuity contract over which he had official responsibility as a committee member, even if he had not previously participated in that matter.

EC-COI-89-27: For purposes of G.L. c. 268A, a municipal employee retains his municipal status during the time he is collecting workman's compensation benefits. In determining whether an employee continues to hold employment within a municipal agency, the Commission will examine the characteristics of the relationship between the employee and the agency, including: whether a previously compensated employee continues to receive compensation from the municipal agency; whether the employee continues to receive the same retirement, insurance and other benefits available to municipal employees; whether the parties have a reasonable expectation that the employee will return to his municipal position; and what actions have been taken by the parties to terminate the employment relationship.

EC-COI-89-28: A municipal police officer is prohibited under §20 of the conflict of interest law from maintaining his employment as a police officer and also serving as a city councilor. An exemption to §20 for selectmen does not apply to city councilors.

EC-COI-89-29: A special state employee who is also a private attorney may participate as a state employee in the re-sale of property previously purchased by his state agency from a former legal client of the special state employee. The employee must abstain from participating in particular matters that affect his own financial interests or those of his immediate family, partners, or associates, and must also avoid any actual or apparent undue favoritism. In addition, the employee is prohibited in his private capacity as an attorney from representing or receiving compensation from a private party in connection with any matter that is of interest to the state.

EC-COI-89-30: A municipal police chief may accept employment with a private resort to provide ongoing consulting services involving the supervision of the resort's private unarmed security force, only if the police chief complies with substantial restrictions set forth in M.G.L. c. 268A, §§17, 19 and 23.

EC-COI-89-31: A member of the General Court who is also an attorney would be subject to §4 of the conflict law if he were to become "of counsel" to a large law firm which either currently or potentially represents clients before state agencies. Unless the Legislator is deemed to have "partner" status at the private law firm, the §4 restrictions will not apply to other attorneys in the law firm.

EC-COI-89-32: A special municipal police officer who owns the only garage in the town with a tow truck is considered a "special municipal employee" in his part-time police officer position. As a special municipal employee, the officer may repair town fire trucks if his police duties do not include matters concerning the fire department, and if he files a written disclosure with the town clerk. He may provide towing services to the town provided he complies with the exemption requirements of §20(d).

EC-COI-89-33: A Conservation Commission member who resides near property whose owner has made a filing under the Wetlands Protection Act, may participate in the matter where: (i) the member is not a direct abutter; (ii) the member is not a "party aggrieved"; (iii) the member is not a "party in interest"; and (iv) the facts do not indicate any other direct or reasonably foreseeable financial interests prohibited by §19. Direct abutters, "parties aggrieved," and "parties in interest" are presumed to have a §19 financial interest which would prohibit participation unless an exemption applied.

EC-COI-89-34: A former state employee who previously participated in the preparation and presentation of a report on certain pending legislation may, under §18, assist and represent a prospective developer in connection with a redraft of the bill to be reconsidered in a subsequent legislative session.