STATE ETHICS COMMISSION

Rulings

Enforcement Actions

Advisory Opinions

1990

Published by The Massachusetts State Ethics Commission

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TABLE OF CASES

(By Subject or Respondent from 1979 through 1990)

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1990 TABLE OF CASES

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Note: Enforcement actions regarding violations of G.L. c. 268B, the Financial Disclosure Law, are not always included in the Rulings publications.

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

Laval Wilson
c/o Thomas Kiley, Esq.
Cosgrove, Eisenberg & Kiley, P.C.
803 Hancock Street
P. O. Box 189
Quincy, MA 02170

RE: PUBLIC ENFORCEMENT LETTER 90-1

Dear Superintendent Wilson:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you violated G.L. c. 268A, §3 by permitting a vendor to pay directly travel expenses you incurred in 1988 on official business trips to the vendor's corporate headquarters. 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, you do not necessarily admit to the facts and law as discussed below. (As noted below, you have maintained that your conduct did not violate the conflict law). The Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. You have been Superintendent of the Boston Public Schools (BPS) since the fall of 1985. In June, 1987, the Boston School Committee adopted your recommendation to use a single basal reader for the BPS.

2. Between July and August, 1987, a group of 40 teachers and parents evaluated the basal reading programs of nationally-recognized publishers. The group's first choice for a publisher was Harcourt, Brace, Jovanovich (HBJ). Four finalists were, however, recommended to you.

During the fall of 1987, your cabinet staff and curriculum specialists narrowed the list of finalists to two: HBJ and MacMillan Publishing Company. Letters were sent to each of the two finalists, inviting them to make full day presentations to you and your cabinet staff and curriculum specialists. The letters (as well as memoranda to BPS staff concerning the presentations) emphasized that luncheon expenses for BPS personnel attending the all-day presentations were to be borne by BPS personnel, not the prospective vendors.

3. On December 16, 1987, HBJ made a presentation to the BPS staff in Boston. MacMillan's presentation occurred two days later.

4. On January 22, 1988, after you met with other staff, teachers and principals to discuss the reading proposal, you made a written recommendation that the School Committee adopt the HBJ proposal.

5. On February 9, 1988, the School Committee voted to adopt the HBJ reading program.

6. While it took several months for BPS and HBJ to agree to all of the details of a contract,[1/] the basic outlines of the agreement were understood in early February. By letter dated February 12, 1988, the BPS General Counsel began the process of reducing that understanding to writing. In her letter, she confirmed that HBJ had agreed to provide "the following services at no extra cost beyond the stated cost of the textbooks and associated materials." Included in the enumerated list of services is "Development of Customized Materials" which basically involved the development of the remedial reading program. Not included, however, was any specific reference to HBJ paying for the costs of BPS staff travel.

7. The remedial reading program alluded to in the foregoing was not the basal reading program adopted in June of 1987. It was instead an additional, tailor-made program designed for Boston's middle schools, but adaptable for other urban school systems. By agreeing to develop these materials at no cost to BPS, HBJ essentially donated their services and facilities to BPS for this limited purpose.

8. On February 23, 1988 you and members of your staff met with the HBJ senior vice president and several HBJ editors in Boston to review a draft of the new middle school remedial reading materials. BPS staff strongly rejected the materials because they were not appropriate for an urban, minority student population such as Boston's. The HBJ senior vice president and staff returned to Orlando and reviewed Boston's evaluation of those materials. After extensive review, the HBJ officials decided to hold the next review session at the work location of their writers and editors. HBJ's senior vice president believed that it

was much more cost-effective to bring four BPS people to the HBJ headquarters rather than to fly 10 to 12 members of his staff to Boston, where they would incur additional meal and lodging expenses.

9. Accordingly, on March 7, 1988, you and three staff members went to Orlando, Florida, at HBJ's expense, to meet with the HBJ staff. You met with about 10 HBJ staff members who had responsibility for book layout, photography decisions, copy and other production details. You met also with approximately nine other members of the HBJ staff for a program entitled "Discussion of a New Developmental Reading Program for Less-Prepared Students in Grades Six, Seven, and Eight." The program was sponsored and paid for by HBJ. The meetings lasted from 4:30 to 9:30 P.M. Monday, and from 8:00 to 10:30 A.M. Tuesday, and included a group dinner on Monday and breakfast on Tuesday. The agenda was fairly detailed. It included no extra-curricular activities. All guests traveled to Orlando in coach class and stayed at the Stouffer's Orlando Resort (approximately $93 each for the lodging). Dinner for 13 at Dux's Restaurant cost $884 ($68 each), and breakfast for 14 at Stouffer's cost $151 ($10 each).

10. You and your staff returned on March 8, 1988.[2/]

11. On August 16, 1988, you again went to Orlando, at HBJ's expense, to film two in-service training videos to be used with BPS staff at the opening of school.[3/] You flew first class, and you were treated to lunch ($35 for two) and dinner ($32.78 for two) while there. You returned to Boston that same night, again flying first class.

II. The Conflict Law

As the Superintendent of the Boston Public Schools, 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 HBJ paying for your trip expenses as described above raises concerns under §3(b). As a matter of longstanding precedent, the Commission has made clear that public employees violate §3 when they travel at the invitation and payment of prospective vendors. **Public Enforcement Letters 89-5 through 89-8; EC-COI-88-18; EC-COI-88-5, EC-COI-82-99.** The Commission views these payments to be items of substantial value given to the public official for or because of official acts already performed, to be performed while on the trip, and/or to be performed in the future. Further, §3 will be deemed violated even if, as in your case, these expense payments are all limited to necessary and ordinary business expenses incurred by the public official in the course of his official duties. Thus, there need not be any excessive "wining and dining" or other "frills" for §3 to be violated regarding such payments.[4/]

There are good public policy reasons for prohibiting the direct payment of even routine travel expenses by vendors. 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 accoutrements on these trips as more important than the quality of their product.

In your defense, you make the following arguments. First, you note that the HBJ contract explicitly provides that HBJ will produce the customized reading materials at no cost to BPS. (Contracts to acquire educational materials are authorized by law. G.L. c. 40, §4.) Thus, when it became clear that it would be necessary for BPS and HBJ staff to meet in or about March of 1988, there was no question but that HBJ would pay for all necessary and reasonable costs related to such a meeting. Where there were many more HBJ staff who would have to attend the meeting than BPS staff, it made good sense economically for the BPS staff to go to Florida. Regardless of whether it was BPS or HBJ staff traveling for such a meeting, you argue that the contract was clear that HBJ would cover the costs. Consequently, you assert that inasmuch as the contract provided for these trips at HBJ's expense, and contracts to acquire educational materials are

authorized by law, your accepting these trips from HBJ was "provided by law for the discharge of official duties," and, therefore, exempted under §3.

While your position is not unreasonable, the Commission has already in effect held that the parties are not free to override the prohibitions of §3 through contract language. Thus, in **EC-COI-88-5** the Commission determined that even if the request for proposals (RFP) issued by a public agency explicitly provided that the bidding vendor would be required to pay for the costs of state employee travel to the vendor's site, that RFP language (and, by inference, the subsequent contract language) would not qualify for the "provided by law for the proper discharge of official duty" exemption in §3. Instead, the Commission insisted there must be either a state statute or regulation authorizing state employees to accept travel expenses from an interested vendor for the expenses to qualify for the §3 exemption.

In your situation, the Commission is aware of no statute or regulation which provides that you may accept travel expenses from an interested vendor. Consequently, the §3 exemption does not apply.[5/] Furthermore, the Commission questions whether it is as clear as you argue that the contract provided for HBJ to pay these expenses. We note that at the time of your first trip to Orlando in March of 1988, the understanding was not yet finalized. In addition, even in the executed contract, there is no explicit reference to HBJ paying for the costs of such trips. Exemptions to the conflict of interest law are to be construed narrowly. At a minimum, even if contract language could qualify for the §3 exemption -- which based on **EC-COI-88-5** it cannot -- the language would have to provide explicitly for such travel expenses.

You also argue that your contract with BPS, which is also authorized by statute, G.L. c. 71, §59, would have obligated BPS, not you, to pay the expenses of your trip to HBJ headquarters. Therefore you received no personal benefit from HBJ. This argument is also not unreasonable, and your contract may distinguish your case from the precedents discussed above. The distinction is insufficient, however, to alter the Commission's position that under §3 the value of the travel accrues to the individual rather than the municipality, even if in fact the individual, as in your case, does not appear to have received any material benefit from having the expenses paid by the private vendor. **See, Public Enforcement Letter 89-8.**

The Commission acknowledges that there may be legitimate public purposes to justify a public employee's travel, and that the public interest may be furthered by allowing private business entities to pay for a public employee's travel expenses. The Commission's policy is designed to ensure that public employees' integrity is not compromised in the name of conserving public funds. Thus, while the conflict law prohibits direct payment of travel expenses by vendors, trips such as yours may be lawfully accomplished without risk of violating the conflict of interest law in the following ways.

First, cities and towns may adopt an ordinance, by-law, or charter provision regulating vendor payments for travel expenses. Such an enactment could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel. For example, a municipality could require that the vendor identify the purpose and cost of the proposed travel, and that the public employee secure the approval of the governing body before undertaking the trip. This would ensure that the expenses are legitimate, and minimize the risk that the public employee is being "wined and dined" at the public's expense.[6/]

Alternatively, G.L. c. 44, §53A and/or G.L. c. 71, §37A may provide statutory vehicles by which a private party may pay travel expenses for public officials. These sections of the municipal finance law would appear to allow a city or town to accept grants from a private corporation or individual and, in turn, the city or town may expend such funds for the specific purpose intended with the approval of the mayor or the board of selectmen. Thus, if HBJ decided to pay the travel expenses of members of the school department to attend an inspection trip, HBJ could probably do so by providing the necessary expenses to the town with the acknowledgement that the donation or gift is to be used to pay for travel expenses. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred by the public employees. This would substantially reduce the potential for abuses. The application of G.L. c. 44, §53A and/or G.L. c. 71, §37A to trips is ultimately a matter of municipal finance law. Municipal officials should review this statute with the city solicitor or town counsel before implementing a procedure for vendor payments of travel expenses.

Finally, a city or town presumably could reimburse an employee for trip expenses incurred for business travel. The city or town could then bill the vendor for the costs of the public employee's travel expenses. This alternative should also be reviewed with the city solicitor or town counsel.

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.[7] By agreeing to publication of this letter, you have also helped other well-intentioned public employees to understand and comply with the law. This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: January 18, 1990

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[1] Given the system of approval applicable to BPS contracts and the incorporation of ordinances and documents into those contracts, it defies easy description to state what the contract contains and when it was entered. Prior to being awarded the basal reader contract, HBJ had been providing textbooks to the BPS pursuant to a standard blanket contract which had a ceiling of $200,000. Following the letter to BPS' General Counsel referenced in the text of this paragraph, the terms of the contract were more or less continuously negotiated by BPS General Counsel on the one hand and HBJ representatives on the other. A May 25th amendment increased the contract ceiling to $1,750,000. On June 21, 1988 a letter was sent to Mayor Flynn over your signature which increased the amount to $2,500,000 and contained an article explicitly stating that HBJ will "provide at no additional cost to BPS, the following customized materials: [remedial reading materials, among others]." The contract, as defined above, was approved by Corporation Counsel.

[2] On your return trip, your staff members travelled coach, you travelled first class. You explained that you returned separately from your staff members, and although you tried to book coach, the only seating available was first class.

[3] According to you, one part of the introduction of the new HBJ remedial reading program was the development of a video tape for elementary staff and one for middle school staff. The president and vice president of HBJ wanted you to introduce the new reading program as the first segment of those video tapes. You agreed. Originally, the taping was going to take place in Boston. HBJ, however, has a model classroom as part of its Orlando headquarters complex. To tape you in Boston would have required the entire HBJ taping crew to fly to Boston with all of its equipment. A second option would have been to hire a complete filming crew in the Boston area. In your view, the third and most sensible option was for you to fly to Orlando and tape in HBJ's studio. This is th option on which you and HBJ settled.

[4] The Commission will view the presence of any such "frills" as a highly exacerbating factor. See **In the Matter of Carl D. Pitaro**, 1986 SEC 271 (the Mayor of Brockton agreed to a disposition agreement in which he paid a $1,000 fine for violating §3 by having taken a trip to Florida to inspect a developer's hotel where all expenses were paid by the developer, that developer having a hotel proposal pending in Brockton. Significant to the Commission imposing a fine were the facts that the Mayor's spouse accompanied him on the trip, and most of her expenses were also paid by the developer. In addition, at least a significant portion of one day of the Florida visit was spent by the Mayor and his spouse on the developer's boat.)

[5] You point to several School Committee policies (DD, DJA, DJ) which you submit required you to have HBJ, rather than BPS, pay for the cost of your travel. In effect, you also suggest that these policies satisfy the §3 "otherwise as provided by law" exemption. On their face, however, these policies do not speak to the issue of vendor-paid-for travel. Even if they did explicitly deal with the issue, it is not clear whether such a policy has the force of law for §3 purposes. See fn. 6, below.

[6] Travel expenses paid by a vendor under such a ordinance, by-law or charter provision would be "otherwise as provided by law" under G.L. c. 268A, §3 and would not give rise to a violation. The Commission takes no position at this time as to whether a regulation or by-law adopted by a school committee could satisfy the "otherwise as provided for by law" language of G.L. c. 268A, §3. If a municipality wanted to pursue that particular route, it should obtain an opinion from the Commission.

[7] The Commission could have directed the staff to commence adjudicatory proceedings which, in appropriate circumstances, can result in fines of up to $2,000.00 for any violation. 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 could be held to be in violation of the law.

William Marble
51 Spring Lane
Holbrook, MA 02343

RE: PUBLIC ENFORCEMENT LETTER 90-2

Dear Chief Marble:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you, as a Holbrook Fire Chief, traveled to Florida at the expense of Woodward Spring Shop, a dealer representative for FMC Corporation, to inspect a new fire truck. 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 Holbrook Fire Chief, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). Woodward Spring Shop (Woodward) was a private business run by Tom Woodward.[1/] Woodward Spring Shop was engaged in the repair of automobiles, trucks, buses and fire apparatus, the sale of auto and truck parts, and the sale of fire apparatus for FMC Fire Apparatus, a manufacturer with home offices in Orlando, Florida. Woodward was a dealer representative for FMC since 1983. Woodward also serviced Holbrook Fire Department vehicles.

2. In November, 1986, the Holbrook town meeting appropriated money for the purchase of a new fire truck on a lease purchase basis. On January 8th and 9th, 1987, the town's request for bids was published in two local newspapers. Woodward and Emergency One, another fire apparatus manufacturer, picked up the specifications and submitted bids. The specifications had been prepared largely by Firefighter David Kincus after reviewing various fire trucks and bid packages from other cities and towns. The specifications do not call for an inspection trip.

3. On January 16, 1987, Selectman Frank McGaughey opened the bids. FMC offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,610.78 with interest calculated at 6%. Emergency One offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,675.00 with interest calculated at 7.3%. When interest was factored into each bid, FMC was the lowest responsible bidder. You awarded the bid to FMC with town counsel's approval.

4. You signed the fire apparatus contract on behalf of the Town of Holbrook on January 21, 1987. This contract called for delivery of the truck within 120 calendar days from the date FMC received the check. While you originally anticipated that the truck would be delivered in August of 1987, it was not delivered and accepted by the town until May, 1988.

5. Around August of 1987, FMC prepared and transmitted blueprints ("approval drawings") of the fire truck. Firefighter Kincus (and other firefighters) reviewed these and made numerous changes to the drawings, which were returned to Woodward. At that point, Tom Woodward decided that an inspection trip was necessary to ensure that the truck was built to these specifications. Tom Woodward offered to take you and Firefighter Kincus to Florida to inspect the fire truck.

6. Tom Woodward made reservations for himself, you and Firefighter Kincus to fly to Orlando on November 17, 1987. Each round-trip ticket cost $392.50 and was billed to Tom Woodward's personal American Express card. Upon arriving in Florida, you went to FMC's factory. You then checked into the Holiday Inn in Orlando. Tom Woodward paid for the room that you and Firefighter Kincus shared, which cost $56.00 per day.

7. The following day, you went to FMC's plant and had the standard tour. You observed the fire truck under construction. You went to lunch at Chile's, a local bar and grill, with Tom Woodward and other FMC personnel. It appears that one of the FMC employees picked up this tab. Upon returning to the factory in the afternoon, you met with various plant engineers and went over the blueprints. You left the plant at approximately 6:30 and probably went to Charlie's Steak House for dinner with Tom Woodward and Firefighter Kincus. Tom Woodward paid the bill. On November 19th, you drove with Tom Woodward to the plant in the morning and left him to attend meetings not related to the Holbrook fire truck. The Holbrook truck was to undergo a pump test; however,

for unknown reasons, that did not happen. You and Firefighter Kincus took Tom Woodward's rented automobile back to the hotel to pick up your suitcases and check out. You may also have stopped at a local mall. You returned to the factory to meet Tom Woodward and flew home on the 6:00 P.M. flight.

8. Apart from airfare, meals, and the hotel room, you did not receive any entertainment or other gratuities from Woodward or FMC.

9. The Commission is aware of no evidence that you knew your actions in accepting travel expenses from Woodward would violate the conflict of interest law. In fact, it appears to be a common practice for fire chiefs to inspect the fire trucks which they purchase. The practice serves a legitimate public interest, because fire trucks generally are customized to meet the needs of a particular locality.

II. The Conflict Law

As the Holbrook Fire Chief, 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 proper discharge of his official duties, from requesting or accepting for himself anything of substantial value[2/] for or because of any official act[3/] performed or to be performed.

Your acceptance of Woodward's paying for your trip expenses as described above raises serious concerns under §3(b). The act of inspecting the fire truck was an official act. By accepting travel expenses from Tom Woodward to inspect the fire truck, you accepted something of substantial value for an official act. The Commission has ruled that vendor-subsidized travel for or because of official acts violates the conflict of interest law. **See, EC-COI-82-99** and **EC-COI-88-5**. Absent a statute or regulation authorizing this, a vendor may not pay for a public employee's travel expenses. **See EC-COI-88-5.** The Commission believes that "business travel" has historically been too vulnerable to abuse to be treated otherwise. **See, In the Matter of Carl D. Pitaro,** 1986 SEC 271 (where Brockton Mayor received all expense paid trip to Florida to view a hotel built by a developer who proposed to build a similar hotel in Brockton, the Commission held that the travel privilege of substantial value accrued to Mayor Pitaro and not to the City of Brockton, notwithstanding the public purpose served by the trip).

Sound public policy requires the prohibition of these kinds of payments. As the Commission stated in **EC-COI-82-99** (where members of the state board of registration traveling to view equipment proposed by a manufacturer for approval by the board were prohibited from receiving travel expenses from this 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 products.

The Commission acknowledges that there may be legitimate public purposes to justify a public employee's travel, and that the public interest may be furthered by allowing private business entities to pay for a public employee's travel expenses. The Commission's policy is designed to ensure that public employees' integrity is not compromised in the name of conserving public funds. Thus, while the conflict law prohibits direct payment of travel expenses by vendors, trips such as yours may be lawfully accomplished without risk of violating the conflict of interest law in the following ways.

First, cities and towns may adopt an ordinance, bylaw or charter provision regulating vendor payments for travel expenses. Such an enactment could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel. For example, a municipality could require that the vendor identify the purpose and cost of the proposed travel, and that the public employee secure the approval of the governing body before undertaking the trip. This would ensure that the expenses are legitimate, and minimize the risk that the public employee is being "wined and dined" at the public's expense.[4/]

Alternatively, G.L. c. 44, §53A 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 or town to accept grants from a private corporation or 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 selectmen. Thus, if FMC decided to pay the travel expenses of members of the fire department to attend an inspection trip, FMC

could probably do so by providing the necessary expenses to the town with the acknowledgement that the donation or gift is to be used to pay for travel expenses. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred by the public employees. This would substantially reduce the potential for abuses. The application of G.L. c. 44, §53A to trips is ultimately a matter of municipal finance law. Municipal officials should review this statute with city solicitors and town counsel before implementing a procedure for vendor payments of travel expenses.[5/]

Finally, a city or town presumably could reimburse an employee for trip expenses incurred for business travel. The city or town could then bill the vendor for the costs of the public employee's travel expenses. This alternative should also be reviewed with town counsel.

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.[6/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: January 18, 1990

[1/]While originally located in Quincy, Massachusetts, this enterprise has recently stopped doing business in Massachusetts.

[2/]The Commission has found $50.00 to be substantial value. **See, Commonwealth v. Famiglietti,** 4 Mass. App. 584, 587 (1976).

[3/]"Official act," any decision or action in a particular matter or in the enactment of legislation.

[4/]Travel expenses paid by a vendor under such an ordinance, by-law or charter provision would be "otherwise as provided by law" under G.L. c. 268A, §3 and would not give rise to a violation.

You indicated that the Selectmen approved the trip before you went on it. We were not able to definitively corroborate this in our investigation. Even if the Selectmen approved the trip, this would not obviate the violation. Absent an ordinance, by-law, or charter provision authorizing vendor payments for travel expenses, such trips violate G.L. c. 268A, §3.

[5/]We note that evidence adduced during this inquiry suggests that FMC sponsored a "Fly-In Program" through which fire chiefs were flown to FMC's plant in Orlando, Florida for the express purpose of selling fire trucks to the chiefs. Such trips also violate G.L. c. 268A, §3(b), because the chiefs receive travel expenses in return for their official acts in purchasing FMC's fire trucks.

[6/]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 $2,000.00 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, particularly among various fire departments, where inspection trips appear to be common, 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.

David F. Kincus
374 West Main Street
Avon, MA 02322

RE: PUBLIC ENFORCEMENT LETTER 90-3

Dear Mr. Kincus:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you, as a Holbrook Firefighter, traveled to Florida at the expense of Woodward Spring Shop, a dealer representative for FMC Corporation, to inspect a new fire truck. 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 Holbrook Firefighter, and as such, a "municipal employee" as defined in G.L. c. 268A, §1(g). Woodward Spring Shop (Woodward) was a private business run by Tom Woodward.[1/] Woodward Spring Shop was engaged in the repair of automobiles, trucks, buses and fire apparatus, the sale of auto and truck parts, and the sale of fire apparatus for FMC Fire Apparatus, a manufacturer with home offices in Orlando, Florida. Woodward was a dealer representative for FMC since 1983. Woodward also serviced Holbrook Fire Department vehicles.

2. In November, 1986, the Holbrook town meeting appropriated money for the purchase of a new fire truck on a lease purchase basis. On January 8th and 9th, 1987, the town's request for bids was published in two local newspapers. Woodward and Emergency One, another fire apparatus manufacturer, picked up the specifications and submitted bids. The specifications had been prepared largely by you after reviewing various fire trucks and bid packages from other cities and towns. The specifications do not call for an inspection trip.

3. On January 16, 1987, Selectman Frank McGaughey opened the bids. FMC offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,610.78 with interest calculated at 6%. Emergency One offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,675.00 with interest calculated at 7.3%. When interest was factored into each bid, FMC was the lowest responsible bidder. Fire Chief Marble awarded the bid to FMC with town counsel's approval.

4. Chief Marble signed the fire apparatus contract on behalf of the Town of Holbrook on January 21, 1987. This contract called for delivery of the truck within 120 calendar days from the date FMC received the check. While you originally anticipated that the truck would be delivered in August of 1987, it was not delivered and accepted by the town until May, 1988.

5. Around August of 1987, FMC prepared and transmitted blueprints ("approval drawings") of the fire truck. You (and other firefighters) reviewed these and made numerous changes to the drawings, which were returned to Woodward. At that point, Tom Woodward decided that an inspection trip was necessary to ensure that the truck was built to these specifications. Tom Woodward offered to take you and Chief Marble to Florida to inspect the fire truck.

6. Tom Woodward made reservations for himself, you and Chief Marble to fly to Orlando on November 17, 1987. Each round-trip ticket cost $392.50 and was billed to Tom Woodward's personal American Express card. Upon arriving in Florida, you went to FMC's factory. You then checked into the Holiday Inn in Orlando. Tom Woodward paid for the room that you and Chief Marble shared, which cost $56.00 per day.

7. The following day, you went to FMC's plant and had the standard tour. You observed the fire truck under construction. You went to lunch at Chile's, a local bar and grill, with Tom Woodward and other FMC personnel. It appears that one of the FMC employees picked up this tab. Upon returning to the factory in the afternoon, you met with various plant engineers and went over the blueprints. You left the plant at approximately 6:30 and probably went to Charlie's Steak House for dinner with Tom Woodward and Chief Marble. Tom Woodward paid the bill. On November 19th, you drove with Tom Woodward to the plant in the morning and left him to attend meetings not related to the Holbrook fire truck. The Holbrook truck was to undergo a pump test; however, for unknown reasons, that did not happen. You and Chief Marble took Tom Woodward's rented automobile back to the hotel to pick up your suitcases and check out. You may also have stopped at a local mall. You returned to the factory to meet Tom Woodward and flew home on the 6:00 P.M. flight.

8. Apart from airfare, meals, and the hotel room, you did not receive any entertainment or other gratuities from Woodward or FMC.

9. The Commission is aware of no evidence that you knew your actions in accepting travel expenses from Woodward would violate the conflict of interest law. In fact, it appears to be a common practice for fire chiefs to inspect the fire trucks which they purchase. The practice serves a legitimate public interest, because fire trucks generally are customized to meet the needs of a particular locality.

II. The Conflict Law

As a Holbrook Firefighter, 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 proper discharge of his official duties, from requesting or accepting for himself anything of substantial value[2/] for or because of any official act[3/] performed or to be performed.

Your acceptance of Woodward's paying for your trip expenses as described above raises serious concerns under §3(b). The act of inspecting the fire truck was an official act. By accepting travel expenses from Tom Woodward to inspect the fire truck, you accepted something of substantial value for an official act. The Commission has ruled that vendor-subsidized travel for or because of official acts violates the conflict of interest law. See, EC-COI-82-99 and EC-COI-88-5. Absent a statute or regulation authorizing this, a vendor may not pay for a public employee's travel expenses. See EC-COI-88-5. The Commission believes that "business travel" has historically been too vulnerable to abuse to be treated otherwise. See, In the Matter of Carl D. Pitaro, 1986 SEC 271 (where Brockton Mayor received all expense paid trip to Florida to view a hotel built by a developer who proposed to build a similar hotel in Brockton, the Commission held that the travel privilege of substantial value accrued to Mayor Pitaro and not to the City of Brockton, notwithstanding the public purpose served by the trip).

Sound public policy requires the prohibition of these kinds of payments. As the Commission stated in EC-COI-82-99 (where members of the state board of registration traveling to view equipment proposed by a manufacturer for approval by the board were prohibited from receiving travel expenses from this 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 products.

The Commission acknowledges that there may be legitimate public purposes to justify a public employee's travel, and that the public interest may be furthered by allowing private business entities to pay for a public employee's travel expenses. The Commission's policy is designed to ensure that public employees' integrity is not compromised in the name of conserving public funds. Thus, while the conflict law prohibits direct payment of travel expenses by vendors, trips such as yours may be lawfully accomplished without risk of violating the conflict of interest law in the following ways.

First, cities and towns may adopt an ordinance, bylaw or charter provision regulating vendor payments for travel expenses. Such an enactment could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel. For example, a municipality could require that the vendor identify the purpose and cost of the proposed travel, and that the public employee secure the approval of the governing body before undertaking the trip. This would ensure that the expenses are legitimate, and minimize the risk that the public employee is being "wined and dined" at the public's expense.[4/]

Alternatively, G.L. c. 44, §53A 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 or town to accept grants from a private corporation or 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 selectmen. Thus, if FMC decided to pay the travel expenses of members of the fire department to attend an inspection trip, FMC could probably do so by providing the necessary expenses to the town with the acknowledgement that the donation or gift is to be used to pay for travel expenses. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred by the public employees. This would substantially reduce the potential for abuses. The application of G.L. c. 44, §53A to trips is ultimately a matter of municipal finance law. Municipal officials should review this statute with city solicitors and town counsel before implementing a procedure for vendor payments of travel expenses.[5/]

Finally, a city or town presumably could reimburse an employee for trip expenses incurred for business travel. The city or town could then bill the vendor for the costs of the public employee's travel expenses. This alternative should also be reviewed with town counsel.

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.[6/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: January 18, 1990

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[1]/While originally located in Quincy, Massachusetts, this enterprise has recently stopped doing business in Massachusetts.

[2]/The Commission has found $50.00 to be substantial value. **See, Commonwealth v. Famigletti,** 4 Mass. App. 584, 587 (1976).

[3]/"Official act," any decision or action in a particular matter or in the enactment of legislation.

[4]/Travel expenses paid by a vendor under such an ordinance would be "otherwise as provided by law" under G.L. c. 268A, §3 and would not give rise to a violation.

[5]/We note that evidence adduced during this inquiry suggests that FMC sponsored a "Fly-In Program" through which fire chiefs were flown to FMC's plant in Orlando, Florida for the express purpose of selling fire trucks to the chiefs. Such trips also violate G.L. c. 268A, §3(b), because the chiefs receive travel expenses in return for their official acts in purchasing FMC's fire trucks.

[6]/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 $2,000.00 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, particularly among various fire departments, where inspection trips appear to be common, 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.

Woodward Spring Shop
c/o Tom Woodward
P.O. Box 458
Newport, New Hampshire 03773

RE: PUBLIC ENFORCEMENT LETTER 90-4

Dear Mr. Woodward:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you, as President of Woodward Spring Shop, paid for the expenses of Holbrook Fire Chief William Marble and Firefighter David Kincus to travel to Florida inspect a new fire truck. 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 discuss below), the Commission, however, does not feel th 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. Woodward Spring Shop (Woodward) was a private business run by you.[1]/ Woodward Spring Shop was engaged in the repair of automobiles, trucks, buses and fire apparatus, the sale of auto and truck parts, and the sale of fire apparatus for FMC Fire Apparatus, a manufacturer with home offices in Orlando, Florida. Woodward was a dealer representative for FMC since 1983. Woodward also serviced Holbrook Fire Department vehicles.

2. In November, 1986, the Holbrook town meeting appropriated money for the purchase of a ne fire truck on a lease purchase basis. On January 8t and 9th, 1987, the town's request for bids was published in two local newspapers. Woodward and Emergency One, another fire apparatus manufacturer, picked up the specifications and submitted bids. The specifications had been prepared largely by Holbrook Firefighter David Kincus, who reviewed various fire trucks and bid packages from other cities and towns. The specifications do not call for an inspection trip.

3. On January 16, 1987, Selectman Frank McGaughey opened the bids. FMC offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,610.78 with interest calculated at 6%. Emergency One offered a lease purchase agreement which called for a $70,000.00 down payment and three equal payments of $32,675.00 with interest calculated at 7.3%. When interest was factored into each bid, FMC was the lowest responsible bidder. Chief Marble awarded the bid to FMC with town counsel's approval.

4. Chief Marble signed the fire apparatus contract on behalf of the Town of Holbrook on

January 21, 1987. This contract called for delivery of the truck within 120 calendar days from the date FMC received the check. While it was originally anticipated that the truck would be delivered in August of 1987, it was not delivered and accepted by the town until May, 1988.

5. Around August of 1987, FMC prepared and transmitted blueprints ("approval drawings") of the fire truck. These were reviewed by Firefighter Kincus (and other firefighters), who made numerous changes to them and returned them to Woodward. At that point, you decided that an inspection trip was necessary to ensure that the truck was built to these specifications. You offered to take Chief Marble and Firefighter Kincus to Florida to inspect the fire truck.

6. You made reservations for yourself, Chief Marble and Firefighter Kincus to fly to Orlando on November 17, 1987. Each round-trip ticket cost $392.50 and was billed to your personal American Express card. Upon arriving in Florida, you went to FMC's factory. You then checked into the Holiday Inn in Orlando. You paid for the room that Chief Marble and Firefighter Kincus shared, which cost $56.00 per day.

7. The following day, you went to FMC's plant with Chief Marble and Firefighter Kincus, who had the standard tour of the factory. You observed the Holbrook fire truck under construction. You went to lunch at Chile's, a local bar and grill, with other FMC personnel. It appears that one of the FMC employees picked up this tab. Upon returning to the factory in the afternoon, you attended to other business while Chief Marble and Firefighter Kincus met with various plant engineers and went over the blueprints for the Holbrook truck. You left the plant at approximately 6:30 and probably went to Charlie's Steak House for dinner with Chief Marble and Firefighter Kincus. You paid the bill. On November 19th, you drove with Chief Marble and Firefighter Kincus to the plant in the morning. You attended meetings not related to the Holbrook fire truck. The Holbrook truck was to undergo a pump test; however, for unknown reasons, that did not happen. Chief Marble and Firefighter Kincus took your rented automobile back to the hotel to pick up their suitcases and check out. They may also have stopped at a local mall. Chief Marble and Firefighter Kincus returned to the factory to meet you and you all flew home on the 6:00 P.M. flight.

8. Apart from airfare, meals, and the hotel room, Chief Marble and Firefighter Kincus did not receive any entertainment or other gratuities from Woodward or FMC.

9. The Commission is aware of no evidence that you knew your actions in providing travel expenses for Chief Marble and Firefighter Kincus would violate the conflict of interest law. In fact, it appears to be a common practice for fire chiefs to inspect the fire trucks which they purchase. The practice serves a legitimate public interest, because fire trucks generally are customized to meet the needs of a particular locality.

II. The Conflict Law

Section 3(a) of G.L. c. 268A prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from giving, offering or promising anything of substantial value[2/] to any municipal employee for or because of any official act[3/] performed or to be performed.

Your payment of the travel expenses of Chief Marble and Firefighter Kincus as described above raises serious concerns under §3(a). The act of inspecting the fire truck was an official act. By providing travel expenses for these municipal employees to inspect the fire truck, you gave something of substantial value for an official act. The Commission has ruled that vendor-subsidized travel for or because of official acts violates the conflict of interest law. **See, EC-COI-82-99** and **EC-COI-88-5**. Absent a statute or regulation authorizing this, a vendor may not pay for a public employee's travel expenses. **See EC-COI-88-5**. The Commission believes that "business travel" has historically been too vulnerable to abuse to be treated otherwise. **See, In the Matter of Carl D. Pitaro**, 1986 SEC 271 (where Brockton Mayor received all expense paid trip to Florida to view a hotel built by a developer who proposed to build a similar hotel in Brockton, the Commission held that the travel privilege of substantial value accrued to Mayor Pitaro and not to the City of Brockton, notwithstanding the public purpose served by the trip).

Sound public policy requires the prohibition of these kinds of payments. As the Commission stated in **EC-COI-82-99** (where members of the state board of registration traveling to view equipment proposed by a manufacturer for approval by the board were prohibited from receiving travel expenses from this 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 products.

The Commission acknowledges that there may be legitimate public purposes to justify a public employee's travel, and that the public interest may be furthered by allowing private business entities to pay for a public employee's travel expenses. The Commission's policy is designed to ensure that public employees' integrity is not compromised in the name of conserving public funds. Thus, while the conflict law prohibits direct payment of travel expenses by vendors, trips such as this may be lawfully accomplished without risk of violating the conflict of interest law in the following ways.

First, cities and towns may adopt an ordinance, bylaw, or charter provision regulating vendor payments for travel expenses. Such an enactment could ensure that the travel expenses are legitimate and directly related to the public purposes served by the travel. For example, a municipality could require that the vendor identify the purpose and cost of the proposed travel, and that the public employee secure the approval of the governing body before undertaking the trip. This would ensure that the expenses are legitimate, and minimize the risk that the public employee is being "wined and dined" at the public's expense.[4/]

Alternatively, G.L. c. 44, §53A may provide a statutory vehicle by which a private party may pay traveling expenses for public officials. This section of the municipal finance law would appear to allow a city or town to accept grants from a private corporation or 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 selectmen. Thus, if FMC decided to pay the travel expenses of members of the fire department to attend an inspection trip, FMC could probably do so by providing the necessary expenses to the town with the acknowledgement that the donation or gift is to be used to pay for travel expenses. This procedure allows for scrutiny by the city treasurer or auditor as to the reasonableness of the expenses incurred by the public employees. This would substantially reduce the potential for abuses. The application of G.L. c. 44, §53A to trips is ultimately a matter of municipal finance law. Municipal officials should review this statute with city solicitors and town counsel before implementing a procedure for vendor payments of travel expenses.[5/]

Finally, a city or town presumably could reimburse an employee for trip expenses incurred for business travel. The city or town could then bill the vendor for the costs of the public employee's travel expenses. This alternative should also be reviewed with town counsel.

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.[6/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: January 18, 1990

[1/]While originally located in Quincy, Massachusetts, this enterprise has recently stopped doing business in Massachusetts.

[2/]The Commission has found $50.00 to be substantial value. **See, Commonwealth v. Famigletti**, 4 Mass. App. 584, 587 (1976).

[3/]"Official act," any decision or action in a particular matter or in the enactment of legislation.

[4/]Travel expenses paid by a vendor under such an ordinance would be "otherwise as provided by law" under G.L. c. 268A, §3 and would not give rise to a violation.

[5/]We note that evidence adduced during this inquiry suggests that FMC sponsored a "Fly-In Program" through which fire chiefs were flown to FMC's plant in Orlando, Florida for the express purpose of selling fire trucks to the chiefs. Such trips also violate G.L. c. 268A, §3(b), because the chiefs receive travel expenses in return for their official acts in purchasing FMC's fire trucks.

[6/]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 $2,000.00 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, particularly among various fire departments, where inspection trips appear

to be common, 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.

Ms. Carol Corso
c/o Daniel J. Bailey, Esq.
83 Broad Street
Union Towers Mall
P.O. Box 147
Weymouth, MA 02188

RE: PUBLIC ENFORCEMENT LETTER 90-5

Dear Ms. Corso:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you, as Director of the Haverhill Council on Aging, have been traveling free, or at reduced rates, on so-called "familiarization trips" (FAMs) offered by travel agencies to promote sales of their trips to senior citizen organizations. The results of our investigation, discussed below, indicate that you appear to have violated the conflict of interest law in this case. Nevertheless, in view of certain mitigating factors, also discussed below, the Commission has determined that adjudicatory proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed by our investigation and explaining the applicable provisions of the law, with the expectation that this will ensure both your and other government employees' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not necessarily admit to the facts and law as discussed below. The Commission and you have agreed that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. You are the Director of the Haverhill Council on Aging. In that capacity, you supervise the Volunteer Coordinator, Joyce Pavlidakes. One of the responsibilities of the Volunteer Coordinator is to offer recreational trips to the elderly, including overnight and day trips. Ms. Pavlidakes selects the trips the senior citizens will be offered based upon location, price, meals, accommodations, and the reputation of the tour company. The trips are paid for by the senior citizens themselves, and the Haverhill Council on Aging makes a 5% commission on each trip. The money is used to fund senior citizen parties and other social activities of the Council.

2. It has been the practice of virtually all of the Massachusetts Councils on Aging to send their travel coordinators on trips sponsored by tour companies. The tour companies run the so-called FAMs for the coordinators as they would if the senior citizens were attending in order to give an accurate experience of the services and accommodations offered.

3. In the course of our inquiry, you informed us that you attended a FAM operated by Sisson Tours to Vermont on November 19 and 20, 1988. You stated that you paid your own way, used your vacation time and were accompanied by your husband who also paid his own way. According to Sisson Tours, the FAM cost you and your husband $59.00 per person while the regular rate for this weekend as sold to senior citizens would be $189.00 per person.

4. On or about November 11, 1988, you and Joyce Pavlidakes also attended a four-day FAM run by Colette Tours to Montreal and Quebec. The cost to you was $69.00 per person. The regular price for the trip, according to a Colette Tours travel agent, would be $179.00 per person.

5. Neither the Vermont package tour nor the Montreal package tour was offered to the senior citizens through the Haverhill Council on Aging travel program.

6. In the course of our inquiry, we spoke with the Executive Director for the Massachusetts Council on Aging. She informed us that there are 340 Councils on Aging around the state. She told us that some of the Councils organize many trips for their senior citizens while others do not plan as many. While she informed us that she was not sure how widespread the practice of accepting FAMs was, she was sure that all Council On Aging employees and trip planners believe the practice to be acceptable.

7. The Commission finds no corrupt intent on your part in connection with the above-described conduct. The Commission knows of no evidence that you were aware that accepting these trips may have violated the law. In fact, there appears to be a widespread misconception among public employees of municipal Councils on Aging that such trips are permissible.

II. Analysis

As the Director of the Haverhill Council on Aging, 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, other than as provided by law for the discharge of his official duties, from requesting or accepting anything of substantial value[1/] for himself for or because of official acts[2/] performed or to be performed. The selection of tours and trips to be promoted by your agency to the senior citizens of Haverhill is an official act. When travel agencies offer you and members of your family substantially discounted travel with the intent of persuading you that their travel packages are suitable for your program, they are providing you with something of substantial value because of official acts to be performed by you. Accordingly, this practice violates G.L. c. 268A, §3(b).

It is not sufficient that the trips may serve a valid public purpose in allowing you to make informed decisions about available travel packages. As the Commission previously noted in **EC-COI-82-99**,

> 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 can exploit the system in order to procure unwarranted privileges and the public impression that state employees were improperly influenced in their decision could arise.

Although in a slightly different context, the logic is equally persuasive in this instance. Accordingly, we consider such travel to be prohibited in the absence of explicit authorization.

As noted above, the Commission acknowledges that there may be a legitimate public purpose to justify a Council on Aging travel planner in accepting a privately sponsored FAM.[3/] For that reason, although the Commission prohibits you from receiving directly a discounted trip from a travel agency, there is a lawful way to accomplish the same result. Cities and towns may adopt an ordinance or bylaw authorizing and regulating the acceptance of FAM discounts for use by designated employees. The ordinance or bylaw could require the travel agency, airline or hotel to identify the nature, purpose and cost of the trip and could require prior approval by the City Council or Board of Selectmen. This would avoid any risk of a public perception that the FAMs give unfair advantages to the travel agencies that sponsor them or that the public employee is being unduly influenced by secret wining and dining.[4/]

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.[5/]

This matter is now closed. If you have any questions, please contact me at (617) 727-0060.

Date: January 18, 1990

[1/] In the past the Commission has found $50.00 to be substantial value. See, **Commonwealth v. Famigletti,** 4 Mass. App. 584, 587 (1976).

[2/] "Official act," any decision or action in a particular matter or in the enactment of legislation.

"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/] It is unlikely, however that that purpose could ever be stretched to justify travel by family members.

[4/] We note that G.L. c. 44, §53A may also provide an alternative. The statute provides that "[a]n officer or department of any city or town ... may accept grants or gifts of funds from ... a private corporation, or an individual and ... may expend such funds for the purposes of such grant or gift ..." with the specific approvals applicable to the form of government. However, this procedure may not be adaptable to the type of in-kind discount represented by the FAMs. Should you choose to explore this further, we recommend you consult with the City Solicitor.

[5/] 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 $2,000.00 for each violation could be imposed. The Commission has chosen to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among the public employees of the municipal councils on aging that such

travel is permissible, and (2) the Commission knows of no evidence that you were aware that accepting these discounted trips violated the law.

Ms. Joyce Pavlidakes
c/o Daniel J. Bailey, Esq.
83 Broad Street
Union Towers Mall
P.O. Box 147
Weymouth, MA 02188

RE: PUBLIC ENFORCEMENT LETTER 90-6

Dear Ms. Pavlidakes:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you, as Volunteer Coordinator of the Haverhill Council on Aging, have been traveling free, or at reduced rates, on so-called "familiarization trips" (FAMs) offered by travel agencies to promote sales of their trips to senior citizen organizations. The results of our investigation, discussed below, indicate that you appear to have violated the conflict of interest law in this case. Nevertheless, in view of certain mitigating factors, also discussed below, the Commission has determined that adjudicatory proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed by our investigation and explaining the applicable provisions of the law, with the expectation that this will ensure both your and other government employees' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not necessarily admit to the facts and law as discussed below. The Commission and you have agreed that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. You are the Volunteer Coordinator of the Haverhill Council on Aging. In that capacity, you report to the Director of the Council, Carol Corso. One of the responsibilities of the Volunteer Coordinator is to offer recreational trips to the elderly, including overnight and day trips. You select the trips the senior citizens will be offered based upon location, price, meals, accommodations, and the reputation of the tour company. The trips are paid for by the senior citizens themselves, and the Haverhill Council on Aging makes a 5% commission on each trip. The money is used to fund senior citizen parties and other social activities of the Council.

2. It has been the practice of virtually all of the Massachusetts Councils on Aging to send their travel coordinators on trips sponsored by tour companies. The tour companies run the so-called FAMs for the coordinators as they would if the senior citizens were attending in order to give an accurate experience of the services and accommodations offered.

3. In the course of our inquiry, you informed us that on or about November 11, 1988 you and Carol Corso attended a four-day FAM run by Colette Tours to Montreal and Quebec. The cost to you was $69.00 per person. The regular price for the trip, according to a Colette Tours travel agent, would be $179.00 per person.

4. The Montreal package tour was not offered to the senior citizens through the Haverhill Council on Aging travel program.

5. In the course of our inquiry, we spoke with the Executive Director for the Massachusetts Council on Aging. She informed us that there are 340 Councils on Aging around the state. She told us that some of the Councils organize many trips for their senior citizens while others do not plan as many. While she informed us that she was not sure how widespread the practice of accepting FAMs was, she was sure that all Council On Aging employees and trip planners believe the practice to be acceptable.

6. The Commission finds no corrupt intent on your part in connection with the above-described conduct. The Commission knows of no evidence that you were aware that accepting these trips may have violated the law. In fact, there appears to be a widespread misconception among public employees of municipal Councils on Aging that such trips are permissible.

II. Analysis

As the Volunteer Coordinator of the Haverhill Council on Aging, 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, other than as provided by law for the discharge of his official duties, from requesting or accepting anything of substantial value[1/] for himself for or because of official acts[2/] performed or to be performed. The selection of tours and trips to be promoted by your agency to the senior citizens of

Haverhill is an official act. When travel agencies offer you substantially discounted travel with the intent of persuading you that their travel packages are suitable for your program, they are providing you with something of substantial value because of official acts to be performed by you. Accordingly, this practice violates G.L. c. 268A, §3(b).

It is not sufficient that the trips may serve a valid public purpose in allowing you to make informed decisions about available travel packages. As the Commission previously noted in **EC-COI-82-99**,

> 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 can exploit the system in order to procure unwarranted privileges and the public impression that state employees were improperly influenced in their decision could arise.

Although in a slightly different context, the logic is equally persuasive in this instance. Accordingly, we consider such travel to be prohibited in the absence of explicit authorization.

As noted above, the Commission acknowledges that there may be a legitimate public purpose to justify a Council on Aging travel planner in accepting a privately sponsored FAM. For that reason, although the Commission prohibits you from receiving directly a discounted trip from a travel agency, there is a lawful way to accomplish the same result. Cities and towns may adopt an ordinance or bylaw authorizing and regulating the acceptance of FAM discounts for use by designated employees. The ordinance or bylaw could require the travel agency, airline or hotel to identify the nature, purpose and cost of the trip and could require prior approval by the City Council or Board of Selectmen. This would avoid any risk of a public perception that the FAMs give unfair advantages to the travel agencies that sponsor them or that the public employee is being unduly influenced by secret wining and dining.[3/]

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.[4/]

This matter is now closed. If you have any questions, please contact me at (617) 727-0060.

Date: January 18, 1990

[1/] In the past the Commission has found $50.00 to be substantial value. See, **Commonwealth v. Famigletti**, 4 Mass. App. 584, 587 (1976).

[2/] "Official act," any decision or action in a particular matter or in the enactment of legislation.

"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/] We note that G.L. c. 44, §53A may also provide an alternative. The statute provides that "[a]n officer or department of any city or town ... may accept grants or gifts of funds from ... a private corporation, or a individual and ... may expend such funds for the purposes of such grant or gift ..." with the specific approvals applicable to the form of government. However, this procedure may not be adaptable to the type of in-kind discount represented by the FAMs. Should you choose to explore this further, we recommend you consult with the City Solicitor.

[4/] 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 $2,000.00 for each violation could be imposed. The Commission has chosen to resolve this matter with a public enforcement letter because (1) there appears to be a widespread misconception among the public employees of the municipal councils on aging that such travel is permissible, and (2) the Commission knows of no evidence that you were aware that accepting these discounted trips violated the law.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 378

IN THE MATTER
OF
D. JOHN ZEPPIERI

DISPOSITION AGREEMENT

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

On March 8, 1989, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Zeppieri, who was then Chairman of the North Adams License Board. The Commission concluded its inquiry and, on November 30, 1989, found reasonable cause to believe that Mr. Zeppieri violated G.L. c. 268A, §19.

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

1. At all times relevant to this matter, Mr. Zeppieri was an appointed member and chairman of the North Adams License Board (License Board). As such, he was a municipal employee as defined in G.L. c. 268A, §1(g).

2. Among its various duties, the License Board is responsible for the annual renewal of all liquor licenses in North Adams. The process of renewal was as follows: In or about early November of each year, Mr. Zeppieri, in his capacity as Chairman of the License Board, would send out renewal affidavits to each holder of a liquor license. (Those affidavits required each licensee to represent under oath that all conditions regarding the license remained the same and to represent that all state taxes had been paid as required by law.) In turn, these affidavits were completed and returned to Mr. Zeppieri as License Board Chairman in November and early December. The License Board would then vote to renew all of the licenses. This usually occurred sometime in early December. In or about mid-December, 1989, Mr. Zeppieri, as License Board Chairman, would send out notices to each licensee that the annual fee was due by December 31st (for the renewal for the next year). The licensees would pay their fees directly to the city treasurer and the treasurer would provide the licensee with the new license.

3. At all times material to this agreement, Mr. Zeppieri was also a licensed real estate broker doing business as RCI Real Estate.

4. At all times material to this agreement, Louis E. Matney (Mr. Matney) was the owner of the premises at 117 River Street, North Adams. In or about November, 1987, Mr. Matney obtained a beer and wine restaurant license for a business he operated on those premises known as Luigi's Deli. That license was renewed by the License Board for 1988. For various reasons, Luigi's Deli did not open for business in 1988.

5. In or about June of 1988, Mr. Zeppieri obtained an exclusive real estate listing from Mr. Matney for the premises at 117 River Street. This was a 3-month exclusive, and expired without a sale.

6. Throughout the fall and early winter of 1988, Mr. Zeppieri was interested in obtaining another exclusive from Mr. Matney regarding the premises at 117 River Street. During this time period, they had occasional, brief discussions regarding the sale of the property.

7. In or about November, 1988, Mr. Zeppieri as License Board Chairman sent out renewal affidavits to all licensees. However, he unilaterally decided not to send a renewal affidavit to Mr. Matney because Mr. Zeppieri had determined that Luigi's Deli had not been open for business and it did not appear that it was going to be open for business and use the license. Mr. Zeppieri did not inform Mr. Matney of his action.

8. On or about December 29, 1988, Mr. Matney went to see Mr. Zeppieri at Mr. Zeppieri's city hall office. Although the exact nature of the conversation is in dispute, the subject was the potential renewal of Mr. Matney's liquor license. During this discussion, Mr. Zeppieri called a fellow License Board member, and he and that member agreed to grant Mr. Matney a 10-day extension such that his fee would be due on January 10, 1989. Mr. Zeppieri then had Mr. Matney complete a renewal affidavit and back-date it to November 7, 1988.

9. One or two days later, Mr. Matney began discussions with one of Mr. Zeppieri's real estate agents concerning renewing the real estate exclusive for Luigi's Deli. Mr. Matney wanted the listing to be for two months and at $114,900. Mr. Zeppieri instructed

his agent to reject this proposal. The agent, in turn, informed Mr. Matney of Mr. Zeppieri's rejection. Mr. Matney then proposed three months at $114,900. Mr. Zeppieri, again through his agent, insisted on $108,000 and a six-month exclusive. On January 9, 1989, Mr. Zeppieri, through his agent, gave Mr. Matney an ultimatum, that Mr. Matney must decide that day. At that point, the negotiations ended.

10. At its meeting of January 12, 1989, the License Board voted unanimously to revoke Mr. Matney's license for failure to pay his fee.

11. Section 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 which are of substantial value and which are not properly available to similarly situated individuals.

12. By negotiating for a real estate exclusive from Mr. Matney during a time when there was an issue pending before the License Board as to whether Mr. Matney's license would be revoked, Mr. Zeppieri in effect attempted to use his official position to secure an unwarranted privilege of substantial value which would not be properly available to similarly situated individuals. Therefore, he violated §23(b)(2).

13. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. By the foregoing conduct, Mr. Zeppieri did act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Mr. Matney could either improperly influence him or unduly enjoy his favor in the performance of his official duties. Therefore, Mr. Zeppieri violated G.L. c. 268A, §23(b)(3).

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. Zeppieri:

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; 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: February 13, 1990

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 379

IN THE MATTER
OF
JOHN P. KING

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered in to between the State Ethics Commission (Commission) and John P. King (Mr. King) of Wareham 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. 268A, §4(j).

On June 14, 1988, the Commission initiated, pursuant to G.L. c. 268A, §4(a), a preliminary inquiry into possible violations of the conflict of interest law G.L. c. 268A, by Mr. King. The Commission has concluded that inquiry and, on January 24, 1990, found reasonable cause to believe that Mr. King violated G.L. c. 268A, §17.

The Commission and Mr. King now agree to the following facts and conclusions of law:

1. At all times here relevant, Mr. King was a member of the Wareham Planning Board (Planning Board), a part-time, unpaid position to which he was appointed by the Wareham Board of Selectmen (Board of Selectmen). Mr. King ceased to be a Planning Board member as of June 26, 1989. As a member of the Planning Board, Mr. King was, at all times here relevant, a "municipal employee" as that term is defined in G.L. c. 268A, §1(g).

2. Planning Board members were designated by the Board of Selectmen as "special municipal employees" in 1963, pursuant to G.L c. 268A, §1(n). As a member of the Planning Board, Mr. King was, at all times here relevant, a "special municipal employee" as that term is defined in G.L. c. 268A, §1(n).

3. In addition to serving on the Planning Board, at all times here relevant, Mr. King worked privately for his own civil engineering firm. Mr. King is a registered professional engineer.

4. During 1987, sometime prior to September, Mr. King, in his private capacity as a professional engineer, created a site plan for a building which Frank Gropman (Mr. Gropman) of Wareham planned to build on Mr. Gropman's property at 3223 Cranberry Highway in Wareham. Mr. King was not compensated by Mr. Gropman for the engineering work he did for the planned 3223 Cranberry Highway building, but instead did the work as a favor for Mr. Gropman, based on their long-standing personal friendship.

5. In approximately September, 1987, Mr. Gropman sought a building permit for his planned 3223 Cranberry Highway building. In order to obtain the building permit, Mr. Gropman applied for Site Plan Review by the Planning Board, pursuant to Section 6, subsection C of the Wareham Zoning By-law, and actively sought a hearing of the matter by the Planning Board. Mr. Gropman's application for Site Plan Review included the site plan prepared for him by Mr. King.

6. The Planning Board held a public hearing on Mr. Gropman's request for Site Plan Review of his proposed Cranberry Highway building on November 16, 1987. Mr. Gropman did not attend the hearing. Mr. King was present at the hearing, but not as a member of the Planning Board. Mr. King appeared before the Planning Board in his private capacity as a professional engineer representing Mr. Gropman as his client in Mr. Gropman's request for Site Plan Review. On behalf of Mr. Gropman, Mr. King described the proposed Cranberry Highway project and answered questions put to him by other members of the Planning Board, in a hearing that lasted 45 minutes. Mr. King was Mr. Gropman's sole representative at the hearing. Mr. King did not participate in the hearing as a member of the Planning Board.

7. On December 14, 1987, the Planning Board acted on Mr. Gropman's request for Site Plan Review of his proposed Cranberry Highway building. Mr. King absented himself from this meeting and the four remaining Planning Board members voted unanimously to deny Mr. Gropman's Site Plan Review application based on their determination that it was "improperly submitted" and did not "meet the requirements of the Town of Wareham Zoning By-law, Site Plan Review, Section 6, subsection c., Information Required."

8. Section 17(c) of G.L. c. 268A prohibits a municipal employee from acting as agent or attorney for anyone other than the municipality in connection with any particular matter in which the same municipality is a party or has a direct and substantial interest. For a "special municipal employee," such as Mr. King, the prohibition of §17(c) applies only in relation to particular matters (i) in which the employee has participated as a municipal employee, or (ii) which is, or within one year has been, a subject of his official responsibility, or (iii) which is pending in the municipal agency in which he is serving.[1/] The Site Plan Review of Mr. Gropman's proposed project was a particular matter in which the Town of Wareham had a direct and substantial interest and which was a subject of Mr. King's official responsibility as a Planning Board member when Mr. King acted as Mr. Gropman's agent.

9. By representing Mr. Gropman at the November 16, 1987 Planning Board meeting, Mr. King acted as the agent for someone other than the Town of Wareham (Mr. Gropman) in connection with a particular matter in which the Town of Wareham had a direct and substantial interest and which was a subject of Mr. King's official responsibility as a Planning Board member when Mr. King acted for Mr. Gropman, thus violating §17(c).

In view of the foregoing violation of G.L. c. 268A, §17(c), 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 by Mr. King:

1. that Mr. King pay to the Commission the amount of seven hundred and fifty dollars ($750.00) as a civil penalty for violating G.L. c. 268A, §17(c); and

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

Date: March 1, 1990

[1/]Restriction (iii) is applicable only to special municipal employees who serve on more than sixty days during any period of 365 consecutive days. No conclusion has been made for the purposes of this Agreement whether Mr. King was such a special municipal employee and restriction (iii) is not here relied upon in reaching the conclusion that Mr. King

violated G.L. c. 268A, §17(c).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 381

IN THE MATTER
OF
VINCENT J. LOZZI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Vincent J. Lozzi (Mr. Lozzi) 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 possible violations of the Conflict of Interest Law, G.L. c. 268A, involving Mr. Lozzi as a member of the General Court. The Commission concluded its inquiry and, on February 28, 1990, found reasonable cause to believe that Mr. Lozzi violated G.L. c. 268A, §23.

This Commission and Mr. Lozzi now agree to the following findings of fact and conclusions of law:

1. At all times relevant to this matter, Mr. Lozzi was a member of the General Court.

2. On October 2, 1986, Mr. Lozzi flew to San Francisco. He remained there until October 8, 1986, when he returned to Massachusetts. This trip was a personal trip.

3. By a voucher dated November 4, 1986, Mr. Lozzi submitted a request for state reimbursement (or) for $562.70 in expenses incurred in San Francisco on the above-mentioned trip. This voucher characterized these expenses as expenses incurred in connection with Mr. Lozzi's attendance at an insurance seminar while on state business.

4. On January 12, 1987, Mr. Lozzi submitted a voucher requesting reimbursement for $989.50 for air fare incurred regarding the above-mentioned trip.

5. These vouchers were approved in the ordinary course of business, and subsequently, the Commonwealth of Massachusetts issued to Mr. Lozzi checks in the amounts of $562.70 and $989.50, respectively.

6. Mr. Lozzi deposited these checks in his personal account.

7. On December 26, 1989, Mr. Lozzi reimbursed the Commonwealth $1,552.20.

8. Section 23(b)(2) provides in relevant part that no state employee shall knowingly, or with reason to know, 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.

9. By submitting vouchers for state reimbursement for private travel, and by accepting such state reimbursement for private travel, all as described above, Mr. Lozzi used his position to secure an unwarranted privilege of substantial value not properly available to similarly situated individuals, thereby violating §23(b)(2).

10. 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. Lozzi:

1. that he pay to the Commission the amount of two thousand dollars ($2,000.00) for his violation of G.L. c. 268A, §23(b)(2); and

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

Date: March 8, 1990

John F. Aylmer
Massachusetts Maritime Academy
P.O. Box D
Buzzards Bay, MA 02532

RE: PUBLIC ENFORCEMENT LETTER 90-7

Dear President Aylmer:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that as the president of the Massachusetts Maritime Academy (Academy) you invited your family and friends to embark on Academy cruises. 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 president of the Academy. As such you were a "state employee" as defined in G.L. c. 268A, §1(q).

2. The Academy is a school of higher education sponsored and run by the Commonwealth of Massachusetts. Its primary focus is to train students to become licensed mariners.

3. As part of its curriculum, the Academy conducts training cruises. Most of the student body, along with many faculty members, embark on these cruises.

4. Included among the persons who have participated in these cruises are so called "observers." These observers have included state officials, academy alumni, academy trustees, and other guests. They have also, from time to time, included your friends and relatives as well as spouses of trustees and academy personnel. These observers typically did not stay on the entire cruise, but rather on average stayed one to two weeks.

5. According to you, the rationale for having observers on board is as follows: First, the trips serve an educational and support building-function for guests who are unfamiliar with the nature, purpose and operation of the Academy. Second, guests interact with the cadets, potentially leading to employment opportunities. Third, having observers on board the cruises gives the cadets the opportunity to learn to interact with distinguished visitors. Fourth, embarking "mature married couples" as guests provides a stabilizing influence and model of behavior for cadets. Fifth, the traveling observers represent the Commonwealth of Massachusetts to foreign officials in the various ports of call.

6. Observers pay the cost of their meals and linen on these cruises. Otherwise, they sail free of charge. (Federal regulations prohibit the Academy from charging fares on these cruises.)

7. The above-mentioned cruises are taken on the Patriot State, a converted freighter owned by the U.S. Maritime Administration and provided to the Academy for the purpose of training cadets. The accommodations are relatively spartan. In addition, there is no entertainment center or swimming pool.

8. The other maritime academies in the United States have varying policies regarding observers. The Great Lakes Maritime Academy has no ship of its own and assigns its cadets to commercial shipping companies. Texas Maritime Academy is a college within Texas A&M. No observers are permitted on board ship. California Maritime Academy permits no observers but does permit the spouses of officers as well as its trustees and their spouses to embark. New York Maritime Academy not only permits observers at the discretion of its admiral, they encourage their trustees and their spouses as well as local guidance counsellors and other influential people to travel with the ship. The U.S. Merchant Marine Academy has no ship of its own. The Maine Maritime Academy uses observers but does not permit the spouses of officers to travel aboard the ship. The president of that academy has full discretion in awarding berths to observers.

9. Regarding the 1988 Academy cruise,[1/] you decided to allow several observers on board including your spouse, your father, and one couple who are close friends of you and your spouse.

10. Regarding the 1989 cruise[2/], you invited your spouse, the same couple mentioned above that went on the 1988 cruise, and a couple who are your brother-in-law and sister-in-law. (The woman is your spouse's

sister.)

11. The Academy's trustees were aware of the fact that you invited observers on these cruises, and at least some of them were aware that this included your spouse, and other family members and friends. Indeed, after the media raised questions regarding the identity of your guests on the 1989 cruise, the trustees voted on April 7, 1989 as follows:

> That the Board of Trustees, Massachusetts Maritime Academy, after a review of the long-standing Academy practice of embarking observers aboard the *Patriot State* and noting that this practice has been a consistent Academy policy, and in consideration of the Chancellor's letter of 21 March to the Chairman of the Board that the Board of Trustees is of the opinion that no Federal or State law, rule, regulation, policy or guideline has been violated. Nor have any taxpayers' monies been expended in conjunction with such policy....

The trustees then voted to create a sub-committee to study the observer policy questioned. On November 3, 1989, the trustees unanimously voted to adopt the recommendations of this sub-committee. This policy formally gives you complete discretion to allow, on a space available basis, anyone to sail with the ship and to consider the ship an "extension of the campus." Your choices may be reviewed by the trustees and no costs are to be paid by the Commonwealth or the Academy for any observer on any of the cruises, according to this vote.

II. The Conflict Law

As the Academy president, you have been a state employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 6 prohibits a state employee from participating as such in a particular matter in which to his knowledge he, or a member of his immediate family, among others, has a financial interest.

In our view, each decision to allow an observer to embark on a cruise was a particular matter. Inasmuch as you made those decisions, your involvement was clearly personal and substantial. While it is not quantifiable, it is obvious that the observers had a financial interest in these cruises.[3/] Therefore, where your decisions involved your spouse, your spouse's sister, or your father, you participated in particular matters in which you knew an immediate family member had a financial interest.[4/] Absent your satisfying the exemption in §6[5/] or otherwise having a defense, your inviting immediate family members on these trips would appear to violate §6.

You do not appear to have satisfied the requirements of the §6 exemption. While your appointing authority may have been aware of some, or even all of these decisions, you did not disclose the above-discussed decisions in writing to your appointing authority nor did your appointing authority make the appropriate written determination as is required by the statute.[6/]

Accordingly, we do not view the trustees' knowledge of your conduct, or, for that matter, their ratification vote formally giving you discretion to invite anyone you choose, as complying with §6's requirements. The trustees do not have the authority to, in effect, amend §6. Consequently, if in the future you are to invite an immediate family member to embark on one of these cruises, except as discussed below, you must follow the written disclosure and authorization mechanism discussed above.

The exception to the foregoing involves your own spouse. As we understand it, a spouse of a president of an institution of higher education is expected to be actively involved in the activities of the campus. While this apparently exists to a greater or lesser extent at various institutions in the Commonwealth, and while this expectation may be becoming somewhat out-moded, nevertheless, your position is that as part of the terms and conditions of your employment, your spouse was expected to and did perform an active role on campus, which includes embarking on the cruises. The Commission has previously taken the position that where a course of conduct is an inherent part of the original terms and conditions of employment, it will not be considered a conflict. See, e.g. EC-COI-87-19. Accordingly, we do not view your decision to allow your spouse on these cruises as violating §6.

Your conduct also raises questions under §23, the so-called "code of conduct" section of G.L. c. 268A. Section 23 prohibits a state employee from using or attempting to use his position to secure an unwarranted privilege of substantial value not otherwise available to similarly situated people.[7/] It also prohibits a state employee from acting in a manner which would cause a reasonable person knowing all the facts to conclude that he can be improperly influenced by or someone can unduly enjoy his favor in the performance of his official duties.[8/]

By inviting family members, whether immediate or non-immediate family members, and your friends on

Academy cruises, you appear to have secured an unwarranted privilege of substantial value for those people[9/] and you also appear to have created an appearance of giving preferential treatment to family and friends. Accordingly, your conduct raises concerns under both §§23(b)(2) and (3).

You argue by way of defense that as to the non-immediate family members and friends, your appointing authority was aware of your inviting these people and these people sailed at no additional cost to the commonwealth. You point out that the Board of Trustees has now adopted a policy authorizing you to issue such invitations, subject to their review. Therefore, you maintain, it cannot be said that their sailing involved an unwarranted privilege.

The Commission has serious reservations about an institutional policy which authorizes selected individuals, not currently affiliated with the Academy, to participate in such cruises at no cost other than meals and linen, particularly when the policy results in your inviting family and friends to participate. While the Commission generally defers to the discretion exercised by an appointing authority (such as the Board of Trustees) when issues are raised under §23 of G.L. c. 268A, the Commission recommends that the Board reconsider its policy in light of the findings contained in this letter.

You also argue that at least the spirit of the disclosure exemption contained in §23(b)(3) was met, and, consequently, that a reasonable person should be precluded from concluding that there was an appearance of favoritism in this situation. You should, however, be aware that, much as with the §6 issue, unless you make your disclosures in advance and in writing, that appearance of favoritism cannot be deemed precluded. Therefore, in the future, you must follow the appropriate §6 or §23 disclosure and approval requirements carefully to avoid running afoul of G.L. c. 268A concerns.

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.[10/] This matter is now closed.

Date: March 21, 1990

[1/]The 1988 cruise visited ports of call including Barbados, the Canary Islands, Naples and Fort Lauderdale.

[2/]The 1989 cruise visited ports of call including Port Canaveral, Trinidad and Puerto Rico.

[3/]The term "financial interest" means any private economic interest, no matter how small, which is direct, immediate or reasonably foreseeable. Graham v. McGrail, 370 Mass. 133, 139 (1976).

[4/]Your wife's sister is an immediate family member for purposes of §6. Your wife's sister's husband, though your brother-in-law, is not an immediate family member as that term is defined in G.L. c. 268A, §1.

[5/]Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the State Ethics Commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:

> (1) assign the particular matter to another employee; or
>
> (2) assume responsibility for the particular matter; or
>
> (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the employee and filed with the State Ethics Commission by the person who made the determination. Such copy shall be retained by the Commission for a period of six years.

[6/]**Compare In the Matter of John Hanlon**, 1986 SEC 253 where the Commission stated as to these disclosure and determination procedures:

> 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.

[7]/Section 23(b)(2).

[8]/Section 23(b)(3). Like §6, §23(b)(3) has an exemption: "It shall be unreasonable to so conclude as such employee has disclosed in writing to his appointing authority, or, if no appointing authority exist, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

[9]/With the exception of your spouse for the reasons discussed above.

[10]/The Commission chose to resolve this matter with a public enforcement letter because your appointing authority does appear to have been aware of your conduct in advance, and the financial interests involved here were relatively small.

George Simard
c/o Thomas E. Dwyer, Jr., Esq.
Dwyer & Collora
400 Atlantic Avenue
Boston, MA 02110

RE: PUBLIC ENFORCEMENT LETTER 90-8

Dear Chief Simard:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you received a number of valuable free tickets to the U.S. Open Golf Tournament in June, 1988, and distributed the tickets to various criminal justice agencies and individuals in the greater Boston area. 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 Brookli Police Chief and, as such, a "municipal employee" a defined in G.L. c. 268A, §1(g).

2. The 1988 U.S. Open Golf Tournament was held at The Country Club in Brookline (The Country Club) between June 2nd and 6, 1988.

3. Approximately two years before this event, the Country Club formed a U.S. Open Committee which engaged in planning for the 1988 U.S. Open. A subcommittee was responsible for public safety, traffic, parking, security, and law enforcement issues.

4. As the Brookline Police Chief, you were responsible for maintaining law, order, and overall security inside and outside The Country Club during the 1988 U.S. Open.

5. In late 1986 or early 1987, you appointed Brookline Police Captain Francis Hayes as the liaison officer between the Brookline Police Department and the U.S. Open Committee. You and Captain Hayes met with members of this committee in 1987 and 1988 and planned the security measures for the U.S. Open.

6. During early discussions with the U.S. Open Committee, it became clear that the committee was willing to provide you with a number of complimentar U.S. Open tickets for distribution to various law enforcement agencies. The evidence is inconclusive as to whether the committee offered you those tickets or you requested them. It is acknowledged that the U.S. Open Committee indicated that those types of tickets were distributed at other U.S. Open events.

7. During subsequent discussions, you and the applicable U.S. Open Sub-committee agreed that six uniformed police officers would work details inside The Country Club to establish a command post to maintain and provide security for the pro shop and post office during the U.S. Open; that 54 uniform police officers would control traffic outside The Country Club; and that Spectraguard, a private security firm, would be hired to provide security inside The Country Club. The town eventually billed The Country Club approximately $100,000 for the detail work. This fee included the standard 10% surcharge applicable to all police details provided by the Brookline Police Department.

8. The Brookline police who worked details inside The Country Club had access to it by virtue of their assignment inside. They did not need tickets.

9. Several days prior to the U.S. Open, a member of the U.S. Open Committee delivered approximately 40 to 60 sets of tickets to the 1988 U.S. Open to Captain Hayes at the Brookline Police Department. Each set contained seven tickets with individual face values between $18 and $20. The total value of a set of tickets was between $126 and $140.

10. You directed Captain Hayes to distribute one or more sets of tickets to various law enforcement officers and court personnel. Neither you nor Captain Hayes took any steps to ensure that the ultimate recipients of the tickets were trained law enforcement personnel, nor to coordinate the activities of those recipients with the police working details inside and outside The Country Club.

11. As a member of the Brookline Municipal Golf Course, you purchased eight sets of tickets to the 1988 U.S. Open for a total of $1,120. These tickets were distributed to your family and friends. None of the so-called complimentary tickets were distributed to any of your family or friends.

II. The Conflict of Interest Law

As the Brookline Police Chief, you are a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. Section 23(b)(3) prohibits a municipal employee from causing a reasonable person knowing all the facts to conclude that anyone can unduly enjoy his favor in the performance of his official duties. By accepting and distributing the aforementioned tickets, you engaged in conduct that arguably would cause a reasonable person knowing all of the facts to conclude that The Country Club could unduly enjoy your favor in the performance of your official duties. While we acknowledge that you do not entirely agree with our view of the evidence, we believe that such a conclusion would be supported by the facts that (1) the tickets appear to have been given as a goodwill gesture rather than serving a legitimate law enforcement purpose; (2) you were involved in numerous law enforcement issues of concern to The County Club at or about the time you accepted these tickets, including determining the numbers and hours of police details which cost The Country Club approximately $100,000; and (3) the manner in which you distributed those tickets did not ensure that trained law enforcement personnel would use them, or that the recipients' activities would be coordinated with the police working details at The Country Club.[1/]

We acknowledge that you did not personally use any of the tickets. We also acknowledge that when requested by The Country Club, you did not waive the detail charge fee. While these facts might dispel the appearance of favoritism in some minds, they are counter-balanced by your accepting and distributing a large number of tickets, with a significant dollar value, to agencies without taking any precautions to assure that the ultimate recipients of the tickets were in fact capable of responding to any law enforcement crises that may arise.

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 and future compliance with the conflict of interest law.[2/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: March 26, 1990

[1/]You maintain that you had town counsel's advice and the approval of the Board of Selectmen before you accepted the aforementioned tickets. While both Town Counsel and the Chairman of the Board of Selectmen acknowledge that there may have been informal discussion of the matter, it is clear that any disclosure or request for advice by you was not in writing, as required under the conflict law.

[2/]The Commission could have directed the staff to commence adjudicatory proceedings which, in appropriate circumstances, can impose fines of up to $2,000 for any violation. The Commission chose to resolve this matter with a Public Enforcement Letter because it appears that you did not seek nor receive any tickets for your own personal use, and that you were not aware that your receipt and distribution of the tickets could raise concerns under the conflict law.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 384

IN THE MATTER
OF
DEIRDRE A. LING

DISPOSITION AGREEMENT

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

(Commission) and Deirdre A. Ling (Dr. Ling) pursuant to Section 5(D) 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. 268A, §4(j).

On January 24, 1990, the Commission initiated, pursuant to G.L. c. 268A, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Dr. Ling. The Commission has concluded that inquiry and, on February 28, 1990, found reasonable cause to believe that Dr. Ling violated G.L. c. 268A, §6.

The Commission and Dr. Ling now agree to the following findings of fact and conclusions of law:

1. At all relevant times, Dr. Ling was vice-chancellor for university relations and development at the University of Massachusetts at Amherst (UMass-A). As such, she was a "state employee" as that term is defined in G.L. c. 268A, §1(q).

2. As vice-chancellor for university relations and development, Dr. Ling was responsible for a number of areas, including supervising the following offices: State Relations, Community Relations, Development, Alumni Relations, Public Information, and Publications.

3. Dr. Ling has also done a certain amount of private consulting work in the field of enrollment management.[1/] Thus, she has worked for Enrollment Management Consultants, Inc. (EMC), which sometimes does business through Advanced Marketing Technologies, Inc. (AMTech), which together are hereinafter referred to as EMC/AMTech. The president of EMC/AMTech, at all times relevant to this matter, was Dr. John Maguire.[2/] Dr. Ling's work for EMC/AMTech, as detailed more fully below, involved her consulting at public institutions of higher education outside of the Commonwealth of Massachusetts. She was paid for that work by EMC/AMTech on an hourly basis.

4. Between April 22, 1985 and April 23, 1985, Dr. Ling acted as an EMC/AMTech consultant at S.U.N.Y. Buffalo. EMC/AMTech paid her $1,641 for this work.

5. During the summer of 1985, Dr. Maguire sought commitments from a number of educators to teach at a two-week workshop he planned to conduct the following summer regarding enrollment management issues. This was to be called the Nantucket Institute for Enrollment Management (Nantucket Institute). It would function under the auspices of EMC/AMTech. Thus, during the summer of 1985, Dr. Maguire informally sought and obtained Dr. Ling's commitment to serve on the faculty of the Nantucket Institute (for 1986). Both Dr. Maguire and Dr. Ling understood that this service would be on a compensated basis.

6. Between September 17, 1985 and September 20, 1985, Dr. Ling acted as a consultant for EMC/AMTech at the University of Cincinnati. EMC/Amtech paid her $2,656.50 for her services.

7. By letter dated January 13, 1986, Dr. Maguire formally invited Dr. Ling to serve as a faculty member on the Nantucket Institute faculty for a 10 day workshop to be held in June, 1986.

8. In January, 1986, Dr. Maguire invited Dr. Ling and Dr. Ling accepted his offer to consult for EMC/AMTech at the Delaware County Community College in approximately March or April, 1986.

9. At its January 31, 1986 meeting, the UMass-A chancellor's Executive Committee voted to have UMass-A conduct an attitude and image survey.[3/]

10. In early February, 1986, Dr. Ling directed her staff to solicit proposals from various outside consultants for such a survey. Three proposals were received. One company offered to do the work for a price between $37,145 and $98,500 depending on the size of the survey. A second company's bid for the same scope was between $80,000 and $250,000. AMTech's bid was $35,000, although it is not clear from the bid what the exact scope of the survey would be.

11. On February 24, 1986, Dr. Ling met with UMass-A Chancellor Joseph Duffey regarding a number of items, including the opinion and attitude and image survey. She provided Chancellor Duffey with the bids she had received for that work. She rated EMC/AMTech's proposal number one, because of price, EMC/AMTech's knowledge of Massachusetts (the other two companies were out-of-state), and UMass-A's favorable experience with Dr. Maguire. At the same meeting, she raised with Chancellor Duffey, who is her appointing authority, her concern that her involvement in this contract award might create an appearance of conflict because of her prior and future private business arrangements with Dr. Maguire. She disclosed that she had previously consulted for EMC/AMTech on a paid private basis, and that she would be serving as a paid faculty member at the Nantucket Institute that coming summer.

12. According to Chancellor Duffey, in his view the "potential for conflict of interest was so small" that he decided to hire EMC/AMTech notwithstanding Dr. Ling's relationship with Dr. Maguire. However, Chancellor Duffey suggested that Dr. Ling distance herself from the contract somewhat by having one of her assistants handle the day-to-day supervision of the contract, while she would retain the overall ultimate responsibility for the contract.

13. On February 28, 1986, Dr. Ling informed Dr. Maguire that EMC/AMTech had been awarded the contract. EMC/AMTech began working on the contract shortly thereafter. The original contract, dated March 3, 1986, was for $24,000. It was contemplated, however, that the full project would require an expenditure of approximately $35,000. The reason the original contract was not for the full cost of the project was because there were not enough funds remaining in that fiscal year's budget to cover the full cost. Consequently, the remaining portion of the survey's costs was covered by an $11,000 contract entered into between UMass-A and EMC/AMTech dated July 1, 1986.

14. One of Dr. Ling's deputies did, in fact, supervise EMC/AMTech's day-to-day performance under this contract. Dr. Ling, however, was involved at certain points. For example, sometime in March or April 1986, she reviewed and approved the original survey instrument and the determination as to which constituencies would be surveyed.

15. Between April 29, 1986 and May 1, 1986, Dr. Ling consulted for EMC/AMTech at Delaware County Community College in Pennsylvania. EMC/AMTech paid her $1,125 for this work.

16. Between June 2, 1986 and June 6, 1986, and June 8, 1986 and June 13, 1986, Dr. Ling lectured at the Nantucket Institute. She received $4,000 from EMC/AMTech for these services.

17. In September, 1986, EMC/AMTech provided UMass-A with a written report on the survey results.

18. Except as otherwise permitted in that section,[4/] §6 of G.L. c. 268A prohibits a state employee from participating in a particular matter in which, to his knowledge, a person with whom he has an arrangement for employment has a financial interest.

19. The contractual agreement between UMass-A and EMC/AMTech was a "particular matter" as defined in G.L. c. 268A, §1(k).

20. Dr. Ling participated in the above contract when she determined which proposals to solicit and which proposals to submit to Chancellor Duffey, and when she evaluated EMC/AMTech's proposal as the preferred choice. She also participated in the contract after it was awarded, for example by reviewing and approving the survey instrument and the constituencies to be sampled.

21. Dr. Ling's participation in these contract-related matters occurred at a time when she had two separate arrangements for employment with EMC/AMTech: first, that she would be consulting at Delaware Community College in March or April, 1986; and second that she would be serving on the EMC/AMTech Nantucket Institute faculty in June of 1986.

22. By participating in awarding and monitoring the survey contract at a time when she had the above described arrangements for employment with EMC/AMTech, Dr. Ling violated G.L. c. 268A, §6.

23. The Commission is aware of no evidence that Dr. Ling's performance of her official duties was influenced by her relationship to Dr. Maguire. Indeed, she showed some sensitivity to the potential conflict by raising the issue with her appointing authority, Chancellor Duffey, and disclosing her relationship with Dr. Maguire.[5/]

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

The requirement that the disclosure and authorization be in writing serves at least two purposes. First, it establishes a record of both the disclosure and subsequent determination of the appointing authority, a record which, among other things, protects the interest of the state employee if allegations of impropriety should arise. Second, it forces both the state employee and the appointing authority to consider carefully the nature of the conflict of interest and the options available for dealing with that conflict. Given the clear problem Dr. Ling's involvement created under §6 of the conflict law, had Dr. Ling and Chancellor Duffey followed the proper

procedure, they might well have concluded that Dr. Ling's participation was unwise.

As the Commission said in a similar situation,[7/]

> Thus, while an argument can be made that a state employee who discloses a §6 conflict to his appointing authority and is told to participate ought to be able to rely on the appointing authority's familiarity with the conflict law, especially where the appointing authority is a high ranking state official..., strict compliance with the written disclosure and authorization provisions of §6 is necessary to ensure that all due consideration is given to issues with potential controversy and the potential for abuse....
>
> That it has insisted on a public resolution ... reflects the importance the Commission places on proper compliance with §6's disclosure and exemptions provisions. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure - particularly that the determination be in writing and a copy filed with the Commission - are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision.

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

> 1. that Dr. Ling will take all reasonable steps to ensure that all UMass-A employees in management positions familiarize themselves with G.L. c. 268A, §6; and
>
> 2. that Dr. Ling waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement in this or in any related administrative or judicial proceeding in which the Commission is or may be a party.[8/]

Date: April 17, 1990

[1/]Enrollment management has been defined as being an approach which evaluates all functions of the university which impact on enrollment. This includes marketing techniques, publications, enrollment materials, public relations, and image management.

[2/]EMC/AMTech is now known as Maguire Associates, Inc. AMTech's name was changed officially at the Secretary of State's Office on March 27, 1989. EMC is now a division of Maguire Associates, Inc.

[3/]An attitude and image survey is designed to obtain the opinions of "key constituencies;" that is to say, the survey obtains the opinions of those persons who are deemed most important to the overall functioning of the university outside the university itself.

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

[5/]Dr. Ling also disclosed her receipt of fees from EMC/AMTech in her 1985 and 1986 SFIs.

[6/]See footnote 4 above.

[7/]**In the Matter of John J. Hanlon,** 1986 SEC 253, 255 (the Commission approved a Disposition Agreement in which a state police captain paid a fine of $250 for violating §6 by participating in the Commonwealth's evaluation of an anti-theft device at a time when he owned substantial stock in the company marketing that device, notwithstanding his complete **oral** disclosure to his appointing authority of his stock ownership prior to so participating).

[8/]The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. The Commission, however, believes that no fine is appropriate here. The Commission notes that Dr. Ling did disclose her private relationship with Dr. Maguire to her appointing authority. Her situation is distinguishable from that in **Hanlon**, where, as discussed above, a small fine was imposed, by the fact that her post-disclosure involvement in the matter was relatively minimal and the private interest in question was that of a future employer's and not her own.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 385

IN THE MATTER
OF
GEORGE KEVERIAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and George Keverian (Speaker Keverian) pursuant to Section 5 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 possible violations of the conflict of interest law, G.L. c. 268A, by Speaker Keverian. The Commission concluded its inquiry and, on February 28, 1990, found no reasonable cause to believe that Speaker Keverian had violated §§3 and 23(b)(2) of G.L. c. 268A or §7 of G.L. c. 268B in connection with the facts as set forth below; and on the same date found reasonable cause to believe that Speaker Keverian violated G.L. c. 268A, §23(b)(3), which provision is part of the statute's supplemental code of conduct.

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

1. Speaker Keverian has been Speaker of the Massachusetts House of Representatives since January 2, 1985. As such he is a state employee as defined in G.L. c. 268A, §1(q).

2. As Speaker, he has been responsible for, among other matters, the operation of the Speaker's Office. The Speaker's Office employs a number of full-time people including, but not limited to, a chief of staff, business manager, various maintenance staff (including a maintenance coordinator), photographers, and secretaries. The Speaker's Office also is, as a practical matter, responsible for providing all goods and services necessary for the operation of the House. Thus it is through the Speaker's Office that the House purchases its furniture, stationery, computers, cleaning services, and the like. Because of his legislative responsibilities, the Speaker delegates the management of those matters to his chief of staff or business manager.

3. In August 1984, before Speaker Keverian became Speaker, the Speaker's Office hired Richard F. Sousa (Sousa) as the House maintenance coordinator. Sousa's regular workday was from 7:00 a.m. until 3:30 p.m. His starting salary was $36,750. That salary was increased each year on January 1. The January 1, 1988 increase to $42,718, and the January 1, 1989 increase to $44,854 involved the same percentage increases given to all other Speaker's Office personnel.

4. In or about December 1986 or January 1987, Speaker Keverian decided to do substantial renovations on his four-family home at 116 Irving Street, Everett. Renovation work began in approximately February or March, 1987 and was substantially completed by the summer of 1988.

5. In or about April or May, 1987, Speaker Keverian had to hire a carpenter to replace the carpenter who had been working on his renovations. Speaker Keverian was initially unsuccessful in locating a new carpenter. He then asked Sousa whether Sousa knew of anyone who could do the work. Speaker Keverian and Sousa ultimately agreed that Sousa would perform the work in his spare time. Speaker Keverian stated that he directed Sousa to perform this work on personal time, not on state time, i.e., at night and on weekends, and by taking vacation time whenever Sousa worked at Speaker Keverian's home during his normal working hours. Sousa informed the Commission that he did the work in accordance with those directions. Personnel records reflecting Sousa's vacation time for this period no longer exist.

6. Between July 1987 and August 1988, Sousa worked approximately 1,100 hours at Speaker Keverian's residence, charging $15 .an hour, and receiving approximately $16,000 for his services. Frank Tunnera and Charles Eliopoulos, two House maintenance workers hired by the Speaker's Office, also worked at Speaker Keverian's residence during this time, also charging $15.00 an hour, and each receiving approximately $1,000. Speaker Keverian paid Sousa, Tunnera and Eliopoulos by check. The hourly rate paid by Speaker Keverian was reasonable. This finding is based on a Commission survey of carpenters in the area, carpenters' affidavits supplied by Speaker Keverian, and published government data on rates charged.

7. Beginning in July, 1985, Michael Mouradian, doing business through a franchise known as Continental Chem-Dry, was hired by the Speaker's Office to perform rug cleaning services at the House. It is unclear as to who hired Mouradian to do this

work. Speaker Keverian stated he had nothing to do with Mouradian's hiring. By the end of the summer of 1985, however, Speaker Keverian was aware that Mouradian had been so hired.

8. There is a 50-year history of family, cultural, ethnic and friendship ties between Speaker Keverian and Mouradian. Their families maintained close personal contacts when Speaker Keverian and Mouradian were children, and Speaker Keverian and Mouradian continued that friendship to the present.

9. Continental Chem-Dry did the following amounts of business at the House for each of the following calendar years: 1985 ($2,135); 1986 ($5,308); 1987 ($8,598); 1988 ($13,966).

10. Speaker Keverian approved many of the Continental Chem-Dry invoices for payment as part of his routine and usual procedure for approving invoices submitted to the House of Representatives by various vendors, after review by the Speaker's Office personnel.

11. The Commission is aware of no evidence to indicate that the business manager or any one else in the Speaker's Office put the foregoing rug cleaning business out to bid, or otherwise made an effort to ascertain whether Mouradian's price was reasonable. The House of Representatives and the Speaker's Office are, and have been for many years, exempt from any legal requirements that work such as that performed by Continental Chem-Dry be put out to bid. See G.L. c. 12A. The long-standing, customary practice of the House and the Speaker's Office was to deal with such vendors without requiring any bid procedures. The Commission, however, is also unaware of any evidence of criticisms of the quality of the work performed for the House by Mouradian.

12. In or about February 1987, after Speaker Keverian had decided to renovate his residence, he called Mouradian for advice regarding the storage of a large oriental rug inherited by Speaker Keverian from his mother. That conversation led to Mouradian volunteering to go to Speaker Keverian's residence and pick up and store the large rug and three or four smaller oriental rugs. Each of these was stored and cleaned at Melrose Oriental Rug Company, Mouradian's business, and some of the smaller rugs were repaired. Mouradian stated the value of these services was approximately $550. Speaker Keverian cannot recall any details regarding the repairing and cleaning. Speaker Keverian stated to the extent Mouradian incurred any costs, he assumed Mouradian would submit a bill. No such bill was ever submitted.

13. Also as part of the renovations, it was necessary for Speaker Keverian to move all of his personal belongings out of his residence. Mouradian was one of several friends and relatives who offered assistance in the packing of Speaker Keverian's belongings. On two separate evenings, Mouradian, accompanied on the first evening by three employees (one of whom was his son) of Melrose Oriental Rug Company, and on the second by two such employees, assisted Speaker Keverian in packing. Mouradian paid those employees $192 for these services, but did not charge Speaker Keverian. Speaker Keverian was not aware that Mouradian, or Melrose Oriental Rug Company, was incurring any costs regarding this service. According to Speaker Keverian, a number of his friends including Mouradian, helped him to pack. While Speaker Keverian recalled Mouradian bringing his son and an employee on one occasion to help pack, Speaker Keverian further stated that had he known Mouradian was incurring any costs, he would not have accepted these services inasmuch as his other friends would have provided the assistance without any charge.

14. In or about November, 1987, Speaker Keverian purchased three oriental stair runners from Melrose Oriental Rug Company for $1,860. Mouradian sold these three rugs to Speaker Keverian at or slightly over cost. At his normal mark-up, Mouradian would have sold those rugs for approximately $3,350. Speaker Keverian stated he had no knowledge that he had purchased these rugs at or slightly over cost, and further he had no knowledge of any claim that the rugs had a retail value higher than the price he paid. Mouradian never told Speaker Keverian that he sold him the rugs at or slightly over cost.

15. In December, 1987, Mouradian suggested that he provide Speaker Keverian with several additional rugs to protect his newly finished hardwood floors. On December 11, 1987, Mouradian delivered seven additional oriental rugs on consignment, and listed those rugs on a Melrose Oriental Rug Company printed consignment form. The consignment slip indicates that these rugs had a retail value of $3,917. Speaker Keverian stated that he accepted the consignment of these rugs so that he could inspect the rugs for a period of time to determine whether he wanted those particular rugs or others which might have been available. Under the terms of the consignment, Speaker Keverian was under no obligation to buy any of these rugs. Mouradian informed Speaker Keverian that under the terms of the consignment he did not believe he would lose any money if Speaker Keverian kept these rugs for an extended period of time because the rugs were insured and such rugs increase in value over time.[1/]

16. All the foregoing rugs remained at Speaker Keverian's residence until October 8, 1988 when, at the Speaker's request, Mouradian provided a substitute for one of the rugs. The Melrose Oriental Rug Company consignment slips indicate that a rug with an approximate retail value of $3,085 was substituted for a rug with an approximate retail value of $1,995. At that same time, Mouradian also delivered from Melrose Oriental Rug Company two additional oriental rugs to Speaker Keverian's residence. The consignment slip indicates that these two rugs had an approximate retail value of $2,070. All of these rugs were covered by printed consignment forms filled out by Mouradian.

17. The rugs described above have remained in Speaker Keverian's residence to the present time. According to Speaker Keverian, through April, 1989, when he received notice of the Commission's investigation into these matters, he had not taken the time to make up his mind whether he would purchase these rugs or seek substitute rugs by visiting the Melrose Oriental Rug Company showroom. After April, 1989, when Speaker Keverian received the Commission's notice of its investigation, on advice of counsel he took no further steps regarding these rugs.

18. Mouradian stated the reason he stored, cleaned and repaired Speaker Keverian's rugs, sold rugs to him at or slightly above his cost, and allowed Speaker Keverian to keep rugs on consignment for this period of time without either paying for them or returning them was out of friendship.

19. Section 23(b)(3) of G.L. c. 268A prohibits a state employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties. The Commission has consistently stated that public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. **See, e.g., Commission Advisory No. 1; In the Matter of Frank Wallen,** 1984 SEC 197; **EC-COI-82-64.** In the Commission's view, the reason for this prohibition is two fold: first, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cut-backs are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy any such relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors or subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

20. By hiring and paying House maintenance employees to work at his private residence during approximately a one-year period of time as detailed in paragraphs 3 through 6 above, Speaker Keverian entered into a significant private commercial relationship with House employees who work for the Speaker's Office. This conduct would cause a reasonable person knowing these facts to conclude that those employees can unduly enjoy Speaker Keverian's favor in the performance of his official duties. Therefore, Speaker Keverian violated G.L. c. 268A, §23(b)(3).

21. By participating in the various transactions involving oriental rugs and the packing of certain of his personal belongings as detailed in paragraphs 12 through 18 above, Speaker Keverian entered into a series of transactions, which taken individually, but especially in the aggregate, constituted a significant private relationship with a vendor who does work for the Speaker's Office. This conduct would cause a reasonable person knowing these facts to conclude that Mouradian can unduly enjoy Speaker Keverian's favor in the performance of his official duties. Therefore, Speaker Keverian violated G.L. c. 268A, §23(b)(3).[2/]

22. The Commission acknowledges that Speaker Keverian was not aware that his actions in hiring Speaker's Office employees to do work at his private residence could constitute a violation of §23(b)(3), and that he took steps to avoid such a violation by insisting that those employees do that work on their private time, and by paying them by check at a reasonable rate. As stated above, however, given the significant and simultaneous public and private relationships, in the Commission's view the only way for Speaker Keverian to have avoided violating §23(b)(3) regarding these actions was to disclose his conduct in accordance with §23, which provides in pertinent part:

> It shall be unreasonable to so conclude [i.e., that any person can improperly influence or unduly enjoy the state employee's favor] if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a

cconclusion.[3]

23. Similarly, the Commission acknowledges that Speaker Keverian was not aware that his private dealings with Mouradian could constitute a violation of §23(b)(3). He believed that any considerations he was receiving were based on personal friendship. Again, however, avoidance of that violation arising from these simultaneous public and private relationships, would, in the Commission's view, have required public disclosure of these dealings as explained above.

In view of the foregoing violations of G.L. c. 268A, §23(b)(3), as set forth in paragraphs 20 and 21 above, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings or the imposition of a civil penalty. In deciding not to impose a fine, the Commission has taken into consideration the following: 1) The carpenters and Mouradian were all apparently willing participants in their respective commercial and private relationships with Speaker Keverian; and 2) The Commission is unaware of any evidence indicating that the above-mentioned Speaker's Office employees or Mouradian received any preferential treatment from Speaker Keverian in the performance of his official duties.

In disposing of this matter by this disposition agreement, Speaker Keverian has waived all rights to contest the findings of fact and conclusions of law contained in this Agreement in this or any related administrative or judicial proceeding in which the Commission is or may be a party. Speaker Keverian has personally read this agreement and understands it is a public document.

Date: April 23, 1990

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[1]A number of rug dealers contacted by the Commission indicated that extended consignments of this type are not consistent with good business practice. The Commission is unaware of any evidence that Speaker Keverian knew of this.

[2]While the evidence indicates that Mouradian was motivated by friendship in providing these favors, in the Commission's view these personal ties and favors only serve to enhance the appearance of favoritism that arises when a public official has private dealings with a vendor who does business with his office.

[3]The Commission notes that this disclosure must be in writing and must be kept as a public record. For example, Speaker Keverian could have made a written disclosure to the Commission and/or to the Clerk of the House to be maintained in the public files.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 386

IN THE MATTER
OF
JEFFREY ZAGER

DISPOSITION AGREEMENT

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

On November 9, 1989 the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Zager, as the administrative assistant to the mayor of the City of Gloucester. The Commission concluded its inquiry and, on February 28, 1990, found reasonable cause to believe that Mr. Zager violated G.L. c. 268A, §19.

This Commission and Mr. Zager now agree to the following findings of fact and conclusions of law:

1. At all times relevant to this matter, Mr. Zager was the administrative assistant to the mayor of the City of Gloucester, and as such, a municipal employee as defined in G.L. c. 268A, §1(g).[1]

2. As administrative assistant, Mr. Zager has been responsible for coordination and supervision of all city agencies. From January 1984 until January 1986 those responsibilities included the duties of personnel director. Those duties included responsibility for the day-to-day administration of the personnel ordinance, personnel regulations and all collective bargaining agreements, other than those entered into by or in behalf of the city's school committee. When Mr. Zager was reappointed as administrative assistant in 1988, his duties were basically the same except that he no longer had day-to-day responsibilities for personnel matters. (The city charter has been amended creating

a personnel director position.)

3. In or about May or June, 1984, the Gloucester City Treasurer requested that Mr. Zager authorize a new position of financial secretary in the treasurer's office. Mr. Zager,the Mayor[2/] and the City Council approved this request. The Treasurer then drafted an advertisement for the position. He gave the ad to Mr. Zager. Consistent with his then responsibilities as personnel director, Mr. Zager ran the ad.[3/]

4. Mr. Zager has a sister, Maria O'Brien. At or about the time the foregoing position was advertised, Mr. Zager talked to his sister regarding the financial secretary position, telling her he thought she was qualified for it based on his reading of the job description drafted by the Treasurer.

5. Mr. Zager received only a few resumes for the financial secretary position. One of those was his sister's, Maria O'Brien. According to Mr. Zager, he forwarded all of these resumes, including his sister's, to the Treasurer.

6. After reviewing Ms. O'Brien's resume, the Treasurer stated to Mr. Zager that she did not appear to have the experience he wanted. Accordingly, the Treasurer asked Mr. Zager to continue to advertise. Mr. Zager declined that request, stating that in his view Ms. O'Brien met the qualifications of the position as advertised, and that further advertisement would not result in additional qualified applicants.

7. The Treasurer interviewed Ms. O'Brien. While he formed a good impression of her as a person, and concluded that she had the potential to be trained for the position, he concluded she did not have the experience he wanted. In turn, he communicated that concern to Mr. Zager. Mr. Zager informed the Treasurer that in his view according to the job description, O'Brien was qualified and he would be recommending to the Mayor (the final hiring/appointing authority) that she be hired for the position.

8. On July 1, 1984, the Mayor approved Ms. O'Brien's appointment as financial secretary. Her starting date was August 6, 1984.

9. The customary starting grade and step for the financial secretary position would have been grade 6, step 1. Mr. Zager recommended that Ms. O'Brien should start at grade 6, step 2 because her salary history justified the higher step. The Mayor approved this recommendation.

10. Mr. Zager did not disclose to the Treasurer or the Mayor that Ms. O'Brien was his sister. Neither the Treasurer nor the Mayor was aware of this family relationship at the time Ms. O'Brien was hired.

11. Ms. O'Brien is one of the 110 members of AFSCME local 687. The 1989 AFSCME contract with the City of Gloucester, which was signed in April, 1989, covers Ms. O'Brien's position.

12. As administrative assistant, Mr. Zager was involved in the negotiations between the city and the union regarding the 1989 AFSCME contract. Thus, beginning in February, 1988 and through and including April, 1989, Mr. Zager acted as one of the members of the three-person city negotiating team. While the Mayor[4/] took the lead regarding these negotiations, Mr. Zager acted as the chief negotiator when the Mayor was not present, which occurred from time to time in the process of these negotiations.

13. The 1989 AFSCME contract provided for a 5% wage increase for all city employees covered by that contract, including Ms. O'Brien.

14. G.L. c. 268A, §19 provides in relevant part that, except as permitted by §19,[5/] municipal employees are prohibited from participating in particular matters in which, to their knowledge, a member of their immediate family has a financial interest.

15. The hiring of Ms. O'Brien, the determination as to her salary, and the 1989 AFSCME contract, were "particular matters." Mr. Zager "participated" in those matters by declining the Treasurer's request to do additional advertisements, by recommending that his sister be hired, by recommending the salary step she would receive, and by acting in a significant way as one of the city's negotiators regarding the 1989 AFSCME contract.

16. By participating in the foregoing particular matters with knowledge that Ms. O'Brien had a financial interest in each of those matters, Mr. Zager participated as the mayor's administrative assistant in particular matters in which he knew his sister had a financial interest, thereby violating §19.

Baed 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. Zager:

1. that he pay to the Commission the

amount of $1,500.00 for his participation in the 1984 hiring of his sister and the determination of her salary;

2. that he pay to the Commission the amount of $500.00 for his participation in the 1989 AFSCME contract negotiations[6]; and

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

Date: May 1, 1990

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[1]Mr. Zager was first appointed as the Gloucester administrative assistant by former Mayor Richard Silva. He served in that capacity from January, 1984 through January, 1986. Thereafter, he worked as the North Reading town administrator from January, 1986 through January, 1988. He was re-appointed as the Gloucester administrative assistant in January, 1988 by current Mayor William B. Squillace.

[2]Mayor Richard Silva.

[3]The ad directed applicants to send their resume to Mr. Zager by July 2, 1984.

[4]This was Mayor William Squillace. According to Mayor Squillace, he was aware of the fact that Ms. O'Brien was Mr. Zager's sister when he appointed Mr. Zager to the negotiating team.

[5]None of the §19 exemptions applies.

[6]While Mayor Squillace's knowledge that Ms. O'Brien was Mr. Zager's sister is a mitigating factor regarding his participation in the contract negotiations, it is not a defense to the §19 violation. Section 19 makes clear that if a municipal employee is going to participate in a particular matter in which a member of his immediate family has a financial interest, he can do so only 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. The disclosure and the authorization must be in writing and kept as public records." G.L. c. 268A, §25.

These disclosure and authorization requirements are not mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure -- particularly that the disclosure and authorization be in writing and filed as public records -- are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision. In addition, they create a clear, historical record subject to public scrutiny.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 387

IN THE MATTER
OF
WILLIAM WEDDLETON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William Weddleton (Weddleton) 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, 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. Weddleton. The Commission has concluded that inquiry and, on June 19, 1989, found reasonable cause to believe that Mr. Weddleton violated G.L. c. 268A, §14.

The Commission and Mr. Weddleton now agree to the following facts and conclusions of law:

1. At all times here relevant, Mr. Weddleton was employed as the Assistant Deputy Superintendent of Personnel at the Norfolk County House of Correction. During the same period, Mr. Weddleton also served as an appointed Norfolk County deputy sheriff.

2. Both as the Assistant Deputy Superintendent of Personnel at the Norfolk County House of Correction and as a Norfolk County deputy sheriff, Mr. Weddleton was, at all time here relevant, a county employee as that term is defined in G.L. c. 268A,

§1(d).

3. As of May, 1986, Mr. Weddleton was employed full-time at the Norfolk County House of Correction and was an appointed Norfolk County deputy sheriff. In his capacity as a deputy sheriff, Mr. Weddleton on a regular basis served civil process out of the Norfolk County Deputy Sheriffs' Office in Dedham. On each such occasion, the attorney requesting these services was billed the appropriate fee as listed in G.L. c. 268, §8 by the Deputy Sheriffs' office, which office then compensated Mr. Weddleton for serving the process.

4. In June, 1986, the Enforcement Division of the Commission terminated an investigation of Mr. Weddleton concerning his compensated service of civil process while also employed at the Norfolk County House of Correction, and Mr. Weddleton agreed to seek an advisory opinion from the Commission concerning his civil process serving activities. Mr. Weddleton sought the Commission's advisory opinion and, on September 16, 1986, the Commission issued an advisory opinion (**EC-COI-86-18**) which advised Mr. Weddleton that he was subject to the provisions of G.L. c. 268A, in particular to §14, and could not, therefore, both be employed as an assistant deputy superintendent and also serve process for a fee as a deputy sheriff. Mr. Weddleton did not contest the Commission's advisory opinion or seek its reconsideration by the Commission.

5. Despite the Commission's advisory opinion, Mr. Weddleton continued to serve civil process and to receive compensation from the Norfolk County Deputy Sheriffs' Office for those services. In 1986, Mr. Weddleton was paid $5,408 for serving civil process; in 1987, $5,505; and in 1988, $3,280. In addition, Mr. Weddleton was paid a gasoline allowance of $75 per month by the Norfolk County Deputy Sheriffs' Office during the period he served civil process. Mr. Weddleton continued serving civil process for compensation through July, 1988, at which time he was contacted by a Commission investigator seeking to confirm information that he was still serving civil process. Upon being contacted by the Commission investigator, Mr. Weddleton ceased serving civil process.

6. Section 14 of G.L. c. 268A prohibits a county employee from knowingly having a direct or indirect financial interest in a contract made by a county agency of the same county, in which the county or a county agency of the same county is an interested party. The Norfolk County Sheriff is a county agency of Norfolk County within the meaning of G.L. c. 268A, §1(c).

7. A contract made by a county agency of Norfolk County in which Norfolk County was an interested party, within the meaning of G.L. c. 268A, §14, resulted on each occasion when Mr. Weddleton accepted the opportunity offered to him by Norfolk County (through the agency of the Norfolk County Sheriff) in his appointment as deputy sheriff and served civil process for compensation.

8. By continuing to serve civil process for compensation as an appointed Norfolk County deputy sheriff after having been advised by the Commission that to do so violated G.L. c. 268A, §14, Mr. Weddleton, as Assistant Deputy Superintendent of Personnel at the Norfolk County House of Corrections, knowingly and repeatedly had a financial interest in contracts made by a Norfolk County agency in which Norfolk County or a Norfolk County agency was an interested party, thus repeatedly violating §14.

In view of the foregoing violations of G.L. c. 268A, §14, 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. Weddleton:

1. that Mr. Weddleton pay to the Commission the amount of five thousand dollars ($5,000.00) as a civil penalty for violating G.L. c. 268A, §14;

2. that Mr. Weddleton refrain from serving civil process for compensation so long as he is otherwise employed by or under contract with Norfolk County; and

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

Date: May 2, 1990

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 388

IN THE MATTER
OF
GARY P. MATER

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Gary P. Mater pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission Order enforcible in the Superior Court pursuant to G.L. c. 268B, §4(j).

On November 21, 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 Gary P. Mater, former Board of Health member for the Town of Hubbardston. The Commission has concluded that Preliminary Inquiry and, on December 21, 1989, found reasonable cause to believe that Mr. Mater violated G.L. c. 268A, §§19 and 20.

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

1. Gary P. Mater was an elected member of the Hubbardston Board of Health from 1985 to 1988. As such, he was a municipal employee under the conflict of interest law, G.L. c. 268A, §1(g).

2. As a member of the Board of Health, Mr. Mater had official responsibility to perform septic system, housing, occupancy, well siting and food establishment inspections. Board of Health members received a $350 annual stipend for their services. Mr. Mater was not authorized to receive payment for performing inspections apart from the annual stipend paid to the Board of Health members.[1/]

3. In 1987, the Board of Selectmen and the Board of Health created a Board of Health Agent position. This position was created to relieve the Board of Health members from their duties to perform certain inspections and to secure an employee with specialized knowledge of engineering and sanitation. Neither Mr. Mater nor any of the other Board of Health members were trained in engineering or sanitation.

4. In August, 1987, Steven Aldrich, a registered sanitarian, was hired as the Hubbardston Board of Health Agent under a contract with the town. Th contract provided that Steven Aldrich was to witne percolation tests, review sewage disposal system designs, perform final installation inspections of septic systems, and perform water well site inspections and flea market inspections. He was to be compensated for these services on a fee for service basis at a rate to be set by the Board of Health. Mr. Aldrich was also to perform housing inspections, nuisance complaint inspections, and attend Board of Health meetings twice a month. He was to be compensated for these services through an annual $6000 retainer fee. Mr. Aldrich's contract expired on June 30, 1988.

5. After Steven Aldrich assumed the Board of Health Agent position, Mr. Mater continued to perform final septic system inspections, housing inspections, occupancy inspections, and well siting inspections in his official capacity as a member of the Board of Health. Unlike the Board of Health agent, Mr. Mater was not authorized to receive fees for these services.

6. Between October, 1987, and April, 1988, Mr. Mater engaged in a course of conduct whereby he obtained fees for the inspections he performed through Mr. Aldrich. Specifically, Mr. Mater appeared at Board of Health meetings and gave Mr. Aldrich an index card which identified the various inspections Mr Mater had performed.[2/] Mr. Aldrich submitted bil for these inspections to the Board of Health. These bills were on Aldrich Engineering Company letterhead. Mr. Mater filled out and submitted vouchers (town forms for payment which accompanied the foregoing bills) to the Board of Health in the name of Steve Aldrich. Thus, the vouchers billed for various inspections purportedly done by Mr. Aldrich, including housing inspections, occupancy inspections, well siting inspections and final septic system inspections.[3/] Mr. Mater signed these vouchers with the other members of the Board of Health, thus authorizing the town accountant to approve payments to Mr. Aldrich. Mr. Aldrich, in turn, upon receiving payment from the town, paid the fees for these inspections to Mr. Mater. Mr. Mater approved approximately seven vouchers between October, 1987 and April, 1988, and received a minimum of $1,985 from Mr. Aldrich as a result of this practice.[4/]

7. General Laws Chapter 268A, §20 prohibits a municipal employee from having a direct or indirect financial interest in contracts made by the municipality. By procuring inspection fees from Mr. Aldrich through the submission of vouchers which falsely identified Mr.

Aldrich as the person who performed the inspections, Mr. Mater acquired a financial interest in Mr. Aldrich's contract, thereby violating §20.

8. Except as otherwise permitted in that section, G.L. c. 268A, §19 prohibits a municipal employee from participating as such in any particular matter in which to his knowledge he has a financial interest.[5/]

9. Each Board of Health decision to approve a voucher was a particular matter. Mr. Mater had a financial interest in the vouchers which identified Mr. Aldrich as the person performing inspections by virtue of his arrangement with Mr. Aldrich whereby Mr. Aldrich would receive monies from the town and pay them to Mr. Mater. Thus, Mr. Mater knew that by approving the vouchers which were submitted in Mr. Aldrich's name, he was participating in particular matters in which he, Mr. Mater, had a financial interest; thereby violating §19.

10. The Commission is not aware of any evidence to suggest that Mr. Mater did not in fact render the services for which he submitted vouchers in Mr. Aldrich's name.

11. Mr. Mater knew that the conflict of interest law prohibited this conduct, but engaged in it anyway. Mr. Mater, in effect, used the Board of Health Agent's position as a "straw" to conceal his §§19 and 20 violations.

12. 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 bases of the following terms agreed to by Mr. Mater:

1. that he pay to the Commission the amount of $5,000.00 as civil penalty for his violations of G.L. c. 268A §§19 and 20; and

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

Date: May 4, 1990

[1/]In 1985, a Hubbardston Town Meeting authorized Board of Health members to receive a separate fee for witnessing percolation tests. Board of Health members were not authorized to receive fees for any other work.

[2/]In general, Mr. Mater accomplished this task discreetly, e.g., by handing Mr. Aldrich the index cards under the table around which the Board of Health members were seated.

[3/]Some vouchers also billed for services which were, in fact, rendered by Mr. Aldrich, e.g., plan reviews.

[4/]Mr. Aldrich paid ths amount ($1,925.00) to Mr. Mater by various checks. Some payments may have been made in cash, although the precise amount is unknown.

[5/]None of the exceptions applies.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 375

IN THE MATTER
OF
HELEN Y. WILLIAMS

Appearances: Linda E. Neary, Esq.
Counsel for Petitioner

Commissioners Participating:
Hennessey, Ch., Gleason, Jarvis[1/] [2/]

RULING ON MOTION FOR SUMMARY DECISION

I. Background

These adjudicatory proceedings were commenced when the Petitioner filed the Order to Show Cause on October 3, 1989 alleging that the Respondent, Helen Y. Williams, had violated G.L. c. 268B, §5(g)[3/] by failing to amend her 1987 calendar year Statement of Financial Interest (SFI) in a timely manner. Specifically, the Order to Show Cause alleged the Respondent, an Assistant Chief Housing Specialist with the Boston Housing Court, was designated under c. 268B and 930 CMR 2.00 to file a 1987 SFI which she filed on May 18, 1988. On December 12, 1988 the Commission sent and on December 15th, 1988 the Respondent received a Formal Notice of Delinquency (Notice) which outlined certain deficiencies in the Respondent's 1987 SFI and specified that failure to amend her SFI within ten days would subject her to

certain financial penalties.[4/] These deficiencies were: failure to report the name of the governmental body in which she served in 1987, her title, date of employment and income category; failure to report the assessed value of her residence, and failure to report the year in which her final mortgage payment was due. The Respondent filed an amendment to her 1987 SFI on April 24, 1989, seventy-six business days after the deadline indicated by the Notice.

The Respondent failed to Answer the October 3, 1989 Order to Show Cause. The Petitioner filed a Motion for Summary Decision pursuant to 930 CMR 1.01(6)(f)(2) on October 30, 1989.[5/] In support of this motion, the Petitioner cited the Respondent's failure to file an Answer to the Order to Show Cause within the 21 day period specified by 930 CMR 1.01(5)(b).[6/]

Despite numerous opportunities to Answer the October, 1989 Order to Show Cause, the Respondent failed to respond either orally or in writing to any subsequent requests, notices, or orders of the Petitioner or the Presiding Officer.[7/] The Respondent, notwithstanding notice, failed to appear at the hearing on the Motion for Summary Decision held by the Presiding Officer on March 5, 1990. The Respondent subsequently did not respond to the Order issued by the Presiding Officer on March 7, 1990 requesting the Respondent to submit a written brief by March 20, 1990 to show cause why Summary Decision should not be entered against her.

II. Sanction

The Respondent has violated G.L. c. 268B, §5(g) by filing an SFI amendment seventy-six days after receiving a Notice and has failed to participate in or otherwise cooperate in the adjudicatory hearings.

Pursuant to M.G.L. c. 268B, §4(j)(3), the Commission may impose a maximum civil penalty of $2,000 for each violation of c. 268B. The Commission has previously imposed civil penalties for violations stemming from a respondent's lack of response to the Commission's adjudicatory proceedings. **See, In the Matter of Thomas H. Nolan,** 1989 SEC 361 ($2,000 fine imposed with summary decision order based on a respondent's failure to answer adjudicatory proceedings); **In the Matter of Allison Goodsell,** 1982 SEC 38 ($1,000 fine imposed for summary decision on basis of a respondent's failure to respond to adjudicatory proceedings); **See also, In the Matter of Terence J. McGee,** 1984 SEC 167 ($1,000 fine). In deciding a summary decision motion where the respondent has failed to respond to allegations set forth in an Order to Show Cause, the Commission may find a respondent has violated the law and weigh the seriousness of that violation in determining the appropriate fine. **See, Nolan,** supra.

The fine for filing an SFI amendment seventy-six business days late would be $1,420 according to the fine schedule set forth in the Formal Notice of Delinquency. In previous cases involving the late filing of SFIs, however, the Commission has imposed a maximum fine of $500. **See, In the Matter of Vernon R. Thornton,** 1984 SEC 171. In setting the $500 maximum penalty in **Thornton,** the Commission weighed the amount of the penalty against the nature of the violation. Without condoning the Respondent's actions, the Commission determined that a $500 penalty would secure compliance with the filing requirements of c. 268B. Consistent with Commission policy articulated in **Thornton,** the Commission therefore believes a $500 maximum penalty should also be applied to cases where individuals file late amendments to their SFIs. In adopting this maximum fine, the Commission recognizes the importance of the timely filing of an SFI amendment to ensure the accuracy of the information required on an SFI pursuant to c. 268B, §5(g). In this case, we believe that the Respondent's delinquency in filing her SFI amendment seventy-six days late together with her total lack of response in these adjudicatory proceedings warrants a maximum fine of $500.

III. Order

1. The Petitioner's Motion for Summary Decision is hereby granted.

2. Pursuant to the Commission's authority granted in c. 268B, §4(j)(3), the Respondent is ordered to pay a civil penalty of $500.00 within thirty days of notice of this decision.

Date Authorized: May 9, 1990

[1/]Commissioner Doty abstained from these proceedings.

[2/]Commissioner Epps was the Presiding Officer to these adjudicatory proceedings. He did not, however, participate in this ruling.

[3/]Section 5(g), last paragraph states in relevant part:

Failure of a reporting person to file a statement of financial interests within ten days after receiving notice... or the filing of an incomplete statement of

financial interests after receipt of such a notice, is a violation of this chapter and the Commission may initiate appropriate proceedings pursuant to the provisions of Section 4 of this chapter.

This section applies as well to the failure to file an amendment after receiving a Notice. **In the Matter of John R. Buckley**, 1980 SEC 2.

[4]/The Formal Notice States:

Failure to respond to this notification of delinquency within ten (10) days carries with it specific financial penalties: **FAILURE TO SUBMIT AN AMENDED SFI WITHIN 10 CALENDAR DAYS OF RECEIPT OF A FORMAL NOTICE OF DELINQUENCY CARRIES WITH IT A FINE OF $10 PER DAY FOR THE FIRST 10 BUSINESS DAYS AND $20 PER DAY AFTER THE FIRST 10 BUSINESS DAYS.**

[5]/930 CMR 1.01 (6)(f)(2) states:

When the record discloses the failure of the Respondent to file documents required by these Rules, to respond to notices or correspondence, or to comply with orders of the Commission or Presiding Officer, 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 Section 9(m) of these rules.

[6]/930 CMR 1.01(5)(b) provides:

Answer. Within twenty-one (21) days of the issuance of an Order to Show Cause, the Respondent shall file an Answer containing a full, direct and specific answer to each claim set forth in the Order admitting, denying, or explaining material facts. If there is insufficient knowledge to answer with specificity, this shall be so stated and the response shall be treated as a general denial. The Answer shall contain all affirmative defenses which are relied upon and must cite any statute(s) and/or regulation(s) which form the basis of each defense. All allegations contained in the Order which are not specifically admitted in the Answer shall be deemed denied. All new matters contained in the Answer shall be treated as if denied.

[7]/**See**, December 7, 1989 letter from Presiding Officer to Respondent; Notice of Hearing on Plaintiff's Motion for Summary Judgment dated December 29, 1989; Motion for New Hearing Date on Petitioner's Motion for Summary Decision dated February 5, 1990; and Order issued by Presiding Officer on March 7, 1990.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 383

IN THE MATTER
OF
CHARLES O. BALDWIN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Charles O. Baldwin (Mr. Baldwin) pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On October 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 Mr. Baldwin, a member of the Swansea Planning Board. The Commission has concluded that preliminary inquiry and, on July 19, 1988, found reasonable cause to believe that Mr. Baldwin violated G.L. c. 268A, §19.

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

1. Mr. Baldwin has been a Swansea Planning Board member since 1982. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1(g).

2. On June 21, 1984, Dillon Lane Construction Company, Inc. (Dillon Lane) was organized. Patricia Baldwin, then Mr. Baldwin's wife, was the incorporator and held all of the corporation's offices. Dillon Lane engaged in the construction of homes in Swansea and Berkeley.

3. On January 29, 1986, P&H, Inc. (P&H) was organized. Patricia Baldwin was the president and a director of this company. P&H engaged in land development.

4. At all times material to this Agreement, Mr. Baldwin was a beneficial owner of Dillon Lane and P&H. Although Patricia Baldwin was the named president of both corporations, Mr. Baldwin exercised authority and controlled the decisions of these entities.[1/]

5. On May 12, 1986, Mr. Baldwin participated in the Planning Board's vote to approve an Approval Not Required (ANR) plan for Swansea Farms, a subdivision owned by Dillon Lane. This plan amended the subdivision plan, which was approved by the Planning Board on March 24, 1986.[2/] As a result of this amendment, on May 23, 1986, Dillon Lane sold Lot D in the Swansea Farms subdivision for $33,000.

6. On November 17, 1986, Mr. Baldwin participated in a 4-0 vote by the Swansea Planning Board to approve an Approval Not Required (ANR) plan for three lots of land on Old Fall River Road, Swansea. Mr. Baldwin signed the plan depicting this property and identifying its owners as Patricia Baldwin (Mr. Baldwin's wife) and Michael J. McNally.

7. On June 8, 1987, Mr. Baldwin participated in the Planning Board's public hearing on Cheryl Drive, a seven-lot subdivision owned by P&H, Inc. Specifically, Mr. Baldwin responded to questions posed by various members of the audience.

8. On July 7, 1987, Roland Martelly filed a change of officers form for P&H. Patricia Baldwin and Helen Martelly were removed as the president and treasurer, respectively, and Roland Martelly assumed all the offices of P&H.

9. Also on July 7, 1987, Roland Martelly and Mr. Baldwin executed a nominee statement, which was not a public record, by which Martelly agreed to hold 100 shares, one-half of P&H's stock, as the nominee for Mr. Baldwin. By signing the statement, Mr. Martelly agreed to hold these shares for the benefit of Mr. Baldwin, and to vote these shares in accordance with Mr. Baldwin's direction. Mr. Martelly further agreed to pay to Charles Baldwin all income or proceeds generated by these 100 shares immediately upon receipt of such income or proceeds. Mr. Baldwin thus retained a financial interest in P&H after Patricia Baldwin was removed as president of P&H.

10. On July 14, 1987, Mr. Baldwin separated from his wife, Patricia Baldwin.

11. On July 20, 1987, Mr. Baldwin participated in the Planning Board's 3-0 vote approving the Cheryl Drive subdivision, a seven lot subdivision off of Stephen French Road. This subdivision was owned by P&H.

12. Also on July 20, 1987, Mr. Baldwin participated in the Planning Board's public hearing on the Warhurst Park subdivision, a 16-lot subdivision owned by P&H. Specifically, Mr. Baldwin responded to questions raised by various members of the audience.

13. On September 14, 1987, Mr. Baldwin participated in the Planning Board's 4-0 vote to approve the Warhurst Park subdivision.

14. Mr. Baldwin understood that the conflict of interest law, G.L. c. 268A, prohibited him from participating in matters in which he or his family had a financial interest.

15. In each of the foregoing instances where Mr. Baldwin participated in a discussion or vote regarding a P&H or Dillon Lane matter, he did not disclose, nor did any of the papers filed with the Planning Board otherwise reveal, his interest in P&H or Dillon Lane. Indeed, at the July 20, 1987 hearing on Warhurst Park Mr. Baldwin identified Mr. Martelly as the developer when he knew that in fact both he and Mr. Martelly were the developers.

16. Section 19 of G.L. c. 268A provides in relevant part that except as otherwise provided in that section,[3/] a municipal employee is prohibited from participating as such an employee in a particular matter in which to his knowledge he or a member of his immediate family[4/] has a financial interest.

17. By participating in the Planning Board public meeting discussions regarding the Cheryl Drive and Warhurst Park subdivisions, and by voting on the Old Fall River Road ANR, the Swansea Farms ANR, the Cheryl Drive subdivision, and the Warhurst Park subdivision, Mr. Baldwin participated as a Planning Board member in these particular matters.

18. Mr. Baldwin's wife, Patricia Baldwin, had a financial interest in the Old Fall River Road ANR, and Mr. Baldwin knew this when he voted on this particular matter.

19. Mr. Baldwin knew he had a financial interest in the Swansea Farms ANR, the Cheryl Drive

subdivision, and the Warhurst Park subdivision as the beneficial owner of Dillon Lane and P&H.

20. By the conduct described in paragraphs 5 through 19, above, Mr. Baldwin participated on six different occasions as a municipal employee in particular matters in which to his knowledge he, or a member of his immediate family had a financial interest. Therefore, Mr. Baldwin violated §19.

21. Concealment is an exacerbating factor here. Mr. Baldwin appears to have taken steps, at least as of July 7, 1987 when his interests were placed in what was in effect a secret trust, to conceal his interests in P&H. This action occurred just shortly prior to the P&H matters coming before the Planning Board in which he participated.

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

1. that he pay the Commission a sum of six thousand dollars ($6,000.00) forthwith as a civil penalty for violating G.L. c. 268A, §19;[5/] and

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

Date: May 16, 1990

[1/]P&H was owned beneficially and controlled by Mr. Baldwin and Roland Martelly. Patricia Baldwin was the president of P&H in name only. Similarly, Helen Martelly, Roland Martelly's wife, was the treasurer of P&H.

[2/]Mr. Baldwin properly abstained from the Planning Board's vote to approve this subdivision.

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

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

[5/]Technically, there are six §19 violations here. The Commission is authorized to impose fines of up to $2,000 for each violation. The Commission is satisfied, however, that it is in the public interest to resolve this matter with a single fine of $6000.00 for Mr. Baldwin's course of conduct in violation of §19.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 382

IN THE MATTER
OF
VITO TRODELLA

DISPOSITION AGREEMENT

1. This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Vito Trodella 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).

2. On September 14, 1988, the Commission authorized a preliminary inquiry into possible violations of the Conflict of Interest Law by Vito Trodella (Mr. Trodella), a member of the Board of Registration of Veterinary Medicine. On May 31, 1989, the Commission found reasonable cause to believe that Vito Trodella (Mr. Trodella) violated G.L. c. 268A and, by a majority vote, authorized the initiation of these proceedings.

3. Mr. Trodella has served as the public member of the Board of Registration in Veterinary Medicine (Board) since December, 1979.

As a member of the Board, Mr. Trodella is a state employee as that term is defined in G.L. c. 268A, §1(q).

4. The Board is a state agency within the Division of Registration. The Board's primary function is to deal with violations of veterinary licenses; the Board acts as a disciplinary panel and has the authority to reprimand veterinarians and to revoke veterinary licenses. Mr. Trodella is one of five

members of the Board.

5. At all relevant times, Suffolk Downs Racetrack Suffolk Downs) was a horse racing facility. Approximately 17 veterinarians licensed by the Commonwealth of Massachusetts participated in the business of Suffolk Downs by caring for horses at the track. Two of these veterinarians were employees of the State Racing Commission, three were employees of Suffolk Downs, and 12 were private veterinarians who were licensed to practice at the track. All of these veterinarians were subject to the supervision of the Board, which has the authority to suspend or revoke their license to practice veterinary medicine in the Commonwealth.

6. Suffolk Downs has approximately 250 race dates per year. The track charged an admission fee for each race day, and a separate charge for automobile parking. Season passes were not sold at Suffolk Downs, but were rather distributed by the management free of charge to select groups of people, including horse owners, jockeys, trainers, and members of the press. Suffolk Downs also maintains a parking lot for "preferred customers," i.e., high-stakes gamble, and others holding a special sticker on their automobiles. No daily fee was charged to those admitted to this special parking lot.

7. In each of the years 1983, 1984, 1985, 1986 and 1987, Mr. Trodella received for himself at least one season pass from the Suffolk Downs management. Mr. Trodella received the passes at his request after making known to the Suffolk Downs management that he was a member of the Board. Mr. Trodella did not pay for the passes. Mr. Trodella used the passes to gain entry to Suffolk Downs for private recreation.

8. In late 1987, Mr. Trodella requested and received from Suffolk Downs management a sticker for 1988 allowing him to park without charge in the preferred customer parking lot at Suffolk Downs. Mr. Trodella did not pay for the parking sticker. At the same time, Mr. Trodella asked for and was promised a free season pass to the track for 1988. The season pass was not then given to Mr. Trodella because season passes had yet to be printed.

9. Also in late 1987, after he had received a 1988 parking sticker and had been promised a 1988 season pass for his personal use, Mr. Trodella approached Suffolk Downs General Manager Daniel Bucci (Bucci) and told Bucci that the other four members of the Board wanted season passes to Suffolk Downs and that he was requesting four season passes on the Board members' behalf. Mr. Trodella asked Bucci to send him the four season passes so that he, Mr. Trodella, could distribute them to the other Board members. In fact, the other Board members had not requested these passes. Bucci agreed to provide four additional season passes.

10. In January, 1988, Mr. Trodella received his own 1988 Suffolk Downs season pass. He did not receive the four additional season passes because the Board secretary turned them over to the Board's legal counsel. On January 28, 1988, Mr. Trodella met with the Board's legal counsel, who instructed Mr. Trodella that the receipt of season passes involved a conflict of interest. Mr. Trodella returned his season pass. The Board's legal counsel returned the four additional passes Mr. Trodella had sought from Bucci.

11. Section 3(b) of G.L. c. 268A prohibits a state employee from directly or indirectly asking for or receiving anything of substantial value for or because of any official act or acts within his official responsibility performed or to be performed by him.

12. The season passes to Suffolk Downs were items of substantial value within the meaning of G.L. c. 268A, §3(b). The unlimited ability to use the pass for as many entrances as desired makes the pass an item of substantial value. Similarly, the free parking sticker was an item of substantial value because it gave Mr. Trodella the unlimited ability to park at Suffolk Downs at no charge.[1/]

13. At all relevant times, the suspension or revocation of veterinarians' licenses were acts within Mr. Trodella's official responsibility as a member of the Board of Registration of Veterinary Medicine. Insofar as Suffolk Downs employed veterinarians whose licenses were subject to regulation to the Board, Mr. Trodella was in a position to use his authority to affect Suffolk Downs, and Suffolk Downs had a motive to obtain Mr. Trodella's good will by giving him season passes. Thus, the season passes were given to Mr. Trodella for or because of official acts to be performed by him.[2/]

14. By requesting and receiving for himself free season passes to Suffolk Downs in 1983, 1984, 1985, 1986, 1987, and 1988; by requesting and receiving a free 1988 Suffolk Downs parking sticker, and by requesting four additional 1988 free season passes, Mr. Trodella sought and/or received items of substantial value for himself for or because of official acts or acts within his official responsibility as a Board member, thereby violating G.L. c. 268A, §3(b).

15. Section 23(b)(2) of G.L. c. 268A prohibits a

state employee from knowingly, or with reason to know, using or attempting 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.

16. The free season passes to Suffolk Downs for 1983, 1984, 1985, 1986, 1987 and 1988, and the free parking sticker which Mr. Trodella requested and received for 1988, and the four additional 1988 free season passes Mr. Trodella sought but did not receive, were unwarranted privileges of substantial value which were not properly available to Mr. Trodella and similarly situated individuals. Therefore, by identifying himself as a Board member, asking for and receiving those passes from Suffolk Downs while he had official regulatory authority over the veterinarians who worked at Suffolk Downs, Mr. Trodella violated G.L. c. 268A, §23(b)(2).

17. Section 23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position, or undue influence of any party or person.

18. By requesting and/or receiving free season passes to Suffolk Downs for 1983, 1984, 1985, 1986, 1987, and 1988, and by requesting and receiving a free 1988 parking sticker, all while he had official regulatory authority over veterinarians who worked at Suffolk Downs, Mr. Trodella acted in a manner which would cause a reasonable person to conclude that Suffolk Downs could unduly enjoy his favor in the performance of his official duties, thereby violating G.L. c. 268A, §23(b)(3).[3/]

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

1. that he pay to the Commission the sum of $500.00 for violating G.L. c. 268A, §§3(b), 23(b)(2) and 23(b)(3); and
2. that he waive all rights to contest the findings of fact, conclusions of law and the terms and conditions of this agreement in this or any related administrative or judicial civil proceeding in which the Commission is a party.

Date: June 12, 1990

[1/]In May, 1985, the Commission issued Advisory No. 8, "Free Passes", to alert public officials and members of the entertainment industry that the practice of providing free passes to public officials often violates the conflict of interest law. The Commission observed that, "[a] season pass to a theater, racetrack or other entertainment facility which charges a fee for admission is an 'item of substantial value' within the meaning of [G.L. c. 268A,] §3." Advisory No. 8, 1985 SEC 40.

[2/]There need by no showing of an explicit understanding that the gratuity is being given in exchange for any specific act performed or to be performed. **See, In the Matter of George A. Michael,** 1981 SEC 59, 68. "All that is required to bring section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited." **Id.**

[3/]The Commission lacks the jurisdiction to pursue any violation of G.L. c. 268A, §23 which occurred prior to April 8, 1986. **See, Saccone v. State Ethics Commission,** 395 Mass. 326 (1985); G.L. c. 268B, §3(i), as amended by St. 1986, c. 12.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 390

IN THE MATTER
OF
ROBERT A. FOWLER

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert A. Fowler (Mr. Fowler) pursuant to Section 5 of the Commissions's **Enforcement Procedures.** This agreement constitutes a consented-to final Commission order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On March 23, 1988, 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. Fowler while he was a member of the Tewksbury Planning Board. The Commission has concluded its inquiry and, on May 10, 1989, by a majority vote, found reasonable cause to believe that Mr. Fowler violated G.L. c. 268A, §17.

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

1. At all times here relevant, Mr. Fowler was a member of the Tewksbury Planning Board (Planning Board). Planning Board members are elected, part-time, paid municipal employees, but are not special municipal employees within the meaning of G.L. c. 268A. In addition to serving on the Planning Board, Mr. Fowler was, during the relevant time period, employed as a lieutenant in the Tewksbury Fire Department and was also an unpaid reserve Tewksbury police officer in order to fulfill his duties as Arson Investigator for the Fire Department. Mr. Fowler was, therefore, during the period here relevant, a municipal employee as defined in §1(g) of G.L. c. 268A. At the times here relevant, Mr. Fowler was also self-employed as a homebuilder.

2. In 1984, a real estate developer named John Sullivan (Sullivan) was in the process of developing a subdivision in Tewksbury called Fox Run Estates. The subdivision consisted of 31 lots on a single-access road, Fox Run Drive. Mr. Fowler became interested in purchasing some of the Fox Run Estates subdivision lots so that he could build houses on the lots for resale. Sometime in mid-1984, Mr. Fowler and Sullivan began negotiations concerning the lots. These negotiations continued over several months.

3. At a Planning Board meeting on August 13, 1984, the Fox Run Estates subdivision was discussed. Mr. Fowler stepped down as a member of the Planning Board and told the Planning Board that he was requesting releases for building permits on Fox Run Estates Lots 5, 6, 7, 8, 28 and 29, after inspection by the town engineering consultant. Mr. Fowler did not say anything to indicate that he was acting on anyone's behalf other than his own in making this request. The Planning Board then voted 4-0, with Mr. Fowler abstaining, to release the lots as requested by Mr. Fowler for building permits, after town inspection. At the time Mr. Fowler requested building permits for Lots 5, 6, 7, 8, 28 and 29, Mr. Fowler did not own the lots. Lots 6, 7, 8, 28 and 29 were owned by Sullivan. Lot 5 was owned by a Tewksbury resident who had asked Mr. Fowler to request the release for him. Mr. Fowler also told the Planning Board that a Tri-Party Agreement would be submitted on Fox Run Estates.[1]

4. On October 31, 1984, Mr. Fowler, Sullivan and John F. Comeau (Comeau) incorporated Pike Properties, Inc. (Pike Properties). The stated purpose of the corporation was to carry on any and all aspects of real estate development, including, but not limited to, the buying and selling of real estate, and any and all aspects of building, rehabilitation, and development of real estate. The ownership of the corporation was divided equally among the three incorporators (Mr. Fowler, Sullivan and Comeau). The articles of incorporation show Mr. Fowler, Sullivan and Comeau as directors; Mr. Fowler as treasurer and president; and Mr. Fowler's wife, June M. Fowler, as clerk. Mr. Fowler received a $100.00 per week as a stipend for expense as president of the corporation. Mr. Fowler also received a portion of the profits from Pike Properties' business activities.

5. On or about November 5, 1984, Pike Properties purchased from Sullivan Fox Run Estates Lots 6, 7, 8, 27 and 28, for a total consideration of $200,000. The purchase of the lots was financed with a $525,200 development loan from the Andover Savings Bank. $120,000 of the loan was applied to the $200,000 purchase price for the lots; the remaining $405,200 portion of the loan was to be used to finance the construction of houses on the five lots. As part of the transaction, Sullivan received $24,000 cash for each of his five lots, for a total of $120,000 in cash, and took back a second mortgage on each lot of $16,000, for a total second mortgage of $80,000 for the five lots.

6. At a Planning Board meeting on March 11, 1985, the Fox Run Estates subdivision was again the subject of discussion. Mr. Fowler stepped down from the Board during discussion of Fox Run Estates in order to address the Board. Mr. Fowler explained to the Board the efforts which were being made to put together a Tri-Party Agreement for the Fox Run Estates subdivision. After the discussion of the Tri-Party Agreement, Mr. Fowler requested a release for conveyance of Lot 7 in the Fox Run Estates development and stated that a Tri-Party Agreement would be submitted for further releases.

7. On April 8, 1985, Mr. Fowler stepped down from the Board during the Board's discussion of the Fox Run Estates development. Mr. Fowler informed the Board that the attorney for the developer had drawn up a Tri-Party Agreement and that the agreement would be signed by Sullivan and the bank and presented to the chairman of the Planning Board. Mr. Fowler then requested that the Board act on the

Tri-Party Agreement, subject to the Town's planning consultant agreeing that everything was "in line." The Board then voted 4-0 to approve the Tri-Party Agreement. Mr. Fowler did not vote.

8. Section 17(c) of G.L. c. 268A provides that no municipal employee shall, otherwise than in proper discharge of his official duties, act as agent or attorney for anyone other than the municipality in connection with any particular matter in which the same municipality is a party or has a direct and substantial interest.

9. The decisions of the Planning Board concerning releases of Fox Run Estate lots and other determinations concerning the subdivision described above on August 13, 1984, March 11, 1985 and April 8, 1985 were particular matters in which the Town of Tewksbury had a direct and substantial interest within the meaning of G.L. c. 268A, §17(c).

10. By requesting that the Planning Board take action on Fox Run Estates lots owned by Sullivan (and by another Tewksbury resident) on August 13, 1984 and by requesting Board action concerning lots owned by Pike Properties, Inc. on March 11, 1985 and April 8, 1985, Mr. Fowler acted as the agent for persons other than the Town of Tewksbury in connection with particular matters in which the town was a party or had a direct and substantial interest, thereby violating G.L. c. 268A, §17(c).

11. The evidence indicates that Mr. Fowler did not intentionally violate the conflict of interest law.[2/]

In view of the foregoing violations of G.L. c. 268A, §17(c), 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. Fowler:

1. that Mr. Fowler pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §17(c); and

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

Date: June 29, 1990

[1/]A Tri-Party Agreement is an agreement between the Town (or the Planning Board), the developer and the developer's financing bank or other institution under which an agreed portion of the financing of the development is withheld in order to guarantee the completion of the development's common streets, utilities and services.

[2/]Ignorance of the law is not a defense to a violation of the conflict of interest law, G.L. c. 268A. **In the Matter of C. Joseph Doyle**, 1980 SEC 11, 13; **see also, Scola v. Scola**, 318 Mass. 1, 7 (1945).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 391

IN THE MATTER
OF
RICHARD SINGLETON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Richard N. Singleton (Mr. Singleton) pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On May 31, 1989, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268B, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Singleton, former Fire Chief for the Town of Tyngsborough. The Commission has concluded that preliminary inquiry and, on December 21, 1989, found reasonable cause to believe that Mr. Singleton violated G.L. c. 268A, §23(b)(2).

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

1. Mr. Singleton was employed by the Tyngsborough Fire Department for 28 years. He started as a call firefighter, and rose through the ranks. He was appointed Fire Chief in July, 1985. As such, he was a municipal employee under G.L. c. 268A, §1(g).

2. As the Tyngsborough Fire Chief, Mr. Singleton had official responsibility for, among other matters, reviewing building plans and inspecting smoke detector systems installed in new residential homes and in commercial construction.

3. Since 1972, Mr. Singleton has operated R.N. Singleton and Son, Inc. (Singleton & Son), a dry wall construction company engaged in commercial dry wall construction in the Boston, Lowell, and Manchester, New Hampshire areas. Mr. Singleton conducted his drywall business and the Fire Department business from his private office.[1/]

4. At all relevant times, the Scribner Hill subdivision (Scribner Hill) was a development of approximately 100 homes located off of Scribner Hill Road in Tyngsborough. This subdivision was initially owned and developed by the Winter Hill Development Corporation (Winter Hill). All homes constructed in Scribner Hill contained smoke detector systems. The Fire Department was required to inspect and approve the smoke detector systems before certificates of occupancy could issue for these homes.

5. In approximately December, 1985, Winter Hill hired Singleton & Son to perform drywall construction work on Scribner Hill. Mr. Singleton's son, Richard A. Singleton, (Rick Singleton), participated in the drywall work on Scribner Hill as an employee of Singleton & Son. In 1986, Singleton & Son had $200,291.27 as gross sales from Scribner Hill sales. After deducting certain subcontractor, material, and overhead expenses, Singleton & Son netted $20,978.72. Both Mr. Singleton and his son received income as a result of this work.[2/]

6. In October, 1986, Winter Hill sold the Scribner Hill development to Gibraltar Development Corporation (Gibraltar). Gibraltar continued to use Singleton & Son as the drywall contractor on Scribner Hill. Singleton & Son billed Gibraltar for drywall work through May 18, 1987.

7. In April, 1987 Mr. Singleton's son, Rick Singleton, formed Singleton Construction, Inc. (Singleton Construction). Rick Singleton was the sole incorporator and the president, treasurer, clerk and sole director of this corporation. Singleton Construction engaged in commercial drywall construction in Tyngsborough.

8. After May 18, 1987, Singleton Construction billed Gibraltar for the drywall work on Scribner Hill. Rick Singleton supervised the drywall work at Scribner Hill as an employee of Singleton Construction.

9. In 1987, both Singleton & Son and Singleton Construction derived income from drywall work on Scribner Hill. Singleton & Son's gross sales from Scribner Hill sales were $73,019.52. Singleton Construction's gross sales from Scribner Hill sales were $164,877.52.[3/]

10. In early 1988, Gibraltar reevaluated the subcontractors working on Scribner Hill in anticipation of building the next phase of the development. Singleton Construction was one of the subcontractors that was reevaluated.

11. During this reevaluation period, Mr. Singleton accompanied his son while he participated in a meeting at the Scribner Hill subdivision. According to Mr. Singleton, his son submitted an oral bid for the drywall work in the second phase of the development. This bid was submitted to Victor Barton (Barton), the foreman of the Scribner Hill development, and other representatives of Gibraltar.

12. On March 17, 1988, Barton went to the offices of Singleton & Son to drop off a check for work previously completed by Singleton Construction. He entered the office and engaged in a conversation with Mr. Singleton, who wore his fire chief's uniform. Mr. Singleton inquired whether Barton had decided who would get the drywall work for the next phase of Scribner Hill. Barton indicated he had not made a decision. Mr. Singleton asked Barton how long it took to obtain an inspection from the Building Department. Barton stated that it took 48 hours. Mr. Singleton stated in substance that there was no such time limit for the Fire Department to perform inspections and that it could take forever to obtain such inspections.[4/]

13. Mr. Singleton resigned from the Fire Chief's position in April, 1988. He assumed the position of director, and received ownership of one-half of Singleton Construction, in July, 1988.

14. General Laws chapter 268A, §23(b)(2) prohibits a municipal employee from knowingly or with reason to know, using or attempting 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.

15. By stating that the Fire Department's inspections could take forever after inquiring about the drywall construction contract for Singleton Construction, Mr. Singleton, in effect, attempted to use

his official position to secure for Singleton Construction an unwarranted privilege of substantial value which would not be properly available to similarly situated individuals. Therefore Mr. Singleton violated §23(b)(2).[5/]

16. There is no evidence that Mr. Singleton ever withheld or otherwise delayed inspections on this subdivision or received anything of substantial value for himself or his son as a result of this conduct.

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

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)[6/]; and

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

Date: June 29, 1990

[1/]The Board of Fire Engineers authorized Mr. Singleton to conduct Fire Department business from Singleton & Son's office. The office space, office equipment, computer, copy machine, desks, chairs and utilities were provided by Mr. Singleton at no cost to the town.

[2/]While Mr. Singleton did not inspect the drywall work done by his company, on an undetermined number of occasions, Mr. Singleton inspected smoke detector systems on Scribner Hill while his private company worked there. After January, 1986, Fire Captain Tim Madden performed most of the smoke detector inspections on Scribner Hill. Mr. Singleton inspected the smoke detector systems if Captain Madden was not available.

[3/]Singleton & Son netted $1605.02 from Scribner Hill sales after similar deductions for labor, materials and overhead. Singleton Construction netted $18,822.88 after similar deductions.

[4/]This conversation was witnessed by Fire Captain Timothy Madden. Both Mr. Barton and Mr. Madden took Mr. Singleton's remarks seriously.

[5/]Mr. Singleton maintains that he did not intend for his remarks to be perceived as an attempt to use his official position to secure any business for himself or his son. General Laws c. 268A, §23(b)(2), however, embodies an objective test by which a public employee's conduct is judged by what the employee knew or had reason to know at the time of his conduct. Mr. Singleton had reason to know his remarks would be perceived as an attempt to use his official position to secure the drywall contract since he knew his son had submitted a bid to retain the drywall contract and that Gibraltar would require additional inspections from the Fire Department as construction progressed.

[6/]The Commission is authorized to impose a fine of up to $2,000 for violations of G.L. c. 268A. The Commission imposed a $1,000 fine in this case because the evidence indicates that Mr. Singleton did not realize any economic gain as the result of his conduct and because there is no evidence to suggest that Mr. Singleton withheld or delayed inspections from the Fire Department. Neither Mr. Singleton nor his son performed any drywall work on Scribner Hill after March, 1988.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 392

IN THE MATTER
OF
ROBERT J. GARVEY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert J. Garvey (Sheriff Garvey) 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. 268A, §4(j).

On January 24, 1990, 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 Sheriff Garvey. The Commission has concluded that inquiry and, on May 9, 1990, found

reasonable cause to believe that Sheriff Garvey violated G.L. c. 268A, §23.

The Commission and Sheriff Garvey now agree to the following facts and conclusions of law:

1. Sheriff Garvey has been the Hampshire County Sheriff since September 1984. As such, he is a county employee as defined in G.L. c. 268A, §1(d).

2. As sheriff, he has been responsible for, among other matters, the operation of the Hampshire County House of Correction (the Jail). The Jail employs a number of full-time people, including, but not limited to, corrections officers and maintenance employees. Sheriff Garvey has been the appointing authority for all of these positions. These positions are not civil service protected. Until September 1988, all Jail employees served at the pleasure of Sheriff Garvey until they had accrued five years of service. After five years of service, they could only be terminated for cause. (As of September 1988, certain Jail employees became unionized and, pursuant to their union contract, after six months have certain grievance rights regarding termination.)

3. Beginning in 1987, Sheriff Garvey, aided by various subcontractors, built a tennis court at his private residence. By late summer 1988, construction of the tennis court was nearly complete; Sheriff Garvey needed only a fence around one end of the court. (Because of the rising topography, no fence was necessary at the other end.) According to Sheriff Garvey, in a conversation with the Jail's director of engineering, Sheriff Garvey said that he was going to have to engage a contracting company to finish the fence. According to Garvey and the director of engineering, the director of engineering mentioned that he and several of the maintenance staff would be willing to do the work for Sheriff Garvey. Sheriff Garvey and the director of engineering agreed that the hourly rate Sheriff Garvey would pay the men for this work was $15 an hour.[1/] According to both men, their original intention was to do the work on Saturdays. However, after scheduling and weather-related problems prevented that, the director of engineering proposed that the work be done during regular work hours using "personal time." According to both men, Sheriff Garvey approved that proposal on the conditions that the work be done in a manner that would not leave the institution without adequate maintenance staffing during those times when the men were using "personal time" to work on the fence, and that an accounting of hours spent on the project be kept.

4. The director of engineering went to Sheriff Garvey's residence in Amherst and visited the site. He prepared a sketch for the construction, which Sheriff Garvey approved. The director of engineering then ordered the fencing and subsequently supervised the construction. The fencing was picked up by a Jail employee in his personal vehicle at a building supply outlet and delivered to Sheriff Garvey's home by that employee on his private time.

5. Sheriff Garvey paid for all materials used to construct the fence.

6. Approximately one week after the fence was completed, each employee submitted "personal time" forms to the Jail and each submitted his hours to Sheriff Garvey for payment. Their forms indicate that on October 14, October 27, November 7, November 8, and November 10, 1988, five Jail employees worked a total of 29.5 hours in constructing Sheriff Garvey's tennis court fence.[2/]

7. Sheriff Garvey's cancelled checks indicate that he promptly paid these men the agreed upon $15 an hour, for a total payment of $442.

8. According to the five maintenance employees, they did not feel any pressure to assist the Sheriff as described above. In addition, they did not expect nor receive any special treatment for having provided the assistance.

9. Section 23(b)(3) of G.L. c. 268A prohibits a state employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties.

10. As the Commission recently observed,[3/]

> The Commission has consistently stated that public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cut-backs are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the

appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors or subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains [citations omitted].

11. By hiring and paying Jail maintenance employees to work at his private residence during October and November of 1988 as detailed in paragraphs three through eight above, Sheriff Garvey entered into a significant private commercial relationship with Jail employees who work for him. Such conduct would cause a reasonable person knowing these facts to conclude that those employees can unduly enjoy Garvey's favor in the performance of his official duties. Therefore, Sheriff Garvey violated G.L. c. 268A, §23(b)(3).

12. Jail personnel records indicate that a certain correction officer (CO) worked at the Jail from 1984 to October, 1987. According to that CO, he was personally interviewed by Sheriff Garvey when he was hired. Sheriff Garvey could not recall being involved in the interviewing process, although he acknowledged approving all hirings.

13. Sheriff Garvey owns a summer home in Kennebunkport, Maine. He also owns real property in New Hampshire.

14. According to Sheriff Garvey and the CO: At some time in late May or early June 1986, Sheriff Garvey and the CO discussed their familiarity with the Maine seacoast area. At some point in the discussion, either the CO suggested that if ever Sheriff Garvey was making a trip to that area the CO would be happy to ride with him, or Sheriff Garvey may have said he would enjoy having the CO ride up with him and the CO replied he would like to go. A few weeks later in June of 1986, Sheriff Garvey mentioned to the CO that he was driving to New Hampshire to pick up a refrigerator to take to Maine and asked if the CO would be interested in riding with him. The CO said yes and offered to drive his own pick-up truck rather than having Garvey borrow one. They drove to Nashua, New Hampshire where they obtained a small used refrigerator from a home. They then took the refrigerator to Kennebunkport. They had to remove an old refrigerator from Sheriff Garvey's Kennebunkport summer home, and replaced it with the newer one. They put the older refrigerator in the CO's truck, and returned to Northampton. The trip took approximately six to seven hours and involved travel over approximately 275 miles.

Sheriff Garvey gave the refrigerator, which was in working order, to the CO. When the CO returned home with the refrigerator, he found that it did not fit into the area in which he intended to use it. He offered it to other family members, and later disposed of it at a local landfill.

15. Approximately two to three weeks later, the CO joined Sheriff Garvey and a second man on a trip to New Hampshire. Once again, the CO used his own pick-up truck. During the day, the three men moved a used refrigerator from a home in Nashua to Garvey's summer cottage in Hampton, New Hampshire. Sheriff Garvey bought sandwiches and beverages which the three men consumed at the beach before returning to Northampton. The trip took approximately nine hours and involved travel of approximately 300 miles.

16. On both of the above trips, Sheriff Garvey paid for all gas, tolls and food. The CO was on his days off from work on both occasions. He received no compensation from Sheriff Garvey for these trips.

17. According to the CO, he did not feel any pressure to assist Sheriff Garvey as described above. His assistance was totally voluntary. He went to Maine because he wanted to see the area and Sheriff Garvey's home, and also for the enjoyment and sociability of the trip. He considered both trips to be pleasure trips. In addition, according to the CO, he did these favors because he felt friendly towards Sheriff Garvey. He did not expect or receive any raise or promotion for having provided such favors. (In fact, the CO did not receive any raises or promotions while working at the Jail.)

18. By using one of his own Jail employees to assist him in moving refrigerators, where that assistance involved approximately fifteen hours of that employee's time and approximately 575 miles on that employee's vehicle, Sheriff Garvey entered into a significant private relationship for his personal benefit with one of his own Jail employees. This conduct would cause a reasonable person knowing these facts to conclude that this employee can unduly enjoy Sheriff Garvey's favor in the performance of his official duties. Therefore, Sheriff Garvey violated G.L. c. 268A, §23(b)(3).[4/]

19. The Commission acknowledges that Sheriff Garvey was not aware that his actions in hiring five

Jail maintenance employees to do work at his private residence could constitute a violation of §23(b)(3), and that he took steps to avoid any violation by insisting that those employees do that work on their "personal time," and by paying them by check at a reasonable rate. As stated above, however, given the significant and simultaneous public and private relationships, in the Commission's view the only way for Sheriff Garvey to have avoided violating §23(b)(3) regarding these actions was to disclose this conduct in accordance with §23, which provides in pertinent part:

> It shall be unreasonable to so conclude [i.e., that any person can improperly influence or unduly enjoy the state employees' favor] if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.[5/]

20. Similarly, the Commission acknowledges that Sheriff Garvey was not aware that his private dealings with the CO could constitute a violation of §23(b)(3). He believed that any assistance he was receiving was based on friendship and that the employee's interest in making the trips was for pleasure and sociability. Again, however, avoidance of that violation arising from the simultaneous public and private relationships would, in the Commission's view, have required public disclosure as explained above.

21. In view of the foregoing violations of G.L. c. 268A, 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 Sheriff Garvey:

> 1. that he refrain from using Jail employees for any personal purposes;[6/] and
>
> 2. that Sheriff Garvey waive all rights to contest the findings of facts, conclusions of law, and terms and conditions contained in this Agreement in this or in any related administrative or judicial proceeding in which the Commission is or may be a party.

Date: August 22, 1990

[1/]This appears to be a reasonable rate for these services.

[2/]The Commission notes that the written Jail policy requires all personal time requests to be submitted in advance. Also, the monthly personnel reports for October and November 1988 to the County Commissioners enumerating, among other matters, personal time taken, did not reflect these hours; however, the information on the personal time forms does appear to have been recorded on the employee calendars kept at the jail. (Jail officials explained that pursuant to the instructions of the County Commissioners, personal time taken in less than one half day amounts is not reported until the end of the year.) In addition, these employees did not account for their whereabouts on the official Jail log for the occasions on which they left work during normal hours to work on Sheriff Garvey's fence. (Jail officials explained that the policy requiring all employees to use the log is applied less strictly to maintenance employees, and in fact a review of the log indicates that maintenance vehicles were not rigorously logged when exiting from or returning to the Jail.) Finally, these employees did not "punch out" on the time clock for these hours. (Jail officials explained that the time clock had been put into operation in October 1988 and employees frequently were forgetting to use it as of that time.)

[3/]**In the Matter of George Keverian**, 1990 SEC 460.

[4/]This appearance of impropriety is underscored by the fact that the CO served at the pleasure of Sheriff Garvey, and, therefore, could be terminated for any reason. It is also exacerbated by the fact that Sheriff Garvey did not pay the CO for his time or for the mileage on the vehicle. (We note, however, that even had he paid a fair rate for these services, that would not have eliminated the appearance of impropriety. **See, e.g., In the Matter of George Keverian**, 1990 SEC 460 (in a Disposition Agreement the Commission found it was an appearance of impropriety for the Speaker to hire his own maintenance staff to do work at his house, notwithstanding the fact that he appeared to have paid them at a reasonable rate for their time.) See also the discussion above regarding Sheriff Garvey's hiring his own maintenance staff to construct a fence around his tennis court.)

[5/]The Commission notes that this disclosure must be in writing and must be kept as a public record. For example, Sheriff Garvey could have made a written disclosure to the County Commissioners to be maintained in its public files. Alternatively, Sheriff Garvey could have made his written disclosure to the Ethics Commission which maintains various disclosures

as public records.

6/Where Sheriff Garvey paid the employees who worked on his fence what appears to be a reasonable rate, where the employees' assistance on that fence and in moving refrigerators involved a relatively small amount of time and expense, where there is no indication of any explicit pressure having been exerted, and where Sheriff Garvey showed good faith and was unaware that his actions would constitute a violation of G.L. c. 268A, the Commission has decided not to impose a fine for these violations.

Malcolm FitzPatrick
323 Great Road
Stow, MA 01775

RE: PUBLIC ENFORCEMENT LETTER 91-1

Dear Mr. FitzPatrick:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that, as a Stow Selectman, you participated in particular matters relating to the Apple Farm development, an affordable housing project to be built at 328-330 Great Road, Stow. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. However, in view of certain mitigating circumstances (also discussed below), the Commission does not feel 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 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, you do not admit to the facts and law discussed therein. The Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

A. Time Period Before You Became a Selectman[1/]

1. On March 4, 1988, Brian Lafferty, president of the Apple Farm Development Corporation, filed with the Stow Town Clerk an application for a comprehensive permit for Apple Farm, an affordable housing development including subsidized multi-family condominiums. The application proposed to construct 36 townhouse style units on approximately 11.5 acres of land. This land comprises lots 48, 49 and 50 on the Stow Assessors map. A house and garage presently exist on lots 49 and 50, respectively. Apple Farm was to be the first condominium development in Stow. The comprehensive permit application was filed before the town adopted regulations establishing a procedure for handling such permit applications.[2/] The comprehensive permit application form provided, among other things, that, "owners of property directly opposite on any public or private street(s) or way(s) as they appear in the Assessors records, shall be considered a direct abutter."

2. According to the comprehensive permit application, approximately seven acres of Apple Farm's site would remain as natural open space under post development conditions. You maintain that five of these acres are wetlands. The application represented that there would be no significant changes in drainage patterns, no introduction of pollutants into surface or ground water, and no air quality degradation as a result of traffic generated by the development.

3. You and your wife reside at 323 Great Road, across the street from lots 49 and 50 of Apple Farm's proposed site, separated from Great Road by a tree covered bicycle/pedestrian easement and two lots (36 and 38) owned by the Union Evangelical Church. Your property is depicted on lot 26 of the Assessors map. This property is within 300 feet of lots 49 and 50.

You also own a perpetual right-of-way over a strip of land on lot 36, which is adjacent to your lot 26. The right-of-way runs over a paved parking lot, and leads to the driveway to your home. You use this right-of-way as the primary access to your property.[3/]

4. While the Apple Farm development as a whole will occur on three lots, the bulk of construction will occur on lot 48, the site of the proposed condominiums. Lot 48 is behind lots 49 and 50, which border Great Road. There is a significant drop in elevation between lot 48 and your property. The developer proposed to build an entrance to Apple Farm that would be approximately 25-50 feet wide and located on lot 49. When finished, the entrance to Apple Farm would be within 50 feet of your right-of-way on Great Road.

5. On March 10, 1988, the Stow Board of Zoning Appeals (ZBA) forwarded a copy of Apple Farm's application to various town boards, including the Conservation Commission and Selectmen. The ZBA requested all boards to review the application and

submit written comments with documentation for any exceptions taken to the application. The ZBA scheduled the public hearing on Apple Farm for April 4, 1988. You received advance notice of this hearing by certified mail as a party in interest pursuant to G.L. c. 40A, §11 and G.L. c. 40B, §21. You were sent this notice because the Stow Assessor's office determined that you were one of the "abutters" within 300 feet of lots 49 and 50 of Apple Farm.[4/]

6. Between March 24th and April 4, 1988, various town boards and employees submitted letters to the ZBA regarding Apple Farm. These included the Selectmen, Police Chief, Board of Health, and Planning Board. While many letters expressed reservations and/or conditions recommended by these boards, most generally supported the application.

7. On April 4, 1988, the ZBA held a public hearing on the Apple Farm Comprehensive Permit Application. You did not attend the public hearing but your wife, Elizabeth FitzPatrick, did. Your wife submitted a petition to the ZBA which was prepared and signed by you. The petition requested that the ZBA determine that the proposed density of the project was too great for the site. It states, "the burden of this increased intensity of land use does not fall on the present owner of the land nor the developer, but on the surrounding residents and more generally on the residents of Stow." The petition requested that the project be thoroughly reviewed by professionals and recommended that the ZBA wait until the May town meeting approved a housing partnership to review the comprehensive permit application. It further recommended that the ZBA request $5000 from the Selectmen to fund a study of Apple Farm's comprehensive permit application.

8. Although the comprehensive permit application was deficient at the April 4, 1988 ZBA hearing because it failed to contain a site approval letter from the MHFA, after discussion between town counsel and the developers attorney, the ZBA executed an extension agreement with the developers which provided that ". . .the hearing of the Board on the application of Apple Farm shall be closed as of April 4, 1988 provided, however, that Apple Farm agrees to grant the Board an extension of the Board's 40-day deadline within which the Board must draft a decision under c. 40B. Said 40-day period shall commence only upon the submission to the Board of a site approval letter.[5/] Further the parties agree that the time for submitting additional materials by other town Boards shall be similarly extended." The meaning of this agreement became the subject of dispute between the developers and the town while Apple Farm was pending.

9. By letter dated April 13, 1988 and addressed "To whom it may concern," Selectmen Ken Farrell and James Dunlap voiced their support for Apple Farm's MHFA funding application. The MHFA issued a letter to the Selectmen on April 20, 1988 which requested comments relating to the developer's efforts to negotiate the project with the community and any information and issues related to the project. By letter dated April 29, 1988, Selectmen Farrell and Dunlap submitted to MHFA numerous letters from other town boards concerning Apple Farm's application. They also submitted the citizen's petition that your wife had submitted to the ZBA. The Selectmen's cover letter to MHFA represented that the town boards supported the concept of Apple Farm while identifying "concerns and issues" that remained to be addressed. The Selectmen also stated they had voted to support the concept of affordable housing submitted by Apple Farm Development, Inc.

B. Time Period After You Became a Selectman

10. You were elected to the Stow Board of Selectmen in early May, 1988. Between May and October, 1988, you participated in your official capacity in various particular matters related to Apple Farm, as described below.

11. At a joint meeting of the town Boards on May 12, 1988, you solicited detailed information about Apple Farm's comprehensive permit application and advocated that the developer be required to obtain a hydrogeological study of the site.[6/] You proposed that the ZBA deny the application based on the need for additional information.

12. Town Counsel Jacob Diemert vaguely recalled a discussion with you after this meeting in which you may have represented that you were not an abutter to Apple Farm and inquired whether you had a conflict of interest regarding Apple Farm. He recalled telling you to distinguish when you were acting as spokesman for the Selectmen and when you were only speaking for yourself. He also indicated that he customarily advises municipal officials to submit written requests for opinions and that opinions may be sought from the State Ethics Commission. Your recollection is that you received no such advice from attorney Diemert. You did not submit a written request for an opinion to town counsel nor to the Commission.[7/]

13. On May 17, 1988, the Board of Selectmen appointed fourteen residents to the Stow Housing Partnership. The Selectmen also appointed you to this

board.[8]

14. You also attended a ZBA meeting on May 18, 1988. This meeting was convened under the open meeting law. Correspondence sent by the ZBA to the Selectmen on April 28, 1988 indicates that, at that time, the ZBA intended the May 18th meeting to be open for public comments. At the beginning of the May 18th meeting the ZBA Chairman read a statement as to the issue of whether the meeting would be public.[9] In any event, it is undisputed that you participated in this meeting. Brian Lafferty asked you whether you were speaking as a Selectman or as a resident of Stow, however, ZBA Chairman Robert Byrd stated that he recognized you as a Selectman.

You stated that the geology of the site was important to know, and that construction might cause ground water to be drained. You suggested that the development could pump neighboring wells dry and contaminate ground water. You read a list of 22 questions related to Apple Farm. Among other things, you asked what consideration would be given by the town as by property tax abatements to property owners who would be impacted by the development.[10]

15. Town Counsel Robert Ruzzo and Selectman Wayne Erkinnen indicated that the May 18, 1988 ZBA meeting was, in effect, a working meeting of town boards, and that it was not open for public comment. You testified that, in your view, you participated in this meeting as a private citizen, not in your official capacity as a Selectman. You testified that you were not aware of any conflict of interest at that time, but spoke as a private citizen to avoid embarrassing the other Selectmen. You acknowledged, however, that you had a sense that Brian Lafferty was suggesting that you had a possible conflict of interest at that meeting.

16. At the May 24, 1988 Selectmen's meeting, you suggested that the Selectmen should withdraw their support for Apple Farm based on the project's density. While you thought the site was appropriate for single family homes, you opposed condominiums because a stigma would attach to those who lived there in that, insofar as the development was not consistent with the style of housing in the surrounding neighborhood, it would be apparent that the development contained affordable housing.

17. As a result of the May 24, 1988 Board of Selectmen's meeting, you sent a letter to town counsel by fax from Selectman Erkinnen's private office. Both Selectmen Dunlap and Erkinnen knew and consented to your sending this letter, which sought advice about Apple Farm and the comprehensive permit process generally and the application of G.L. c. 40A, §11 and G.L. c. 40B, §21. The letter was not sent on Board of Selectmen's stationery. You signed the letter in your capacity as a Stow Selectman.

18. Sometime in May or June, 1988, Selectman Dunlap gave you a copy of the Commission's Fact Sheet titled "Municipal Officials: Don't Vote on Matters Affecting An Abutting Property." This Fact Sheet states, in part,

> The conflict of interest law states that a municipal official may not participate (by voting, discussing or otherwise acting) in any matter which affects his or her own financial interest. The Ethics Commission has ruled that it would presume that municipal officials may not take action in their official capacity on matters affecting property which abuts their own unless they can clearly demonstrate that they do not have a financial interest in the matter.

The Fact Sheet states that the Commission issued a public letter critical of a Selectman who participated in negotiations for the towns purchase of a private landfill located directly across the street from his home. This portion of the Fact Sheet was highlighted in pink.

19. On June 10, 1988, the MHP informed Lafferty that his application had been accepted for funding subject to certain conditions.

20. On or about June 15-16, 1988, you met with Sarah Robertson, MHP's regional representative to the Stow Housing Partnership, to ascertain whether the Stow Housing Partnership should be reviewing Apple Farm. You forwarded copies of various documents related to Apple Farm to Robertson by letter dated June 21, 1988. You signed the letter as a Stow Selectman and Housing Partnership member. You acknowledged that you contacted Robertson in your capacity as Selectman and Stow Housing partnership member.[11]

21. You participated in the June 21, 1988 Board of Selectmen's meeting by advocating that a $3000 grant be administered through the Selectmen and Stow Housing Partnership to review Apple Farm. Selectmen Dunlap and Erkinnen felt that the Stow Housing Partnership should not be involved in this review, since the housing partnership was created after Apple Farm had been reviewed by various town boards.

You also were reappointed as an associate member of the Stow Conservation Commission on

June 21, 1988. Associate members have no voting rights.

22. On July 7, 1988, you wrote to Amy Anthony, co-chairman of MHP, and stated that " ... the Selectmen have received a MAP grant to analyze the project and have appointed a local housing partnership. To date, no negotiations have occurred between the developers and the ZBA." The letter asks, "believing negotiations to be crucial is ... there any legal reason why the local Housing partnership should not be negotiating with the developer ...?" You signed this letter Malcolm FitzPatrick, Stow Selectman and member of Stow Housing Partnership.[12/]

23. By letter dated July 15, 1988, the MHP informed Brian Lafferty that a subsidy had been set aside for Apple Farm under the HOP program. On July 20, 1988, the MHFA issued a site approval letter for Apple Farm. This started the ZBA's time clock running for the Apple Farm decision. Per agreement with the developer, the ZBA had 70 days to make a decision.

24. On August 16, 1988, you participated in a Selectmen's meeting and posed questions regarding affordable housing issues generally and Apple Farm in particular. The minutes of this meeting state, "Mr. Diemert (Town Counsel) said that if Mr. FitzPatrick wished certain conditions be included in a decision he should suggest same."

25. As a result of the aforementioned meeting, you submitted a letter to the ZBA which requested that the ZBA seek additional time from the developers in which to address issues related to Apple Farm. You testified that town counsel specifically advised you to send this letter on Board of Selectmen's stationery. Town counsel indicated that he did not advise you to do this specifically but he could understand how you might have interpreted his remarks that way. Town Counsel indicated that he advised you to address your concerns to the ZBA directly and in a fashion that made it clear that you were speaking for yourself only, not the Board of Selectmen as a whole. You recall that Town Counsel told you to make it clear you were speaking for yourself as a single Selectman.

26. On August 19, 1988, the ZBA issued its decision on Apple Farm's comprehensive permit application. The decision allowed the application with various conditions and was filed with the town clerk. Pursuant to G.L. c. 40A, §17, any appeal of this decision had to be filed on or before September 9, 1988. It appears that you had the right to appeal the decision as a "person aggrieved" within the meaning of G.L. c. 40A, §17.[13/]

Shortly before August 30th, you met with a informal group of neighbors who had previously voiced objections to Apple Farm. You discussed appealing the ZBA's decision and the cost of that process. You testified that it was the consensus of this group that the town should bear this expense and that the Board of Selectmen should appeal the ZBA's decision. Your wife typed a list of eight grounds to appeal the decision which were developed at the neighborhood meeting. You expected this group to present the list at the upcoming August 30, 1988 Selectmen's meeting.

28. On August 29th and 30, 1988, you consulted acting Town Counsel Paul Killeen concerning the Ethics Commission's ruling on abutters and the rule of necessity. You sought this advice in anticipation of the Selectmen's August 30, 1988 meeting, at which the neighbors and opponents of Apple Farm intended to request that the Selectmen appeal the ZBA's decision. As a result of your conversation with acting town counsel, you understood that you could participate in matters related to Apple Farm because you were not an abutter and did not have a conflict of interest. You also understood that the rule of necessity could be invoked to obviate any existing conflict of interest. Attorney Killeen faxed you copies of the Commission's Fact Sheets on Abutters and the Rule of Necessity.

29. Acting Town Counsel Killeen recalled that you telephoned him on several occasions between August 29-30, 1988. He testified that, initially, you asked a series of abstract questions generally related to whether someone who was located across the street and several lots removed from a particular site was an "abutter." Attorney Killeen recalled that he advised you of the definition of "abutter" in Black's Law Dictionary.[14/] He also recalled that you disclosed additional facts as your conversation progressed. You eventually acknowledged that you were calling with regard to Apple Farm, and that you had received notice as a party in interest to the comprehensive permit application. Attorney Killeen recalled that he advised you that the Commission would probably consider you to be an "abutter" to Apple Farm. He also recalled that he did not advise you to invoke the rule of necessity, but stated that "caution was due" and, in his view, the circumstances did not present a true necessity. You deny receiving this advice.

30. On August 30, 1988, the citizens group appeared at the Selectmen's meeting and asked the Selectmen to appeal the ZBA's decision. You acknowledged that a question of your possible conflict of interest had been raised and asked that the board

invoke the Rule of Necessity to permit your participation. You and Selectmen Dunlap voted to invoke the rule.[15/] You moved that the Selectmen hire outside counsel to appeal the ZBA's decision. Selectmen Dunlap did not favor the motion. Eventually you and Selectmen Dunlap voted to hire outside counsel to determine whether the ZBA's decision provided the necessary protection to the town.

31. The following day, you scheduled a Selectmen's meeting at the law offices of McGregor, Shea & Doliner to review the ZBA's Apple Farm decision. Selectmen Erkinnen and Dunlap did not attend. You appeared briefly at Attorney McGregor's office then left without retaining counsel to review or appeal the ZBA's decision.

32. On September 5, 1988, the Selectmen again voted to invoke the Rule of Necessity and reversed the August 30th vote to hire outside counsel. This time Selectman Erkinnen participated in the vote. You voted against this motion.

33. On or about September 15, 1988, the developers filed a Notice of Intent for Apple Farm with the Stow Conservation Commission. According to you, you participated as a resident in the October 4, 1988 and October 18, 1988 Conservation Commission meetings on Apple Farm. You also contacted, upon the recommendation of the Chairman of the Conservation Commission, the Conservation Commission's consultant, BSC Engineering (BSC),[16/] and discussed its review of Apple Farm's Notice of Intent. You identified yourself as a resident of Stow, and also as a selectman and Conservation Commission Associate member when you contacted BSC.

BSC did not submit a report, citing an alleged conflict of interest. You did not sign the Conservation Commission's Order of Conditions on Apple Farm's Notice of Intent.

II. The Conflict Law

As of May, 1988, you were a Selectman for the Town of Stow and as such, a municipal employee under G.L. c. 268A, §1(g). You were subject to c. 268A generally, and, in particular, to §19. Section 19 prohibits a municipal employee from participating[17/] in particular matters[18/] in which, among others, he or a member of his immediate family[19/] has a financial interest.[20/] The concern of this section is that the objectivity and integrity of municipal employees can be compromised if they act on matters affecting their own financial interests. You should be aware that the Massachusetts Supreme Judicial Court has determined that participation involves more than just voting, and includes any significant involvement in a discussion leading up to a vote. **See, Graham v. McGrail**, 370 Mass. 133, 138 (1976). In that case, the Court advised that, "the wise course for one who is disqualified from all participation is to leave the room." **Id.**

As discussed briefly above, the Commission's precedent establishes that "parties in interest" as defined by G.L. c. 40A, §11 and "parties aggrieved" within the meaning of G.L. c. 40A, §17 are presumed to have a financial interest in the particular matter as to which they are "parties in interest" or "parties aggrieved." **See, EC-COI-89-33.** The Commission established this presumption based on the fact that when one's property rights stand to be significantly affected, the values of those rights also stand to be affected and thus, one's financial interest is implicated. **Id.** Where the Commission has found a public official's financial interest to be slight or non-quantifiable, however, the Commission has declined to impose a fine. **See, In the Matter of Marguerite Coughlin, supra,** where planning board member voted on variance application of property which abutted her own at one corner, the Commission found this violated G.L. c. 268A, §19 but did not impose a fine. Similarly, the Commission, declined to initiate adjudicatory proceedings **In the Matter of George Prunier, Public Enforcement Letter 88-1,** where the evidence suggested that Mr. Prunier placed the town's interest before his own by advocating for the continued operation of a landfill across the street from his home. The Commission examined the evidence adduced during this preliminary inquiry in light of these principles.

The ZBA's decision on Apple Farm's comprehensive permit was a particular matter. Similarly, each Board's decision related to this project was a separate particular matter as was each state agency's decision with regard to the funding of the project. You presumably had a financial interest in these particular matters as a party in interest or as a party aggrieved. Absent evidence sufficient to rebut the presumption, participation is prohibited.[21/] Although the evidence on this question is conflicting, the Commission concludes that is not sufficient to rebut the presumption that you have a financial interest in Apple Farm. (Indeed, even if you were not a "party in interest" or a "party aggrieved," for the reasons discussed below the Commission would conclude as a property owner within 300 feet of Apple Farm, you did have a reasonably foreseeable financial interest in these particular matters.)

While the topography of your property and that of the Apple Farm site suggest that there will be

minimal, if any, visual impact on you, the evidence indicates that the anticipated traffic increase from this project is likely to affect adversely your property. This adverse impact would result both from an increase in the volume of cars, less than 1%, travelling on Great Road and from the location of the entrance to Apple Farm within 50 feet of your right of way. You would also be subject to adverse noise and dust during construction. The potential hazards associated with this proposed entrance and the increased inconvenience associated with a heightened traffic flow are reasonably likely to diminish the value of your property. Moreover, where you personally opined that the values of surrounding properties are likely to decline, it is reasonable to infer that, if you were correct, your property value may also be adversely affected from the attendant declines in surrounding property values. Therefore, the Commission concludes that you have a financial interest in Apple Farm and you were prohibited from participating in your official capacity in any particular matters related to this project.[22/]

The Commission concludes that there is sufficient evidence to find reasonable cause to believe that each of the actions enumerated above constitutes participation in your official capacity in Apple Farm, in violation of G.L. c. 268A, §19.[23/] Your violations are aggravated by the fact that you appear to have been on notice, at least as early as May 18, 1988, that you might have a conflict of interest relating to Apple Farm. You continued to participate notwithstanding this knowledge. Ordinarily the Commission would view these facts, if proven, as evidence reflecting a serious neglect of the conflict law, and would impose a fine. However, your violations are mitigated by the following circumstances.

First, the evidence suggests that there was substantial confusion among town officials regarding how to process Apple Farm's comprehensive permit application. In this context, some of your official acts (e.g. your May 26, 1988 letter to town counsel and your comments at the August 16, 1988 selectmen's meeting) addressed the comprehensive permit process generally and did not target Apple Farm. Such actions may be permissible pursuant to G.L. c. 268A §19(b)(3).[24/] Second, your actions had no impact on the town's processing of Apple Farm. The ZBA had 70 days from the issuance of the July 20, 1988 site approval letter in which to issue its decision on Apple Farm. The ZBA issued its decision well within this time frame. Third, the Commission is persuaded that your actions were not motivated by self interest but rather by your perception of your duty as a selectmen to represent the interests of the abutters to Apple Farm and the town as a whole. The evidence indicates that the project provoked fierce opposition among a small but vocal group of concerned citizen You perceived it as your duty as the electe representative of this group to represent their interests. While the Commission rejects your contention that you had no financial interest in Apple Farm, the Commission is persuaded that this was not the motivating factor for your actions. Finally, while the Commission does not endorse your failure to contact your brother selectmen and advise them of your plans for the August 30th meeting, given Selectman Erkinnen's persistent abstinence on affordable housing issues, on the surface it appears that the rule of necessity could have been invoked properly at that meeting.[25/]

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 future compliance with the conflict of interest law.[26/] This matter is now closed. If you have any questions, please contact me at 727-0060.

Date: August 13, 1990

[1/]You were an associate member of the Conservation Commission from 1984 to present. Your activities discussed below occurring before you became a selectman but while you were an associate member of the Conservation Commission, do not suggest any violations of G.L. c. 268A.

[2/]Apple Farm sought to provide affordable housing through the Massachusetts Homeownership Opportunity Program (HOP). The developer sought funding approvals from both the Massachusetts Housing Partnership (MHP) and the Massachusetts Housing Finance Agency (MHFA) to construct Apple Farm. While the comprehensive permit application was pending before the Stow ZBA, Apple Farm's requests for state funding and site approval were pending before MHP and MHFA.

[3/]You own a second right-of-way on the opposite side of lot 26, leading to Crescent Street. This right-of-way is unpaved. You use this once or twice a year.

[4/]General Laws c. 40B, §21 sets forth the provisions by which developers may obtain comprehensive permits, and expressly provides that the "provisions of §11 of c. 40A shall apply to all public hearings held by boards of appeals on comprehensive permits applications." General Laws c. 40A, §11

establishes the notice requirements for public hearings held by boards of zoning appeals. It defines "parties in interest" requiring notice of permit applications as "the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within 300 feet of the property line of the Petitioner as they appear on the most recent applicable tax list ...". You acknowledged that your property is within 300 feet of Apple Farm. You have maintained, however, that you are not an abutter to Apple Farm because your respective properties are not contiguous. You also argue that you are not an abutter to an abutter within three hundred feet of the property line of Apple Farm because there is a street between the property you abut and Apple Farm. In other words, you are asserting that the property you abut is not an abutter because it is not contiguous to Apple Farm, therefore, you are not an abutter to an abutter within 300 feet. We are not aware of any precedents that deal with this issue. Clearly, the town considered you to be a party in interest, because you were sent notice. The Commission's precedent establishes that "parties in interest" as defined by G.L. c. 40A, §11, are presumed to have a financial interest within the meaning of G.L. c. 268A, §19 in the particular matter as to which they are parties in interest, regardless of whether or not the financial interest is in fact substantial and whether or not it is actually realized. **See, In the Matter of Marguerite Coughlin**, 1987 SEC 316, 318 n. 3, citing **EC-COI-84-96.**

Even if you are not a "party in interest," you would still have a financial interest in the matter if it is reasonably feasible that your property's value would be affected by that partiuclar matter. **EC-COI-89-33; 84-96.**

[5/] the 40-day deadline was subsequently extended to 70 days.

[6/] The developer, through his attorney, submitted a letter to town counsel which objected to the May 12, 1988 joint boards meeting as a breach of the agreement executed after the April 4, 1988 ZBA public hearing. The developer took the position that the ZBA's public hearing was closed on April 4, 1988, and the Extension Agreement did not allow further public comment on Apple Farm. Town counsel invoked the open meeting law as a basis for the ZBA to conduct further public meetings on Apple Farm.

[7/] You testified that you sought Town Counsel's advice at some point and that you said, "I hope you will provide me with advice if there's any conflict." You recalled that Town Counsel said, "I'm here to advise the selectmen but I can't tell you that." When you were subsequently interviewed by Attorney Roy Bourgeois on this subject, you stated, "Jake had said earlier in the summer I'd better be careful about conflict of interest but that's the only advice I got on it. You've got to be careful when wearing your selectmen's hat that you're not in conflict of interest."

[8/] You resigned from this board in April, 1989. General Laws c. 268A, §21A prohibits a member of a municipal board [e.g., a Board of Selectmen] from being appointed to a position under the supervision of that board, unless an appointment has first been approved at an annual town meeting. Your appointment to the Stow Housing Partnership appears to violate G.L. c. 268A, §21A, because the selectmen appointed the SHP and determined its authority, and the town meeting did not approve expressly your appointment to the SHP. You were not aware of this when you were appointed to the SHP, in part because you relied on a handbook for local housing partnerships published by the Massachusetts Housing Partnership before June, 1988. That handbook states that it was appropriate for Selectmen to sit on local housing partnerships, and does not discuss the possible limitations on members of local housing partnerships under the conflict of interest law. A similar handbook published in June, 1988 now makes it clear that members of local housing partnerships are subject to the Conflict of Interest law.

[9/] The evidence is conflicting as to whether this statement was read or not. According to you the statement was read and it was stated that the meeting would be open to public comment. You provided us with two copies of the informational statement made by the Chairman of the ZBA. One statement says that the board had elected to open the meeting to public comment the other statement says that the board may elect to open the meeting to the public.

[10/] During the Commission's preliminary inquiry, you testified that you thought some of the abutting properties (e.g., lots 46, 47, 51, 52, and 53) would decrease in value as a result of Apple Farm. You did not think that your own property would decrease in value.

[11/] It appears that your conversations with Robertson had no impact on MHP's treatment of Apple Farm.

[12/] By letter dated August 17, 1988, MHP Director of Regional Operations Peter Gagliardi responded to your July 7th letter. In short, he wrote that when the Apple Farm project entered the HOP competition, it

had the endorsement of the Board of Selectmen. The Selectmen represented the town in the initial negotiations, review and approval of this project since the Housing Partnership had not been established when the comprehensive permit application was submitted to the ZBA. The letter observed that the partnership's authority and role was determined by the Board of Selectmen, and that the Stow Housing Partnership should address its concerns regarding the Apple Farm comprehensive permit to the Stow ZBA.

You construed this letter to mean that the Board of Selectmen were responsible for ensuring that any outstanding questions related to Apple Farm were resolved.

13/There is a rebuttable presumption that abutting property owners entitled to receive notice of a public hearing under G.L. c. 40A, §11, are "person[s] aggrieved" within the meaning of G.L. c. 40A, §17, and thus, have a right to appeal the ZBA's decision. **See, Paulding v. Bruins**, 18 Mass. App. Ct. 707, 709 (1984). You do not believe that you qualified as a "person aggrieved" under G.L. c. 40A, §17, and you maintain that you had no right to appeal the ZBA's decision on Apple Farm's comprehensive permit application. The Commission rejects this position because you appear to have "a plausible claim of a definite violation of a private right resulting from" the ZBA's decision. **See, Prudential Ins. Co. of America v. Board of Appeals of Westwood**, 18 Mass. App. Ct. 632, 633 (1984).

14/Black's Law Dictionary (5th ed.) provides the following definition for the term "abutter": "One whose property abuts, is contiguous, or joins at a border or boundary, as where no other land, road or street intervenes."

15/Selectmen Erkinnen left the room when the citizens group announced that they sought action on Apple Farm. Selectman Erkinnen routinely abstained from particular matters related to affordable housing projects because he believed he had a conflict of interest in these matters. While Selectman Erkinnen was advised that the Rule of Necessity was invoked to permit his participation, he nonetheless declined to participate.

16/Conservation Commission Chairman Dwight Sipler said that it was possible that he suggested you contact BSC, however, Mr. Sipler could not recall specifically making that recommendation.

17/"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.

18/"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.

19/"Immediate family," the employee and his spouse, and their parents, children, brothers and sisters.

20/"Financial Interest" the term "financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. **See, Graham v. McGrail**, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. **See, EC-COI-84-98.** The interest can be affected in either a positive or negative way. **See, EC-COI-84-96.**

21/**See Public Enforcement Letter 88-1, EC-COI-84-96.**

22/Your financial interest is underscored by your apparent standing to appeal the ZBA's decision as a "person aggrieved" under G.L. c. 40A. Thus, in addition to the likely effect Apple Farm would have on your property value, you had an additional financial interest in the selectmen's August 30, 1988 vote to hire outside counsel. If the town bore the cost of an appeal from the ZBA's decision, you would not have to pay for an appeal yourself. The evidence suggests that you shared this interest with the other abutters. You do not, however, believe that you were a "person aggrieved" by the ZBA's decision granting Apple Farm's comprehensive permit.

23/You have admitted that you acted in your official capacity as a Selectman and/or a member of the Stow Housing Partnership on all occasions before August 30, 1988 except the May 18, 1988 ZBA meeting. The minutes of this meeting suggest that you were recognized to be participating in your official capacity, while you expressly identified yourself as a resident of Stow. Similarly, you maintain that you did not participate in your official capacity in the Conservation Commission meetings on Apple Farm's Notice of Intent, and that you did not contact BSC

Engineering in your official capacity. The fact that you were an associate Conservation Commission member without voting rights does not automatically mean that you could not act in an official capacity regarding Apple Farm. Nevertheless, the Commission does not need to resolve the question of whether your participation in these matters was in an official capacity given your admitted official participation in other particular matters related to Apple Farm.

24/Section 19(b)(3) provides an exemption to the conflict law if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

25/Selectman Erkinnen perceived that he had a conflict of interest as a director of the Stow Community Housing Corporation, a non-profit corporation engaged in developing affordable housing in Stow. He felt that the projects proposed by this corporation could arguably be deemed to be competitors of Apple Farm and other affordable housing projects. Thus, he routinely abstained from these matters. The Stow Community Housing Corporation had a project, called Pilot Grove Hill, pending before the ZBA at approximately the same time that Apple Farm was pending. Our investigation determined that these projects were not competitors on the state level because they sought different sources of state funding. However, the Commission generally defers to local officials to determine whether local factors render two entities "competitors" for purposes of the conflict of interest law. **See, EC-COI-86-13, 87-1, 87-31 note 5.** Accordingly, it appears that the rule of necessity could have been invoked at the August 30th meeting had proper procedural safeguards been followed.

26/The Commission could have imposed a civil fine of up to $2,000 for each violation of the conflict law.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 394

IN THE MATTER
OF
JOHN LARKIN, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John Larkin, Jr. (Mr. Larkin) pursuant to Section 5 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, 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. Larkin while he was the District Supervisor of the Red Line for the Massachusetts Bay Transportation Authority (MBTA). The Commission has concluded its inquiry and, on April 18, 1990, by a majority vote found reasonable cause to believe that Mr. Larkin violated G.L. c. 268A, §6.

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

1. At all times here relevant, Mr. Larkin was an employee of the MBTA. As an MBTA employee, Mr. Larkin is a state employee as defined in §1(q) of G.L. c. 268A.

2. Mr. Larkin has a daughter, Jennifer M. Larkin (Jennifer), who at all times here relevant was employed by the MBTA. Jennifer is a member of Mr. Larkin's immediate family as defined in G.L. c. 268A, §1(e). Jennifer began work with the MBTA as a part-time Blue Line guard in May, 1986. Jennifer subsequently became a full-time Blue Line guard and, in March, 1987, transferred from the Blue Line to the Red Line.

3. In 1987, Mr. Larkin was the District Supervisor of the Red Line, a position he had held since 1985. Mr. Larkin was appointed to this position by the MBTA General Manager.1/ As Red Line District Supervisor, Mr. Larkin was responsible for the supervision of all Red Line employees and was Jennifer's immediate supervisor.2/

4. In March, 1987, acting in response to an educational seminar held by the Commission, Mr. Larkin submitted to his immediate superior, MBTA Rail Lines Superintendent John Killgoar (Killgoar) a memorandum advising Killgoar that Jennifer was transferring to the Red Line and asking Killgoar to "take charge of" the matter and to forward a copy of the memorandum to the "proper officials." The memorandum stated that it was being made in compliance with the conflict of interest law, G.L. c. 268A. Killgoar, in turn, forwarded a copy of Mr.

Larkin's memorandum to MBTA Chief Transportation Officer Paul J. Lennon (Lennon) along with a cover memorandum in which Killgoar stated that "any discipline and/or promotions (not mandated by seniority) which involve [Jennifer] will be performed at the superintendent's level."[3] Mr. Larkin's March 1987 memorandum to Killgoar was the only written disclosure made by Mr. Larkin concerning Jennifer's MBTA employment. During the period here relevant, Mr. Larkin personally made no disclosures concerning Jennifer's MBTA employment to anyone other than Killgoar. Other than Killgoar's memorandum to Lennon, the MBTA management took no action in response to Mr. Larkin's March, 1987 written disclosure.

5. On May 29, 1987, Jennifer was promoted to the position of full-time motorman on the Red Line. Jennifer's promotion to the position of full-time motorman and her prior promotion to full-time guard occurred on the basis of seniority pursuant to the provisions of the applicable collective bargaining agreement.

6. Candidates seeking promotion to the positions of spare inspector and chief inspector are required to take and pass qualifying examinations which test their knowledge of the MBTA rapid transit line system and MBTA procedures. Those candidates who pass the examination are then evaluated and scored by their supervisor. The candidates receive promotions based upon their combined scores on the examinations and the evaluations. On June 15, 1987, Jennifer took and passed the qualifying examination for the position of spare inspector. Mr. Larkin played no role in the administration or grading of the qualifying examination.

7. It was one of Mr. Larkin's responsibilities as Red Line District Supervisor to do the evaluations of the job performance of Red Line employees who were candidates for promotion to the positions of spare inspector and chief inspector. When Mr. Larkin learned that Jennifer was going to take the June, 1987 examination for promotion to spare inspector, he spoke with Killgoar regarding how Jennifer was to be evaluated in connection with her candidacy for promotion. Killgoar told Mr. Larkin that he (Killgoar) would evaluate Jennifer and that Mr. Larkin should evaluate the other Red Line candidates. Mr. Larkin's participation in the June, 1987 spare inspector candidate evaluation process was not disclosed in advance of that participation to Killgoar's superiors in the MBTA management hierarchy.

8. In late June, 1987, Mr. Larkin did evaluations of all Red Line candidates for promotion to spare inspector, with the exception of Jennifer. On June 30, 1987, Mr. Larkin signed and dated Spare Inspector Rating Sheets scoring thirteen Red Line candidates. At the time Mr. Larkin evaluated the candidates, he did not know their scores on the qualifying examination, but only that they had received passing scores. On July 1, 1987, Killgoar's assistant, Deputy Superintendent of Rail Lines Robert Prince (Prince), who also did not know the candidates' examination scores, evaluated Jennifer and completed a Spare Inspector Rating Sheet for her, which was signed and dated by Killgoar. At the time Prince evaluated Jennifer, Prince had in his possession the rating sheets Mr. Larkin had scored for the other candidates. After Mr. Larkin and Prince evaluated and scored the job performance of the candidates, other MBTA personnel added the candidates' examination scores to the rating sheets and combined them with the supervisors' job performance evaulation scores to yield total scores. On the basis of the candidates' combined scores on the qualifying examination and the performance evaluation, Jennifer was ranked seventh highest of the thirteen Red Line candidates for promotion to spare inspector. Jennifer was promoted to the position of spare inspector on July 19, 1987.

9. In August, 1987, Jennifer took and passed the qualifying examination for promotion to the position of chief inspector. Mr. Larkin did not participate in any way in the administration or grading of the chief inspector qualifying examination.

10. In August, 1987, Mr. Larkin, with the knowledge and approval of Killgoar, evaluated all of the Red Line candidates for promotion to chief inspector, with the exception of Jennifer. Mr. Larkin's participation in the August, 1987 chief inspector candidate evaluation process was not disclosed in advance of that participation to Killgoar's superiors in the MBTA management hierarchy. On August 17, 1987, Mr. Larkin completed, signed and dated Chief Inspector Rating Sheets scoring eleven Red Line candidates. At the time Mr. Larkin evaluated the candidates, he did not know their scores on the qualifying examination, but only that they had received passing scores. On August 18, 1987, Prince, also without knowing the candidates' examination scores, evaluated Jennifer and completed, signed and dated a Chief Inspector Rating Sheet scoring her. At the time Prince evaluated Jennifer, Prince had in his possession the rating sheets Mr. Larkin had scored for the other candidates. After Mr. Larkin and Prince evaluated and scored the job performance of the candidates, other MBTA personnel added the candidates' qualifying examination scores to the rating sheets and combined them with the supervisors' performance evaluation

scores to yield total scores. On the basis of the candidates combined scores on the qualifying examination and the performance evaluation, Jennifer was ranked seventh highest of the eleven candidates who qualified for promotion to chief inspector.

11. There is no evidence that Mr. Larkin at any time discussed the evaluation of Jennifer with Prince, or that Mr. Larkin made any attempt to influence Prince's evaluation of Jennifer. Mr. Larkin did not participate in any way in Jennifer's performance evaluations in June and August, 1987.

12. There is no evidence that, at the time of her promotion to spare inspector and chief inspector, Jennifer did not meet the minimum established requirements for promotion to the positions.

13. There is no evidence that Mr. Larkin's participation in the spare inspector and chief inspector promotion process by evaluating Jennifer's Red Line competitors actually benefitted Jennifer or diminished the fairness of the process. There is no evidence that Jennifer was ever promoted out of order, i.e., ahead of anyone who received a higher combined rating sheet score than she.

14. Section 6 of G.L. c. 268A prohibits a state employee, except as permitted by that section, from participating in any particular matter in which to his knowledge a member of his immediate family has a financial interest. Section 6 requires that a state employee, whose duties would otherwise require him to participate in such a particular matter, advise the official responsible for his appointment (the appointing official) and the Commission in writing of the nature and circumstances of the particular matter and fully disclose the financial interest. Pursuant to section 6, the appointing official is, upon receipt of the employee's written disclosure, required to either assign the matter to another employee or assume responsibility for the matter himself or make a written determination that the financial interest in issue is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case the employee is permitted to participate in the matter. A copy of the appointing official's determination must be filed with the Commission by the appointing official, who must also forward a copy of the determination to the disclosing employee.

15. Jennifer is a member of Larkin's immediate family and had a financial interest, known to Mr. Larkin, in the particular matters of the evaluations of the Red Line employees who were competing with her for promotion to the positions of spare inspector and chief inspector. Accordingly, by evaluating Jennifer's competitors for promotion in June and August, 1987, Mr. Larkin participated in particular matters in which a member of his immediate family had a financial interest. Mr. Larkin's March, 1987 memorandum to Killgoar was not a disclosure to Mr. Larkin's appointing official of the nature and circumstances of the particular matter of the evaluations of Jennifer's competitors for promotion, nor of Jennifer's financial interest in those particular matters, meeting the requirements of section 6, in that it was not made to Mr. Larkin's appointing official and did not disclose the actual particular matters in which Mr. Larkin was to participate.[4/] In addition, a copy of the disclosure was not filed with the Commission by Mr. Larkin as required by section 6. Furthermore, Mr. Larkin at no time received a written determination from his appointing official permitting him to participate in the evaluations of Jennifer's competitors. Therefore, Mr. Larkin violated section 6 of G.L. c. 268A by evaluating Jennifer's competitors for promotion in July and August, 1987.

16. The evidence indicates that Mr. Larkin did not intentionally violate the conflict of interest law.[5/]

Although the Commission is empowered, pursuant to G.L. c. 268B, §4(j)(3), to imposed a fine of up to $2,000 for each violation of the conflict of interest law, the Commission has decided not to impose a fine against Mr. Larkin in consideration of the following mitigating circumstances: (1) Mr. Larkin appears to have made a good faith, albeit ineffective, effort to comply with G.L. c. 268A, §6 by making the March, 1987 written disclosure to his immediate superior; (2) Mr. Larkin apparently did not participate in Jennifer's 1987 evaluations; (3) Mr. Larkin participated in the 1987 evaluations of Jennifer's competitors with the knowledge, and pursuant to the instructions, of his immediate superior; (4) Jennifer's financial interest in the evaluations of her competitors was indirect and may not have been fully appreciated by Mr. Larkin; (5) there is no evidence that Mr. Larkin's participation in the promotion process by evaluating Jennifer's competitors actually benefitted Jennifer or diminished the fairness of the process; and (6) Mr. Larkin cooperated fully with the Commission's investigation of this matter. That the Commission has, however, insisted on a public resolution of this matter reflects the importance that the Commission places on proper compliance with the disclosure and exemption provisions of G.L. c. 268A, §6. As the Commission stated in **In the Matter of John J. Hanlon**, 1986 SEC 253, 255,

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

In view of the foregoing violations of G.L. c. 268A, §6, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings and without the imposition of a fine on the basis of the following terms and conditions agreed to by Mr. Larkin:

1. that Mr. Larkin will act in conformance with the requirements of G.L. c. 268A in his future conduct as a state employee; and

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

Date: September 13, 1990

[1/]Mr. Larkin's appointment as Red Line District Supervisor was "initiated" by the MBTA Superintendent of Rail Lines on March 23, 1985 and "approved" by four MBTA officers, including the Chief Transportation Officer, the Deputy Director and Chief of Staff, and the Director of Operations, before being signed by the MBTA's General Manager on April 16, 1985.

[2/]Mr. Larkin resigned as Red Line District Supervisor in February, 1989 and returned to his former position as a rapid transit line instructor. In his current position, Mr. Larkin does not supervise Jennifer.

[3/]Pursuant to his memorandum to Lennon, Killgoar assumed responsibility for Jennifer's discipline and promotion. Mr. Larkin, however, remained Jennifer's supervisor for routine purposes.

[4/]Although Killgoar was Mr. Larkin's immediate supervisor, he was not Mr. Larkin's appointing official within the meaning of G.L. c. 268A, §6. The appointing official to whom Mr. Larkin was required to make disclosure under §6 was the MBTA's General Manager, who had final authority over Mr. Larkin's appointment as District Supervisor of the Red Line.

[5/]Ignorance of the law is not a defense to a violation of the conflict of interest law, G.L. c. 268A. **In the Matter of C. Joseph Doyle**, 1980 SEC 11, 13; **see also, Scola v. Scola**, 318 Mass. 1, 7 (1945).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 389

IN THE MATTER
OF
ROBERT ST. JOHN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert St. John (Mr. St. John) pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On November 21, 1988, 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. St. John. The Commission has concluded the inquiry and, on July 19, 1989, voted to find reasonable cause to believe that Mr. St. John violated G.L. c. 268A, §19, and to authorize adjudicatory proceedings. On May 25, 1990, the Enforcement Division issued an Order to Show Cause pursuant to that vote.

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

1. At all relevant times, Mr. St. John was employed as a wiring inspector for North Attleboro. As such, Mr. St. John was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Mr. St. John's official duties as North

Attleboro Wiring Inspector include the issuing of wiring permits for electrical work being done in the town, enforcing Section 3L of G.L. c. 143, which requires that wiring permits be obtained for all such electrical work, and inspecting electrical work performed in the town to insure its compliance with the Massachusetts electrical code, 527 CMR 12.00.

3. Between 1985 and 1988, Mr. St. John owned and operated a private business, St. John Electric, which engaged in the installation of electrical wiring in residences and commercial buildings in North Attleboro and other towns.

4. On the following dates, and at the places indicated, Mr. St. John, in his capacity as North Attleboro Wiring Inspector, knowingly allowed St. John Electric to perform electrical work without obtaining a permit:

a. In 1985, for electrical work at lot 68, Mary Ann Way;

b. In 1986, for lot 157 Virginia Avenue, lot 163 Oak Ridge Avenue, lot 270 Oak Ridge Avenue, and lot 64 Mary Ann Way.

5. In 1987, Mr. St. John knowingly allowed St. John Electric to perform electrical work without obtaining a permit at the following locations:

a. lot 48, Mary Ann Way;

b. lot 1, Lyman Street;

c. lot 149, Virginia Avenue;

d. lot 155, Virginia Avenue;

e. lot 150, Virginia Avenue;

f. lot 161, Virginia Avenue;

g. lot 26, Norton Road; and

h. 28 East Washington Street.

6. Section 19 of G.L. c. 268A, except as permitted by paragraph (b),[1/] prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he has a financial interest.

7. Mr. St. John, by knowingly allowing St. John Electric, his private business, to perform electrical work without permits, as is set forth in paragraphs 4-5 above, and by doing so without notifying his appointing authority of the situation, participated in his official capacity in particular matters in which he had a financial interest, thereby violating G.L. c. 268A, §19.

8. On the following dates and at the places indicated, Mr. St. John, in his capacity as North Attleboro Wiring Inspector, acted as is described regarding wiring installed by St. John Electric:

a. September 29, 1985: conducted the final electrical inspection and signed the occupancy permit for Lot 161, John Rezza Drive;

b. In 1985: conducted the final electrical inspection and signed the occupancy permit for Lot 68, Mary Ann Way;

c. March 17, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 112, Virginia Avenue;

d. April 16, 1987: conducted the final electrical inspection and signed the occupancy permit for Lot 152, Virginia Avenue;

e. April 18, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 124, Virginia Avenue;

f. October 26, 1989: conducted the final electrical inspection and signed the occupancy permit for Lot 157, Virginia Avenue;

g. October 27, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 270 Oak Ridge Avenue;

h. October 30, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 121 Virginia Avenue;

i. November 19, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 269 Oak Ridge Avenue;

j. November 22, 1986: conducted the final electrical inspection and signed the occupancy permit for Lot 164 John Rezza Drive;

k. January 16, 1987: conducted the final electrical inspection and signed the occupancy permit for Lot 48 Mary Ann Way;

l. April 30, 1987: conducted temporary service inspections for Lots 107 and 109 John Rezza Drive;

m. October 28, 1987: conducted the final inspections and signed the occupancy permits for each of the condominiums units at 364 East Washington Street;

n. October, 1987: performed service and rough electrical inspections at lots 3A and 4A, John Dietsch Boulevard; thereafter, conducted the final electrical inspections and signed the occupancy permits for these lots;

o. December 11, 1987: conducted the final electrical inspection and signed the occupancy permit for Lot 1 Lyman Street;

p. In 1987: conducted the final electrical inspections and signed the occupancy permits for Lots 149, 150 and 155 Virginia Avenue;

q. January 15, 1988: conducted the final electrical inspection and signed the occupancy permit for Lot 109 John Rezza Drive.

9. By performing each of the inspections and signing the occupancy permits as enumerated in paragraph 8 a-q above, Mr. St. John participated in particular matters in which he had a financial interest, thereby violating G.L. c. 268A, §19.

In view of the foregoing violations of G.L. c. 268A, §19, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. St. John:

1. that Mr. St. John pay to the Commission the sum of five thousand dollars ($5,000.00) as a penalty for violating G.L. c. 268A, §19;

2. that Mr. St. John will act in conformance with the requirements of G.L. c. 268A, §19 in the future; and

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

Date: October 18, 1990

[1/] None of those exemptions applies here.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 398

IN THE MATTER
OF
LOUIS R. NICKINELLO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Louis R. Nickinello (Mr. Nickinello), pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On March 8, 1989, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Mr. Nickinello's employer, Ackerley Communications of Massachusetts, Inc. (Ackerley), had violated the conflict of interest law, G.L. c. 268A. On September 12, 1990, the Commission voted to make Mr. Nickinello an additional subject of that preliminary inquiry. The Commission has concluded the inquiry and, on October 10, 1990, voted to find reasonable cause to believe that Mr. Nickinello violated G.L. c. 268A, §3.

The Commission and Mr. Nickinello now agree to the following facts and conclusions of law:

1. At the time here relevant, Mr. Nickinello was the president and the general manager for outdoor advertising operations of Ackerley. As such, Mr. Nickinello was Ackerley's employee and agent.

2. Ackerley is a corporation doing business in Massachusetts. Ackerley is a major owner of outdoor billboards in Massachusetts and sells and leases advertising space on its outdoor billboards.

3. Outdoor advertising in Massachusetts is regulated by state law. In addition, from time to time bills are proposed in the state House of Representatives (House) which, if enacted, would further regulate outdoor advertising. In 1988, several bills were proposed in the House which, if enacted, would have placed new restrictions on outdoor

billboard advertising and would have had a substantial negative effect on Ackerley's business in Massachusetts and on its financial interests. Most, if not all, of these bills had been filed during prior legislative sessions. As had occurred in prior years, in 1988 these bills were referred to committee for study and none were voted on by the House.

4. In 1988, Ackerley leased Skybox No. 32 at the Boston Garden. The skybox contained twelve seats and the lease entitled Ackerley to twelve tickets for those seats for almost all events held at the Boston Garden, including all Boston Celtics basketball and Boston Bruins hockey games.

5. Charles F. Flaherty (Rep. Flaherty) is a member of the House and the House Majority Leader. As such, Rep. Flaherty is a state employee as that term is defined in G.L. c. 268A, §1(q). As a state representative and as House Majority Leader, Rep. Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. During the time here relevant, Rep. Flaherty was not a member of any committee that considered outdoor advertising legislation and there is no evidence that he voted on any measure which directly pertained to the regulation of outdoor advertising.

6. On November 16, 1988, Mr. Nickinello gave Rep. Flaherty three of Ackerley's skybox tickets to that evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Mr. Nickinello and Rep. Flaherty,[1/] the evidence does not establish that that relationship was the predominant motivating factor in Mr. Nickinello's giving Rep. Flaherty the three tickets.

7. On November 16, 1988, Ackerley's director of public relations and registered legislative agent, Elizabeth Palumbo (Palumbo), gave Rep. Flaherty two Ackerley skybox tickets to that evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Palumbo and Rep. Flaherty[2/] the evidence does not establish that that relationship was the predominant factor in Palumbo's giving Rep. Flaherty the two tickets.

8. The Ackerley skybox tickets which were given to Flaherty did not have a face value printed on them. The five tickets were, however, worth at least $30 each and, thus, a total of at least $150.

9. Rep. Flaherty used the five free Ackerley skybox tickets he received from Mr. Nickinello and Palumbo to take himself and four fellow House members to the November 16, 1988 Celtics game. While Rep. Flaherty and his four colleagues were in the Ackerley skybox watching the game, Ackerley made available to them complimentary food and beverages, at an average per person cost to Ackerley of approximately fifteen dollars.

10. Section 3(a) of G.L. c. 268A, prohibits anyone from, directly or indirectly, giving a state employee anything of substantial value for or because of any official act performed or to be performed by the state employee. Anything with a value of $50 or more is of substantial value for §3 purposes.[3/]

11. By giving three Ackerley skybox tickets to Rep. Flaherty, while, as a House member and as House Majority Leader, Rep. Flaherty was in a position to take official action concerning proposed legislation which would affect Ackerley's financial interests, Mr. Nickinello gave Rep. Flaherty a gift of substantial value for or because of acts within Rep. Flaherty's official responsibility performed or to be performed by him.[4/] In so doing, Mr. Nickinello violated G.L. c. 268A, §3(a).[5/]

12. The Commission is aware of no evidence that the tickets were given to Rep. Flaherty with the intent to influence any specific official act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Flaherty took any official action concerning any proposed legislation which would affect Ackerley in return for the tickets.[6/] However, even if the conduct were only intended to create official goodwill, it was impermissible.

13. When summoned to testify under oath before the Commission during the preliminary inquiry concerning this matter, Mr. Nickinello and Palumbo, based upon the advice of their own legal counsel, both invoked their state and federal constitutional rights against compelled self-incrimination and declined to answer questions concerning any free tickets and other gratuities given by them and Ackerley to Massachusetts state, county or municipal employees and officials. Because adjudicatory proceedings before the Commission are administrative rather than criminal in nature, the law allows the Commission to draw an adverse inference from such a refusal to testify. In this matter, the adverse inference would be that Mr. Nickinello, Palumbo and Ackerley have provided unlawful gratuities to Massachusetts public officials in addition to the previously described five November 16, 1988 Celtics tickets to Rep. Flaherty. Ackerley, however, during the preliminary inquiry provided the

Commission with corporate records, testimony and other information concerning its activities and the activities of its agents and employees sufficient to persuade the Commission not to draw any such adverse inference from Mr. Nickinello's and Palumbo's refusal to testify. Thus, when the Commission voted on this matter on October 10, 1990, it did not vote to find reasonable cause to believe that Mr. Nickinello, Palumbo and Ackerley had provided such additional gratuities in violation of §3. The Commission, nevertheless, reserves the right to pursue any such additional violations of G.L. c. 268A, should allegations of such other illegal gratuities be brought to its attention.

In view of the foregoing violation of G.L. c. 268A, §3(a), 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. Nickinello:

1. that Mr. Nickinello pay to the Commission the sum of five hundred dollars ($500.00) as a civil fine for violating G.L. c. 268A, §3(a);

2. that Mr. Nickinello will in the future act in conformance with G.L. c. 268A; and

3. that Mr. Nickinello 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.[7]

Date: December 10, 1990

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[1]Mr. Nickinello and Rep. Flaherty were formerly House colleagues when Mr. Nickinello served as a state representative for several years.

[2]Palumbo was a House staffer during some of Rep. Flaherty's years at the House. Palumbo's family and Rep. Flaherty have a long-standing friendship.

[3]See **Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[4]The Commission made explicitly clear in its **Advisory No. 8**, entitled "Free Passes," issued on May 14, 1985, that tickets to sporting events may be items of substantial value for §3 purposes. The Commission also made clear in **Advisory No. 8** that the giving of such tickets to a public employee by a party subject to the employee's official authority violates §3 when the tickets are given for or because of official acts performed or to be performed by the public employee. Furthermore, the Commission, reiterated in **Advisory No. 8** its ruling in its 1981 decision in **In the Matter of George Michael**, 1981 SEC 59, 68, that §3 prohibits gifts of substantial value for the purpose of securing a public employee's official goodwill. As the Commission stated in **Michael**,

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do -- a good job.

[5]Where a public employee is in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates section 3, even if the public employee and the party have a private personal relationship and the employee does not in fact participate in any official matters concerning the party, unless the evidence establishes that the private relationship was the motive for the gift. See **Advisory No. 8.**

[6]As the Commission made clear in the **Michael** decision and in **Advisory No. 8**, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Mr. Nickinello (or Palumbo) and Rep. Flaherty.

[7]The Commission is authorized to impose fines of up to $2,000 for each violation of G.L. c. 268A. Here, however, the Commission has determined that it would be in the public interest to resolve this matter with a

$500 fine because:

(1) this is the first case in which the Commission has found the gift to and receipt by a public employee of a gratuity to violate G.L. c. 268A, §3 despite evidence of a "mixed motive" for the gift/receipt of the gratuity. On the one hand, there is no question that Mr. Nickinello and Palumbo attempted to foster goodwill with Rep. Flaherty at a time when legislation affecting Ackerley's interest was pending. On the other hand, there is evidence of long-standing private relationships between Mr. Nickinello and Palumbo and Rep. Flaherty. As discussed in footnote 5 above, however, to the extent a private relationship is a motivating factor in the gift/receipt of such a gratuity, the private relationship must be the motive or §3 is violated; and

(2) the gift and receipt of the tickets in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 397

IN THE MATTER
OF
CHARLES F. FLAHERTY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Charles F. Flaherty (Rep. Flaherty) pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On March 8, 1989, 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 Rep. Flaherty. The Commission has concluded the inquiry and, on October 10, 1990, voted to find reasonable cause to believe that Rep. Flaherty violated G.L. c. 268A, §3.

The Commission and Rep. Flaherty now agree to the following facts and conclusions of law:

1. Rep. Flaherty has been a member of the state House of Representatives (House) since 1967 and the House Majority Leader since 1985. As such, Rep. Flaherty is a state employee as that term is defined in G.L. c. 268A, §1(q).

2. As a state representative and as House Majority Leader, Rep. Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth.

3. Ackerley Communications of Massachusetts, Inc. (Ackerley) is a corporation doing business in Massachusetts. Ackerley is a major owner of outdoor billboards in Massachusetts and sells and leases advertising space on its outdoor billboards.

4. Outdoor advertising in Massachusetts is regulated by state law. In addition, from time to time bills are proposed in the House which, if enacted, would further regulate outdoor advertising. In 1988, several bills were proposed in the House which, if enacted, would have placed new restrictions on outdoor billboard advertising and would have had a substantial negative effect on Ackerley's business in Massachusetts and on its financial interests. Most, if not all, of these bills have been filed during prior legislative sessions. As had occurred in prior years, in 1988 these bills were referred to committee for study and none were voted on by the House.

5. In 1988, Ackerley leased Skybox No. 32 at the Boston Garden. The skybox contained twelve seats and the lease entitled Ackerley to twelve tickets for those seats for almost all events held at the Boston Garden, including all Boston Celtics basketball and Boston Bruins hockey games.

6. On November 16, 1988, Ackerley's then president and its general manager for outdoor advertising operations, Louis R. Nickinello (Nickinello), gave Rep. Flaherty three Ackerley skybox tickets to that evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Rep. Flaherty and Nickinello,[1/] the evidence does not establish that that relationship was the predominant motivating factor in Nickinello's giving Rep. Flaherty the three tickets.

7. On November 16, 1988, Ackerley's registered legislative agent, Elizabeth Palumbo (Palumbo), gave Rep. Flaherty two Ackerley skybox tickets to that

evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Rep. Flaherty and Palumbo,[2] the evidence does not establish that that relationship was the predominant motivating factor in Palumbo's giving Rep. Flaherty the two tickets.

8. The Ackerley skybox tickets which were given to Rep. Flaherty did not have a face value printed on them. The five tickets were, however, worth at least $30 each and, thus, a total of at least $150.

9. Rep. Flaherty used the five free Ackerley skybox tickets he received from Nickinello and Palumbo to take himself and four fellow House members to the Celtics game. Rep. Flaherty did not inform his four guests that he had received the tickets from Ackerley. While in the Ackerley skybox at the November 16, 1988 Celtics game, Rep. Flaherty and his guests were treated by Ackerley to complimentary food and beverages, at an average per person cost to Ackerley of approximately fifteen dollars.

10. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for the purposes of §3.[3]

11. By receiving the five free Ackerley skybox tickets from Nickinello and Palumbo, while, as a House member and as Majority Leader, he was in a position to take official action concerning proposed legislation which would affect Ackerley's financial interests, Rep. Flaherty received a gift of substantial value for himself[4] for or because of acts within his official responsibility performed or to be performed by him.[5] In so doing, Rep. Flaherty violated G.L. c. 268A, §3(b).[6]

12. The Commission is aware of no evidence that the November 16, 1988 Celtics tickets were received by Rep. Flaherty in return for his being influenced in his performance of any specific official act as a legislator or any particular act within his official responsibility. During the time here relevant, Rep. Flaherty was not a member of any committee that considered outdoor advertising legislation and there is no evidence that he voted on any measure which directly pertained to the regulation of outdoor advertising. The Commission is also aware of no evidence that Rep. Flaherty took any official action concerning any proposed legislation which would affect Ackerley in return for the tickets.[7] However, even if the gift and receipt of the tickets were only intended to create official goodwill, it was still impermissible.

In view of the foregoing violation of G.L. c. 268A §3(b), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Rep. Flaherty:

1. that Rep. Flaherty pay to the Commission the sum of five hundred dollars ($500.00) as a civil fine for violating G.L. c. 268A, §3(b);

2. that Rep. Flaherty pay to the Commission the sum of one hundred and fifty dollars ($150.00) as a forfeiture of the unlawful benefit he received in accepting the five Ackerley skybox tickets;[8]

3. that Rep. Flaherty undertake measures, agreeable to the Commission, to ensure that all House members are fully informed concerning the conflict of interest and financial disclosure laws, particularly as those laws apply to legislators, and are made aware that they may not accept gratuities in violation of G.L. c. 268A, §3;

4. that Rep. Flaherty will act in conformance with the requirements of G.L. c. 268A in his future conduct as a state employee; and

5. that Rep. Flaherty 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.[9]

Date: December 10, 1990

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[1]Nickinello and Rep. Flaherty were formerly House colleagues when Nickinello served as a state representative for several years.

[2]Palumbo was a House staffer during some of Rep. Flaherty's years at the House. Palumbo's family and Rep. Flaherty have a long-standing friendship.

[3]**See Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[4]The Commission notes Rep. Flaherty's position that it was not his understanding that he would be held responsible for the acceptance of five tickets

under circumstances in which he intended to use only one ticket for himself. Where a public employee receives several tickets to use at the employee's discretion and the employee gives some or all of the tickets to others to use as his guests, however, the Commission views the employee as having received all of the tickets for himself and attributes to the employee the value of all the tickets received in determining whether substantial value was given and received for the purposes of G.L. c. 268A, §3. See, e.g., **Public Enforcement Letter 89-2**, 1988 Ethics Commission 360, 365 at footnote 6.

5/The Commission made explicitly clear in its **Advisory No. 8**, entitled "Free Passes," issued on May 14, 1985, that tickets to sporting events may be items of substantial value for §3 purposes. The Commission also made clear in **Advisory No. 8** that the giving of such tickets to a public employee by a party subject to the employee's official authority violates §3 when the tickets are given for or because of official acts performed or to be performed by the public employee. Furthermore, the Commission reiterated in **Advisory No. 8** its ruling in its 1981 decision in **In the Matter of George Michael**, 1981 SEC 59, 68, that §3 prohibits gifts of substantial value for the purpose of securing a public employee's official goodwill. As the Commission stated in **Michael**,

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply by an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do -- a good job.

6/Where a public employee is in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates section 3, even if the public employee and the party have a private personal relationship and the employee does not in fact participate in any official matter concerning the party, unless the evidence establishes that the private relationship was the motive for the gift. See **Advisory No. 8**.

7/As the Commission made clear in the **Michael** decision and in **Advisory No. 8**, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Ackerley's agents (Nickinello and Palumbo) and Rep. Flaherty.

8/The Commission made clear in **Advisory No. 8** that in appropriate cases it would seek to recover any economic advantage any person obtained in violating §3.

9/The Commission is authorized to impose fines of up to $2,000 for each violation of G.L. c. 268A. Here, however, the Commission has determined that it would be in the public interest to resolve this matter with a $500 fine and a $150 forfeiture because:

> (1) this is the first case in which the Commission has found the gift to and receipt by a public employee of a gratuity to violate G.L. c. 268A, §3 despite evidence of a "mixed motive" for the gift/receipt of the gratuity. On the one hand, there is no question that Nickinello and Palumbo attempted to foster goodwill with Rep. Flaherty at a time when legislation affecting Ackerley's interests was pending. On the other hand, there is evidence of long-standing private relationships between Rep. Flaherty and Nickinello and Palumbo. As discussed in footnote 6 above, however, to the extent a private relationship is a motivating factor in the gift/receipt of such a gratuity, the private relationship must be the motive for the gift or §3 is violated; and
>
> (2) the gift and receipt of the tickets in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 399

IN THE MATTER
OF
ELIZABETH PALUMBO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Elizabeth Palumbo (Ms. Palumbo), pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On March 8, 1989, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Ms. Palumbo's employer, Ackerley Communications of Massachusetts, Inc. (Ackerley), had violated the conflict of interest law, G.L. c. 268A. On September 12, 1990, the Commission voted to make Ms. Palumbo an additional subject of that preliminary inquiry. The Commission has concluded the inquiry and, on October 10, 1990, voted to find reasonable cause to believe that Ms. Palumbo violated G.L. c. 268A, §3.

The Commission and Ms. Palumbo now agree to the following facts and conclusions of law:

1. At the time here relevant, Ms. Palumbo was the director of public relations and the registered legislative agent for Ackerley. As such, Ms. Palumbo was Ackerley's employee and agent.

2. Ackerley is a corporation doing business in Massachusetts. Ackerley is a major owner of outdoor billboards in Massachusetts and sells and leases advertising space on its outdoor billboards.

3. Outdoor advertising in Massachusetts is regulated by state law. In addition, from time to time bills are proposed in the state House of Representatives (House) which, if enacted, would further regulate outdoor advertising. In 1988, several bills were proposed in the House which, if enacted, would have placed new restrictions on outdoor billboard advertising and would have had a substantial negative effect on Ackerley's business in Massachusetts and on its financial interests. Most, if not all, of these bills had been filed during prior legislative sessions. As had occurred in prior years, in 1988 these bills were referred to committee and none were voted on by the House.

4. In 1988, Ackerley leased Skybox No. 32 at the Boston Garden. The skybox contained twelve seats and the lease entitled Ackerley to twelve tickets for those seats for almost all events held at the Boston Garden, including all Boston Celtics basketball and Boston Bruin hockey games.

5. Charles F. Flaherty (Rep. Flaherty) is a member of the House and the House Majority Leader. As such, Rep. Flaherty is a state employee as that term is defined in G.L. c. 268A, §1(q). As a state representative and as House Majority Leader, Rep. Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. During the time here relevant, Rep. Flaherty was not a member of any committee that considered outdoor advertising legislation and there is no evidence that he voted on any measure which directly pertained to the regulation of outdoor advertising.

6. On November 16, 1988, Ms. Palumbo gave Rep. Flaherty two Ackerley skybox tickets to that evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Ms. Palumbo and Rep. Flaherty,[1/] the evidence does not establish that that relationship was the predominant motivating factor in Ms. Palumbo's giving Rep. Flaherty the two tickets.

7. On November 16, 1988, Ackerley's president and its general manager for outdoor advertising operations, Louis R. Nickinello (Nickinello), gave Rep. Flaherty three Ackerley skybox tickets to that evening's Celtics game at the Boston Garden. While there is some evidence of a long-standing personal relationship between Nickinello and Rep. Flaherty,[2/] the evidence does not establish that that relationship was the predominant motivating factor in Nickinello's giving Rep. Flaherty the three tickets.

8. The Ackerley skybox tickets which were given to Flaherty did not have a face value printed on them. The five tickets were, however, worth at least $30 each and, thus, a total of at least $150.

9. Rep. Flaherty used the five free Ackerley skybox tickets he received from Nickinello and Ms. Palumbo to take himself and four fellow House

members to the November 16, 1988 Celtics game. While Rep. Flaherty and his four colleagues were in the Ackerley skybox watching the game, Ackerley made available to them complimentary food and beverages, at an average per person cost to Ackerley of approximately fifteen dollars.

10. Section 3(a) of G.L. c. 268A, prohibits anyone from, directly or indirectly, giving a state employee anything of substantial value for or because of any official act performed or to be performed by the state employee. Anything with a value of $50 or more is of substantial value for §3 purposes.[3/]

11. By giving two Ackerley skybox tickets to Rep. Flaherty, while, as a House member and as House Majority Leader, Rep. Flaherty was in a position to take official action concerning proposed legislation which would affect Ackerley's financial interests, Ms. Palumbo gave Rep. Flaherty a gift of substantial value for or because of acts within Rep. Flaherty's official responsibility performed or to be performed by him.[4/] In so doing, Ms. Palumbo violated G.L. c. 268A, §3(a).[5/]

12. The Commission is aware of no evidence that the tickets were given to Rep. Flaherty with the intent to influence any specific official act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Flaherty took any official action concerning any proposed legislation which would affect Ackerley in return for the tickets.[6/] However, even if the conduct were only intended to create official goodwill, it was impermissible.

13. When summoned to testify under oath before the Commission during the preliminary inquiry concerning this matter, Ms. Palumbo and Nickinello, based upon the advice of their own legal counsel, both invoked their state and federal constitutional rights against compelled self-incrimination and declined to answer questions concerning any free tickets and other gratuities given by them and Ackerley to Massachusetts state, county or municipal employees and officials. Because adjudicatory proceedings before the Commission are administrative rather than criminal in nature, the law allows the Commission to draw an adverse inference from such a refusal to testify. In this matter, the adverse inference would be that Ms. Palumbo, Nickinello and Ackerley have provided unlawful gratuities to Massachusetts public officials in addition to the previously described five November 16, 1988 Celtics tickets to Rep. Flaherty. Ackerley, however, during the preliminary inquiry provided the Commission with corporate records, testimony and other information concerning its activities and the activities of its agents and employees sufficient to persuade the Commission not to draw any such adverse inference from Ms. Palumbo's and Nickinello's refusal to testify. Thus, when the Commission voted on this matter on October 10, 1990, it did not vote to find reasonable cause to believe that Ms. Palumbo, Nickinello and Ackerley had provided such additional gratuities in violation of §3. The Commission, nevertheless, reserves the right to pursue any such additional violations of G.L. c. 268A, should allegations of such other illegal gratuities be brought to its attention.

In view of the foregoing violation of G.L. c. 268A, §3(a), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Ms. Palumbo:

1. that Ms. Palumbo pay to the Commission the sum of five hundred dollars ($500.00) as a civil fine for violating G.L. c. 268A, §3(a);

2. that Ms. Palumbo will in the future act in conformance with G.L. c. 268A; and

3. that Ms. Palumbo 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.[7/]

Date: December 10, 1990

[1/]Ms. Palumbo was a House staffer during some of Rep. Flaherty's years at the House. Ms. Palumbo's family and Rep. Flaherty have a long-standing friendship.

[2/]Nickinello and Rep. Flaherty were formerly House colleagues when Nickinello served as a state representative for several years.

[3/]**See Commonwealth v. Famigletti**, 4 Mass. App. 584 (1976).

[4/]The Commission made explicitly clear in its **Advisory No. 8**, entitled "Free Passes," issued on May 14, 1985, that tickets to sporting events may be items of substantial value for §3 purposes. The Commission also made clear in **Advisory No. 8** that the giving of such tickets to a public employee by a

party subject to the employee's official authority violates §3 when the tickets are given for or because of official acts performed or to be performed by the public employee. Furthermore, the Commission, reiterated in **Advisory No. 8** its ruling in its 1981 decision in **In the Matter of George Michael**, 1981 SEC 59, 68, that §3 prohibits gifts of substantial value for the purpose of securing a public employee's official goodwill. As the Commission stated in **Michael**,

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do -- a good job.

5/Where a public employee is in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates section 3, even if the public employee and the party have a private personal relationship and the employee does not in fact participate in any official matters concerning the party, unless the evidence establishes that the private relationship was the motive for the gift. **See Advisory No. 8.**

6/As the Commission made clear in the **Michael** decision and in **Advisory No. 8**, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Ms. Palumbo (or Nickinello) and Rep. Flaherty.

7/The Commission is authorized to impose fines o up to $2,000 for each violation of G.L. c. 268A. Here, however, the Commission has determined that it would be in the public interest to resolve this matter with a $500 fine because:

> (1) this is the first case in which the Commission has found the gift to and receipt by a public employee of a gratuity to violate G.L. c. 268A, §3 despite evidence of a "mixed motive" for the gift/receipt of the gratuity. On the one hand, there is no question that Ms. Palumbo and Nickinello attempted to foster goodwill with Rep. Flaherty at a time when legislation affecting Ackerley's interests was pending. On the other hand, there is evidence of long-standing private relationships between Ms. Palumbo and Nickinello and Rep. Flaherty. As discussed in footnote 5 above, however, to the extent a private relationship is a motivating factor in the gift/receipt of such a gratuity, the private relationship must be the motive or §3 is violated; and
>
> (2) the gift and receipt of the tickets in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.

Included are:

Summaries of all Commission Decisions and Orders,
Disposition Agreements and public
Enforcement Letters issued in 1990.

In the Matter of Carol Corso, David Kincus, William Marble, Joyce Pavlidakes, Laval Wilson and Woodward Spring Shop (January 18, 1990)

The State Ethics Commission issued Public Enforcement Letters in three cases involving job-related trips which were taken by municipal officials and employees, but paid for by private businesses. Taken together, the Letters further clarify how the Massachusetts Conflict of Interest Law applies to private parties paying for public employees' business travel and related expenses.

The Public Enforcement Letters explain certain options available within the confines of the conflict law to allow private entities to pay for business travel in connection with contracts made with cities and towns. While the conflict law prohibits direct payment of travel expenses by vendors, legitimate business trips may be lawfully accomplished in the following ways, according to the Letters:

1) Cities and towns may adopt an ordinance or bylaw regulating vendor payments for travel expenses. Such ordinances ensure the travel expenses are legitimate and directly related to the public purposes served by the travel.

2) A municipality can reimburse an employee for trip expenses incurred for business travel. The city or town may then bill the vendor for the costs of the public employee's travel expenses. This alternative should be reviewed with the city solicitor or town counsel before any action is taken.

3) G.L. c. 44, §53A may provide a statutory vehicle by which a private party may pay travel expenses for public officials. This section of the municipal finance law appears to allow a city or town to accept grants from a private corporation or individual and, in turn, expend such funds for the specific purpose intended with the approval of the mayor and/or the board of selectmen.

Boston School Superintendent Laval Wilson, Holbrook Fire Chief William Marble, Holbrook Firefighter David Kincus, Haverhill Council on Aging Director Carol Corso and Volunteer Coordinator Joyce Pavlidakes, and Woodward Spring Shop all received Public Enforcement Letters issued in three separate cases. Although the actions of the six parties raised concerns under Section 3 of M. G.L. c. 268A, the conflict law, the Commission ruled that adjudicatory proceedings were not warranted and that issuance of the public letters should ensure future compliance with the law.

In the Matter of D. John Zeppieri (February 14, 1990)

Former North Adams License Board Chair D. John Zeppieri was fined $1000 for violating the conflict law by negotiating for a real estate "exclusive" from a local restaurateur whose license was being considered for revocation by the Board.

In a Disposition Agreement reached with the Commission, Zeppieri admitted his actions violated Section 23 of the Conflict of Interest Law, and agreed to pay the fine. Section 23 prohibits public employees from using their official position to secure unwarranted privileges for themselves or anyone else; it also prohibits public employees from acting in a manner that would give an objective observer reason to believe they would act with bias in their official capacity.

In the Matter of John P. King (March 1, 1990)

Former Wareham Planning Board Chair John P. King was fined $750 by the Ethics Commission for violating the Conflict of Interest Law by representing a private client before his own board.

In a Disposition Agreement reached with the Commission, King admitted that his actions violated Section 17 of G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 17 prohibits municipal employees from representing any private party in a matter that is of substantial interest to their municipality.

In addition to King's post on the Planning Board, he also worked privately as a registered professional engineer, the Disposition Agreement said. At a Planning Board meeting in November of 1987, King addressed the other members in his capacity as a structural engineer, representing a personal friend in his application for a Site Plan Review for a building the friend wanted to construct. King did not participate in the hearing or the vote as a member of the Planning Board, the Agreement said. King did not get paid for his representation, the Disposition

Agreement said; however, the conflict law prohibits municipal employees from acting as agent for another party in matters of interest to their city or town regardless of whether they are paid or not.

In the Matter of Vincent J. Lozzi
(March 8, 1990)

State Representative Vincent J. Lozzi was fined $2,000 by the State Ethics Commission for violating the Conflict of Interest Law by submitting vouchers for state reimbursement of a private trip to San Francisco and by accepting state funds to pay for the trip.

Lozzi admitted violating Section 23(b)(2) of the conflict law in a Disposition Agreement reached with the Commission. Section 23 prohibits public employees from using their official position to secure substantial unwarranted privileges for themselves or anyone else.

According to the Disposition Agreement, Lozzi flew to San Francisco on a personal trip in October of 1986, and by vouchers dated November 4, 1986, and December 12, 1987, submitted requests for state reimbursement for the above-mentioned personal trip. The vouchers characterized the $1552.20 in expenses as being incurred in connection with Lozzi's attendance at an insurance seminar while on state business. The Ethics Commission initiated a preliminary inquiry into Lozzi's conduct in April of 1989, and on December 26, 1989, Lozzi reimbursed the Commonwealth $1552.20, the Disposition Agreement said.

In the Matter of John F. Aylmer
(March 21, 1990)

The State Ethics Commission issued a Public Enforcement Letter to Massachusetts Maritime Academy President John F. Aylmer in connection with his taking personal friends and members of his family on two Academy training cruises as "observers."

The Public Enforcement Letter, which did not require Aylmer to pay a fine or admit to violating the conflict law, states that Aylmer's conduct raised questions under Sections 6 and 23 of G.L. c. 268A. Section 6 prohibits state employees from participating in their official capacity in any matter in which they or a member of their immediate family has a financial interest. Section 23 prohibits public employees from using or attempting to use their official position to secure unwarranted privileges for themselves or anyone else, and also prohibits public employees from acting in a manner that would cause a reasonable person to conclude that the employee could be unduly influenced in his or her official position.

Exemptions to Sections 6 and 23 could allow state employees to participate in a matter in which they or their family members have a financial interest, or which could result in the appearance of a conflict of interest, provided that the employee discloses the matter in writing to his or her appointing authority and receives written permission to participate in the matter prior to participating.

In the Matter of George Simard
(March 26, 1990)

The State Ethics Commission cited Brookline Police Chief George Simard in connection with his acceptance of a number of free tickets to the 1988 U.S. Open Golf Tournament and his distribution of those tickets to various criminal justice agencies and individuals in the greater Boston area.

In a Public Enforcement Letter, the Commission said Simard's conduct appeared to violate Section 23(b)(3) of the Conflict of Interest Law, which prohibits public employees from acting in a manner that would cause a reasonable person to conclude anyone could unduly enjoy their favor in the performance of their official duties. The Public Enforcement Letter did not require Simard to pay a fine or admit he violated the law.

Several days prior to the 1988 U.S. Open, the Public Enforcement Letter said, the U.S. Open Committee delivered approximately 40-60 sets of tickets for the event to Brookline Police Department. Each set contained seven tickets with individual face values between $18 and $20, giving each set of tickets a total value between $126 and $140, the Commission's letter said.

Simard purchased eight sets of tickets to the 1988 U.S. Open as a member of the Brookline Municipal Golf Course, and distributed these tickets to his family and friends, according to the Public Enforcement Letter. None of the tickets

provided by the U.S. Open Committee were given to any of Simard's family or friends. In addition, Simard declined a request from the Country Club to waive the 10-percent surcharge fee for the police details. However, the Enforcement Letter said, additional safeguards were necessary in order to completely dispel any appearance of bias on Simard's part.

In the Matter of Deirdre Ling
(April 17, 1990)

Deirdre Ling, the University of Massachusetts-Amherst Vice Chancellor for university relations and development, was cited by the Ethics Commission for violating the Conflict of Interest Law by participating in awarding and monitoring several university contracts to a private corporation with whom she had current and future employment arrangements.

Although Ling disclosed her dealings with the corporation to her appointing authority, UMass Chancellor Joseph Duffey, and verbally received his permission to participate in the matters, the Commission found that both the disclosure and the permission were inadequate to avoid a violation of the conflict law. However, because there was disclosure, the Commission determined a fine was not appropriate.
In a Disposition Agreement reached with the Commission, Ling admitted she violated Section 6 of M.G.L. c. 268A by her actions as a UMass-Amherst employee in connection with Enrollment Management Consultants, Inc., and/or Advanced Marketing Technologies. Section 6 of the conflict law prohibits state employees from participating in their official capacity in any matter in which a person with whom they have an arrangement for employment has a financial interest.

In the Matter of George Keverian
(April 23, 1990)

In a Disposition Agreement reached with the State Ethics Commission, Massachusetts House Speaker George Keverian (D-Everett) admitted to violating the Conflict of Interest Law by engaging members of the House maintenance staff to perform substantial renovations on his private residence, and by participating in a number of private transactions involving oriental rugs with Michael Mouradian, a rug vendor who does significant business with the State House.

The Commission declined to impose a fine against Keverian for the violations of the so-called "appearances of impropriety" provision of the law, for two reasons, the Disposition Agreement said. First, the House employees and Mouradian appeared to have entered willingly into their private commercial relationships with the Speaker; and second, the Commission found no evidence that any of the maintenance employees or Mouradian received preferential treatment from Keverian in the performance of his official duties.

According to the Disposition Agreement, Keverian violated Section 23(b)(3) by hiring the House maintenance workers and paying them more than $18,000 to do over 1200 hours of carpentry work on his private residence between 1987 and 1988; and by accepting more than $500 in rug storage, cleaning and repair costs, approximately $200 in packing services, three oriental rugs at nearly $1500 below retain cost, and 10 oriental rugs on consignment for between 10 and 20 months from Mouradian, who is a life-long friend of Keverian's. Section 23(b)(3) prohibits public employees from acting in a manner that would cause an objective observer to believe that the public employee would act with bias in his official duties.

In the Matter of Jeffrey Zager
(May 1, 1990)

The State Ethics Commission fined Jeffrey Zager, the administrative assistant to the Mayor of Gloucester, $1750 for participating in hiring his sister to a city job and subsequently negotiating a city contract with the union to which his sister belonged. When he recommended to the Mayor that his sister be hired, Zager failed to disclose the family relationship. In addition, Zager pushed for the hiring despite objections from the city treasurer that Zager's sister lacked sufficient experience for the job.

In a Disposition Agreement reached with the Commission, Zager admitted his actions violated Section 19 of G.L. c. 268A, and agreed to pay the fine. Section 19 prohibits municipal employees from officially participating in any matter that could affect the financial interests of a member of their immediate family.
Zager was fined $1500 for his role in the 1984 hiring, and $250 for participating in the contract talks.

In the Matter of Gary P. Mater
(May 4, 1990)

The State Ethics Commission fined former Hubbardston Board of Health member Gary P. Mater $5000 for using the town's Board of Health Agent as a "straw" to collect inspection fees Mater was prohibited from receiving.

Mater admitted in a Disposition Agreement that he violated Sections 19 and 20 of Massachusetts G.L. c. 268A by procuring inspection fees from Hubbardston's Board of Health Agent using payment vouchers that falsely identified the agent as the person who performed the inspections, and by knowingly approving these vouchers as a member of the Board of Health.

Section 19 prohibits municipal employees from acting in their official capacity on any matter that affects their own financial interests. Section 20 prohibits municipal employees from having a financial interest in any contract (other than their own employment contract) made with the city or town for which they work.

In the Matter of Charles O. Baldwin
(May 16, 1990)

Charles O. Baldwin, the former chairman of the Swansea Planning Board, was fined $6000 by the Ethics Commission for violating the Conflict of Interest Law by participating in Planning Board actions regarding real estate properties and developments in which either he or his wife had a financial interest.

In a Disposition Agreement reached with the Commission, Baldwin admitted to violating Section 19 of Massachusetts G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 19 of the conflict law prohibits municipal employees from participating in their official capacity in matters in which they or a member of their immediate family has a financial interest.

According to the Agreement, Baldwin participated on four occasions during 1987 in Planning Board discussions and votes regarding subdivisions owned by P&H Inc., a business of which Baldwin was an unnamed but beneficial owner. Baldwin also participated on two occasions in 1986 in Planning Board votes to approve ANR (Approval Not Required) plans for property owned by himself and by Patricia Baldwin, who was then his wife, the Agreement said.

In each of the instances where Baldwin participated in the discussion or vote regarding the corporations' properties, he did not disclose, nor did any of the papers filed with the Planning Board otherwise reveal, his financial interest in the corporations that owned the properties, the Disposition Agreement said. In addition, from at least July of 1987 Baldwin made attempts to conceal his interests in P&H, the Agreement said. This effort to conceal his interests was an exacerbating factor.

In the Matter of Vito Trodella
(June 12, 1990)

The State Ethics Commission fined Vito Trodella, a member of the Board of Registration in Veterinary Medicine, $500 for violations of the state's Conflict of Interest Law. Trodella violated the law by requesting and receiving free season passes to Suffolk Downs Racetrack, which had veterinarians under the Board's supervision, and by attempting to secure additional passes by falsely asserting that other Board members also desired season passes.

The Commission issued an Order to Show Cause in the case on March 9, 1990, charging Trodella with violating Sections 3 and 23 of M.G.L. c. 268A. In a Disposition Agreement reached with the Commission and released June 12, Trodella admitted violating both sections of the law and agreed to pay the fine.
Section 3 prohibits public employees from requesting or receiving anything of substantial value for or because of any action within their official responsibility. Section 23 prohibits public employees from using or attempting to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or anyone else; Section 23 also prohibits public employees from acting in a manner that would cause a reasonable person to conclude they would act with bias in their official capacity.

In the Matter of Richard Singleton
(July 2, 1990)

The State Ethics Commission fined Richard Singleton, former fire chief for the town of Tyngsborough, $1000 for telling the foreman of a local development project that Fire Department inspections on the development could take

forever, after the foreman told Singleton he had not yet reached a decision on awarding drywall construction work that had been bid on by Singleton's son.

In a Disposition Agreement reached with the Commission, Singleton admitted his actions violated Section 23(b)(2) of the Conflict of Interest Law, and agreed to pay the fine. Section 23(b)(2) prohibits public employees from attempting to use their official position to secure an unwarranted privilege of substantial value for themselves or anyone else.

While the Commission may impose sanctions of up to $2000 for violations of the conflict law, the Commission imposed a $1000 fine in this case because Singleton apparently did not realize any economic advantage as a result of his conduct, and because there was no indication that Singleton withheld or delayed Fire Department inspections.

In the Matter of Robert A. Fowler
(July 2, 1990)

The State Ethics Commission fined Tewksbury Planning Board member Robert A. Fowler $1000 for violating the Conflict of Interest Law by representing a real estate corporation and two individuals before his own board. Fowler admitted the violations of Section 17 of the law in a Disposition Agreement with the Commission, and agreed to pay the fine.

Section 17 prohibits municipal employees from representing anyone other than their city or town in matters in which the municipality has a substantial interest.

In the Matter of Malcolm FitzPatrick
(August 13, 1990)

Former Stow Selectman Malcolm FitzPatrick received a Public Enforcement Letter from the State Ethics Commission in connection with official actions FitzPatrick took involving a proposed affordable housing project near his home. The Public Enforcement Letter said that while FitzPatrick's actions appeared to violate Sections 19 and 21A of the conflict law, several mitigating factors warranted resolving the matter without imposing a fine or requiring FitzPatrick to admit he violated the law.

FitzPatrick appeared to violate Section 19 of the conflict law, which prohibits municipal employees from participating in their official capacity in matters affecting their own financial interests, when he participated as a Stow selectman in several zoning and approval matters regarding the Apple Farm affordable housing development. At its proposed site, Apple Farm was within 300 feet of FitzPatrick's property.

FitzPatrick also appeared to violate Section 21A of the law when the selectmen appointed him to Stow's Housing Partnership in May of 1988. Section 21A bars members of municipal boards from being appointed to positions supervised by that board without prior approval at annual town meeting. However, because the appointment was based on information provided in a handbook for local housing partnerships that did not discuss the conflict law, the Commission felt the matter would best be resolved with a Public Enforcement Letter. Editions of the handbook published after June, 1988, make clear that the conflict law applies to members of housing partnerships.

In the Matter of Robert Garvey
(August 22, 1990)

The Ethics Commission cited Hampshire County Sheriff Robert Garvey for hiring county jail employees to build a fence around the tennis court at his home, and for using a jail employee to help him move refrigerators to and from his vacation homes in New Hampshire and Maine.

Garvey admitted in a Disposition Agreement to violating Section 23 of the conflict law, which prohibits public workers from behavior that could cause the appearance of bias in their official duties.

"The Commission has consistently stated that public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities," the Agreement said. "(T)he reason for this prohibition is two-fold. First such conduct raises questions about the public official's objectivity and impartiality ... Second, such conduct has the potential for serious abuse."

No fine was imposed in the case because of several mitigating factors, including the fact there was no evidence that favoritism was actually shown to the employees who did the work for the Sheriff, the Disposition Agreement said.

In the Matter of John Larkin, Jr.
(September 13, 1990)

A Disposition Agreement was reached between the Ethics Commission and former MBTA District Supervisor John Larkin, Jr., in which Larkin admitted to violating the conflict law in connection with his daughter's promotions at the MBTA.

The Commission declined to impose a fine against Larkin because he mad a good faith, albeit ineffectual, effort to comply with Section 6 of the law, which generally prohibits state employees from participating in matters that could affect the financial interests of members of their immediate family. An exemption to the law allows appointed employees to make written disclosures to their appointing authority and receive written permission from that authority to participate in matters affecting members of their immediate family.

However, Larkin made a written disclosure to his immediate supervisor rather than to his appointing authority, and therefore did not receive the exemption required under the law.

The Commission insisted on a public resolution to this case because, "(t)hese provisions are more than mere technicalities. They protect the public interest from potentially serious harm," the Disposition Agreement said.

In the Matter of Robert St. John
(October 18, 1990)

North Attelboro wiring inspector Robert St. John was fined $5000 for violating the Conflict of Interest Law by allowing his private business to perform electrical work on 13 properties in town without permits, and by inspecting electrical work done by his own company on at least 21 occasions.

St. John admitted to violating Section 19 of the conflict law, which prohibits municipal employees from participating in their official capacity in any particular matter that could affect their own financial interests. St. John also agreed to pay the fine.

In the Matters of Louis R. Nickinello, Charles Flaherty and Elizabeth Palumbo
(December 10, 1990)

The State Ethics Commission fined Massachusetts House of Representatives majority leader Charles F. Flaherty (D-Cambridge) $500 for his acceptance of five skybox tickets to a November, 1988, Boston Celtics game from employees of Ackerley Communications of Massachusetts, Inc. (Ackerley), and also required Flaherty to forfeit the value of the tickets. The Commission also fined two of Ackerley's senior employees, Louis Nickinello and Elizabeth Palumbo, $500 each for giving the tickets to Flaherty.

In Disposition Agreements reached with the Ethics Commission, Flaherty, Nickinello and Palumbo all admitted to violating Section 3 of the Conflict of Interest Law, which prohibits public employees from accepting anything of substantial value given to them because of their official position, and likewise prohibits anyone from offering public employees such gifts. In addition to paying the fine and agreeing to comply with the conflict law in the future, Flaherty paid a $150 forfeiture for the value of the tickets and agreed to take measures to educate his colleagues regarding the statutes enforced by the Ethics Commission.

On November 16, 1988, the Disposition Agreements said, Rep. Flaherty received three Ackerley skybox tickets for that evening's Boston Celtics game from Nickinello, who was then Ackerley's president and general manager for advertising operations. The same day, Flaherty received two additional Ackerley skybox tickets from Palumbo, who is Ackerley's director of public relations and legislative agent, the Disposition Agreements said. While there is some evidence that Flaherty had long-standing personal relationships with both Nickinello and Palumbo, the Disposition Agreements state the evidence failed to establish friendship as the predominant motivating factor in either Ackerley employee giving Flaherty the skybox tickets.

Flaherty used the five Ackerley skybox tickets to take himself and four fellow House members to the November 16, 1988, Celtics game, the Agreements said. Flaherty did not inform his four guests that he had received the tickets from Ackerley.

The Ethics Commission is aware of no evidence that the Ackerley skybox tickets were received by Flaherty in exchange for his being influenced in the performance of his official duties as a legislator, the Disposition Agreements said. During the time here relevant, the Agreements said, the Commission found no evidence that Flaherty took any official action concerning proposed legislation that would affect Ackerley, nor was there any evidence Flaherty voted on any measure directly pertaining to the regulation of outdoor advertising. However, even if the tickets were given only to create official good will, the gift was still impermissible.

While the Commission may impose fines of up to $2,000 for violations of the conflict law, the Commission determined that this case would best be resolved by imposing relatively small fines on all of the parties involved and by requiring Flaherty to forfeit the value of the tickets. This is the first case in which the Commission has considered the "mixed motive" of simultaneous professional and personal relationships in connection with a gift to a public employee, and the gift and receipt of the tickets in this case was apparently a single incident and not part of a pattern or practice of misconduct, the Disposition Agreements said.

Included are:

All Advisory Opinions issued in 1990,
page 288.

Cite Advisory Opinions as follows:

EC-COI-90-(number)

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

CONFLICT OF INTEREST OPINION
EC-COI-90-1

FACTS:

You currently serve as Tax Collector of ABC, having been appointed temporarily to that position by the Board of Selectmen to fill a vacancy. Prior to your appointment, the Board of Selectmen had appointed your mother as the Assistant Tax Collector. You have recently received guidelines concerning the application of G.L. c. 268A to you in your official dealings with your mother. You intend to run for election to fill the remainder of the unexpired term and wish to receive formal Commission guidance prior to the election.

QUESTION:

Does G.L. c. 268A allow you to serve as Tax Collector in the same department as your mother?

ANSWER:

Yes, subject to several conditions.

DISCUSSION

Section 19

As Tax Collector, you are considered a municipal employee for the purposes of G.L. c. 268A. Section 19 of G.L. c. 268A prohibits a municipal employee from officially participating[1/] in any decision, contract, controversy or other particular matter[2/] in which the employee's mother has a financial interest. By way of example, you must abstain from participating, either by recommending or approving, any personnel matter, evaluation, promotion, step raise, salary determination or other term or condition of employment in which your mother has a financial interest. **See, In the Matter of Frederick Cronin**, 1986 SEC 269. The prohibition also applies to your day-to-day supervision of your mother. **See, Commission Advisory No. 11, Nepotism.** The fact that the Board of Selectmen is authorized to sign and approve the payroll and negotiate contracts does not relieve you of obligations under §19 because participation includes recommending as well as making a final decision. **See, In the Matter of Peter Cassidy**, 1988 SEC 371. You must therefore abstain from involvement, whether by recommendation or decision, in any matter in which your mother has a financial interest.

An exemption is available to you under §19(b)(1) by which you may participate in matters affecting your mother's financial interest if you receive written permission from your appointing official, the Board of Selectmen, pursuant to the conditions spelled out in §19(b)(1).[3/] Unless and until you receive such an exemption, however, you must continue to abstain from participating as Tax Collector in any matter affecting your mother's financial interest. This exemption would not be available to you once you were elected, however, since you will no longer have an appointing official. **District Attorney for the Hampden District v. Grucci**, 384 Mass. 525 (1981). Assuming you are elected, the Board of Selectmen may wish to consider steps to minimize any risk to your violating §19. For example, the Selectmen could either delegate to another official the day-to-day supervision of your mother or could arrange a transfer of your mother to another municipal department. We are available to assist you and the Board of Selectmen in reviewing these options, if and when you are elected to that position.

DATE AUTHORIZED: January 24, 1990

[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, powers, duties, finances and property.

[3/] (b) Under G.L. c. 268A, §19(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.

CONFLICT OF INTEREST OPINION
EC-COI-90-2*

FACTS:

You are the Executive Director of the Martha's Vineyard Land Bank Commission (Commission) and you ask whether the Commission is subject to G.L. c. 268A, and if so, how c. 268A applies to Land Bank Commissioners and Town Advisory Board members. The Land Bank was established by Chapter 736 of the Acts of 1985 "for the purpose of acquiring and holding and managing land and interest in the land." §2. According to the enabling legislation, the Land Bank is a public instrumentality and the Land Bank's exercise of its statutory powers is deemed to be "the performance of an essential governmental function."

The Land Bank is administered by a seven member Commission composed of a member of each of the towns on Martha's Vineyard and the Secretary of Environmental Affairs (EOEA) or his designee. Each town elects one individual to the position of Land Bank Commissioner and no business may be conducted by the Commission unless a majority of the town Commissioners are present. §3.

The Commission is assisted in administering the Land Bank by town advisory boards which have been established in each town of Martha's Vineyard. The town's conservation commission, planning board, board of assessors, board of health, park and recreation commission, board of selectmen and water commission each appoint a representative to the town's advisory board. §1. The local boards may appoint a member of their own board or another citizen to serve on the advisory board. Under c. 736, each advisory board exercises advisory duties as well as binding veto powers over the Commission regarding land located in said town.

The Commission has the authority to, among other things, acquire interests in land, exercise eminent domain powers, accept gifts of funds to further the purposes of the Land Bank, incur debt, issue bonds and notes. If authorized by a two-thirds town meeting vote, the Commission may pledge the full faith and credit of each of the towns which comprise the Land Bank when incurring debt or securing an issue of bonds or notes. §4. Each member town is authorized to appropriate money for the Land Bank fund and to provide funds to repay bonds or notes. §§4A, 4C. Each land acquisition by the Commission must be approved by the town advisory board in the town where the land is located, and any disposition of the Land Bank's interest or change in use of the land must also be approved by the advisory board of the town in which the land is located and by the Secretary of EOEA. §§4, 6.

The Commission is required to develop a management plan for managing each of its land holdings, and must use the open space and master plans of the individual towns and be guided by the particular town's advisory board's recommendations for the piece of property. §3. The adoption of a management plan, and any change in the plan, must be approved by a two-thirds vote of the members of the advisory board for the town in which the land is located. §3.

The Commission receives most of its funding from a 2% statutory fee on the purchase price of any real estate property transfer in each of the member's towns.[1] §10. Other sources of funding include private contributions, funds appropriated or deposited by the County Commissioners or individual town meetings, or proceeds from the disposition of real property. The Commission's funds are maintained in an account within the Dukes County Treasury. The County Treasurer administers the account in accordance with the directions of the Commission. §8. In essence, the Treasurer acts as the Commission's agent and does not have any policy making role vis-a-vis the funds. In addition to the Commission fund, the Treasurer maintains an individual account for each member town. Fifty percent of the revenues collected remain in the Commission fund and are directly administered by the Land Bank Commission. The remaining revenues are placed in the individual town accounts according to a proportional formula. A majority of the town advisory board must approve the expenditure of money in individual town accounts, but the accounts are administered for the benefit of the Land Bank Commission, and title to the funds remains with the Commission until such time as the Commission dissolves. §§8A, §15.

Upon dissolution of the Land Bank, any of its land interests will be transferred to the town in which the land is located and placed under the management of the local conservation commission for continued protection. Any remaining funds will revert to the towns to be held in trust for the management and preservation of conservation land. §15.

JURISDICTION:

A threshold issue is whether the Commission is a public or private agency. In its determination of public status, the State Ethics Commission will consider:

1. the means by which the entity was created (e.g. legislative or administrative action);

2. whether the entity performs some essentially governmental function;

3. whether the entity receives and/or expends public funds; and

4. the extent of control and supervision exercised by government officials or agencies over the entity. **EC-COI-89-1; 88-24; 88-19; 84-147.**

No one factor is dispositive as the Commission considers the totality of the circumstances.

We conclude that c. 736 clearly manifests a legislative intent to create a public entity. The Commission was created by special legislation to perform "an essential governmental function." G.L. c. 736, §2. The purpose of the Commission is to fund, acquire and manage property for conservation purposes on a regional basis, similar to obligations conferred on local conservation commissions. See, e.g., G.L. c. 132A, §11 (towns may receive funds for conservation projects). Additionally, some of the Commission's funding is derived from public sources, such as the member towns and the county. The municipalities, through town advisory boards, possess veto power over most of the substantive Commission decisions, such as acquisition, management and use of any parcel of land located in the municipality. Accordingly, we conclude that the Commission is a public instrumentality for purposes of G.L. c. 268A.

We turn to the question of whether the Commission is a state, county or municipal entity. As one commentator has indicated, the focus of the analysis is on "the level of government to be served by the agency in question." Buss, **The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U. L. Rev. 299, 310 (1965). When an agency possesses attributes of more than one level of government, the State Ethics Commission will review the interrelation of the agency with the different government levels in order to determine the agency's status under c. 268A. **EC-COI-89-20; 83-157.** For example, in **EC-COI-83-157**, we concluded that a county Mosquito Control project was an instrumentality of a state agency because state agencies exercised control and oversight of the project and the project's funding was derived from annual Legislative appropriation. In **EC-COI-82-25**, we concluded that a regional school district organized under G.L. c. 71 was an independent municipal agency under the conflict of interest law where the entity was supported solely by public funds and engaged by the member towns to provide a service mandated by G.L. c. 71. See, **EC-COI-83-74** (local private industry councils are municipal agencies because of decision making role they share with local officials).

Arguably, the Land Bank Commission shares attributes of each governmental level.[2/] We conclude that the Commission is an independent municipal entity similar to a regional school district. **EC-COI-82-25.** Our decision rests on the substantial control exercised by each town advisory board over the Commission's affairs. The level of government with the most direct and substantial interest in Commission decisions is the municipal level, as each municipality is concerned with the disposition of land within its borders. The town advisory boards are vested with veto power over most substantive decisions that the Commission makes. The Commission is accountable to the municipality if the full faith and credit of the municipality is pledged. If the Land Bank dissolves, any remaining funds or interest in land revert back to the individual towns, and the Commission must consider each municipality's master and open space plan as it develops a management plan. Finally, each municipality elects a member of the Commission to represent it. Based on these facts, we conclude that the Commission is an independent municipal agency for purposes of G.L. c. 268A.

Although the Commission is a separate independent regional municipal agency for purposes of c. 268A, we consider the town advisory boards to be local municipal agencies similar to any local municipal board, such as the board of selectmen, board of health, etc. Under the statutory scheme of c. 736, each town's advisory board has the responsibility to represent the local interest by exercising advisory, review and veto powers over Commission decisions pertaining to land in the particular town. c. 736, §§3, 4, 6, 8A. Further, the town advisory board is comprised of members of other local boards in the respective town, or their designees. **Id.** §1.

APPLICATION OF G.L. c. 268A TO LAND BANK COMMISSIONERS AND TOWN ADVISORY BOARD MEMBERS

For purposes of the conflict of interest law, Land Bank Commissioners, employees and town advisory board members are municipal employees. G.L. c. 268A, §1(g). You have posed several questions regarding the application of the law to these individuals.[3/]

1. **May a Land Bank Commissioner or Town**

Advisory Board member participate in Land Bank decisions when the official is an abutter to the property at issue or when the subject property is owned by an immediate family member?

A. Land Bank Commissioners

Generally, c. 268A, §19 requires that a public official abstain from participation[4/] in any particular matter[5/] in which he, his immediate family,[6/] his business partner or the business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest. Decisions, determinations and recommendations pertaining to the purchase, use or disposition of a piece of land are particular matters for purposes of c. 268A. The definition of participation includes participation in the formulation of a matter for a vote, as well as voting on the particular matter. See, **Graham v. McGrail**, 370 Mass. 133 (1976).

Therefore, a Commissioner must abstain from official participation in a land decision if he or an immediate family member has a direct or reasonably foreseeable financial interest in the matter. **EC-COI-84-96; 84-98; Public Enforcement Letters 88-1 and 91-1.** Section 19 encompasses any financial interest without regard to the size of said interest. However, the financial interest must be direct 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). Financial interests which are remote, speculative or not sufficiently identifiable do not require disqualification under c. 268A. **EC-COI-89-19; 84-98; 87-16.**

Accordingly, a Commissioner must abstain in matters regarding an immediate family member's land because the family member has a direct financial interest in such decisions. Similarly, the Commissioner may not participate in matters pertaining to land which his property abuts. In a prior conflict of interest opinion, the State Ethics Commission found that a property abutter is presumed to have a financial interest in abutting property because one's property rights stand to be affected by the disposition of said property. **EC-COI-84-96.** Additionally, we presume a financial interest in matters affecting real property where a party is a party in interest as defined by G.L. c. 40 or where a party is a person aggrieved as defined by G.L. c. 131, §40. **EC-COI-89-33.** Therefore, if a Commissioner falls within any of these classes of individuals, he should also abstain from participation.

Section 19 contains an exemption for appointed officials, such as town advisory board members, that may permit participation in a particular matter, notwithstanding the general prohibition. This exemption, however, is not available to elected officials, such as Land Bank Commissioners, because elected officials do not have appointing authorities. Therefore, Land Bank Commissioners are required to abstain in all determinations in which they or immediate family members have a direct or reasonably foreseeable financial interest.

B. Town Advisory Board Members

Under §19, town advisory board members must abstain in matters regarding an immediate family member's land and in matters where they are a property abutter, party in interest or person aggrieved as defined by the applicable statute. However, unlike Land Bank Commissioners, town advisory board members may be eligible for a §19 exemption that allows participation in a particular matter, notwithstanding the general provision. Under §19(b)(1), a municipal employee may participate if, prior to any participation, he advises his appointing official, in writing, of the nature and circumstances of the particular matter and makes full disclosure of his financial interest and receives in advance a written determination by the appointing official that his financial interest is not so substantial as to be deemed likely to effect the integrity of his services to the municipality. This determination may vary depending on the facts and circumstances of each matter. **EC-COI-86-13.**[7/]

When a local official seeks a §19 exemption from the board which appointed him to the town advisory board, additional conflict of interest issues will arise for that official as a local board member. Whether a local official may participate as a local board member in the decision how to resolve his conflict of interest problem will depend upon whether the town advisory board member is also a local elected official, appointed official or a private citizen. For example, if an elected selectman is also a town advisory board member, he must make a full disclosure to the board of selectmen regarding his family's financial interest in the property and the selectmen, in turn, must make a written determination whether the member may participate in the advisory board matter affecting his or his immediate family's financial interest. However, the selectman/advisory board member must abstain from participation in the selectmen's determination whether he may participate on the town advisory board because he will also have a financial interest in the selectman's determination. Therefore, local elected officials who

also serve on the town advisory board should inform their respective board of their potential conflict of interest as a town advisory board member, and should abstain from the elected board's determination how to solve the conflict. If the town advisory board member is also a member of an appointed board, such as the conservation commission, he must notify his local board in writing and may participate in the local board's decision how to resolve the conflict of interest if he receives the permission of the authority which appointed him to the conservation commission. If he does not receive this determination, he may not participate as a conservation commissioner. If the town advisory board member does not hold other municipal office he must make full disclosure of his or his family's financial interest to his appointing authority and wait for a written determination from his appointing authority. Regardless of whether the local official may participate in the decision how to resolve the conflict problem, he may not participate as a town advisory board member in a matter affecting his or his family's financial interest if the appointing authority does not give written approval.

2. May a Land Bank Commissioner or Town Advisory Board member sell land or collect a real estate brokerage fee from the sale of land to the Land Bank Commission?

Generally, G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency in which the municipality is an interested party. An agreement for the purchase, sale or disposition of a piece of property is a contract for §20 purposes. EC-COI-84-51.

The next issue is whether a Land Bank Commissioner or a board member has a direct or indirect financial interest in the contract. A Commissioner or board member who enters a contract with the Commission has a direct financial interest in the agreement. EC-COI-84-51; 83-111. We conclude that members who are real estate brokers also have a financial interest in a purchase and sale contract between a property owner and the Land Bank Commission if they receive a brokerage fee based on the selling price.

The final question is whether the town or, in the case of Commissioners, the Land Bank Commission, is an interested party to the transaction. In the case of Land Bank Commissioners, the Commission is a party to the contract and Commissioners will be prohibited from entering a contract with the Commission or receiving brokerage fees from sales to the Commission. In the Matter of Norman McMann, 1988 SEC 379; EC-COI-83-111. Similarly, a town advisory board member is prohibited from selling land to the Commission or accepting a brokerage fee if the property is located in the town in which she sits on the Board. Her town will be an interested party to the transaction because it must approve or veto the sale. Although §20 contains several exemptions, none are applicable to the above situations.[8/]

Our decision would be different if the town advisory board members sold land to the Commission or accepted a brokerage fee for the sale of property not located in the town in which the advisory member served. Under these circumstances, the member's town would not be an interested party and would not be required to approve the transaction. In this situation, the advisory board member may sell land to the Commission but a Commissioner may not because the advisory board member would have a financial interest in a contract, not with their local town, but with an independent municipal agency, namely the Land Bank Commission. In comparison, a Commissioner may not sell land to the Commission because she would have a financial interest in a contract with her own agency, which would violate §20.[9/]

3. May a Town Advisory Board member also perform services as a real estate broker in the town in which he serves?

A. Town Advisory Board Members

Section 17 prohibits a municipal employee from 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. Generally, the town is not a party to nor has a direct and substantial interest in the private transfer of property within its borders. Under the circumstances you present, we do not find that the town, within the meaning of G.L. c. 268A, has a direct and substantial interest in property transfers under c. 736, even though a portion of the statutory fee under c. 736 is deposited in an individual town account. The town's interest is indirect and is not in connection with the sale contract. The town advisory board does not review real estate contracts or administer the fee collection process. See, EC-COI-86-23 (no state interest in private transaction not requiring agency review or approval or place agency in position of being party in interest). Proceeds from the fee collection do not revert to the town treasury, but rather remain in the county treasury for the benefit of the Land Bank Commission. c. 736, §8A. If a town

withdraws from the Land Bank, monies in its town account will revert to the Land Bank Commission's account. c. 736, §15. The town will not receive title to funds in its individual town account until such time as the Land Bank Commission permanently dissolves. As the town does not have a direct and substantial interest in private real estate sales contracts, a real estate broker who is also an advisory board member may receive a brokerage fee from the private sale of property subject to c. 736.[10/]

B. Land Bank Commissioners

Under §17, Land Bank Commissioners may not receive compensation from anyone, other than the Land Bank Commission, in relation to a particular matter in which the Commission is a party or has a direct and substantial interest. We conclude that the Land Bank Commission has a direct and substantial interest in every real estate contract under c. 736 because the Land Bank Commission, unlike the individual town, directly receives 50% of the statutory fee imposed on real property transfers as calculated according to the purchase price of the property. The Land Bank Commission also retains title to the portion of the fee designated in the individual town accounts. The Land Bank Commission is required to review and certify the purchase price of each transfer subject to c. 736, and this certification is submitted to the Register of Deeds. Unlike an individual town, the Land Bank Commission is a direct party in interest to each real estate transfer and is vested with enforcement powers to protect its interests. c. 736, §§13, 14. Therefore, the Commissioner/real estate broker is prohibited under G.L. c. 268A, §17 from receiving a brokerage fee from the sale of any Martha's Vineyard property that is subject to c. 736. In effect, a Land Bank Commissioner may not work as a real estate broker on Martha's Vineyard during his tenure as a Commissioner.

4. May a Land Bank Commissioner or a Town Advisory Board member who is also a local municipal employee participate in a Commission decision where the town is also competing for the piece of property?

A. Land Bank Commissioner/Local Municipal Employee

(1) As a Land Bank Commissioner

Pursuant to G.L. c. 268A, §19, a Land Bank Commissioner must abstain in matters, such as a determination to purchase land, if a business organization in which he is serving as an officer, director, trustee, partner or employee has a reasonably foreseeable financial interest. In past precedent, we have considered a municipality to be a "business organization" for purposes of G.L. c. 268A, §19. EC-COI-89-2; 81-153. For example, in EC-COI-81-153, a city employee who was also a member of a state authority was prohibited from participating as an authority member in particular matters, such as land agreements between the city and the authority, in which the city had a reasonably foreseeable financial interest.

Similarly a Land Bank Commissioner who is also a municipal employee may not participate in any matters affecting the financial interest of his town. For example, under §19 a Land Bank Commissioner who is also a municipal employee must abstain in any decisions which affect his town's financial interest, such as decisions to purchase land in town, to allocate money to the town account or to dispose of land in town. Therefore, if his town has presented a competing bid for property, the Commissioner must abstain in Land Bank decisions regarding the property. There is no exemption available under §19 because the Commissioner is an elected official.

Although a Commissioner/municipal employee must not participate, as a Commissioner, in a decision whether to compete with his town for a piece of property, he may step down from the Commission and publically announce that he is representing the interests of his town and articulate his town's position before the Commission. Generally, G.L. c. 268A, §17 would prohibit a Commissioner, otherwise than as required by law for the proper discharge of his official duties, from acting as an agent for anyone other than the Commission in connection with a particular matter in which the Commission is a party or has a direct and substantial interest. We conclude that, under c. 736, a Commissioner is acting as required by law for the proper discharge of his official duties. Chapter 736 permits Land Bank Commissioners to represent their towns' interests before the Commission because c. 736 provides that each town elect one Commissioner. As the Commission is comprised of a legal resident of each of the member towns, it appears that the intention of the statute is to provide for each town's representation on the Land Bank. Thus, a Commissioner is engaging in permissible constituency work when he advocates his town's interests before the Commission. **See, Commission Advisory No. 13.**

It may seem anomalous that a Land Bank Commissioner/municipal employee is required to abstain as a Commissioner in most Commission decisions pertaining to property in his town although he is elected to represent his town before the Land

Bank Commission. However, c. 736, by its plain language, does not contemplate that Commissioners will also be local municipal employees nor does it reference any express exemption to G.L. c. 268A. The only requirement is that the Commissioner be a legal resident of the town. In certain other statutes, where board members' affiliation on boards and private affiliations inevitably will result in conflicts, the Legislature has included statutory language addressing the problem. See, e.g., G.L. c. 92, App. §1-3(e) (MWRA board members who are also public employees may vote or act on behalf of town or MWRA on matters affecting the town); c. 15A, §2 (members of the Board of Regents who are also affiliated with institutions of higher education may participate in matters involving institutions); EC-COI-87-39 (interpreting St. 1982, c. 560, §3). Absent express statutory language in c. 736 permitting Commissioners who are municipal officials to participate in matters affecting their town's financial interest, we must assume that the Legislature intended c. 268A to apply in its entirety to Land Bank Commissioners. Accordingly, Commissioners who are also municipal employees may not participate as Commissioners in matters in which their town has a reasonably foreseeable financial interest.

(2) As a Municipal Employee

Chapter 268A also applies to Land Bank Commissioners in their official activities as local municipal officials. In past precedent, the State Ethics Commission has considered a regional district to be a "business organization" for purposes of G.L. c. 268A, §19. EC-COI-82-25. Accordingly, a Land Bank Commissioner may not participate as a local official in a municipal decision affecting the Land Bank Commission's financial interest. For example, a local selectman who is also a Commissioner cannot participate as a selectman in a decision to sell town land to the Land Bank because the Commission has a financial interest in the decision. As another example, members of boards of health or conservation commissions who are also Commissioners must abstain in health board or conservation decisions regarding permits sought by the Land Bank Commission. Appointed officials may be eligible for a §19(b)(1) exemption but no exemption is available for elected officials.

You should also be aware that §17 will limit the ability of local municipal employees who are also Commissioners to represent the Land Bank Commission before local boards. G.L. c. 268A, §17. For example, a selectman may not represent the Land Bank Commission before the conservation commission regarding an Order of Conditions because the selectman would be acting as an agent for someone other than the municipality in connection with a matter in which the municipality is a party.[11/] See, Commission Advisory No. 13; In the Matter of Richard Reynolds, 1989 SEC 423.

B. Land Bank Commissioners who are not municipal employees in another capacity

Land Bank Commissioners who do not hold other local office may participate as Commissioners in all Commission decisions affecting their town's financial interest because they are not employed by the town. These Commissioners will be required to abstain if a decision affects their financial interest, or the financial interest of their immediate family, partner, a business organization in which they are an officer, director, partner, trustee or employer. Just as a Commissioner/local municipal official must abstain if his municipal employer's financial interest is affected, the Commissioner/private citizen must abstain if his private employer's financial interest is involved.

Land Bank Commissioners/private citizens may also represent their town's interests before the Commission and they may represent the Land Bank Commission before town boards because they do not serve in a local municipal capacity.

C. Town Advisory Board Members who are not Municipal Employees in Another Capacity.

Members of town advisory boards are municipal employees for purposes of G.L. c. 268A. As municipal employees, their loyalty is to the municipality they serve. A town advisory board member may participate in a decision to deny the Land Bank Commission's acquisition of property just as the zoning board of appeals may deny a special permit. Each board is performing the duty with which it is charged and §19 is not implicated. Issues under §19 would arise if a town advisory board member was also an employee of the Land Bank Commission. In that case, the member must abstain as his employer would have a financial interest in the matter.

Town advisory board members may not receive compensation from or act as agent or attorney for anyone other than the town in connection with a particular matter in which the town is a party or has a direct and substantial interest. Therefore, board members may not act on behalf of private parties or the Land Bank Commission before local boards. If

town advisory board members serve on a part-time or uncompensated basis, the board may be designated special municipal employee status by the board of selectmen. G.L. c. 268A, §1(n). Special municipal employees may receive compensation from or act on behalf of third parties in relation to particular matters in which they do not participate as municipal employees, for which they do not have official responsibility, or matters not pending in their agency. G.L. c. 268A, §17, ¶5.

D. Town Advisory Board Members/Municipal Employees

Sections 17 and 19 are applicable to town advisory board members who also hold another municipal position in town in the same manner as to board members who do not hold other municipal offices. However, issues arise under §20 for municipal employees who hold dual positions in town.

Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency, in which the town is an interested party. For example, a town advisory board member who is also a paid employee in the park and recreation commission would violate §20, unless she was eligible for an exemption, because she is a municipal employee as a board member who has a financial interest in a contract with her town, namely her employment arrangement. **See, Advisory No.7.**

Section 20 contains many exemptions and town advisory board members who have §20 issues should contact the SEC for further guidance regarding their particular situation. Of particular significance to Martha's Vineyard is an exemption permitting an employee in a town with a population of less than 3500 people to hold and be compensated for more than one appointed position in town provided that the board of selectmen approves the exemption from §20. G.L. c. 268A, §20, ¶5.

E. Town Advisory Board Member who is also a Land Bank Commissioner

A Land Bank Commissioner who is also a town advisory board member will be subject to the same restrictions as Land Bank Commissioners who are also municipal employees (see Section A above). In particular, such a Commissioner may not participate, as a Commissioner, in any matter in which his town has a reasonably foreseeable financial interest. No exemption is available under §19 because he is an elected official.

Additionally, under §19, he may not participate as a town advisory board member in any matter in which the Land Bank Commission has a financial interest because the Commission is a business organization in which he serves as a public official. Particular matters in which the Land Bank Commission will have a financial interest include decisions to sell property, to purchase property, to incur debt, to use the town account, to improve property. As a practical matter, §19 will impose substantial restrictions on a Commissioner/advisory board member's official actions and may essentially prohibit him from holding both offices because conflicts of interest will inevitably arise on a repeated basis. An exemption may be available to this individual as an advisory board member. In order to obtain this exemption, such an individual must advise the official responsible for his appointment to the advisory board of the nature and circumstances of the particular matter and make full disclosure of the Land Bank Commission's financial interest. The appointing official must consider whether the financial interest is not so substantial as to be deemed likely to affect the integrity of the services the town may expect from the advisory board member and provide the member with a written determination. G.L. c. 268A, §19(b)(1). It will be necessary for the appointing authority to make a separate written determination for each particular matter because the facts and circumstances may vary. Without a written determination, a Commissioner/advisory board member may not participate, as an advisory board member, in decisions affecting the Commission's financial interest. **See, In the Matter of Deidre Ling,** Disposition Agreement (1990).[12]

5. May relatives of Commissioners and board members enter contracts with the Land Bank Commission?

Relatives of Commissioners or board members may enter contracts with the Commission provided that the Commissioner or board members do not participate in any decision that will affect an immediate family member's financial interest. If the relative is not an immediate family member, the Commissioner or board member may participate in personnel decisions affecting the relative if they file a public written disclosure with their appointing official, or at each town clerk's office if they are an elected official.

Chapter 268A defines immediate family as the employee and his spouse, and their parents, children, brothers and sisters. §1(e). If the Land Bank Commission wants to hire an immediate family member, the Commissioner or board member must abstain from participation in any matters pertaining to

hiring the family member, any involvement in re-appointment, promotion, firing, determining the family member's salary, conducting job reviews, supervising the family member, and delegating the task of dealing with an immediate family member to a subordinate.[13] **See Commission Advisory No 11; In the Matter of Peter J. Cassidy, 1988 SEC 371; EC-COI-83-11.**

Additionally, board members or Commissioners who are also owners or partners in family businesses may not have any interest in a contract awarded to another family member in the business as this interest would violate §20. The family business must take care to keep adequate records demonstrating that the advisory board member or Commissioner's financial benefits from the corporation are segregated from the proceeds of any Commission contract. **See, EC-COI-84-13; 83-111; 83-125.**

Finally, if the relative does not fall within the classification of immediate family member, §23 will apply. Section 23 contains general standards of conduct applicable to all state, county and municipal employees. It provides, in pertinent part, that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. G.L. c. 268A, §23(b)(2). Furthermore, §23(b)(3) prohibits a state employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties.

An appearance of a conflict of interest or bias may be raised when a Commissioner or board member participates in a decision affecting a relative who is not an immediate family member because of the kinship relationship. The proper course for a Commissioner confronted with this situation is, prior to participating, to make a full written disclosure of the relationship and file it with each town clerk represented by the Commission. An advisory board member should file a full written disclosure with his appointing authority. These disclosures will become public records. Further, Land Bank Commissioners and advisory board members should make a verbal public disclosure for inclusion in the meeting minutes prior to any official participation or action. The public official should take care to evaluate the relative's proposal with the same objective standards as are used for all proposals.

Although this written disclosure will permit official participation under §23(b)(3), it will not protect a Commissioner or board member from a §23(b)(2) violation. Section 23(b)(2) is implicated if a Commissioner gives a relative an "inside track" on an unadvertised position or provides better benefits or schedules to a relative than to similar Land Bank Commission employees.

6. How does c. 268A apply to relationships other than family relationships?

The Legislature has delineated a series of relationships which would mandate abstention by public officials in their official dealings. As previously discussed, a municipal employee is required to abstain in any particular matter affecting his financial interest, or the financial interests of an immediate family member, a partner, an organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has an arrangement for prospective employment. G.L. c. 268A, §19. We have determined that §19 does not apply to matters affecting personal or business relationships outside of the relationships listed within §19. **See, EC-COI-89-16** (friendship); **83-12** (spouse of state employee's sister-in-law is not an immediate family member); **83-34** (occasional attorney services do not create an employee relationship); **89-12** (hospital overseer is not an officer, director, trustee or employee of the hospital).

Although §19 is not applicable, G.L. c. 268A, §23 is. As previously indicated, §23 contains general standards of conduct applicable to all state, county and municipal employees. It provides, in pertinent part, that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. G.L. c. 268A, §23(b)(2). Furthermore, §23(b)(3) prohibits a state employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him 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 or position of any party or person.

To dispel any appearance of bias, §23(b)(3) requires that the public employee make a written disclosure of all the relevant facts concerning the relationship to the appointing authority or town clerk, if an elected official. **See, In the Matter of George Keverian** (Disposition Agreement, April 23, 1990). This disclosure will become a public record and must be filed prior to participation in the matter. Additionally, municipal employees should make a verbal public disclosure for inclusion in the meeting

minutes prior to any official participation or action.[14]/

DATE AUTHORIZED: November 14, 1990

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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]/Certain land interests are exempt. G.L. c. 736, §12.

[2]/For example, at the state level, the Secretary of EOEA is a voting member of the Commission and holds veto power over decisions of the Commission regarding the disposition and change in use of any Commission interests in land. We note that the Legislature did evidence an intent to limit the influence of the Secretary of EOEA. See, c. 736, §3. At the county level, the Commission may receive county funds, and utilize the services of the County Treasurer, and the initial Commission was appointed by the County Commissioners until such time as local elections could be held.

[3]/Because your questions are general in nature, we are only able to render a general opinion. We recommend that individual Commissioners, Land Bank employees, and town advisory board members who suspect they may have a conflict of interest situation contact the SEC for an opinion regarding their individual situation.

[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]/"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).

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

[7]/An advisory board member or Land Bank Commissioner faces additional limitations in his official capacity under §19 in that he may not participate as a public official in any matter in which he or his business partner, or any real estate agency in which he is an officer, director, trustee, partner or employee has a reasonably foreseeable financial interest. For example, a Commissioner who is a real estate broker may not participate in any advisory board approval of a Land Bank Commission purchase if his real estate agency is the broker. Advisory board members may be eligible for a §19(b)(1) exemption.

[8]/Town advisory board members may be eligible for an exemption under G.L. c. 268A, §20(d) if the Selectmen designate the town advisory board as special municipal employees. G.L. c. 268A, §1(n). The designation of special municipal employee status is not applicable to Land Bank Commissioners, unless that status is granted by the Legislature. EC-COI-87-2.

[9]/Business partners of board members and Commissioners may also be restricted in their dealings with the Commission or a town advisory board. G.L. c. 268A, §18(d) prohibits partners of municipal employees from acting on behalf of third parties before boards on which the municipal employee sits or over which the municipal employee has official responsibility. See EC-COI-89-5. Section 18(d) will prohibit partners of board members from appearing before town advisory boards and the Commission.

[10]/As previously indicated, our conclusion would be different if the advisory board member was involved in a sale directly to the Land Bank Commission or to the town in which he is an advisory board member. See, Question 2.

[11]/If the municipal employee has been designated a special municipal employee for purposes of the conflict of interest law, he may represent the Land Bank Commission before local boards in relation to a matter in which he has not participated as a municipal employee, or a matter for which he does not have official responsibility, or a matter which is not pending in his agency. See, §17, ¶5, §1(n).

[12]/You have also sought an opinion regarding whether the members of the Wampanoag Tribal Council who are also town advisory board members may participate in a land dispute action between the Tribal Council and the Land Bank Commission. Absent the probability of an actual dispute and further facts, we decline to render an opinion on this issue at this time.

[13]/The §19(b)(1) exemption procedure may be available to appointed officials.

[14/] You have also asked how the conflict of interest law applies to Land Bank Commission staff. Commission staff are municipal employees for purposes of c. 268A because they are performing services for a municipal agency. §1(g). Therefore, G.L. c. 268A, in its entirety, will apply to Commission staff. Staff members should direct their specific questions and fact situations to the State Ethics Commission to obtain guidance under the law.

CONFLICT OF INTEREST OPINION
EC-COI-90-3

FACTS:

You are the President of ABC College (College), an institution under the authority of the Board of Regents of Higher Education (M.G.L. c. 15A, §3) and the College Board of Trustees (M.G.L. c. 73, §19). You also serve without compensation on the board of directors of the ABC College Foundation, Inc. (Foundation). The Foundation is a non-profit corporation, established in 1981 and organized under M.G.L. c.180. It qualifies as a tax-exempt organization under the Internal Revenue Service Code §501(c)(3).

Based on information provided by you, we understand that the establishment of the Foundation arose from the desires of College faculty and staff members for a means to raise money for special projects and programs which were not funded through the state budget. The Foundation has access to funding sources normally unavailable to public institutions. Additionally, proponents of the non-profit foundation stated it was a means to "keep funds separate from state coffers" and that similar organizations had been formed in a number of state educational institutions.

According to its articles of organization, the Foundation was formed as a "charitable educational corporation...to render financial assistance and support to the educational programs and development of the College...and to solicit, receive and accept inter vivos and testamentary gifts of real and personal property; administer, invest, reinvest, change investments, and...manage said property..." Annual membership in the Foundation is open to any individual contributing more than $100 in a fiscal year.

The Foundation's board of directors originally consisted of six members of the College's administration who, via a majority vote, selected five additional board members. As of June 29, 1989, the Foundation's by-laws, provide for twenty (20) members on the board of directors consisting of: (1) the College president; (2) the College vice president of academic affairs; (3) one College faculty member (elected by College faculty members); (4) two College trustees (selected by the College Board of trustees); (5) five alumni (ae) of the College (selected by Alumni Association); (6) and ten directors not affiliated with the College (elected by a majority of the Foundation directors). Additional "Honorary Directors" may be elected by majority vote but serve as members who do not vote. A Director's term is a three-year appointment with a maximum tenure of two consecutive terms. Vacancies on the Board may be filled by the directors. A quorum consists of one-half of the directors holding office. A majority vote of the directors attending a valid meeting is required for the board of directors to take action. Directors may serve in the corporation "in any other capacity and receive compensation for any such service." Section 4.15.

The corporate officers of the Foundation, its chairperson, vice chairperson, treasurer and clerk are annually elected by the directors. Corporate officers may, but are not required to, be members of the board of directors. The Foundation's executive director acts as the corporation's chief executive officer and is subject to the control of the directors. The executive director is generally responsible for the operation and supervision of the corporation. (Section 5.5). Legal documents (deeds, leases, transfers, checks, etc.) are made by the chairperson and the treasurer.

The Foundation's current Board of directors includes a 25% representation of College alumni (ae) (or five seats). As indicated above, this percentage requirement stems from the Foundation by-laws, which incorporate the Alumni Association as a "permanent undertaking of the Foundation according to an agreement reached on March 10, 1986." Section 8. The Alumni Association's tax exempt status is derived through the Foundation. The Alumni Association has full use of certain College facilities and Foundation services. The 1989 guidelines for the Alumni Association indicate that its membership consists of College graduates and College students completing one year of study. The Association helps the Foundation with fundraising activities and the Foundation acts as the repository for certain scholarship funds for the Association. Changes in the Alumni Association's operation guidelines are subject to review by the Foundation. In sum, the Alumni Association operates as a "subsidiary" of the Foundation: the Foundation primarily acts as a fundraising entity and the Association assists the College by providing programs and publishing an alumni newsletter. For example, the

cost of postage for the 1988 Alumni Newsletters (which were prepared, printed and distributed by the Association) was primarily derived from Foundation funds. In addition, the College provided $3500 towards the postage for the Newsletter.

The Foundation's funding is derived in most part from private sources. In addition to paying for its own clerical and bookkeeping personnel, the Foundation (and Alumni Association) receives support from the College via the gratuitous use of: College office and meeting room space; secretarial help; exhibition services; postage, telephone, photo copying, bulk mail services; organizational services for large projects, maintenance of alumni lists, and the issuance of alumni identification cards. The College provides the Foundation and the Association with a mailbox and someone to answer day-to-day correspondence and phone calls. The College provides additional support at its discretion.

Furthermore, the College's paid Director of Development and Alumni Relations also acts as the Foundation's unpaid Executive Director. The College also provides the Foundation with the services, at no cost, of three College employees in the College's development office. While there is no formal agreement as to the use of these three employee's services, you state the College "derives benefits in the form of gifts from the Foundation which substantially exceed the value of services and supplies provided by the College."

QUESTIONS:

1. Is the Foundation subject to the jurisdiction of the conflict of interest law?

2. If so, how would the Foundation's board of directors be subject to the conflict law?

3. Would changing the number of Directors to increase the number of unaffiliated seats to comprise a majority of the Board change the jurisdictional result?

4. Would G.L. c. 268A, §§8A or 23A prohibit appointment of Foundation directors who hold positions in the College or on its Board of trustees?

ANSWERS:

1. Yes.

2. They would be subject generally to G.L. c. 268A. In particular, they would be subject to §§7 and 23.

3. No.

4. No.

DISCUSSION:

I. Jurisdiction

The fundamental question posed by your request is whether the Foundation, for the purposes of the conflict law, is a "state agency" or an instrumentality or division of a state agency within the meaning of M.G.L. c. 268A, §1(p). That provision defines a "state agency" as: "any department of a state government...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."

The Commission has previously determined that the organizational structure of an entity is not dispositive of jurisdictional status under the conflict of interest law. **See, EC-COI-88-19, 84-147**, citing **In the Matter of Louis Logan**, 1981 SEC 40,45. The fact that the Foundation is organized as a non-profit corporation in accordance with G.L. c. 180 therefore, is not a sufficient basis to remove it from the definition of a state agency. **EC-COI-88-24; 89-24; cf. 88-19.**

The Commission has, in prior opinions, identified four factors which it will examine in determining whether an entity falls within the jurisdiction of c. 268A. These factors are:

(1) the means by which the entity was created (e.g., legislative or administrative action);

(2) the entity's performance of some essentially governmental function;

(3) whether the entity receives and/or expends public funds; and

(4) the extent of control and supervision exercised by government officials or agencies over the entity. **See, EC-COI-88-2; 85-22; 84-65.**

None of these factors standing alone is dispositive. Rather, the Commission considers the overall effect of these criteria in light of the particular entity. **EC-COI-84-65; 88-19; 89-1; 89-24.** In light of Commission precedent, we conclude that the Foundation is a state agency within the definition of §1(p).

A. Creation:

The creation of the Foundation as a chapter 180, non-profit corporation originated from the actions of College officials. The fact that such officials would be considered "state employees"[1/] within the meaning of the conflict law, c. 268A, would not be controlling in determining whether the Foundation is a governmental creation. The Commission "looks to the impetus for the creation, rather than merely the affiliation of the entity's organizers." EC-COI-88-24 at p.3; EC-COI-88-19; cf. EC-COI-84-65. For example, the Commission found governmental creation concerning a non-profit corporation formed by two state college faculty members where that corporation's primary purpose was to benefit and support their state college department. EC-COI-89-24. The Commission concluded in that opinion that the impetus for the corporation's creation stemmed from the state college's "legislatively mandated functions of education and research." Id. at p 5. In addition, the Commission has previously found governmental creation where municipal officials in a municipal agency created a non-profit organization to further the agency's statutory mandate. EC-COI-88-24. Similarly, where a state agency on its own initiative created a non-profit corporation to further its legislative purpose, the Commission confirmed a prior opinion and found the corporation was governmentally created. EC-COI-89-1; EC-COI-84-147. See also, EC-COI-84-66 (though not created pursuant to specific state statute or regulations, a committee would be considered governmentally created where it would become part of a state agency's operations and would function to promote that state agency's legislative purpose).

We conclude that the impetus for the creation of the Foundation is akin to the aforementioned opinions and therefore is a governmentally created entity. We base this conclusion on the fact that the Foundation's primary purpose is to render financial assistance and support to College programs by soliciting and raising funds. This purpose is no different from the legislatively mandated responsibilities ascribed to the College's Board of Trustees under G.L. c. 15A, §10(e). That provision states the College trustees are responsible for seeking, accepting and administering for faculty research, programmatic and institutional purposes grants, gifts and trusts from private foundations, corporations and alumni as well as other sources. The statutory responsibilities of the college trustees, therefore, are being furthered by the Foundation and the Association. This result is consistent with our conclusions in EC-COI-89-24; 88-24; 89-1 and 84-66. Furthermore, the reason behind the creation of Foundation is dissimilar from other instances where the Commission has found no governmental creation. EC-COI-84-65 (trust fund created by a will not governmentally created); EC-COI-88-19 (governmental creation did not apply to a non-profit corporation created by a private contract).

B. Governmental Function

Closely related to the above analysis concerning the impetus for the Foundation's creation is whether the Foundation is performing some function which is essentially governmental in nature. We conclude the Foundation and its Alumni Association are performing a governmental function by raising funds to support and subsidize the College, a public institution of higher education. The Commission has previously determined that revenue raising for a state college and a specific department within that college to be a governmental activity. EC-COI-89-24. Similarly, the Commission in EC-COI-89-1 stated governmental function will be found where the legislature has imposed an obligation on a state institution's board of trustees to finance and ensure the financial viability of that institution. See also, EC-COI-88-19. The Foundation's primary function, to raise money and to provide supplemental financial assistance to the College, is clearly a function which the legislature has deemed to be a responsibility of the College's Board of trustees. G.L. c. 15A, §10(e) and c. 73, §1. Thus, the Foundation both facilitates and carries out a statutory mandate. CF. EC-COI-85-44.

C. Public Funds

The Foundation and Alumni Association raise most of their funding from private sources. There is, however, significant support from the College by means of in-kind support as well as monetary assistance. For example, the College gave $3,500 to the Foundation to help defray the costs of mailing the Alumni newsletter. Also, the College provides the Foundation and Alumni Association with free office and meeting room space, telephones, photo copying, exhibition and other assistance for large projects, alumni lists and bulk mailing services. The college also provides the Foundation with a mailing address and with personnel to respond to inquiries. Importantly, the College permits three of the employees to render their services to the Foundation, free of charge, at its discretion. In addition, the College's Director of Development and Alumni Relations also serves as the Foundation's unpaid executive director. These facts indicate that considerable state resources and public funds are used to sustain the Foundation (and Alumni Association). EC-COI-88-24 (a non-profit entity's use of public agency's employees and faculties is viewed as

substantial use of public funds).

D. Governmental Control

The extent of governmental control over an entity may be evidenced by the selection process and composition of that entity's governing board. **EC-COI-84-147; 89-1; 89-24.** While the facts considered here indicate less governmental control over the Foundation than situations previously reviewed by the Commission, we find that both the potential for, and the reality of, significant governmental control exists under the facts you have presented. On its face, the composition of the Foundation Board appears neutral, as only five of the twenty directors are College-affiliated. However, since the by-laws are silent on the whether the alumni directors may be College-affiliated individuals, there is a potential for a majority of the director positions to consist of College-affiliated individuals. Additionally, the Foundation's executive director and staff are College employees.

Balancing all the factors discussed above, we conclude that the Foundation is an instrumentality of the College.[2/] **EC-COI-89-24; 89-1; 88-24; 84-147.** Therefore, members of the board of directors are "state employees" within the meaning of the conflict law. Since Foundation directors serve in their positions on an uncompensated basis, they would also be considered "special state employees." **See,** §1(o)(1). Generally, Foundation directors would be subject to §§2,3,4,6,7, and 23 of the conflict law. **See, Guide to the Conflict Law for State Employees.** In particular, §§7 and 23 are relevant to your questions.

II. Relevant Sections of G.L. c. 268A

A. Section 7

Section 7 prohibits a special state employee and a regular state employee from having direct or indirect financial interest in contracts made by state agencies. For example, absent an exemption from §7, a state employee is prohibited from having a second paid state job. **See, EC-COI-84-109.** The purpose of this section is to avoid the perception that state employees have an inside track on state contracts.

Section 7, however, would not apply to a Foundation director (special state employee) who has outside private employment which is not funded by a state contract or who holds other unpaid state positions. In addition, this section would not apply to any Foundation director who serves in that position by virtue of his college-affiliated position. **EC-COI-84-147.**[3/] Section 7 would apply to any Foundation director who holds a paid position which is funded under a state contract and where that state position does not envision his Foundation directorship. For example, absent compliance with an exemption, a Foundation director would be prohibited under §7 from being a paid consultant to the Department of Public Health because she would be a special state employee with an impermissible financial interest in a contract made by a state agency.

Exemptions from Section 7

Despite the general prohibition of §7, there are a number of exemptions from this section. A general exemption provided in §7(b) is available to a state employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency if the contract is made after public notice and who files a disclosure form with the State Ethics Commission. **EC-COI-87-24. EC-COI-83-35; 83-158.** Furthermore, if the contract involves personal services, additional requirements must be met. **See, EC-COI-83-97.**

A special state employee "who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the State Ethics Commission a statement making full disclosure of his interest and the interest of his immediate family in the contract" is eligible for an exemption under §7(d). This exemption is unavailable to any special state employee whose official duties would require him to oversee or interact with the contracting agency. **See, EC-COI-86-7; 85-3; 84-87; 81-26.**

If an overlap exists between the special state employee's duties and the contracting agency, a §7(e) exemption is available to a Board member who files with the State Ethics Commission a statement making full disclosure of his contract, if the governor with the advice and consent of the Executive Council exempts him. This exemption may be necessary for a Foundation director who is for example, also a part-time paid consultant to the College or to the Foundation.

A special provision applies to a Foundation director who also is a faculty member or teacher in a state educational institution. Section 7(e), paragraph three states:

This section shall not prohibit a state employee from teaching in an educational institution of the commonwealth; provided, that such employee does not

participate in, or have official responsibility for, the financial management or such educational institution; and provided, further, that such employee is so employed on a part-time basis. Such employee may be compensated for such services, not withstanding the provisions of section twenty-one of chapter 30.[4]

Due to the numerous exemptions under §7, individual Foundation directors who may be subject to this provision are advised to seek individual advice.[5]

B. Section 23

Section 23, the standards of conduct provision, applies to all state employees. These supplemental provisions to c. 268A are intended to avoid state employees from engaging in activity presenting the appearance of a conflict of interest.

Section 23(b)(2) prohibits any Foundation director from using his official position to secure for himself or others any unwarranted privileges or exemptions of substantial value.[6] For example, this section would prohibit a director from endorsing a private venture with his official Foundation position (EC-COI-83-82; 84-127) or from using Foundation facilities to promote his private work (81-87; In the Matter of Frederick C. Langone, 1984 SEC 187).

Additionally, §23(b)(3) prohibits a state employee from engaging in activity which could reasonably appear to improperly or unduly influence the performance of his official party or person. An exemption under this provision is available, however, if the appointed state employee (director) discloses in writing to his appointing authority (the entire Foundation Board) the facts creating the appearance of a conflict. The disclosure under this provision should be made in advance of activity proscribed by this section.

Section 23(c) further prohibits a current and a former state employee from using or improperly disclosing confidential information which was learned in his state position. See, EC-COI-85-23. Under this section, confidential information is that which would not be considered a public record under M.G.L. c. 4, §7.

Finally, §23(e) provides that a constitutional officer or head or an agency may establish and enforce additional standards of conduct. See, EC-COI-85-12.[7]

C. Application of Section 8A

Section 8A provides:

> No member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

The applicability of §8A turns on whether the Foundation is under the "supervision" of the College board of trustees. The Commission has previously considered the degree of independence of an entity's finances, operational, control and organization with respect to a state board. See, EC-COI-84-25. In EC-COI-84-147, the Commission found that the non-profit holding company's activities were not subject to the direct management and regulation by the institution board and therefore, §8A did not restrict institution board members from being appointed company board members. The Commission noted in that opinion that the threshold for finding "supervision" under §8A is "higher than for finding the factor of 'exercisable government control' in establishing jurisdiction under chapter 268A." Id. at p. 6.

Applying §8A to the Foundation's Board of directors we find that the corporate by-laws provide that two College trustees, selected by the College board of trustees, are to hold Foundation director positions. There is no indication, based on the facts as we currently understand them, that the College trustees supervise the Foundation board of directors. The fact that the Foundation by-laws allow trustees on its board of directors does not create a level of interaction amounting to the trustees' supervision of the directors.[8] See also, EC-COI-80-44. Thus, we conclude that §8A would not prohibit the appointment of College trustees to the Foundation's board of directors.[9]

CONCLUSION:

In summary, for the purposes of the conflict law, the Foundation is considered a state agency and thus Foundation directors are considered special state employees, subject to the provisions of G.L. c. 268A.

DATE AUTHORIZED: February 28, 1990

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[1]/"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether

serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group 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.

2/Even if the existing level of governmental control over the Foundation was further reduced, this would not affect our findings as to the other three factors discussed above. Therefore, any further changes to or alteration of the Board's composition would not be likely to affect the jurisdictional findings herein.

3/The Commission has found §7 not applicable to situations where additional state services or compensation are attributable to a state employee's primary state contract. See, EC-COI-84-148 (state employee's primary position envisioned his services on a state committee under his agency's enabling legislation); 88-10 (a municipal teacher's employment contract permitted the legitimate extra curricular activities compensated by that school district without violating §20, a parallel provision to §7). See also, EC-COI-84-12.

4/See, EC-COI-83-8; 81-24.

5/Commission precedent also indicates that state college faculty members are considered special state employees. See, EC-COI-81-64; 84-147. This status would not apply, for instance, to other full-time College employees.

6/An item of substantial value has been interpreted by the Commission to be anything valued at $50 or more. See, Commission Advisory No. 8.

7/Though not presented by your request, other provisions of c. 268A may apply to Foundation directors. For instance §4 may apply to a director's private activities and §6 may pertain to a director's official actions which forseeably affect his financial interests or those of his immediate family or business associates. Individual directors may wish to seek opinions as to their specific circumstances.

8/As noted in EC-COI-82-156, footnote 4, there may be a question as to whether the College board of trustees is a "State board" within the meaning of §8A.

9/Although §23A pertains to trustees of higher education institutions, it would not affect College trustees' services on the Foundation board of directors. Section 23A states in relevant part:

> No trustee of any public institution of higher education operated by the commonwealth shall be eligible to be appointed to or hold any other office or position with said institution for a period of three years next after the termination of his services as such trustee, ...provided... that a trustee may be appointed to or hold an unpaid office or position with said institution after his service as such trustee.

Unlike §8A, 23A applies to a trustee's future paid services in positions within his own institution. See, EC-COI-79-28. Assuming compliance with the provisions of §7, §23A would not prohibit a trustee from simultaneously holding an unpaid position with his own institution.

CONFLICT OF INTEREST OPINION
EC-COI-90-4

FACTS:

You are housing specialists employed by the ABC Division of the Housing Court Department of the Trial Court (Housing Court). The ABC Division is one of several housing courts established under G.L. c. 185C with jurisdiction over certain civil and criminal actions relating to laws concerned with the health, safety or welfare of tenants, as well as "all housing problems, including all contract and tenant actions which affect the health, safety and welfare of the occupants or owners" of property within the geographical jurisdiction of the court. G.L. c. 185C, §3,1/ as appearing in St. 1978, c. 512, §15.

As housing specialists, you inspect property, mediate landlord-tenant factual disputes, and coordinate the court resolution of housing problems.

You are also both certified code enforcement inspectors and have been asked by the XYZ Housing Authority (XYZ) to perform code inspections for its Section 8 and Chapter 707 housing programs. Housing authority certification of compliance with the state sanitary code is a condition to rental of an apartment under these housing programs.

You state that matters involving units owned or managed by XYZ do not regularly or frequently come before the ABC Housing Court. For example, most alleged building code violations in XYZ units are handled by the city Housing Department, an agency of that city, rather than through resort to the ABC Housing Court.

You have reviewed your prospective employment plans with the First Justice of the ABC Housing Court, who has implemented certain interim standards pending formal consideration of your advisory opinion request by the full Ethics Commission.

QUESTION:

Does G.L. c. 268A permit your proposed code inspection work for the XYZ while you also serve as housing specialists for the ABC Housing Court?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

As housing specialists employed by the ABC Housing Court, you are considered state employees for the purposes of G.L. c. 268A.

1. **Limitations on Your Proposed XYZ Activities**

As state employees, you are subject to certain limitations on your proposed outside activities. Under G.L. c. 268A, §4(a), a state employee is prohibited from receiving compensation from any non-state party such as XYZ in connection with any determination or other "particular matter"[2/] in which the Commonwealth or any state agency is a party or has a direct and substantial interest. Assuming that a state agency such as the Department of Community Affairs has a direct and substantial interest in housing code compliance certifications, your proposed compensated code inspection activities for the XYZ would violate G.L. c. 268A, §4. A 1980 exemption to G.L. c. 268A, §4, however, permits most of your proposed inspection activities. Under St. 1980, c. 10,

> This section [4] shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided by such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

Because the XYZ is a municipal agency for the purposes of G.L. c. 268A, see G.L. c. 121B, §7, you may hold an appointed, compensated position with the XYZ, provided that you not act or vote in your XYZ inspection capacity on any matter which is within the purview of the ABC Housing Court. For example, if a matter is pending before the ABC Housing Court relating to the compliance by an XYZ unit with the state sanitary code, you are prohibited by §4 from performing paid sanitary code inspection services for the XYZ in connection with that unit. On the other hand, the exemption to §4 permits you to perform inspection work in connection with housing units which are not the subject of a ABC Housing Court proceeding.

Under G.L. c. 268A, §23(b)(1), a state employee is prohibited from accepting other employment, the responsibilities of which are inherently incompatible with the responsibilities of his public office. In previous rulings, the Ethics Commission has prohibited outside employment which requires an advocacy or mindset which conflicts with an employee's impartial performance of duties, EC-COI-82-7, or which involves activities for an organization which has substantial needs for the employee's official services. **In the Matter of John DeLeire**, 1985 SEC 236.

In light of the relative infrequency of XYZ matters before the Court, and the determination by the First Justice that your proposed compensated XYZ inspections are not inherently incompatible with your housing specialist responsibilities under the conditions established by the First Justice, we conclude that your acceptance of XYZ employment would not violate §23(b)(1). **See, EC-COI-89-30.** We also take note of G.L. c. 268A, §23(d) which provides that any activity specifically exempted under any other section of G.L. c. 268A will also be exempt from the provisions of §23. In any event, the Court is free to establish additional standards which are stricter than those found in §4. **See, LaBarge v. Chief Administrative Justice**, 402 Mass. 462 (1988).

2. **Limitations on Your Court Activities**

Section 6 prohibits a state employee from officially participating in any matter which affects the financial interests of a business organization which employs him. Because XYZ is considered a business organization for G.L. c. 268A purposes, **EC-COI-88-4**, you will be required to abstain from participating as housing inspectors in any matter involving the housing authority which employs you, including units rented under XYZ programs. This abstention requirement will continue to apply unless you receive from the presiding justice written permission to participate in these cases, pursuant to the standards of §6(3).[3/] The abstention requirement will not apply to matters involving other municipalities or housing authorities since XYZ will not have a foreseeable financial interest in those matters.

You state that you have received from the First Justice conditional permission to participate as court housing specialists in certain matters in which the XYZ is a party. Those conditions prohibit your participation in such matters unless you have fully disclosed on the record to the parties, all of whom must be represented by counsel, your employment arrangement with the XYZ and have received written consent from the parties to participate in the case. Insofar as the exemption standards of §6 are concerned, we see nothing which would prohibit an appointing official from permitting participation by an employee subject to particular conditions. Where an appointing official possesses discretion under §6 to entirely permit or deny participation by an employee, it logically follows that an appointing official possesses the authority to establish conditions on participation. This is particularly apt where, as here, the conditions established by the appointing official reasonably relate to preventing any perception that an employee's official judgment may be clouded by competing private loyalties. Pursuant to G.L. c. 268A, §6(3), a copy of the conditions permitting participation should be filed with the Commission.

We would add that the statutory exemption scheme in G.L. c. 268A, §6 requires an appointing official to evaluate the substantiality of the financial interest at issue. In your case, the First Justice must evaluate the financial interest of the XYZ which is at stake in each XYZ-related matter which comes before you as a housing specialist. In cases in which the financial interests of the XYZ are substantial, the First Justice may very well determine that the financial interest will effect the integrity of your services and that your participation would therefore not be appropriate, even following disclosure to and consent by the interested parties. In such cases, the First Justice should assign the XYZ-related matter to a different housing specialist.

Finally, you should observe the limitations of G.L. c. 268A, §23(b)(2). This section prohibits a state employee from using his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. As applied to you, §23(b)(2) requires that you perform your housing authority activities entirely outside of your Court work schedule and that you refrain from using any Court equipment or resources to carry out your housing authority activities.

DATE AUTHORIZED: April 18, 1990

[1/]The enactment of this statute expanded the jurisdiction of the ABC Division and other housing courts. See, **Harker v. Holyoke**, 390 Mass. 555 (1983); **Chakrabati v. Marco S. Marinello Associates, Inc.**, 377 Mass. 419 (1979).

[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/]Under §6,

> Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either:
>
> (l) assign the particular matter to another employee; or
>
> (2) assume responsibility for the particular matter; or
>
> (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written

determination shall be forwarded to the employee and filed with the state ethics commission by the person who made the determination.

CONFLICT OF INTEREST OPINION
EC-COI-90-5

FACTS:

You are a partner in a law firm which currently contracts with a state board (Board) to provide legal services. You indicate that the Board has divided administrative responsibilities so that your law partner, Mr. X, assists the Board staff in its prosecutorial function, while you assist the Board hearing officer and the Board in its adjudicatory function.

QUESTION:

Does G.L. c. 268A permit you and Mr. X to perform your proposed services for the Board?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

1. Jurisdiction

The "state employee" provisions of G.L. c. 268A apply to you and Mr. X, inasmuch as you are performing services for Board, a state agency. See, G.L. c. 268A, §1(q). We note that the Board has also classified you as "special state employees" within the meaning of G.L. c. 268A, §1(o). While this status will provide an exemption from certain G.L. c. 268A restrictions on your outside activities, special state employee status will not affect the application of G.L. c. 268A to the questions which you have posed.

2. G.L. c. 268A, §6

Under §6, you are required to abstain from participating as Board counsel in any contract, determination, controversy or other particular matter[1/] in which either you, your partner or firm has a financial interest. Issues under §6 may arise when you are called upon to review, in the context of an adjudication, the merits of legal issues in which Mr. X has developed and advocated as the prosecutor. Notwithstanding the application of the §6 restriction, however, §6 contains an exemption procedure which would permit your participation following your disclosure of the relevant facts and the receipt of written permission from your appointing official pursuant to the standards of §6(3).[2/] Because your appointing official has expressly granted permission to you and other firm employees to participate in connection with matters in which you are assigned, the abstention requirements of §6 do not apply to you or other firm employees.

3. G.L. c. 268A, §23

Under §23(b)(2), you may not use or attempt to use your official position to secure any unwarranted privilege or exemption of substantial value for yourself or others. Further, §23(b)(3) requires that you avoid creating an appearance of undue favoritism towards your partner in carrying out your adjudicatory functions. By disclosing the relevant facts to your appointing official, you have dispelled any appearance of favoritism. To comply with §23(b)(2), there need to be sufficient safeguards to insure that you are not providing unwarranted favoritism to positions advocated by your partner. One such safeguard would be your refraining from any *ex parte* communication with Mr. X concerning matters in which you are assisting in the adjudicatory process. Another safeguard would be your basing your advice to the Board on objective standards, such as established administrative, judicial and statutory precedent.
See, EC-COI-82-181, in which the Commission concluded that an assistant city solicitor could serve as a hearing officer in a civil service disciplinary proceeding in which his supervisor was an advocate, subject to similar safeguards under §23.

4. Conclusion

Given your receipt of a §6(3) exemption, your continued arrangement under which you perform divided administrative responsibilities for the Board is permissible under G.L. c. 268A as long as you continue to observe the safeguards of §23. Whether your participation in any case could rise to the level of bias is more appropriately addressed through an appeal of an Board administrative decision to the courts. See, G.L. c. 30A, §14. Finally, we do not have the authority to construe either the Code of Professional Responsibility or the Code of Judicial Conduct, and we suggest that you pursue constructions of those codes with appropriate sources.

DATE AUTHORIZED: April 18, 1990

[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]/Under §6(3), an appointing official following receipt of a disclosure of a financial interest from a subordinate state employee may

> make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the commission for a period of six years.

CONFLICT OF INTEREST OPINION
EC-COI-90-6

FACTS:

You recently retired from your position a Supervisor for the Department of Education (DOE). You are now interested in consulting to school districts and wish to know how G.L. c. 268A applies to your proposed consultation to local school systems with which you may have had prior official dealings as DOE Supervisor.

QUESTION:

Does G.L. c. 268A permit you to consult with local school systems?

ANSWER:

Yes, subject to the conditions set forth below.

DISCUSSION:

Following your retirement from DOE, you became a former state employee and are subject to the restrictions contained in §§5 and 23(c) of G.L. c. 268A.

1. **Section 5(a)**

This section prohibits you from consulting to or otherwise receiving compensation from any non-state party such as a school system if your consultation is in connection with any agreement or grant, or other particular matter[1]/ in which you previously participated as a DOE employee. For example, if you previously reviewed an application which, following final approval, became effect after your retirement, you are prohibited by §5(a) from consulting to a school district in connection with the same grant. **EC-COI-88-14.** On the other hand, §5(a) does not prohibit your consulting on successor applications since the Ethics Commission regards each annual application or grant as a separate particular matter. **EC-COI-79-34.** Consequently, you will need to determine whether any grant on which are invited to consult was one in which you previously participated as a DOE employee. In light of the one-year duration of those grants, the §5(a) restrictions should not permanently limit your proposed consultations.

2. **Section 5(b)**

Under §5(b), you are subject to a supplementary one-year bar on your personally appearing before state agencies in connection with matters in which you did not previously participate but which were nonetheless under your "official responsibility"[2]/ as DOE Supervisor. For example, if a city had filed an application for FY1991 while you were that city's Supervisor, you would be subject to a one-year bar on your appearing before a state agency in connection with that FY1991 grant, even if you had not participated in the application process prior to your retirement.

3. **Section 23(c)**

This section, which is largely self-explanatory, prohibits a state employee from disclosing or otherwise misusing any confidential information which he acquired as a state employee. As applied to you, you must refrain from disclosing to your school district clients any confidential information which you acquired at DOE, such as internal DOE standards for evaluating school system compliance with grants.

DATE AUTHORIZED: May 9, 1990

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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/"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.

CONFLICT OF INTEREST OPINION
EC-COI-90-7

FACTS:

You are counsel to the ABC Fund (Fund). You have asked whether G.L. c. 268A, the Massachusetts conflict of interest law, applies to the Fund.

The Fund is a trust created by a trust agreement by and among the DEF Agency (DEF), the Union (Union), and the Board of the Fund (Board). The Fund is the successor in interest to a trust created pursuant to a Declaration of Trust by and among DEF's predecessor and the XYZ Bank.

The trust agreement was created pursuant to the provisions of a Pension Agreement by and between DEF and the Union, as amended (Pension Agreement). DEF was authorized to enter into the Pension Agreement by statute (cites omitted).

The Pension Agreement establishes the Board as administrator of the Fund. Board membership is as follows: (a) three members of the Board are appointed by DEF, (b) one member is elected by a vote conducted by DEF by members of the Fund who are not members of the Union, (c) two members are designated by the Union, and (d) one member, who holds an honorary position, is elected by the other six members (but has no vote except as provided in the Pension Agreement).

Each Board decision must be made by a vote of at least four members, including the vote of at least two members appointed by DEF and the votes of at least two members designated under either (b) or (c) above.1/

All monies contributed to the Fund are irrevocable and are to be used solely to provide benefits to Union members. No part of the corpus or income shall thereafter be used for, or be diverted to purposes other than, the exclusive benefit of members and retired members of the Union.

In an undated letter written by a DEF manager for consideration in this matter, DEF states that "individuals presently employed by the Board are not employees of DEF and, accordingly, do not receive any compensation from DEF."

QUESTION:

Are the Board's members and employees state employees for purposes of G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

Chapter 268A defines a state employee as a "person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis." G.L. c. 268A, §1(q). The issue of whether the Board's members and employees are considered state employees therefore depends upon whether the Board is a state agency, which is defined by the conflict of interest law as "any department of a state government . . . including the executive, legislative or judicial and all councils thereof and thereunder and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department thereof or thereunder." G.L. c. 268A, §1(p).

In its previous determinations concerning the public status of an entity for the purposes of c. 268A, the Commission has focused on the following factors:

(1) the means by which it was created (e.g. legislative or administrative action);

(2) the entity's performance of some essentially governmental function;

(3) whether the entity receives and/or expends public funds; and

(4) the extent of control and supervision exercised by government officials or agencies over the entity.

See, e.g., EC-COI-84-65. None of these factors

standing alone is dispositive. For example, the Commission concluded that local private industry councils are municipal agencies within the meaning of G.L. c. 268A, §1(f) because of the role they play in the implementation of the Federal Job Training and Partnership Act, namely in the decision-making role they share with local elected officials in the development of job training plans, the selection of grant recipients and the expenditure of public funds. EC-COI-83-74; see also, EC-COI-82-25 (regional school district is a municipal agency for c. 268A purposes because it is supported solely by public funds and it provides a service which each municipality in the Commonwealth is required by law to provide).

1. Creation

The Board was not created by direct legislative enactment or by administrative rulemaking or regulation, but rather was established pursuant to the Pension Agreement made between DEF and a private entity (the Union). Although this Commission has exercised jurisdiction over entities formed by an Act of Congress, state legislation and executive order (See, EC-COI-83-74; 88-16; 84-147; 84-55), it has generally declined to do so where the entity is created by a private instrument even where one of the parties was a governmental actor. See, e.g., EC-COI-88-19 (notwithstanding the participation of governmental officials in organizational efforts, an entity stemming from a contract between a private corporation and a mayor (as the issuing authority) does not rise to the level of a governmental agency); See also, EC-COI-84-65 (a governmental agency cannot be created by a will). Generally, the presence of a law, rule or regulation creating the entity is necessary. EC-COI-82-81 (task force created by Inspector General not a state agency because it was not created pursuant to any statute, rule or regulation); 88-19; 88-24 (city development authority's administrative decision to create separate corporation was prompted by statutory mandate).

In making a determination as to governmental creation, however, the Commission looks to the impetus for the creation, as well as the affiliation of the entity's organizers. See, EC-COI-88-24; Cf. EC-COI-84-147, in which the Commission concluded that a private, not-for-profit corporation formed by a state agency was a state agency for the purposes of the conflict of interest law. In that opinion, the Commission found that the corporation was formed for the purpose of performing some of the state agency's duties under the law, namely to maintain the competitiveness of a teaching hospital through the development of new ventures.

Similarly, in EC-COI-89-24, this Commission recently found that a not-for-profit corporation whose major corporate purpose was to "support, enhance and extend" the research program of a state agency's academic department[2/] was itself a state agency for c. 268A purposes. The corporation was established to transform research products developed by the academic department into marketable items. Revenues generated by the corporation from its activities would directly accrue to the academic department or the state agency itself.

Here we are dealing with a trust rather than a corporation, but the applicable principle is the same, that is, that the trust was created pursuant to the broad authorization given to DEF by statute to continue and modify a pension plan already in place. The fact that the Fund is unique among entities established for the benefit of Massachusetts state employees does not diminish its legislative underpinnings. Although the legislative underpinning is indirect, it is enough to satisfy this factor. See, EC-COI-89-24.

2. Governmental Functions

The Board's sole purpose is to provide and administer pensions and other benefits to Union members who are state employees. The provision of such benefits to state workers is a function traditionally provided by a state government. As noted above, for most state employees, this function is regulated by statute, but DEF employees were exempted from those provisions. The fact that DEF employees are not covered by this statute, however, in no way diminishes the Commonwealth's historic responsibility to provide such benefits to its employees.

3. Public Funds

The Fund receives a significant portion (approximately 76%) of its funding from or on behalf of a state agency (DEF).[3/] The Commission finds that the Trust's substantial reliance on public monies satisfies this factor. See, EC-COI-90-3 (although a foundation's funding was derived in most part from private sources, the Commission found that the provision of some state funds was enough to satisfy this factor).

4. State Government Control of the Board

Because members of the Union are employed by DEF and are the beneficiaries of the Fund, the Pension Agreement provides that the Fund be administered through a Board consisting of several

members connected with DEF. These provisions for administration of the Fund appear to derive out of the Pension Agreement's provisions for some DEF accountability on the part of the Fund's managers. Thus a plurality of the Board members are DEF officials.

Although as with all trustees of trusts, the three DEF appointees acting in their trustee capacities owe a duty of loyalty to the Fund first, not DEF, and they must administer the Fund solely with a view to the accomplishment of the purposes of the Fund, Scott on Trusts, §379 (3d. ed. 1967), where the purpose of the Fund is to provide benefits for DEF employees, and virtually all the members of the Board are in fact DEF employees, the existence of the Trust does not negate the fact that there is obvious governmental (as opposed to private) control of the Board. See, EC-COI-83-74 (an entity is a municipal agency even where a majority of its membership is selected from the private sector); see also EC-COI-90-3 (the potential and reality of significant governmental control can satisfy this factor).

Thus we distinguish this case from EC-COI-84-65, where a trust for the benefit of a municipality was established by a private instrument (a will). Although a majority of the trustees who were appointed by the will were also municipal employees, this Commission found that the individual trustees were acting in their private capacities as trustees, not municipal employees, in carrying out the functions of the trust. The distinction between the two cases lies in the genesis and purpose of the trusts. The trust established in 84-65 arose from a will and was established by a private citizen to perform a laudable but not essential governmental function. Here, the trust was created as a vehicle for accomplishing a required state function and was, in part at least, established by a state agency pursuant to an indirect state directive.

Balancing all of the foregoing, therefore, the Commission concludes that the Board is a state agency for the purposes of c. 268A. Where it was established to administer certain benefits for Union members who are also state employees, the Board serves a significant state function. It also receives substantial state funding. Accordingly, even though the legislative underpinning is indirect and, even though there is no direct control over the Board by DEF,[4/] we conclude that the Board is a state entity for purposes of c. 268A. Consequently, its members and employees are state employees.

This opinion is limited to finding that the Board's members and employees are state employees for purposes of c. 268A. It should not be construed as determining the status of the Board's members and employees, or the Board itself, for any other purpose. This opinion shall be limited to prospective application only.

DATE AUTHORIZED: May 9, 1990

[1/]In the event of a failure to reach a decision, the honorary member may cast a vote at the next meeting of the Board members. The Board is not authorized to adopt a less restrictive rule on voting.

[2/]The academic department, as part of the state agency, had a statutory mandate to provide educational services.

[3/]Most of the remaining funds are contributed directly by DEF employees.

[4/]The state does, however, have a "veto power" over any decisions made by the Board through the elaborate voting process set-up in the Trust.

CONFLICT OF INTEREST OPINION
EC-COI-90-8

FACTS:

You are currently employed on a full-time basis as counsel to a state agency ABC. Your office is located at ABC and your office hours are 8:30 a.m. to 4:30 p.m. Monday through Friday, although additional hours are often required.

Outside of your ABC work schedule, you also serve as the Town Counsel to a town (Town). In that capacity, you interpret statutes, regulations, court decisions and opinions concerning various aspects of municipal government. You prepare opinions, reports and advisories, usually upon the request of a Town official. You also receive all civil litigation served upon the Town. Usually, since the Town is covered by various insurance policies, the insurance company hires an outside counsel to handle the civil matters.

In the few remaining cases where no money damages are sought, you handle preliminary work. You usually prepare civil litigation in which the Town is plaintiff, and again, handle the preliminary work. Whether the Town is plaintiff or defendant, if the case is to go to trial, you hire an outside attorney to handle the matter. You do not handle any criminal matters. Depending upon the issues and/or lawsuits which arise,

you generally work an average of ten hours per week in your capacity as Town Counsel. Since you no longer maintain a private office outside of your home, your work is usually done at home, although you have access to Town Hall and the secretary to the Board of Selectmen, as needed.

QUESTION:

Does G.L. c. 268A permit you to maintain your Town Counsel position while also serving as ABC Counsel?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

In your capacity as ABC Counsel, you are considered a state employee for the purposes of G.L. c. 268A. The principal section of c. 268A which regulates the after-hours activities of state employees is G.L. c. 268A, §4. Under §4, a state employee is prohibited from either representing or receiving compensation from a non-state party in connection with any application, permit, contract, controversy or other particular matter[1/] in which the Commonwealth or any state agency is either a party or has a direct and substantial interest. Where a state employee holds employment with a municipality, however, the prohibition of §4 is less restrictive. Specifically, a 1980 amendment to §4 provides that

> This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

In practical terms, you may continue to serve as Town Counsel except in matters which fall within the jurisdiction of ABC. For example, you may not act as Town Counsel on Town matters relating to permits or the use of Town resources by ABC. Because you indicate that the Town handles relatively few legal matters which involve ABC the exemption conditions of §4 should not unduly restrict your Town Counsel activities.

Your retention of your Town Counsel position results in certain restrictions on you in your ABC capacity. Specifically, G.L. c. 268A, §6 prohibits your participation as ABC Counsel in any particular matter in which affects the financial interests of a business organization which employs you. Because the Town is considered a business organization for G.L. c. 268A purposes, EC-COI-88-4, you must abstain from participating[2/] as ABC Counsel in any particular matter in which the Town has a reasonably foreseeable financial interest. EC-COI-84-96. Should a matter affecting the Town's financial interest be assigned to you, you must abstain and notify your ABC appointing official and the Commission of the nature and circumstances of the particular matter and financial interest involved. Your appointing authority may thereafter exercise certain options, one of which could permit your participation pursuant to the standards of G.L. c. 268A, §6(3). Unless and until you receive written permission pursuant to §6(3), you must continue to abstain from ABC participation in matters affecting the Town's financial interest.

Aside from §6, you are also subject to certain limitations under §23(b)(2), which prohibits you from using your official ABC position to secure unwarranted privileges or exemptions of substantial value for you or the Town. To comply with §23(b)(2), you must continue to conduct your Town Counsel activities entirely outside of your ABC work schedule and refrain from using ABC resources such as telephones, word processors, copy machines and mailing privileges in connection with your Town Counsel activities.[3/]

DATE AUTHORIZED: June 27, 1990

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

[2/]"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[3/]While §23(b)(1) prohibits you from accepting employment whose responsibilities are inherently incompatible with your ABC responsibilities, nothing in the facts which you have presented would lead to a

conclusion that your Town Counsel and ABC responsibilities are inherently incompatible. See, EC-COI-89-30.

CONFLICT OF INTEREST OPINION
EC-COI-90-9

FACTS:

You are an appointed head of a public agency (ABC). Your official duties include supervising departments and employees within ABC. You also are responsible for setting policies and guidelines for certain ABC contracts, and your office gives final approval to those vendor contracts. The ABC vendors are selected by ABC departments pursuant to a contract bid process without assistance from your office. You have direct responsibility, however, for the budget allocation for these vendors and for the audit of these contracts.

You wish to be an unpaid advisor during your off hours to a candidate for public office. You wish to provide advice to the candidate. You state this role would not entail fundraising or use of public resources. You would not solicit participation in the campaign from ABC vendors.

QUESTIONS:

1. May you sign a letter of endorsement for the candidate?

2. May you invite ABC vendors to meetings with the candidate?

3. May you invite these vendors to render advice to the candidate?

4. May you participate in meetings with the candidate when ABC vendors are present?

ANSWERS:

1. Yes, as discussed below.

2,3,4. No, pursuant to the limitations discussed below.

DISCUSSION:

1. General Discussion of G.L. c. 268A, §23

As the head of ABC you are considered a "public employee" for the purposes of the conflict law, G.L. c. 268A. The issue of political activity of public employees has been addressed by the Commission in Commission Advisory No. 4. That advisory, issued in 1984, summarizes the applicability of the conflict law to public employees' conduct or participation in political campaigns.[1/] Section 23, the standards of conduct section to the conflict law, contains supplemental provisions which apply to all state, county and municipal employees. These provisions are intended to set standards for public employees' conduct which is not covered by other sections of c. 268A. Section 23 is relevant to your questions.

Section 23(b)(2),[2/] prohibits a state, county, or municipal employee, knowingly or with reason to know, from using or attempting 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. The Commission has interpreted an item of substantial value to be anything valued at $50 or more. See generally, Commission Advisory No. 8. This section, for instance, prohibits you from using ABC staff, equipment and time to further your personal or private interests, including work on a political campaign. See, EC-COI-82-51; 82-61; Public Enforcement Letter 78-1. In addition, the Commission has concluded that a public employee's use of his official position to promote political or campaign related matters is unwarranted where such political activity falls outside the scope of his official duties. See, EC-COI-85-29 (general court member's use of a student intern to perform tasks that would predominantly benefit his political committee and his re-election effort exceeds the customary use of his office and, therefore, is unwarranted); EC-COI-82-112 (general court member's placement of a word processor in his state house office for purely personal or campaign purposes would be an unwarranted privilege arising from his official position); 84-127 (use of judge's name to promote a commercial product exceeds the customary conduct of his official position and has a private rather than a public benefit).

The use of official stationery or official title by a public employee to endorse or promote a private interest has also deemed to be an unwarranted use of an official's position. **See, Public Enforcement Letter 89-4** (state employee's use of official stationery and state resources in an attempt to promote a private trip which would result in a free trip for himself and possibly another individual was an unwarranted use of official position in addition to presenting an unwarranted appearance of state sponsorship or endorsement). **See also, In the Matter of Elizabeth Buckley, 1986 SEC 137; EC-COI-84-44; 83-82.**

Conversely, if the use of an official's position is considered within the customary or accepted conduct of his official position, an endorsement or promotion is not unwarranted.[3/] **See, EC-COI-83-102** (general court member's signing of a letter soliciting prizes from merchants for a contest to promote a voter registration drive is permissible activity for legislators); **EC-COI-84-128** (state agency secretary may solicit private contributions to fund a state-wide public service program to publicize the use of drugs and alcohol in the public schools and programs addressing those problems where his state office had limited authority over the private donors, the activity could reasonably be seen as part of his official duties and a public rather than a private interest would be served).

Section 23(b)(3), on the other hand, addresses situations involving the appearance of conflict by a state, county or municipal employee. That provision specifically prohibits you from acting in a manner which would cause a reasonable person, knowing the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy your favor in the performance of your official duties, or that you are likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. For example, under the questions you have presented, you would run afoul of this provision if a reasonable person could conclude that your simultaneous public and private relationships with ABC vendors creates the appearance of favoritism. **See, In the Matter of George Keverian,** Commission Adjudicatory Docket No. 385 (Disposition Agreement, April 29, 1990). An exemption from this provision is available, however, if you disclose in writing to your appointing authority the facts which would dispel the appearance of a conflict.

2. **Application of §23 to you**

In accordance with the principles of §23(b)(2) as articulated above, you may not use your official position to sign a letter of endorsement for a political candidate using your official title or official stationery. You may, however, send a letter expressing your personal viewpoint in support of the candidate if the letter is privately funded, on private stationery, without the use of your official title or position. In addition, the text of the letter must not contain a solicitation, nor request a recipient who is subject to your official position to respond to or answer the letter in any way. Furthermore, under §23(b)(3), it is advisable for you to disclose to your appointing authority a copy of the letter with a description of the intended audience.

Your questions under 2, 3 and 4, however, present somewhat different concerns under §23. Each of these questions involves your direct contact with ABC vendors creating concerns that your private activity may produce a potentially coercive or exploitative situation because of the official regulatory and budgetary role you occupy over those individuals. In **Compliance Letter 82-2,** similar circumstances were considered by the Commission. The course of conduct by former Boston Mayor White, involving the direct and indirect solicitation of monetary gifts from vendors and employees subject to his official authority, was deemed to have violated §23(d) and (e) [former versions of §23(b)(2) and (b)(3)]. In its findings, the Commission specifically noted the implicit pressure placed on subordinates and vendors of the Mayor by the fundraising efforts.[4/ 5/]

The Commission has reviewed other situations which have been found under §23 to involve inherently coercive or exploitative circumstances. **See, EC-COI-81-66** (state employee's circulation of a catalog to individuals subject to his official control was an unwarranted advantage under §23(d) because of the potentially coercive atmosphere created by the employee's unique official relationship to the catalog purchasers); **EC-COI-82-64** (state employee's private business solicitations, directed to persons subject to his official authority, placed inherent pressure on those subordinates resulting in an unwarranted privilege arising from his official position). These opinions strongly suggest that a public employee must avoid making private solicitations of individuals who are dependent on or subject to that employee's official actions.

In light of these considerations, we conclude that §23(b)(2) prohibits your proposed activity under Questions 2, 3 and 4. We find that because of your unique regulatory role over vendors in your ABC position, your invitations to and personal interaction with ABC vendors in a political campaign setting could place pressure on those vendors to respond to you. This would result in an unwarranted privilege not

available to other similar candidates. Your primary contact with ABC vendors devolves from your position as head of ABC and not from other circumstances. Therefore, under §23(b)(2) you must refrain from any campaign activity which directly or indirectly, implicitly or explicitly, obligates ABC vendors to respond to you in writing or in person.[6/] This prohibition, in accordance with the purpose of c. 268A, is intended to preclude circumstances creating actual or potential conflicts of interest.[7/] In other words, if you have reason to know that ABC vendors will be present at a campaign meeting, the safest course of conduct would be for you not to attend that meeting. By choosing this option, you will avoid all situations leading to an inadvertent violation of §23.[8/] This is not to say that c. 268A prohibits your involvement in political activities but, rather, that your activities on behalf of the candidate or campaign must not involve your requests for responses from parties who are dependent on your official actions. You may not actually use or appear to use your official position in connection with such private activity. See, EC-COI-82-51; 82-124.[9/]

DATE AUTHORIZED: August 1, 1990

[1/]Other provisions of the General Laws may also apply to or prohibit certain types of political conduct by state, county, or municipal employees. See, M.G.L. c. 55, 56.

[2/]As amended by Chapter 12, Acts of 1986.

[3/]In determining the scope of a public employee's responsibilities, the Commission typically looks for a statutory basis or other legal definition relating to that individual's official position. See, EC-COI-89-7 (cabinet secretary's official responsibility defined by statute); 89-26 (state employee's official responsibility found in statute); 84-48 (town by-law authorized selectmen to defend or settle lawsuits). Where no legal basis exists to determine whether an activity falls within customary or accepted conduct of a public employee's position, the Commission will traditionally defer judgment on that matter to that employee's appointing authority unless to do so would be unreasonable or would otherwise frustrate the purposes of c. 268A. See, EC-COI-89-25 (Commission deferred to general counsel's opinion as to state employee's duties); 88-17 (state employee's duties did not include board position in an organization); 88-10 (deference given to school committee's interpretation of teacher's job under collective bargaining agreement); 83-137 (appointing official's discretion in determining official duties of public employee is not unlimited [citations omitted]).

[4/]In finding the existence of affirmative obligations placed on Mayor White by §23(d) and (e), the Commission stated:

> No public official who controls the jobs of large numbers of employees and the awarding of important contracts with vendors can permit a large event to be planned that will raise money for him or any members of his family without making every reasonable effort to insure that there is neither direct solicitation of these employees or vendors nor pressure, either implicit or explicit on such employees or vendors to attend and contribute. In addition, public officials must instruct those planning such an event that even unsolicited contributions from employees or vendors should not be accepted unless the circumstances make it clear that family or personal relationships are the motivating factors. **Id. at p. 83.**

[5/]**Compliance Letter 82-2** noted that legitimate fundraisers are regulated by G.L. c. 55.

[6/]For the purposes of your opinion request, we will assume that your proposed solicitation would constitute something of substantial value for your candidate. **See, In the Matter of William A. Burke, Jr.**, 1985 SEC 248, **affirmed, William A. Burke, Jr. v. State Ethics Commission**, Suffolk Superior Court Civil Action No. 79226 (November 15, 1988).

[7/]**See, LaBarge v. Chief Administrative Justice**, 402 Mass. 462, 466-467 (1988) citing **Edgartown v. State Ethics Commission**, 391 Mass. 83, 89 (1984).

[8/]This advice is not intended to abridge your freedom to associate with others for political purposes. Nonetheless, we recognize that under certain circumstances your participation in meetings with ABC vendors may inevitably be construed as coercive. The high degree of official responsibility you possess as head of ABC creates a potentially greater risk of pressure over ABC vendors which in turn justifies a preventative application of §23(b)(2).

[9/]Section 23(e) provides that the head of a public agency may establish and enforce additional standards of conduct. You may wish to determine whether any agency policy on political activity is relevant to your circumstances.

CONFLICT OF INTEREST OPINION
EC-COI-90-10

FACTS:

You anticipate appointment by the Mayor of a City as a member of the City Commission Commission (ABC), a position which has previously been classified as a special municipal employee position under G.L. c. 268A §1(n). Outside of your ABC activities, you are a director and shareholder of the XYZ Corporation (XYZ). As a director, you receive annual compensation as well as compensation for attending meetings. Your stock holdings in XYZ are less than one percent of the total stock.

A subsidiary of XYZ is negotiating with ABC for mutual participation in a co-project. The negotiations, if successful, would lead to a contract between the subsidiary and ABC. You state that you will at all times abstain as an XYZ director from any action relating to the matters resulting from these negotiations, and that your director compensation will be unrelated to the negotiations or their outcome.

QUESTION:

Can you may accept appointment as an ABC Commissioner of the City?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

As an ABC member, you will be considered a municipal employee and special municipal employee under G.L. c. 268A. Four sections of G.L. c. 268A are relevant to you.

1. Section 17

This section places certain limitations on you in your capacity as an XYZ director. While a special municipal employee, you will be prohibited from either receiving compensation from, or representing XYZ in connection with, any submission, contract, determination or other particular matter[1/] which is within the official responsibility of the ABC, irrespective of whether you actually participate in these matters as an ABC member. Therefore, you may not contact or otherwise communicate with ABC officials or employees on behalf of XYZ or its subsidiary. Further, you may not receive director compensation which is attributable to the subsidiary's matters before the ABC. **EC-COI-87-5.** To avoid violating the compensation restriction, you must avoid participating as an XYZ director in any action relating to the subsidiary's dealings with ABC and must also arrange to memorialize in writing with XYZ the fact that your director compensation will not be attributable to the subsidiary's activities with ABC.[2/]

2. Section 19

This section prohibits your participation as an ABC member in any decision, contract or other particular mater in which XYZ has a foreseeable financial interest. The abstention requirement applies both on account of your status as an XYZ director and your financial interest as a stockholder. **EC-COI-84-96.** Assuming that you and/or XYZ have a financial interest in contracts made by XYZ's subsidiaries, §19 requires your abstention from participation as an ABC member in any matter affecting the subsidiary's financial interest, including the proposed project agreement. This result will continue to apply unless and until you receive written permission from the mayor to participate, pursuant to the conditions established in §19(b)(1).

3. Section 20

Under this section, a municipal employee may not have a financial interest in a contract made by a municipal agency, unless an exemption applies. While §20 is relevant to you in light of your stock ownership in a company which may have an indirect financial interest in an ABC contract, your ownership of less than 1% of XYZ stock qualifies you for an exemption. This result will continue to apply as long as your stock ownership remains at less than one percent of XYZ's total stock. **EC-COI-83-147.**

4. Section 23

This section establishes certain safeguards to avoiding actual or apparent undue favoritism towards the project proposal in your official ABC capacity. Assuming that you receive written permission under §19(b)(1) to participate, §23 should pose no problems for you. We would add, however, that:

1. you many not use your official position to secure unwarranted privileges or exemptions of substantial value for XYZ (§23(b)(2)), and

2. you may not disclose the XYZ or its subsidiary any confidential information which you have acquired

as an ABC member (§23(c)).

DATE AUTHORIZED: August 1, 1990

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/We concur with your view that appreciation in your XYZ stock cannot be regarded as compensation for §17 purposes in view of the absence of "services" and is more appropriately addressed under §20. See, G.L. c. 268A, §1(a). EC-COI-89-13.

CONFLICT OF INTEREST OPINION
EC-COI-90-11

FACTS:

You are currently an attorney engaged in the private practice of law. In that capacity, you represent the XYZ Corporation (XYZ) in defense of a tort action which the City of ABC and the ABC School Committee initiated prior to 1990. The City and the School Committee are represented by an independent firm in this action.

You state that the parties completed discovery of the fact portion of the case in 1989, that discovery of the expert witnesses is continuing and that the case is scheduled for trial in 1990. You also state that XYZ's defense does not relate to or in any way use information relating to the structure and operation of the School Department.

Until 1990 you served as counsel for the School Committee and, in that capacity, represented the City and School Committee in certain matters pending in state and federal courts. You state that during the entire term of your employment, you were under the immediate supervision of the general counsel of the School Committee and reported in writing on your work activities on a monthly basis to the City Solicitor. You further state that during the entire term of your employment you did not have any responsibility for, and did not participate in, representing the City of or the School Department in the tort action, nor did you participate in or have responsibility for any other matter involving facts or claims similar or related to those asserted in the tort action. You have also provided letters from the School Committee counsel confirming that, during the entire term of your employment with the School Committee, you did not receive any information from any source regarding the factual or legal matters at issue in the tort action, nor did you communicate at any time with the independent law firm regarding the factual or legal matters at issue in that action. Specifically, you did not receive any information during your representation of the School Committee which would be relevant to the factual or legal matters at issue in the tort case or which could be used to the detriment or disadvantage of the School Committee in that litigation.

QUESTION:

Does G.L. c. 268A permit your representation of XYZ in the tort litigation?

ANSWER:

Yes.

DISCUSSION:

Following the completion of your services for the School Committee in 1990, you became a former municipal employee for the purposes of G.L. c. 268A, and are therefore subject to restrictions in two sections of that law.

1. **Section 18**

Two paragraphs of G.L. c. 268A, §18 are relevant to you. The first, G.L. c. 268A, §18(a), prohibits you from either representing or receiving compensation from anyone other than the City in relation to any lawsuit, controversy or other particular matter1/ in which you previously participated2/ while serving as a municipal employee. Section 18(a) codifies the fiduciary relationship which a municipal employee has with his municipality, **Town of Nantucket v. Beineke**, 379 Mass. 345, 349 (1979), and prohibits a breach of that relationship with respect to those matters on which he worked as a municipal employee. Simply stated, a former municipal employee's loyalty must remain with the municipality with respect to any matter in which the former employee previously participated.

The prohibition of §18(a) is limited, however, to those particular matters in which the employee actually participated and does not extend to other matters which may have been pending in his municipal agency.

The definition of "participate" includes personal and substantial involvement in a matter and covers anything more than a purely ministerial act. See generally, EC-COI-89-7; 89-26; see also, EC-COI-83-114 (signing of a contract is personal and substantial participation); 88-14 (recommendation on the awarding of a grant, even though not a final decision, is "participation"). Cf. EC-COI-87-7.

On the other hand, when an employee has had absolutely no prior involvement through either discussion or work in a matter, the employee will not be found to have participated in that matter. In light of your representation that you had no prior involvement, either through assignment or otherwise, in the tort matter, you did not participate in that matter for the purposes of §18(a). Accordingly, since you had no fiduciary relationship with the City or School Committee with respect to tort, you are not now prohibited from representing XYZ in the tort litigation.

Section 18(b) establishes a supplementary one-year bar on your personally appearing in connection with matters in which, although you did not previously participate, were nonetheless under your official responsibility.[3/]

Generally, a public employee's official responsibility is determined by his authority to act rather than by whether he actually exercises that authority. See, EC-COI-89-7; 89-26; 87-17. Accordingly, the restrictions of §18(b) become greater with greater authority found in the former employee's position. See, EC-COI-89-7. Typically, a statute or other legal definition provides a sufficient basis to delineate a public employee's responsibilities. See, EC-COI-89-7 (by statute, a state cabinet secretary had official responsibility to supervise his entire agency); 89-26 (by statute, a special state employee had official responsibility over matters delegated to others to perform); 85-50 (city charter gave city solicitor responsibility for defending all claims); 84-48 (town by-laws authorized selectmen to settle or defend).

Based on your representation to us, as confirmed by your prior supervisors who were responsible for your assignments, we conclude that you did not have official responsibility for the tort matter. In particular, the official responsibility for the tort matter rested with the general counsel and the independent firm to which the City and School Committee referred the case for litigation. Accordingly, the one-year appearance bar of §18(b) does not apply to you in connection with the tort matter.

2. Section 23(c)

Under §23(c), a former municipal employee may neither

> (1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority; nor
>
> (2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

Therefore, even if a former municipal employee has neither participated in nor has had official responsibility for a particular matter, he may be prohibited from acting as attorney in any case which will require him to disclose confidential information which he gained through his prior position. For example, if you previously reviewed a confidential memorandum to the School Committee revealing and discussing litigation strategy in the tort matter, you would be prohibited by §23(c) from representing XYZ since your duty to represent zealously the interests of XYZ would necessarily require you to utilize the confidential information relevant to the case. See, EC-COI-86-7 (employee may not use confidential information relating to a competitor).

On the other hand, where you had no access as a municipal employee to confidential information relating to tort, there is no confidential information which you could now disclose. To the extent that you had access to general information relating to structure and operation of the School Department, that information may very well be a public record and therefore exempt from G.L. c. 268A, §23(c). Even assuming, for the sake of argument, that the School Department's structure and operation could be regarded as confidential, §23(c)(1) prohibits you from engaging in a professional activity which requires you to disclose that information. Given your representation to us that your representation of XYZ does not relate to or in any way use information relating to the structure and operation of the School Department, we conclude that §23(c)(1) does not prohibit your representation of XYZ in the tort matter.[4/]

DATE AUTHORIZED: August 1, 1990

[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 advice in this opinion is limited to the application of G.L. c. 268A to your facts and does not purport to reach any conclusions with respect to the application of the Code of Professional Responsibility.

CONFLICT OF INTEREST OPINION
EC-COI-90-12*

FACTS:

You are the General Counsel to the State Department of Environmental Protection (DEP). Together with the Boston Bar Association, DEP has developed a proposal which would authorize the training and use of volunteer private sector environmental lawyers to assist DEP in reducing its backlog of adjudicatory hearing cases. Under the initial phase of the pilot project, DEP will assign volunteer lawyers to serve as mediators to facilitate either the settling of cases or the framing and narrowing of those issues which will subsequently be adjudicated. If the program is successful, DEP may seek expansion of the volunteer attorney program to include law clerk or special master services for DEP.

On behalf of both DEP and attorneys who are interested in the volunteer program, you seek formal guidance as to the application of G.L. c. 268A to volunteer attorneys.

QUESTION:

Does G.L. c. 268A allow private attorneys to serve in a volunteer capacity for the DEP pursuant to the proposed DEP/BBA pilot program?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

1. Jurisdiction

An attorney who performs mediation services for DEP is considered a "state employee" under G.L. c. 268A, §1(q) during the period in which those services are performed. This jurisdictional status under G.L. c. 268A applies to uncompensated, as well as to compensated service to any state agency. Id.

An attorney who performs services to DEP on a voluntary basis is also considered a "special state employee" under G.L. c. 268A, §1(o). A special state employee is exempt from many of the restrictions which G.L. c. 268A imposes on the private outside activities of full-time state employees.

2. Limitations on outside activities of volunteer attorneys

Section 4 of G.L. c. 268A limits certain outside activities of special state employees to DEP, depending on the employees' time commitment to DEP.

(a) Volunteers who serve for 60 days or less in any 365 day period

Under G.L. c. 268A, §4, a special state employee who serves DEP for 60 days or less in any 365 day period is prohibited from acting as attorney for or receiving compensation from any non-state party in connection with any administrative proceeding, controversy or other particular matter[1]/ in which the employee participates[2]/ or has official responsibility for as a special state employee. For example, if a volunteer attorney is assigned by DEP to mediate a permit dispute, the attorney is prohibited by §4 from representing a private client in connection with the same dispute. On the other hand §4 does not prohibit the attorney from representing clients in connection with other matters pending in DEP.

(b) Volunteers who serve for more than 60 days in any 365 day period

Under G.L. c. 268A, §4, a special state employee to DEP who serves in that capacity for more than 60 days in any 365-day period is prohibited from privately representing a client in connection with any matter pending within DEP, irrespective of whether the employee has participated in or had responsibility for the matter as a volunteer lawyer. Under established Ethics Commission and Attorney General precedent, an attorney who serves DEP on any part of a day is considered to have served for a "day" in calculating the 60-day period under §4. **EC-COI-80-31.** Conversely, a day is not counted for the purposes of the 60-day limit unless services are actually performed, **EC-COI-85-49.** Because the application of §4 turns on the calculation of the 60-day period, volunteer attorneys must keep accurate records of their daily services for DEP.

3. Limitations on official activities of volunteer attorneys

Volunteer attorneys are also subject to certain limitations on their official DEP activities. Under G.L. c. 268A §6, a volunteer attorney must abstain from participating for DEP in any matter in which the attorney's law firm has a financial interest. The abstention requirements will apply to participation in any matter in which the attorney's firm appears. **EC-COI-89-5.** To avoid any potential §6 difficulties, DEP should ascertain, prior to assignment, whether the pending matter is one which would have a financial effect on the volunteer attorney's firm. Following receipt of information disclosing a financial interest under §6(3), the DEP official responsible for hiring volunteer attorneys may exercise several options, one of which would be to grant written permission to the attorney to participate following a written determination under the standards of §6(3). Further, should a volunteer attorney be assigned a matter which, by virtue of the attorney's prior relationship with the parties, creates an appearance that the attorney will unduly favor one side, the attorney should disclose this relationship to DEP. G.L. c. 268A, §23(b)(3). Volunteer attorneys must also observe the safeguards of G.L. c. 268A, §23(c) and refrain from disclosing any confidential information which they have acquired as DEP volunteers.

4. Limitations on partners of volunteer attorneys

The partners of a volunteer attorney are also subject to certain limitations on their private practice. Under G.L. c. 268A, §5(d), a partner of a state employee is prohibited from representing a private client in connection with the same particular matter in which the volunteer attorney participates in or has official responsibility for as a DEP volunteer attorney. For example, if a volunteer attorney is assigned to mediate a permit dispute, the partners of the attorney may not represent private clients in connection with the same dispute. Aside from those matters in which a volunteer attorney participates or has official responsibility for at DEP, a partner may represent clients in other matters before DEP.

5. Post-employment restrictions on volunteer attorneys

Upon the completion of services for DEP, a volunteer attorney will be considered a former state employee and will be subject to three restrictions under G.L. c. 268A.

G.L. c. 268A, §5(a) and (c), permanently prohibit a former volunteer attorney, and for one year the attorney's partners, from representing private clients in connection with the same matters in which the attorney previously participated as a DEP volunteer attorney. For example, if a volunteer attorney mediated without success a permit dispute for DEP, the attorney is permanently prohibited from representing a private client in connection with the appeal of the DEP adjudicatory decision in that same dispute. The attorney's partners will share this restriction for a one year period following the completion of services for DEP by a volunteer attorney.

G.L. c. 268A, §5(e) establishes a one-year bar on a former volunteer attorney acting as a legislative agent[3] on behalf of a private client before DEP. The restriction on acting as legislative agent includes activities to persuade DEP officials to take specific legislative action through either direct communication to those officials or by the solicitation of others to engage in such efforts. **In the Matter of Cornelius Foley,** 1984 SEC 1982. In addition, the G.L. c. 268A, §23(c) prohibition on disclosing confidential information continues to apply to former DEP volunteers.[4]

6. Additional Limitations

Aside from the substantive restrictions of G.L. c. 268A discussed above, DEP is authorized by G.L. c. 268A §23(e) to establish additional standards of conduct on volunteer attorneys. These standards, which would be enforced by DEP, rather than the Commission, could address these potential conflict

issues which DEP and the BBA believe G.L. c. 268A does not sufficiently address.[5/]

DATE AUTHORIZED: September 12, 1990

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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/]"Legislative agent" means any person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule of regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereof, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services. G.L. c. 268B, §1(k).

[4/]A potential supplementary restriction concerning matters under the volunteer's official responsibility, contained in §5(b), is not relevant because any matter within the volunteer's official responsibility would also be a matter in which the volunteer participated for §5(a) purposes.

[5/]For example, limitations addressing the contemporaneous private appearance in a wetlands case by a mediator assigned to a wetlands case could be the subject of an additional standard of conduct under §23(e). **EC-COI-85-12.**

CONFLICT OF INTEREST OPINION
EC-COI-90-13

FACTS:

You are a professional engineer with state agency ABC (ABC). You also hold a license to operate wastewater treatment plants and you are seeking a part-time position as an operator of a municipal wastewater treatment plant outside of the ABC service area. The duties of a wastewater treatment plant operator include recording plant operations data, maintaining plant logs, collecting samples, performing basic lab analysis and operating and maintaining equipment.

Some of the municipal wastewater plants are operated under contracts with private companies, and some are run directly by the municipality. You are unsure whether you will accept a position directly with a municipality or with a private company. If you accept a position with a private company, you will not be named in the contract between the company and the municipality. Regardless of which entity employs you, you only intend to work on a part-time weekend basis outside of your regular ABC duties. You assume that your duties on a weekend shift would be limited to operating equipment, checking security, making minor equipment adjustments and obtaining lab samples.

QUESTION:

1. Does G.L. c. 268A permit your proposed outside employment with a private company that operates municipal wastewater treatment plants?

2. Does G.L. c. 268A permit you to accept direct outside employment with a municipality at its wastewater treatment plant?

ANSWER:

1. Yes, as long as you comply with the conditions set forth below.

2. Yes, as long as you do not act on any matter within the purview of the ABC.

DISCUSSION:

As a full-time ABC employee, you are a state employee for purposes of the conflict of interest law, G.L. c. 268A, §1(q). Accordingly, the provisions of G.L. c. 268A, §4 apply to your outside employment.

1. **Private Company Employment**

Section 4(a) prohibits a state employee from receiving compensation from anyone other than the commonwealth or a state agency in relation to any particular matter[1/] in which the commonwealth or a state agency is a party or has a direct and substantial interest. At issue is whether the Commonwealth has a direct and substantial interest in matters pertaining to the operation of municipal wastewater treatment plants. In past precedent, the Commission has found that where an agency exercises substantial regulatory authority and oversight of an activity, the commonwealth will have a direct and substantial interest in the activity. See **EC-COI-83-130** (state has direct and substantial interest in county corrections officer's activities due to substantial regulatory authority of Department of Corrections); **83-104** (activities of assistant medical examiner of direct and substantial interest); **82-68** (activities of local liquor licensing authorities of direct and substantial interest to ABCC).

The Commission concludes that the Commonwealth has a direct and substantial interest in many of the activities of treatment plant operators. Although the treatment plant is owned by a municipality, the operation and maintenance of all treatment plants is regulated by the Department of Environmental Protection (DEP). G.L. c. 21, §34 ("division shall supervise the operation and maintenance of treatment works within Commonwealth") DEP requires a municipality to obtain a state permit for either surface water or groundwater discharge. G.L. c. 21, §43; 314 CMR 3.00 - 5.00. The permit includes conditions for compliance with DEP and federal standards, monitoring by DEP and conditions for operation. See, e.g., 314 CMR 3.00 (9)(10)(11). DEP also performs inspections of treatment plants to monitor compliance and has regular monthly reporting requirements. 314 CMR 12.07. For example, DEP requires specific laboratory sampling and analysis for each facility. 314 CMR 12.06. Upon request, DEP may review septage discharge records, operating records, certain equipment failure records and monitoring instrumentation records. 314 CMR 12.07. Additionally, under G.L. c. 21, §§34A and 34B all wastewater treatment operators are required to obtain state certification "to insure the proper management, operation and maintenance of wastewater treatment facilities."

Because of this extensive regulation, the Commission concludes that wastewater treatment operator activities required pursuant to the DEP permit or necessary for DEP determination of plant compliance with DEP standards will be "in relation to" a particular matter in which the Commonwealth has a direct and substantial interest. These activities may include, but are not limited to, performing lab tests or analysis required by DEP, collecting data or other information to be incorporated into reports submitted to DEP, submitting reports directly to DEP, maintaining or adjusting equipment to comply with DEP standards for the facility, or recording plant operation data which may be reviewed by DEP. Therefore, you may not receive compensation from a private company if your responsibilities include matters to be reviewed or monitored by DEP or required by DEP.

On the other hand, some positions within the municipal wastewater treatment plant may not be "in relation to" the DEP permit or any DEP determination regarding plant compliance and, accordingly, would not violate §4. In past precedent, the Commission has recognized that certain facts may overcome a presumption that all work done pursuant to a permit is in relation to that permit. See, **EC-COI-88-9; 87-31.** In **EC-COI-87-31**, the Commission concluded that a municipal official could not be paid privately to install septic systems because the installation was in relation to the septic permit and subsequent inspection. We held that where the official operated his own septic business and was the only installer on the job, there was a presumption that the work he performed was in relation to the permit. In that opinion, however, we recognized that certain facts may overcome the presumption that all work done pursuant to a permit is in relation to the permit.

> For example, a municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated "in relation to" the permit which allows the construction. Furthermore, certain permits which authorize a major construction project (e.g., a zoning municipal reuse permit to convert a school building into condominiums) will not necessarily render all work done on the project, e.g., interior painting, "in relation to" the permit.

Applying the principles to your circumstances we conclude that if your duties with the private company were limited to such matters as internal plant security, maintenance of the plant grounds or mechanical equipment repairs, then you would not be receiving

compensation in connection with a particular matter in which the Commonwealth has a direct and substantial interest because these matters are incidental to the DEP permit, standards and regulations.[2/]

2. Direct Municipal Employment

You indicate that you are also considering direct employment with a municipality that operates its own treatment plant without outside contracts. As the Commission has concluded above, the receipt of compensation as a wastewater treatment operator from anyone other than the Commonwealth in relation to matters pertaining to the DEP permit or DEP compliance will generally violate §4. However, when a state employee holds employment with a municipality, not a private entity, the prohibition of §4 is less restrictive. See, EC-COI-90-8; 90-4. In a 1980 amendment to §4, the Legislature provided that:

> This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties or receiving compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This exemption would permit you to accept direct employment with a municipality as long as the municipality is not in the ABC service area. If the municipality is within the ABC service area, this exemption will significantly restrict your activities because virtually every matter would fall within the purview of the agency by which you are employed.

In conclusion, "§4, prohibiting assistance to outsiders, is the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to be also a private employee is a contradiction in terms: it suggests that he is serving two masters." **Buss, The Massachusetts Conflict of Interest Statute: An Analysis**, 45 B.U.L. Rev. 299, 322 (1965). If you received compensation from a private entity in connection with a matter in which the Commonwealth has a direct interest, your loyalties would be impermissibly split between the Commonwealth and the private company. Therefore, you may not receive private compensation in connection with being a treatment plant operator if your responsibilities include matters pertaining to the DEP permit or compliance standards. You may work directly for a municipality outside of the ABC service area because the Legislature recognized that a state employee who also serves in a municipal capacity will continue to serve the public interest.

DATE AUTHORIZED: September 12, 1990

[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/]This opinion will require you to scrutinize the responsibilities for each position to which you apply. This opinion is based only on the facts that you have presented. If the facts change, you should seek further guidance from the State Ethics Commission.

CONFLICT OF INTEREST OPINION
EC-COI-90-14

FACTS:

You are the legal counsel to a Regional Vocational Technical High School District (District). The District is managed by a District School Committee whose members are elected from certain municipalities, and which serves as the appointing official for superintendent ABC. You seek this opinion on behalf of both the District and ABC.

Outside of his superintendent responsibilities, ABC is a 26% equity owner of XYZ (XYZ) which has entered into a distribution agreement with a manufacturer STU to distribute a software package which is manufactured by STU. The software has educational applications in the areas of finance, scheduling and general education and administration and is considered a major upgrade of the District's present software. The software package has an approximate retail value of $20,000. ABC has purchased for himself a copy of this software at a wholesale price and has donated it to the District at no cost to the District. This software has been installed in the District's computer system and is ready to be used, although it has not been used to date.

XYZ plans to incorporate the software into the financial management and student administration systems of the District, to help the District maintain the system, and to make any necessary modifications to the system, all at no cost to the District. The system will be examined, investigated and evaluated for a period of one year. If proved useful, the software will be adopted by the District at no cost. If the system has no benefit to the District, the software will be returned to ABC. In no event will the District be paying either ABC or XYZ for the software or its maintenance.

Other than the long-term benefits that may accrue to ABC as a stockholder of XYZ should the District utilize the system, ABC is not receiving any compensation of any kind from either XYZ or the manufacturer with regard to the installation or utilization of the software.

If the software is used, both the manufacturer and XYZ will consider the District as a test site. Utilization of the software on a day-to-day basis by the District will allow the manufacturer and the distributor the opportunity to observe the software package under actual working conditions. As a result of its use by the District, corrections and modifications will be made to the package which will ostensibly serve as an enhancement to it. XYZ draws its primary benefits from this arrangement by receiving an opportunity to have the program used under actual conditions.

You state that this would not be the first occasion in which a software company has donated a package to the District. Approximately two years ago, the District accepted and implemented an offer of software from an out-of-state company, at no cost to the District. Pending before the District School Committee is the decision as to whether to accept and implement the software donated by ABC.

QUESTION:

Does G.L. c. 268A permit the District to accept ABC's software gift under the arrangement described above?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

1. Application of G.L. c. 268A to ABC

The District is considered a regional municipal agency for the purposes of G.L. c. 268A. See EC-COI-82-25; In the Matter of Norman McMann, 1988 SEC 379. As an employee of the District, ABC is therefore a "municipal employee" for the purposes of G.L. c. 268A.[1/]

Section 19

This section places restrictions on ABC's official activities as superintendent. Specifically, G.L. c. 268A §19 prohibits ABC from participating[2/] officially as superintendent in any decision or other particular matter[3/] in which either he or XYZ has a financial interest. In construing §19, the Commission applies a reasonable foreseeability test to financial interests. EC-COI-84-96. Thus, if either ABC or XYZ has a reasonably foreseeable financial interest in decisions regarding the implementation of the software, ABC must abstain from official participation in those decisions. The abstention requirement applies to discussion as well as recommendations.

Based on the information you have provided, we conclude that both XYZ and ABC have a reasonably foreseeable financial interest in the District's acceptance of the software package. If the package proves successful, XYZ will be able to market the product to other school systems as software which has successfully been test-marketed in a school system. It is reasonably foreseeable, therefore, that the District's decision to accept the software will affect XYZ's marketing prospects for the software, and thus, the financial interest of XYZ. As a 26% equity owner of XYZ, ABC shares the financial interest of XYZ in the test-marketing decision. It is well established that a public employee who owns stock or an equity interest in a company which wishes to test-market a product is prohibited from participating officially in any decisions relating to the testing or implementation of the same product. See, In the Matter of John Hanlon, Raymond Sestini and Louis Sakin, 1986 SEC 253 - 259.

Notwithstanding the prohibition of §19, ABC may participate in matters in which either he or XYZ has a financial interest if he discloses to the District School Committee the relevant facts surrounding the financial interest and he receives a written determination by the School Committee 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 him. G.L. c. 268A, §19(b)(1). Unless and until such determination is made, however, ABC must continue to abstain from any official participation as superintendent in the decision to accept or implement the software.

Section 17(c)

This section places limitations on the private activities of ABC. Under G.L. c. 268A §17(c), a District employee may not represent or otherwise act as agent for anyone other than his District in connection with any particular matter in which the District is either a party or has a direct and substantial interest. Thus, ABC may not represent XYZ or act as XYZ's agent in connection with the District decision to accept or implement the software. To avoid any potential problems under §17, XYZ should designate an individual other than ABC to represent its interest for the particular matter before the School Committee.[4/]

Section 23(b)(2)

This section prohibits a District employee from using his official position to secure an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals. As applied to ABC, he must conduct his work for XYZ entirely outside of his District work schedule and refrain from using District resources such as telephones and computer equipment for his XYZ activities. He must also refrain from granting any unwarranted official endorsement to XYZ. **See, In the Matter of Byron Battle**, 1988 SEC 369.

2. Application of G.L. c. 268A to District School Committee Members

District School Committee members are also subject to the limitations of §23(b)(2) and must therefore avoid granting any unwarranted privileges or exemptions of substantial value to either ABC or XYZ. Based on the information you have provided, District members would not violate §23(b)(2) by accepting ABC's gift of software. Because the District has accepted gifts under similar terms in the past, whatever test-market privilege XYZ receives is available to similarly situated individuals. **See, EC-COI-89-4.**

DATE AUTHORIZED: October 10, 1990

[1/]We note that you have previously assumed that ABC is a state employee, as opposed to a municipal employee. The fact that ABC is a municipal employee, as opposed to a state employee, will have little bearing on our advice since state, county and municipal employees are each subject to nearly identical restrictions under G.L. c. 268A.

[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/]"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/]This is not to say that ABC cannot speak on his own personal behalf in connection with his gift to the District. **See, Commission Advisory No. 13 (Agency).** Where the facts suggest that his donation is connected to the marketing activities of XYZ, however, ABC must observe the limitations of §17(c).

CONFLICT OF INTEREST OPINION
EC-COI-90-15

FACTS:

You are a licensed master plumber and serve as the Plumbing Inspector for a Town (Town). As Plumbing Inspector, you are compensated on a "per inspection" basis. You also own a private plumbing company which conducts business in the Town. Most plumbing work requires a permit which may only be issued to a licensed plumber. **See** 248 CMR 2.04 (3)(c).

You indicate that it is common practice in the Commonwealth for plumbing inspectors who work on a per inspection basis to perform private business within their towns under c. 142, §12. Chapter 142, §12 provides:

> No inspector of plumbing or inspector of gas fitting shall inspect or approve any plumbing or gas fitting work done by himself, his employer, employee or one employed with him, but in a city or town subject to sections one to sixteen, inclusive, the said inspector of buildings, or the board of health, shall in the manner provided in the preceding section appoint an additional inspector of plumbing or gas fitting so done. Said additional inspector may act in the absence or disability of the

local inspector and his services shall receive like compensation.

This section shall not apply to any city or town establishing an annual salary for an inspector of plumbing or inspector of gas fitting, and in such city or town an inspector of plumbing or inspector of gas fitting shall not engage or work at the business of plumbing or gas fitting; provided, however such an inspector may perform the work of journeyman plumber or gas fitter outside the area over which he exercises jurisdiction as an inspector.

Chapter 142 applies to all cities and towns in the Commonwealth. G.L. c. 142, §2.

QUESTION:

Can you serve as Town Plumbing Inspector and maintain your private plumbing business in Town?

ANSWER:

Yes.

DISCUSSION:

In this opinion we are asked to consider whether G.L. c. 142, §12 supersedes the prohibitions of §17 with respect to private plumbing work by you as a local plumbing inspector. We conclude that c. 142, §12 does override G.L. c. 268A, §17.

As Plumbing Inspector, you are a municipal employee for purposes of G.L. c. 268A, the conflict of interest law. Section 17 of G.L. c. 268A primarily regulates the outside business activities of municipal employees. Under this section, a municipal employee may not receive compensation from a private party or act as agent for the party in connection with any submission, decision or other particular matter[1/] in which the town or town agency is either a party or has a direct and substantial interest. The purpose of §17, prohibiting assistance to outsiders, is "the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to be also a private employee is a contradiction in terms: it suggests that he is serving two masters." **Buss, The Massachusetts Conflict of Interest Statute: An Analysis,** 45 B.U.L. Rev. 299, 322 (1965); **Town of Edgartown v. State Ethics Commission,** 391 Mass. 83, 89 (1984).

Ordinarily, §17 would prohibit you from performing plumbing work in town where the work is performed pursuant to a permit and subject to inspection by town officials because you would be receiving compensation in connection with a matter in which the town is a party and has a direct and substantial interest. The Commission has concluded in past precedent that work performed pursuant to a permit is presumptively "in relation to" the permit and of direct and substantial interest to a municipality because of the extensive municipal regulation and municipal determinations surrounding the application for a permit, decision to issue a permit, and inspection required under the permit. **EC-COI-90-13; 88-9** (part-time building inspector prohibited from performing carpentry requiring a building permit in his town); **87-31** (Chairman of Board of Health prohibited from performing septic system installations requiring a town permit).[2/] Accordingly, as the owner of your company and the person who pulls permits, you would be unable to maintain your private plumbing business in town unless you qualify for a statutory exemption from §17. We conclude that the Legislature has provided such an exemption in c. 142 §12.

In the absence of any specific reference to G.L. c. 268A §17 in c. 142 §12, the Commission is obligated to construe the statute in light of its language and the presumed intent of the legislature which enacted it. **See Int'l Org. of Masters, etc. v. WoodsHole, Martha's Vineyard & Nantucket Steamship Authority,** 392 Mass. 811, 813 (1984); **Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.,** 380 Mass. 212, 214 (1980). The statute provides that plumbing inspectors and gas inspectors who are not paid a salary by a municipality may perform plumbing and gas fitting work in their respective towns, provided they not inspect their own work.[3/] Thus, the Legislature implicitly recognized and addressed the issue of a public employee's dual loyalties by prohibiting any such inspection. Moreover, in §12, the Legislature distinguished between salaried and non-salaried plumbing inspectors, providing that only those plumbing inspectors who are paid per inspection are permitted to perform work within their municipality. This distinction evidences a legislative intent to hold inspectors who are paid an annual salary to the highest duty of loyalty to their communities by prohibiting all work within the community, while permitting some flexibility for inspectors who are paid on a per inspection basis. The Legislature recognized an analogous distinction in G.L. c. 268A when it provided that, under certain circumstances, c. 268A will apply less restrictively to part-time or uncompensated public employees than to full-time public employees. Compare §17(a) with §17 ¶5.

Accordingly, we construe the provisions of G.L. c. 142, §12 to permit you to perform private plumbing services in the town, as long as an assistant inspector conducts all of the inspections of your work.[4/]

DATE AUTHORIZED: October 10, 1990

[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 Commission has recognized that certain facts may overcome the presumption that all work done pursuant to a permit is in relation to the permit. For example, if the work is incidental to what is required in the permit or if the permit covers an entire construction project, said work may not be "in relation to" the permit. EC-COI-90-13; 87-31. You have not overcome the presumption because plumbing work requires a separate permit and you are the only licensed plumber in your company to perform the work. EC-COI-87-31.

[3/]While the statutory origin of G.L. c. 142, §12, St. 1894, c. 455, predates G.L. c. 268A, we find no express or implied intent by the Legislature to override the 1894 law in enacting G.L. c. 268A in 1962. Moreover, the Legislature had the opportunity to revisit the G.L. c. 142, §12 provisions when it rewrote much of G.L. c. 142 in 1977, but left unchanged the language pertaining to plumbing inspectors performing local plumbing work. St. 1977 c. 843 §9.

[4/]Although you are exempt from the prohibitions of G.L. c. 268A §17, you remain subject to the other sections of G.L. c. 268A.

CONFLICT OF INTEREST OPINION
EC-COI-90-16*

FACTS:

You are the District Attorney for Suffolk County (DA) and are establishing a pilot program under which members of the private bar would assist your office in handling appeals of convictions. Under the program, each law firm would solicit volunteers from among its attorneys and would put together a list of those who would like to handle a criminal appeal on behalf of the Commonwealth. At intervals, the Appellate Division of the Suffolk County District Attorney's office would call on those firms to provide volunteers to handle appeals that it was unable to handle in-house. Each attorney would be sworn in as a special assistant district attorney without compensation to write the Commonwealth's brief and make the oral argument in a particular case. The appointments would not be for any set length of time, but would last as long as the appeal took, typically between one and three months. The actual time the volunteer will spend on a particular appeal would likely range from a minimum of ten hours to a maximum of sixty or seventy hours in an exceptional case.

You anticipate that no individual attorney from these firms would handle more than two appeals per year. You also anticipate that each firm would undertake for you between five and fifteen appeals each year. You also understand that these firms also provide representation to defendants in unrelated cases prosecuted by your office.

QUESTION:

Does G.L. c. 268A permit attorneys from private law firms to represent your office in appeals from criminal convictions where these firms also represent defendants in unrelated cases prosecuted by your office.

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

1. Jurisdiction

An attorney who performs services for the DA under the pilot program is considered a "state employee" under G.L. c. 268A, §1(q) during the period in which those services are performed. This jurisdictional status under G.L. c. 268A applies to uncompensated, as well as to compensated service to any state agency. Id.

An attorney who performs services to the DA on a voluntary basis is also considered a "special state employee" under G.L. c. 268A, §1(o). A special state employee is exempt from many of the restrictions which G.L. c. 268A imposes on the private outside activities of full-time state employees.

2. Limitations on outside activities of volunteer attorneys

Section 4 of G.L. c. 268A limits certain outside activities of special state employees to the DA, depending on the employees' time commitment to the DA.

(a) Volunteers who serve for 60 days or less in any 365 day period

Under G.L. c. 268A, §4, a special state employee who serves the DA for 60 days or less in any 365 day period is prohibited from acting as attorney for or receiving compensation from any non-state party in connection with any proceeding, controversy or other particular matter[1/] in which the employee participates[2/] or has official responsibility for as a special state employee. For example, if a volunteer attorney is assigned by the DA to handle a criminal appeal of a prosecution, the attorney is prohibited by §4 from representing the defendant in connection with the same dispute. On the other hand, §4 does not prohibit the attorney from representing clients in connection with other matters pending in the DA's office.

(b) Volunteers who serve for more than 60 days in any 365 day period

Under G.L. c. 268A, §4, a special state employee to the DA who serves in that capacity for more than 60 days in any 365-day period is prohibited from privately representing a client in connection with any matter pending within the DA's office, irrespective of whether the employee has participated in or had responsibility for the matter as a volunteer lawyer. Under established Ethics Commission and Attorney General precedent, an attorney who serves the DA on any part of a day is considered to have served for a "day" in calculating the 60-day period under §4. EC-COI-80-31. Conversely, a day is not counted for the purposes of the 60-day limit unless services are actually performed, EC-COI-85-49. Because the application of §4 turns on the calculation of the 60-day period, volunteer attorneys must keep accurate records of their daily services for the DA.

3. Limitations on official activities of volunteer attorneys

Volunteer attorneys are also subject to certain limitations on their official activities. Under G.L. c. 268A §6, a volunteer attorney must abstain from participating for the DA in any matter in which the attorney's law firm has a financial interest. The abstention requirements will apply to participation in any matter in which the attorney's firm appears. EC-COI-89-5. To avoid any potential §6 difficulties, the DA should ascertain, prior to assignment, whether the pending matter is one which would have a financial effect on the volunteer attorney's firm. Following receipt of information disclosing a financial interest under §6(3), the official in the DA's office responsible for hiring volunteer attorneys may exercise several options, one of which would be to grant written permission to the attorney to participate following a written determination under the standards of §6(3). Further, should a volunteer attorney be assigned a matter which, by virtue of the attorney's prior relationship with the parties, creates an appearance that the attorney will unduly favor one side, the attorney should disclose this relationship to the DA . G.L. c. 268A, §23(b)(3). Volunteer attorneys must also observe the safeguards of G.L. c. 268A, §23(c) and refrain from disclosing any confidential information which they have acquired as volunteers for the DA.

4. Limitations on partners of volunteer attorneys

The partners of a volunteer attorney are also subject to certain limitations on their private practice. Under G.L. c. 268A, §5(d), a partner of a state employee is prohibited from representing a private client in connection with the same particular matter in which the volunteer attorney participates in or has official responsibility for as a volunteer attorney. For example, if a volunteer attorney is assigned to handle a criminal appeal for the DA, the partners of the attorney may not represent the defendant in connection with the same case. Aside from those matters in which a volunteer attorney participates or has official responsibility for at the DA's office, a partner may represent clients in other matters before the DA.

5. Post-employment restrictions on volunteer attorneys

Upon the completion of services for the DA, a volunteer attorney will be considered a former state employee and will be subject to three restrictions under G.L. c. 268A.

G.L. c. 268A, §5(a) and (c), permanently prohibit a former volunteer attorney, and for one year the attorney's partners, from representing non-Commonwealth clients in connection with the same matters in which the attorney previously participated as a volunteer attorney. For example, if a volunteer attorney wrote a brief to the appeals court concerning a prosecution, the attorney is permanently prohibited from representing a private client in connection with

the appeal of that prosecution to the State Supreme Judicial Court or the Federal Courts. The attorney's partners will share this restriction for a one year period following the completion of services by a volunteer attorney.

G.L. c. 268A, §5(e) establishes a one-year bar on a former volunteer attorney acting as a legislative agent[3/] on behalf of a private client before the DA. The restriction on acting as legislative agent includes activities to persuade officials in the DA's office to take specific legislative action through either direct communication to those officials or by the solicitation of others to engage in such efforts. **In the Matter of Cornelius Foley**, 1984 SEC 1982. In addition, the G.L. c. 268A, §23(c) prohibition on disclosing confidential information continues to apply to former volunteers.[4/]

6. Additional Limitations

Aside from the substantive restrictions of G.L. c. 268A discussed above, the DA's office is authorized by G.L. c. 268A §23(e) to establish additional standards of conduct on volunteer attorneys. These standards, which would be enforced by the DA, rather than the Commission, could address these potential conflict issues which G.L. c. 268A does not fully address, such establishing procedures to protect against unwarranted access to unrelated prosecution files.[5/]

DATE AUTHORIZED: November 14, 1990

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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/]"Legislative agent" means any person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule of regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereof, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services. G.L. c. 268B, §1(k).

[4/]A potential supplementary restriction concerning matters under the volunteer's official responsibility, contained in §5(b), is not relevant because any matter within the volunteer's official responsibility would also be a matter in which the volunteer participated for §5(a) purposes.

[5/]This opinion is limited to the application of G.L. c. 268A and does not purport to address other bodies of law such as G.L. c. 12, §16 or the Code of Professional Responsibility. You should therefore ascertain the application of the Code from other sources.

CONFLICT OF INTEREST OPINION
EC-COI-90-17

FACTS:

You were recently elected to the General Court and will take office in January, 1991. You are also the president and owner of ABC, a specialty business. You believe that some of your business clients may either do business with state agencies or may be affected by legislation which comes before the General Court.

QUESTIONS:

1. May you participate as a member of the General Court in legislation which affects companies with which ABC does business?

2. May ABC continue to do business with companies which contract with state agencies?

ANSWER:

1. Yes, subject to certain conditions.

2. Yes, subject to certain conditions.

DISCUSSION:

As a member of the General Court, you will be considered a state employee for the purposes of G.L. c. 268A.

1. Participation in Legislation

As a state employee, you must abstain from official participation[1/] in any particular matter[2/] in which either you or ABC has a financial interest. The propriety of your sponsorship, advocacy, voting and participation in connection with the enactment of any legislation will turn on (1) whether a bill is a particular matter within the meaning of §1(k) and (2) whether either you or ABC has a financial interest in the enactment of the bill.

(a) 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). **See, EC-COI-89-8.**

(b) Financial Interest

In order to invoke the abstention requirements of §6, the particular matter must be one in which you or ABC 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.** For example, the fact that special legislation might affect an ABC client does not necessarily mean that ABC has a foreseeable financial interest in the legislation. You must therefore ascertain, prior to participation, whether any piece of special legislation would have a reasonably foreseeable affect on ABC's financial interest.

Assuming that the legislation is either general or does not have a reasonably foreseeable financial impact on you or ABC, you may participate in the legislation. To dispel any appearance that your official actions as a legislator may be unduly affected by your business clients' interests in the legislation, you should publicly disclose in writing to either the Clerk or the Ethics Commission, prior to participation, the relevant facts concerning the legislation and its impact on ABC clients: **G.L. c. 268A, §23(b)(3).**

2. ABC Business with Companies which Contract with the State

As a state employee and State Senator, your

private business activities are subject to two restrictions under G.L. c. 268A. The first, §4, prohibits you from personally appearing for compensation on behalf of ABC before any state agency in connection with any contract made by a state agency. This section applies only to your activities and does not limit the ability of ABC business clients to appear before or apply for contracts with state agencies.

The second, §7, prohibits you from having a financial interest, direct or indirect, in a contract made by a state agency. For example, §7 would prohibit ABC from providing services under a subcontract to a company which in turn is providing the work under a state contract. In such a case, you as the owner of ABC would have an indirect financial interest in the company's contract with the state.[3/] On the other hand, the fact that an ABC business client is also a state vendor does not necessarily mean that you have a financial interest in that vendor contract. EC-COI-83-173. As long as your services for a business client are independent of any contract the client has with a state agency, you will not violate §7.

DATE AUTHORIZED: December 12, 1990

[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/]In light of your substantial proprietary interest in ABC, you would not qualify for an exemption under §7(c) permitting certain contracts involving companies in which a legislator owns less than ten percent share.

CONFLICT OF INTEREST OPINION
EC-COI-90-18*

FACTS:

You are a member of the Mental Health Advisory Council (Council), which is established pursuant to G.L. c. 19, §11. The Council is a fifteen member body appointed by the secretary of human services, with the approval of the governor. Eight of its members are affiliated with community mental health boards, and of the remaining seven members one is a professional in the field of children's mental health and at least four are appointed to represent one of the following professions and groups: state level medical, psychological, nursing, educational, social work, occupational therapy, or bar associations, associations for mental health, industrial and labor groups and the clergy.

The Council is directed by G.L. c. 19, §11 to:

(a) advise the Commissioner of the Department of Mental Health (DMH) on policy, program development, and priorities of need in the commonwealth for comprehensive programs in mental health;

(b) participate with DMH in holding a regular series of public hearings throughout the commonwealth to obtain the views of the area boards and other citizens concerning the programs of the department and the needs of the people for mental health services;

(c) review the annual plans and the proposed annual budget of the DMH and make recommendations to the commissioner in regard thereto;

(d) hold at least three meetings per year and convene special meetings at the call of the chairman of the council, a majority of the council, or the commissioner.

QUESTION:

Are you covered by the state conflict of interest law as a Council member and, if so, what limitations

does the law places on your having, as a Council member, a financial interest in a contract made by DMH?

ANSWER:

You are subject to the restrictions discussed below.

DISCUSSION:

1. **Jurisdiction**

Initially, it is well-established that DMH is a "state agency" within the meaning of G.L. c. 268A, §1(p).[1/] See, G.L. c. 19, §1. The definition of state agency also includes any department of state government and all councils thereof and thereunder, and any instrumentality within such department. We conclude that the Council is a state agency of DMH for the purposes of G.L. c. 268A.

The Council is a state agency since it possesses many of the qualities which are common to state agencies. The Commission has recognized the following four factors as significant: (1) how the agency was created; (2) the purpose the entity serves; (3) whether the entity receives or uses public funds; and (4) the degree of government control exercised over the entity. The Council qualifies as a state agency since it was created by statute; it is a permanent, as opposed to an **ad hoc**, temporary committee; it performs a governmental function by reviewing and making recommendations concerning the DMH budget, by advising the DMH Commissioner on policy, program development and priorities for mental health program; its members are entitled to reimbursement from the commonwealth for all expenses incurred the performance of their duties, and its members are all appointed by a state official.[2/]

The Council is similar to other state advisory committees which the Commission has found to be state agencies under G.L. c. 268A. **See, EC-COI-87-17; 86-4; 82-157; compare EC-COI-86-5.** For the purposes of G.L. c. 268A, §1(p), the Council is not comparable to an independent state agency such as the MBTA or other state authorities but rather appears to be a council or instrumentality which serves DMH. It is established to serve in an advisory capacity to DMH in establishing mental health policy and program priorities as well as in making recommendations to DMH regarding its proposed annual budget. Notwithstanding the fact that the appointment of council members is made by the secretary of human services, rather than DMH, the primary focus of the services provided by the Council is to assist and advise DMH.[3/] Thus, the Council appears to be either a council of (and under DMH or an instrumentality within DMH, G.L. c. 268A, §1(p), and its members are, accordingly, state employees of DMH. G.L. c. 268A, §1(q).[4/]

2. **Application of G.L. c. 268A, §7**

The consequence of your status as a state employee of DMH is that you will be subject to the restrictions of G.L. c. 268A, §7, which prohibits you from having a financial interest in a contract made by a state agency. In light of your unpaid status on the Council, you are a special state employee under G.L. c. 268A, §1(o), and therefore, you will be eligible for certain exemptions from the prohibition of §7.

While you serve on the Council, you will not be eligible for an exemption available to special state employees under §7(d)[5/] with respect to your financial interest in any contract made by DMH. To qualify for a §7(d) exemption, a special state employee may not participate in or have official responsibility for any activity of the contracting agency. In your case, your financial interest in a contract made by DMH will qualify under §7(d) only if, in your Council position, you neither participate in nor have official responsibility for any activity of DMH. We conclude that by (1) reviewing the annual plans and proposed annual budget of DMH and making recommendations to the DMH Commissioner regarding those matters; (2) advising the DMH Commissioner on policy, program development and priorities for mental health programs; and (3) participating with DMH in conducting public hearings to obtain DMH area board and citizen input into DMH programs and services, you participate as a Council member in activities of DMH. **See, EC-COI-86-7; 85-80.** Accordingly, you do not qualify for an exemption under §7(d) with respect to your financial interest in a DMH contract. Your financial interest would be permissible, however, if you received a gubernatorial exemption under §7(e)[6/] or if your services for DMH qualified under an exemption designed for services to mental health institutions or clients.[7/]

DATE AUTHORIZED: December 12, 1990

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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 state government including the executive, legislative or judicial, and all councils thereof and thereunder, and

any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

2/The fact that the Council may have had its origin in a federal statute does not detract from the Council's status as a state agency. See, EC-COI-83-30; EC-COI-84-55.

3/Jurisdiction has consistently been based on the destination of the services which a state employee provides rather than on the identity of the appointing official of the employee. Otherwise, jurisdiction under G.L. c. 268A would result in anomalies such as judges being considered employees of the governor and executive branch.

4/Even if, for the sake of argument, we were to conclude that the Council is a separate state agency, independent of DMH, the conclusion which we reach in applying G.L. c. 268A, §7 would be unchanged. For the purposes of §7(d), the key issue is not the identity of the agency with which a special state employee is associated, but rather whether the special state employee participates in or has official responsibility for any activity of the contracting agency. It follows that if DMH is the contracting agency, a special state employee does not qualify for a §7(d) exemption if the employee participates in or has official responsibility for any activity of DMH while serving as a special state employee.

5/Section 7(d) states that the prohibition of §7 does not apply

> to a special state employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interest of his immediate family in the contract ...

6/Section 7(e) exempts from §7:

> ... a special state employee who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him.

7/The final paragraph of §7 provides as follows:

> This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for mental health care, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

Included are:

Summaries of all Advisory Opinions issued in 1990,

and

Commission Advisory 14, issued in 1990.

EC-COI-90-1 - A municipal tax collector whose mother is the assistant tax collector may not participate in any personnel matter, evaluation, promotion, step raise, salary determination or other term or condition of employment affecting her mother's financial interest.

EC-COI-90-2 - Members of the Martha's Vineyard Land Bank are considered employees of an independent municipal agency for the purposes of G.L. c. 268A, and members of local advisory boards are municipal employees under G.L. c. 268A. The opinion addresses the limitations which G.L. c. 268A imposes on the official and private activities of these employees.

EC-COI-90-3 - Members of the board of directors of a foundation created and supported by a state college to perform a governmental function for the college are special state employees of a state agency under G.L. c. 268A, §1(p). Directors must observe the limitations of §§7 and 23 in their dealings with other state agencies.

EC-COI-90-4 - Trial court housing specialists may work after hours performing code inspections for a municipal agency, subject to certain restrictions under §§4, 6, and 23.

EC-COI-90-5 - Two law partners may contract to perform investigative and adjudicatory legal services, respectively, for a state agency, subject to the restrictions of §§6 and 23.

EC-COI-90-6 - A former state supervisor is subject to the post-employment restrictions of §§5 and 23 with respect to contracts and other matters in which he previously participated or had official responsibility for as a supervisor.

EC-COI-90-7 - Members of the board of directors and employees of a trust fund created by a pension agreement between a union and a state agency to provide pension benefits to state employees are considered employees of a state agency pursuant to G.L. c. 268A §1(p).

EC-COI-90-8 - A full-time counsel for a state agency may also work after-hours as a part-time town counsel, subject to the restrictions of §§4, 6 and 23.2.

EC-COI-90-9 - Consistent with §23, the appointed head of a public agency may not use his official position to endorse a political candidate nor solicit for political support individuals who are dependent on the agency head's official actions. The agency head must refrain from campaign activity which directly or indirectly obligates an agency vendor to respond in writing or in person to the agency head.

EC-COI-90-10 - A part-time city official may retain his directorship and less than 1% ownership of a company which contracts with the same city, subject to the restrictions of §§17, 19 and 23.

EC-COI-90-11 - A former municipal attorney may represent a private client in a lawsuit in which he neither participated nor had official responsibility for as a municipal attorney.

EC-COI-90-12 - A private attorney who volunteers to serve as a mediator for the state Department of Environmental Protection pursuant to a Department Environmental Protection/Boston Bar Association program will be considered a special state employee under G.L. c. 268A. The restrictions which G.L. c. 268A, §4 places on the attorney's private law practice will be limited as long as the attorney does not serve as a mediator for DEP for more than 60 days in any 365-day period.

EC-COI-90-13 - A state employee may work after hours for a municipal waste treatment plant as long as he does not act or vote in his municipal capacity on any matter within the purview of his state agency. The employee's work for a private company, however, may not relate to any matter in which DEP or any state agency has a direct and substantial interest.

EC-COI-90-14 - The superintendent of a regional school district who also owns a software company may donate to the district a software package, subject to certain restrictions. In particular, he may not officially participate in the matter as superintendent nor may he act as his company's agent in its dealings with the district.

EC-COI-90-15 - A municipal plumbing inspector may also perform private plumbing and gas fitting work in the same municipality, notwithstanding the restrictions of G.L. c. 268A, §17, in light of the enactment of G.L. c. 142, §12.

EC-COI-90-16 - A private attorney who volunteers to handle criminal appeals for the Suffolk County district attorney's office is considered a special state employee under G.L. c. 268A. The restrictions which G.L. c. 268A, §4 places on the attorney's private law practice will be limited as long as the attorney does not volunteer for the district attorney's office for more than 60 days in any 365 day period.

EC-COI-90-17 - A member of the General Court who also owns a specialty business may neither contract with state agencies nor represent his company before state agencies. While he may participate in his official

capacity in general legislation affecting his business, he must abstain from special legislation in which his business has a financial interest.

EC-COI-90-18 - A member of the Mental health Advisory Council is a special state employee under G. c. 268A. A council member may not separately contract with the Department Mental Health (DMH) since, as a council member, he participates in and has official responsibility for activities of DMH as a special state employee.

COMMISSION ADVISORY NO. 14

NEGOTIATION FOR PROSPECTIVE EMPLOYMENT

I. INTRODUCTION

The conflict of interest law, G.L. c. 268A, attempts to insure that a public employee's loyalty to the public interest will not be clouded by potentially competing private loyalties. There is a substantial risk of conflicting loyalties whenever a public employee negotiates for prospective employment with a party with whom the employee has concurrent official dealings.[1] The purpose of this Advisory is to explain how G.L. c. 268A applies when public employees are either contemplating or commencing negotiations for prospective employment.

II. THE LAW

All public employees, whether state, county or municipal employees, are subject to similar restrictions under G.L. c. 268A. Section 6 prohibits a state employee from participating[2] officially in any particular matter[3] in which any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment has a financial interest. County and municipal employees are subject to parallel restrictions under §§13 and 19, respectively.

The conflict of interest law does not prohibit a public employee from seeking prospective full or part-time employment. The law does require, however, that certain abstention and/or disclosure requirements be observed if the employee would customarily be expected to participate officially in a matter affecting the financial interests of the person or organization with whom the employee is negotiating. In these situations, the employee must abstain from participation in the matter. Further, state and county employees must also notify in writing both the State Ethics Commission and their appointing official of the nature and circumstances of the particular matter and make full disclosure of the financial interest affected. For the purposes of notification, the appointing official is the official with the statutory authority to make the appointment of an employee.[4]

At this stage, the law shifts responsibility onto the employee's appointing official to determine how the public agency should handle the matter. Under §§6, 13 and 19, the appointing official, following notification of the financial interest, can exercise one of three options. The official may either: (1) assign the matter to another employee; or (2) assume responsibility for the particular matter; or (3) grant written permission to the employee to participate. The written permission must include a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the public expects from the employee. In the case of state and county employees, the appointing official must also file with the Ethics Commission a copy of the written permission granted under (3), above. Following receipt of the appointing official's permission by the employee and, where appropriate, by the Ethics Commission, the employee may participate in the matter.[5]

The law establishes substantial consequences for an employee who violates G.L. c. 268A by participating in a matter without complying with the notification requirements and without receiving from his or her appointing official written permission to participate. Not only is the employee subject to civil and criminal penalties under G.L. c. 268A, §§6, 13, 19 and G.L. c. 268B, §4, but also any governmental action which was substantially influenced by the employee's participation may be rescinded. See, G.L. c. 268A, §§9, 15 and 21. While the Commission is sensitive to the potential difficulty which state and county employees may experience in having to disclose to their current appointing official prospective employment negotiations with another person or organization, the disclosure requirements protect the public interest from potentially competing personal loyalties.

III. NEGOTIATING FOR PROSPECTIVE EMPLOYMENT

The abstention and notification requirements of G.L. c. 268A, §§6, 13 and 19 accrue when an employee is negotiating for prospective employment. Although the term "negotiating for prospective employment" is not defined in G.L. c. 268A, the Commission and

courts have given a common sense meaning to negotiating.[6]

The key operating principle is mutuality of interest. Where a public employee and a person or organization have scheduled a meeting to discuss the availability of a position and the employee's qualifications for that position, the employee will be regarded as negotiating for prospective employment with that person or organization. See, **EC-COI-82-8** (where an employee affirmatively responds to an inquiry from a prospective employer and meets with the employer, the employee is negotiating for future employment); Department of the Attorney General, **Personnel Manual** (1988), p. E-8 ("employment negotiations exist as soon as both the employee and the prospective employer show any interest in the employee working for the prospective employer. For example, disclosure must be made as soon as an employment interview is scheduled.")[7]

For the purposes of G.L. c. 268A, §§6, 13 and 19, prospective employment negotiations are synonymous with discussions and are not limited to the final meetings during which the parties review salary and other terms of employment. Nor does negotiation require a face to face meeting. See, Commission Adjudicatory Docket No. 302, 1986 SEC 260 (a state employee violates §6 by officially participating in a contract with a company with whom she is concurrently discussing prospective employment by telephone).

Not all employment interest inquiries, however, rise to the level of negotiations for G.L. c. 268A purposes. For example, an employee who submits an application in response to an advertisement which does not identify the prospective employer will not be considered to be negotiating with that employer until the prospective employer identifies itself and arranges for an interview with the employee. Similarly, meetings with professional or social acquaintances (commonly referred to as networking) to discuss general opportunities in a professional field will not ordinarily be treated as negotiations. Where the meetings involve individuals who have a role in the hiring process for an organization, however, an employee will be regarded as "negotiating" if the discussions focus on the availability of a specific position within the organization and the employee's qualifications for that position. Where there is a mutuality of interest between a public employee and a prospective employer for a particular position, the employee's loyalty may become divided between the public interest and personal interest when dealing with matters affecting the prospective employer's financial interests. In such situations, the employee must abstain from participating in these matters unless and until the employee receives from his or her appointing official written permission to participate.

IV. OUTCOME OF NEGOTIATIONS

If the negotiations lead to an offer of full or part-time employment which the public employee accepts, the employee has an arrangement for future employment. The employee must, therefore, abstain from official participation in any matter affecting the financial interests of a person or organization with whom the employee has an arrangement for future employment. The employee must continue to observe the abstention and disclosure requirements of G.L. c. 268A, §§6, 13 and 19 discussed previously, unless and until the employee receives written permission to participate. See, **Commission Adjudicatory Docket No. 302**, 1986 SEC 260 (state employee violates §6 by participating in contract involving company for whom she had accepted a job offer).

If, by objective standards, the negotiations have been terminated through the action of either the public employee or the prospective employer, the employee will no longer be considered to be negotiating for prospective employment with that employer. The employee should apprise his or her appointing official of the termination of negotiations to enable the appointing official to determine whether and when the employee may be assigned prospectively to handle matters involving the employer.

V. ADDITIONAL SAFEGUARDS

(a) Under G.L. c. 268A, §23(b)(3), a public employee may not act in a manner which would cause a reasonable person to conclude that any person can improperly enjoy the employee's favor in the performance of official duties, or that the employee is likely to

act or fail to act as a result of kinship, rank, position or undue influence of any party or person. This appearance may be disspelled if the employee discloses the relevant facts to his or her appointing official. The law does not prescribe any particular "cooling off period" prior to an employee resuming participation in matters affecting a prospective employer with whom the employee has terminated negotiations.[8] Following confirmation of the termination of negotiations, the employee's appointing official is presumably in a favorable position to evaluate the needs of the particular governmental agency, as well as the perception which a premature assignment might create. This determination rests within the sound discretion of the appointing official.

(b) The disclosure procedure outlined in §23(b)(3) should also be observed by a public employee who is about to participate in, but who has not previously been assigned, matters involving a prospective employer with whom he or she has recently terminated negotiations. For example, if negotiations have terminated the day before an employee is newly assigned a matter involving the same prospective employer, the employee may risk violating §23(b)(3) unless the employee discloses to his or her appointing official the fact that negotiations have recently terminated with that employer. Alternatively, the employee may abstain entirely from participation in the matter, thereby avoiding any actual or apparent bias as well as the requirements of a disclosure.

(c) Under G.L. c. 268A, §23(b)(2), a public employee may not use his or her official position to secure an unwarranted privilege of substantial value for the employee or others. To comply with §23(b)(2), a public employee must avoid misusing his or her position to exploit the vulnerability of persons or organizations which are dependent on the public employee's official actions. A public employee must, therefore, exercise caution when pursuing prospective employment with persons or organizations which have matters pending within the official responsibility[9] of the employee. Any employee who wishes to receive more specific guidance concerning his or her compliance with §23(b)(2) may seek an advisory opinion from the Commission.

(d) Under G.L. c. 268A, §23(c), a public employee may not disclose to individuals or organizations any confidential information which the employee has acquired in the course of his or her official duties, nor use such information to further the employee's personal interest. A public employee must observe this restriction in particular when negotiating for prospective employment. The disclosure of confidential information may not be used to advance the interests of the public employee at the expense of the public interest which the employee serves.

VI. CONCLUSION

The conflict of interest law attempts to balance a public employee's right to seek future employment with the public interest in assuring that an employee will make decisions in the public interest, rather than with an eye towards prospective employment. Where there is mutuality of interest between an employee and prospective employer, the law requires that a different agency employee participate in matters affecting the prospective employer, unless the disclosure and permission requirements of §§6, 13 and 19 have been observed. By observing the additional safeguards of §23, a public employee will avoid any actual or apparent risk that the employee's official conduct has been affected by private employment negotiations.

DATE AUTHORIZED: February 28, 1990