STATE ETHICS COMMISSION

Rulings

Enforcement Actions

Advisory Opinions

1991

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 405

IN THE MATTER
OF
ROBERT M. GALEWSKI

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert M. Galewski (Mr. Galewski) 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 September 20, 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. Galewski while he was a Braintree assistant building inspector. The Commission has concluded its inquiry and, on September 12, 1990, by a majority vote, found reasonable cause to believe that Mr. Galewski violated G.L. c. 268A.

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

1. Mr. Galewski has been a Braintree assistant building inspector since 1986. As such, Mr. Galewski is a municipal employee as defined in G.L. c. 268A, §1(g).

2. Among his duties as assistant building inspector, Mr. Galewski is responsible for issuing building permits, inspecting construction at various stages to ensure that the construction conforms with local and state building codes, and issuing certificates of occupancy for such construction.

3. In or about 1985, Nashua - Boston Development Corporation (NBDC) began to contract and sell homes in a subdivision in Braintree known as Buckingham Place. This subdivision consisted of 52 lots. The Buckingham Place subdivision was an "upscale" or "high end" development with houses selling at $350,000 and up.

4. At all times relevant herein, Donald Greenbaum and Scot Greenbaum were the NBDC president and vice president, respectively.

5. On or about October 2, 1987, Mr. Galewski inspected lot #23 in the Buckingham Place subdivision for the purpose of determining whether the house was ready for an occupancy permit. In the course of his inspection, Mr. Galewski had a discussion with Scot Greenbaum.

Mr. Galewski asked Scot Greenbaum if he would sell him a lot in the Buckingham Place subdivision. Scot Greenbaum explained that he could not, due to a commitment to the home buyers that no lots "as opposed to houses" would be sold.[1/] Mr. Galewski then asked if Scot Greenbaum would build him a house. Scot Greenbaum explained that the cost of the houses was in the upper $300,000s. Mr. Galewski then asked Scot Greenbaum if he would build him a house that he could afford to buy. Scot Greenbaum told Mr. Galewski that he was concerned about a conflict of interest.

6. On or about December 1, 1988, Mr. Galewski inspected lot #63 of Buckingham Place for the purpose of issuing an occupancy permit. Mr. Galewski was aware that the closing date was December 2, 1988, and if the house did not close on that date, the buyer could lose his financing. Donald Greenbaum met with Mr. Galewski at lot #63 on December 1, 1988. Mr. Galewski made his inspection and then had a discussion with Donald Greenbaum.

Mr. Galewski told Donald Greenbaum that he would only issue a temporary certificate inasmuch as the railing for the rear deck was not in place. Donald Greenbaum asked Mr. Galewski if he could reinspect on December 2nd in the morning so they would be able to close in the afternoon. Mr. Galewski and Donald Greenbaum then went to do a framing inspection at a nearby lot. Mr. Galewski approved the framing inspection. While inspecting, he raised the question with Donald Greenbaum of the Greenbaums selling him a house lot. Donald Greenbaum expressed a concern about possible conflict ramifications.

Mr. Galewski never appeared on the morning of December 2nd to do the final inspection. However, the Greenbaums were able to close on this property using the temporary certificate.

7. On or about January 30, 1989, Mr. Galewski met with Scot Greenbaum and again raised the issue of buying a lot or a house on Buckingham Place.

8. Between May 1986 and May 1987, the Braintree Building Department conducted nine final inspections of houses at Buckingham Place. Six of those were conducted by Mr. Galewski, three by the building inspector. Each of those inspections resulted in a determination that the construction was satisfactory and the occupancy certificate issued. Thereafter, in August, 1987 at the next final inspection of a Buckingham Place house, Mr. Galewski declined to issue the certificate of occupancy, rather issuing a temporary certificate until certain asserted deficiencies were corrected. The next four final inspections occurred between October of 1987, and May of 1988, all done by Mr. Galewski and all resulting in certificates of occupancy issuing. The next four final inspections occuring between July 1988 and February 1989, all conducted by Mr. Galewski, resulted

in three temporary certificates because of asserted deficiencies, and one certificate of occupancy.

9. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know, using or attempting to use his official position to secure an unwarranted privilege of substantial value not otherwise available to similarly situated people.

10. By asking the Greenbaums to sell him a lot when he knew the Greenbaums were not selling a lot, and by asking Scot Greenbaum to sell him a house that he could afford, Mr. Galewski sought unwarranted privileges of substantial value. By making these requests during the course of official inspections, Mr. Galewski knew or should have known that in effect he was using his position as an inspector to attempt to secure unwarranted privileges. This is particularly true for the conversation with Donald Greenbaum which appears to have taken place on or about December 1, 1988, immediately after Mr. Galewski had issued only a temporary certificate of occupancy; and as to the January, 1989, conversation with Scot Greenbaum, which took place not only after Mr. Galewski had issued a series of temporary certificates of occupancy to the Greenbaums, but, after Donald Greenbaum had explicitly raised conflict of interest concerns. Accordingly, Mr. Galewski knew or should have known that the effect of his conduct was to put pressure as an inspector on the Greenbaums to make some sort of unwarranted private accommodation to him.[2/] Therefore, by acting as just described, Mr. Galewski knew or had reason to know that he was attempting to use his official position to secure an unwarranted privilege of substantial value not otherwise available to similarly situated people, thereby violating §23(b)(2).

11. 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. Galewski:

1. that he pay to the Commission the amount of twelve hundred and fifty dollars ($1,250.00) as a civil penalty for his violation of §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: January 24, 1991

[1/]This commitment was intended to maintain the overall "luxury" character of the development.

[2/]Mr. Galewski maintains that he did not intend for his conduct to be perceived as an attempt to use his official position to secure any such unwarranted accommodation. The Commission previously addressed this point in **In the Matter of Richard Singleton**, 1990 SEC 476 (fire chief violates §23(b)(2) by telling a company's representative that certain fire department inspections could take forever while in the same conversation asking the company to maintain its business with his son). In **Singleton**, the Commission said, "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." Thus, even if Mr. Galewski did not intend for his conduct to be perceived as an attempt to secure an unwarranted privilege of substantial value, he had reason to know his conduct would be so perceived.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 407

IN THE MATTER
OF
WILLIAM HART

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William Hart (Mr. Hart) 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 July 19, 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. Hart. The Commission has concluded its inquiry and, on August 1, 1990, by a majority vote, found reasonable cause to believe that Mr. Hart violated G.L. c. 268A, §§6 and 23.

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

1. At all times relevant to this matter, Mr. Hart was an employee of Recreation Division of the Metropolitan District Commission (MDC).[1/] As such, Mr. Hart was, at the times here relevant, a state employee as defined in G.L. c. 268A, §1(q).

2. At the times here relevant, Mr. Hart's duties as an Executive Assistant and Deputy Director included advising his immediate superior and supervisor, MDC Director of Recreational Facilities and Programs Lou Rodrigues (Rodrigues), on policy, personnel, and purchasing matters. In addition, Mr. Hart was indirectly

responsible for supervising the operation of approximately twenty-four staffed MDC facilities, including the MDC's Everett facility. Mr. Hart worked out of the MDC's Boston office.

3. Dolores Hart (Mrs. Hart) is Mr. Hart's mother. Mrs. Hart was a seasonal MDC employee[2] between 1974 and 1989. Mrs. Hart was employed at the MDC prior to her son's initial MDC employment. For the last several years of her employment with the MDC, Mrs. Hart worked as a matron at the Everett facility, where her duties were to collect fees and to assist in keeping the facility clean. Mrs. Hart's matron position was the lowest grade in the MDC Recreation Division. As a matron, Mrs. Hart was assigned to work a 40 hour week, during both the MDC's summer and winter seasons.[3]

4. In 1986, Mr. Hart directed all MDC Recreation Division payroll clerks to review their records from 1984 to 1986 and to recalculate vacation time for seasonal employees pursuant to a consistent formula in order to ascertain whether or not those employees were owed any vacation time.[4] In all, the records of approximately several hundred MDC employees were reviewed to determine whether those employees were owed vacation time. In connection with this review, Mr. Hart sent a memorandum, dated November 20, 1986, to all MDC Recreation Division payroll clerks advising that seasonal employees were to receive vacation time from that point on and were to be credited for vacation time owed to them since 1984. As a result of this review, a significant number of MDC employees received "back" vacation time. Included among those MDC employees receiving "back" vacation time was Mrs. Hart, who received 45 hours of "back" vacation time. Mr. Hart's supervisor, Director Rodrigues, was aware of and approved of Mr. Hart's decision to have the vacation time for seasonal employees recalculated. Although Rodrigues was aware that Mrs. Hart was a MDC employee, Rodrigues was not aware at that time that Mr. Hart's mother was a seasonal employee with a financial interest in the review of seasonal employee vacation time being undertaken at Mr. Hart's direction and under his supervision.

5. General Laws c. 268A, §6, except as permitted by that section,[5] prohibits a state employee from participating as such in a particular matter in which to his knowledge an immediate family member has a financial interest.

6. Mrs. Hart, as Mr. Hart's mother, is a member of his immediate family as that term is used in G.L. c. 268A.

7. The recalculation of vacation time for MDC seasonal employees described above was a particular matter as that term is used in G. L. c. 268A.[6]

8. By directing and supervising the implementation of the program by which vacation time was recalculated for MDC seasonal employees, Mr. Hart was personally and substantially involved in that particular matter. Therefore, Mr. Hart participated in that particular matter within the meaning of G. L. c. 268A.[7]

9. Mr. Hart knew that his mother had a financial interest in the recalculation of vacation time for MDC seasonal employees.[8]

10. By directing and supervising the implementation of a program by which vacation time was recalculated for MDC seasonal employees, including his mother, Mr. Hart participated as a state employee in a particular matter in which to his knowledge his mother had a financial interest. In so doing, Mr. Hart violated G.L. c. 268A, §6.

11. During the time here relevant, Thomas Burke (Burke) was an MDC seasonal employee. Burke began working for the MDC in July 1975. Burke became the person in charge of the Everett facility in July 1987.[9] As the person in charge of the Everett facility, Burke was responsible for the operation of the pool, ice skating rink, basketball courts, and the maintenance of the grounds, and was one of Mrs. Hart's supervisors. Unlike Mrs. Hart, Burke was a "seasonal employee" who worked throughout the entire year.

12. At all times relevant to this matter, Burke's immediate superior and supervisor was Mystic District Supervisor of Recreational Facilities Gerry O'Neill (O'Neill). O'Neill, in turn, reported directly to Assistant Director of Recreation William O'Brien (O'Brien). O'Brien, in turn, reported to Mr. Hart and Director Rodrigues.

13. During the time that Burke was the person in charge of the Everett facility, there were conflicts between Burke and some of the employees he supervised concerning work assignments, schedules and job performance. Among these conflicts were conflicts between Mrs. Hart and Burke, including, among others, those arising from Mrs. Hart's parking her automobile in an unauthorized area of the Everett facility. While at Everett, Burke was a supervisor who insisted that his subordinates do the jobs for which they were being paid and that they follow MDC rules and regulations. Some of the Everett employees, including Mrs. Hart, were unhappy with Burke's conduct as a supervisor and complained directly to Mr. Hart about Burke.[10]

14. In April 1988, Burke decided that it was necessary to transfer one of the Everett facility's employees, Henry Rogowicz (Rogowicz), from the Everett facility because Rogowicz would not obey Burke's instructions. As a result, on April 15, 1988, Burke submitted a memorandum to the Stoneham District Office recommending Rogowicz's transfer. O'Neill and O'Brien concurred in Burke's recommendation. O'Brien, in turn, recommended Rogowicz's transfer to Director Rodrigues, who orally approved the transfer.[11] Consequently, by letter dated April 26, 1988, O'Brien advised Rogowicz that he was being transferred to the MDC's Charles District facility in Cambridge.

15. Sometime after Director Rodrigues approved the transfer of Rogowicz, Mr. Hart interceeded on Rogowicz's behalf and told Rodrigues that he was "transfering the wrong guy."[12/] Partly as a result of Mr. Hart's intercession, and partly upon his own evaluation of the situation, Director Rodrigues reversed his decision to transfer Rogowicz. On May 6, 1988, Mr. Hart telephoned Burke informing him that Rogowicz would not be transferred.

16. Sometime between May 6, 1988 and June 9, 1988, Mr. Hart orally recommended to Director Rodrigues that Burke be transferred from Everett. Based in part upon Mr. Hart's recommendation and in part upon his own evaluation of the situation at Everett, Rodrigues decided to transfer Burke from Everett. On June 9, 1988, Burke received a letter from O'Brien informing Burke that Burke had been transferred to the MDC's Cambridge facility.[13/]

17. Upon Burke's transfer, Rogowicz and another assistant manager took over the management of the Everett facility. Shortly thereafter, Rogowicz died. Subsequently, Mr. Hart recommended the reassignment of a family friend, who was then employed at the MDC's Malden facility, to be the assistant manager at the Everett facility replacing Rogowicz. The person recommended by Mr. Hart was reassigned in September 1988 to the assistant manager's position at the Everett facility. Subsequently, in November 1988, that assistant manager was designated as the person in charge of the Everett facility.

18. Section 23(b)(2) 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 an unwarranted privilege of substantial value not otherwise available to similarly situated people.

19. 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 the undue influence of any party or person.[14/]

20. Mr. Hart used his MDC position to reverse the decision to transfer Rogowicz, and to influence the decision to transfer Burke instead. This conduct secured unwarranted privileges for Mrs. Hart and Rogowicz in that it removed from the Everett facility a supervisor who Mr. Hart's mother had complained to him about and allowed a friend of Mrs. Hart's (Rogowicz) to remain at the facility as her supervisor. These unwarranted privileges were of substantial value to Mr. Hart's mother and to Rogowicz in that they affected the conditions of employment of both.

21. Therefore, by acting to reverse Rogowicz's transfer and by recommending that his mother's supervisor be transferred instead, Mr. Hart used his position to secure unwarranted privileges of substantial value for his mother and Rogowicz, not otherwise available to similarly situated people. In so doing, Mr. Hart violated §23(b)(2).

22. Even if the Burke transfer were on the merits, by acting to reverse the Rogowicz transfer and by participating significantly in the Burke transfer, all without fully disclosing to his appointing authority the extent of his mother's interest in those matters, Mr. Hart created the appearance that he was giving his mother and a friend of his mother preferential treatment. By so acting, Mr. Hart acted in a manner which would cause a reasonable person, knowing the relevant facts, to conclude that he could be unduly influenced by kinship in the performance of his official duties. In so doing, Mr. Hart violated §23(b)(3).[15/]

In view of the foregoing violations of G.L. c. 268A by Mr. Hart, 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. Hart:

1. that Mr. Hart pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268A, §6;

2. that Mr. Hart pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §23;

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

4. that Mr. Hart 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 19, 1991

[1/]Mr. Hart was first appointed as Assistant Director of Development and then as an Executive Assistant to the Director of the Recreation Division. Mr. Hart's title was subsequently changed to that of Deputy Director.

[2/]A seasonal employee is generally someone who works either the summer, winter, or both seasons. However, some seasonal employees work year round.

[3/]The MDC's Everett facility provides the public with swimming during its summer season and ice skating during its winter season. The summer season is approximately ten weeks long and the winter season approximately seventeen weeks long.

[4/]It is Mr. Hart's contention that he so directed this review of records by the payroll clerks in order that the MDC would be in compliance with negotiated collective bargaining agreements to which the MDC was a party, and that he so acted in consultation with the MDC Labor Relations office.

[5/]None of the exceptions apply here.

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

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

[8/]"Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population. **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.**

[9/]Burke's official job title remained that of Assistant Manager for purposes of sick time, vacation time and personal days. Burke, however, received extra compensation for being the person in charge of the Everett facility.

[10/]Burke's performance as the person in charge of the Everett facility was satisfactory to his supervisor O'Neill and to O'Brien. O'Neill and O'Brien's March and June, 1988 evaluations of Burke's performance as the person in charge of the Everett facility rated Burke as meeting or exceeding all performance criteria.

[11/]Director Rodrigues has the ultimate authority as to all such transfers.

[12/]Rogowicz and Mrs. Hart were friends in the context of their work at the Everett facility.

[13/]Although O'Brien wrote the letter to Burke informing him of his transfer, O'Brien was opposed to Burke's reassignment and advised Rodrigues against it. Burke's transfer resulted in a cut in Burke's pay and a longer commute for Burke than his former assignment at Everett. Burke resigned from the MDC several months after he was transferred.

[14/]Section 23(b)(3) provides further that, "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion." No such disclosure was made by Mr. Hart in connection with his actions affecting his mother, Burke or Rogowicz.

[15/]Pursuant to §23(b)(3), in order for Mr. Hart to lawfully participate in a personnel matter involving his mother's direct supervisor, he would have to disclose in writing to his appointing authority all of the circumstances relevant to that situation, including any history of friction between his mother and the supervisor, before so participating. This disclosure, in turn, would have been required to be kept as a public record by Mr. Hart's appointing authority pursuant to G.L. c. 268A, §24. (Mr. Hart would also have to meet the disclosure and exemption requirements of G.L. c. 268A, §6, to the degree that the matter affected his mother's financial interests.) The Commission does not view these disclosures as mere technicalities. Such disclosures create a public record regarding the relevant facts; and the process of having to disclose facts in writing to the appointing authority, and the appointing authority having to consider carefully that disclosure, is well designed to avoid biased, ill-considered decision making. **See In the Matter of John Hanlon**, 1986 SEC 253.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 408

IN THE MATTER
OF
CLIFFORD MARSHALL

DISPOSITION AGREEMENT

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

On December 21, 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 Sheriff Marshall. The Commission has concluded that inquiry and, on December 14, 1990, found reasonable cause to believe that Sheriff Marshall violated G.L. c. 268A, §§3 and 23. Also, on December 12, 1990 the Commission initiated a preliminary inquiry into possible violations of G.L. c. 268A, §13 by Sheriff Marshall. The Commission concluded that inquiry, and on January 16, 1991, found reasonable cause to believe

that Sheriff Marshall violated G.L. c. 268A, §13.

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

1. At all times material herein, Sheriff Marshall has been sheriff of Norfolk County. As such, he is a county employee within the meaning of G.L. c. 268A, §1.

2. As sheriff he is responsible for, among other matters, the service of civil process by deputy sheriffs in Norfolk County. He is also responsible for appointing all deputy sheriffs in Norfolk County who are authorized to serve civil process. Such deputies serve at his pleasure.

3. Since Sheriff Marshall became sheriff in 1975, civil process has been served by the deputy sheriffs he has appointed through the Norfolk County Deputy Sheriffs Office (NCDSO). The NCDSO is not incorporated, nor is it formally a partnership. Its precise legal status as an entity is unclear.[1/]

The NCDSO is located at 630 High Street, Dedham, Mass. It provides office support services for the approximately 20 deputies who serve civil process in Norfolk County. It employs several clerical workers. The NCDSO also employs a chief administrative deputy who manages the office. The chief deputy is selected by Sheriff Marshall.

Each deputy who serves civil process obtains the papers to be served at the NCDSO office. After the deputy serves the papers, the NCDSO collects the fee (as authorized by G.L. c. 262, §8 for the type of process in question) from the person who has asked that the process be served. The NCDSO keeps a certain percentage of each fee (approximately 40%) for its support services. The remainder is remitted to the deputy who served the papers.

4. In or about 1975, shortly after becoming sheriff, Sheriff Marshall appointed his sister-in-law, Barbara Chaisson (Chaisson), to be the NCDSO chief administrative deputy. She has acted as such ever since.

I. Credit Card

5. According to both Sheriff Marshall and Chaisson, for several years after Sheriff Marshall became sheriff, he incurred various expenses in promoting the NCDSO's interests. These included expenses incurred in attending various conventions (for example, the Massachusetts Sheriffs' Association and Massachusetts Deputy Sheriffs' Association conventions), promoting or opposing legislation which affects the NCDSO (for example, a bill that would affect the statutory fees), and meeting with local attorneys and other people to encourage them to use the NCDSO for their civil process purposes. Typically, these expenses involved paying for meals and/or drinks. Frequently, Sheriff Marshall paid for these expenses out of his own pocket, according to Sheriff Marshall and Chaisson. For reasons that are not clear, these expenses were not submitted to the county for reimbursement.[2/]

6. In or about 1980, Chaisson gave Sheriff Marshall an American Express card which had been issued to the account of the NCDSO (hereinafter the NCDSO credit card or credit card).[3/] Sheriff Marshall understood that the card was to be used for "business-related purposes." According to Marshall and Chaisson, "business-related purposes" meant anything which could be said to promote the interests of the NCDSO. That could include expenses directly related to the NCDSO, such as a meal incurred in meeting with legislators and/or their staff to discuss legislation of interest to the NCDSO; or any expense incurred in an activity intended to promote the interests of the Norfolk County Sheriff's Department generally. In other words, in Sheriff Marshall's and Chaisson's view, if an expense would benefit the Sheriff's Department, then indirectly it would benefit the NCDSO.

7. Between December 1984 and April 1989,[4/] Sheriff Marshall made at least 298 charges on his NCDSO credit card in the total amount of $25,289.25. Fifty-four of those he has identified as personal, totaling $4,450.52.[5/] Twenty-five of which he has identified as having specific "business-related" reasons, totaling $4,818.55. The remaining approximately 220 he asserts are "business-related," although he has no specific recollection for any of them. They total $16,020.18.

8. Sheriff Marshall has reimbursed the NCDSO $4,450.52 for his personal charges. He reimbursed $301.00 on April 13, 1989.[6/] The Commission began this investigation on or about April 20, 1989, at which time Sheriff Marshall ceased using the NCDSO credit card. Subsequently, he reimbursed the NCDSO for the remainder of these personal charges.

9. Sheriff Marshall kept no contemporaneous records of what his NCDSO credit card charges were for. He did not review the monthly statements regarding these charges. They went directly to Chaisson. In reviewing the monthly charges on the NCDSO credit cards, Chaisson did not question any of Sheriff Marshall's charges.

10. Section 23(b)(2) prohibits a county employee from using or attempting to use his official position to obtain an unwarranted privilege of substantial value not otherwise available to similarly situated people.

11. As detailed above, Sheriff Marshall's use of the credit card to make $4,450.52 in personal charges "involved substantial value."[7/] In the absence of the card, Sheriff Marshall would have had to pay for these expenses out of his own pocket.

12. Sheriff Marshall received the NCDSO card because he is the sheriff of Norfolk County. Therefore, he used his position as sheriff to receive the substantial value as described above.

13. Sheriff Marshall's use of the card for

$4,450.52 in personal charges without making timely reimbursements involved an unwarranted privilege.

14. Therefore, by using the NCDSO credit card for personal charges without making timely reimbursements, Sheriff Marshall used his official position to secure an unwarranted privilege of substantial value, thereby violating §23(b)(2).

15. Section 3(b) of G.L. c. 268A, in pertinent part, prohibits a state employee from, otherwise than as provided by law for the proper discharge of official duty, 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.

16. The NCDSO credit card was of substantial value to Sheriff Marshall because, in effect, it was a conduit through which the deputy sheriffs paid for approximately $21,000 in Sheriff Marshall's expenses which he has characterized as "business-related."

17. Sheriff Marshall's meetings with legislators and/or their staff members, and his various actions as sheriff in attempting to promote the NCDSO's interests, involved acts within his official responsibility.

18. By accepting and using the NCDSO credit card for "business-related expenses," Sheriff Marshall accepted an item of substantial value for or because of official acts performed or to be performed, and not otherwise authorized by law, thereby violating §3.[8/]

19. The Commission is not aware of any evidence that Sheriff Marshall knew he was violating §3 by the conduct just described.[9/] In addition, this is the first occasion on which the Commission has applied §3 to this kind of fact pattern.[10/]

20. Section 23(b)(3) prohibits a county employee from causing a reasonable person knowing all of the facts to conclude that anyone can unduly enjoy his favor in the performance of his official duties.

21. By using the NCDSO credit card for not only personal charges in the amount of $4,450.52, but also for "business-related expenses" in the amount of $16,020.18 for which he can give no accounting, and by doing all of this while the person responsible for monitoring his use was not only his direct subordinate but his sister-in-law, Sheriff Marshall would cause a reasonable person knowing all of the facts to conclude that either his sister-in-law and/or his deputies could unduly enjoy his favor in the performance of his official duties, thereby violating §23(b)(3).

II. Appointing Sons as Deputy Sheriffs

22. In or about January, 1985 Sheriff Marshall appointed his son Clifford H. Marshall, III as a Norfolk County deputy sheriff for the purpose of serving civil process. Clifford H. Marshall, III served process through the NCDSO from approximately January 1985 through October 1988. During that time he received $44,658.34 in fees for serving process (approximately $11,150 annually).

23. In or about March 1986, Sheriff Marshall appointed his son Michael Marshall as a Norfolk County deputy sheriff for the purpose of serving civil process. Michael Marshall served process through the NCDSO between March 1986 and the end of 1990.[11/] During that time he earned $54,784.07 in fees for serving process (approximately $10,700 annually).

24. Except as otherwise permitted in that section,[12/] §13 of G.L. c. 268A prohibits a county employee from participating[13/] in a particular matter[14/] in which to his knowledge a member of his immediate family has a financial interest.

25. The decisions to appoint Clifford H. Marshall, III and Michael Marshall as deputy sheriffs were particular matters.

26. Sheriff Marshall participated in the foregoing particular matters by making the appointments as sheriff.

27. Sheriff Marshall's sons Clifford and Michael had a financial interest in these appointments inasmuch as they were then empowered to serve civil process for a fee. Sheriff Marshall was aware of the financial interest that accompanied these appointments.

28. By making the foregoing appointments as sheriff, Sheriff Marshall participated in particular matters in which he knew his sons had a financial interest, thereby violating §13.[15/]

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 Sheriff Marshall:

1. that he pay to the Commission the amount of $8,900.00 as a civil penalty for his violations of G.L. c. 268A, §23(b)(2) involving his use of the NCDSO credit card for personal charges;[16/]

2. that he pay a $2,000.00 civil penalty for his violating §13 in connection with his appointing his sons as deputy sheriffs; and

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

Date: February 21, 1991

[1/] According to Sheriff Marshall, the Internal Revenue

Service considers NCDSO to be a quasi-public agency, and as such it does not file tax returns. The State Ethics Commission has not had the occasion to rule on the issue of whether the NCDSO, or any organization like it, is a county agency for purposes of G.L. c. 268A.

[2/]The county does not have any clear policy regarding reimbursable expenses. There are no written policies on the type or amount of expenses which can be incurred. In any event, under G.L. c. 37, §21, the sheriff is authorized to be reimbursed for all of his travel expenses incurred in the performance of his duties. In Norfolk County, the sheriff submits to the county treasurer a reimbursement request which includes a receipt for the expense and a justifying memo. The county treasurer issues the sheriff a check with the appropriate reimbursement, if he approves the request.

[3/]According to Chaisson, it was her idea to give Sheriff Marshall the credit card.

[4/]As discussed below, Sheriff Marshall stopped using the card in April 1989. Due to the Commission's Statute of Limitations, 930 CMR 3.01, the Commission did not review charges prior to December 1984.

[5/]These personal charges included, for example, various expenses incurred on trips to New York, Colorado, Rhode Island, Michigan, and Canada to watch his son play hockey; as well as airline tickets, birthday gifts, and dinners for family members.

[6/]Sheriff Marshall was aware at that time that a concern had been raised by the media regarding his use of the card.

[7/]Anything with a value of $50 or more is of substantial value. **See Commonwealth** v. **Famigletti**, 4 Mass. App. 584 (1976).

[8/]Sheriff Marshall's use of the credit card for business purposes is analogous to conduct dealt with by the Commission in its so-called "vendor-sponsored travel" cases. In a series of Public Enforcement Letters, the Commission has made clear that a vendor may not deal directly with a public employee in paying for travel expenses the public employee incurs in officially dealing with the vendor. **See, e.g., Public Enforcement Letters 89-5 through 89-7; 90-1 through 90-4.** This is true even if the expenses would otherwise be entirely legitimate expenses.

As the Commission previously ruled, if a private party regulated by a public official wishes to pay for the travel expenses of the public official, the public official's agency should pay for the expenses and seek reimbursement from the private party (alternatively, the private party can attempt to make a gift to the public agency to cover the expenses, or a law, regulation, ordinance, or by-law can be promulgated to regulate the conditions under which such a private party will be allowed to pay these expenses). In this way, a public official's expenses are subject to review and approval, and the potential for abuse is thereby reduced.

An argument might be made that the monies which were used to pay for Sheriff Marshall's NCDSO credit card charges were, in effect, public monies within his own department (in that they were paid from that portion of the fees retained by the NCDSO). This argument would turn on the question of whether the NCDSO is a public or a private entity, a matter on which, as discussed above, the Commission has not yet ruled. Yet even if it were determined that the NCDSO is a public agency, these funds came from the fees collected by the deputy sheriffs. In effect, they are paying for Sheriff Marshall's expenses out of their own pockets, without any legal justification.

[9/]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**, Mass 1, 7 (1945).

[10/]Although as discussed above in fn. 8, the facts are analogous to the Commission "vendor-sponsored travel" cases.

[11/]Michael Marshall resigned his deputy sheriff appointment on February 8, 1991.

[12/]None of the exceptions applies.

[13/]"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).

[14/]"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).

[15/]According to Sheriff Marshall, the hiring of his two sons as civil process servers was solely within Chaisson's discretion as chief administrative deputy. For the purpose of this agreement, the Commission need not resolve that issue because the §13 violations are based on Sheriff Marshall having commissioned his sons as deputy sheriffs while knowing that they were to be hired by Chaisson to serve civil process.

[16/]The Commission does not deem it appropriate to impose a separate penalty for Sheriff Marshall's use of the NCDSO card for business-related purposes.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 393

IN THE MATTER
OF
LYNWOOD HARTFORD, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Lynwood Hartford, Jr. (Mr. Hartford) 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. Hartford in his former capacity as the building inspector and health agent for the Town of Freetown. The Commission has concluded its inquiry and, on June 27, 1990, by a majority vote, found reasonable cause to believe that Mr. Hartford violated §23(b)(2) and §23(b)(3) of G.L. c. 268A.

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

1. Mr. Hartford was employed, from approximately April, 1986 to July, 1988, as the building inspector and health agent for the Town of Freetown.

2. As the Freetown building inspector and health agent, Mr. Hartford was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. As the Freetown building inspector, Mr. Hartford's responsibilities included locally enforcing the state building code and granting building permits. As the Freetown health agent, Mr. Hartford's responsibilities included inspecting local buildings and locally enforcing the state sanitary code.

4. Both as the Freetown building inspector and as the Freetown health agent, Mr. Hartford conducted numerous inspections of property in Freetown owned by a Freetown real estate broker and developer named Paul Bernard (Bernard) and took other official actions concerning Bernard during Mr. Hartford's tenure in those positions. In the fall of 1986, Mr. Hartford participated in bringing Bernard before the state Department of Public Safety in an attempt to have Bernard's contractor's license revoked. In 1986 and 1987, Mr. Hartford conducted many inspections of a building owned by Bernard on South Main Street in Freetown and sought to have the building evacuated for saftey reasons in the spring of 1987 when a possible fuel leak in the basement of the building was reported to him.

5. In January, 1987, Bernard sought and Mr. Hartford denied a building permit for a house Bernard was building at 7 Jeffrey Lane in Freetown on the stated ground that Mr. Hartford believed the house to be located in a flood zone and that, before the issuance of a building permit for the property, a registered professional engineer was required to establish the elevation of the house's basement floor. When Bernard subsequently submitted to Mr. Hartford a plan showing the house's elevation, Mr. Hartford, by letter dated February 24, 1987, informed Bernard that he must reject the plan and deny the building permit. On March 26, 1987, however, Mr. Hartford issued a building permit to Bernard for 7 Jeffrey Lane. Then, on April 28, 1987, Mr. Hartford issued a stop work order as to 7 Jeffrey Lane.[1] On June 9, 1987, the Freetown Board of Appeals suspended the building permit issued to Bernard by Mr. Hartford on the grounds that the Jeffrey Lane house was in the flood plain. Subsequently, in a June 25, 1987 letter to the Board of Appeals, Mr. Hartford stated that he did not believe Bernard's Jeffrey Lane house to be in the flood plain. The Board of Appeals, nevertheless, continued in its position that Bernard's house was in the flood plain and that the building permit had been improperly issued by Mr. Hartford, and the matter of the 7 Jeffrey Lane house became a subject of litigation between Bernard and the town. In March, 1988, the litigation was settled and the 7 Jeffrey Lane matter was resolved through the placing of additional fill on the property, a slight modification of the dwelling and a payment to the town by Bernard of $1,000 for litigation costs. Mr. Hartford did not participate in the settlement of the litigation.

6. In 1987, Bernard owned a one-half interest in a lot of undeveloped land on Richmond Road in Freetown that he wished to sell. Bernard had purchased the property in 1974 with Attorney William White (Attorney White) as his partner.[2] On April 16, 1987, Bernard sought to have a percolation test performed on the Richmond Road lot. Mr. Hartford, as health agent, was present to witness the test. No percolation test was attempted, however, because of a high water level in the test pit when it was excavated. Mr. Hartford wrote a report on the abortive test in which he noted "no perc attempted because of big H2O and excellent gravel." Mr. Hartford's report listed Bernard as the owner of the Richmond Road lot.

7. Sometime after the abortive percolation test, Mr. Hartford informed Bernard that he had a buyer for Bernard's Richmond Road property. Mr. Hartford further informed Bernard that he expected to be paid a 5% "referral fee" for supplying the buyer. Bernard and Attorney White agreed to the 5% fee and eventually agreed to pay Mr. Hartford a fee of $2,000.

8. The buyer Mr. Hartford "supplied" was Andre J. Fournier (Fournier), who owned a large landlocked tract of land abutting Bernard's Richmond Road lot to the rear. Fournier had come to Mr. Hartford's office at

town hall to examine certain records, and, in the course of seeking information from Mr. Hartford in his official capacity, was told by Mr. Hartford that Bernard's Richmond Road lot was for sale. With Mr. Hartford acting as intermediary, Fournier first agreed to purchase the lot for $35,000. Subsequently, however, the agreed purchase price was raised to $40,000. The closing of the sale of the Richmond Road lot to Fournier took place on September 30, 1987.

9. On September 30, 1987, Bernard directed White to write a check payable to Mr. Hartford in the amount of $1,900 as payment of the referral fee, rather than the agreed $2,000, and a check to himself (Bernard) in the amount of $100. Bernard then took the $1,900 check to Mr. Hartford at Mr. Hartford's town hall office and gave the check to Mr. Hartford telling him that he had deducted the $100 from the agreed $2,000 finder's fee as compensation for a fine in the same amount that Mr. Hartford, in his official capacity, had previously caused Bernard to pay. Mr. Hartford thereupon demanded that Bernard pay him the additional $100. As a result of Mr. Hartford's insistence, Bernard, fearing that Mr. Hartford would retaliate against him using his powers as town health agent and building inspector, paid Mr. Hartford the additional $100.

10. Section 23(b)(2) of G.L. c. 268A 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.

11. By participating, in 1987, in a private real estate transaction involving Fournier after Fournier had come to his town office and sought information from him in his official capacity, by seeking a commission from Bernard and Attorney White at a time when Bernard was subject to his official authority, and by demanding the final $100 of the commission from Bernard, Mr. Hartford used his official position to obtain for himself an unwarranted privilege which was of substantial value and which was not properly available to similarly situated persons. In so doing, Mr. Hartford violated G.L. c. 268A, §23(b)(2).

12. Section 23(b)(3) of G.L. c. 268A prohibits a municipal 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 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.

13. By seeking and receiving the $2,000 finder's fee from Bernard and Attorney White, and by demanding from Bernard the final $100 of the fee, while Mr. Hartford had official regulatory authority over Bernard, particularly where Mr. Hartford had recently changed his official position concerning Bernard's entitlement to a building permit for 7 Jeffrey Lane, Mr. Hartford, in 1987, acted knowingly, or with reason to know, in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that a person paying Mr. Hartford a finder's fee could unduly enjoy his favor in the performance of his official duties. In so doing, Mr. Hartford violated G.L. c. 268A, §23(b)(3).

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 and conditions agreed to by Mr. Hartford:

1. that Mr. Hartford pay to the Commission the sum of two thousand dollars ($2,000.00) as a forfeiture of the unlawful economic benefit he received by violating G.L. c. 268A, §23;

2. that Mr. Hartford pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §23; and

3. that Mr. Hartford 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 22, 1991

[1/] According to Mr. Hartford, in rejecting Bernard's request for a building permit and in issuing a stop work order as to 7 Jeffrey Lane, he was acting pursuant to the directions of the Freetown Board of Health and Board of Selectmen. The Commission takes no position as to the truth of this contention, which is an issue whose resolution is not necessary for the disposition of this matter. The parties agree, however, that Mr. Hartford acted independently of any directions of the Board of Health and Board of Selectmen in issuing a building permit to Bernard on March 26, 1987.

[2/] The title to the Richmond Road lot was registered in Attorney White's name. Although Attorney White subsequently transferred his interest in the property to a third party and acted as agent for that undisclosed principal, title to the Richmond Road lot remained in Attorney White's name.

Lieutenant Donald Whalen
c/o Dennis R. Brown, Esq.
12 Washington Street
Wellesley, MA 02181

RE: PUBLIC ENFORCEMENT LETTER 91-2

Dear Lieutenant Whalen:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you have been involved in attempting to fix tickets at the request of fellow police officers connected in some way to the person ticketed. 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 admit to the facts and law discussed herein. The Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. At all relevant times, you were a lieutenant in the Wellesley Police Department (WPD). As such, you were a "municipal employee" as defined by G.L. c. 268A, §1.

2. According to the court record copy of traffic citation no. A2217623, a citation was given to Elizabeth Finneran on October 29, 1987 by WPD Officer Richard Peterson. The ticket was for a red light violation. The fine was $20. The court record copy indicates that there was a hearing regarding the citation on February 24, 1988 at the Dedham District Court, and Finneran was found not responsible for the violation.

3. In an undated note to Police Prosecutor Peter Nahass, you wrote the following:

> I got a call from Lt. Finneran Mass. State Police. He is an old friend of mine. His son is a Southboro cop. Dick Peterson stopped his daughter Elizabeth, and cited her for a red light. He put in for a hearing. It is coming up February 24, docket number NC16545. Elizabeth L. Finneran, 538 Potter Road, Framingham. Ticket no. A2217623. Can you get me some consideration on it. If she has to appear let me know.

4. You provided us with the following information: You have been employed by the WPD since June, 1971. You were promoted to sergeant in 1979 and to lieutenant in 1982. Your primary responsibility as lieutenant is supervising the detective bureau.

As to the Finneran citation, you received a phone call from retired State Police Lieutenant Finneran. Finneran asked you if something could be done to assist his daughter with the citation. You agreed and told Finneran you would write a note to the prosecutor. You did so.[1/] Finneran probably called you a couple of days before the hearing. Your understanding was that Finneran was asking to have the ticket dismissed. Finneran did not directly ask that, but simply requested if you could help his daughter out.[2/] When you wrote the note to Nahass about getting consideration, consideration meant to have the ticket dismissed. You justified your actions on the basis that by helping Finneran, you maintained good relations with the state police and, therefore, it was in the interests of the WPD for you to act as you did. (You stated that Finneran was the only contact you had with the state police on the Massachusetts Turnpike. He had worked out of the Weston barracks.) Ultimately, you stated that a combination of factors were involved: Finneran could provide professional assistance in investigations and you and he were fellow police officers and had taken classes together.

We asked you how you would distinguish between consideration being used as a legitimate tool to further professional relationships among various police departments from a situation where anyone who simply knows the police officer can have tickets fixed. You stated that first it has to be understood that consideration is never sought on anything other than a minor motor vehicle violation. It would not be sought for a driving under the influence case, for example. In addition, there has to be some decision as to what the return benefit would be. If the return benefit cannot be articulated, then consideration should not be sought.

In your view, this practice goes on state-wide and it is to be expected. Any department which is not willing to cooperate soon becomes ostracized. Currently, no one in the WPD seeks consideration on traffic citations and this has caused the department to develop a reputation with other departments. Getting cooperation from other departments has become more difficult as a result. Any officer who is being truthful would corroborate your information as to the common practice of seeking consideration on tickets within the department.

II. Analysis

As a Wellesley police officer, you are a municipal employee for purposes of the conflict of interest law, G.L. c. 268A. Section 23(b)(2) prohibits a municipal employee from using or attempting to use his position to secure an unwarranted privilege of substantial value not otherwise available to similarly situated people. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person knowing all of the relevant circumstances to conclude that anyone can unduly enjoy his favor in the performance of his

official duties.

"Ticket-fixing" violates §23. See generally, In the Matter of Lawrence Cibley, 1989 SEC 422 (Commission approved disposition agreement in which Selectman Cibley paid $1,000 fine for violating §§23(b)(2) and (3) by asking police to fix a friend's ticket). Thus, in the Commission's view, if a public official/employee is involved in seeking and/or obtaining special consideration on tickets because the alleged violator has private connections to that public official/employee, such conduct would raise §§23(b)(2) and (b)(3) issues. If the ticket involved a fine of $50 or more, the substantial value requirement would be satisfied for §23(b)(2) purposes. In addition, if the reason consideration were sought was private connections to a public official/employee, that would involve an unwarranted privilege. Accordingly, such conduct would have violated §23(b)(2). In addition, such conduct would cause a reasonable person knowing all of the relevant circumstances to conclude that the alleged violator could unduly enjoy the favor of the public official/employee who seeks or grants such consideration.

You concede you wrote the above-quoted note, and that you were trying to get the ticket dismissed. Your rationale was part friendship, part "professional courtesy" and part business. (The business part is based on your position that police departments have to grant these requests in order to cultivate good relations with other police departments.) The friendship and "professional courtesy" reasons are clearly improper. Further, in our view, while we are sympathetic with the objective of cultivating good relations with other departments, dismissing tickets for no other reason than the fact that the driver has a private relationship with a police officer is an unwarranted means for achieving that end.

Consequently, in the Commission's view, the evidence would support a reasonable cause finding that you violated §23(b)(3) in that your conduct would cause a reasonable person to conclude that Elizabeth Finneran could unduly enjoy your favor in the performance of your official duties. On the other hand, there is no §23(b)(2) violation here because the ticket in question was only for $20.[3/]

In our view the seriousness of this case transcends the dollar amount of the ticket and the fact that it involved only a request. The ability of a police officer to seek special treatment for somebody because of that person's private relationship to a police officer is the kind of conduct that offends and troubles people. It demonstrates that there is one standard for the public, but a different standard for those with private connections to the police. In the area of law enforcement, the standards must be clear and be administered in an even-handed way. If you are correct in your view that this practice is widespread, then other police officers need to be informed and warned that this activity is unlawful. The wide dissemination of this letter by the Commission, with your consent, should help achieve that purpose.

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.

Date: March 12, 1991

[1/]You may have spoken with Officer Peterson, the issuing officer, before writing the note because your normal practice was not to get involved unless the issuing officer knew of the situation and approved of it. It is a kind of unwritten rule that police officers follow, according to you.

[2/]According to Finneran, he just wanted to make sure that if his daughter went to appeal the ticket, that the process would not be overwhelming and that someone would be there to guide her through. He did not ask you to fix the ticket. He only knows you from taking classes together at Northeastern University. He called you because he did not know any other Wellesley police officers.

[3/]As we understand it, the red light citation would have no accompanying insurance surcharge.

[4/]The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. The Commission chose to resolve this matter with a public enforcement letter for the following reasons: (1) You do not appear to have attempted to exert any pressure on police prosecutor Nahass to dismiss the ticket. Compare, Cibley where the person making the request was a selectman, a member of the board with the most significant power in the town, including jurisdiction over police matters. (2) You were making only a request. You were not in a position to dismiss the ticket yourself. (3) The amount of the ticket was relatively small. (In Cibley the ticket was for $200.) (4) Most importantly, there probably has been a widespread misapprehension among police officers that it was appropriate to seek consideration on tickets when requested by a fellow police officer, in part as a professional courtesy and in part to cultivate good relations with the officers' police department. You appear to have written your note primarily for those reasons, as opposed to strictly private reasons.

George Nelson, Jr.
c/o Richard K. Sullivan, Esq.
36 Washington Street
Wellesley, MA 02181

RE: PUBLIC ENFORCEMENT LETTER 91-3

Dear Mr. Nelson:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you have been involved in attempting to fix tickets at the request of fellow police officers connected in some way to the person ticketed. 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 admit to the facts and law discussed herein. The Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. At all relevant times, you were an officer in the Wellesley Police Department (WPD). As such, you were a "municipal employee" as defined by G.L. c. 268A, §1.

2. According to the court copy of citation no. A3096387, you issued a speeding ticket on February 2, 1988 to Catherine Ewing for speeding 46 mph in a 30 mph zone. The potential fine was $50. The court record indicates that on May 4, 1988 a hearing occurred at the Dedham District Court at which time Ewing was found not responsible for the violation. (You were not requested to be present at the May 4, 1988 hearing by either the WPD or anyone else.)

3. In a note dated February 10, 1988 from you to WPD Police Prosecutor Peter Nahass, you wrote:

> The enclosed citation no. A3096387 was issued on Feb. 2nd, the operator is the sister of Boston Police Detective assigned to the Att. Generals Office (Det. John McReynolds 727-4190). He called today, asking if he could have some consideration regarding the citation. I told him we'd take care of it, via a hearing to dismiss the ticket. If there is any problem with this please let me know.

4. An undated note of reply from Nahass to you states:

> I have been instructed by the Chief not to get involved in any dispositions, that in the case of criminal they be handled by the ADA and in the case of civil they be handled by a Clerk of Court. What I would suggest is that you call Det. McReynolds and tell him to call Dedham Dist and make his request.

5. You provided us with the following information. You were first appointed to the WPD as a special police officer in 1980, and served until 1983 as such. You were appointed a full-time police officer on April 25, 1983.

As to the Ewing citation, you wrote the February 10, 1988 note to Nahass. You explained that McReynolds called the WPD asking for you, but you were not available so McReynolds left a message. You played telephone tag once or twice. Eventually you returned the call to McReynolds. McReynolds advised you that you had issued a citation to Catherine Ewing and that Ewing was his sister. McReynolds asked for consideration on the citation; however, you could not recall the exact conversation. You told McReynolds that you no longer had control over the citation, that it had been submitted through normal channels and that McReynolds would have to speak to the police prosecutor. His sister would have to put in for a hearing if the citation were to be dismissed or consideration sought. You told McReynolds that you would speak to Nahass.

You had no further contact with McReynolds. You understood that when McReynolds asked for consideration he wanted the ticket either dismissed or other steps taken so that ultimately his sister would not have to pay a fine. There was nothing that you could do about it, so you simply passed the request on to the next person (the police prosecutor who goes to court on citations). We asked you why you wrote the note to the police prosecutor if you advised McReynolds that there was nothing you could do. You responded that you just wanted to alert Police Prosecutor Nahass about the citation.

We asked you what the following language in the note meant: "I told him we'd take care of it, via a hearing to dismiss the ticket." You pointed out that you used the word "we'd" as opposed to "I'd", and this supported your claim that you were not in a position to act on McReynolds' request but that any request would have to be acted on by the police prosecutor. Ultimately, however, you could not satisfactorily explain the difference in import between your note which suggests that the ticket will be dismissed and your testimony, which merely suggests that the request for consideration would be passed along, but it would ultimately be up to the clerk magistrate.

You did not feel any pressure to act on McReynolds' request. However, McReynolds was a fellow police officer and as such you did not wish to be in a position

of denying the request.

We asked you if you had any understanding that the police prosecutor was in a position to act on a request for consideration. You replied negatively, that such requests can only be granted by a clerk magistrate. The police prosecutor, however, could forward the request to the clerk magistrate.

You have not been involved with any similar requests from police officers from other jurisdictions, police officers within your department or any friends or relatives. You have no knowledge of a practice in the department where a person could seek consideration on a citation by requesting a hearing and then contacting the police prosecutor to use his influence with the clerk magistrate.[1/]

6. Boston Police Sergeant John McReynolds provided us with the following information: He was appointed to the Boston Police Department in January 1978, worked as a patrolman until 1983 when he became a detective. In 1987, he was temporarily assigned to the Attorney General's drug control task force where he remained until he was promoted to sergeant in September, 1990. He currently serves as a patrol supervisor.

As to citation no. A3096387, his sister showed him a copy of the citation shortly after she received it. She told him she had been stopped for speeding and was thinking about whether to appeal. His sister did not ask him to do anything regarding the citation. He told her, however, that he would contact the issuing officer and on the basis of that conversation, advise her whether she should appeal. He did contact you for that purpose. He wanted to find out whether his sister was discourteous or whether there were any other violations observed for which she was not cited. If either case existed, he would have advised her to pay the fine.[2/]

In any event, at the same time he was having this discussion with his sister at her house, he tried to contact you. He telephoned the WPD and left a message indicating he was a Boston police officer working out of the Attorney General's Office. You were not available. You subsequently returned his call at a later time. McReynolds asked you whether his sister had been belligerent or whether there were any other violations you did not cite her for. You replied no to both. He may have advised you that his sister would ask for a hearing. He did not ask for or suggest favorable treatment or consideration. McReynolds could not recall if he used the word consideration, but if he did, it would be just to indicate his appreciation for the time you had taken in returning his call.

We showed McReynolds the note from you to Nahass in which you asked Nahass for consideration based on the call from McReynolds. The document did not change his testimony. He could only assume that you drew an inappropriate inference from your discussion with him, i.e., that McReynolds was seeking special consideration on the ticket.

7. As part of our investigation of this matter, we determined that WPD Lt. Donald Whalen had sought "consideration" on a ticket issued to the daughter of a former state police officer. Lt. Whalen justified his conduct primarily on the basis that by helping the former state police officer, he would maintain good relations with the state police and, therefore, benefit the WPD. Lt. Whalen also observed that this practice goes on state-wide and it is to be expected. Any department which is not willing to cooperate soon becomes ostracized. Any officer who is being truthful would corroborate his information as to the common practice of seeking consideration on tickets within the department.[3/]

II. Analysis

As a Wellesley police officer, you are a municipal employee for purposes of the conflict of interest law, G.L. c. 268A. Section 23(b)(2) prohibits a municipal employee from using or attempting to use his position to secure an unwarranted privilege of substantial value not otherwise available to similarly situated people. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person knowing all of the relevant circumstances to conclude that anyone can unduly enjoy his favor in the performance of his official duties.

"Ticket-fixing" violates §23. See generally, In the Matter of Lawrence Cibley, 1989 SEC 422 (Commission approved disposition agreement in which Selectman Cibley paid $1,000 fine for violating §§23(b)(2) and (3) by asking police to fix a friend's ticket). Thus, in the Commission's view, if a public official/employee is involved in seeking and/or obtaining special consideration on tickets because the alleged violator has private connections to that public official/employee, such conduct would raise §§23(b)(2) and (b)(3) issues. If the ticket involved a fine of $50 or more, the substantial value requirement would be satisfied for §23(b)(2) purposes. In addition, if the reason consideration were sought was private connections to a public official/employee, that would involve an unwarranted privilege. Accordingly, such conduct would violate §23(b)(2). In addition, such conduct would cause a reasonable person knowing all of the relevant circumstances to conclude that the alleged violator could unduly enjoy the favor of the public official/employee who seeks or grants such consideration.

You concede you wrote the above-quoted note. You deny, however, that you were trying to get the ticket dismissed. According to you, you were merely passing along a request. The matter was out of your hands. It would be up to the clerk magistrate to decide whether to grant the request.

In our view the above-quoted note is determinative. The language you use in that note leaves very little doubt

that you were attempting to invoke a convention or protocol by which a police officer will seek to dismiss a ticket at the request of another police officer so long as the issuing officer does not object. **See, In the Matter of Lt. Donald Whalen, Public Enforcement Letter 91-2.** You, of course, were the issuing officer and had no apparent objection to consideration being sought. Thus you wrote to the police prosecutor stating in part, "The operator is the sister of a Boston Police Detective ... He called today, asking if he could have some consideration regarding the citation. I told him we'd take care of it, via a hearing to dismiss the ticket. If there is any problem with this please let me know." Based on this language, in our view there can be little question that your intention was to have the ticket dismissed. (That, of course, is consistent with what you understood Detective McReynolds' intention to be.)

Consequently, the evidence would support a reasonable cause finding that you violated §23(b)(2) and (3) in that you attempted to secure an unwarranted privilege of substantial value for Catherine Ewing and that by your conduct you would cause a reasonable person to conclude that she could unduly enjoy your favor in the performance of your official duties.

In our view the seriousness of this case transcends the dollar amount of the ticket and the fact that it involved only a request. The ability of a police officer to seek special treatment for somebody because of that person's private relationship to a police officer is the kind of conduct that offends and troubles people. It demonstrates that there is one standard for the public, but a different standard for those with private connections to the police. In the area of law enforcement, the standards must be clear and be administered in a even-handed way. If Lt. Whalen is correct in his view that this practice is widespread, then other police officers need to be informed and warned that this activity is unlawful. The wide dissemination of this letter by the Commission, with your consent, should help achieve that purpose.

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.

Date: March 13, 1991

[1/]Earlier, you had told us that this kind of activity has gone on for decades in most police departments in the state, and that you were upset at having your integrity questioned at this time when the practice had gone on for so long.

[2/]In McReynolds' experience, if his sister appeared at a hearing and explained the situation, coupled with the fact that she had no previous citations, there was a chance the citation would be dismissed as long as the issuing officer would have no recollection of an unpleasant contact. If the officer had already given her a "break" at the scene, or she was discourteous, he might argue against the hearing officer dismissing the ticket.

[3/]The Commission concluded there was reasonable cause to believe Lt. Whalen violated the conflict of interest law by his efforts to seek consideration as just described. The Commission resolved its case against Lt. Whalen with a public enforcement letter as well. **Public Enforcement Letter 91-2.**

[4/]The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. The Commission chose to resolve this matter with a public enforcement letter for the following reasons: (1) You do not appear to have attempted to exert (nor could you have exerted) any pressure on police prosecutor Nahass (who was directly answerable to Chief Fritts) to dismiss the ticket. **Compare, Cibley** where the person making the request was a selectman, a member of the board with the most significant power in the town, including jurisdiction over police matters. (2) You were making only a request. You were not in a position to dismiss the ticket yourself. (3) The amount of the ticket was relatively small. (In **Cibley** the ticket was for $200.) (4) Most importantly, there probably has been a widespread misapprehension among police officers that it was appropriate to seek consideration on tickets when requested by a fellow police officer, in part as a professional courtesy and in part to cultivate good relations with the officer's police department. You appear to have written your note primarily for those reasons, as opposed to strictly private reasons.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 406

IN THE MATTER
OF
ACKERLEY COMMUNICATIONS
OF MASSACHUSETTS, INC.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Ackerley Communications of Massachusetts, Inc. (Ackerley), 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 Ackerley had violated the conflict of

interest law, G.L. c. 268A. The Commission has concluded the inquiry and, on October 10, 1990, voted to find reasonable cause to believe that Ackerley violated G.L. c. 268A, §3, through the acts of its employees.

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

1. 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.

2. At the time here relevant, Ackerley's president and its general manager for outdoor advertising operations was Louis R. Nickinello (Nickinello), Ackerley's registered legislative agent was Elizabeth Palumbo (Palumbo), and both Nickinello and Palumbo were employees and agents of Ackerley.

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, 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,[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, 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 motivating 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 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. Evidence was presented that it is Ackerley's policy that its skybox tickets may not be given to public officials.

11. 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/]

12. By giving the five 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, Nickinello and 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, Nickinello and Palumbo violated G.L. c. 268A, §3(a).[5/]

13. As a corporation, Ackerley acts through and is responsible for the acts of its agents and employees. This conclusion applies even if these actions are unauthorized. Thus, in that Ackerley's employees and agents, Nickinello and Palumbo, violated §3 by providing Rep. Flaherty with five free skybox tickets, Ackerley also violated G.L. c. 268A, §3(a), notwithstanding the evidence that was presented that Ackerley's policy prohibited the giving of its skybox tickets to public officials and that those acts were not authorized by that policy.

14. The Commission is aware of no evidence that the November 16, 1988 Celtics 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 still impermissible.

15. When summoned to testify under oath before the Commission during the preliminary inquiry concerning this matter, 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 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 Nickinello's and Palumbo's refusal to testify. Thus, when the Commission voted on this matter on October 10, 1990, it did not find reasonable cause to believe that 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 violations 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 Ackerley:

1. that Ackerley 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 Ackerley undertake measures, agreeable to the Commission, to assure that in the future no sporting event tickets owned by Ackerley or any other gratuities be given by Ackerley or by any of Ackerley's agents, officers or employees to any Massachusetts state, county or municipal employee or official in violation of §3; and

3. that Ackerley 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]

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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 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 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 §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.**

[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 Ackerley's agents (Nickinello and 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 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 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 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. 412

IN THE MATTER
OF
LEON STAMPS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Leon Stamps (Mr. Stamps) 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. 268B, §4(j).

On March 8, 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. Stamps. At the conclusion of this inquiry, on November 9, 1989, the Commission found reasonable cause to believe that Mr. Stamps had violated G.L. c. 268A, §3.

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

1. Mr. Stamps has been the Auditor for the City of Boston since 1984. As Auditor, he is an ex officio member of the three-person Retirement Board for the City of Boston. The Retirement Board invests the funds (a total of approximately $780 million) contributed by city workers towards their pensions.

2. Since 1979 the Trust Department of the State Street Bank and Trust Company has been the custodian of these funds for the City of Boston Retirement Board. In the past two years the money has generated custodial fees of approximately $400,000 per year to State Street Bank. In September of 1988, the City of Boston Retirement Board also transferred $70 million to a passive account at State Street Bank which generates approximately $70,000 in annual fees to the Bank.

3. In 1987 and 1988, the Trust Department of the State Street Bank held its "Annual Master Trust Client Conference" in Arizona. Clients of the bank's Trust Department were invited to attend these conferences, with all expenses (other than airfare) paid by the bank.

4. In 1987 the conference was held at the Biltmore Hotel in Phoenix, Arizona from March 1, 1987 to March 4, 1987. Over the three days, participants attended informational sessions in the mornings and were offered a variety of social events and entertainment in the afternoons and evenings.

5. In 1988 the conference was held in Tucson, Arizona from February 28, 1988 to March 2, 1988 and the agenda was the same.

6. In both 1987 and 1988 the State Street Bank invited Mr. Stamps to attend and Mr. Stamps did attend both conferences. All of his expenses except for airfare, a total of $1,716.67, were paid by the State Street Bank.

7. In 1987 Mr. Stamps obtained prior approval for the trip from the Mayor of the City of Boston, but did not inform him that the bank was paying all costs but airfare. In 1988, Mr. Stamps obtained prior approval for the trip from the Mayor and informed him that State Street Bank would be paying all costs but airfare.

8. Mr. Stamps did not consult the City Corporation Counsel prior to accepting the invitations. Following press reports of the trips, at the advice of the Corporation Counsel, Mr. Stamps obtained a bill from State Street Bank for the two trips in the amount of $1,716.67, which the City of Boston then paid.

9. Section 3(b) of G.L. c. 268A prohibits, other than as provided by law, a municipal employee from directly or indirectly receiving "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" the employee.[1/] The Commission may impose a find of up to $2,000 for a violation of §3.

10. By accepting invitations for two years to expense-paid conferences offered by a bank with which Mr. Stamps had dealings in his official capacity as a member of the City of Boston Retirement Board, Mr. Stamps violated §3(b). There are no exemptions allowed by the statute. Therefore, the fact that the Mayor approved Mr. Stamp's attendance at the conference does not alter the findings here. An appointing authority cannot exempt a subordinate from the prohibition against accepting gifts from public vendors.

11. The Commission has found no evidence suggesting corrupt intent or an intentional or knowing violation of the law by Mr. Stamps.

In view of the foregoing violations of G.L. c. 268A, §3 by Mr. Stamps, the Commission has determined that the public interest will 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. Stamps:

(1) that the Commission be paid the amount of fifteen hundred dollars ($1,500.00) as a civil penalty for his violations of §3; 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 civil proceeding to which the Commission is a party.

Date: May 14, 1991

[1/]In the past, the Commission has considered entertainment expenses in the amount of $50.00 to constitute "substantial value." **Public Enforcement Letter 88-1. See Commission Advisory No. 8** issued May 14, 1985. Moreover, for §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. The prohibitions of this section are prophylactic in nature and apply where the parties act without corrupt intent and even though no official act is improperly influenced by the benefit conferred. It is sufficient that the gratuities are given the official "in the course of his everyday duties for or because of official acts performed or to be performed by him and which could affect the gift giver." **United States v. Standefer**, 452 F. supp. 1178, 1183 (W.D. Pa. 1978), **aff'd** 610 F.2d 1076 (3rd Cir. 1976), **aff'd** on other grounds, 447 U.S. 10 (1980); **See also United States v. Niederberger**, 580 F.2d 455 (5th Cir. 1978); **United States v. Evans**, 572 F.2d 455 (5th Cir. 1978). As the Commission explained in Advisory No. 8:

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 411

IN THE MATTER
OF
STONE & WEBSTER
ENGINEERING CORPORATION

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Stone & Webster Engineering Corporation (Stone & Webster) 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, 1990 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 Stone & Webster Engineering Corporation. The Commission concluded its preliminary inquiry and on August 1, 1990, found reasonable cause to believe that Stone & Webster had violated G. L. c. 268A, §3.

The Commission and Stone & Webster now agree to the following findings of fact and conclusions of law:

1. Stone & Webster is an international engineering firm that provides consulting engineering, design and construction services to clients throughout the United States. It is headquartered in Boston and numbers among its clients some Massachusetts state and local agencies.

2. In 1986 and 1987 Stone & Webster invited various federal, state and local public officials in Massachusetts with an interest in water resources and infrastructure issues to attend an educational program that included a seminar and harbor cruise.

3. In each year there were two seminar programs held on consecutive days. The first focused on water resource issues and the second on infrastructure issues. Each public official who was invited to attend was invited for only one of the two seminars depending on his or her likely area of interest and expertise. Among the officials invited were representatives of various state and municipal agencies. Stone & Webster was doing or had

done business with some of these agencies. With others, it had never done business previously, though it might in the future, and with some it was unlikely ever to do business. The purpose of the seminars was to educate public officials on matters of current interest in their fields, to improve communication both between the public and private sectors and among different public agencies at all levels of government, to educate company employees as to concerns of public agencies and to generate goodwill for the company.

4. On each day, the presentation portion of the program was approximately two hours long and consisted of four half-hour lectures and question periods. Following the lectures, the participants, and in some instances their spouses, were taken on a cruise of Boston Harbor. This was intended by the company to provide a relaxed atmosphere where the participants could enjoy themselves and engage in further informal discussions of the issues that had been raised in the seminars. In 1986, the lectures were held in the morning and lunch and a bar were provided on the cruise. A hospitality suite was made available for those seminar participants who wished to change or freshen up after the cruise. In 1987, the lectures were held in the early afternoon and hors d'oeuvres and a bar were provided on the cruise.

5. Although attendance records were not kept, over 100 persons (including company employees) participated in the program each year. The cost of the cruise (including food and beverages) exceeded $100 per person in 1986. The hospitality suite increased the overall per person cost for those who used it. Although the costs in 1987 were somewhat lower, they still exceeded $100 per person in that year.

6. The seminars and the accompanying cruises were discontinued by Stone & Webster after 1987 and prior to the commencement of this investigation by the Commission.

7. Section 3 of G. L. c. 268A prohibits, other than as provided by law, the giving of anything of "substantial value" to any municipal or state employee for or because of any official act performed or to be performed by such an employee.[1/]

8. In this instance, there is no evidence that Stone & Webster had a corrupt intent or intentionally violated G. L. c. 268A, §3. Nor is there any evidence that the conduct of any public official was improperly influenced by the Stone & Webster program.

9. The Commission has authority to impose a fine of up to $2,000 for each violation of §3. In this case, however, because of the educational aspects of the events at issue, the Commission has determined that the public interest would be served by resolving the matter without further enforcement proceedings and with the imposition of less than the maximum fine. Thus, this matter will be resolved on the following terms and conditions agreed to by Stone & Webster:

1. that it pay to the Commission the amount of $2,000.00 (two thousand dollars) as a civil penalty for its violations of §3; and

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

Date: May 14, 1991

[1/]In the past, the Commission has considered entertainment expenses in the amount of $50 to constitute "substantial value." Public Enforcement Letter 88-1. See, **Commission Advisory No. 8** issued May 14, 1985. Furthermore, for §3 purposes it is unnecessary to prove that any gratuities given were generated by some specific identifiable act performed or to be performed. In other words no specific **quid pro quo** or corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner which could affect the gift giver, received a gratuity to which he was not legally entitled, regardless of whether or not that public offical ever actually exercised his authority in a manner that benefitted the gift giver. See, **Commission Advisory No. 8.** See also **United States v. Standefer,** 452 F. Supp. 1178, (W.D.P.A. 1978), **aff'd** other grounds, 447 U.S. 10 (1980); **United States v. Evans,** 572 F.2d 455, 479-482 (5th Cir, 1978).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 414

IN THE MATTER
OF
JAMES N. RUSSO

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission (hereafter "the Commission") and James N. Russo 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 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 James N. Russo in his capacity as fire chief for the Town of Hull.

The Commission and Chief Russo now agree to the

following findings of fact and conclusions of law:

1. Chief Russo has been the fire chief for the Town of Hull since 1985. As such, he is a municipal employee as defined in G.L. c. 268A, §1(g).

2. Among his duties as fire chief, Chief Russo appoints firefighters off the civil service list.

3. In the spring of 1989 Chief Russo had reason to believe there would be two vacancies for firefighters in the department within a year. He requested a list of Hull residents who were eligible for full-time, permanent firefighter positions in anticipation of having to fill the vacancies.

4. According to the civil service list, one candidate was listed first with the highest score, and seven candidates tied for the second place on the list. The tying candidates were listed in alphabetical order. The first name listed of the tied candidates was Chief Russo's wife's brother.

5. It was Chief Russo's intention to appoint the first two names on the list. However, he realized that because the second candidate was his brother-in-law, he might have a problem making the appointment himself. He had previously received a union bulletin which contained advice about applying for an exemption from the conflict of interest law when appointing a family member.

6. Chief Russo consulted town counsel who advised him to follow the exemption procedures described in the bulletin.[1/]

7. Instead of requesting an exemption, Chief Russo wrote to the Board of Selectmen (with a copy to the town manager) stating that he was removing himself from the hiring process and delegating the appointment authority to his deputy chief.

8. By October of 1989, the two vacancies had not yet occurred. Chief Russo became concerned about his ability to control the two vacancies because he was getting indications from the Department of Personnel Administration that it was about to issue new regulations giving appointment priority to previously laid-off firefighters regardless of residency. This would prevent Chief Russo from reserving the positions for Hull residents, which in his view was not in the best interests of Hull.

9. Accordingly, Chief Russo decided to do what he could to reserve the two upcoming vacancies for Hull residents. He decided to make two "permanent intermittent" appointments. As the list of eligible candidates for "permanent intermittent" firefighters was the same as the list for full-time firefighters, his brother-in-law's name was again listed second. On October 6, 1989, Chief Russo appointed the highest scoring candidate and his brother-in-law to two "permanent intermittent" positions.

10. "Permanent intermittent" appointees act as a reserve force. Appointment to a permanent intermittent force does not automatically put the person on the town payroll. However, its members, in order of seniority, have an absolute priority in appointment to the permanent full-time force. Although they did not go on the payroll as a result of their appointment, by appointing the highest scoring candidate and his brother-in-law as permanent intermittent firefighters, Chief Russo effectively made them the only candidates eligible for the two full-time vacancies when they eventually did occur.

11. On February 1, 1990, the two permanent intermittents were appointed permanent full-time Hull firefighters by the deputy chief of the Hull Fire Department.

12. Except as otherwise provided in that section, G.L. c. 268A, §19, in pertinent part, prohibits a municipal official from participating as such in a particular matter in which he knows that an immediate family member has a financial interest.[2/]

13. The appointment of permanent intermittent firefighter is a particular matter within the definition of G.L. c. 268A, §1(k).

14. A spouse's brother is an immediate family member within the meaning of G.L. c. 268A, §1(g).

15. The appointment of Chief Russo's brother-in-law as a permanent intermittent firefighter affected his financial interest because it effectively guaranteed he would be placed on the town payroll as a full-time firefighter as soon as the predicted vacancies occurred.

16. Accordingly, when Chief Russo appointed his brother-in-law as a permanent intermittent firefighter knowing that he would be second in line for the permanent vacancies once they occurred, he violated G.L. c. 268A, §19.

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

1. that he pay to the Commission the sum of $750.00 as a civil penalty for violating G.L. c. 268A, §19; and

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

Date: May 3, 1991

[1/]G.L. c. 268A, §19 provides that an appointed

municipal official may participate in a matter affecting the financial interest of an immediate family member if, before he participates, he discloses the conflict in writing to his appointing authority and gets written permission to participate. Copies of the correspondence must be made available for public inspection at the clerk's office.

[2]None of the exemptions apply here.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 395

IN THE MATTER
OF
WILLIAM E. HOWELL

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William E. Howell (Mr. Howell) 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 June 19, 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, involving Mr. Howell, the former chief of the Industrial Accident Division in the Department of the Attorney General. The Commission concluded its inquiry on September 12, 1990, and by majority vote, found reasonable cause to believe that Mr. Howell violated G.L. c. 268A, §5.

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

1. Mr. Howell was the division chief of the Department of the Attorney General's Industrial Accident Division (the Division) from March 5, 1975 until January 20, 1987. As such, he was responsible for all of the Division's functions, and was a state employee within the meaning of G.L. c. 268A.

2. At the time Mr. Howell was chief, the Division had the responsibility for representing the interests of the Commonwealth in workers' compensation claims made by state employees. (The Commonwealth is self-insured regarding the workers' compensation claims of state employees.) During that time, it was the responsibility of the state agency employing the employee to file, within 48 hours after the injury, a "notice of injury" with the Public Employee's Retirement Administration (PERA). Files with potentially compensable claims were then forwarded to the Division for review. The purpose of this review was to make a recommendation whether to investigate the matter further, or pay any worker's compensation that would be due. In general, if the employee were out of work for six consecutive days as a result of an injury sustained during work, he would have a right to compensation. If the Commonwealth failed to pay the compensation the employee believed was due, the employee had the right to file a worker's compensation claim with the Industrial Accident Board (IAB)[1/] (a state agency separate from the Division). The Division would then defend its position in front of the IAB.

3. Mr. Howell resigned as Division chief effective January 21, 1987. A few weeks thereafter, Mr. Howell began an association with attorney Augustus Camelio. Mr. Howell and Mr. Camelio were not partners. Rather Mr. Camelio paid Mr. Howell $100 a day to represent Mr. Camelio's private clients regarding workers' compensation claims.

4. A Ms. Zwyrbla, a state employee, was injured on October 28, 1984.

5. On February 28, 1985, the Division approved an agreement as to compensation for Ms. Zwyrbla pursuant to which she received $207.53 per week from November 2, 1984 to January 20, 1985, for a total amount of $2,371.77.

6. On June 10, 1987, Mr. Camelio, representing Ms. Zwyrbla, filed a G.L. c. 152, §36 claim on behalf of Ms. Zwyrbla. This claim sought compensation for the disfigurement she sustained from her October 28, 1984 injury.

7. On June 11, 1987, Mr. Howell requested an opinion from the Commission as to how G.L. c. 268A would apply to his privately representing state employees regarding their workers' compensation claims. Included in the questions he raised in this request was a specific inquiry as to how §5 would apply to his representing state employees regarding §36 claims.

8. On or about July 27, 1987, while his request for an opinion was still pending, Mr. Howell, representing Ms. Zwyrbla, attended a conciliation hearing and agreed to the resolution of the foregoing §36 claim. Ms. Zwyrbla was paid $950 for that §36 claim.

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

10. The determination as to what compensable claims Ms. Zwyrbla had as a result of her October 24,

1984 accident was a particular matter as defined in G.L. c. 268A, §1(k).

11. The determination as to what compensable claims Ms. Zwyrbla had as the result of her October 24, 1984 accident was within Mr. Howell's official responsibility when the Division approved the agreement as to compensation on February 28, 1985, less than two years prior to Mr. Howell resigning.

12. The foregoing conciliation hearing and agreement for compensation were in connection with the determination of what compensation Ms. Zwyrbla received as the result of her October 24, 1984 injury.

13. By attending the foregoing conciliation hearing and executing the agreement for compensation, Mr. Howell appeared before the IAB within the meaning of §5(b).

14. Being self-insured for these claims, the Commonwealth had a direct and substantial interest regarding the the foregoing determination.

15. Therefore, by appearing, within one year after his last employment with the Commonwealth had ceased, before the IAB as attorney for Ms. Zwyrbla in connection with Ms. Zwyrbla's §36 claim where the issue of what compensable claims Ms. Zwyrbla had as a result of her October 24, 1984 accident was within Mr. Howell's official responsibility within the two years preceding his resignation, Mr. Howell thereby violated §5(b).

16. The Commission sent Mr. Howell a formal opinion (EC-COI-87-27) on July 29, 1987. He received and read the opinion shortly thereafter. The opinion generally reviewed the applicability of G.L. c. 268A, §5 to Mr. Howell's private representation of state employees workers' compensation claims. In addition, it specifically addressed the issue of his involvement in §36 claims explaining that such involvement would be deemed to be in connection with the general claim as to the employee's rights to compensation under the workers' compensation law for a given injury. Therefore, if an employee were injured and paid compensation benefits within the two years prior to Mr. Howell's resigning as division chief, he would be barred from appearing before any state agency regarding a §36 claim involving that same injury for one year after his resignation.

17. In view of the foregoing violation of G.L. c. 268A, §5(b), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Howell:

1. that he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil penalty for his violation of G.L. c. 268A, §5(b); and

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

Date: June 3, 1991

[1/]Effective November 1, 1986 the IAB's name was changed to the Department of Industrial Accidents. St. 1986, c. 662. In addition, certain significant procedural changes were also enacted. Those changes are not material to this Agreement.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET No. 419

IN THE MATTER
OF
PAUL PEZZELLA

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Paul Pezzella (Mr. Pezzella) 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. 268A, §4(j).

On November 14, 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 Mr. Pezzella. The Commission has concluded that inquiry. On May 13, 1991, the Commission found reasonable cause to believe that Mr. Pezzella violated G.L. c. 268A, §§4 and 23.

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

I. The Violations of G.L. c. 268A, §4(c) and §23(b)(2)

1. On March 1, 1985, Mr. Pezzella was appointed as Governor Dukakis' Deputy Legislative Director. He served in that position until August 28, 1987, when he resigned to work on the Dukakis presidential campaign. From August 28, 1987 until December 19, 1988, he was not a state employee within the meaning of G.L. c. 268A, §1. He resumed state employment and again became a state employee within the meaning of G.L. c. 268A on December 19, 1988 when he became Governor Dukakis' Deputy Chief of Staff. In March, 1989 he became Personnel Director. He resigned his position on May 2, 1989.

2. Mr. Pezzella has been a life-long resident and political activist in the City of Worcester. He was a member of the City of Worcester Charter Commission. He is a long-time member of the Worcester Democratic City Committee and has served as its Chairperson for the last six years. While a member of the Governor's staff he often received requests of Worcester constituents seeking information or assistance with respect to various governmental matters. Mr. Pezzella was generally expected to be, and was, responsive to these requests.

3. Angelo Scola, at all times herein, was a Worcester developer. He did his development business through a company by the name of Scola Development Group.

4. Scola and Mr. Pezzella are friends of longstanding. Their families have been close for many years. Scola and Mr. Pezzella frequently socialize. They exchange gifts on birthdays and at Christmas.

5. On August 15, 1988, the Worcester Redevelopment Authority (WRA)[1/] issued a request for proposals for a development plan as to a vacant Worcester parcel known as Lot 35.

6. In September 1988 Scola, through Scola Development Group, submitted a proposal for Lot 35 which contemplated an extensive development costing over $100 million. At or about the same time, four other applicants submitted Lot 35 proposals.

7. On December 7, 1988, Mr. Pezzella and Scola flew to Philadelphia for purposes unrelated to the Lot 35 proposal. While on that trip, at Scola's request, Mr. Pezzella telephoned WRA member Julie Carrigan and inquired as to her position regarding the Lot 35 development. Mr. Pezzella knew Carrigan through their association in Democratic party politics. He told her that Scola was a friend and that he was calling on Scola's behalf. He encouraged her to support the Scola Lot 35 proposal. In the course of the conversation, he referred to the fact that Carrigan had been appointed by the Governor. At some point after this telephone conversation, Carrigan called the Worcester Office of Planning and Community Development (OPCD) Director Paul Carey[2/] and asked whether she had to vote the way Mr. Pezzella was encouraging her to vote.

8. Shortly after the Philadelphia trip, Mr. Pezzella received an offer to return to government service. As stated above, on December 19, 1988, Mr. Pezzella became Governor Dukakis' Deputy Chief of Staff.

9. In early January 1989, Mr. Pezzella introduced Scola to an investment banker, Mark Ferber, of Lazard Freres and Co., to discuss possible financing assistance for the Lot 35 project. The introduction took place at a breakfast meeting on January 9, 1989, arranged by Mr. Pezzella. The breakfast was attended by Ferber, Scola and Scola's financial assistant. Mr. Pezzella made introductions, had a cup of coffee, and departed. He did not participate substantively in the discussion.

10. On or about February 17, 1989, Mr. Pezzella had a second telephone conversation with Carrigan. He asked her if she had made a decision and spoke favorably of Scola. On or about February 21, 1989, Mr. Pezzella had another telephone conversation with Carrigan, to the same effect.

11. On March 2, 1989, the WRA voted 3 to 2 to designate Scola Development Group as the Lot 35 developer. (Carrigan voted for another developer.)

12. On March 3, 1989, Ferber began making inquiries of Brian Carty, Executive Director of the Massachusetts Industrial Finance Agency (MIFA), as to whether MIFA would have any interest in assisting Scola in the financing of the Lot 35 project. Seeking the assistance of MIFA was Ferber's idea and had not been suggested by or discussed with Mr. Pezzella.

13. On March 23, 1989, Ferber arranged a meeting at the Marriott Long Wharf cocktail lounge to discuss possible MIFA assistance. At Ferber's invitation the meeting was attended by Carty and Scola. Scola invited Mr. Pezzella and also brought several employees. At the meeting Mr. Pezzella gave input, based on his political expertise, as to how certain issues affecting the Lot 35 project should be resolved. During the meeting Ferber told Mr. Pezzella that he wanted to know if the Dukakis administration was aware of or had any problem with Mr. Pezzella's involvement in the matter. (By this time Mr. Pezzella had become Personnel Director for the Dukakis Administration). Specifically, he asked Mr. Pezzella to inform the Governor's Chief of Staff, S. Stephen Rosenfeld, of what was happening.

14. In late March or early April 1989, in a follow-up conversation with Ferber, Mr. Pezzella told Ferber that he had spoken with Rosenfeld and that Rosenfeld had no problem with Mr. Pezzella's involvement. In fact, Mr. Pezzella had not disclosed his involvement in the project to Rosenfeld, and Rosenfeld had not expressed any approval.

15. In late March or early April, 1989, Scola told Mr. Pezzella that Ferber had told him that there would be a delay in MIFA's preliminary vote. Mr. Pezzella then called Ferber and inquired as to the reason for the delay. Mr. Pezzella told Ferber that Scola was anxious about it.

16. Other than his attendance at the Long Wharf meeting and his conversations with Ferber, as set forth above, the Commission is aware of no evidence indicating that Mr. Pezzella had any other involvement with Scola's effort to obtain MIFA assistance.

17. On April 6, 1989, the MIFA Board voted preliminary approval for the proposal to issue $86 million in taxable economic development revenue bonds to finance the Lot 35 project, subject to certain conditions.

18. On or about April 10, 1989, Mr. Pezzella was contacted by various members of the Governor's office regarding the drafting of a letter supporting the Lot 35 project. Mr. Pezzella had not suggested or initiated the idea of the letter. However, in response to inquiries, he provided information and spoke favorably of the Scola proposal.

19. Also on April 10, 1989, Mr. Pezzella took Scola to meet the Worcester legislative delegation in Boston.

20. On April 11, 1989, Governor Dukakis issued a letter supporting the Lot 35 project.

21. General Laws c. 268B, §4(c) prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

22. The determination as to whether MIFA would support financing for the Lot 35 project was a particular matter in which the Commonwealth, through MIFA, had a direct and substantial interest.

23. Mr. Pezzella acted as an agent for Scola in connection with the foregoing particular matter by his attendance at the March 23, 1989 Long Wharf meeting and in his contacting Ferber in late March 1989 regarding the delay in the MIFA vote.

24. Therefore, by so acting as Scola's agent in connection with a particular matter in which the Commonwealth had a direct and substantial interest, Mr. Pezzella violated §4(c).[3/]

25. Section 23(b)(2) prohibits a state employee from knowingly or with reason to know using or attempting to use his official position to secure for anyone an unwarranted privilege of substantial value not otherwise available to similarly situated people.

26. Mr. Pezzella's first call to Carrigan on December 7, 1988, in which he referred to the fact that she was a gubernatorial appointee, was not in violation of §23(b)(2) since he was not then a state employee. However, Mr. Pezzella violated that section when he called Carrigan twice more in February 1989. During the second and third call, Mr. Pezzella should have known that, in effect, he was using his position as the Governor's Deputy Chief of Staff to attempt to secure an unwarranted privilege of substantial value. (Carrigan's vote in a $100 million proposal would be of substantial value.) By seeking to persuade Carrigan to vote for Scola, he thereby attempted to obtain unwarranted privileges for Scola, since this was not the position of the Dukakis Administration, nor was he authorized to so act by the Administration. Therefore, he was, in effect, using his public position to advance the private interests of his friend, Scola. Moreover, since he knew that Carrigan was a gubernatorial appointee and knew that he had reminded her of this in December in his first call, he should have known that his later calls would have the effect of putting pressure on her to vote for Scola. Therefore, by acting as just described, Mr. Pezzella had reason to know that he was attempting to use his official position to secure an unwarranted privilege of substantial value for another not otherwise available to similarly situated people, thereby violating §23(b)(2).

II. The Violation of G.L. c. 268A, §23(b)(3)

27. Sometime in or about June of 1988, Scola and Mr. Pezzella decided jointly to buy a condominium in Boston. At that time, Mr. Pezzella was traveling outside of the Commonwealth in connection with the presidential campaign. He intended to take up residence in Boston upon his return.

28. In the late summer of 1988, Scola decided not to purchase the condominium with Mr. Pezzella. However, according to Mr. Pezzella and Scola, he informed Mr. Pezzella that he was willing to loan Mr. Pezzella funds for the downpayment if Mr. Pezzella chose to purchase a Boston condominium.

29. In early December 1988, Mr. Pezzella decided he wanted to purchase a condominium at 341 Beacon Street (the condominium). He so informed Scola. Scola directed one of his subordinates, Brian Kean, to provide Mr. Pezzella with legal assistance in that purchase.

30. On December 13, 1988, Scola issued a $1,000 check[4/] to secure Mr. Pezzella's written offer on the condominium. The next day, Mr. Pezzella, through Kean, submitted a written offer for $172,000 to purchase the condominium, which offer was secured by the foregoing $1,000 check.

31. On January 18, 1989, Scola issued a $9,000 check[5/] to Mr. Pezzella for the remainder of the downpayment on the condominium.

32. On January 25, 1989, Mr. Pezzella submitted a mortgage application to the Cambridgeport Savings Bank. Scola issued a Scola Development Group check to pay the $235 fee. In his application, Mr. Pezzella omitted mention of the money received from Scola as an outstanding loan.

33. On February 13, 1989, the Cambridgeport Savings Bank rejected Mr. Pezzella's mortgage application because the downpayment was insufficient.

34. On February 21, 1989, Kean submitted a mortgage application for Mr. Pezzella to First American Bank. (Scola issued another Scola Development Group check to pay the $290 fee on that same date.)

35. On April 12, 1989, Mr. Pezzella, through Kean, notified the seller's real estate agent that he no longer wanted to buy the condominium.

36. On April 24 ,1989, the condominium seller remitted $6,635.86 back to Scola through Kean. The remainder of the $10,000 downpayment was retained by the seller as liquidation damages.

37. Section 23(b)(3) 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.

38. By accepting a $9,000 check from Scola for a condominium purchase downpayment, as well as by accepting from Scola $525 in mortgage application fees and the value of free legal services in connection with the condominium purchase, all while making phone calls to Carrigan urging her to support Scola's designation as the Lot 35 developer and, thereafter, assisting Scola in obtaining MIFA assistance for the Lot 35 project, Mr. Pezzella by his conduct acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that Scola could improperly influence or unduly enjoy Mr. Pezzella's favor in the performance of his official duties, thereby violating §23(b)(3).

In the Commission's view, these facts cannot help but create the appearance that Mr. Pezzella was using his official influence to assist Scola. This appearance problem is further underscored by the facts that there was no document evidencing the $10,000 as a loan, the $10,000 was not identified as a loan on Mr. Pezzella's Cambridgeport Savings Bank mortgage application, the $525 in application fees and the legal assistance appear to have been outright gifts, and Mr. Pezzella did not disclose to Rosenfeld his involvement in the effort to obtain financing for Scola and, indeed, told Ferber that he had disclosed to Rosenfeld and obtained approval (for his involvement) when he had not.

Based on the foregoing, 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. Pezzella:

1. that he pay to the Commission the amount of $2,000.00 as a civil penalty for his violation of G.L. c. 268A, §4(c);

2. that he pay a $1,000.00 civil penalty for his violating §23(b)(2) in connection with his two phone calls to Carrigan;

3. that he pay a $2,000.00 civil penalty for his violating §23(b)(3) by creating an appearance that he was using his official influence to assist Scola; and

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

Date: June 27, 1991

[1/]The WRA is a municipal agency part of whose purpose is to promote new construction in the city of Worcester. It has a five member board, one of whom is appointed by the governor. At all times material herein, the governor's appointee was Julie Carrigan.

[2/]The WRA has no staff. Support functions and technical assistance are carried out by the OPCD.

[3/]Mr. Pezzella did not violate §4(c) by his attendance at the above-described early January meeting. This is because, at that point, MIFA financing was not being sought. Therefore, the Commonwealth did not have a direct and substantial interest in any particular matter which was the subject of the meeting.

[4/]The check was issued on a Reservoir Realty Trust account. Reservoir Realty Trust was a Scola owned business developing a project in Holden.

[5/]Again, on the Reservoir Realty Trust account.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 421

IN THE MATTER
OF
MICHELE ESPOSITO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Michele Esposito (Ms. Esposito) 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 16, 1991, 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 Ms. Esposito. The Commission has concluded that inquiry and, on April 18, 1991, found reasonable cause to believe that Ms. Esposito violated G.L. c. 268A, §6.

The Commission and Ms. Esposito now agree to the following findings of fact and conclusions of law:

1. At all relevant times, Ms. Esposito was a

Massachusetts Department of Revenue (DOR), Child Support Enforcement Unit (CSEU) employee.

2. On September 20, 1989, the DOR entered into a 4.8 million dollar contract (Contract) with Maximus Inc. (Maximus), a Virginia-based technical consulting company with a local office in Waltham.

3. The Contract required Maximus to review and replicate the relevant portions of 70,000 probate and district court files so as to create an information base for enforcement purposes for the CSEU.

4. On or about September 20, 1989, Ms. Esposito was assigned to be the co-contract administrator of the Contract.[1/] Thus, her responsibilities included day-to-day supervision of contract performance as well as ensuring that Maximus satisfied all the required steps specified by the Contract (each step being referred to as a "deliverable").

5. In October, 1989, Ms. Esposito decided to leave the DOR. She began looking for employment elsewhere.

6. At that time, Ms. Esposito informed her immediate supervisor, Paul Osganian (Osganian) that she would be seeking employment elsewhere.

7. On October 12, 1989, Ms. Esposito discussed her intention to leave the DOR with Maximus' president, Raymond Ruddy. At that time, Ruddy tried to persuade her to stay at the DOR.

8. On November 3, 1989, Ms. Esposito and her court counterpart reviewed Maximus' project plan submitted pursuant to the Contract. They suggested a number of modifications to the plan.

9. On November 27, 1989, Ms. Esposito approved Maximus' first "deliverable," which was the completion of a satisfactory project plan. By approving the deliverable, Ms. Esposito was recommending that her superiors approve the payment to Maximus of that portion of the Contract attributable to the first deliverable, namely $287,816.40.

10. On December 1, 1989, at Mr. Ruddy's request, Ms. Esposito met with Ruddy. They had substantial discussions regarding her possibly being employed by Maximus. They discussed generally the type of work she would do if she were hired by Maximus. In effect, Maximus, through Ruddy, was attempting to recruit Ms. Esposito to work for Maximus. At that meeting, Ruddy put two conditions on any job offer: (1) DOR approval, and (2) Ethics Commission approval.

11. According to Ms. Esposito, shortly after this meeting she contacted the Commission and obtained its approval. The Commission, however, has no record of any such contact.[2/] In addition, Ms. Esposito asserts that on the next working day after her December 1, 1989 meeting with Ruddy, and before she further participated in the Maximus contract, she informed Osganian of the nature of her meeting with Ruddy. Osganian, however, has no recollection of being so informed and asserts that the first time he recalls becoming aware of Maximus' interest in hiring Ms. Esposito was when he was called by Ruddy on December 15, 1989.

12. On December 12, 1989, Ms. Esposito approved the third deliverable pursuant to the Contract. This approval resulted in her superiors authorizing an additional $287,816.40 to be paid to Maximus.[3/]

13. On December 14, 1989, Ms. Esposito wrote a memo to the DOR accounting department justifying paying the third deliverable before the second deliverable was completed.

14. On December 15, 1989, Ms. Esposito called Ruddy to say that she had talked to the Ethics Commission and Osganian, and that the conditions regarding his employment offer to her had been met.

15. On December 15, 1989, Ruddy called Osganian to confirm that DOR would have no objection to Ms. Esposito going to work for Maximus. Osganian informed Ruddy that the DOR would have no such problem.

16. Sometime shortly after his December 15, 1989 phone call with Ruddy, Osganian informed his superior, Deputy DOR Commissioner Anne F. Donovan, of the Maximus offer to Ms. Esposito. Donovan raised a concern that the offer put Ms. Esposito in a conflict of interest. Thereafter, DOR's internal affairs unit investigated this matter.

17. On or about December 28, 1989, Ms. Esposito received a draft of a written offer of employment to work for Maximus. Eventually, Ms. Esposito did go to work for Maximus in March of 1990.

18. On January 3, 1990, Ms. Esposito was removed as contract administrator.

19. Except as otherwise permitted in that section,[4/] section 6 of G.L. c. 268A prohibits a state employee from participating in a particular matter in which, to her knowledge, an organization with which she is negotiating an arrangement for prospective employment has a financial interest.

20. The Contract was a "particular matter" as defined in G.L. c. 268A, §1(k).

21. When Ms. Esposito met with Maximus' Ruddy on December 1, 1989, she was negotiating for employment with Maximus within the meaning of c. 268A, §6.[5/] By the end of the meeting on December 1, 1989, both Maximus and Ms. Esposito had evinced an interest in each other as employer/employee. Indeed, Ruddy had stated he planned to make an offer subject to Ms. Esposito satisfying two conditions. Ms. Esposito indicated she would attempt to satisfy those conditions.

22. Notwithstanding the fact that she had begun negotiating with Maximus on December 1, 1989, Ms. Esposito participated in the Contract when she approved the third deliverable on December 12, 1989, and when on December 14, 1989, she wrote a memo justifying paying the third deliverable before the second deliverable was completed. In addition, she also participated by performing her day-to-day supervisory responsibilities regarding the Contract.

23. Maximus had an obvious financial interest in Ms. Esposito approving the third deliverable, as well as in her performing her day-to-day supervisory responsibilities.

24. Therefore, Ms. Esposito violated G.L. c. 268A, §6 when she participated in the Contract after beginning negotiating for employment with Maximus.

25. The Commission has found no evidence to suggest that in her capacity as a DOR employee, Ms. Esposito acted to provide any special or favorable treatment to Maximus while she was negotiating for employment with Maximus.[6/]

26. By way of defense, Ms. Esposito claims that she notified her supervisor of her negotiations almost immediately after they began. As discussed above, Osganian does not recall being so informed. Even if Osganian had corroborated Ms. Esposito's disclosure claim, such a disclosure would not be a defense. (See fn. 4 above which explains the §6 disclosure/exemption procedure.) Osganian was not her appointing authority, and the disclosure and authorization were not in writing.[7/]

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

1. that she pay to the Commission the sum of $500.00 as a civil penalty for violating G.L. c. 268A, §6;[8/] and

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

Date: September 6, 1991

[1/]The other administrator was a representative from the Office of the Chief Justice of the Trial Court.

[2/]Even if Ms. Esposito did call the Commission, she concedes that she was asking about post-DOR employment restrictions and not whether her having begun negotiating with Maximus barred her from further participation in the Contract.

[3/]The second deliverable, the development of certain procedures, had not been satisfactorily completed before the third deliverable was ready.

[4/]As noted in **In the Matter of Deirdre A. Ling**, 1990 SEC 456, §6 provides the following 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 interest; and (2) the appointing official should then assign the matter to another employee, assume responsibility for the matter, 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/]As the Commission has explained in **Advisory No. 14**;

> 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 [footnote omitted]. 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 the 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").

[6/]No such evidence, however, is necessary to establish a §6 violation. As the Commission said **In the Matter of Mary V. Kurkjian**, 1986 SEC 260, 262, "Section 6, like many of the other sections of G.L. c. 268A, is intended to prevent any questions arising as to whether the public interest has been served with the single-minded devotion required of public employees."

[7/]See **In the Matter of Dr. Diedre Ling**, 1990 SEC 456, where the Commission stated,

> 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.

As the Commission said **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, ill-advised or badly motivated decision.

[2/]The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. However, notwithstanding the lack of confirmation, the Commission found credible Ms. Esposito's testimony that she disclosed her negotiations with Maximus to her supervisor. Therefore, this reduced fine is appropriate.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 422

IN THE MATTER
OF
PETER Y. FLYNN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Sheriff Peter Y. Flynn (Sheriff Flynn) 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 February 28, 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 Flynn. The Commission has concluded that inquiry and, on May 13, 1991, found reasonable cause to believe that Sheriff Flynn violated G.L. c. 268A, §§3 and 23.

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

1. At all times material herein, Sheriff Flynn has been sheriff of Plymouth County.[1/] As such, he is a county employee within the meaning of G.L. c. 268A, §1.

2. As sheriff he is responsible for, among other matters, the service in Plymouth County of civil process directed to the Office of the Sheriff. The service of civil process may be carried out by deputy sheriffs, and he appoints all deputy sheriffs who are authorized to serve civil process in Plymouth County. Such deputies serve at his pleasure.

3. Civil process in Plymouth County (as served by deputy sheriffs) has been administered since 1984 through Deputies, Inc., a for-profit corporation. Deputies, Inc. is located at 20 Cottage Street, Brockton, MA. It provides office support services for the approximately 20 deputies who serve civil process in Plymouth County. It employs several clerical workers.

4. Deputies, Inc. was incorporated in 1984 with William Renny as its president and sole shareholder. Shortly before then, Sheriff Flynn appointed Renny as his chief deputy for civil process. As such, Renny was responsible for supervising the deputies appointed by Sheriff Flynn to serve civil process. (Prior to 1984, civil process had been administered through a different for-profit corporation managed by a different chief deputy.)

5. Each deputy who serves civil process obtains the papers to be served at the Deputies, Inc. office. After the deputy serves the papers, Deputies, Inc. collects the fee (as authorized by G.L. c. 262, §8 for the type of process in question) from the party who has asked that the process be served. Deputies, Inc. keeps a certain percentage of each fee (approximately 50%) for its support services. The remainder is remitted to the deputy who served the papers.

6. For several years after Sheriff Flynn became sheriff, he incurred expenses in promoting the various civil process serving deputies' interests. These included expenses incurred in attending conventions (for example, the Massachusetts Sheriffs' Association and Massachusetts Deputy Sheriffs' Association conventions), promoting or opposing legislation which affects the deputies who serve process (for example, bills that would affect the statutory fees), and meeting with local attorneys and other people to encourage them to use the deputy sheriffs for their civil process purposes. Typically, these expenses involved paying for meals and/or drinks.

7. In or about April 1985, Deputies, Inc. gave Sheriff Flynn an American Express card opened on the account of Deputies, Inc. (hereinafter the Deputies, Inc. credit card or credit card). According to Renny, it was his idea to give Sheriff Flynn the credit card. Sheriff Flynn understood that the credit card was to be used for "business-related purposes." According to Sheriff Flynn and Renny, "business-related purposes" meant anything which could be said to promote Deputies, Inc.'s interests. That could include expenses directly related to Deputies, Inc., such as a meal incurred in meeting with legislators and/or their staff to discuss legislation of interest to

Deputies, Inc., or any expense incurred in an activity intended to promote the interests of the Plymouth County Sheriff's Department generally. Prior to using the card for the first time, Sheriff Flynn inquired of counsel for Deputies, Inc., George Fairbanks, whether the anticipated use of the card was legal. The answer was "yes."

8. Between September 1985 and April 1989, when he stopped using the card, Sheriff Flynn used the Deputies, Inc. card on 275 occasions for a total of $12,761.43 in charges.[2] Sheriff Flynn has asserted that he never intentionally used the credit card except for a business purpose as defined above. Thirteen charges, totalling $1,069.14, were business expenses[3] (based on satisfactory evidence that the expense was incurred on a business trip and a specific recollection provided by Sheriff Flynn and corroborated by a third party or documentary evidence). In the Commission's view, however, Sheriff Flynn's business purpose characterization for certain meals was erroneous. Thus, four charges, totalling $461.69, were personal charges.[4]

As to 10 charges totalling $787.44, Sheriff Flynn states that he recalls the specifics of these charges, but invoking his rights against self-incrimination under Article 12 of the State Constitution, and asserting certain concerns about protecting the privacy of third parties, he has refused to identify any of the third parties who were present on those occasions. (Two of these 10 charges were incurred on out-of-state trips which Sheriff Flynn acknowledges were essentially personal trips, although he has identified on each of these two occasions a business-related activity which involved a charge on the card.)

According to Sheriff Flynn, as to nine other charges, totaling $375.74, he has no recollection. Sheriff Flynn has also acknowledged that six of these nine charges, totalling $184.34, were incurred on out-of-state trips which were personal in nature.

As to the remaining 235 charges, totalling $10,067.42, Sheriff Flynn states he has many recollections of entertaining various people for business purposes which would have resulted in those charges, but he cannot connect specific entertainment occasions with specific charges.[5]

9. Neither Sheriff Flynn nor Deputies, Inc. kept any contemporaneous records reflecting what any of these Deputies, Inc. charges were for. Renny did not question Sheriff Flynn regarding any of these charges.

10. The Commission has obtained Sheriff Flynn's personal charge card records and county records pertaining to his requests for reimbursement. The former category of records confirms Sheriff Flynn's assertion that the trips that he took that were predominantly personal were paid for personally. The latter category reveals no instances of "double dipping," i.e., occasions where the Sheriff sought reimbursement from the county for expenses incurred on the Deputies, Inc. card.

11. Section 23(b)(2) prohibits a county employee from using or attempting to use his official position to obtain an unwarranted privilege of substantial value not otherwise available to similarly situated people.

12. As detailed in ¶ 8 above, Sheriff Flynn's use of the card to make $461.69 in personal charges over a four year period involved substantial value.[6] In the absence of the card, Sheriff Flynn would have had to pay for these expenses out of his own pocket. In addition, the Commission, based on Sheriff Flynn's refusing to identify the third parties who were present on those 10 occasions (referenced above in ¶ 8) where Sheriff Flynn has specific business recollections, concludes that these 10 charges were personal in nature.[7] As indicated above, these charges amounted to $787.44. Therefore, the personal charges over the four period totalled $1,249.13 ($461.69 and $787.44).

13. Sheriff Flynn would not have received the Deputies, Inc. card if he were not the sheriff of Plymouth County. Therefore, he used his position as sheriff to receive the substantial value as described above.

14. Sheriff Flynn's use of the card for $1,249.13 in personal charges without making timely reimbursements involved an unwarranted privilege.

15. Therefore, by using the Deputies, Inc. credit card for personal charges without making timely reimbursements, Sheriff Flynn used his official position to secure an unwarranted privilege of substantial value, thereby violating §23(b)(2).

16. Section 23(b)(3) prohibits a county employee from causing a reasonable person knowing all of the facts to conclude that anyone can unduly enjoy his favor in the performance of his official duties.

17. By using the Deputies, Inc. credit card for not only personal charges in the amount of $1,249.13, but also for "business-related expenses" during the relevant period in the amount of $11,512.30 for which he kept no records, and for which, for the most part, he can give no accounting, and by doing all of this while the person responsible for monitoring his use was his direct subordinate, Sheriff Flynn would cause a reasonable person knowing all of the facts to conclude that either Renny and/or his deputies could unduly enjoy his favor in the performance of his official duties, thereby violating §23(b)(3).[8]

18. Section 3(b) of G.L. c. 268A, in pertinent part, prohibits a state employee from, otherwise than as provided by law for the proper discharge of official duty, 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.

19. The Deputies, Inc. credit card was of substantial value to Sheriff Flynn because it was used, during the relevant period to pay for $12,761.43 in Sheriff Flynn's

expenses, most of which would not have been reimbursable as a Sheriff's expense (pursuant to G.L. c. 37, §21).[9]

20. Sheriff Flynn's meetings with legislators and/or their staff members, and his various actions as sheriff in attempting to promote Deputies, Inc.'s interests, involved acts within his official responsibility.

21. By accepting and using the Deputies, Inc. credit card for "business-related expenses," Sheriff Flynn accepted an item of substantial value for or because of official acts performed or to be performed, and not otherwise authorized by law, thereby violating §3 as applied in **In the Matter of Clifford Marshall**, 1991 SEC 508 where the Commission reached the same conclusion regarding Norfolk County Sheriff Marshall's use of a credit card given to him by the unincorporated association of deputies who serve civil process in Norfolk County.

22. The Commission is not aware of any evidence that Sheriff Flynn knew he was violating §3 by the conduct just-described.[10] Indeed, by way of defense Sheriff Flynn notes his reliance on Deputies, Inc.'s attorney's advice that the use of the credit card was proper, and that the Commission did not apply §3 to this kind of fact pattern until after he had stopped using the card.

Reliance on a private attorney's advice is not a defense to a G.L. c. 268A violation.[11] In addition, Sheriff Flynn's discontinuing his use of the card before the Commission applied §3 to this type of fact pattern is not a defense. **See Marshall, i.d.**

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 Sheriff Flynn:

1. that he pay to the Commission the amount of $2,000 as a civil penalty for his violations of G.L. c. 268A, §23 involving his use of the Deputies, Inc. credit card for charges which the Commission found to be personal;[12]

2. that he reimburse Deputies, Inc. $1,249.13 forthwith for these charges; and

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

Date: September 20, 1991

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[1] Sheriff Flynn was first elected sheriff in 1980. He has served continuously as sheriff since then, having been reelected in 1986.

[2] Due to the Commission's statute of limitations, the Commission has not considered charges which predate this agreement by more than 6 years. In addition, the Commission does not have jurisdiction to consider violations of G.L. c. 268A, §§23(b)(2) or (3) which occurred before April 8, 1986. **See St. 1986, c. 12.** The breakdown of the 275 charges set forth in the remainder of ¶ 8 does not include any charge which occurred prior to April 8, 1986. This is because the breakdown is intended to be a part of the factual basis for the §23 analysis, **infra.**

[3] As defined by Sheriff Flynn and Renny.

[4] These involved dinners at restaurants attended by Sheriff Flynn and his spouse on June 20, 1987 ($63.17) and September 26, 1987 ($163.50); an $8.50 charge by Sheriff Flynn on January 9, 1989 at Logan Airport when he was leaving on vacation; and a $226.53 dinner at a restaurant on March 26, 1988 attended by Sheriff Flynn, his spouse and two other couples. Sheriff Flynn asserts that each of these charges was incurred in connection with Deputies, Inc.'s business, but concedes that the Commission could find these expenses to be predominantly personal.

[5] Sheriff Flynn contends that if asked in a timely fashion to describe the business nature of any of the charges, he could have done so, but it is impossible to do so now.

[6] Anything with a value of $50.00 or more is of substantial value. **See, Commonwealth vs. Famigletti,** 4 Mass. App. 584 (1976).

[7] As indicated above, two of these charges were incurred on out-of-state trips which Sheriff Flynn acknowledges were personal in nature. The personal nature of the trips supports the conclusion, at least as to those two charges, that these were personal charges.

[8] This appearance problem is underscored by the fact that two of the "business" charges were incurred on out-of-state personal trips, and Sheriff Flynn has no recollection as to nine charges totalling $375.74 (where six of those were incurred on out-of-state personal trips.)

[9] Section 21 of G.L. c. 37, as it applies to the sheriff of Plymouth County, provides that the sheriff is entitled to receive from the county his actual traveling expenses incurred in the performance of his official duties.

[10] 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,** Mass 1, 7 (1945).

[11] Reliance on legal advice will only be a defense for a county official if that advice comes from the Ethics Commission.

[12/]The Commission does not deem it appropriate to impose a separate penalty for Sheriff Flynn's use of the Deputies, Inc. credit card for business-related purposes.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 404

IN THE MATTER
OF
STEPHEN MALCOLM

Appearances: Karen Gray, Esq.
Counsel for the Petitioner

Commissioners: Hennessey, Ch.; Doty; Epps; Gleason; Jarvis

Presiding Officer: Archie C. Epps, III

RULING ON MOTION FOR SUMMARY DECISION

On January 30, 1991, the Petitioner filed a Motion for Summary Decision, pursuant to the Commission's Regulations, 930 CMR 1.01(f)(2).[1/] The Motion asserted that Respondent Stephen Malcolm had failed to file an answer to a December 18, 1990 Order to Show Cause which alleged that he had violated G.L. c. 268A, §23(b)(3)[2/] through misconduct as a member of the Hull Board of Assessors. For the reasons stated below, we grant the Petitioner's Motion and order the Respondent to pay a civil penalty of $2000.

Under 930 CMR 1.01(6)(f)(2), the Commission may enter a summary decision in favor of the Petitioner when the record discloses the Respondent's failure to file required documents, to respond to notices or correspondence, to comply with orders of the Commission or a Presiding Officer, or otherwise indicates a substantial failure to cooperate with the adjudicatory proceeding. The record in this case amply warrants the entry of a summary decision in favor of the Petitioner. Despite notice, and, in particular, a diligent effort by the Commission's Legal Advisor to explain the procedural requirements of G.L. c. 268B, and 930 CMR, the Respondent has failed to file an answer to the December 18, 1990 Order to Show Cause, has failed to respond either orally or in writing to any of the subsequent requests, notices or orders of the Petitioner or Presiding Officer, and has failed to appear at a hearing to show cause why summary judgment should not be entered against him.

The December 18, 1990 Order to Show Cause alleged that the Respondent, a member of the Hull Board of Assessors, had improperly or unduly influenced the assistant assessor to increase the assessed value of the home owned by Colleen Fleming, Malcolm's former girlfriend, in violation of G.L. c. 268A, §23(b)(3). Specifically, the Order alleges that the facts which Malcolm conveyed to the assistant assessor were false, resulting in an improper $2,000 tax increase for Fleming, and that Malcolm had failed to disclose the fact that he and Fleming had recently ended a personal relationship on bad terms. The Respondent's failure to defend or otherwise respond to these allegations constrains us to conclude that he violated G.L. c. 268A, §23(b)(3). **Compare, In the Matter of Richard N. Singleton**, 1990 SEC 476 (violation found where Fire Chief had reason to know that his remarks concerning the timing of Fire Department inspections would be perceived as an attempt to use his official position to secure a private contractual arrangement to benefit his son); **In the Matter of D. John Zeppieri**, 1990 SEC 448 (violation found where Chairman of Licensing Board negotiated a real estate exclusive from an applicant before the Board at a time when the applicant's license was under consideration for revocation).

In light of the seriousness with which we view this violation, we conclude that a maximum statutory fine of two thousand dollars is appropriate. Accordingly, pursuant to G.L. c. 268B, §4(j)(3), we hereby ORDER Respondent Stephen Malcolm to pay to the Commission a civil penalty of two thousand dollars within thirty days (30) of receipt of this ruling.

Date Authorized: September 11, 1991

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

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

[2/]Under G.L. c. 268A, §23(b)(3), a municipal employee may not:

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 396

IN THE MATTER
OF
MICHAEL D. POWERS

Appearances: Stephen P. Fauteux, Esq.
Counsel for the Petitioner

Charles A. Roberts, Esq.
Counsel for the Respondent

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

Presiding Officer: Commissioner Herbert P. Gleason, Esq.

DECISION AND ORDER

I. Procedural History

The Petitioner Enforcement Division (Petitioner) initiated adjudicatory proceedings on December 5, 1990 by filing an Order to Show Cause (OTSC) pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that the Respondent, Attorney Michael D. Powers (Powers), a former employee of the City of Boston, violated G.L. c. 268A, §18(a) of the Massachusetts conflict of interest law by acting as an attorney for the Massachusetts Police Chiefs Association (MPCA) in connection with a lawsuit, **Guiney v. Roache**, in which the City was either a party or in which it had a direct and substantial interest. The OTSC alleged that Powers had participated in the **Guiney** lawsuit when he was employed by the City.

Powers filed his Answer on December 31, 1990, denying the material allegations of the OTSC. Powers also raised two affirmative defenses, which were later submitted in the form of Motions to Dismiss: (i) that the statute of limitations barred these proceedings, and (ii) that his actions were consistent with prior Commission rulings.

Powers made seven motions[2/] prior to the pre-hearing conference, including the two Motions to Dismiss cited above. Commissioner Gleason[3/] denied three of these motions. At Powers' request, the two Motions to Dismiss were presented before the full Commission, but without a hearing, for action prior to the hearing date.[4/] See 930 CMR 1.01(6)(a)(1). Of the final two motions, one was rendered moot, and, therefore, no action was taken.[5/] In response to Powers' final motion, the adjudicatory hearing date was postponed until May 2, 1991.

A pre-hearing conference was held on April 8, 1991, Commissioner Gleason presiding. Powers filed several exhibits during the pre-hearing conference. The parties also filed a set of Proposed Stipulations.

The Adjudicatory Hearing was held on two separate dates, May 2, 1991 and May 9, 1991. At the May 2 hearing date, Powers made a Motion to Disqualify the presiding officer. Commissioner Gleason orally denied the motion and also denied Powers' request to postpone the hearing. Powers had requested the postponement in order to obtain preliminary relief from the Superior Court. In response to Commissioner Gleason's rulings, Powers entered into the record a continuing objection to the adjudicatory hearing.

On May 2, 1991, Commissioner Gleason also orally denied Petitioner's motion to amend its Order to Show Cause, and directed the parties to attempt to enter into final stipulations. The parties filed a set of final Stipulations on May 9, 1991.

On May 16, 1991, after the conclusion of evidence, Powers filed a motion to examine, and enter into evidence, certain medical records which he had had subpoenaed in the Commission's name and which were delivered to the Commission's offices on May 2, 1991. See 930 CMR 1.01(9)(i)(1). Commissioner Gleason denied this motion on June 27, 1991 as the records in question constituted neither new nor relevant evidence. See 930 CMR 1.01(9)(n); 930 CMR 1.01(9)(f)(2).[6/]

The parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01(9)(k). The Petitioner submitted its brief on June 27, 1991. Powers chose not to file a brief.

The parties chose to present their closing arguments before the full Commission. 930 CMR 1.01(9)(e)(5). Closing arguments were heard on July 11, 1991. Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on October 22, 1991.

In rendering this Decision and Order, the Commission has considered all of the testimony, evidence, and the arguments of the parties.

II. Findings

A. Jurisdiction

Powers does not contest the fact that in his capacity as a former employee of the City of Boston, he is a "former municipal employee" within the meaning of G.L. c. 268A, §18(a).

B. Findings of Fact

The Commission finds the following facts, which have been stipulated to by the parties:

1. From July of 1984 until sometime in April 1987, Michael D. Powers (Powers) was a special assistant corporation counsel employed by the City of Boston to represent the Boston Police Department.

2. On April 29, 1986, Robert T. Guiney, president of the Boston Police Patrolmen's Association, sued the City of Boston Police Commissioner in federal court (**Guiney v. Roache**, 86-1346), challenging on constitutional grounds the policy of the Boston Police Department to administer random drug tests to police officers.

3. Powers had been involved in drafting the foregoing policy.

4. Shortly after **Guiney** was filed, Powers was assigned to act as counsel for the defendant Roache in that lawsuit. More specifically, Powers filed the defendant's answer on April 30, 1986; and handled all the other legal issues arising from that litigation while so assigned.

5. On March 6, 1987, the Federal District Court, invoking the doctrine of abstention, dismissed the case on the ground that the matter was more suited to state court review.

6. On March 13, 1987 the plaintiff Guiney filed his notice of appeal, and thereafter, the parties appealed the Federal District Court's (District Court) decision to the First Circuit Court of Appeals (First Circuit) on an agreed statement of the case.

7. On March 27, 1987, Powers filed a request for reconsideration [on behalf of the City of Boston] urging the Federal District Court to hear the case.[7]

8. Approximately a week after filing the request for reconsideration in **Guiney**, Powers left the employment of the City of Boston.

9. On April 9, 1987, the Federal District Court denied the motion for reconsideration.

10. Shortly thereafter, Powers was engaged by the Massachusetts Police Chiefs Association (MPCA) to file an amicus brief in the **Guiney** appeal.

11. On May 21, 1987, Powers filed a motion in the First Circuit asking for leave to file an amicus brief on behalf of the MPCA in the **Guiney** matter.

12. On July 6, 1989,[8] Powers filed a motion in the First Circuit to enlarge the time in which he could file the foregoing amicus brief. The motion was allowed that same day.

13. On July 27, 1987, Powers filed the foregoing amicus brief in which he argued (1) that the First Circuit should reverse the District Court's decision, (2) that the First Circuit should decide the case itself, and (3) that the regulation was valid.

14. On December 2, 1987, the First Circuit vacated the District Court's judgment, and remanded the case to the District Court directing the District Court to hear the matter.

15. On December 4, 1986,[9] Powers billed the MPCA $425 for his costs in filing the foregoing amicus brief. The MPCA paid this bill.

16. On December 23, 1987, Powers filed a motion in the District Court for leave to file an amicus brief on behalf of the MPCA.

17. On February 3, 1988, Powers was present at a court conference in the District Court regarding **Guiney**. At that conference, the court allowed Powers' motion to file an amicus brief.

18. On March 21, 1988, Powers filed a motion to enlarge the time in which he could file his amicus brief.

19. On April 6, 1988, the District Court allowed the foregoing motion, no opposition having been filed, and accepted Powers' amicus brief for the MPCA.

20. On May 13, 1988, Powers presented an oral argument in support of his amicus brief in the District Court. Thereafter, there was no further involvement by Powers in the **Guiney** matter.

21. On May 18, 1988, the District Court issued a final judgment declaring the drug testing rule unconstitutional.

22. On June 14, 1988, the defendant appealed.

23. On May 17, 1989, the First Circuit, holding that the drug testing rule was constitutional, reversed the District Court.

24. The question of the validity of the drug testing rule is now in the state courts.

25. As counsel for the City of Boston Police Commissioner assigned to defend the **Guiney** lawsuit, Powers participated, as reflected by the District Court's docket as a City employee in the **Guiney** matter.

26. As a former City of Boston employee, Powers knowingly acted as an attorney for the MPCA, as described above in ¶¶ 10-20, in connection with the Guiney case.

In addition to the above, the Commission finds the following facts:

27. The amicus representation of a client by an attorney requires both permission from the court and notification of the parties. Powers' actions in connection with his amicus representation of the MPCA during the Guiney lawsuit, beginning at least as early as May 21, 1987 (Stipulations, ¶11), were made known to the federal court, the parties, and the City of Boston through its Corporation Counsel's office and/or the Boston Police Department's legal office at all relevant times herein.

28. We find as credible the testimony of Petitioner's witness, Kevin McDermott (Special Assistant Corporation Counsel employed by the Boston Police Department during all relevant times herein) that the Police Department's legal office had been made aware of Powers' amicus representation of the MPCA at least as early as July, 1987, but made no official objection as a matter which conflicted with Powers' prior employment relationship with the City.

29. Prior to December 2, 1987, the main legal issue of the Guiney litigation concerned whether the lawsuit itself should continue to be heard in the federal courts, or whether the state courts were more appropriate.

30. From on or after December 5, 1987, the main legal issue of the Guiney litigation concerned the constitutionality and/or validity of Rule 111 -- the random drug testing rule applicable to Boston Police Department personnel.

31. Between December 5, 1987 and May 13, 1988, Powers supported the validity of Rule 111 in connection with his amicus representation of the MPCA.

32. The Guiney litigation received a substantial amount of publicity throughout the proceedings.

III. Decision

Powers has raised the Commission's statute of limitations regulation, 930 CMR 1.01(10), as both an affirmative defense and as a Motion to Dismiss. On April 18, 1991, the Commission voted to stay any action on this Motion to Dismiss until after the adjudicatory hearing. For the reasons stated below, the Commission concludes that the statute of limitations bars action against Powers for any activities prior to December 5, 1987.

The statute of limitations regulation requires that the OTSC must be issued within three (3) years after a disinterested person learned of the violation. 930 CMR 1.01(10)(a). When the statute of limitations is raised as a defense, the Petitioner has the burden of showing that a disinterested person learned of the violation no more than three (3) years before the OTSC was issued. That burden will be satisfied by:

(a) an affidavit from the investigator currently responsible for the case that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the OTSC was issued; and

(b) with respect to any violation of G.L. c. 268A other than §23, affidavits from the Department of the Attorney General and the appropriate office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the OTSC was issued.[10/]

If the Petitioner meets the above burden, the Respondent "will prevail on his statute of limitations defense only if he shows that more than three (3) years before the order was issued the relevant events were either:

(a) a matter of general knowledge in the community; or

(b) the subject of a complaint to the Ethics Commission, the Department of the Attorney General, or, with respect to a §23 violation only, the Respondent's public agency." 930 CMR 1.01(10)(d).

In the present case, the Petitioner met its burden by the submission of four (4) affidavits, one from the Attorney General's Office, two from the Suffolk County District Attorney's Office, and one from the Commission's investigator assigned to this proceeding.

The burden then shifted back to Powers to show that the relevant events were a matter of general knowledge in the community more than three (3) years before the OTSC was issued.[11/] We conclude that, as to activities prior to December 5, 1987, Powers has met this burden.

Powers' actions prior to December 5, 1987, which are described above in those paragraphs prior to and including ¶15 of the stipulated facts, consisted of representing the MPCA as an amicus curiae in the federal district court. The filing of an amicus curiae brief requires that the attorney (i) receive permission from the presiding judge, (ii) notify the parties, and (iii) appear on the court's docket sheet.

In the present case, it is undisputed that Powers' representation of the MPCA was made known to the federal court, the parties, and most importantly, to the City of Boston through its Corporation Counsel office and/or the police department's legal office. We note, for example, that Petitioner's witness, Kevin McDermott,[12/] testified that the police department's legal office had been

made aware of Powers' representation of the MPCA at least as early as July, 1987 but made no official objection because of Powers' prior employment relationship to the City.

It is also undisputed that the Guiney case was well known throughout the community because it received a substantial amount of publicity.

In Nantucket v. Beinecke, 379 Mass. 345, 351 (1979) (a case which was decided prior to the Commission's promulgation of its statute of limitations regulation), the Court suggested that a municipality should be charged with knowledge of a violation of the conflict of interest law, for purposes of the statute of limitations, "when those disinterested persons who are capable of acting on behalf of the town knew or should have known of the wrong . . . .." While Beinecke is not controlling here, since the Commission's Enforcement Division, as opposed to the City of Boston, is the Petitioner, the fact that City officials were in a position to object, but did not do so, is relevant to our determination of this issue.

Accordingly, based upon the evidence produced during this proceeding, we find that the "general knowledge in the community" standard is satisfied here, and is applicable to those actions which occurred more than three years prior to the issuance of the OTSC (December 5, 1990). Cf. In the Matter of Clarence D. Race, 1988 SEC 328 (not all of the delineated people knew enough of the relevant facts to be described as members of the community who knew about the relevant events). We so find because Powers' representation was in connection with a highly publicized case, and was specifically authorized by the Court only after notice to all parties, including the City of Boston.

We do not find that all of Powers' conduct is time barred, however, and where actions which are alleged to violate §18(a) are of a continuing nature (such as the representation of a client by an attorney during various stages of litigation), and only a part of those actions are time barred,[6/] we normally would inquire into whether those remaining actions which are not time barred constitute a separate violation of the law. In this matter, however, we decline to do so.

In the Order to Show Cause issued by the Petitioner, Powers was alleged to have violated §18(a) in connection with actions taken at various times prior to December 5, 1987. On May 2, 1991, during the hearing on this matter, the Petitioner sought leave to amend the Order to Show Cause to allege additional actions by Powers constituting violations of §18(a). The Presiding Officer, in his discretion, denied the motion to amend. Although the Presiding Officer would clearly have been on solid ground in allowing the motion, as there would have been minimal prejudice, if any, to Powers (who subsequently entered into a stipulation concerning his alleged actions after December 5, 1987), we affirm his ruling on the motion and decline to determine the validity of alleged violations not contained in the Order to Show Cause. In so deciding, we note that these additional allegations involve only the filing of an amicus brief and oral argument, all pro bono, in support of the Boston Police Department's policy.

IV. Conclusion

The statute of limitations bars us from considering Powers' actions prior to December 5, 1987. With respect to Powers' actions after December 5, 1987, we conclude that said actions were not charged in the Order to Show Cause, and we decline to consider them. Accordingly, this matter is dismissed.

Date Authorized: October 22, 1991

[1/] Commissioner Doty did not participate in this proceeding. Commissioner Epps did not vote on the issuance of this Decision and Order.

[2/] The seven motions included: (i) a Motion to Dismiss on statute of limitations grounds; (ii) a Motion to Dismiss based on prior Commission precedent (EC-COI-87-27; 85-11); (iii) a Motion for Request for Production of Documents; (iv) a Motion for Statements; (v) a Motion to be Furnished with Exculpatory Evidence; (vi) a Motion for Names, Addresses, and Dates of Birth of Petitioner's Witnesses; and (vii) a Motion to postpone the hearing date until April 29 or April 30, 1991 (originally scheduled for April 10, 1991).

[3/] Commissioner Gleason was duly designated as a presiding officer in this proceeding. See G.L. c. 268B, §4(e).

[4/] Any action which would terminate the adjudicatory proceeding must be taken only by the Commission. 930 CMR 1.01(6)(a)(1). In the present case, the Commission voted on April 18, 1991 to stay any action on either Motion to Dismiss until after the adjudicatory hearing.

[5/] Powers' Motion for Names, Addresses and Dates of Birth of Petitioner's Witnesses was not acted upon because the Petitioner had provided the requested information at the pre-hearing conference.

[6/] The Commission hereby orders that the documents in question be returned to their original custodian forthwith.

[7/] The evidence is unclear as to whether Powers acted under the instruction of Boston Corporation Counsel Joseph I. Mulligan when he filed the reconsideration request. Powers testified that Mulligan had assented to the filing. Indeed, Mulligan's name appears (in printed form) on the City's request for reconsideration. Petitioner's Exhibit No. 4; Docket No. 27. Petitioner's witness, Kevin McDermott, testified to his understanding, however, that Powers filed the reconsideration on his own initiative and against the direct order of James Hart,

Boston Police Department Counsel Legal Advisor. (It is not clear from the evidence presented whether Hart was, in fact, Powers' superior.) The parties have focused our attention on this contradictory testimony as pertinent to their respective cases. Because of our ruling on the statute of limitations below, we need not resolve this issue of credibility.

[8/]So in Stipulations. Probably should be 1987. See Docket No. 25.

[9/]So in Stipulations. Probably should be 1987. See Docket No. 30.

[10/]930 CMR 1.02(10) includes an additional requirement for §23 violations. That section, however, is not at issue in this proceeding.

[11/]See In the Matter of Frank Wallen and John Cardelli, 1984 SEC 197 (the statute of limitations is tolled on the date that the Order to Show Cause is issued). The OTSC in the present case was issued on December 5, 1990.

[12/]Special Assistant Corporation Counsel employed by the Boston Police Department during all relevant times herein.

[13/]We reject both the Petitioner's and Powers' arguments concerning the statute of limitations. While the Petitioner, in effect, would have us hold that the continuing nature of the violation would permit us to look back to, and rule upon, all of Powers' actions in this case, including those occurring prior to December 5, 1987, we find that such a ruling would be both unfair to respondents and contrary to the meaning of a statute of limitations where, as here, the "general knowledge in the community" standard has been met. We further decline to adopt Powers' position which would, in effect, have us find that, because some of his earlier actions are time barred, all subsequent actions are time barred.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 425

IN THE MATTER
OF
JAMES H. SMITH

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and James H. Smith (Mr. Smith) 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 June 10, 1991, 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. Smith. The Commission has concluded that inquiry and, on September 9, 1991, found reasonable cause to believe that Mr. Smith violated G.L. c. 268A.

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

1. At all times here relevant, Mr. Smith was a member of the Board of the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (Authority). In 1963, Mr. Smith was first appointed to the three member Board of the Authority (Board) by the Falmouth Board of Selectmen as the Board member representing Falmouth. Mr. Smith was subsequently reappointed by the Falmouth Selectmen to the Board position several times. The other two Board members represented Nantucket and Martha's Vineyard, respectively. At all times here relevant, Mr. Smith was also an attorney in private practice and a partner and principal of the Falmouth law firm of Smith & Connolly, P.C. (Smith & Connolly).

2. The Authority is a state agency as that term is defined in G.L. c. 268A, §1(p). Members of the Board serve without compensation. As a member of the Board, Mr. Smith was a special state employee as that term is defined in G.L. c. 268A, §1(o). As a special state employee, Mr. Smith was subject to the provisions of the state conflict of interest law, G.L. c. 268A.

3. David V. Peterson (Peterson) is a real estate developer with a principal residence in Falmouth.

4. D.T.B., Inc. (DTB) is a Massachusetts corporation with a principal place of business in Falmouth.

5. DTB was incorporated in March 1981 for the purpose of conducting the business of purchasing and developing real estate. Mr. Smith's law firm did the legal work involved in forming DTB and Mr. Smith was named in DTB's corporate papers as the incorporator of the corporation. As originally incorporated, the directors of DTB were Peterson, Peterson's wife, Anne R. Peterson (Mrs. Peterson), and Mr. Smith. As originally incorporated, DTB's president was Peterson, its treasurer was Mrs. Peterson, and its clerk was Smith. In June 1981, Mrs. Peterson resigned as treasurer and became vice president of DTB. At the same time, Peterson became treasurer of DTB as well as president. At all times from 1981 through September 1988, Mr. Smith remained a director and the clerk of DTB and, as DTB's clerk, kept in his possession the DTB corporate book and seal. There is no evidence of any other action by Mr. Smith as a DTB director and as the DTB clerk after 1982.

6. In addition to serving as the clerk and as a director of DTB, Mr. Smith provided legal services to DTB and Peterson. Mr. Smith represented Peterson in numerous real estate related matters during the period from the mid-1960s through 1988. During 1988, Mr. Smith had an active and ongoing attorney-client relationship with Peterson and DTB. There is no evidence that Mr. Smith otherwise participated in the corporate affairs of DTB (except as discussed in paragraph 5 above).

7. During the first six months of 1988, James Prouty and C. Althea Prouty (the Proutys) attempted without success to sell 40 acres of undeveloped land owned by them on Blacksmith Shop Road in North Falmouth (hereinafter referred to as "the Prouty land") at a price ranging from $725,000 to $475,000. On June 23, 1988, DTB and Peterson entered into a purchase and sale agreement with the Proutys pursuant to which DTB agreed to purchase the 40 acres of land on Blacksmith Shop Road from the Proutys for $300,000 and a two acre house lot. The purchase and sale agreement provided for a closing date of October 1, 1988. At the time of the execution of the purchase and sale agreement, DTB paid the Proutys a $10,000 down-payment.

8. Sometime after the purchase and sale agreement was executed, but in any event no later than July 20, 1988, Peterson took a copy of the purchase and sale agreement to Mr. Smith's law office. Peterson gave the purchase and sale agreement to a member of Mr. Smith's secretarial staff in order to have Mr. Smith's law firm prepare the deeds necessary for the transaction between DTB and the Proutys.

9. Between late July 1988 and September 13, 1988, Mr. Smith's new secretary, Susan Bragdon (Bragdon), prepared the two deeds for the Proutys' transfer of the Prouty land to DTB and DTB's transfer of a two acre lot of land on Blacksmith Shop Road to the Proutys. During the time that she worked on the two deeds, Bragdon informed Mr. Smith that she was preparing the two deeds for Peterson. Mr. Smith instructed Bragdon to charge Peterson $75 each for the preparation of the two deeds.

10. In 1988, the Authority was seeking to purchase real estate for use as Authority parking facilities in order to deal with traffic congestion problems in Woods Hole and downtown Falmouth created by Authority passengers driving into those areas to reach the Authority's existing parking facilities. At a Falmouth Selectmen's meeting on July 18, 1988, attended by Mr. Smith, the Selectmen, Mr. Smith and members of the public discussed the parking issue, including the desirability of having Authority passengers park before reaching Woods Hole.

11. In late July or early August 1988, Falmouth real estate agent Richard L. Kinchla, Jr. (Kinchla), who was aware of the Authority's interest in acquiring land in Falmouth for parking, approached Peterson and asked if he had a parcel of about ten acres of land that he would be interested in selling. Peterson responded that he was not interested in selling ten acres, but that he did have 40 acres of land on Blacksmith Shop Road (the Prouty land) that he would sell for $30,000 an acre. When Kinchla identified the prospective purchaser of the land as the Authority, Peterson told Kinchla that he would sell the land to the Authority only if the transaction were not made public, as he was concerned about becoming involved in a public dispute or law suit over the use of the Prouty land for parking.

12. On or about August 3, 1988, Mr. Smith, Authority General Manager Barry Fuller (Fuller), and Authority Public Relations Director Ray Martin (Martin) did a "drive by" inspection of the Prouty land. During the "drive by," Mr. Smith mentioned to Fuller and Martin that he had handled real estate closings for Peterson concerning residential real estate located on the opposite side of Blacksmith Shop Road from the Prouty land. Mr. Smith did not, however, fully disclose to Fuller or Martin the facts of his relationship to Peterson and DTB.

13. On or about August 4, 1988, Fuller, on behalf of the Authority, and Peterson, on behalf of DTB, entered into an agreement giving the Authority an option to purchase the Prouty land from DTB at a price of $30,000 per acre. The Authority paid DTB $1,000 for the option, which was to expire on August 19, 1988.

14. On or about August 12, 1988, Fuller sent each member of the Board, including Mr. Smith, a copy of the agenda for the executive session of the Board's meeting on August 18, 1988. Among the items listed on the agenda was the topic of a "Real Estate Acquisition" by the Authority. On August 18, 1988, Fuller gave each member of the Board, including Mr. Smith, a copy of a revised agenda for the Board meeting which listed, as "Item No. 1," "Real Estate Acquisition - Oral and visual presentation will be made on various properties, including Consiglio and DTB, Inc."

15. On August 15, 1988, Fuller retained an appraiser to appraise the Prouty land.

16. When the Board met in executive session on August 18, 1988, Mr. Smith, in his capacity as the Board member representing Falmouth, vigorously advocated the purchase of the Prouty land by the Authority. According to the minutes, Mr. Smith's comments concerning the Prouty land included, "You've got to see it. I have twice. I'm high on it and I think we ought to grab it." "It's a steal." "The beauty of the property is that it is so close to the highway." "What are we waiting for? I'll move it." At the August 18, 1988 meeting, the Board voted in favor of the purchase of the Prouty land at a price of $30,000 per acre subject to several contingencies, including an appraisal of the property. On Mr. Smith's motion, Smith and Board member Robert Stutz (Stutz) voted in favor of the purchase. The third member of the Board, Bernard Grossman (Grossman), either voted in favor of the purchase or abstained (the record is unclear). At no time prior to or during the

August 18, 1988 Board meeting did Mr. Smith disclose to his fellow Board members or to the Authority's staff the facts of his relationship with DTB and Peterson (except as described in paragraph 12 above).

17. On August 19, 1988, the $1,000 option expired. On that same date, Fuller, on behalf of the Authority, made a counteroffer of $1 million to Peterson through Kinchla. The counteroffer was rejected by Peterson.

18. By a letter to Kinchla dated August 22, 1988, Fuller agreed on behalf of the Authority to buy the Prouty land from DTB for $1.2 million subject to certain contingencies, including a satisfactory appraisal.

19. Sometime between August 23, 1988 and September 9, 1988, Peterson, on behalf of DTB, and Fuller, on behalf of the Authority, signed the purchase and sale agreement by which the Authority agreed to purchase the Prouty land for $1.2 million. The purchase and sale agreement, which was dated August 23, 1988, provided for a closing date on the transaction of September 22, 1988, and was contingent on, among other conditions, "[a] satisfactory review and acceptance of the appraisal." By enclosure with a letter-memorandum dated September 9, 1988, Fuller sent a copy of the signed purchase and sale agreement to each member of the Board, including Mr. Smith. Fuller's letter-memorandum stated its subject to be the "Purchase and Sale Agreement with DTB, Inc." Mr. Smith does not recall receiving Fuller's letter-memorandum on or about September 9, 1988. On September 7, 1988, the Authority issued and delivered to Peterson a $100,000 check payable to DTB as a down-payment for the Prouty land.

20. Sometime between September 1, 1988 and September 22, 1988, on a date Mr. Smith cannot recall, Mr. Smith had a conversation with Peterson in Mr. Smith's law office during which he discussed with Peterson the Authority's pending purchase of the Prouty land. Mr. Smith informed Peterson that he was in favor of the Authority's purchase of the Prouty land.

21. On Friday, September 9, 1988, the appraisers retained by the Authority gave Fuller a verbal report that the Prouty land had a value of $1 million. Fuller was advised by the appraisers to renegotiate the purchase price.

22. On Monday, September 12, 1988, Fuller, on behalf of the Authority, again offered DTB $1 million for the Prouty land. Peterson again rejected the offer.

23. On September 12 or 13, 1988, Fuller telephoned Grossman and Mr. Smith (Stutz was out of the country). Fuller obtained Grossman's and Mr. Smith's verbal approval to close on the Prouty land on September 22, 1988 (the date stipulated in the purchase and sale agreement dated August 23, 1988).

24. On September 13, 1988, Smith & Connolly secretary Bragdon gave Peterson the two deeds she had typed for the Proutys/DTB transaction. Peterson was billed a total of $150 by Smith & Connolly for the preparation of the deeds. Peterson paid this $150 amount with a DTB check, dated September 20, 1988, payable to Mr. Smith. The DTB check subsequently was deposited into a Smith & Connolly account.

25. On September 19, 1988, the closing occurred on the sale of the Prouty land from the Proutys to DTB. The two deeds prepared for Peterson by Mr. Smith's office were used in the transaction, however, Peterson was represented at the closing by an attorney other than Mr. Smith, who had no connection to Mr. Smith's law firm. On or shortly after that same date, the attorney who was handling the legal aspects of the purchase of the Prouty land from DTB for the Authority, first learned that DTB had until that date not owned the Prouty land and had on that date purchased the Prouty land for $300,000, plus the conveyance of a two acre lot. The Authority's attorney informed the Authority's treasurer, Wayne Lamson (Lamson), of these facts.

26. On or about September 21, 1988, Fuller, who was out of state, was informed by Lamson of the price difference between what the Authority was paying DTB and what DTB had paid the Proutys for the Prouty land. Fuller took no action based on this information. According to Mr. Smith, Fuller subsequently informed him that, notwithstanding what DTB had paid for the Prouty land, he (Fuller) and the Authority staff supported the acquisition of the Prouty land by the Authority and he (Fuller) was comfortable with and could fully defend the purchase price paid by the Authority.

27. On September 22, 1988, the Authority closed on the purchase of the Prouty land from DTB, making a final payment of $1.1 million to DTB.

28. On September 30, 1988, at a regular meeting of the Board on Martha's Vineyard, the Board, including Mr. Smith, voted to confirm the purchase of the Prouty land from DTB without discussion. On the ferry trip to Martha's Vineyard prior to the meeting, Mr. Smith alluded, in conversation with Authority staffers, to the fact that he had done legal work for Peterson in the past. Mr. Smith did not, however, prior to or during the September 30, 1988 Board meeting, fully disclose to his fellow Board members or to the Authority staff the facts of his relationship with DTB and Peterson.

29. At no time prior to the Board's September 30, 1988 vote, did Mr. Smith make any disclosure to his appointing authority, the Falmouth Board of Selectmen, concerning the facts of his relationship with DTB and Peterson or seek the Selectmen's authorization to participate as a Board member in matters in which DTB or Peterson had a financial interest. At no time did the Falmouth Selectmen authorize Mr. Smith to participate officially as a Board member in matters in which DTB or Peterson had a financial interest.

30. During October 1988, Smith gave the DTB

corporate book and seal to Peterson and forwarded to DTB's corporate accountant documents effecting his resignation as clerk and director of DTB.

31. Except as otherwise permitted by that section, G.L. c. 268A, §6, in pertinent part, prohibits a state employee from participating as such in a particular matter in which, to his knowledge, an organization in which he is serving as a director or an officer has a financial interest. None of the exceptions to G.L. c. 268A, §6 applies in this case.

32. The decision by the Authority's Board to purchase the Prouty land was a "particular matter" as defined in G.L. c. 268A, §1(k).

33. When Mr. Smith advocated the purchase of the Prouty land at the August 18, 1988 Board meeting, when Mr. Smith, on September 12 or 13, 1988, verbally approved Fuller's request to close on the Prouty land on September 22, 1988, and when Mr. Smith voted at the September 30, 1988 Board meeting to confirm the Prouty land purchase, Mr. Smith personally and substantially involved himself in the Board's decision to purchase the Prouty land. In so doing, Mr. Smith "participated" in that particular matter as that term is defined in G.L. c. 268A, §1(j).

34. On each of the three above-described occasions when Mr. Smith so participated, he knew that Peterson (and DTB) was the seller of the Prouty land. Therefore, Mr. Smith knew that DTB had a financial interest in that particular matter when he so participated as described above.

35. On each of the three above-described occasions when Mr. Smith so participated, he was an officer and director of DTB.

36. Therefore, by participating as a Board member in the Authority's decision to purchase the Prouty land from DTB, a decision in which he knew DTB had a financial interest, all while he was an officer and director of DTB, Mr. Smith violated §6 on each of the three occasions identified above.

37. 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.

38. By promoting (and/or otherwise being involved in) as a Board member the Authority's purchase of the Prouty land from DTB, while he was an officer and director of DTB and was also acting as DTB's and Peterson's legal counsel on other matters, Mr. Smith engaged in conduct that would cause a reasonable person to conclude that DTB and/or Peterson could unduly enjoy his favor in the performance of his official duties. In addition, Mr. Smith knew or had reason to know, no later than July 20, 1988, when his law firm opened a file on that matter, that his law firm was handling the Proutys/DTB transaction. Thus, at the time he acted as a Board member on the Prouty land purchase, Mr. Smith knew or should have known that his law firm had prepared the two Blacksmith Shop Road land deeds for Peterson and knew or should have known that those deeds were the deeds by which DTB was acquiring the very land it was selling to the Authority. None of these facts were disclosed to Mr. Smith's appointing authority (the Falmouth Selectmen), to his fellow Board members or to the Authority staff. Therefore, by his above-described conduct Mr. Smith violated §23(b)(3).

In view of the foregoing violations of G.L. c. 268A, §§6 and 23(b)(3), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Smith:

1. that he pay to the Commission the sum of $4,000.00 for his violations of G.L. c. 268A; and

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

Date: November 26, 1991

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 423

IN THE MATTER
OF
CHRISTOPHER S. LOOK, JR.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Dukes County Sheriff Christopher S. Look, Jr. (Sheriff Look) 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 16, 1991, 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 Look. The Commission concluded its inquiry and, on July 11, 1991, voted to find reasonable cause to believe that Sheriff Look violated G.L. c. 268A, §§13 and 23.

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

1. At all times relevant to this matter, Sheriff Look was the elected sheriff of Dukes County.[1] As such, Sheriff Look was, at the times here relevant, a county employee as defined in G.L. c. 268A, §1(d).

2. As sheriff of Dukes County, Sheriff Look is empowered to appoint deputy sheriffs. Although deputy sheriff appointments are unpaid, deputy sheriffs are eligible to be assigned to work paid details and, with court approval, as paid per diem court officers in the superior and district courts in Dukes County. Deputy sheriffs serve conterminously with the sheriff and must be reappointed each time the sheriff is reelected, or each time a new sheriff is elected, in order to continue so serving.

3. Peter Look is Sheriff Look's brother. William Look and Christopher S. Look, III are two of Sheriff Look's sons.

4. Peter Look has been a deputy sheriff and a per diem court officer since before Sheriff Look took office. During Sheriff Look's tenure as sheriff, Peter Look has earned money as a deputy sheriff through his service as a part-time paid per diem court officer. As sheriff, Sheriff Look has reappointed his brother as a deputy sheriff on several occasions, most recently in January 1987, at the start of Sheriff Look's current term, with knowledge that Peter Look would continue serving as a paid per diem court officer.

5. Sheriff Look first appointed Christopher S. Look, III as a deputy sheriff in 1980 or 1981 and reappointed him as such in January 1987, at the start of Sheriff Look's current term. Although Christopher S. Look, III's initial appointment as a deputy sheriff in 1980 or 1981 made him eligible for paid deputy sheriff detail assignments, he did not work any such details until 1990, in which year he earned approximately $2,600 working such details.

6. Sheriff Look first appointed William Look as a deputy sheriff in 1980 or 1981 and reappointed him as such in January 1987, at the start of Sheriff Look's current term. Although William Look's initial appointment as a deputy sheriff in 1980 or 1981 made him eligible for paid deputy sheriff detail assignments, he did not work any such details until May 1987, when he joined the Norton Point Beach patrol. As a deputy sheriff working the Norton Point Beach patrol in 1987, 1988, 1989 and 1990, William Look earned, on average, approximately $3,200 annually.

7. In his capacity as sheriff, Sheriff Look in 1987 recruited William Look to work as a paid member of the Norton Point Beach patrol, at a starting rate of approximately $8.00 per hour.

8. General Laws c. 268A, §13, except as permitted by that section,[2] prohibits a county employee from participating as such in a particular matter in which to his knowledge an immediate family member has a financial interest.

9. Peter Look, as Sheriff Look's brother, and William Look and Christopher S. Look, III, as Sheriff Look's sons, are members of Sheriff Look's immediate family as that term is defined in G.L. c. 268A, §1(e).

10. The 1987 reappointments of Peter Look, William Look and Christopher S. Look, III as deputy sheriffs and the 1987 recruitment of William Look for the Norton Point Beach patrol were particular matters within the meaning of G.L. c. 268A.[3]

11. Due to the eligibility of deputy sheriffs to be assigned to paid details, Peter Look, William Look and Christopher S. Look, III each had a financial interest in their 1987 reappointments as deputy sheriffs.[4] In addition, Peter Look had a financial interest in his appointment as a deputy sheriff in that in Dukes County paid per diem court officers have traditionally been appointed exclusively from the ranks of deputy sheriffs. Finally, because his work on the Norton Point Beach patrol was compensated, William Look had a financial interest in his recruitment to work on the beach patrol. Sheriff Look knew of these financial interests.[5]

12. By in 1987 making the above-described reappointments of his immediate family members and recruiting one of his sons to work as a paid member of the Norton Point Beach patrol, Sheriff Look personally and substantially participated in particular matters in which to his knowledge members of his immediate family had financial interests.[6] In so doing, Sheriff Look violated G.L. c. 268A, §13.

13. Sheriff Look asserts that a number of county and state officials knew that he was reappointing his brother and sons as deputy sheriffs and that he had recruited his son William to serve on the Norton Point Beach patrol, and such officials raised no objection to those actions. Regardless of the truth of this assertion, however, these officials' awareness of these facts is not a defense to Sheriff Look's §13 violation.[7]

14. Section 23(b)(3) of G.L. c. 268A prohibits a county 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 the undue influence of any party or person.

15. By reappointing three members of his immediate family as deputy sheriffs and by recruiting one of his sons to work as a member of a paid beach patrol, Sheriff Look acted in a manner which would cause a reasonable person, knowing the relevant facts, to conclude that Sheriff Look could be unduly influenced by kinship in the

performance of his official duties. In so doing, Sheriff Look violated G.L. c. 268A, §23(b)(3).

16. The Commission has found no evidence that Sheriff Look actually gave preferential treatment to his brother or his sons in regard to the actions described above. Nor has the Commission found any evidence that Sheriff Look derived personal gain from his actions or that he attempted to conceal any of the relevant facts. The absence of such evidence, however, is at most a mitigating factor, not a defense to liability under G.L. c. 268A. See, e.g., In the Matter of James Geary, 1987 SEC 305, 307.

17. The Commission has found no evidence that Sheriff Look was aware that his actions violated G.L. c. 268A. Ignorance of the law, however, is no defense to a violation of G.L. c. 268A. See, e.g., In the Matter of Mary L. Padula, 1987 SEC 310, 311 and n.2.

In view of the foregoing violations of G.L. c. 268A by Sheriff Look, 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 Sheriff Look:

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

2. that Sheriff Look either secure the resignations of Christopher S. Look, III and William Look as deputy sheriffs or, alternatively, make their further service as deputy sheriffs expressly conditioned or restricted so as to prohibit their working paid details as long as Sheriff Look remains sheriff;[8/]

3. that Sheriff Look act in conformance with the requirements of G.L. c. 268A in his future conduct as a county employee; and

4. that Sheriff Look 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: November 27, 1991

[1/]Sheriff Look has been in office since 1971. Sheriff Look's most recent reelection was in 1986.

[2/]None of the exceptions apply in this case. See paragraph 13, footnote 7 below.

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

[4/]"Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the county. 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.

[5/]At the time he reappointed his brother Peter Look as a deputy sheriff in January 1987, Sheriff Look knew that his brother had a financial interest in continuing to serve as a paid per diem court officer. Likewise, at the time he recruited his son William Look to serve on the Norton Point Beach patrol, Sheriff Look knew that his son had a financial interest in such service. However, at the time he reappointed his sons William Look and Christopher S. Look, III as deputy sheriffs in January 1987, Sheriff Look did not know that they would later accept assignments to work on paid details or otherwise derive financial benefits from their status as deputy sheriffs. In Dukes County, there are many deputy sheriffs who hold that title without performing any paid services, and both of Sheriff Look's sons held appointments as deputy sheriffs for several years before January 1987 without deriving any financial benefit from those appointments. In the Commission's view, however, these facts show only that Sheriff Look did not consciously violate the law; they do not provide a defense to liability. The §13 violations concerning the January 1987 reappointments of Sheriff Look's sons are based not on evidence that Sheriff Look knew his sons would necessarily derive financial benefit from those reappointments, but rather on his knowledge that their status as deputy sheriffs would at least place them in a class of persons eligible to work on paid details and on the fact that their reappointments as deputy sheriffs were not expressly conditioned or restricted so as to prohibit their working paid details. Cf. In the Matter of Clifford Marshall, 1991 SEC 508, 510, n.15.

[6/]Sheriff Look's earlier reappointments of Peter Look and original appointments of William Look and Christopher S. Look, III in 1980 or 1981, took place before the Supreme Judicial Court's decision in Scuito v. The City of Lawrence, 389 Mass. 929 (1983), which determined that public employees are prohibited from acting on any matter affecting a family member's financial interest, and are thus beyond the scope of this Agreement. See Commission Advisory No. 11 (Nepotism).

[7/]In certain narrowly defined circumstances, a public official's awareness and approval of a county employee's participating in the appointment of a family member can avoid a §13 violation. Thus, §13(b), in pertinent part,

provides:

> Any county 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 appointment official shall thereupon either (1) assign the particular matter to another employee; or (2) assume responsibility for the particular matter; or (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the county may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter....

This exception is not, however, available to elected officials, like Sheriff Look, who, by definition, do not have an "appointing official" within the meaning of the law. See, e.g., In the Matter of Paul Nowicki, 1988 SEC 365, 366, n.4.

[8/] Peter Look has already resigned as a deputy sheriff.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 424

IN THE MATTER
OF
MICHAEL MCCORMACK

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Michael McCormack (Mr. McCormack) 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 16, 1991, 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. McCormack. The Commission concluded its inquiry and, on July 11, 1991, voted to find reasonable cause to believe that Mr. McCormack violated G.L. c. 268A, §§13 and 23.

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

1. At the times here relevant, Mr. McCormack was the Dukes County Special Sheriff and the Deputy Superintendent of the Dukes County Jail and House of Correction (Jail). As such, Mr. McCormack was, at all times here relevant, an employee of Dukes County within the meaning of G.L. c. 268A, §1(d). Mr. McCormack's county employment was full-time and salaried.

2. In addition to being a full-time Jail employee, Mr. McCormack was one of several Dukes County deputy sheriffs nominated by the Sheriff of Dukes County and appointed by the state courts to serve as a part-time paid per diem court officer in the state superior and district courts in Dukes County.[1/] As a per diem court officer, Mr. McCormack was paid by the Commonwealth for his services at a daily rate which was set by statewide contract and was not dependent upon the number of hours worked in a given day.[2/]

3. During the period here relevant, when the state courts were in session in Dukes County, Mr. McCormack was informed in advance by Sheriff Look or by the Clerk of Courts of the days on which the courts would need court officers.[3/] In turn, Mr. McCormack would prepare a monthly court officer schedule by contacting persons on the list of approved court officers, notifying them of the days on which court officers were needed, and determining which court officers were available to serve on which days.

4. In the years 1985 through 1988, Mr. McCormack, in performing the afore-described court officer scheduling function, scheduled himself to work on certain days as a paid per diem court officer in the superior and district courts.[4/]

5. During the period from 1985 through 1988, Mr. McCormack scheduled himself to work and worked approximately 430 days as a per diem court officer. On an undetermined number of these days, court was in session for two hours or less. Mr. McCormack received, on average, approximately $9,000 a year from the Commonwealth for serving as a court officer from 1985 through 1988.

6. For the most part, Mr. McCormack scheduled himself to work and was paid to work as a court officer on days when he was also scheduled and paid to work at the Jail. Thus, Mr. McCormack was paid as a state employee for many of the same work days for which he was also paid as a county employee.

7. Dukes County Sheriff's Department policy at the times here relevant required salaried Jail employees, such as Mr. McCormack, to devote at least 35 hours per week to their Jail duties and required Jail employees who served as per diem court officers to either make up the hours they worked as court officers by working an equal number of make up hours at the Jail, or to use vacation time, compensation time or other leave time for the hours they served as court officers.

8. Although Mr. McCormack made up many of the hours that he worked as a paid per diem court officer on days that he was also scheduled and paid to work at the

Jail, by either working make up hours at the Jail or by using vacation time, compensation time or other leave time, there were occasions on which he did not do so. As a result, Mr.McCormack received compensation from both the Commonwealth and Dukes County for some of the same hours of work. The number of occasions on which Mr. McCormack received such overlapping compensation cannot be determined because there are no records of the specific hours that Mr. McCormack actually worked at the Jail during the period in question.[5/]

9. General laws c. 268A, §13, except as permitted by that section,[6/] in pertinent part, prohibits a county employee from participating, as such, in a particular matter in which to his knowledge, he has a financial interest.

10. The scheduling of per diem court officers was a particular matter within the meaning of G.L. c. 268A.[7/]

11. Mr. McCormack had a financial interest in his being scheduled to work as a paid per diem court officer.[8/]

12. By scheduling himself to work on certain days as a paid per diem court officer, Mr. McCormack personally and substantially participated as a county employee in particular matters in which, to his knowledge, he had a financial interest. In so doing, Mr. McCormack violated G.L. c. 268A, §13.

13. Section 23(b)(2), in pertinent part, prohibits a public employee from knowingly, or with reason to know, using his official position to secure an unwarranted privilege of substantial value for himself.

14. By receiving compensation from the Commonwealth for serving as a per diem court officer for some of the same hours for which he was also paid by Dukes County to work at the Jail, Mr. McCormack used his official position to obtain unwarranted privileges of substantial value for himself. In so doing, Mr. McCormack violated G.L. c. 268A, §23(b)(2).[9/]

15. The Commission has found no substantial evidence that, at the time of the above-described violations, Mr. McCormack was aware that his actions violated G.L. c. 268A. Ignorance of the law, however, is no defense to a violation of G.L. c. 268A. See, e.g., **In the Matter of Mary L. Padula**, 1987 SEC 310, 311 and n.2. Nor has the Commission found any evidence that Mr. McCormack attempted to conceal any of the facts relevant to this matter. This too, however, is only a mitigating circumstance, not a defense to liability under G.L. c. 268A. See, e.g., **In the Matter of James Geary**, 1987 SEC 305, 307.

16. It is Mr. McCormack's position that, in scheduling himself to work and in serving as a paid per diem court officer, he was acting at the direction of, and with the knowledge and implict approval of, his appointing official, the Sheriff of Dukes County. Even if this were true, however, such knowledge and implict approval is at most a mitigating factor, not a defense to liability under G.L. c. 268A, §13. While there is an exception to liability under G.L. c. 268A, §13(b), when a county official makes full disclosure of the relevant circumstances to both his appointing official and to the Commission and obtains the appointing official's written authorization to participate in the particular matter in which the county employee has a financial interest, those are not the circumstances here. Absent strict compliance with the statute's disclosure and exemption provisions, there can be no defense to liability under G.L. c. 268A, §13. See, e.g., **In the Matter of Roger H. Muir**, 1987 SEC 301, 302; **In the Matter of Edward Rowe**, 1987 SEC 307, 309.

In view of the foregoing violations of G.L. c. 268A by Mr. McCormack, 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. McCormack:

1. that Mr. McCormack pay to the Commission the sum of six thousand dollars ($6,000.00) as a civil penalty for violating G.L. c. 268A, §§13 and 23(b)(2) on an undetermined number of occasions;

2. that Mr. McCormack act in conformance with the requirements of G.L. c. 268A in his future conduct as a county employee; and

3. that Mr. McCormack 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: December 3, 1991

[1/]At all times here relevant, the Sheriff of Dukes County was Christopher S. Look, Jr. (Sheriff Look).

[2/]The per diem fee during the period here relevant averaged approximately $85.

[3/]As sheriff, Sheriff Look served as the unpaid chief court officer during the period here relevant.

[4/]Mr. McCormack ceased serving as a paid per diem court officer in October 1988, when he learned that his services as such was prohibited by G.L. c. 30, §46(12), which bars such service by county employees receiving more than $20,000 in annual compensation from the county.

[5/]It was one of Mr. McCormack's responsibilities as Deputy Superintendent to keep and maintain records of the hours worked and the dates on which vacation, compensation, personal, sick and other leave time was

taken by Jail employees. Although Mr. McCormack kept and maintained such detailed records for other Jail employees, for himself he only recorded his monthly totals of hours worked and leave time taken.

[6/] None of the exceptions apply in this case. See paragraph 16 below.

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

[8/] "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the county. 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.**

[9/] The Commission is aware that, from time to time during the period here relevant, Mr. McCormack scheduled his wife, who was then a Jail employee, a deputy sheriff and an appointed per diem court officer, to work as a paid per diem court officer on days that she was also scheduled to work at the Jail. This conduct raised questions under G.L. c. 268A. The Commission, however, has decided not to make any findings or to impose any additional penalty with regard to this conduct by Mr. McCormack in light of the substantial penalty which Mr. McCormack is paying for his violations of G.L. c. 268A in connection with his own service as a paid per diem court officer.

Kevin Fitzgerald
c/o Thomas Kiley, Esq.
Cosgrove, Eisenberg & Kiley, P.C.
One International Place
Boston, MA 02110

RE: PUBLIC ENFORCEMENT LETTER 92-1

Dear Representative Fitzgerald:

As you know, on September 11, 1991, the State Ethics Commission commenced a preliminary inquiry into allegations that you violated G.L. c. 268A, §§3, 23(b)(2) and (b)(3) by your official dealings with Mary Guzelian (Guzelian) and your ultimate acceptance of a bequest from her estate. On October 25, 1991, the Commission found reasonable cause to believe that you violated §§3 and 23(b)(3). (The Commission has not voted to find reasonable cause to believe you violated §23(b)(2).) Aware that the Attorney General and the United States Attorney may be conducting investigations into your dealings with Guzelian or her estate, the Commission also directed the staff to refer its investigative materials to those agencies for any action they deem appropriate. Finally, in view of certain mitigating circumstances discussed below, the Commission voted to resolve its inquiry by issuing this Public Enforcement Letter.[1/]

By agreeing to this public letter as a final resolution of this matter, the Commission recognizes that you do not admit to the facts and law as discussed below. (You deny or have no knowledge of many of the facts and you maintain 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. You have waived no other rights other than the right to have a hearing.[2/]

I. Facts[3/]

1. As a member of the House of Representatives of the General Court you are a "state employee" for the purposes of the conflict of interest law, G.L. c. 268A.

2. You have served as a state representative, first from the 17th and now the 16th Suffolk District, since you were first elected in 1974. As a state representative, you served first on the Health Care and Transportation and then Ways and Means Committees. You were on the Committee on Post Audit and Oversight from 1979 through 1984.[4/] You were vice-chairman from 1979 through 1981, and chairman thereafter.[5/] In 1985, you left Post Audit and became chairman of the Joint Housing and Urban Development Committee. In 1990 you left the Joint Housing and Urban Development Committee to become the majority whip. You have served in that position to the present.

3. As a member of the House of Representatives, your duties and responsibilities include participating in the drafting of, conducting hearings on, and ultimate passage of legislation. In addition, however, through your own actions and the actions of your staff, you provide assistance to people who come to your office looking for help regarding various problems. The Commission views this assistance as constituent services. While most such assistance is given to people who live in your district, your office frequently helps people who live outside the district as well.

4. In or about November 1979, Patricia McDermott (then Ford) began doing volunteer work at your State House office as an administrative assistant. Her duties included answering the phone, dealing with mail, and responding to requests for information and/or assistance from citizens who contacted your office. In or about June 1980 McDermott became a so-called "03" employee[6/] of the Post-Audit Committee, but her duties

remained the same as they were when she was providing volunteer services. In or about November 1981, McDermott became a so-called "02" employee[7] of the Post-Audit Committee. In that capacity she continued to work for you as an administrative assistant performing the same duties as described above. McDermott has continued to serve as your administrative assistant to the present.

5. According to her death certificate, Guzelian was born August 26, 1916 in Camden, New Jersey. Guzelian married Krikor George Romian of Lowell, Massachusetts on July 11, 1943. Nine months later the marriage broke up. The couple were finally divorced on September 24, 1949, when the decree nisi became absolute. Thereafter, Guzelian appears to have lived with her mother at various addresses until her mother's death in 1974.

On August 25, 1952, Guzelian purchased 47 Payson Road, Belmont. She and her mother lived there until 1969, when Guzelian sold that property. At or about the same time, Guzelian purchased 27 Cleveland Street, Arlington, a two-family house in which she and her mother lived[8] until sometime in or about July 1970, when they purchased (and moved into the downstairs unit of) a two-family house in Cambridge, 118-120 Aberdeen Avenue. Thereafter, Guzelian rented out the two-family house in Arlington, as well as the upstairs unit at 118-120 Aberdeen.

On May 6, 1974, Guzelian's mother died. Between the time her mother died and Guzelian herself died in 1985, she appears to have frequently appeared in public as a destitute, oddly dressed older woman, who carried some of her possessions in shopping or garbage bags.[9] Many people who knew her have described her as a "bag lady." During this same time period, Guzelian did a considerable amount of pan-handling, especially near the Lenox Hotel area and in the gay community. She also pan-handled from the taxi cab drivers who operated in the Lenox Hotel area, and became a well-known figure to those drivers, the Lenox Hotel management, and owners or customers of several other business establishments in the area. During much of this same time period, Guzelian continued to own the Arlington and Cambridge properties, and collected the rents from those properties.[10] She also opened and maintained numerous savings accounts, kept savings bonds in a safe deposit box (the bonds she purchased before her mother's death had a payment on death (POD) designation for her mother; the bonds purchased after her mother's death had no such feature), and received monthly United States Civil Service and Social Security checks (which she arranged to have directly deposited into one of her accounts). In addition, she regularly attended prayer groups in Quincy and Boston.

On August 16, 1976, Guzelian, using the name Romano, obtained a Boston Housing Authority (BHA) subsidized apartment, No. 6, at 1871 Commonwealth Avenue, Brighton (hereinafter sometimes referred to as the "Brighton apartment"). She was a tenant there until July 9, 1981, as discussed below. While leasing the Brighton apartment for her own use, she continued to rent out the Cleveland Street, Arlington units, and the second floor of 118-120 Aberdeen Street, Cambridge. She did not rent out the first floor unit. That space she used for herself (hereinafter sometimes referred to as the "Cambridge apartment").

During the time period between her mother's death in 1974 and her eviction from the Brighton apartment in July 1981, it is unclear where Guzelian was living. She spent some nights at Rosie's Place and other shelters. New England Deaconess Hospital records indicate that Guzelian was admitted and treated for frostbite between February 11, 1976 and February 14, 1976. The extent to which she lived at either her Brighton or Cambridge apartments is unclear. What is clear, is that the living conditions in both places, to varying extents at various times, were deplorable. In the summer of 1976, the Cambridge Board of Health obtained an order allowing it to enter her Cambridge apartment and clean the premises. The problem at that time was that the apartment contained an enormous number of bags containing trash, clothing, and rotting food which created a considerable odor, as well as fire and health concerns. When the inspectors entered the premises, they also found a certain amount of money and other valuables along with the trash and other materials.[11]

At the request of the Cambridge authorities, Guzelian was seen by a psychiatrist at Cambridge City Hospital.[12] He examined Guzelian and observed that although she was anxious and bizzarely dressed, she had appropriate affect and no formal thought disorder. He concluded that she was suffering from a psychotic grief reaction arising from her mother's death. He did not believe she was committable.[13] The authorities were advised and were satisfied.

After her Cambridge apartment was cleaned, it is not clear to what extent Guzelian used it thereafter, as she appears to have obtained the Brighton apartment at just about this time. However, she would go to the Cambridge property to collect the rent from the tenant upstairs. She would also keep flowers in the downstairs unit. She also received mail there. It appears that she frequently stopped by the Cambridge apartment in conjunction with visiting her mother's gravesite, which was at Mt. Auburn Cemetery in Cambridge. The Cambridge apartment, however, at least as of July 1981, when it was first visited by McDermott, did not have running water or gas for the stove. Some furniture was still there. Some bags of materials were there as well, but apparently nothing like the situation that existed in 1976.

Nor is it clear to what extent, if at all, Guzelian then lived in her Brighton apartment. As with the Cambridge apartment before it was cleaned, she appears to have used the Brighton apartment to hoard an enormous amount of trash and other materials, including money, much of it in bags piled virtually from the floor to the ceiling as is

discussed further below. And, as of July 1981, there was no running water in the Brighton apartment.

Between 1976 and 1981, Guzelian was treated by Dr. Randolph Rienhold, a physician associated with the New England Deaconess Hospital. He basically treated her for circulation problems in her legs throughout these years. A consistent theme in his evaluation notes is that Guzelian was unable to follow through with the course of treatments he had recommended, and that she consistently suffered from very poor personal hygiene.[14]

6. On March 28, 1981, the BHA served Guzelian with a notice to quit her Brighton apartment. On April 24, 1981, the Boston Rent Equity Board (BREB) conducted a hearing (Dkt. E-5334) regarding certain efforts to evict Guzelian from her Brighton apartment. According to the BREB records, the tenant involved was Mary Romano, represented by McDermott (then Ford).[15] The landlord was the BHA. The BHA was represented by Marcia Peters and David Allen represented Scott Management, the business entity which managed the apartments at 1871 Commonwealth Ave. The findings were: "tenant keeps apt. in deplorable and dangerous conditions. See pictures." The hearing officer's recommendation was "grant #2 and 3."[16]

7. On May 26, 1981, the BHA initiated an action in the Boston Housing Court to evict Guzelian (BHA vs. Romano; DKT. 20177). On June 4, 1981 there was an agreement for judgment-"Def't agrees to sort through her possessions in the apartment with volunteers to be supplied from a local church, during the month of June, so that she will be ready to move by June 30." Apparently, Guzelian did not satisfy these conditions, because on July 9, 1981, the Housing Court ordered her evicted.

8. When we informally interviewed you, you explained the circumstances surrounding your initial contacts with Guzelian as follows: Guzelian first approached you near a gym where the Mission High basketball team, which you were coaching, was scheduled to practice. You could not and cannot recall for certain when this meeting occurred, although your best recollection was that it occurred sometime during the 1979-1980 or 1980-1981 basketball season. In any event, Guzelian approached you on the street and asked for your help. You gave her a slip of paper on which you wrote McDermott's name and your State House telephone number. You told Guzelian you were late for practice, you had unsupervised players in the gym, and suggested she call McDermott.

The next time you recalled seeing Guzelian, after seeing her outside the gym, was when you were exiting the Paulist Center from a noon mass. You were walking up Park Street. Guzelian stopped you and reminded you of your first meeting. You and she then walked up to your State House office. At your office, you got her a cup of tea. You recalled kneeling in front of Guzelian to make eye contact and learning that she had some type of medical problem. McDermott then joined you. You talked about a number of matters, including "assistance," medical problems and a housing problem. You decided to take Guzelian on "as a project," to try to help her to the extent possible.[17] You essentially dictated a game plan on a yellow pad to McDermott, who implemented it. You could not recall any specifics as to what the plan entailed.

In doing all of this, you indicated you were not dealing with Guzelian as a state representative. You were assisting Guzelian as a private person trying to help another private person with problems. The reason you helped her was because she was someone in need who had asked for help.

Thereafter, you would see Guzelian in your office with varying degrees of frequency. On average, you would see her there approximately once a week. Sometimes you would just say "hi," other times you would sit and talk at greater length. There were periods of greater frequency of contact than others. One period of more frequent visits was that leading up to her eviction and the discovery of the money. After the money was found in Guzelian's Brighton apartment and the conservatorship was in place (as described below), you saw her on a less frequent basis.

You knew about the BREB and Housing Court eviction issue involving Guzelian's Brighton apartment. You were kept informed. You made no contacts with either entity. During this time, you did not socialize with Guzelian outside of the office. She did not visit your home, nor you hers. You could not recall attending any political or social events with her.

9. Under oath, you testified about these initial contacts as follows: Your best recollection was that you first met Guzelian outside the basketball gym in 1980. You also testified that when you met Guzelian for the second time and went to your State House office with her, as you were discussing her problems with her, McDermott gave you a look and otherwise made it clear to you that she was already working on Guzelian's situation. You had no discussion with McDermott during your meeting with Guzelian concerning what McDermott was doing for Guzelian. Basically, McDermott handled everything.

We asked you about your statement to the effect, "We decided to take her on as a project." You explained that the reference to "we" reflected a habit of yours of substituting "we" when you really meant "I." Moreover, you explained that you really did not develop a "game plan" with McDermott. She was already on top of the issue. You meant by that reference to a "game plan" that you were aware that McDermott had identified the problems that needed to be addressed, and was addressing them. Although you could not recall the specifics of any discussion you had with McDermott as to what those actions were, you were certain that you would have had such a discussion. Again, you insisted that you were not

providing Guzelian with a constituent service at this point. You noted that Guzelian was not someone living in your district; and helping such people is not part of your duties as a state representative.

You testified that during this time period before the money was found, you spent a significant amount of time with Guzelian in your office talking to her about politics, current events, or family. You shared a cup of tea with her, and maybe a hug as well as the conversation. You formed a bond of friendship. You found her intelligent and engaging. You liked her personality. Although you did not see her frequently outside the office, she did call you on many occasions at home.

10. McDermott testified. She provided the following information. According to McDermott, her first contact with Guzelian was on the telephone. (You had told her that a lady would be calling.) McDermott's best guess was that this call was approximately in April 1980, because it occurred a few months prior to McDermott becoming an "03".[18] The woman first introduced herself as Mary Romano. This was an introductory call. Guzelian indicated she would call McDermott at a later time with some questions. She did not ask for anything in that first phone conversation. Guzelian then began calling her on a more frequent basis with a lot of general questions. They were questions about housing, welfare, elderly lunches. There were a number of phone conversations before McDermott actually met Guzelian. McDermott could not recall the number of phone calls she had with Guzelian before they met.

Finally, McDermott met Guzelian after receiving a telephone call from her in which Guzelian said she had a problem at the BREB. Guzelian asked if McDermott would be able to go there and help her. McDermott cannot recall when this conversation took place vis-a-vis her first telephone conversation with Guzelian. McDermott met Guzelian outside of the Brigham's next door to the BREB.

McDermott asked Guzelian about her problem. Guzelian was not certain. They went into the BREB together. At the BREB, McDermott ascertained there was no reason for Guzelian to be there that day.

We asked McDermott whether it was fair to characterize her dealings with Guzelian up until that point as part of her job as an administrative assistant in dealing with someone whom you had met. She replied "no." She too noted that Guzelian did not reside within your district. Therefore, she did not consider any assistance to Guzelian part of her job, to be within her job description, and, in any event, to constitute "constituent services." We asked McDermott if she ever assisted someone who was not a constituent as part of her job. She replied she did typically by referring them to their own legislators. She indicated that she does not on a regular basis take constituents before government bodies, and though she could recall some instances of doing so with a non-constituent, she did not consider such assistance as being part of her job. McDermott stated she was trying to help Guzelian privately. They had become friendly over the telephone and had already established a "little bit of a relationship." Guzelian needed some help and Guzelian stated she had no one else to help her. That is why, according to McDermott, she helped her.

McDermott testified that after the BREB meeting, the frequency of her contacts with Guzelian increased both by phone and in person. They developed a real friendship. They exchanged correspondence. McDermott would see Guzelian at your office. She would also see her sometimes at Brigham's or at the Paulist Center or the Arch Street Church. McDermott did not visit Guzelian's home until Guzelian was being evicted. She believed she had Guzelian to her house before the eviction.

Sometime beginning in March 1981, McDermott on several occasions accompanied Guzelian to the BREB. McDermott introduced herself as a friend of Guzelian's at the BREB. She made no reference to her affiliation with you. McDermott testified that Guzelian's building was being converted into condominiums, there were a number of tenants that had problems. McDermott's visits to the BREB ended; there was nothing the board could do, and the matter was referred to the Housing Court. McDermott could not recall whether you were aware that she accompanied Guzelian to the BREB. She stated you were aware that she and Guzelian were friends.

The eviction issue moved from the BREB to the Housing Court. McDermott made a number of trips to the Housing Court in May and June, 1981. McDermott dealt with various housing specialists affiliated with the Court. The representative from the management company, David Allen, was also present. McDermott characterized his attitude towards Guzelian as "mean" and "condescending." All of these meetings took place during normal business hours at the Housing Court. It became obvious that Guzelian was not going to be allowed to stay in the Brighton apartment. McDermott and Guzelian then began talking about alternatives.

McDermott testified that as part of her job, she was attending more and more community meetings during the evenings. She did not need your permission to take actions on Guzelian's behalf during normal working hours. She stated that she assisted Guzelian as a friend. It had nothing to do with her job. McDermott did not keep any record of the number of hours she put in when she was an 03 consultant, from June 1980 until November 1981. There was no doubt in her mind that she made up for the number of hours she was away assisting Guzelian through her attendance at the community meetings at night. McDermott did not obtain any legal advice for Guzelian regarding the eviction issue. She thought Guzelian may have discussed the matter generally with Michael Muse.[19]

According to McDermott, you and Guzelian had established a friendship by the time the money was found in July 1981. She was welcome in the office and everyone knew this, to the point the Capitol Police would help her up the stairs when they saw her coming in. According to McDermott, Guzelian liked the attention she received from you. "She just absolutely shone in [your] presence...it was like she had a school girl crush on [you]." She testified Guzelian wanted to look her best when she saw you, asked McDermott not to share with you concerns about her personal hygiene, and that the two of you had a "real warm reciprocal rapport." You discussed your children with Guzelian and you shared your respective feelings about your mothers. All of this lead McDermott to say the two of you were genuine friends.

11. Former Boston Housing Authority Attorney Peters informed us that she recalled a young woman who became involved in the Guzelian eviction matter. That woman introduced herself as being from a state representative's office. Peters agreed to allow some additional time before the eviction would take place and was pleased to have someone involved to whom Guzelian listened. Peters was surprised to find a state representative taking such an interest in an eviction matter, as it had never before happened in her experience. However, the state representative (you) never contacted her and did not ask for any favors.

12. David Allen informed us that in the six to eight week period before Guzelian was evicted from her Brighton apartment, he put a great deal of pressure on the BHA to do something about the situation.[20] During that same time period, he received numerous calls from your office concerning Guzelian. The calls were from McDermott. In her first conversation, Allen said she identified herself as being from your office, and wanted to know why Guzelian was being evicted. Thereafter, whenever McDermott called, she would always identify herself as being from your office. Allen had no doubt in his mind that McDermott was trying to put some pressure on him to keep Guzelian in the Brighton apartment. Allen stated he never had the impression that, when McDermott called, she was calling for Guzelian as a friend.

Allen did not speak with you. His view, however, was that as a state representative you were trying to prevent the eviction. This was based in part on the calls from McDermott, but also on Guzelian telling Allen that she had someone working for her regarding the eviction, and that person was you ("Representative Fitzgerald").

13. George Traylor, your senior legislative aide at the time, testified that it was not at all unusual for your office staff to be providing what was, in effect, a constituent service for someone who did not live within your district. He explained that this was something your office staff did all of the time. Basically, your office would help anyone who needed assistance, regardless of whether they were a constituent.

14. Numerous other witnesses working in the Room 146 suite of offices at the time informed the Commission that Guzelian was seen frequently at your office prior to the money being found. These Room 146 employees had varying recollections as to when they first saw Guzelian in your office. Traylor recalled it as being several months before the money was found. Timothy Burke recalled it was at least nine months to a year before the money was found, because he recalled your office receiving a poinsettia from Guzelian in December 1980. The receptionist, Marjorie Murphy, and your secretary, Camille Austin, had no clear recollection.

In any event, from the witnesses we talked to, a picture emerges indicating that, for some not insignificant period of time prior to the discovery that Guzelian had assets, you frequently met with her in your office, sometime merely to say "hi," other times to sit and have tea and socialize for longer periods of time. You would hug her, kiss her, make her feel comfortable. You directed your office to make her feel welcome as well. You did this notwithstanding the fact that you knew she could not vote for you and notwithstanding her frequently being dirty and foul-smelling. (In fact, on one occasion one of the employees in Room 146 threatened to quit because Guzelian's presence was so unpleasant.)

15. McDermott testified that once she knew that Guzelian would have to leave the Brighton apartment, she made arrangements for Guzelian to move to the local YWCA. She asked you if she could borrow one of your brothers to help with the move. At your suggestion, she contacted your brother Thomas Fitzgerald who agreed to help. On July 9th or 10th, 1981, McDermott met Guzelian and the two of them went to her Brighton apartment. When they entered the apartment, McDermott was shocked to find it the way it was. It was a four or five room apartment virtually filled from floor to ceiling with various kinds of bags which were filled to varying degrees. There were so many bags that they actually defined narrow pathways through which one walked to get from room to room. There was no running water. McDermott could not recall whether there was electricity. There was a strong odor. McDermott described what ensued as being highly emotional. Guzelian was crying and said, "Thank God you are here. Please help me." McDermott became very upset to see that Guzelian was living in these conditions and asked "How did this ever happen?" To which Guzelian replied, "I don't know. I used to do everything with my mother." Guzelian indicated that there were things in the bags and that they should go through them. Upon opening some of the bags, they discovered rotting food, trash, clothes, and money all mixed together. McDermott testified that feces were found in the bags nearest the bathroom. McDermott testified her reaction to all of this was overwhelmingly sad and that she was particularly saddened to discover that Guzelian had assets to take care of herself, and so there was no need to live in such conditions. McDermott was angered at the landlord, who had apparently shut off Guzelian's water, as well as at the entire situation.

At some point, Tom Fitzgerald joined Guzelian and McDermott to help clean out the apartment. Later, as that process continued, McDermott went to the landlord, told him it would not be completed that day, she would be back with help, and asked him to secure the premises. He agreed. She also contacted you and informed you of what she found. Given her emotional state, you asked if she and Guzelian were all right. McDermott told you they were coming back to the State House to bring the money to your office. Thereafter, McDermott put a number of bags containing valuables into the trunk of the automobile she had driven, and returned to the State House along with Guzelian.

You stated that at or about that point you contacted John Gould of the Shawmut Bank and asked for advice as to the safekeeping of the money. He advised you to have the money brought to the bank and put in a safe deposit box. (Gould recalls being contacted by McDermott for this purpose. It was his impression that she was making this contact on behalf of a constituent of yours.) In addition, you arranged with the Capitol Police to have someone come to your office and provide security for the money. Officer Charles Dolan performed that service that day. You also contacted the State House press room and reached Bill Harrington, then a Channel 5 news reporter, and, according to Harrington, apprised him of the fact that your office had been helping a woman who appeared to be a "bag lady" who had just been discovered to have bags of money in the apartment from which she was being evicted.

16. Guzelian, McDermott and Tom Fitzgerald returned to the State House. Several bags of money were placed on or near the couch in the reception area of Room 146. Officer Dolan stood guard. Guzelian and McDermott withdrew to an inner office. Harrington interviewed you first off camera and then on camera. According to Harrington, off camera you told him that you and your staff had been trying to help a woman with a housing problem. You told him that when McDermott went to the apartment she found money in bags. You inquired whether this was a good human interest story. He said "yes". Harrington brought Lisa Capone of the State House News Bureau in to write for the print media. Harrington interviewed you on camera in Capone's presence.[21] No other reporters interviewed you on this matter. According to Harrington, you were asked who the woman was and you declined to identify her by name or have her filmed because you thought disclosure of her wealth would imperil her safety. You indicated your staff had been working with this woman trying to solve her housing problem and when they went to her apartment because she was being evicted, found it to be a derelict apartment -- meaning it had no heat, light and was in disarray. You indicated the money was being placed in a special account and Guzelian's medical needs would be met. In that interview, you stated, "She was most probably mentally ill."[22]

Although memories differ on exactly who was present, it appears that thereafter, you, McDermott, Guzelian, Traylor, and William Ezekiel, accompanied by Officer Dolan, proceeded to the Shawmut Bank. You and McDermott met briefly with Gould, who referred you to someone in the safe deposit division. You met with that person and secured the valuables. McDermott and Guzelian then proceeded to the YWCA. You agreed to meet McDermott and Guzelian at the Brighton apartment the next day.

Various witnesses have inconsistent memories as to whether the cleaning of the apartment and the opening of the bags continued the next day, or did not resume until Monday. In any event, you, McDermott and others, either that next day or the following Monday, helped complete the process of opening the bags, collecting the valuables, and otherwise cleaning the apartment. At one time or another, the following additional people were present for that purpose: Officer Dolan, Traylor, Muse and John Ryan.[23] In this follow-up clean-up, additional money and numerous bank passbooks were found. These additional valuables were also secured at the Shawmut safety deposit box.[24]

17. We interviewed a Father John Spenser, a Jesuit priest posted to St. Ignatius in Brighton between June 1981 and 1984.[25] Guzelian, known to him as Romano, would come to St. Ignatius periodically. According to Father Spenser, he visited Guzelian at her Brighton apartment on two occasions. The first visit occurred when Guzelian came to him asking for him to help her put a new lock on her door because the landlord was trying to evict her. (This was approximately one week before the Channel 5 broadcast discussed above.) At that time, Father Spenser went to her apartment and discovered it was filled with newspapers from floor to ceiling and wall to wall. He also found bags of money in the apartment. Guzelian told him that she obtained the money by begging for it.

At this point, Father Spenser telephoned your office. He does not recall with whom he spoke. Thereafter, according to Father Spenser, you, a woman and a man came out to Guzelian's apartment to survey the situation; and the three of you stayed at the apartment for approximately 20 minutes before leaving to get more help.

Father Spenser also recalled that, at the time, you suggested that the matter not be publicly disclosed because disclosing the fact that Guzelian had assets could imperil her safety. Two to three days later, Father Spenser saw pictures of the bags of money in your office in the news. Finally, Father Spenser visited you in your office a week to ten days after the news broadcast. On that occasion you informed him that Guzelian had been relocated in an apartment and the valuables had been secured.

18. At some point during the weekend of July 11-12, 1981, either you or McDermott contacted Muse regarding what had been discovered at Guzelian's Brighton apartment. (McDermott testified that Muse was

contacted at Guzelian's suggestion because as an attorney he could give advice on what to do.) While it is unclear who spoke to whom[26], Muse agreed to attend a meeting at your State House office regarding Guzelian. That meeting took place on Monday, July 13, 1981. It was attended by Muse, McDermott and Guzelian. According to Muse, you were around and he thought you came by to say hello.

Muse and McDermott both testified that at this July 13, 1981 meeting, Muse outlined various options that could be used in dealing with Guzelian's assets, from simply helping her as friends to using a power of attorney, a conservatorship, or a guardianship. His recommendation was a conservatorship based on physical incapacity in that Guzelian had various medical problems, including difficulty with her legs which affected her walking. According to Muse and McDermott, Guzelian fully understood what was being explained to her, and chose the conservatorship option, further choosing McDermott as her conservator and Muse as her attorney.

19. Thereafter, according to Muse and McDermott, they assisted Guzelian in finding all of her assets. They discovered, among other assets, approximately $60,000 in United States Savings Bonds dating from the 1940's through June 1981, as well as Guzelian's ownership of the Cambridge and Arlington two-family properties.

20. Muse testified that he arranged for Guzelian to be examined at Belmont Associates in Cambridge (Muse knew a Dr. Stephen Ranere who practiced there.)[27] On July 15, 1981, Guzelian was examined by a Dr. Michael Fuller of Belmont Associates. Guzelian was taken to the doctor's office by you and McDermott. Dr. Fuller's examination notes state as follows:

> This is a 66 year old "bag lady" brought in by Representative Fitzgerald and social worker, Pat Ford, for the purposes of establishing that Mary is competent to make decisions about who should handle her money affairs, but not competent to handle them herself...Patient apparently walked into Rep. Fitzgerald's office a couple of months ago and asked for help...When his workers went to help her move from her apartment on Commonwealth Avenue to new housing, they found the apartment full of feces and other excreta, as well as bags of garbage and trash. Upon further investigation, many of the bags had a great deal of money in them, both paper and coin, and part of today's examination is to establish that Mary is competent to assign Representative Fitzgerald and/or his assistant Patricia Ford to handle her money matters... she has a considerable amount of body odor and hygiene is poor... neurologically she is alert and oriented times three, she knows her presidents; calculations were done poorly... I feel that she is competent to comprehend the nature of her act of assigning Representative Fitzgerald or Pat Ford to manage her money affairs, but I would consider her incapable of handling these affairs on her own, as is clear from her present situation.

At the completion of his examination, Dr. Fuller signed a medical certificate attesting to the fact that he had personally examined "Mary Romana" and she was incapable by reason of physical incapacity of caring for herself and her estate and had sufficient mental ability to comprehend the nature of her act in assenting to the petition.[28]

21. On July 16, 1981, Suffolk County Probate Court Judge Mary Fitzpatrick granted the conservator petition after a hearing at which Guzelian was present. Judge Fitzpatrick wrote the following note on the petition, "Age 67 -- living in house with no running water. Dirty. She (one year ago) came to Mrs. Ford[29] at State House."

22. According to Muse, on July 22, 1981, a Wednesday, Guzelian contacted him and asked to see him that day. A meeting was scheduled in Muse's law office for that afternoon. Guzelian met him at his office that day at approximately 5:30 p.m., and told him she wanted to make out a will. He interviewed her at length. He asked her whether she was married and about relatives. She replied she was divorced, had a sister Elizabeth and identified no other living relatives. Guzelian stated she had no prior will. According to Muse, she was aware of the extent of her assets and was rational. She was fastidious about accounts, always involved and concerned about getting the best interest rates possible. She wanted to leave her estate equally to McDermott and Fitzgerald. According to Muse, she wanted to do this because "They're my friends. They're the closest friends I have. They're almost like family and there's no on else to give it to." She said she wanted to leave only a dollar to her sister Elizabeth because Elizabeth had run out on her and her mother. According to Muse, he asked whether Guzelian wanted to leave anything to any charities. She said "no." He then listed specific charities and Guzelian again demurred saying, "No they can take care of themselves." We asked whether Guzelian linked the bequests to what you and McDermott had done for Guzelian as public officials. Muse said "no" and went on to state that Guzelian described you as "the most wonderful person in the world."

Thereafter, Muse drafted the will on Thursday, July 23, 1981, gave Guzelian a copy that same day and asked her to read it, and then arranged to have her come into his office on Friday, July 24, 1981, to sign the will.

23. Muse further testified that, at the appointed time, Guzelian signed the will prepared by Muse at his 59 Temple Place office.[30] She read the original will and said it was exactly as she wanted it. The will signing was witnessed by Richard Leazott and Helen Chuminski. As of that time, Leazott and Chuminski were employees of the SEIU[31], but had and have no connections to Fitzgerald or McDermott. Both Leazott and Chuminski testified that they witnessed Guzelian sign the will. Neither noticed anything unusual about Guzelian's

behavior on that occasion.[32] Forensic tests done by the Secret Service indicate that the signature on the will is genuine and that the ink used to make that signature was commercially available as of 1981.

24. From August 5, 1981 through August 20, 1981, Guzelian was an in-patient at the Sancta Maria Hospital. The admission dealt primarily with the problems she was having with her legs. Her attending physician was Dr. Fuller. In his discharge note, he emphasized the importance of her having a bone scan to determine whether she had a tumor. He observed that she persistently refused a further work-up. He also recommended, "Evaluation by psychiatrist or psychologist."[33] Both his notes and his testimony make clear that these recommendations were discussed with McDermott. According to both McDermott and you, you both visited Guzelian in the hospital during this stay.[34]

25. Beginning on or about August 14, 1981, Guzelian began a lease of an apartment at the Longwood Towers, 20 Chapel Street, Brookline, MA. She appears to have physically moved in sometime shortly after her release from the Sancta Maria Hospital.

26. On September 25, 1981, McDermott, as conservator, filed an inventory with the Probate Court indicating that Guzelian's personal estate was appraised at $103,388, and the real estate, consisting of the Cambridge and Arlington properties was valued at $197,500.

27. On October 30, 1981, Dr. Ranere[35] signed a medical certificate indicating that Guzelian had sufficient mental ability to comprehend the nature of her act in assenting to a petition. It is not clear for what purpose the certificate was signed.[36]

28. Between November 9, 1981 and November 10, 1981, Guzelian was a patient at the Sancta Maria Hospital where she underwent a bone scan and was treated for phlebitis.[37]

29. On November 13, 1981, McDermott, as conservator, petitioned the Probate Court for authority to sell Guzelian's Arlington property for $88,500. On November 16, 1981, Dr. Ranere signed a medical certificate stating Guzelian had sufficient mental ability to comprehend the nature of her act in assenting to the petition. The petition was granted on November 20, 1981. On December 18, 1981, McDermott, as Guzelian's conservator, and with her consent, sold the property for $88,500. Muse apparently acted as the broker on the sale, earning a commission of $5,100.

30. On December 29, 1981, McDermott petitioned the Probate Court for partial conservator fees in the amount of $6,000 for the period July 21, 1981 through December 21, 1981. Guzelian assented. In an accompanying affidavit, McDermott stated she had expended over 750 hours since appointment, and she spent an average of around 20 hours per week as Guzelian's conservator.

31. Between December 23, 1982 and January 24, 1983, Guzelian was an in-patient at the Sancta Maria Hospital as a result of being struck by a taxi cab near the Lenox Hotel. Guzelian was also evaluated for a change in personality because, according to the hospital records, "her friends [were] concerned about some possible changes in her mental status." A January 4, 1983 nurse's note states, "constantly yells out - bangs on rails, ...obnoxious and crazy and dirty." A January 23, 1983 neurological consultation report by Dr. A. Fullerton describes Guzelian's mental status as follows: "Actually seems remarkably good..." Dr. Ranere's discharge report concerning this hospitalization states, "Mrs. Guzelian is a 67 year old white female admitted to the hospital for treatment of phlebitis and question of altered mental status. Her friends also noted her to have a change in personality ... she was seen in consultation by Dr. Fullerton who felt that Mrs. Guzelian's mental status was a little off." It also appears clear that by this point she has been diagnosed as having Paget's Disease.[38]

32. During the next several months of 1983, Guzelian's condition deteriorated. She had both urinary and bowel incontinence problems. She had urinary and bowel "accidents" at the Longwood Towers in the public restrooms and common areas. Longwood Towers' management complained to McDermott about the situation. Guzelian also began to see certain people, especially management at Longwood Towers, as much more threatening. McDermott discussed this with Dr. Ranere in the fall of 1983. He, and an endocrinologist who was apparently treating Guzelian for the Paget's Disease, recommended that Guzelian be evaluated by a psychiatrist, and referred Guzelian to a local psychiatrist.[39]

33. On November 5, 1983, McDermott took Guzelian to see the psychiatrist. He examined Guzelian for approximately an hour. Based on the medical history he obtained and his examination, the psychiatrist diagnosed Guzelian as having chronic paranoid schizophrenia. (He observed in his interview of Guzelian that she was cheerful and cooperative, with generally appropriate affect, not clinically depressed, and oriented times three.) He concluded that she was not committable at that time, and he would work closely with McDermott. The psychiatrist scheduled Guzelian for another appointment for November 8, 1983.[40]

Thereafter, Guzelian failed to appear for her November 8, 1983 appointment with the psychiatrist. On November 14, 1983, he met with McDermott to discuss the situation. On November 18, 1983, McDermott called the psychiatrist stating that Guzelian had defecated in the lobby of Longwood Towers, was refusing to cooperate with suggestions from McDermott, and that Longwood Towers was in the process of obtaining an injunction against Guzelian.

As a result of this phone call, the psychiatrist, on

that same day, completed a so-called "pink paper"[41] recommending Guzelian be committed to the Massachusetts Mental Health Center (MMHC). He may have brought a copy of the "pink paper" to the local police department. He also coordinated with a doctor (now deceased) from MMHC. (We have not been able to locate a copy of this "pink paper.")

Nothing happened regarding this "pink paper" until November 26, 1983. At that time, two police officers took Guzelian to MMHC, accompanied by McDermott. Muse was also present at MMHC at that time. Guzelian saw an MMHC psychiatrist.[42] He examined her, and then apparently declined to admit her.

We contacted the MMHC psychiatrist. He has no current recollection of the events in question. He did observe that at that time no one would have been committed to MMHC unless they were in imminent danger to themselves or others. We have also contacted the MMHC. They cannot find any records regarding this or any other visit by Guzelian to the MMHC.

34. On February 23, 1984, McDermott, as conservator, petitioned the Probate Court to be allowed to purchase a condominium at 9 Corey Road, Brookline for Guzelian. On that same date, Dr. Ranere signed a medical certificate stating that Guzelian had sufficient mental capacity to assent to that petition. (There is no record that Dr. Ranere examined Guzelian at or about that time.[43] In addition, Dr. Ranere was not aware of the results of Guzelian's visit to the psychiatrist or the MMHC. Neither Guzelian, McDermott nor the psychiatrist informed Dr. Ranere of the diagnosis or that she had been "pink slipped." Dr. Ranere stated that he would not have signed the certificate if he had known about the "pink paper." Dr. Ranere expressed surprise upon being advised of the chronic paranoid schizophrenia diagnosis and that Guzelian had been "pink slipped.") The Probate Court approved the conservator's petition that same day.

35. On or about June 11, 1985, Guzelian was struck by a taxi near the Lenox Hotel. She was taken to the Massachusetts General Hospital. She made sufficient progress at the hospital that a transfer to the Spaulding Rehabilitation Hospital was contemplated, but on June 25, 1985 her condition suddenly worsened and she died at 5:09 p.m. Cause of death on the death certificate is listed as pulmonary thrombosis.

36. On July 8, 1985, Muse, as executor, filed Guzelian's will with the Norfolk Probate Court (Docket 85 P 1932 E 1). On July 30, 1985, Muse apparently sent you and McDermott notice that you were parties in interest in the will.[44] Muse, McDermott and you each stated that Muse did not inform you or McDermott that Guzelian had made you her co-beneficiaries, or indeed, had even drafted a will, until after this notice was mailed.[45] Once the notice had been mailed, McDermott and you contacted Muse, and he informed each of you of your status as beneficiaries. On October 25, 1985, the Guzelian will was approved by the Probate Court.

37. You have indicated that you never read the will and were not aware that it was signed in July 1981 until you learned of that fact through the **Boston Globe** in 1991. Muse testified, however, that he gave you the will shortly after you were notified that you were an heir.

38. On November 14, 1985, a column written by Peter Gelzinis appeared in the **Herald** characterizing Guzelian as a "bag lady," and describing how she had been befriended by you. The article discloses that Guzelian had an estate in excess of $300,000 and that you and McDermott are listed as her sole beneficiaries. The article generally applauds both what McDermott and you did for Guzelian, and the fact that you were being, in effect, rewarded for your efforts.

39. According to probate conservatorship records, McDermott received a total of $27,000 in fees for acting as conservator; and Muse received a total of $27,000[46] for legal services provided to the conservator.

40. Pursuant to Guzelian's will, it would appear you and McDermott received a series of distributions beginning in 1985 and ending in late October 1988 totalling $393,784.98.[47] You received $200,142.49 of that amount, and McDermott received $193,642.49.[48]

41. In your deposition, we asked you to describe your contacts with Guzelian between the time McDermott was appointed conservator (July 16, 1981) and Guzelian's death (June 25, 1985). You provided the following information: Guzelian still visited you at your office, but less frequently after the fall of 1981. She was still in frequent telephone contact with you. You attended birthday parties for Guzelian which took place every year, but you were not certain whether you attended each year. Guzelian picked the restaurant of her choice on her birthday. You recalled going to Jimmy's Harborside one year. You did not recall who paid for these dinners. There were also unscheduled meetings with Guzelian when you would bump into her on occasion on Tremont Street. You would then have a sandwich or soft drink. You believe that Guzelian also visited your apartment on Hillside Street in Mission Hill. You did not recall ever visiting her at her Longwood Towers apartment, although you recalled giving her rides there on occasion and dropping her off at the lobby. When she was at your office at the end of the day, you would either give her a ride home, or a ride over to Quincy Market. You also gave her rides home to her 9 Corey Road, Brookline condominium, and visited her there on one or two occasions. Guzelian also attended and saw you at certain events sponsored by your office in conjunction with Thanksgiving or St. Patrick's Day. You did not purchase any gifts for Guzelian, but recalled that McDermott purchased greeting cards and gifts for you to give or send to Guzelian. You did not receive any gifts from Guzelian, only greeting cards. You visited Guzelian in the hospital after her 1982 and 1985 accidents. You also attended Guzelian's wake and funeral, along with

members of your family.[49]

42. We asked McDermott to describe her contacts with Guzelian between July 15, 1981 and June 25, 1985. She provided the following information: She had almost daily contact with Guzelian. She telephoned Guzelian every morning and had general social conversations, and Guzelian contacted her almost every afternoon at the State House, or else Guzelian visited your State House office. During those conversations, they planned evening activities and McDermott advised Guzelian whether she would be stopping by Guzelian's apartment that evening. When Guzelian visited the office, frequently near the end of the day, either you or McDermott gave her a ride from the State House to wherever she wanted to go.

Saturday was cleaning day at Guzelian's Longwood Towers apartment and Brookline condominium. McDermott went there virtually every Saturday. Around the holidays, Guzelian visited McDermott at McDermott's house. At various times during the year, McDermott and Guzelian shopped together. When McDermott was on vacation, McDermott's mother took over the duties of daily contacting Guzelian. In addition, McDermott's two brothers on occasion accompanied McDermott to Guzelian's apartment. Guzelian liked McDermott's brothers. In essence, according to McDermott, all of the normal routine activities that a family is involved in were done with respect to Guzelian. Guzelian was considered part of the family.

McDermott and Guzelian planned social events they would attend regularly. Once a month they had lunch or dinner at a predesignated restaurant. Birthdays were celebrated every year. McDermott and others, often including you and Muse, would take Guzelian to a nice restaurant on her birthday. McDermott or someone else in the group other than Guzelian would pay for the meal.[50] McDermott decorated Guzelian's apartment or condominium with Christmas decorations. They exchanged presents at Christmas. They exchanged cards.[51] McDermott's mother also always had a present for Guzelian. Every Mother's Day, McDermott picked up Guzelian and they would buy a plant and visit the Mount Auburn Cemetery where Guzelian's mother is buried.

McDermott had no knowledge that Guzelian ever spent the night sleeping away from her apartment or condominium. She had no knowledge of her ever sleeping at Rosie's Place.[52] Guzelian called McDermott at night, sometimes very late at night, for rides home. This occurred predominantly whenever Guzelian failed to make the last MBTA trolley out of Arlington Station, at 1:00 a.m., or whenever the escalator was not working at Arlington Station and Guzelian could not climb down the stairs.

Guzelian often referred to McDermott as her daughter and introduced her as such when meeting people. She also referred to McDermott's brother Douglas as her son.[53]

After Guzelian's accident on June 11, 1985, McDermott visited Guzelian at the hospital daily.

43. You, McDermott, and Muse each testified that you had no knowledge of anyone putting any pressure on Guzelian to make you and McDermott beneficiaries of her will. You each testified that you had no knowledge of anyone unduly influencing Guzelian to make you and McDermott beneficiaries of her will. We have obtained no direct evidence indicating you put pressure on Guzelian or otherwise improperly influenced her in regard to her making you a beneficiary of her will.

44. We have interviewed approximately 75 witnesses, including numerous people who knew Guzelian well such as members of her various prayer groups, people who helped her at shelters, medical people, several of her tenants, and people who simply met her on the street and came to know her well. No one can offer any direct evidence that you directly or indirectly pressured Guzelian to name you as a beneficiary of her will.

II. Discussion

As a state representative you are a state employee for the purposes of the conflict of interest law, G.L. c. 268A. As noted in the beginning of this letter, the Commission's inquiry focused on allegations that you violated G.L. c. 268A, §§3, 23(b)(2) and (b)(3) by your official dealings with Guzelian and your acceptance of a bequest from her estate. The basic §3 issue is whether by accepting the bequest you accepted an unlawful gratuity. The §23 issues are essentially two: First, under §23(b)(2) did you use or attempt to use your official position to pressure or otherwise improperly influence Guzelian into naming you a beneficiary? Second, under §23(b)(3) did your conduct create an appearance of impropriety, namely that Guzelian improperly influenced you or unduly enjoyed your favor in the performance of your official duties? We start with the §3 issue.

A. Section 3

Section 3(b) of G.L. c. 268A, in relevant part, prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from soliciting or accepting anything of substantial value from anyone for or because of any official act or act within his official responsibility performed or to be performed by him.

As the Commission stated **In the Matter of George Michael**, 1981 SEC 59, 68:

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of §3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is

> required to bring §3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties and permit multiple remuneration for doing what employees are already obliged to do - a good job.

For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. It is sufficient that the gratuities were given to the official "in the course of his everyday duties for or because of official acts performed or to be performed by him and where he was in a position to use his authority in a manner which could affect the gift giver." **United States v. Standefer**, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978), **aff'd** on other grounds, 447 U.S. 10 (1980), citing **United States v. Niederberger**, 580 F.2d 63 (3rd Cir. 1978). **See also United States v. Evans**, 572 F.2d 455 (5th Cir. 1978). As the Commission explained in **Advisory No. 8:**[54]

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

In 1990 the Commission made clear that §3 would apply even where there is evidence of a private social relationship between the donor and donee unless the private relationship is the motive for the gift.[55]

In determining that reasonable cause exists to believe you violated §3(b) by accepting a bequest from Guzelian, the Commission first considered whether bequests are covered by §3[56] and concluded that they are. A bequest is clearly an item of substantial value.[57] If a state employee accepts such an item of substantial value for or because of official acts, or acts within his official responsibility, performed or to be performed, then the literal language of §3 is satisfied.

There are good policy reasons supporting this result. The conflict of interest law is a remedial statute. **Everett Town Taxi Inc. v Aldermen of Everett**, 366 Mass. 534, 536 (1974). It should be read broadly so as to effect its remedial purposes. **See Levy v. Board of Reg. & Discipline in Medicine**, 378 Mass. 519, 525 (1979). If a public official knows that he has been named a beneficiary in the will of someone with whom he has had official dealings, that person's official treatment by that public official may be affected by the expectation of an inheritance. Even where a public official was not aware of the will while he was dealing officially with the citizen, the suspicion will always linger that he was so aware, no matter how much the matter is investigated. In addition, if a public official can inherit from a person with whom he has had official dealings, concerns will arise as to whether the public official may have in some way exerted undue influence on that person to persuade her to leave a significant bequest to him. In short, in the Commission's view, confidence in government is undermined if public officials are allowed to inherit from people with whom they have had official dealings.[58]

You raise several objections both to the conclusion that §3 applies to bequests, and to the foregoing public policy discussion. First, you note that in G.L. c. 268B, §1(g), the definition of "gift" excludes "anything of value received by inheritance." You argue that if, in 1978, when G.L. c. 268B was adopted, the Legislature determined that bequests need not be reported in SFIs, it should follow that there is an inference that bequests are not covered by G.L. c. 268A, §3.

We do not find that argument persuasive. While it is not irrelevant that the Legislature chose to exclude bequests from gifts for SFI purposes,[59] as the OGE opinion discussed above indicates, such an exclusion is not dispositive for substantive conflict of interest law purposes. The 268B reporting requirements serve purposes beyond just identifying possible 268A violations. (And not all relationships or events which would constitute c. 268A violations are required to be reported in SFIs.) It seems reasonable to conclude that in the absence of clear legislative language to the contrary, the exclusion of bequests from the term "gift" in 268B should have little impact on the question of whether bequests are to be included within the phrase "item of substantial value" as used in G.L. c. 268A, §3.

You also note that the House of Representatives, in adopting in 1977 a Code of Ethics for its members, officers, and employees, enacted a §12 which provided,

> No member of the House, officer or employee shall knowingly accept gifts ... having an aggregate monetary equivalent value in excess of $35 in a calendar year from any person or entity having a direct interest in legislation before the General Court. Nor shall any member of the House, officer or employee accept any gift of cash from the aforementioned persons or entities. Gifts from relatives, bequests, awards of a nominal nature presented in recognition of public service, and commercially reasonable loans made in the ordinary course of business, are exempted from the aforementioned provisions.

Journal of the House of Representatives, 11/10/77, at 2264-2265. In 1979, the House amended §12 to

incorporate the definition of gifts as appearing in 268B, §1. The amended version has continued to appear in the House Rules to the present.

You argue that if the members of the House believed that it was acceptable for a member or employee to accept a bequest even from someone with a direct interest in legislation that was pending, then certainly they should be able to accept a bequest from a constituent with no such interest. The House's Code of Conduct is not, however, determinative of how G.L. c. 268A, §3 should be construed. Again, as with the exemption of bequests from G.L. c. 268B, §1, in the absence of clear legislative language as to how G.L. c. 268A, §3 should be construed, the Commission will construe it broadly so as to achieve its remedial purpose.

You also argue that the purposes of the statute are not served if bequests are covered because at the time when the bequest becomes of value (that is, when it is received[60]), the decedent and the government official can no longer have a public relationship. Therefore, bequests should be distinguished because the decedent can no longer hope to gain anything by creating goodwill with the public official. Furthermore, if the public official did not know he was a named beneficiary while dealing with the testator, how could he be influenced in any way in the performance of his official duties? You argue that this fundamental difference between bequests and other gifts is the main underlying rationale for the House Rules cited above and the different treatment of bequests in the statute which created the Commission. St. 1978, c. 612.

While this argument is not without merit, the literal language of the statute makes no distinction between a person who gives an unlawful gratuity for past acts, with no expectation of any future dealings with the donee, and a person who gives a gratuity with an expectation of future acts to be performed. Both are explicitly covered. There are public policy implications in both situations. If a public official thought he might receive a gratuity for an official act even though he would know that he would never deal with that person again, that could influence the nature of his conduct in relation to the potential donor. If he knew he had been named a beneficiary by someone with whom he was having official dealings, that could very much influence his official treatment of the testator, just as it might influence a family member's attitude towards a rich relative once the family member was named in the relative's will. And, as already discussed, nothing should ultimately turn on whether it can be proved that the public official knew he was a beneficiary or that bequests are subject to change. The statute is prophylactic. It is intended to protect against the potential for conflict. **See Quinn v. State Ethics Commission**, 401 Mass. 210, 214 (1987).[61] There is a potential for conflict where a person who is having official dealings with a state employee makes that person a beneficiary of his will. The best way to prevent such conflicts from arising is to have a rule, as do judges, that requires the public official not to accept the bequest.

Applying the evidence to the elements of §3,[62] it is clear that you were a state employee at all relevant times. The distributions in dollar amounts were certainly items of substantial value. We are aware of no law or regulation which indicates that accepting such bequests is "otherwise provided for by law."

The next question is whether there is reasonable cause to believe that when you accepted these distributions you understood the reason Guzelian made her bequest to you was "for or because of" official acts or acts within your official responsibility. Your understanding should be based on what Guzelian's motive was on the day she signed the will, July 24, 1981, and not on the day she died.[63]

You performed acts within your official responsibility[64] affecting Guzelian. While it is unclear in what capacity Guzelian first approached you, you reacted as a state representative. She had no pre-existing social or business relationship with you. You directed her to your administrative assistant. You met with her in your office on repeated occasions, and as of the date the will was executed, July 24, 1981, rarely outside of your office. You received most of your telephone calls from her at your office, although you testified she would call you at your home as well. You approved your administrative assistant McDermott in intervening in her eviction issue, at that time an issue of paramount importance to Guzelian. You appear to have directed your office to basically help Guzelian with her problems.[65]

This conclusion is bolstered by the fact that McDermott appears to have introduced herself as your administrative assistant in dealing with Peters and with Allen, the Brighton apartment manager. And Guzelian, in telling Allen that a state representative was helping her regarding the eviction, appears to have been relying on your official influence. In addition, when the money was found at her Brighton apartment, you arranged to have Capitol Police provide security, and you appear to have directed another staff assistant, Traylor, albeit along with your brother, to go to the apartment to help with the cleaning. You contacted a banker (with whom you had worked as a state representative on the Tregor bill) to help with the safeguarding of the funds. You thereafter allowed Muse, McDermott and Guzelian to meet in your State House office to decide how to help Guzelian reorganize her affairs, and you stopped by at that meeting. All of these activities appear to be acts performed by a state representative as a state representative on behalf of a citizen.

You argue that these acts were not acts within your official responsibility, but rather private acts provided to a private friend; indeed, that even from the very beginning of your relationship with Guzelian, your acts were private, not acts within your official responsibility. This argument is based on Guzelian's not having an interest in any matters that came before the legislature and her not living within the district. The Commission

rejects this contention. Your office helps people who live outside your district.[66]

You argue that as a matter of law, even if what you did for Guzelian could be properly described as constituent services, broadly defined, those are not acts within your "official responsibilities" as defined in 268A, §1(i) (see fn. 57 above). The argument is that such acts do not involve the directing of agency action. We disagree. You, in effect, told McDermott and others to help Guzelian. That is directing agency action.[67]

The final issue is motive, i.e., whether you understood that Guzelian named you in her will for or because of acts within your official responsibility or because of friendship. The evidence, in our view, indicates that the motive was your official rather than your personal relationship. Your official dealings with the eviction issue and the events surrounding it were so close in time to Guzelian's execution of the will and so important in her life that the Commission has concluded that her motive was to reward you for those acts.[68]

Even if friendship were a motivating factor, for all the reasons just discussed, it falls short of being the motive. Therefore, under the applicable test, we would still not accept your contention that friendship was the motive. Consequently, the "for or because of" element has been met here.

In short, each of the §3 elements, including the "for or because of" element, has been satisfied here. Therefore, the Commission found reasonable cause to believe that you violated §3(b).

B. Section 23

Section 23(b)(2) 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 people.

In a series of disposition agreements the Commission had made clear that a public official may not put pressure on someone with whom he has an official relationship for his or anyone else's private personal gain.[69] If you and/or McDermott pressured Guzelian to name you and McDermott beneficiaries of her will, that would be an unwarranted privilege of substantial value violating §23(b)(2). Indeed, while the above-referenced disposition agreements involve overt pressure, if you took advantage of Guzelian through your contacts with her as a public official by somehow exploiting the trust or reliance she had developed, that too could be an unwarranted privilege. See EC-COI-83-156.

The evidence the Commission has gathered from its investigation is not sufficient to warrant a finding of reasonable cause to believe that you put pressure on Guzelian or improperly influenced her to name you as a beneficiary, thereby violating §23(b)(2). Consequently, the Commission did not vote to find reasonable cause to believe you violated §23(b)(2). (In this regard, the Commission was mindful of the fact that, prior to the discovery of Guzelian's assets, the evidence indicates that you treated her with respect and kindness.)

Finally, Section 23(b)(3) prohibits a state employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person knowing all the relevant circumstances to conclude that anyone can unduly enjoy his favor or improperly influence him.[70] The Commission has made clear in a series of disposition agreements that §23(b)(3) is concerned with the appearance of impropriety, and that a public official creates the appearance of impropriety by entering into a private financial relationship with an individual with whom the public official has or has had official dealings.[71]

The Commission found reasonable cause to believe you violated §23(b)(3) on these facts. Under §23(b)(3) there is clearly a significant appearance of impropriety here. By your accepting the bequest under all of these circumstances, an impression arises that Guzelian either unduly enjoyed your favor or improperly influenced you. This appearance problem is exacerbated by the duration of your involvement with Ms. Guzelian prior to her will being executed, the proximity in time between the discovery of Ms. Guzelian's wealth and the execution of the will, and your relationship to the will's draftsman, Muse.

You have argued that this supplemental standard of conduct does not apply to your conduct with respect to the Guzelian bequest because the relevant facts known to you were disclosed in a manner that was public in nature starting in 1981 and continuing throughout the eighties. You point to your interview with Harrington and Capone in 1981 (which dealt with the discovery of Guzelian's valuables), to the 1985 Gelzinis column (which disclosed your beneficial interest in Guzelian's estate) and to the Probate Court records of the estate (which indicate the identities of the legatees, the draftsman and executor, and the date of the will). You suggest that these disclosures should preclude a reasonable person from concluding you violated §23(b)(3). You have also argued that in a 1986 amendment to §23, the Legislature eliminated the subjective "appearance of impropriety" standard for the more objective "reasonable person" standard.

In response, the Commission notes that at least some of the facts on which a reasonable person would rely in determining whether there was a §23(b)(3) violation here were not publicly disclosed. Thus, the relatively short duration of your involvement with Guzelian prior to her signing her will, the short time period between the discovery of the money and her signing the will and your relationship to the will's draftsman, were not disclosed in the media, in court papers, or in any disclosure to the Commission. (As an elected official, any §23(b)(3) disclosure by you would be made to the Commission.)

As to your contention that §23(b)(3) no longer applies to appearances of impropriety, the Commission rejected that argument in Keverian, 1990 SEC 460.

Your contention that you did not know when the will was drafted until this past year cannot be corroborated and, in any event, the statute applies not just where one acts knowingly, but where one "has reason to know." You certainly could have ascertained the facts at the time you accepted the bequest.

Finally, you argue that you had no knowledge of the will while Guzelian was alive, so your official treatment of her could not have been affected by an expectation of an inheritance. Under all of these circumstances, however, and without information from Guzelian, we cannot satisfy ourselves that that is true. From a policy point of view the only way to ensure that your actions were not influenced by the hope or expectation of inheritance was for you to disavow the inheritance.[12] That would have sent a clear message that all of your conduct with Guzelian was above-board and well-intentioned. Absent such action, an appearance of impropriety inevitably arises.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to insure your understanding of, and your future compliance with, the conflict of interest law. The Commission chose to resolve this matter with a public enforcement letter for the following reasons: (a) this matter involved events which occurred, for the most part, a decade ago, and many of the activities discussed in this letter are beyond the Commission's statute of limitations and outside of this Commission's jurisdiction; (b) there is no legal precedent until now which would put legislators on notice that they may not accept bequests from constituents or others with whom they have had official dealings; and (c) the Commission uncovered no direct evidence that you directly or indirectly coerced or induced Guzelian into making you a beneficiary of her will.

This Ethics Commission matter is now closed.[13]

Date: December 9, 1991

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[1]Pursuant to §5(D) of its Enforcement Procedures, in lieu of an adjudicatory proceeding, the Commission may resolve a matter through the issuance of a public enforcement letter which assesses no civil penalty but which publicly reviews the alleged violations of law for preventative and educational purposes. A public enforcement letter may be authorized where the facts and alleged violations warrant a public resolution without the formality and expense of an adjudicatory proceeding or an admission that a subject has violated G.L. c. 268A or G.L. c. 268B. A public enforcement letter may be issued only with the consent of the subject.

[2]You have raised concerns about the confidentiality of Guzelian's medical records and her communications with doctors. Your counsel has suggested these matters are confidential as a matter of law and that the record must reflect that by agreeing to the public release of this letter you are not participating in the dissemination of privileged material.

[3]The following statement of facts is the result of the Commission's preliminary inquiry into the above-stated allegations. The inquiry includes taking sworn testimony of many witnesses, unsworn personal interviews of many other witnesses, and the assembly and review of thousands of documents.

[4]The Committee on Post Audit and Oversight, unlike other Committees, does not hold hearings on bills. It conducts investigations and issues reports.

[5]Beginning in January 1979, your State House office was located in the Post Audit Committee suite of offices accessed through Room 146. That suite of offices had a common waiting room with a receptionist. There was a couch in the waiting area on which visitors could sit. Between January 1979 through the end of 1981, you shared space with your staff members and clerical help. Beginning in January 1982, when you became Post Audit Committee chairman, your office was still located among the suite of offices in Room 146, but you obtained your own separate office.

[6]An "03 employee" has a contract with the state to be paid a certain amount per hour for a certain number of hours, but does not receive any other benefits beyond the hourly compensation.

[7]An "02" employee is a "regular" state employee, hired for an open-ended period of time and whose compensation includes benefits.

[8]Guzelian's neighbors at 23 Cleveland Street, Arlington, Sarah Sahagin and her daughter Diane Hansel, stated that Guzelian and her mother slept in the dining room among piles of boxes, with a blanket thrown over newspapers serving as a bed.

[9]You are quoted in a November 14, 1985 **Boston Herald** article as stating, "One day Mary followed me up the hill from Park Street and simply appeared in my office. She looked bad. She smelled bad. And it was pretty obvious that she had not taken care of herself in years."

[10]In July 1981, Guzelian and a tenant at 118 Aberdeen agreed to a small increase in the monthly rent.

[11]Cambridge City Solicitor Russell Higley stated that there was a few thousand dollars in cash and approximately $40,000 in bank passbooks. The money and passbooks were held by the city until the solicitor's office was satisfied that it was appropriate to return them to Guzelian, i.e., once she had retained an attorney to

help her with her financial affairs and perhaps serve as a conservator. Higley could not recall who that attorney was. However, according to Gloria Sannella, sometime prior to April 22, 1977, Guzelian came to Sannella's father, Attorney Vincent Mattola, now deceased, with a Board of Health problem. She had photographs with her of an apartment with unsanitary living conditions. (Higley showed us file photos of the Cambridge apartment depicting similar conditions.) Mattola saw Guzelian several times regarding her apartment issue. On or about April 22, 1977, Guzelian paid for and received a copy of a will drafted by Mattola. Sannella's recollection is that Guzelian named family members as beneficiaries in that will. (Sannella was a legal secretary for her father, and recalled typing and witnessing the will.) We have found no such will.

[12]Consistent with a protective order obtained by another psychiatrist in this matter, the Commission will not disclose the identity of this psychiatrist or publish the contents of his notes or direct testimony. See infra.

[13]We deposed this psychiatrist pursuant to a court order. He had no memory, independent of his notes, of his dealings with Guzelian. In reviewing his notes, he observed that Guzelian was not a danger to herself, to others or unable to care for herself in the community. Consequently, he did not recommend her commitment. When asked whether Guzelian had testamentary capacity, he stated he could not determine from his notes whether Guzelian possessed testamentary capacity. He currently is of the view that Guzelian could have developed a trusting and loving relationship with another person, if that person provided a mother substitute.

[14]In various notes Dr. Rienhold states the following: 7/8/80: "comes in today for the first visit in 3 months. Again, in a dilapidated state of repair. Her mouth is filled with ulcers due to poor fitting dentures which she continues to wear. ... Her feet are again swollen and mildly cellulitis, in keeping with the fact it does not appear that she has had any personal hygiene for weeks." 10/8/80: "It is virtually impossible to make her better when her life situation is so difficult. For example, she spent all night sitting up in a chair which is just about the most difficult thing for her legs." 1/7/81: "She was finally able to take a bath recently which is a notable achievement. ... Certainly her state of hygiene isn't helping." 6/19/81: "She has not taken a bath in approximately four months."

We deposed Dr. Rienhold. He testified that he believes that Guzelian had some kind of underlying mental illness, although he noted that he is not a trained psychiatrist. He stated she was competent enough to get around on the street with no apparent source of income and survive. She did not, however, appear to be taking care of herself. He had no way of judging her rationality. At times, she was rational enough to seek and demand medical care; on the other hand, she did not follow through on his recommendations for treatment. He had no professional opinion as to whether she should have been committed.

He described Guzelian as a pleasant, kind person, who was not suspicious and who could not be manipulated. He made no contemporaneous findings of testamentary capacity, but he believed that she would have been capable of understanding a will and that she was leaving her money to certain beneficiaries named in the will. She would be capable of identifying relatives that she may have had and naming them in a will. He treated her through June 1981.

[15]Most BREB and BHA records for this time period have been destroyed. However, based on extant BHA computer printouts, it appears that Guzelian, using the name Romano, had a tenancy in her Brighton apartment from 8/16/76 to 5/26/81, when she was evicted "for cause." We cannot explain why the BHA computer record cites 5/26/81 as the eviction date, when the court record and other evidence makes clear Guzelian was evicted on July 9, 1981.

[16]Ground two is "violation of covenant." Ground three is "nuisance." Xerox pictures of an apartment with an enormous number of bags are on the back side of the document.

[17]In the 1985 **Herald** article cited above, you are quoted as stating, "We adopted her. I know that it sounds crazy, but Mary was ours. And she wasn't even in my district."

[18]"On March 2, 1987, McDermott testified in a Cambridge Rent Control Board matter that she first met Guzelian in March 1981. That involved an action (SCZ-86295) brought by several present and/or former tenants against the estate of Guzelian in which they sought a determination as to the proper rent for 118-120 Aberdeen Avenue.

[19]As of the spring of 1981, Muse was a Boston attorney involved in the general practice of law. A significant portion of his practice involved his acting as legal counsel to the Service Employees International Union (SEIU), Local 254. He was at that time your friend. He was a frequent visitor at your office. It would not be unusual for you and he to socialize after work. In addition, he was a registered lobbyist for various clients, and, on occasion, would lobby you regarding matters of interest to those clients.

[20]According to Allen, he had seen the extent of the garbage that was piled up in Guzelian's apartment and was concerned about a fire hazard. He had also received complaints from other tenants that Guzelian was screaming and urinating in the hallways.

[21]According to Channel 5, it broadcast this interview on July 10, 1981. The release date on Capone's print story is also July 10, 1981. These factors, combined with references in both stories to events taking place that day, suggest that this Harrington interview occurred on

Friday July 10, 1981, rather than the previous day. Moreover, Harrington recalls that the story was broadcast on the same day that the interview was conducted.

[22]Apparently, not all of what Harrington recalled you stating on camera was used in the July 10, 1981 broadcast. (Channel 5 cannot find any "outtakes" from this broadcast.) Thus, the description of the apartment and the references to medical needs being met and staff helping with the eviction issue, did not appear in the broadcast.

Harrington subsequently did a follow-up story in which, according to the broadcast, you said: "What we've done is we've put her in temporary housing, at the present moment. Within a month she will be in permanent housing. We've cleaned her up a bit. We've gotten clean linen and things like that. We're going to put her legal affairs in order, and most of all we're ... looking to take care of her overall needs for the near future." Channel 5 informed us that this story was broadcast on July 24, 1981.

[23]Ryan was a local attorney who Muse knew.

[24]Shawmut Bank representatives informed us that the valuables only remained at the bank for a day or so. The money was counted by representatives of your office, and then moved out of the vault. As we understand it, the money was then deposited into the Provident Institution for Savings.

[25]You testified that in this time-frame you recalled a priest from St. Ignatius or St. Columbkille was helping Guzelian in some fashion.

[26]Muse, had little, if any, recollection of the specifics of the weekend conversation. He only knew that based on the substance of the conversations at the subsequent meeting, it was clear to him that Guzelian wanted him to act as her attorney for purposes of dealing with any issues arising from the valuables which had been discovered.

[27]Subsequently, after reviewing his testimony, Muse informed the Commission through counsel that he did not make these arrangements and does not know who did.

[28]We deposed Doctor Fuller. He is an internist. He testified that in his view Guzelian did have sufficient mental capacity to understand the nature of her actions. He had no serious concerns that Guzelian was mentally ill at the time he examined her.

[29]Again, McDermott's name at that time.

[30]As noted earlier, Muse at this time was acting as legal counsel to the SEIU, Local 254. Consequently, the Local gave him space at their offices.

[31]Leazott was a business agent for SEIU and Chuminski was a cleaning person.

[32]Chuminski only recalled seeing Guzelian for a few moments where they exchanged pleasantries. Leazott recalled that these events took approximately a half an hour.

[33]As to his August 28, 1981 recommendation, "evaluation by psychiatrist or psychologist," in his view Guzelian was competent to make her own judgments regarding whether she should have such an evaluation. He did not feel the need to make a referral. He could not recall the specific reason he made this recommendation.

[34]A Sancta Maria Hospital physical therapist recalled your visiting Guzelian in 1981.

[35]Dr. Ranere is an internist.

[36]We deposed Dr. Ranere. He testified that Guzelian was unique, eccentric, sometimes demanding, sometimes coy, and sometimes manipulative. She probably suffered from a personality disorder, but otherwise her thought processes were intact. This personality disorder was a form of mental illness, yet it would not prevent her from understanding the nature of her acts, and thus she had mental capacity to assent to the various petitions in the probate court, according to Dr. Ranere.

[37]Dr. Ranere stated that Guzelian's mental demeanor at this time was that she could converse normally, she understood what was being said, and generally had good thought process. She was, however, difficult to deal with sometimes.

[38]Paget's Disease involves an enlargement of and weakening of the bones through an overly rapid replacement process. Enlarged bones can press on nerves causing hearing, visual and other problems.

[39]This psychiatrist obtained a protective order from the Superior Court enjoining the Commission from publishing his identity, the contents of his notes or his direct testimony.

[40]We deposed this psychiatrist pursuant to a court order. He testified that in his current medical opinion, Guzelian lacked testamentary capacity in 1983 (and, based on his own records and knowledge only, her mental status was probably the same in 1981.) He based this opinion on his view that Guzelian had no appreciation of her assets and, that consistent with his diagnosis, she would have been incapable of love or emotional attachments to people. He qualified that statement by saying that someone with Guzelian's condition could make a bequest out of spite or to hurt someone she regarded with suspicion. He also observed that he felt McDermott genuinely loved Guzelian and was seeking to do what was appropriate for her.

[41]Applications pursuant to G.L. c. 123, §12, for the involuntary hospitalization of a person were, at the

relevant time, on pink paper, hence the phrase "pink paper." They were issued where, after examination, it had been determined that the failure to so hospitalize would create a likelihood of serious harm by reason of mental illness. Pursuant to §12, the subject had the option of invoking c. 123, §10's voluntary commitment provisions. Only if the application was made by a physician specifically designated to have authority to admit to a mental health facility, would the person be admitted immediately. Otherwise, such a person would be given a psychiatric examination immediately after his reception at such facility. Such admissions would last for no more than a 10 day period, unless an appropriate court order were obtained.

[42] Again, consistent with the above-cited protective order, we have not identified this psychiatrist.

[43] There is no record of Guzelian having been examined by Dr. Ranere or anyone else from Belmont Associates between the time of her January 24, 1983 discharge from the Sancta Maria Hospital and her death on June 25, 1985. Dr. Ranere did, however, order a CT scan for her in late August 1983. It is unclear what prompted that request.

[44] We have a copy of the July 30, 1985 notice sent to McDermott. No one can find any written notice to you; however, Muse testified that a notice similar to McDermott's was sent to you on or about the same date.

[45] We asked Muse whether he was familiar with the requirements of G.L. c. 201, §38, which provides that a conservator or guardian "shall have custody of all wills, codicils, and other instruments purporting to be testamentary dispositions executed by his ward." Muse stated that he was aware of that law at the time he drafted the will. However, in his view, the law did not apply to the Guzelian situation. We do not understand why the law does not apply to this situation.

[46] A check issued on March 13, 1986, on Guzelian's estate account, indicates that $32,730 was paid to Muse for legal fees regarding the conservatorship. Muse testified that some portion of that amount was for his legal work for the estate.

[47] As noted above, the Commission completed its preliminary inquiry into certain G.L. c. 268A allegations on October 25, 1991. In the Commission's view, the only distribution you received which would be actionable under its statute of limitations would be the last one you received, i.e., the $21,892.49 check issued to you on October 25, 1988. (Similarly, the only then actionable distribution for McDermott would be the check issued to her on October 25, 1988, for $33,642.49.) You maintain that the statute of limitations bars action by the Commission even with respect to these final distributions.

[48] These figures are based on our review of the executor's accountant's records, the executor's cancelled checks, and the probate records. We note that the probate records appear to be incorrect in indicating that McDermott received $198,642.49.

[49] One witness, Boston taxi cab driver Lawrence D. Cronin, stated that one night, perhaps in the fall of 1983, Guzelian asked him if he knew you. Guzelian then told him, "[Fitzgerald] is my boy." And "he is my son." Guzelian went on to say, according to Cronin, "He takes care of me and I am going to take care of him. His friend is wonderful. His friend comes over and cleans my house."

[50] The conservatorship checking account ledger indicates check number 169, payable to Muse, totaling $294.09, was for "expenses at birthdays." Neither Muse nor McDermott could recall any information regarding this check. The check itself is dated October 21, 1981 and bears only the notation "expenses."

[51] We have copies of a Christmas card and two birthday cards sent by Guzelian to McDermott on December 25, 1981, November 25, 1981, and November 25, 1982, respectively. We also received four notes written by Guzelian to McDermott. One note states, in part, "Dear Pat: I love you and my son Douglas. You really did me a big favor. I won't forget it. ... While you were here cleaning the sun was out. Then I got cold. Pat I love my refrigerator so don't throw anything out. That will be my job to clean the refrigerator. I am free this Friday and Saturday all day. Please call the electrician and plumber for this (illegible). Thank you. Pat would you please clean that little bit in the bathroom because when I bend down - I fall and I can't get up. Then will you please set the clock radio on loud on the station where the news and weather comes on set it for 8:00. Pat please call me tomorrow Thursday as early as 6:00 in the morning? This girl always gives me $50 once a month and second Thursday of the month and takes me to a hotel to eat. Thanks a million. Love Mary. P.S. Pat bring my prescription for two pairs of peds for my veins in my legs they help me a lot. Also please lock the storm window and the regular window because I have congested head failure. I had two blackouts already - before I knew you. Dr. Reinhold when he was good to me to wear a sheepskin hat. Thank you. Love Mary [underlining in original]."

A second note reads, "Dear Pat: I love you and Doug, very much for helping me. Pat dear please don't put anything in the yellow trash can in the kitchen. Put it in the paper bags that I neatly folded on top of the trash bags I put on the floor next to the lamp then put this one you used where we put the trash, don't throw away any bags away please! The bananas I just brought home (illegible) put them in the bin because it's very dirty and sticky. I'm going to wash my clothes when I come home tonight. Pat please open the clothes drawer and please put the white (illegible) tip that is on the table next to the dryer and then put it in the bathtub. Thank you Pat. Love Mary. P.S. Please call me very early for mass Saturday. Set the clock radio for 8:00 but call me earlier if you are up."

[52]In this regard, we note that at the Cambridge Rent Control Board March 2, 1987 hearing, McDermott testified: "Mary did not live the normal lifestyle that we did. She slept unusual hours... She had no conception of time or anything. If she happened to be downtown and it was late and she missed the last train, she would go into the Mass. General and sleep in the lobby... She would go to Rosie's Place, or just whatever was convenient." It is unclear from the Rent Control Board testimony whether McDermott was describing Guzelian's lifestyle prior to Guzelian's Cambridge apartment being rented (sometime in 1982) or through the time of Guzelian's death.

[53]See the note quoted above in which she refers to "my son, Douglas."

[54]Issued May 14, 1985.

[55]"Where a public employee is in a position to take official action concerning matters affecting a party's interest, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §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." **In the Matter of Charles F. Flaherty**, 1990 SEC 498, 500.

[56]We are aware of no G.L. c. 268A precedent in which §3 in particular, or G.L. c. 268A generally, has been applied to bequests. There does not appear to be any G.L. c. 268A legislative history dealing with bequests. Nor do we find any cases dealing with the issue under the federal counterpart of our §3, 18 USC §201(g), or any other conflict of interest law. The only citation that we have found that is somewhat on point is a letter from the Office of Government Ethics (OGE) responding to a request for an opinion as to whether certain United States Post Office employees could receive a bequest from a deceased patron of their post office branch. The opinion addresses the issue of whether the bequest would be compensation for services under the provisions of 18 USC §209, and thus barred. (The opinion also observed that on the facts presented therein the receipt of the bequest did not violate any other federal conflict of interest provision.) The opinion concludes that the receipt of the bequest under the circumstances of the facts presented would not be prohibited by §209(a). The opinion makes clear, however, that bequests are covered by §209(a). In reaching that conclusion, the opinion makes reference to §209(3A) of Title H of the Ethics in Government Act of 1978, Pub. L. N. 95-521, 92 Stat. 1849 (1978), as defining "gifts" as not including bequests and other forms of inheritance. (The referenced Ethics Act is the apparent counterpart to our financial disclosure law, G.L. c. 268B.) The OGE opinion states, "but since there is little discussion in the legislative history concerning this section of the Ethics Act, it is difficult to draw any definitive conclusions of what Congress might have intended by that definition for the issue presented here."

[57]The phrase "item of substantial value" is not defined in G.L. c. 268A. It has been construed by the courts to include anything in value of at least $50. **Commonwealth v. Famigletti**, 4 Mass. App. 584, 587 (1976). Similarly, the Commission has taken the position that anything in value of $50 or more is substantial value.

[58]For a comparable rule see Code of Judicial Conduct, Canon 5(C)(4)(c), which states: "A Judge or member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and if its value exceeds $100, the Judge reports it in the same manner as he reports compensation in Canon 6(c)." Thus, it would appear that if Guzelian had left a bequest to a judge who had presided over a lawsuit in which she was involved, the judge would not have been able to accept it. We have not found any other codes of conduct addressing this issue.

[59]The legislative history of G.L. c. 268B sheds no light on why bequests were excluded from gifts that have to be reported on statements of financial interests.

[60]The mere fact of being named a beneficiary is not of substantial value because it is contingent. The will can be revoked at any time.

[61]"Chapter 268A is concerned with the appearance of and the potential for impropriety as well as with actual improprieties." **Id.** at 214.

[62]As stated above, §3 prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from soliciting or accepting anything of substantial value from anyone for or because of any official act or acts within his official responsibility performed or to be performed by him.

[63]After all, that is when Guzelian, apparently for the last time, really focused on the issue of who she wanted to inherit her estate. Her donative intent can be best construed based on the circumstances immediately pre-existing her signing her will, not on what happened thereafter.

[64]As discussed above, §3 refers to accepting an item of substantial value for or because of official acts or acts within one's official responsibility. "Act within his official responsibility" is not defined in G.L. c. 268A. However, "official responsibility" is defined as "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."

[65]You are quoted as saying in the November 14, 1985 **Herald** article, "We adopted her."

[66] "McDermott stated that when she went to the Rent Equity Board with Guzelian, she did so as one friend helping another. That friendship, however, appears to have developed based on a few phone calls. (She had not yet met Guzelian at the time.) In contrast, both Peters and Allen stated that McDermott introduced herself as your administrative assistant, and appeared to be dealing with Guzelian as part of her official duties.

[67] In addition, your conduct can be viewed as involving "official acts." "Official act" is defined as "any decision or action in a particular matter or in the enactment of legislation." G.L. c. 268A, §1(h). The definition of particular matter includes a decision or a determination. G.L. c. 268A, §1(k). Your decision, in effect, to have your office "adopt" Guzelian, and all that that implied, was such a determination. In addition, the various decisions you made on the day the money was found also involved actions in a particular matter.

[68] There is a question as to the duration of your relationship with Guzelian prior to the execution of her will. There is evidence that suggests it was a year or more (such as the statement on the conservatorship petition written by Judge Fitzpatrick and Mr. Burke's testimony concerning the Christmas poinsettia). There is also evidence that it could have been a period of three to four months (such as McDermott's testimony at the Cambridge Rent Control Board and the medical history taken by Dr. Fuller at the time he first examined Guzelian). For the reasons articulated in the text, it is unnecessary to resolve this question.

[69] E.g., **Pezzella**, 1991 SEC 526; **Galewski**, 1991 SEC 504; **Zeppieri**, 1990 SEC 448; **Singleton**, 1990 SEC 476; and **Cibley**, 1989 SEC 422.

[70] Section 23(b)(3) goes on to provide, "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

[71] E.g., **Pezzella**, 1991 SEC 526; **Garvey**, 1990 SEC 478; **Keverian**, 1990 SEC 460.

[72] A proper disclosure, while avoiding the §23(b)(3) issue, would, of course, not avoid the §3 issue already discussed.

[73] As discussed above, cognizant that the Attorney General and U.S. Attorney may be conducting investigations into your dealings with Guzelian, the Commission directed the staff to forward our investigative materials to those agencies for any action they deem appropriate.

Patricia McDermott
c/o Thomas Kiley, Esq.
Cosgrove, Eisenberg & Kiley, P.C.
One International Place
Boston, MA 02110

RE: PUBLIC ENFORCEMENT LETTER 92-2

Dear Ms. McDermott:

As you know, on September 11, 1991, the State Ethics Commission commenced a preliminary inquiry into allegations that you violated G.L. c. 268A, §§3, 23(b)(2) and (b)(3), by your official dealings with Mary Guzelian (Guzelian) and your ultimate acceptance of a bequest from her estate. On October 25, 1991, the Commission found reasonable cause to believe that you violated §§3 and 23(b)(3). (The Commission has not voted to find reasonable cause to believe you violated §23(b)(2).) Aware that the Attorney General and the United States Attorney may be conducting investigations into your dealings with Guzelian or her estate, the Commission also directed the staff to refer its investigative materials to those agencies for any action they deem appropriate. Finally, in view of certain mitigating circumstances, the Commission voted to resolve its inquiry by issuing this Public Enforcement Letter.[1]

By agreeing to this public letter as a final resolution of this matter, the Commission recognizes that you do not admit to the facts and law as discussed below. (You deny or have no knowledge of many of the facts and you maintain 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. You have waived no other rights other than the right to have a hearing.[2]

Enclosed is an enforcement letter, **Public Enforcement Letter 92-1**, of even date issued to State Representative Kevin W. Fitzgerald. It sets forth the facts and reasoning of the Commission which have led it to conclude that there is reasonable cause to believe that Representative Fitzgerald violated §3(b) by accepting a bequest from Guzelian for or because of acts performed or to be performed within his official responsibility; and violated §23(b)(3) because, under all of the circumstances set out in his letter, the acceptance of such a bequest from someone whom he had helped as a representative created an appearance of impropriety. Except as set forth below, the facts and discussion in **Public Enforcement Letter 92-1** are as applicable to you as they are to the Representative. Accordingly, they are incorporated by reference into this document, which is itself a public enforcement letter which closes the Commission's investigation of your conduct.

The principal difference between the Commission's view of your activities and Representative Fitzgerald's lies in the extent of the relationship you had with Mary Guzelian. A careful review of the relevant evidence has led the Commission to conclude that you and Guzelian were extremely close by the time of her death. Nevertheless, that relationship does not appear to have had the same character on July 24, 1981, when Guzelian's will was executed. One cannot say that the motive for Guzelian's testamentary disposition to you was friendship alone; instead she may have been motivated by a desire to reward you for services the Commission asserts were part of your official duties, or to impel you to continue to provide them in the future. Therefore, your closer relationship to Guzelian does not alter the ultimate conclusion reached in the enclosed letter, and there is reasonable cause to believe that you violated §3(b) by accepting a bequest from Guzelian because of acts performed or to be performed within your official responsibility, and violated §23(b)(3), because, under all of the circumstances, the acceptance of such a bequest from someone whom you had helped as a legislative aide created an appearance of impropriety.

Date: December 9, 1991

[1/]Pursuant to §5(d) of its Enforcement Procedures, in lieu of an adjudicatory proceeding, the Commission may resolve a matter through the issuance of a public enforcement letter which assesses no civil penalty but which publicly reviews the alleged violations of law for preventative and educational purposes. A public enforcement letter may be authorized where the facts and alleged violations warrant a public resolution without the formality and expense of an adjudicatory proceeding or an admission that a subject has violated G.L. c. 268A or G.L. c. 268B. A public enforcement letter may be issued only with the consent of the subject.

[2/]You have raised concerns about the confidentiality of Guzelian's medical records and her communications with doctors. Your counsel has suggested these matters are confidential as a matter of law and that the record must reflect that by accepting this letter you are not participating in the dissemination of privileged material.

Included are:

Summaries of all Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1991.

In the Matter of Robert Galewski
(January 24, 1991)

The Massachusetts State Ethics Commission fined Braintree Assistant Building Inspector Robert Galewski $1250 for attempting to use his position as an inspector to persuade the developer of a luxury subdivision to sell him property in the development at a price "that he could afford."

In a Disposition Agreement, Galewski agreed to pay the fine and admitted that his actions in connection with the Buckingham Place development in Braintree violated §23(b)(2) of the Conflict of Interest Law. Section 23(b)(2) prohibits public employees from attempting to use their official position to secure an unwarranted privilege for themselves or anyone else.

"By asking the (developers) to sell him a lot when he knew (they) were not selling a lot, and by asking (one of the developers) to sell him a house that he could afford, Mr. Galewski sought unwarranted privileges of substantial value. By making these requests during the course of official inspections, Mr. Galewski knew or should have known that in effect he was using his position as an inspector to attempt to secure unwarranted privileges," the Disposition Agreement said. "Mr. Galewski maintains that he did not intend for his conduct to be perceived as an attempt to use his official position to secure any such unwarranted accommodation ... (However), even if Mr. Galewski did not intend for his conduct to be perceived as an attempt to secure an unwarranted privilege of substantial value, he had reason to know his conduct would be so perceived."

In the Matter of William Hart
(February 19, 1991)

The Ethics Commission fined Metropolitan District Commission (MDC) Deputy Director of Recreation William Hart $1500 for violating the Massachusetts Conflict of Interest Law by directing the recalculation of vacation time for certain MDC employees including his mother, and by interceding in an employee transfer that resulted in a supervisor with whom Hart's mother had a history of conflicts being transferred to another MDC facility and ultimately replaced by a Hart family friend.

In a Disposition Agreement reached with the Commission, Hart admitted his actions violated §§6 and 23 of the conflict law, and agreed to pay the fine. Section 6 of the law prohibits state employees from participating in their official capacity in particular matters in which members of their immediate family have a financial interest. Section 23 prohibits public employees from using their official position to secure unwarranted privileges for themselves or anyone else.

In the Matter of Clifford Marshall
(February 21, 1991)

The State Ethics Commission fined Norfolk County Sheriff Clifford Marshall $10,900 for violating the Massachusetts Conflict of Interest Law by charging $4,450 in personal expenses to a "company" credit card issued to him by the Norfolk County Deputy Sheriffs' Office (NCDSO), and for appointing two of his sons as deputy sheriffs. In addition, the one son who was still employed as a deputy sheriff when this matter came before the Ethics Commission has resigned his post.

In a Disposition Agreement reached with the Ethics Commission, Marshall admitted that his actions violated the conflict law, and agreed to pay a $2,000 fine for the illegal appointments and an $8,900 penalty for repeated personal use of the credit card.

Marshall became Norfolk County Sheriff in 1975. Civil process is served in Norfolk County by deputy sheriffs appointed by the sheriff through the NCDSO.

In or about 1980, the Disposition Agreement said, Marshall received an American Express card that had been issued to the NCDSO. According to the Disposition Agreement, Marshall understood that this card was to be used for "business-related expenses," meaning anything that could be said to promote the interests of the NCDSO. In Marshall's view, any expense that would benefit the Sheriff's Department would likewise benefit the NCDSO and would be a legitimate business expense, the Agreement stated.

Between December 1984 and April 1989, Marshall made at least 298 charges on his NCDSO credit card, totaling $25,289.25. Marshall admitted that 54 of these charges were "personal," and totaled $4,450.52, the Disposition Agreement said. These personal charges included, for example, various expenses incurred on trips to New York, Colorado, Rhode Island, Michigan, and Canada to watch his son play hockey; as well as airline tickets, birthday gifts, and dinners for family members, the Agreement said.

Marshall reimbursed the NCDSO $4,450.52 for his personal charges, in addition to paying the $8,900 fine for his personal use of the credit card, and has not used the NCDSO credit card at all since April 20, 1989. Marshall's personal use of the NCDSO credit card constituted a substantial unwarranted privilege, which violated §23(b)(2) of the conflict law, according to the Disposition Agreement. Section 23(b)(2) prohibits public employees from using their official positions to secure unwarranted privileges for themselves or anyone else.

The Commission also ruled that Marshall's obtaining the card, even if it were used solely for business purposes, still violated the conflict law. The Disposition Agreement stated that Marshall's use of the card for business related purposes violated §3 of the conflict law, which prohibits a public official from accepting anything of substantial value given to them because of their official duties. The Disposition Agreement stated that this was the first occasion in which the Commission had found a violation of §3 in such circumstances.

Marshall was also found to have violated the Conflict of Interest Law when he appointed two of his sons as Norfolk County Deputy Sheriffs. The two appointments violated §13 of the conflict law, which prohibits county employees from participating in their official capacity in any matter that affects their immediate family members' financial interest.

In the Matter of Lynwood Hartford (February 22, 1991)

The Massachusetts State Ethics Commission fined former Freetown Building Inspector and Health Agent Lynwood "Butch" Hartford $1,000 for violating the Conflict of Interest Law by securing a $2,000 "finder's fee" in connection with the sale of property owned by a local developer with whom Hartford was dealing in his official capacity. The Commission also required Hartford to forfeit the $2,000 "finder's fee."

In a Disposition Agreement Hartford admitted that his actions violated §23 of the conflict law, and agreed to pay the fine and forfeiture. Section 23 of the law prohibits public employees from using their official positions to secure unwarranted privileges for themselves or anyone else, and also prohibits such employees from acting in a manner that would cause an objective observer to believe they would act with bias in carrying out their official duties.

The Disposition Agreement with Hartford was reached after the Ethics Commission's Enforcement Division issued Hartford an Order to Show Cause, which would have required an adjudicatory hearing on the matter. The Disposition Agreement marked the end of the Commission's investigation of the case.

In the Matter of Donald Whalen and George Nelson (March 14, 1991)

In Public Enforcement Letters issued to two members of the Wellesley Police Department, the State Ethics Commission ruled that requests by police officers for "consideration," or dismissal, of traffic citations based on the violator's personal connection with a police officer violate the conflict of interest law.

Although the Commission had previously fined a Bellingham selectman for pressing an officer to fix a speeding ticket issued to the selectman's friend, this is the first time the Commission has addressed what the Public Enforcement Letters indicated was a wide-spread practice of police departments arranging for the dismissal of traffic citations as an accommodation to fellow police officers. Although one of the officers involved defended the practice as a "legitimate tool to further professional relationships among various police departments," the Commission rejected the rationale.

The Public Letters explained that ticket-fixing is an unwarranted privilege that violates §23 of the conflict law, and added, "The ability of a police officer to seek special treatment for somebody because of that person's private relationship to a police officer is the kind of conduct that offends and troubles people. It demonstrates that there is one standard for the public, but a different standard for those with private connections to the police. In the area of law enforcement, the standards must be clear and be administered in an even-handed way." Section 23 of the conflict law prohibits public employees from using their official position to secure substantial unwarranted privileges for themselves or anyone else, and also prohibits public employees from acting in a manner that would cause an objective observer to conclude they would act with bias in their official capacity.

In the Matter of Ackerley Communications (March 15, 1991)

The State Ethics Commission fined Ackerley Communications of Massachusetts, Inc. $500 for violating the Conflict of Interest Law through the actions of two of its employees, who illegally gave five skybox tickets to a Boston Celtics game to a State Representative.

In a Disposition Agreement reached with the Commission, Ackerley, through its Vice President Christopher Carr, admitted to violating §3(a) of the Conflict of Interest Law because Ackerley was responsible for the actions of its employees, Louis Nickinello and Elizabeth Palumbo. Nickinello and Palumbo gave a total of five Ackerley skybox tickets to Representative Charles Flaherty (D-Cambridge) for the November 16, 1988, Boston Celtics/Golden State Warriors basketball game at the Boston Garden. The two Ackerley employees gave the tickets to Flaherty in an effort to cultivate Flaherty's goodwill as a public official towards Ackerley, the Disposition Agreement said.

Ackerley agreed to pay the fine, and also agreed to take steps that were acceptable to the Ethics Commission to ensure that no sporting event tickets or other gratuities owned by the corporation be given by Ackerley or any of its agents to any public employee in Massachusetts.

In the Matter of Leon Stamps (May 14, 1991)

The State Ethics Commission fined former Boston City Auditor Leon Stamps $1500 for violations of the Massachusetts Conflict of Interest Law involving business conferences that included substantial "frills."

In a Disposition Agreement reached with the Commission, Stamps admitted to violating §3 of G.L. c. 268A, the conflict law, by attending two State Street conferences in Arizona at the bank's expense.

Section 3 prohibits public officials from seeking or accepting anything of substantial value that is given to them for or because of their official position, or for anything they could do in their official capacity. Section 3 also prohibits any person or entity in the private sector from offering or giving anything of substantial value to

public employees because of their official position or because of anything they could or would do in their official capacity.

According to the Stamps Disposition Agreement, State Street's Trust Department has been custodian of the City of Boston Retirement Board's funds since 1979. The funds total an estimated $780 million and, in the past few years, generated annual custodial fees of approximately $400,000 to State Street. In September of 1988, the Retirement Board transferred $70 million to a passive account at State Street that generates approximately $70,000 in annual fees to the bank, the Disposition Agreement said.

In 1987 and 1988, State Street's Trust Department held its "Annual Master Trust Client Conference" in Arizona. Clients of the bank's Trust Department were invited to attend these conferences, with all expenses other than airfare paid by the bank, the Agreement said. At the conferences, participants attended informational sessions in the mornings and were offered a variety of social events and entertainment in the afternoons and evenings. Stamps attended both conferences and all of his expenses except for airfare were paid by State Street, the Disposition Agreement said.

In the Matter of Stone & Webster
(May 14, 1991)

The Boston-based engineering firm Stone & Webster was fined by the Ethics Commission for violations of the Massachusetts Conflict of Interest Law involving educational seminars that included substantial "frills." Stone & Webster, through a Disposition Agreement signed by its chairman, admitted to violating §3 of the conflict law by sponsoring two educational seminars for public employees that included harbor cruises. Stone & Webster paid a $2,000 civil penalty for their violations of the law.

Section 3 prohibits public officials from seeking or accepting anything of substantial value that is given to them for or because of their official position, or for anything they could do in their official capacity. Section 3 also prohibits any person or entity in the private sector from offering or giving anything of substantial value to public employees because of their official position or because of anything they could or would do in their official capacity.

In the Matter of James N. Russo
(May 31, 1991)

The Massachusetts State Ethics Commission fined Hull Fire Chief James N. Russo $750 for violating G.L. c. 268A, the conflict law, by appointing his wife's brother to the position of "permanent intermittent" firefighter, knowing that the appointment placed the brother-in-law in line for a full-time firefighting position.

In a Disposition Agreement reached with the Commission, Russo admitted that his action violated §19 of the Conflict of Interest Law, and agreed to pay the fine. Section 19 prohibits municipal employees from participating in their official capacity in any particular matter that affects an immediate family member of the employee or his or her spouse.

In the Matter of William E. Howell
(June 3, 1991)

The State Ethics Commission fined William E. Howell, the former division chief of the Attorney General's Industrial Accident Division, $1000 for violating the so-called "revolving door" section of the Conflict of Interest Law. That section prohibits former state employees from working in the private sector on certain matters they were previously responsible for as public employees.

In a Disposition Agreement reached with the Commission, Howell admitted to violating §5(b) of G.L. c. 268A, the conflict law, when he privately represented a state employee in connection with a matter that was under his official responsibility while he was still heading the Attorney General's Industrial Accident Division. Howell also agreed to pay the fine. Three other conflict charges against Howell were dismissed.

Section 5(b) of the conflict law prohibits former state employees, within one year after leaving public service, from acting as agent or attorney for anyone other than the Commonwealth in connection with any particular matter that was under the employees' official responsibility during the last two years of their state service.

According to the Disposition Agreement, Howell was chief of the Industrial Accident Division from March 5, 1975, until January 20, 1987. During this time, he was responsible for representing the interests of the Commonwealth in workers' compensation claims made by state employees. Several weeks after Howell resigned from his state job, he began an association with attorney Augustus Camelio.

A state employee who was injured in 1984, and whose case came under Howell's official responsibility, filed an additional claim in 1987 seeking compensation for the disfigurement she sustained from the 1984 injury, the Disposition Agreement said. Camelio originally represented the state employee.

Howell requested a legal opinion from the Ethics Commission several months after he left state service, asking how the conflict law would apply to his privately representing state employees regarding their workers' compensation claims, the Agreement said.

While his opinion from the Ethics Commission was still pending, Howell represented the state employee mentioned above at a conciliation hearing, thereby violating §5(b).

In the Matter of Paul Pezzella
(June 27, 1991)

The State Ethics Commission fined Paul Pezzella, Deputy Chief of Staff in the Dukakis Administration, $5,000 for violating the Conflict of Interest Law by taking certain actions, both publicly and privately, on behalf of Worcester developer Angelo Scola in connection with a publicly funded development project in Worcester, and by accepting a $9,000 condominium downpayment, $525 in mortgage application fees and free legal services from Scola at the same time he was assisting Scola on the project.

In a Disposition Agreement reached with the Commission, Pezzella agreed to pay the fine and admitted that his actions violated §§4, 23(b)(2)and 23(b)(3) of G.L. c. 268A, the conflict law. Section 4 prohibits state employees from acting as agent or attorney for anyone other than the Commonwealth in matters that are of substantial interest to the Commonwealth. Section 23(b)(2) prohibits public employees from using their official positions to secure unwarranted privileges for themselves or anyone else; §23(b)(3) prohibits public employees from acting in a manner that would cause an objective observer to believe that anyone can unduly enjoy their favor in the performance of their official duties.

According to the Disposition Agreement, Pezzella served as Deputy Legislative Director for then-Governor Michael Dukakis from March 1, 1985, until August 28, 1987, when he resigned to work on the Dukakis presidential campaign. Pezzella resumed state employment on December 19, 1988, when he became Dukakis' Deputy Chief of Staff, the Disposition Agreement said.

Scola and Pezzella are friends of longstanding, and their families have been close for many years, the Disposition Agreement said. Scola and Pezzella frequently socialize. They exchange gifts on birthdays and at Christmas.

On August 15, 1988, the Worcester Redevelopment Authority (WRA) issued a request for proposals for a development plan for a vacant Worcester property known as Lot 35, the Disposition Agreement said. In September 1988 Scola, through his company Scola Development Group, submitted a proposal for Lot 35 that contemplated extensive development costing over $100 million. Four other applicants submitted proposals at approximately the same time, according to the Agreement.

In February 1989, Pezzella telephoned WRA member Julie Carrigan on two occasions, asking her if she had made a decision on how she was going to vote on the Lot 35 proposals and encouraging her to support Scola's proposal. Pezzella and Carrigan knew each other through their association in Democratic party politics, and shortly before rejoining the Dukakis Administration, Pezzella had contacted Carrigan on Scola's behalf, reminded Carrigan that she was a gubernatorial appointee to the WRA, and encouraged her to support the Scola Lot 35 proposal. On March 2, 1989, the WRA voted 3 to 2 to designate Scola Development Group as the developer of Lot 35, the Agreement said. Carrigan voted for another developer.

Pezzella's phone calls to Carrigan violated §23(b)(2) of the conflict law, the Disposition Agreement said.

On April 6, 1989, the Massachusetts Industrial Finance Agency (MIFA) Board voted preliminary approval for $86 million in taxable economic development revenue bonds to finance Scola's Lot 35 project, subject to certain conditions. Pezzella violated §4 of the conflict law by representing Scola in seeking MIFA financing of the Lot 35 development project, the Disposition Agreement said.

In addition, Pezzella's acceptance of a $9,000 mortgage downpayment check from Scola, as well as his acceptance of $525 in mortgage application fees and legal services provided by Scola, at the same time that Pezzella was making telephone calls to Carrigan urging her to support Scola's Lot 35 proposal, and thereafter assisting Scola in obtaining MIFA assistance for the project, violated §23(b)(3) of the conflict law, the Agreement said.

The matter was referred to the Ethics Commission by the Inspector General on June 27, 1990.

In the Matter of Michele Esposito
(September 6, 1991)

The Ethics Commission fined former Department of Revenue (DOR) employee Michele Esposito $500 for violating the Conflict of Interest Law by negotiating future employment with technical consulting firm Maximus Inc., while she was co-contract administrator for a $4.8 million contract Maximus had with DOR.

In a Disposition Agreement reached with the Commission, Esposito admitted that her actions violated §6 of G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 6 of the conflict statute prohibits state employees from participating in their official capacity in any particular matter that could affect their financial interests.

Although an exemption to §6 permits a state employee to participate in a particular matter despite a prohibited financial interest, the exemption requires that full written disclosure of the conflict be made to the state employee's appointing official, and that the appointing official also make a written determination allowing the employee's participation. Although Esposito had orally informed her supervisor that she was seeking employment outside DOR, no such disclosure was made in this case.

In the Matter of Peter Y. Flynn
(September 20, 1991)

The State Ethics Commission fined Plymouth County Sheriff Peter Y. Flynn $2000 for violating the Massachusetts Conflict of Interest Law by charging $1,249.13 in personal expenses to a "company" credit

card he received from a corporation formed to support his civil process-serving deputies. Flynn was also required to repay Deputies, Inc. for the personal charges.

In a Disposition Agreement reached with the Commission, Flynn admitted that his actions with regard to the personal expenses charged to the "company" card violated §23 of G.L. c. 268A, the conflict law, and also that his use of the card for "business-related" expenses violated §3 of the Conflict of Interest statute. No additional fine was imposed for the use of the card for business related expenses.

Section 23 prohibits public employees from using their official positions to secure substantial unwarranted privileges for themselves or anyone else; §23 also prohibits public employees from acting in a manner that would cause an objective observer to conclude the employees would act with bias in their official capacity.

Section 3 prohibits public employees from accepting anything of substantial value ($50 or more) that is given to them for or because of their official position.

In or about April, 1985, Deputies, Inc., the corporation through which civil process is served in Plymouth County, gave Flynn an American Express card opened in the corporation's name, the Disposition Agreement said. Flynn understood the card was to be used for "business-related purposes," meaning anything that could be said to promote Deputies, Inc.'s interests. Such expenses could include expenses incurred in an activity intended to promote the interests of the Plymouth County Sheriff's Department generally, the Agreement said. Prior to using the card for the first time, the Agreement said, Flynn inquired of Deputies, Inc. counsel George Fairbanks whether the anticipated business use of the card was legal, and was told it was. However, the Commission noted in the Agreement that reliance on legal advice other than from the Ethics Commission is not a defense to a violation of the conflict law.

Between September 1985 and April 1989, when he stopped using the card, Flynn charged items or expenses to the Deputies, Inc. credit card on 275 occasions for a total of $12,761.43 in charges. Flynn asserted he never intentionally used the card except for business purposes; however, the Commission found Flynn's characterization of certain meals as "business expenses" to be erroneous, and thus found four charges totalling $461.69 to be personal charges.

In addition, there were $787.44 in charges that Flynn stated he recalled as being business expenses, but for which he declined to identify any third parties present. Based on Flynn's refusal to identify the third parties involved in the credit card charges totalling $787.44, the Commission found the charges to be predominantly personal in nature, the Disposition Agreement said. Flynn was therefore required to reimburse Deputies, Inc., a total of $1,249.13, for personal charges made on the company credit card, the Agreement said.

"By using the Deputies, Inc. credit card for personal charges without making timely reimbursements, Sheriff Flynn used his official position to secure an unwarranted privilege of substantial value, thereby violating §23(b)(2) (of the conflict law)," the Disposition Agreement said. "By using (the card) for not only personal charges ... but also for "business-related expenses" ... and by doing all this while the person responsible for monitoring his use was his direct subordinate, Sheriff Flynn would cause a reasonable person knowing all of the facts to conclude that either [his subordinate] and/or his deputies could unduly enjoy his favor in the performance of his official duties, thereby violating §23(b)(3)... By accepting and using the Deputies Inc. credit card for "business-related expenses," Sheriff Flynn accepted an item of substantial value for or because of official acts performed or to be performed, and not otherwise authorized by law, thereby violating §3 (of the law.)"

In the Matter of Stephen Malcolm
(September 27, 1991)

The State Ethics Commission fined former Hull Board of Assessors member Stephen Malcolm the maximum $2,000 penalty for violating the Conflict of Interest Law by giving false information to his subordinate that resulted in a substantial property tax increase for Malcolm's ex-girlfriend.

In a Summary Decision, the Commission ruled that Malcolm's conduct violated G.L. c. 268A, §23(b)(3), which prohibits public employees from acting in a manner that would cause an objective observer to conclude the employee would act with bias in carrying out his official duties.

Malcolm failed to defend or otherwise respond to charges set forth in an Order to Show Cause issued by the Commission's Enforcement Division in December, 1990. The Order to Show Cause alleged Malcolm's conduct as an assessor in connection with his former girlfriend Colleen Fleming's property violated §23(b)(3) of the conflict law. Under such circumstances, the Commission may enter a summary decision in the matter.

"(Malcolm's) failure to defend or otherwise respond to these allegations constrains us to conclude that he violated G.L. c. 268A, §23(b)(3)," the Commission said in the Summary Decision. "In light of the seriousness with which we view this violation, we conclude that a maximum statutory fine of $2,000 is appropriate."

In the Matter of Michael Powers
(October 31, 1991)

The State Ethics Commission, citing its statute of limitations, issued a Decision and Order dismissing conflict of interest charges against Michael Powers, a former attorney for the city of Boston.

The Commission's Enforcement Division issued an Order to Show Cause against Powers last December, alleging he

had violated §18(a) of the Massachusetts Conflict of Interest Law in 1987 by acting as attorney for the Massachusetts Police Chiefs Association (MPCA) in connection with a federal lawsuit he had previously worked on for the city. Section 18(a) of the conflict law prohibits former municipal employees from representing anyone other than the city or town they used to work for in connection with matters they dealt with as municipal employees.

Under the Commission's statute of limitations regulation, an individual charged with violating the conflict law may assert a statute of limitations defense if he shows that the relevant events were a matter of general knowledge in the community more than three years before an Order to Show Cause was issued.

"In the present case, it is undisputed that Powers' representation of the MPCA was made known to the federal court, the parties, and most importantly, to the City of Boston through its Corporation Counsel office and or/the police department's legal office," the Commission's Decision and Order said. "It is also undisputed that the **Guiney** case was well known throughout the community because it received a substantial amount of publicity ... Accordingly, based upon the evidence produced during this proceeding, we find that the "general knowledge in the community" standard is satisfied here, and is applicable to those actions which occurred more than three years prior to the issuance of the Order to Show Cause (December 5, 1990)."

The Commission declined to separately consider whether Powers' actions after December 5, 1987, violated the conflict law, since such allegations were not presented in the Enforcement Division's original Order to Show Cause, the Decision said.

In the Matter of James Smith
(November 26, 1991)

The State Ethics Commission fined former Woods Hole, Martha's Vineyard and Nantucket Steamship Authority member James Smith $4,000 for violating the Massachusetts Conflict of Interest Law by participating in a Steamship Authority land acquisition that substantially benefitted a business of which Smith was an officer and director.

In a Disposition Agreement reached with the Commission, Smith admitted that his actions violated §§6 and 23(b)(3) of G.L. c. 268A, the Conflict of Interest Law, and agreed to pay the fine. Section 6 of the conflict law prohibits state employees from knowingly participating in their official capacity in any particular matter that affects the financial interests of an organization in which the public employee is serving as a director or an officer. Section 23(b)(3) prohibits public employees from acting in a manner that would cause an objective observer to conclude they would act with bias in their official capacity.

In the Matters of Christopher Look, Jr. and Michael McCormack (December 3, 1991)

The State Ethics Commission fined Dukes County Sheriff Christopher Look, Jr. $1000 for violating the "nepotism" section of the Massachusetts Conflict of Interest Law, and fined Michael McCormack, Deputy Superintendent of the Dukes County Jail, $6000 for scheduling himself to work as a paid per diem court officer on days he was also being paid for working at the jail.

In a Disposition Agreement with the Commission, Look admitted to violating §§13 and 23(b)(3) of G.L. c. 268A, the conflict law, by re-appointing his brother and two of his sons as deputy sheriffs and by recruiting one of his sons to work as a paid member of the Norton Beach patrol. Look agreed to pay the fine, and also agreed to either secure the resignations of his sons as deputy sheriffs, or to restrict their service to prohibit them from working paid details as long as Look remains Dukes County Sheriff. Look's brother has already resigned as a deputy sheriff.

Section 13 prohibits a county employee from participating in his official capacity in any particular matter that affects the financial interests of a member of his immediate family. Section 23(b)(3) prohibits a public employee from acting in a manner that would cause an objective observer to conclude the employee could be unduly influenced in the performance of his official duties.

Look was the fourth county sheriff since 1988 to be cited by the State Ethics Commission for violations of the conflict law. He was also the 26th official to be publicly sanctioned by the Ethics Commission for nepotism since the Supreme Judicial Court determined that public employees are prohibited from acting on hiring and other job-related issues involving family members in the 1983 case, **Sciuto v. Lawrence.**

In a separate Disposition Agreement with the Commission, McCormack admitted to violating §§13 and 23(b)(2) of the conflict law by scheduling himself to work as a paid per diem court officer and by getting paid by both the state and county for some of the same hours.

Section 23(b)(2) of the conflict law prohibits public employees from using their official positions to secure substantial unwarranted privileges for themselves or anyone else.

In the Matters of Kevin Fitzgerald and Patricia McDermott (December 9, 1991)

The Massachusetts State Ethics Commission concluded its investigation of Representative Kevin Fitzgerald (D-Boston) and his administrative assistant, Patricia McDermott by issuing Public Enforcement Letters which state that the Commission found reasonable cause to believe Fitzgerald and McDermott violated the Conflict of Interest Law by accepting bequests totalling close to $400,000 from Mary Guzelian, a so-called "bag lady" who had sought their assistance in the early 1980s.

The Commission's findings of reasonable cause involved §§3 and 23(b)(3) of G.L. c. 268A, the Conflict of Interest Law. Section 3 of the Conflict of Interest Law prohibits public employees from accepting anything of substantial value that is given to them for or because of any act within their official responsibility. Section 23(b)(3) prohibits public employees from acting in a manner that would cause a reasonable person to conclude that anyone can improperly influence them or unduly enjoy their favor in the performance of their official duties.

Public Enforcement Letters do not require the subjects to pay a fine or admit to violating the law, although the subjects must waive their right to a hearing and consent to publication of the Letter. The Commission stated that it chose to resolve the matter with a Public Enforcement Letter for three reasons: (a) the case involved events that occurred, for the most part, a decade ago, and many of the activities discussed in the Public Enforcement Letter were beyond the Commission's statute of limitations and outside the Commission's jurisdiction; (b) there was no legal precedent which would put legislators on notice that they may not accept bequests from constituents or others with whom they have had official dealings; and (c) the Commission uncovered no direct evidence that Fitzgerald or McDermott coerced or induced Mary Guzelian into making them beneficiaries of her will.

The Commission added that it was referring all materials from its investigation to the Attorney General and the U.S. Attorney for any action they deemed appropriate.

Included are:

All Advisory Opinions issued in 1991, page 333.

Cite Advisory Opinions as follows:

EC-COI-91-(number).

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

CONFLICT OF INTEREST OPINION
EC-COI-91-1

FACTS:

You are presently an attorney in private practice. Your question concerns your status as a former state employee. Specifically, you wish to know whether you may now represent a couple pro bono in legal proceedings which will involve your former state agency. You were an attorney for the Department of Social Services (DSS) until 1986. Your duties included representing DSS in trials under Care and Protection Petitions, G.L. c. 119 and Adoption Petitions, G.L. c. 210. One case you handled for DSS between 1984 and 1986 was a Care and Protection Petition in the ABC County Juvenile Court concerning infant minor children. The children were placed in the DSS foster home of Jane Doe from 1981 through 1983 when the children were returned to their biological parents. In mid-1984, the children were placed by DSS in the foster home of XYZ. During this period, you participated as an attorney on DSS' litigation to place the children under that agency's Care and Protection. After your departure from DSS, DSS began a petition to terminate biological parents' rights (Chapter 210 proceedings) in the ABC County Probate Court. The court decree terminating the rights of the biological parents was entered around December, 1989. The children, in the meantime, had been living in the XYZ foster home. Due to allegations of sexual abuse, the children were removed from the XYZ home in early 1989 and were placed in a specialized foster home for one year. The children are now residing in their third DSS foster home placement since their removal from the XYZ home.

Jane Doe and her husband wish to adopt the minor children. Mrs. Doe has been advised by DSS that she and her husband would not be considered an adoptive resource for the children and, because they are not their current foster parents, they have no right to a DSS administrative hearing. You have researched the legal issues raised by Mrs. Doe and you believe that she and her husband have standing to file a guardianship and/or adoption petition for the children in the ABC County Probate Court. You state that the Doe's proposed legal action would not use the DSS record prior to December, 1989. Rather, your argument would be as follows: (1) the children are now 8 years old and are legally free for adoption; (2) DSS has no adoption plan in place as required by DSS regulations and the issue is what placement will best serve the children's interests; and (3) Mr. and Mrs. Doe should be considered as potential adoptive parents because of their specialized skills in dealing with special needs children. In particular, you note that Mrs. Doe has, over the years, had many dozens of foster children in her home. In addition to her own natural children, she has adopted some of the foster children. She has been accorded special recognition for her efforts as an outstanding foster parent. You state that Mr. and Mrs. Doe's guardianship and/or adoption action will not involve any prior legal action in which you participated as DSS counsel and all legal issues relating to the children's care and protection as well as the termination of parental rights were resolved as of December, 1989.

QUESTION:

You wish to know whether the conflict law, G.L. c. 268A, §5(a), permits you now to represent Mr. and Mrs. Doe.

ANSWER:

Yes, subject to §§5 and 23, as discussed below.

DISCUSSION:

Section 5(a)

As a former employee of DSS, you are considered a former state employee for the purposes of G.L. c. 268A, §5. Since you terminated your state employment more than one year ago, you are subject only to §5(a). Section 5(a) prohibits a former state employee from acting as an agent or attorney for, or receiving compensation directly or indirectly, from anyone other than the Commonwealth or a state agency, in connection with any particular matter[1] in which the state or state agency[2] is a party or has a direct and substantial interest and in which you participated[3] as a state employee. A particular matter includes "any judicial or other proceeding ... request for a ruling or other determination, contract, claim, controversy ... decision, determination, [or] finding ..." See, §1(k). Thus, §5(a) would permanently prohibit you from representing a private client in connection with a particular matter in which you participated as a DSS employee. The question is whether your proposed representation of Mr. and Mrs. Doe in the ABC County Probate Court is either the same particular matter or is in connection with a particular matter in which you participated as a DSS employee. Based upon the facts presented by you, we conclude that it is not.

The Commission has previously determined that a former state employee's proposed private activity which is closely connected to a matter in which he previously participated, is precluded under §5(a). The Commission has considered whether a particular matter is the same matter by evaluating whether the matter involves the same parties, the same litigation, the same issues or the same controversy. See, EC-COI-80-108 (private representation of clients prohibited where underlying claims are integrally related to or identical to claims in which state employee participated); 81-28 (former state employee who participated in lawsuit on validity of a law was precluded from representing private party in a different judicial proceeding because it would involve same controversy as litigation in which he officially participated - same parties, same statute, and same legal challenge on the validity of a statute); 83-140 (former state employee who helped to establish a trust is prohibited from performing legal work for the trust where

the state has a continuing interest in monitoring the trust); **84-31** (former state employee who officially reviewed initial application of private entity is prohibited from representing that entity in a resubmission of the application where it involves the same controversy as the first application); **87-34** (former state employee may not challenge policy or validity of draft regulations which he helped to promulgate); **89-7** (former state employee's participation in an environmental impact review process precludes his private representation of the applicant in latter stages of that process because it involves the same controversy).

On the other hand, §5(a) does not apply to particular matters which are not in connection with particular matters in which a state employee previously participated. See, **EC-COI-86-16** (under §17, municipal attorney may act as an attorney for his municipal employer in one lawsuit and as an attorney on behalf of private parties because town's lawsuit and several other lawsuits were considered separate particular matters even when, for reasons of judicial economy, they were combined by a court clerk into one docket number which required one appellate brief); **86-23** (former state employee could represent clients in a private transaction under the terms of an escrow agreement because his representation was not subject to state review or approval although he had previously negotiated the agreement); **88-11** (former state employee's proposed activities not in connection with matters in which he participated or which were under his official responsibility). See also, **EC-COI-84-21** (a construction project with distinct phases is not considered one particular matter); **84-45; 84-14** (under §18, a parallel to §5, each property assessment by a town is generally considered a different particular matter although the same parcel involved).

We conclude, based on the information you have presented, that your current legal representation of Mr. and Mrs. Doe in a guardianship and/or adoption petition in the Probate Court is not precluded by §5(a) as long as the litigation is not in connection with the DSS lawsuit in which you participated. This conclusion is premised on the fact that the Doe lawsuit: (i) is a new particular matter arising subsequent to your departure from DSS; and (ii) it involves different parties, different facts and a different controversy in a different court than the c. 119 Care and Protection litigation in which you participated from 1984 to 1986. **EC-COI-86-16.** We also conclude that, although the children are part of the current litigation as well as the past litigation, this in and of itself is not sufficient to deem the Doe's lawsuit "in connection with" the c. 119 Care and Protection proceeding in which you participated.[4/]

DSS' primary mandate when a child comes into its care and custody is to provide substitute care so that the child may be reunited with the biological parents. See, G.L. c. 119, §1. 110 CMR 1.02(4); 1.03. If unification is not possible, the responsibility of DSS changes and the agency must find a permanent new home for the child in a timely fashion. 110 CMR 1.03. According to the facts you present, you did not participate as a DSS attorney in the determination to place the children with Mrs. Doe between 1981 and 1983, or to return the children to their biological parents between 1983 and mid-1984. Your participation in the Care and Protection litigation between 1984 and 1986 was in furtherance of DSS' initial responsibility to transfer temporary custody to DSS to provide substitute care and to assist the family in reunification.

The legal issues in the present controversy differ significantly from the 1986 Care and Protection proceeding. In 1989, the c. 210 petition to dispense with the parents' consent with adoption was granted and the biological parents' parental rights were permanently terminated. When the petition was granted, DSS' primary reponsibility became the development of an alternate permanent home. At issue in the proposed litigation is whether Mr. and Mrs. Doe should be considered as a potential adoptive resource for the children since DSS has no adoption plan in place for the children. This litigation does not involve the fitness of the biological parents or the return of the children to the biological parents. Moreover, you did not participate in the c. 210 petition or in any adoption plan for the children as a DSS attorney. Accordingly, the proposed litigation does not relate to any particular matter in which you previously participated.[5/]

We note that we might reach a different conclusion if, for instance, you now wish to represent the children's biological parents in litigation challenging or modifying the c. 210 court decree. Such a lawsuit would be subject to §5(a) if it raised issues concerning parental fitness - issues which were the subject of the c. 119 proceeding in which you participated as a DSS employee.

You should also be aware that you remain subject to §23(c). Section 23(c) prohibits a present or former state, county or municipal employee or officer from knowingly or with reason to know: (1) accepting employment or engaging in business or professional activity which will require him to disclose confidential information which he gained from his official position or authority; (2) improperly disclosing material or data which is exempt from the definition of a public record[6/] and which was acquired in the course of his official duties. Accordingly, you may not use information in the Doe's litigation which is confidential and was learned by you while you were employed at DSS. See, **EC-COI-90-11.**[7/]

Date Authorized: January 16, 1991

[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] "State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such 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).

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

[4] We decline to construe the initial DSS determination concerning the children as a continuing particular matter. Such an analysis would be overbroad under the facts of this opinion. This conclusion may not, however, apply to all DSS proceedings. Where, for example, under the broad equity powers accorded the court, proceedings under c. 119 and c. 210 are combined, these standards may not apply.

[5] While we express no view as to the wisdom of your proposed representation of Mr. and Mrs. Doe in this matter and notwithstanding your statements to the contrary, you should be aware that the prohibitions of §5(a) may well be implicated should the Doe's case involve matters in the DSS record prior to 1989 and which are in connection with the Care and Protection action in which you participated as a state employee.

[6] M.G.L. c. 4, §7.

[7] This opinion is limited to an interpretation of G.L. c. 268A to your facts. You are advised to consult with the Board of Bar Overseers or Massachusetts Bar Association regarding the application of the Code of Professional Responsibility to your circumstances. We also note that a motion to disqualify you as counsel because of a conflict of interest can and may be raised in court by DSS upon examination of the facts in a judicial proceeding.

CONFLICT OF INTEREST OPINION
EC-COI-91-2*

FACTS:

You were recently appointed as the Secretary of Transportation and Construction. You have undertaken to divest yourself of two business activities which are "doing business with state agencies coming within the purview" of your new office. You describe the business relationships as follows:

1. Transit Retail Partnership, Inc. (TRPI)

A. Description of Business Activity

TRPI entered into a Master Lease Agreement with the Massachusetts Bay Transportation Authority (MBTA) on May 23, 1989. The Master Lease Agreement is in effect for an initial term of 15 years and 6 months and generally grants to TRPI the right to use and sublease for retail and commercial purposes space located at various stations on the MBTA's Orange Line. The Master Lease Agreement was awarded to TRPI after public notice and a competitive bidding process long prior to your consideration for, or appointment to, the position of Secretary of Transportation and Construction.

B. Description of Ownership Interest

Prior to your appointment to the position of Secretary of Transportation and Construction, you were President and a member of the Board of Directors of TRPI. You were also a holder of 40% of the issued and outstanding capital stock of TRPI and a personal guarantor (along with the two other stockholders of TRPI) of rent arrearages due from time to time to the MBTA under the Master Lease Agreement. Under Section 16(a) of the Master Lease Agreement, TRPI may not, without the prior written consent of the MBTA, permit a voluntary transfer of any beneficial interest in TRPI.

C. Proposed Plan of Divestiture

You have proposed to divest this interest in TRPI within 30 days by (i) immediately resigning from the Board of Directors and the office of President of TRPI, (ii) selling all of your stock in TRPI to a present stockholder of that company for the current fair market value of such stock as determined by a mutually-selected, independent business appraiser and (iii) seeking the consent of the MBTA to the cancellation and withdrawal of your personal guarantee under the Master Lease Agreement.

In considering the foregoing plan of divestiture, you inform us that the proposed transferee is <u>not</u> a member of your immediate family and that any dealings between you and such transferee have been (and will be at all times throughout the transaction) at arms' length. In addition, it is possible that an independent financial appraisal of TRPI could result in a negative present value for ascertaining the value of your stock. In such event, the parties may consider the issuance of a promissory note by you to account for such determination. If issued, the principal amount of such promissory note would be set at a sum certain fixed at the time of your transfer of stock.

D. Removal from MBTA Deliberations Concerning Assignment of Interest

In order to complete the foregoing plan of divestiture, the MBTA will be asked to provide its

consent to (i) the withdrawal and cancellation of your personal guarantee under the Master Lease Agreement and (ii) the transfer of your stock in TRPI. As a related matter, we understand that the MBTA has asserted that TRPI is in arrears under the Master Lease Agreement. You and TRPI have disputed such assertion based upon the advancement of funds by TRPI to improve the premises under the lease, which, according to TRPI should be offset against payments due under the Master Lease Agreement. Although there is not an "arbitration clause" in the Master Lease Agreement contemplating the resolution of such disputes by a mutually-selected, independent arbitrator, we understand that the MBTA is considering the proposal of such a procedure for the resolution of the present problem. This can be accomplished by the written consent of the MBTA and TRPI. The length of time possibly needed to arbitrate this matter is not clear at this time.

You have stated that you will not participate in, or be permitted to review any correspondence or internal memoranda concerning, deliberations of the MBTA relating to the grant of a consent to the transfer of TRPI stock, the resolution of the rent dispute under the Master Lease Agreement, or the cancellation and withdrawal of your personal guarantee, pursuant to §6 of M.G.L. c. 268A.

2. Alewife Commercial Associates, Inc. (ACAI)

A. Description of Business Activity

ACAI entered into a Lease Agreement with the MBTA on June 3, 1988. The Lease Agreement is in effect for an initial term of 10 years and 6 months and generally grants to ACAI the right to use and sublease for commercial and retail purposes space located at the MBTA Alewife Station/Garage Complex in Cambridge, Massachusetts. The Lease Agreement was awarded to ACAI after public notice and a competitive bidding process long prior to your consideration for, or appointment to, the position of Secretary of Transportation and Construction.

B. Description of Ownership Interest

Prior to your appointment to the position of Secretary of Transportation and Construction, you were President and a member of the Board of Directors of ACAI, and a holder of 50% of the issued and outstanding capital stock of ACAI. Under Section 16(a) of the Lease Agreement, ACAI may not, without the prior written consent of the MBTA, permit a voluntary transfer of any beneficial interest in ACAI.

C. Proposed Plan of Divestiture

You have proposed to divest your interest in ACAI within 30 days by (i) immediately resigning from the Board of Directors and the office of President of ACAI, (ii) selling all of your stock in ACAI to a third party for the current fair market value of such stock as determined by a mutually-selected, independent business appraiser. There are no personal guarantees outstanding under the Lease Agreement and, to your knowledge, there are no material disputes concerning past due rents under the Lease Agreement.

In considering the foregoing plan of divestiture, you inform us that the proposed transferee of your stock is not a member of your immediate family and that any dealings between you and such transferee have been (and will be at all times throughout the transaction) at arms' length. In addition, it is possible that an independent financial appraisal of ACAI could result in a negative present value for ascertaining the value of your stock. In such event, the parties may consider the issuance of a promissory note by you to account for such determination. If issued, the principal amount of such promissory note would be set at a sum certain fixed at the time of your transfer of stock.

D. Removal from MBTA Deliberations Concerning Assignment of Interest

In order to complete the foregoing plan of divestiture, the MBTA will be asked to provide its consent to the transfer of your stock in ACAI as set forth above. As with any deliberations concerning TRPI, you have stated that you will not participate in, or be permitted to review correspondence or internal memoranda concerning, deliberations of the MBTA relating to your request for a consent as herein described, pursuant to M.G.L. c. 268A, §6.

Prior to taking office in January, 1991, you entered into an agreement with an independent third party to purchase your interests in TRPI and ACAI. A process was set to determine the value of those interests at that time.

You have already resigned from the Board of Directors and Office of President of each of TRPI and ACAI. Consequently, you are no longer involved in the management of the affairs of these corporations.[1] It is your current understanding and belief that the remaining officers and directors of TRPI and ACAI will not permit you to transfer your shares in these entities to the independent third party without first offering such shares back to TRPI and ACAI in accordance with Article V of the respective Articles of Organization of these two corporations (the "Charter Restrictions").

By their respective terms, the Charter Restrictions require at least a 30-day consideration period by each of TRPI and ACAI before their directors must decide whether to purchase your shares in accordance with your third party offer, reject the offer outright, or reject the offer and exercise a right of arbitration to determine the value to be paid for the shares. In the event either or both of TRPI and ACAI elect to exercise the right of arbitration under the Charter Restrictions, you will be unable to transfer your shares within the 30-day divestment period as set forth in §7 of c. 268A.

Although the exact time frame for completing the arbitration process is unknown, it is unlikely to be resolvable within the next month.

QUESTION:

Given the above facts, must the divestment requirements of G.L. c. 268A, §7(a) be completed within 30 days?

ANSWER:

Based upon the above, including the apparent good-faith attempt to divest of the prohibited interest within 30 days pursuant to §7(a) and the fact that legal constraints will prevent complete divestment within that time period, a period longer than 30 days to complete divestment is warranted, subject to certain conditions.

DISCUSSION:

Section 7 of c. 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party. The restrictions of §7 will not apply, however, to a state employee who, in good faith and within thirty days after he learns of an actual or prospective violation of the section, makes a full disclosure of his financial interests to the contracting agency and terminates or disposes of the interest. G.L. c. 268A, §7(a).

The theory on which a violation of §7 is premised is clear:

> Section 7 announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as if they have influence ... But it may be possible, in at least some instances, to implement such a theory of the section with selective rapier thrusts where needed, rather than indiscriminate sledgehammer blows on any employee who is caught in the area.

Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U. L.Rev. 299, 374 (1965); see also, EC-COI-84-105.

This Commission has always proceeded on the theory that the conflict of interest statute must be given a workable and flexible meaning. See, Graham v. McGrail, 370 Mass. 133, 140 (1976) (flexibility on certain of the restrictions of §19 was warranted); EC-COI-87-19 (§14 - the county counterpart to §7 - must be given a workable and common sense meaning); 87-29 (permitting the receipt of deferred income which would otherwise be a violation of §7). The Commission has also determined on several separate occasions that even the broad preventative purposes of §7 are flexible enough to permit some time period of divestment which is greater than the 30-day period set out in §7(a) when circumstances have warranted. See, EC-COI-84-109; 84-105; 82-12; 81-189. However, each of these prior opinions involved housing and rental subsidies paid to the state employee. In each case, the Commission held that, in an effort to avoid undue hardship to innocent third parties, the restrictions of §7 could be delayed until such time as the contractual or other legal arrangements fully ran their course, notwithstanding the fact that the state employee continued to benefit from a prohibited §7 interest.

In the present case, you have informed us that you have undertaken a number of steps to divest of the interests since taking office. For example, you have resigned all of your positions in the private entities in question and have complied with the §6 disclosure/abstention requirements. In addition, by entering into an agreement to sell your interests in TRPI and ACAI, you have attempted to start the divestment process as soon as possible.

That the respective boards of TRPI and ACAI may now invoke the time-consuming Charter Restriction process, to which they are legally entitled, should not hinder your good faith efforts to comply with §7.

Accordingly, given (i) your apparent good faith efforts, before and after taking office, to fully understand and comply with the requirements of §7; (ii) the necessity of complying with the Charter Restrictions (a legal process outside of your control) in order to complete the divestment process;[2] and (iii) that these interests arose prior to your taking office, the Commission finds that additional time is warranted in this case to avoid undue hardship, even though no innocent third parties are involved.

Although you may have such additional time as is necessary for the Charter Restriction process to run its course,[3] §7 will not permit you to benefit financially from having held an interest in prohibited §7 contracts. In other words, the value you ultimately receive for your shares in TRPI and ACAI, respectively, cannot be <u>greater than</u> (i) the value derived from the third party agreement entered into before you took office, but set as of a date not later than January 3, 1991,[4] or (ii) in the actual event the arbitration process is triggered, the value of such shares as determined as of January 3, 1991 through the arbitration process.[5] By capping the value of the shares, in advance and at these pre-determinable amounts, you would not be receiving any financial gain as a result of the prohibited §7 interests. This is consistent with prior Commission precedent. For example, this Commission has permitted a state employee to continue to be affiliated with a private entity which was a party to state contracts,

provided that the state employee received no financial interest from those contracts. **EC-COI-89-5** (any income derived from the prohibited contracts must be "segregated" so that the state employee would receive no financial benefit from them). In addition, **EC-COI-87-29** held that the deferred receipt of otherwise prohibited §7 income, earned and "capped" prior to taking office, even if paid after the employee begins his state job, is permissible. This result was based upon the theory that newly appointed state employees may not practically be able to receive the complete payment of fees owed as of their final date of work. It would be unreasonable to place such newly appointed state employees in immediate violation of §§4 or 7 merely because of a compensation timing which they do not control. **Id.**

In effect, the "cap" mechanism set out above is similar to the "segregation" mechanism of **EC-COI-89-5** and the deferred income mechanism of **87-29** because your interests would not benefit as a result of any state contract during the time you have been in office. So long as the divestment process continues in good faith, the mere holding of the interests in question will not violate §7 if the value of those interests will not increase beyond the "capped" rate if determined as of an earlier date.[6/] See also, **EC-COI-89-14** (the liquidation of a prohibited interest must be based upon a currently appraised value, not on a post-transfer valuation - in effect, setting a "cap" on the value).

You have already informed us that you agree to the imposition of the cap and that you will move as quickly as possible to complete the divestment process in accordance with the requirements of §7 and this formal opinion. In addition to the above, you must keep this Commission informed on a monthly basis as to the status of the divestment process until such time as the divestment has been completed. This status report will enable the Commission to monitor whether the process is proceeding in accordance with the requirements of §7 and this formal opinion.

We also advise you that an additional disclosure pursuant to §23(b)(3) of c. 268A to Governor Weld, as your appointing authority, is appropriate in order to keep the Governor fully apprised of the potential rent dispute between the MBTA and TRPI, and of the continuing personal guarantees. 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.

Section 23(b)(3) provides, however, that a full written disclosure of all of the relevant facts to the employee's appointing authority will dispel the "appearance" of any conflict of interest. See, e.g., **In the Matter of George Keverian**, 1990 SEC 460.

This disclosure is necessary in your case because you would normally continue to have official dealings with the MBTA, its directors, and staff, while the dispute and the personal guarantees are on-going. This disclosure will provide Governor Weld with the opportunity to decide whether additional safeguards are warranted. For example, the Governor might want to consider whether your official duties under M.G.L. c. 161A, §6 as Chairman of the Board of the MBTA, should or could be delegated to others while the potential dispute and/or the personal guarantees remain in effect.

Date Authorized: February 14, 1991

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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/] In addition, on February 4, 1991, you filed appropriate §6 disclosure forms with the Commission and the Governor's Office concerning these matters.

[2/] We note, for example, that Article V of the respective Charter Restrictions state that "No shares of stock shall be assigned, encumbered or transferred ... until these provisions have been complied with; and any purported ... transfer without such compliance shall be void." Accordingly, if you do not comply with Article V's right of first refusal, you cannot complete the divestment process because the divestment would, in effect, become void anyway.

[3/] We would anticipate, absent extraordinary circumstances, that the Charter Restriction process and complete divestment of your interests (including the personal guarantees) could be completed before the beginning of FY92 (that is, prior to July 1, 1991).

[4/] The date on which you took office.

[5/] In either event, the value related to your share of the potential rent dispute between TRPI and the MBTA must also be taken into account as of January 3, 1991 and must also be included in the final sales price for the TRPI shares.

[6/] Of course, in addition to the "cap," you may not receive any other benefits from holding the interests which have accrued after January 3, 1991, including, but not limited to, income, distributions, and dividends.

CONFLICT OF INTEREST OPINION
EC-COI-91-3*

FACTS:

The Martha's Vineyard Commission (MVC) was created as a "public body corporate" by Chapter 831 of the Acts of 1977, "to further protect the health, safety and general welfare of island residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard ... by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies." §§1, 2.[1/] Every local municipal land regulatory agency is governed by the standards, regulations and criteria established by the MVC in considering applications for development permits relating to areas and developments subject to Chapter 831. §5.

The MVC is comprised of twenty-one members, of which six members are Selectmen in the member towns, or their designees; nine members are elected island-wide; one member is a Dukes County Commissioner; one member is appointed from the Governor's Cabinet; and four, non-voting members whose principal residence is not on Martha's Vineyard, are appointed by the Governor. §2.

The MVC receives its funding through the yearly property tax levies in the individual municipalities. §4. The MVC may also accept private contributions and state or federal grants. §§3, 4.

One of MVC's statutory responsibilities is the designation of critical planning districts within Martha's Vineyard and the regulation of development within these critical planning districts. Districts of critical planning concern are areas which require protection for natural, cultural, ecological or historical reasons or which may be unsuitable for intensive development. §8. Following nominations from individual towns or from seventy-five taxpayers, the MVC may designate specific areas to be districts of critical planning concern. §8. The legislation requires the MVC to adopt regulations for the control of districts of critical planning concern,[2/] and to specify broad guidelines for the development of the district. §§3, 7, 8. The Secretary of the Executive Office of Environmental Affairs is required to approve the standards and criteria which the MVC proposes to use in designating an area as one of critical planning concern. §7.

When the MVC approves a critical planning district, the municipalities in which the district is located may adopt regulations governing development within the district in accordance with the MVC guidelines and submit the regulations to the MVC for approval. If the regulations are not in conformance with MVC guidelines, or if a municipality fails to adopt regulations the MVC will adopt regulations. All adopted regulations are incorporated into the municipality's official ordinances or by-laws and are administered by the municipality. §10. A municipality may only issue a development permit in a district of critical planning concern in accordance with regulations provided by MVC. §9.

The MVC's second statutory responsibility is to develop criteria and standards to determine when a development project will be considered a development of regional impact[3/] and to review and approve all applications for developments of regional impact. §§12, 14. Generally, developments of regional impact (DRI) are those developments which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues which are significant to more than one municipality. §12.

If a municipality determines that a development application meets the MVC DRI criteria, it must refer the development application to the MVC. §13. The MVC is required to review all DRI permit applications, hold a hearing, and make findings concerning whether the probable benefits of the project outweigh the probable detriments, whether the proposed development will substantially interfere with the objectives of a municipality's or the county's general plan, and whether the proposed development is consistent with any municipality or MVC regulations. §14. Absent approval by the MVC, a municipality may not grant a development permit for a DRI. §16. Furthermore, the MVC may specify conditions to be met by the developer in order to minimize any economic, social or environmental damage. §16.

In the spring of 1987, the MVC considered a DRI permit application presented by a realty trust for the development of a 50,000 square foot bank headquarters and supermarket, 324 parking spaces and off-site access. After a public hearing, the MVC approved the project with a number of conditions. Subsequently, two citizens' groups - the Vineyard Conservation Society and Citizens for a Liveable Island, as well as individual citizens, commenced a civil suit appealing the MVC's approval. This appeal is currently pending in Superior Court.

In November, 1988, two of the named plaintiffs in the Superior Court action were elected as MVC Commissioners. These two individuals state that they originally opposed the 1987 project and joined the lawsuit as private citizens because of environmental and policy concerns. This lawsuit is being funded by a Vineyard Conservation Society Legal Defense Fund from private donations and proceeds from fundraising events. The named plaintiffs are not required to pay for legal fees. The two individuals state that they do not have any personal financial interest in the development or in the realty trust which is the developer/ applicant. One of these individuals resigned his membership in both citizens' groups when he became a Commissioner. The other individual continues to be a member of the Vineyard Conservation Society.

The permit applicant/trust has been unable to fulfill the conditions imposed in the 1987 permit and it has submitted a new DRI permit application which is currently pending before the MVC. The new application differs from the 1987 application in that the new application proposes a single 19,600 square foot supermarket with 145 parking spaces. The new proposal will also provide on-site access and will reduce the amount of pavement and increase the percentage of landscaping and green space.

QUESTIONS:

1. Is the Martha's Vineyard Commission a public instrumentality within the jurisdiction of G.L. c. 268A?

2. May elected MVC Commissioners officially participate in a DRI permit application when they are named plaintiffs in a legal action challenging the MVC approval of a prior permit concerning the same piece of property?

ANSWERS:

1. For purposes of the conflict of interest law, the MVC is a municipal agency as defined in G.L. c. 268A, §1(f).

2. The Commissioners may participate in the new permit application if they make the public disclosure required by G.L. c. 268A, §23(b)(3).

DISCUSSION:

1. Jurisdiction

The threshold issue is whether the MVC is a public or private agency. In its determination of public status, the State Ethics Commission will consider:

(a) the means by which the entity was created (e.g., legislative or administrative action);

(b) whether the entity performs some essentially governmental function;

(c) whether the entity receives and/or expends public funds; and

(d) the extent of control and supervision exercised by government officials or agencies over the entity. **EC-COI-90-2; 89-1; 88-24; 88-16.**

No one factor is dispositive as the Ethics Commission considers the totality of the circumstances. We conclude that c. 831 manifests a legislative intent to create a public entity. The MVC was created by special legislation which expressly establishes the MVC as a "public body." The MVC's purpose is to control land use development in a manner that will protect the public health, safety and welfare which is an obligation shared by and generally delegated to local municipalities. See, **In the Matter of Richard L. Reynolds**, 1989 SEC 423 (discussion of municipality's interest in G.L. c. 41). Additionally, the MVC has been delegated traditional governmental powers, such as the ability to promulgate regulations which have the force of law, and to review and approve development permits. See, Chapter 831, §§3, 8, 10, 12; **EC-COI-90-2** (Martha's Vineyard Land Bank a municipal agency where it performs functions similar to conservation commissions); **89-1** (non-profit corporation state entity where it performs essentially governmental functions); **88-16** (Commission assists city in fulfilling statutory mandate). The majority of MVC's funding is derived from public sources. Finally, control of the MVC is vested with Commissioners who are elected or appointed to represent the public interest across Martha's Vineyard. See, Chapter 831, §2. Accordingly, we conclude that the MVC is a public instrumentality for purposes of G.L. c. 268A.

The next issue is whether the Commission is a state, county or municipal entity. As one commentator has indicated, the focus of 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; 82-25.** For example, 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. In **EC-COI-83-74**, we concluded that local private industry councils established under the Federal Job Training and Partnership Act were municipal agencies for purposes of G.L. c. 268A based on the decision-making role the councils shared with municipal officials, the role local officials played in selecting Council members and the Council's expenditure of public funds. See also, **EC-COI-89-20** (interpreting a successor statute to the Federal Job Training and Partnership Act).

Similarly, we conclude that the MVC is an independent municipal entity. Our conclusion rests on the substantial interrelationship between the MVC and local municipalities. The level of government with the most direct and substantial interest in MVC decisions is the municipal level, as each municipality is concerned with land use within its borders. The MVC shares regulatory authority and decision-making with local municipalities in matters concerning areas of sensitive land use and large development projects. The MVC is accountable to the municipalities as it derives most of its funding from a portion of each member municipality's property tax revenues. Chapter 831 also provides for significant municipal control as a plurality of the voting members are selectmen or their designees and if an elected at-large Commissioner fails to fulfill his term, the selectmen in

that Commissioner's town will appoint a Commissioner to fill the term. §2. Based on these facts, we conclude that the MVC is an independent municipal agency and that the Commissioners and MVC employees are municipal employees for purposes of G.L. c. 268A.[4] See also, **EC-COI-90-2** (Martha's Vineyard Land Bank is an independent municipal agency); **89-2** (water district is an independent municipal agency); **87-2** (fire district is an independent municipal agency); **82-25** (regional school district is an independent municipal agency).

2. Commissioner's Participation

All MVC Commissioners are municipal employees[5] for purposes of G.L. c. 268A. Two sections of G.L. c. 268A regulate the scope of official participation by municipal employees.

(a) Section 19

Under §19, a MVC Commissioner is prohibited from participating as a Commissioner in any MVC proceeding affecting his financial interest or the financial interest of a member of his immediate family, a partner or organization in which he serves 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.[6] As the State Ethics Commission has noted "The abstention requirement recognizes that a [municipal] employee cannot be expected to remain loyal to the public interest when matters affecting the financial interest of certain personal relationships comes before him for decision." **EC-COI-89-16.** For example, if the lawsuit in which the Commissioners are named plaintiffs seeks money damages, and if any subsequent action taken by the MVC regarding the property at issue can be used as evidence in the lawsuit, then the Commissioners would have a reasonably foreseeable financial interest in subsequent proceedings and must abstain from participation. **EC-COI-87-9; 82-34.** Similarly, if any Commissioners are direct abutters to the property under consideration, are parties in interest as defined by G.L. c. 40A, or are "parties aggrieved" as defined by the Wetlands Protection Act, the State Ethics Commission will presume that these individuals have a financial interest in the property under G.L. c. 268A, §19 and must abstain. **See, EC-COI-89-33; 84-96.**

Under the facts presented[7] we conclude that the two Commissioners do not have a reasonably foreseeable financial interest in the current permit application. The two Commissioners state that they, their families and their businesses do not have a financial interest in the applicant/trust or the development project. Nor do we find that the MVC Commissioners have a financial interest in the new application based on the legal challenge of the prior application. The parties indicate that the lawsuit does not seek monetary damages, but rather requests judicial review based on policy grounds. Furthermore, the new permit application is substantively different from the prior application in such characteristics as size of the project, functional use, amount of greenspace and the new application will involve a de novo hearing and judicial review. Accordingly, the Commissioners are not required to abstain from participation in the new permit determination. **See, EC-COI-89-19** (husband's stock interest not sufficiently identifiable); **87-16** (financial interest speculative); **87-1.**

(b) Section 23

Section 23 contains general standards of conduct which are applicable to all public 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). Therefore, the MVC Commisssioners may not use their official positions to secure an unwarranted privilege of substantial value for themselves or for any group with which they are affiliated. For example, the two Commissioners should take special care to provide equal access to the public forum for all interested parties at the hearing. The Commissioners must base their evaluation and vote on the merits of the application, using the same objective standards which the MVC applies to other permit applications. **See, EC-COI-90-2; 89-19.**

Furthermore, §23(b)(3) prohibits a municipal 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. Issues are raised under §23(b)(3) because of the Commissioners close prior and current relationship with groups who so strenuously oppose this development project that they have initiated a lawsuit. These circumstances create an appearance of a conflict of interest or bias in one's official actions as a result of one's private activities. **See, EC-COI-89-16** (past friendship relationship); **88-15** (private dealings with development company); **85-77** (private business). In order to dispel an appearance of a conflict of interest, §23(b)(3) requires that the Commissioners publically disclose, prior to their participation in the new permit application, their status in the lawsuit and their relationships with any interested group. The proper procedure is to disclose in writing all of the relevant facts and to file the disclosure with the MVC Executive Director and with the town clerk for the town which has referred the permit application to the MVC. The Commissioners should also make a verbal public disclosure for inclusion in the meeting minutes prior to any official participation or action. **See, EC-COI-90-2; 89-19; In the Matter of George Keverian,** 1990 SEC 460.

We note that the issue concerning whether MVC Commissioners should be subject to abstention standards which are stricter than those contained in c. 268A is a policy question that is beyond the scope of this opinion and can only be addressed through legislative amendment or through the implementation of supplementary standards of conduct by the MVC pursuant to G.L. c. 268A, §23(e). Notwithstanding c. 268A, the alleged bias of a

municipal official may be addressed within the context of a petition for judicial review of the agency's decision. See, Attorney General v. Department of Public Utilities, 390 Mass. 208 (1983); EC-COI-82-31.

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

1/ The Elizabeth Islands, certain Indian lands and land owned by the Commonwealth are excluded from the MVC's jurisdiction. §2.

2/ The MVC may include local municipal regulations in adopting its regulations.

3/ The MVC's proposed criteria are subject to the approval of the Secretary of EOEA.

4/ Although the land under the MVC's jurisdiction includes all of Dukes County, we note that only one County official sits on the MVC, the County has no oversight for the MVC and is not statutorily required to contribute to the MVC's funding. Similarly, while the Commonwealth must approve MVC criteria and guidelines, the MVC does not statutorily receive state funding and does not have jurisdiction over Commonwealth land. In comparison to the large municipal representation on the MVC, the Commonwealth is represented by one member. We conclude that the MVC's relationship with municipal government outweighs its relationship with the Commonwealth.

5/ "Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

6/ Appointed Commissioners may be eligible for an exemption to the general §19 prohibition. See, G.L. c. 268A, §19(b)(1). This exemption is not available to elected Commissioners as elected Commissioners do not have an appointing authority. See, EC-COI-90-2.

7/ This advisory opinion is based on the facts as represented by the parties. The Ethics Commission has not conducted an independent investigation of the facts. Should any of the facts change, the Ethics Commission's conclusions may be different and the parties should seek further guidance.

CONFLICT OF INTEREST OPINION
EC-COI-91-4

FACTS:

You were appointed in November, 1990 as the director of the state lottery. In that capacity, you supervise and administer the state lottery and serve as executive officer of the State Lottery Commission (SLC). G.L. c. 10, §26. Prior to your appointment, you had business relationships with three separate organizations and wish to know whether you may maintain those relationships outside of your regular SLC work schedule.1/

1. Since 1988, you have served as a compensated member of the board of directors of and occasional consultant to Pericomp Corporation (Pericomp), which designs and manufactures equipment for the testing of magnetic tape drives. Pericomp does not engage in any business with either the SLC or any Massachusetts state agency.

2. You are an unpaid member of the board of directors and a stockholder of Filemark Corporation (Filemark), a wholly owned subsidiary of Pericomp. Filemark provides computerized file management systems which involve the use of personal computers and scanners. Filemark does not engage in any business with either the SLC or any Massachusetts state agency.

3. You serve as a technical computer consultant to the president of a quasi-governmental agency of the state of New York, the New York State Catskill Region Off-Track Betting Corporation (OTBC). The OTBC provides off-track betting services to the betting public in the Catskill Region of New York State and has no relationship with the SLC or with any Massachusetts state agency. You state that the computer systems operated by both OTBC and SLC are provided by the same supplier, General Instrument Corporation (GIC). You also state that you were initially hired as a technical consultant by the OTBC president in 1989.

QUESTION:

Does G.L. c. 268A permit you to retain your business relationships with Pericomp, Filemark and OTBC while you serve as director of the state lottery?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

As director of the state lottery, you are considered a state employee for the purposes of G.L. c. 268A. See, G.L. c. 268A, §1(q). Three sections of G.L. c. 268A are relevant to the propriety of your after-hours activities.

The first, G.L. c. 268A, §4, prohibits you from either receiving compensation from or acting as agent for anyone other than the commonwealth or a state agency in connection with any contract, application, proceeding or other particular matter[2] in which the commonwealth or a state agency is either a party or has a direct and substantial interest. The second, G.L. c. 268A, §6, prohibits you from participating[3] in your official capacity as lottery director in any particular matter which affects the financial interests of an organization with which you have an employment or director relationship. The third, G.L. c. 268A, §23(b)(2), prohibits you from using your official state position to secure any unwarranted privileges or exemptions of substantial value for you or anyone else. Based on these statutory provisions, we offer the following advice.

1. Pericomp

Your compensated director and consultant relationship to Pericomp is permissible under G.L. c. 268A, §4 since your activities as you describe them do not relate to any contract or other particular matter in which any commonwealth of Massachusetts agency is either a party or has a direct and substantial interest. Should the facts change and Pericomp propose to commence applications, contracts or other particular matters with any commonwealth of Massachusetts agencies, however, you should renew your opinion request with us.

Although there do not appear to be any current or prospective matters coming before you as lottery director affecting Pericomp's financial interests, you will be subject to the abstention requirements of G.L. c. 268A, §6 should such matters arise. To comply with G.L. c. 268A, §23(b)(2), you must conduct your Pericomp activities entirely outside of your SLC work schedule and must refrain from using SLC resources such as telephones, computers, postage and personnel for your Pericomp work.

2. Filemark

The same principles which apply to you in your Pericomp activities will also apply to you in your activities as a member of the board of directors and stockholder at Filemark. In particular, should Filemark seek to commence any dealings with agencies of the commonwealth of Massachusetts, we recommend that you renew your advisory opinion request.

3. OTCB

Because your consultant activities to OTCB do not relate to any particular matter in which a commonwealth of Massachusetts agency is either a party or has a direct and substantial interest, your OTCB activities as you describe them are permissible under G.L. c. 268A, §4, subject to the condition that your activities be conducted entirely outside of your SLC work schedule and without the use of SLC resources. G.L. c. 268A, §23(b)(2). Your facts also warrant discussion of two additional issues under G.L. c. 268A, §23.

Section 23(b)(3) prohibits a state employee from conduct which would cause a reasonable person to conclude that the employee is likely to act as a result of undue influence of any person. This conclusion can be dispelled through a written disclosure by the employee relating the relevant facts to his or her state appointing authority. To the extent that, in your official SLC capacity, you will be dealing with GIC, which also supplies computer systems to OTCB, there could be an appearance that your official activities could be influenced by GIC's supplier relationship with OTCB. To dispel this appearance, you should disclose to your SLC appointing authority the relevant facts concerning your relationship with GIC. See, In the Matter of George Keverian, 1990 SEC 460.

Section 23(b)(1) prohibits a state employee from accepting paid employment, the responsibilities of which are inherently incompatible with the employee's public office. While your consultant responsibilities for OTCB do not appear to be incompatible with your current duties as lottery director, EC-COI-89-30, issues under §23(b)(1) could arise if the scope of the SLC jurisdiction were expanded to include off-track betting. Should this occur, we suggest that you renew your opinion request with us.[4]

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[1]The Commission does not possess the authority to interpret G.L. c. 10, §26 and, in particular, whether your activities are violative of the statutory requirement that the director of the state lottery "shall devote his entire time and attention to the duties of his office." You should pursue with the Attorney General the interpretation of this requirement.

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

[4]Given your pre-existing consultant relationship with OTCB, it does not appear that your maintenance of that relationship is "for or because of" any official acts as lottery director. G.L. c. 268A, §3.

CONFLICT OF INTEREST OPINION
EC-COI-91-5

FACTS:

Your law firm is outside counsel to ABC Board (Board), a division of state agency XYZ. Your firm now has been asked by a municipal entity to represent it in an administrative proceeding and litigation against XYZ in a matter unrelated to your representation of ABC. You have informed us that, if M.G.L. c. 268A permits this representation, your firm, pursuant to the Canons of Ethics and Disciplinary Rules, would seek XYZ's consent to this proposed representation.

This Commission has previously advised you that, as counsel to the Board, you are an XYZ "special state employee" as that term is defined in M.G.L. c. 268A, §1(o). See, EC-COI-90-5. You inform us that the matter in which you would represent the second client is not one in which you have participated[1] as counsel to the board or which has been the subject of your official responsibility.[2] As you have noted, however, the new matter is one which is pending in XYZ, the agency in which you are serving.[3]

You inform us that you will likely be considered as providing services to XYZ for a total of more than 60 days within the past 365 days, and are now considering representing the municipal entity in a lawsuit against XYZ.

QUESTION:

May an XYZ special state employee, who has already served more than 60 days within the past 365 days in that status, now represent a non-state public entity in a lawsuit against XYZ?

ANSWER:

No.

DISCUSSION:

As a special state employee, you are subject to the conflict of interest law, M.G.L. c. 268A. Section 4 of c. 268A prohibits a state employee from acting as an agent or attorney for anyone other than the commonwealth or a state agency in connection with any particular matter[4] in which the commonwealth or a state agency is a party or has a direct and substantial interest.

As a special state employee, you are subject to the prohibition only in relation to a particular matter (a) in which you at any time participated as a state employee, (b) which is, or within one year has been, the subject of your official responsibility, or (c) which is pending in the same agency in which you are serving. Clause (c) shall not apply, however, in the case of a special state employee who serves "no more than sixty days during any period of three hundred and sixty-five consecutive days." (Emphasis added). c. 268A, §4; EC-COI-85-49.

This provision would permit you to represent the second public entity on any matter, even in a lawsuit against XYZ, as long as the 60-day period were met. Once that period were triggered, however, your status as a special state employee would no longer permit you to take on such matters. The concern addressed by §4 is the potential for influencing pending agency matters. EC-COI-85-49. Accordingly, the 60-day rule is necessary in order to prevent the appearance of undue agency influence. Full-time state employees are, of course, prohibited by §4 from taking on any such matters at all. The 60-day period applicable to special state employees is an arbitrary, but necessary, line drawn by the legislature to prohibit a special state employee from eventually doing what a regular state employee could not. Without the time restriction, the status of a "special state employee" would soon be rendered meaningless. For example, without the time restriction, a special state employee could work eleven of twelve months at an agency yet would be free from all of the restrictions applicable to full time employees -- an incongruous result. The §4 restriction recognizes that the opportunities to influence pending agency matters increase with the amount of time spent working for that agency.

You maintain that the Clause (c) restriction set forth in §4 should apply prospectively only. In other words, you believe that the Clause (c) 60-day restriction only applies from the date on which the matter in question is undertaken. According to your view, the appropriate analysis would be to start anew the 60-day period during which one is considered a special state employee each time a new matter arises without considering the services already provided by that employee in the past 365 days. However, this view of the §4 exemption does not comport with either the intention of §4 or the apparent meaning of the clause as previously interpreted by this Commission.

As evidence of your position, you state that the Clause (c) restriction applies prospectively only because it refers to a special state employee who "serves" no more than 60 days, not who "serves or has served." However, this Commission has implicitly adopted a different rule -- one which applies the §4 restriction over a "floating" period (that is, looking to both prior and subsequent service) as opposed to a fixed, prospective only period of 365 days. See, e.g., EC-COI-82-49; 82-50; 82-55; 84-20; 84-129; 85-13; 85-25; 85-37; 85-39; 85-45; 85-49; 90-12; 90-16; Commission Advisory No. 13 (Agency) (1988). We expressly adopt that rule here. The Commission believes that the more reasonable construction is to have the 60-day restriction apply in such a way as to reduce the appearance of undue agency influence, and that the Commission's interpretation of the restriction accomplishes that goal. See, e.g., EC-COI-90-15 (the Commission is obligated to construe a statute in light of its language and the presumed intent of the legislature).

One commentator has also concluded that any other construction of the restriction would have been more carefully spelled out in the statute. See, Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U. Law Rev. 299, 340 (footnote 230) (1965). Buss' conclusion was based upon the counterpart language to the federal conflict statute (18 U.S.C. §§203(c) and 205) upon which c. 268A was modeled. Buss indicates that the statute itself provides "no answer more persuasive than the word 'serves' itself, which seems to suggest rendering service more than it does availability for services."

You would, in effect, at least double the explicit statutory time period during a given one-year period. Moreover, starting the 60-day period anew each time a matter arises in XYZ would eventually lead to the very problem the Clause (c) restriction was designed to avoid. For example, if six new matters arose 60 days apart, your interpretation would permit you to work on all of those matters for other parties, yet you could still be providing services to the state agency during that time, for a total of 360 days. This, we believe, is not the intent of the restriction, and we do not perceive sufficient cause to reconsider our prior precedent. Our conclusion is consistent with the long-held policy that the provisions of the state conflict of interest law should be broadly implemented and that exemptions for special state employees should be narrowly construed. See, e.g., EC-COI-87-2; 86-7; 85-49; 84-20. Accordingly, once the 60-day period set forth in Clause (c) is reached, you may no longer rely on the §4 exemption available to special state employees with respect to matters pending in the XYZ.

Date Authorized: March 13, 1991

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

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

[3/] In a letter to you dated February 18, 1988, the Legal Division of this Commission concluded, based upon your contract with the board, that the agency you serve is XYZ, not the Board. You do not take issue with that conclusion.

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

CONFLICT OF INTEREST OPINION
EC-COI-91-6

FACTS:

You are an elected county official. You are also considering part-time employment with XYZ, a company which is under permit to provide disposal and treatment services for underground tanks and contaminated water which cannot be disposed of through normal sewage methods. In your position at XYZ, you would provide managerial and financial advice and, in consideration, would receive a 5% interest in the non-voting stock of the company. XYZ does not do any business with the county or any county agency, and does not expect to do so in the future with regard to any particular matter in which a county agency is a party or has a direct or substantial interest. You would perform services for XYZ outside of your normal work schedule for the county.

QUESTION:

Does G.L. c. 268A permit your part-time employment with XYZ?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

You are a county employee for the purposes of G.L. c. 268A. The primary provisions which limit the outside activities of county employees are §11 and §23. Under §11, you are prohibited from either receiving compensation from or acting as an agent for XYZ in connection with any decision, contract or other particular matter[1/] in which the county is either a party or has a direct and substantial interest. See, In the Matter of James Collins, 1985 SEC 228, 230. For example, the Commission concluded in EC-COI-89-10 that prohibited matters under §11 would include decisions regarding the use of county retirement funds, In the Matter of James Collins; county insurance contracts, EC-COI-83-150 and civil actions in which the county is a party, EC-COI-80-42. On the other hand, where the interest of a county agency is too remote or tenuous, the prohibition of §11 does not apply. See, EC-COI-85-46 (filing of documents with County Registry); EC-COI-81-21 (criminal prosecutions by district attorneys); EC-COI-81-166 (campaign manager activities on behalf of state office candidate). Your activities for XYZ do not appear to involve the interests of the county in any direct and substantial way inasmuch as XYZ has no dealings with the county or any county agency.

Under §23(b)(2), you must avoid using your official position to secure any unwarranted privileges or exemptions of substantial value for yourself or XYZ. To comply with §23, you must conduct your XYZ activities entirely outside of your regular county work schedule, and must refrain from using any county resources such as clerical assistance, telephones, copy machines, word processors, stamps, and automobiles for your non-county-related activities. In particular, you should keep accurate records of your work schedule so as to avoid any ambiguity about the use of your time.

Date Authorized: March 13, 1991

[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).

CONFLICT OF INTEREST OPINION
EC-COI-91-7

FACTS:

You are an Associate Professor at a State College (College). In that capacity, you teach a course to College students involving the instruction and coaching of elementary school students. As part of your faculty position, you also teach physical education in K-6 classes at a campus center (Center) which is part of the College. In addition to your faculty position, you coach cross-country and track teams in the fall and winter semesters. Your part-time coaching position is a separate, paid position, funded by the Athletic Trust Fund (Fund). Generally your faculty responsibilities do not coincide with your coaching schedule. For instance, track meets are usually held on weekends and your coaching takes place after your faculty duties. The exception to this arrangement may occur if a national track meet is scheduled out of town. In such a case, you would re-schedule your class or arrange for a substitute instructor and would take personal leave to make such a trip and if necessary, you would pay for the substitute instructor.

QUESTIONS:

Does your financial interest in your compensated cross-country and track coaching position qualify for an exemption from G.L. c. 268A, §7.

ANSWER:

Yes.

DISCUSSION:

In your capacity as an associate professor at the College, you are considered a state employee of a state agency within the meaning of G.L. c. 268A. See, G.L. c. 268A, §1(p),(q).[1/] As a state employee, you are subject to the restrictions of G.L. c. 268A, §7, which prohibits a state employee from having a financial interest, direct or indirect, in a contract made by a state agency. **Quinn v. State Ethics Commission**, 401 Mass. 210 (1987). By virtue of your receipt of compensation from the Fund for your services as a college cross-country athletic and track coach, you have a financial interest in a contract made by a state agency.

Prior to 1980, both the Commission and Attorney General concluded that G.L. c. 268A, §7 prohibits a state employee from performing paid teaching services at a state college or university. **EC-COI-79-9; Attorney General Conflict Opinion No. 844.** In response to these conclusions under G.L. c. 268A, §7, the General Court enacted St. 1980, c. 303 which established the following exemption from §7:

> 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 of 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, notwithstanding the provisions of section twenty-one of chapter thirty.

Since the enactment of this exemption, state employees have received compensation for teaching at state colleges and universities, with the exception of those employees who hold influential positions affecting the financial management of the institutions at which they intended to teach. The Commission has applied the exemption language to cover teaching services in state and community colleges, **EC-COI-81-85**, as well as in institutions which are required by state law to provide education and training. **EC-COI-81-15** (correctional facility), **81-39** (Criminal Justice Training Council). On the other hand, the Commission has found the exemption inapplicable to state employees who have official responsibility for the financial management of the teaching institution (**EC-COI-81-126; 83-90**) or whose services are conducted for state agencies which are not comparable to educational institutions. **EC-COI-81-40; 81-95.**

While the Commission has not directly construed the meaning of "teaching" under the exemption, the Commission found in **EC-COI-82-158** that a state employee who performed paid services in the preparation of a college catalogue did not qualify for the teaching exemption. The instances in which the Commission has

applied the exemption have, without exception, involved instruction to students in an academic classroom setting.

In 1990, the Massachusetts Teachers Association filed legislation to clarify the meaning of the term "teaching" under the exemption. The legislation, An Act Further Regulating Employment in Higher Education, was enacted as St. 1990, c. 487 and provides that the state employee services eligible for the exemption will include teaching as well as "performing other related duties."[2/] In declaring the act to take effect immediately upon signing, the Governor stated that the act would "enable teachers to perform related duties such as part-time coaching and teaching ..." See, **Statement of the Governor**, December 31, 1990, filed with the Secretary of State in connection with the enactment of St. 1990, c. 487.

We conclude that the recently amended exemption to G.L. c. 268A, §7 permits a state employee to perform instructional services both within and outside of the traditional academic classroom setting at a state educational institution as well as services which are directly related to such instruction. The clarifying language reflects an intent to assure that the exemption covers instructional services performed outside of the classroom. In particular, we regard as persuasive the statement of the Governor that the amendment was intended to cover coaching. It is well settled that the message of the Governor in connection with the consideration and enactment of a bill is relevant to assist in the construction of a statute. **Taplin v. Town of Chatham**, 390 Mass. 1 (1983); **MacCuish v. Volkswagonwerk A.G.**, 22 Mass. App. 380 (1986); Sands, **Sutherland Statutory Construction**, §48.05 (4th Ed.).

With respect to the type of services implicated by the amended exemption, we conclude that, while the General Court intended more flexibility than under the original 1980 amendment, the permissible services are not unlimited and must be directly related to the content of instruction and how that content is taught. Thus, services related to the development of curriculum, the selection and evaluation of teachers, course scheduling, and the advising of students in connection with courses would fall within the statutory exemption. On the other hand, purely administrative or custodial functions such as record-keeping, facility management, financial and budgetary services and personnel administration, while indirectly supporting the ultimate educational objectives of the institution, do not have a sufficiently direct relationship to instruction and therefore do not qualify under the amended exemption. In construing this exemption, we note our customary reluctance to expand unduly language contained in statutory exemptions to G.L. c. 268A. See, **EC-COI-87-2** citing **Department of Environmental Quality Engineering v. Town of Hingham**, 15 Mass. App. Ct. 409, 412 (1983).

Based on the foregoing, we conclude that your cross-country athletic and track coaching services for the College qualify for an exemption under G.L. c. 268A, §7, inasmuch as they are performed on a part-time basis, and you do not have responsibility for the financial management of the College. We would caution you, however, to maintain accurate records of your coaching activities and to arrange to take personal or vacation leave if your coaching activities overlap with your regular College employment schedule. Under G.L. c. 268A, §23(b)(2), a state employee may not use his official position to secure for himself any unwarranted privileges or exemptions of substantial value. By receiving dual compensation from the College for the same hours, you will violate §23(b)(2). **EC-COI-86-11** (a state employee may not receive additional compensation on an educational leave day for which he already receives regular state compensation). Your arrangement under which you take personal leave for your cross-country and track coaching must therefore be consistent with §23(b)(2). In particular, it is not appropriate to reschedule regular classes or to arrange for substitute instructors to accomodate your track meet schedule.

Date Authorized: March 13, 1991

[1/]Because your faculty contract expressly permits you to engage in professional activities during customary working hours, you are also considered a "special state employee" under G.L. c. 268A, §1(o). **EC-COI-81-64**. Your status as a special state employee will have no bearing, however, on the application of G.L. c. 268A to your facts.

[2/]We express no opinion as to the merits of this amendment.

CONFLICT OF INTEREST OPINION
EC-COI-91-8

FACTS:

You are an administrator in a town (Town). Your duties include working directly for the town manager on special projects, serving as acting town manager in his absence, and working on special redevelopment projects in the Town.

As part of the revitalization effort in the business district, you initiated a program of housing rehabilitation in the surrounding neighborhoods. Under that program, through community development grants funded by the federal Department of Housing and Urban Development (HUD) and awarded by the state Executive Office of Communities and Development (EOCD), properties which have code violations are eligible for grants to eliminate those violations. In addition, special grants are given in conjunction with the regular funding for the removal of lead paint from homes and rental units.

The program has two components, addressing both owner-occupied and rental units. Under the owner-

occupied program component, owners who meet the income criteria established by Section 8 guidelines of HUD can receive grants to rehabilitate their home. This assistance ranges from outright grants to matching grants dependent upon income. Under the second program component, rental units are targeted for assistance regardless of whether those units are owner or non-owner occupied multi- units. This component provides for matching funds and requires that the occupants of the rental units meet the Section 8 HUD guidelines. In addition, the owner must agree to continue to rent to income-eligible individuals for a specified period of time.

The program is administered by a community development coordinator who works under your supervision. He is responsible for reviewing applications for assistance and determining eligibility. Under his supervision is the housing rehabilitation specialist and the program secretary.

You are the owner of a multi-family unit in which you live. The unit is located in the required target area for eligibility. You have been notified by a representative of the state Department of Public Health that one of your rental units and areas of the exterior of the building contain lead paint. With this notification, you have been informed that you have ten days to contract for the removal of the lead paint. You are interested in applying for a rehabilitation grant for an owner-occupied building under the above-described housing rehabilitation program.

QUESTION:

Does G.L. c. 268A permit you to apply for and accept a rehabilitation grant under the housing rehabilitation program?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

As director of administration and development for the Town, you are considered a municipal employee for the purposes of G.L. c. 268A. Four sections of the law are relevant.

1. Section 20

Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest, direct or indirect, in a contract made by an agency of the same municipality, unless an exemption applies. The housing rehabilitation grant will constitute a contract for the purposes of G.L. c. 268A, **EC-COI-87-40**, and your proposed acceptance of the grant will give you a financial interest in a contract made by a Town agency, the office of administration and development. Under G.L. c. 268A, §20(e), however, the prohibition of §20 does not apply "to a municipal employee who receives benefits from programs funded by the United States or any other source in connection with the rental, improvement or rehabilitation of his residence to the extent permitted by the funding agency." Because your housing rehabilitation grant would involve your receipt of benefits from a federally funded program in connection with the rehabilitation of your residence, you qualify for an exemption under §20(e). **Compare, EC-COI-83-117** (grant must involve improvement or rehabilitation of residence in order to qualify under §20(e)).

2. Section 19

Under G.L. c. 268A, §19, a municipal employee is prohibited from officially participating[1/] in any application, contract, decision or other particular matter[2/] in which he has a financial interest. To comply with §19, you must abstain from any official discussion, review, recommendation, approval or monitoring of your grant application or grant in your capacity as director of administration and development. Your appointing official, the town manager, may assign these official responsibilities to other municipal employees or may assume them himself.[3/]

3. Section 17(c)

Under G.L. c. 268A, §17(c), a municipal employee may not act as agent for anyone in connection with any particular matter in which the municipality or a municipal agency is either a party or has a direct and substantial interest. The Commission has recognized, however, that an employee who appears before a municipal agency on his own behalf is not acting as the agent for others within the meaning of G.L. c. 268A, §17. **See, Advisory No. 13 (Agency); EC-COI-89-11; 85-55.** Accordingly, you may file with a Town agency an application for a housing rehabilitation grant on your own behalf as an owner-applicant.

4. Section 23(b)

Under G.L. c. 268A, §23(b), a municipal employee may neither

> (2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals; nor
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, disclose in a manner which is

public in nature, the facts which would otherwise lead to such a conclusion.

These provisions apply both to you and to other Town officials. Under this section, those Town officials who will be reviewing your housing rehabilitation application may not grant to you any unwarranted treatment and must evaluate your application pursuant to the same objective standards by which other similar applications are handled. Those officials should also disclose to the town manager the fact that they are participating in a matter affecting the director of administration and development.

As applied to you, §23 requires that your official dealings with these town officials be in no way influenced by the outcome of your housing rehabilitation application. For example, your evaluation of employees of the office of administration and development may not be influenced by their handling of your housing rehabilitation grant application.

Date Authorized: March 13, 1991

[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/] Under §19(b)(1), the town manager also has the option of granting you written permission to participate officially in matters in which you have a financial interest, pursuant to the standards of §19(b)(1). See, In the Matter of Peter J. Cassidy, 1988 SEC 371.

CONFLICT OF INTEREST OPINION
EC-COI-91-9

FACTS:

You are a City Solicitor for a City (City). You have asked whether a City Councillor can simultaneously hold a full-time appointed position in the same city. Both the elected position of City Councillor and the appointed agency position are paid positions. The agency is separate from the City Council but the City Council does approve the agency's budget. The agency's appointing authority is a Commission appointed by the City's Mayor. The agency is within the City Department of XYZ.

QUESTION:

May a City Councillor be appointed to a full-time municipal position while continuing to serve on the City Council?

ANSWER:

No.

DISCUSSION:

Section 20 of G.L. c. 268A, the conflict of interest law, prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party, of which financial interest he has knowledge or reason to know, unless an exemption applies.

A City Councillor would, therefore, be prohibited from being appointed to an additional full-time municipal compensated position, unless an exemption permitted the appointment. See, e.g., EC-COI-90-2; Commission Advisory No. 7 (Multiple Office Holding at the Local Level). Section 20 provides a number of exemptions. However, none of the exemptions would permit the proposed appointment. For example, §20(b) would permit a full-time municipal employee to be appointed to a second compensated municipal position, provided that the employee can meet certain specified criteria. Among the criteria are:

(1) the employee must not be employed in an agency which regulates the activities of the contracting (that is, second) agency;

(2) the employee cannot participate[1/] in, or have official responsibility[2/] for, any of the activities of the contracting agency;

(3) the contract must be made after public notice or competitive bidding; and

(4) the employee cannot be compensated for more than 500 hours in the second position during a calendar year.[3/]

In the present case, City Councillors appear to have either regulatory control over, or participate in, activities of the agency (directly or indirectly). Cf. EC-COI-83-77 (agency did not make any decisions affecting other agency); see also, EC-COI-83-158 ("regulate" means to govern or direct according to rule or bring under the control of constituted authority, to limit and prohibit to arrange in proper order, and to control that which already exists). We need not, however, decide that issue because, in any event, the proposed agency position would be full-time. The City Councillor would therefore not meet the 500 hour requirement of §20(b). See, EC-

COI-89-28 (full-time police officer cannot also hold City Council position without violating §20); **EC-COI-85-66**. No other exemption in §20 would appear to be available to the City Councillor.[4/]

Accordingly, the City Councillor may not be appointed to the proposed full-time municipal position.

The Commission expresses no opinion as to whether any such appointments are permitted or prohibited by any other general law or City Charter provision.

Date Authorized: April 18, 1991

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

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

[3/] There are, in addition, several other criteria in §20(b) not listed here.

[4/] We note, for example, that a City Councillor is not eligible for "special municipal employee" status. See, **EC-COI-89-28**; M.G.L. c. 268A, §1(n) (criteria for becoming a "special.")

CONFLICT OF INTEREST OPINION
EC-COI-91-10

FACTS:

You are a former employee of the Department of Industrial Accidents (Department), now engaged in the private practice of law. You have asked whether the conflict of interest law applicable to former state employees, M.G.L. c. 268A, §5, would prohibit you from representing private sector employees and employers in workers compensation matters which were pending prior to your departure from the Department. Specifically, you raise the question as to whether the Commonwealth has a direct and substantial interest in workers compensation matters which involve two or more private parties -- the worker and the employer.[1/]

You inform us that, pursuant to M.G.L. c. 152, the Department is the forum in which all workers compensation claims are made by employees in the Commonwealth. Other than those claims in which the Commonwealth or a political subdivision of the Commonwealth is the employer, a workers compensation claim is made by a private litigant against a private employer. In addition, you inform us that the Department receives virtually all of its funding from private sector employers through a premium payment procedure. Based upon those facts, you would characterize the workers compensation proceeding as merely a forum to resolve private litigation. In effect, you would analogize such proceedings to civil litigation pending in courts of the Commonwealth -- matters in which the Commonwealth usually does not have a direct and substantial interest.

QUESTION:

Under M.G.L. c. 268A, §5, may a former employee of the Department of Industrial Accidents represent private employees or employers on matters in which he participated, or which were pending during the final two years of his tenure?

ANSWER:

No, for the reasons stated below.

DISCUSSION:

Section 5

As a former employee of the Department, you are considered a former state employee for purposes M.G.L. c. 268A, §5.

Section 5(a) prohibits a former state employee from knowingly acting as an agent or attorney for, or receiving compensation, directly or indirectly, from anyone other than the Commonwealth or a state agency, in connection with any particular matter[2/] in which the Commonwealth or a state agency[3/] is a party or has a direct and substantial interest and in which he participated[4/] as a state employee while so employed.

Section 5(b) prohibits a former state employee, within one year after his last employment has ceased, from appearing personally before any court or agency of the Commonwealth as an agent or attorney for anyone other than the Commonwealth in connection with any particular matter in which the Commonwealth is a party or has a direct and substantial interest and which was under his official responsibility[5/] as a state employee at any time within a period of two years prior to the termination of his employment.[6/]

As a general rule, matters pending in state agencies are "particular matters" within the meaning of M.G.L. c. 268A, §1(k). See, e.g., **EC-COI-80-48** (employee of state agency may not represent private litigant on care and protection/adoption matters because those matters are ones in which the Commonwealth is a party); **EC-COI-80-54** (assistant attorney general may not act as a mediator (in a privately sponsored program designed to remove certain matters from the court's docket) in any civil matter in which the Commonwealth has a direct and substantial interest, or in <u>any</u> criminal matter).

This Commission has held that all judicial proceedings, even civil cases between private litigants, are particular matters within the meaning of the statute. **EC-COI-82-132.** Litigation between two private litigants in a judicial proceeding will not, however, automatically result in restrictions under c. 268A for former state employees. Such matters are not normally ones in which the Commonwealth or a state agency is a party or has a direct and substantial interest. See, e.g. **EC-COI-82-132** (judicial civil proceedings, while "particular matters" within the meaning of c. 268A, §1(k), are not generally matters in which the state has a direct and substantial interest); **EC-COI-80-54** (ordinarily in a lawsuit between private parties, there is no state interest). Where, however, the Commonwealth is a party or has a direct and substantial interest in the outcome of the litigation, issues under §5 are raised.

While it is obvious through examination of court papers when the state is a party to litigation (**EC-COI-80-54**), there is a vast range of cases in which the Commonwealth is not a party but still may have a direct and substantial interest in the outcome of a matter, thus requiring analysis under §5. See, e.g., **EC-COI-80-108** (private action involved same claim previously investigated by former state employee); **85-73** (state had direct and substantial interest in bankruptcy proceedings of private company where Commonwealth prepared proof of claim for property damages caused by company's product); **85-16** (application by private company for Commonwealth grant money); **88-25** (state has a direct and substantial interest in referrals of district court "operating under" clients to private driver alcohol education program); see also,[7] **EC-COI-85-8** (town may have a direct and substantial interest in outcome of application where town resident applies to state agency for waiver to develop a piece of land); **88-1** (litigation which implicates a city's rights and liabilities would be of direct and substantial interest to the city); **88-6** (town solicitor may not privately represent town councillor in connection with a case pending before Ethics Commission because town may later be subjected to litigation as a result of outcome); **88-7** (assistant city solicitor may not represent, for compensation, a criminal defendant arrested by city police in connection with a motion to suppress hearing).

In each of these cases, the Commission has looked to the ultimate impact upon governmental agencies. Where, for example, an outcome could cause a governmental agency (i) to expend public funds, or (ii) to take some action, or (iii) to be exposed to liability, or (iv) to otherwise implicate its rights or responsibilities, the government has been considered to have a direct and substantial interest.

In the present case, you describe the board as a "forum" to hear disputes between two private litigants. Accordingly, you would analogize such litigation to private civil litigation where the Commonwealth has no direct interest in the outcome of the dispute. Such an interpretation would permit you to now represent one of those private litigants (on appeal, for example) even where you personally and substantially participated in the same particular matter when it was pending in your agency. We conclude, however, that you may not do so.

Our conclusion is based upon the Department's specific institutional interest in the enforcement of the workers compensation law, and on the broad interest that the Commonwealth has in workers compensation matters generally. In Chapter 152, the Legislature expressed a clear concern for ensuring the enforcement of the workers compensation laws for the benefit, protection and safety of all employees within its borders. See, e.g., **Swift v. American Mutual Insurance Company**, 399 Mass. 373 (1987) (purpose of the act is to eliminate or reduce industrial hazards, as well as compensating injured workers); **Ciszewski v. Industrial Accident Board**, 367 Mass. 135 (1975) (Board has authority to promulgate rules concerning inspections of private businesses where industrial accidents occur). In addition, the Department has a direct interest in ensuring that its worker compensation rules are complied with. See, e.g., c. 152, §25A which expressly empowers the Department to promulgate and enforce rules concerning compensation payment mechanisms; c. 152, §25C which (a) empowers the Department to issue a stop work order, and levy monetary penalties, against any private company which does not comply with the Department's rules and regulations concerning workers compensation payment rules, (b) directs that all state and local licensing agencies withhold the issuance or renewal of a license/permit to operate any business not in compliance, and (c) empowers the Commissioner to bring complaints against employers for violations of this section, and to prosecute such complaints in the district court; c. 152, §25G which establishes requirements for workers compensation self-insurance groups, including the holding of security deposits or bonds in an amount to be determined by the Commissioner of Insurance, sufficient to pay workers compensation and other claims and associated expenses in the event of insolvency of such groups. The security deposit is for "the benefit of the Commonwealth solely to pay" such claims. In other words, if such a group becomes bankrupt, the Commonwealth is potentially liable for workers compensation claims. In addition, the Commissioner of Insurance is appointed as each groups' attorney to receive service of legal process issued against it in the Commonwealth; and c. 152, §6A which makes the division of administration responsible for monitoring the furnishing of workers compensation benefits by the employer or insurer to ascertain that correct benefits are being provided in cases accepted as compensable injuries.

Given the Commonwealth's broad interest in enforcing workers compensation laws for the safety and protection of all employees in the Commonwealth, and the Department's express statutory power and obligation to enforce those laws, we must conclude that the Commonwealth has a direct and substantial interest in all workers compensation matters. Accordingly, we do not view the Department as analogous to the courts of the Commonwealth, which have no interest in the outcome of

any given judicial proceeding (except, perhaps, for the institutional interest of having their decisions upheld on appeal). See, EC-COI-84-9 (Commonwealth has direct and substantial interest in matters pending before Appellate Tax Board).

Finally, we note Attorney General Conflict Opinion No. 144 (August 1, 1963). That opinion suggested, in dicta, that the Commonwealth might not have a direct and substantial interest in matters involving clients who have claims under the Workmen's Compensation Act in which the Commonwealth is not a party. No rationale was included. Based upon our review of present c. 152, however, we cannot reach the same conclusion. Although guided by prior Attorney General conflict opinions, the Commission is not bound by the conclusions stated therein. See, e.g., EC-COI-79-2; 79-7; 79-22. St. 1978, c. 210, §24 (The Commission may modify or reverse prior opinions issued by the Attorney General).

In summary, if a given matter was one in which you either participated or was one which was under your official responsibility as the Commissioner, §5 will apply to your activities on those matters, potentially restricting your work for any of the parties involved in that matter. See, M.G.L. c. 268A, §§5(a), 5(b).[8/]

Date Authorized: May 13, 1991

[1/]You recognize that the Commonwealth has a direct and substantial interest in all workers compensation matters which involve the Commonwealth as an employer. Your opinion request does not concern the representation of private parties in connection with those matters.

[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/]"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such 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).

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

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

[6/]Note also that Section 5(c) will apply to "partners" of former state employees.

[7/]These cases apply the analogous municipal sections, 17 and 18.

[8/]Given your description of your previous responsibilities as Commissioner, it is unlikely that you will have personally and substantially "participated" in many of the cases which were pending in the Department. More likely, the one-year appearances ban of Section 5(b) will apply in your case, because all such matters would appear to have been within your official responsibility. You may wish to seek specific, additional advice as matters arise.

CONFLICT OF INTEREST OPINION
EC-COI-91-11

FACTS:

You are a state employee in state agency ABC. You seek guidance concerning the application of G.L. c. 268A to employees of ABC who will be furloughed for a period of at least five (5) consecutive days during the remainder of the 1991 Fiscal Year. Under St. 1991, c.6, §90, and regulations of the Commissioner of Administration, each state employee must select one of several options which would either defer or eliminate altogether the employee's entitlement to compensation for periods of up to three (3) weeks. One particular option, Option 1, would permit an employee to take a period of unpaid leave. During the leave period, an employee will not perform services for particular days and will not receive compensation for those days, but will receive continued health insurance, sick leave benefits and retirement credit.

QUESTION:

1. Is an employee of the ABC who selects a furlough option under which the employee does not perform services for one to three consecutive weeks and does not receive compensation during that period considered a "state employee"[1/] under G.L. c. 268A during the furlough period?

2. Assuming the answer to Question No. 1 is yes, what restrictions will apply during the furlough period?[2/]

ANSWERS:

1. Yes.

2. The employee will be subject to the restrictions set forth below.

DISCUSSION:

1. State Employee Status

On three previous occasions, the Commission has addressed the application of G.L. c. 268A to appointed employees who are on leave of absence from their full-time positions. Most recently, in EC-COI-89-27, the Commission concluded that an injured municipal employee would be considered a municipal employee under G.L. c. 268A during the injured leave period. In EC-COI-89-27, the Commission announced the following factors as relevant in determining jurisdiction:

> In a determination of whether one continues to hold employment within a municipal agency the Commission will examine the characteristics of the relationship between the employee and the agency. The Commission will consider whether a previously compensated employee continues to receive compensation from the municipal agency, whether the employee continues to receive the same retirement, insurance, collective bargaining, sick leave and other benefits available to municipal employees, whether the parties have a reasonable expectation that the employee will return to his municipal position and what actions have been taken by the parties to terminate the employment relationship. No one factor is dispositive as the Commission considers the cumulative effect produced by each factor, as well as analyzing each factual situation in light of the purpose of the conflict of interest law. (citations omitted)

The Commission applied these standards to establish jurisdiction in EC-COI-89-27 inasmuch as the injured employee continued to receive health insurance and other economic benefits from the municipality during the leave period and had a reasonable expectation that he would return to work.

The Commission reached a similar conclusion in EC-COI-84-46, an opinion addressing the application of G.L. c. 268A to state institutional teachers during the two-month summer period in which these teachers neither teach nor receive compensation. The finding of continuing state employee status rested on the continuity of retirement, insurance, collective bargaining and sick leave benefits to institutional teachers during the two month leave. This opinion distinguished EC-COI-84-17, in which the Commission held that state employee status does not continue during a leave of absence in which the employee receives no compensation, fringe benefits or retirement credit attributable to that leave period. The Commission noted, however, that a period of absence due to vacation, holidays, personal time or illness would not affect state employee status where the employee was receiving benefits during the leave period. EC-COI-84-17.[3/]

Applying the EC-COI-89-27 factors to your question, we conclude that a state employee who chooses Option 1 and who takes unpaid leave will retain state employee status under G.L. c. 268A during the leave period, inasmuch as the employee will be receiving continued health insurance and other benefits and has a reasonable expectation of returning to work. EC-COI-89-27; 84-46.

We also conclude that, during the period of uncompensated leave under Option 1, a state employee will be considered a special state employee pursuant to G.L. c. 268A, §1(o).[4/] This conclusion is consistent with both the language of §1(o) granting special employee status for a position for which no compensation is provided, as well as Commission precedent. See, EC-COI-84-46 (institutional school teachers are special state employees during their uncompensated summer leave).[5/]

2. Application of G.L. c. 268A During Leave Period

Although your opinion request does not identify the specific types of outside activity in which employees intend to engage during the unpaid leave period, we can offer the following general guidelines.

(a) Section 4

If an employee receives compensation from or represents a party other than the commonwealth or a state agency during the leave period, G.L. c. 268A, §4 will apply. Under §4, a state employee may neither receive compensation from nor act as agent or attorney for anyone other than the commonwealth or a state agency in connection with any lawsuit or other particular matter[6/] in which the commonwealth or a state agency is a party or has a direct and substantial interest. As a special state employee, however, the employee is exempt from the restrictions of §4 except for those particular matters in which the employee participates, has official responsibility for, or which are pending in the employee's state agency. EC-COI-91-5. Thus, an ABC employee would be prohibited during the unpaid leave period from receiving compensation from or representing a client in any matter pending in ABC. On the other hand, the employee could work on civil matters and other particular matters which are outside of the ABC's jurisdiction, since those matters would not be pending in the ABC's office.

(b) Section 7

If an employee receives compensation from or works for another state agency during the unpaid leave period, G.L. c. 268A, §7 will apply. Under §7, a state employee may not have a financial interest, direct or indirect, in a contract made by a state agency. As a special state employee, however, the employee is exempt from §7 except for financial interests in contracts made by the same state agency, e.g., the ABC's office. G.L.

c. 268A, §7(d).[7] Thus, an ABC employee could contract with a state agency independent of the ABC's office during the leave period.

In addition to the restrictions of §§4 and 7, employees should also be aware of the following points.

1. Under G.L. c. 268A, §23(c), a state employee may not disclose to anyone, including a law firm, any confidential information which the employee has acquired as a state employee.

2. If, prior to the leave period, a state employee has an arrangement for employment with a law firm, G.L. c. 268A, §6 requires the employee to abstain from any official participation in cases involving that firm and to disclose the employment arrangement to both the employee's appointing official and the Commission. See, Commission Advisory No. 14.

Date Authorized: April 18, 1991

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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 ... G.L. c. 268A, §1(q).

[2]This opinion is limited to the application of G.L. c. 268A. To the extent that you seek guidance as to the application of other statutes to the outside activities of ABC employees on furlough, you should continue to pursue an answer to this question from the Attorney General.

[3]While not directly related, **EC-COI-83-84** concluded in that an elected municipal official retained municipal employee status during the period of a brief leave of absence. This conclusion rested on the fact that the official continued to hold the elected position.

[4]"Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

2) who is not an elected official and

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

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

[5]In **EC-COI-84-46**, the Commission left open the question of whether special employee status would apply during a comparatively short unpaid leave, specifically noting that a state employee would not be a special state employee during the weekend between his or her normal work week. The circumstances surrounding the enactment of St. 1991, c.6 and the resulting employee obligation to choose options to generate savings for the commonwealth at the immediate expense of the employee distinguish unpaid leave under Option 1 from weekend leave. We note that special state employee status does not accrue to employees who elect furlough options for periods in which they perform services and agree to receive deferred compensation or vacation days for those periods. On the other hand, a period of uncompensated leave, under Option 1, even for a period of less than five continuous days, would result in eligibility for special state employee status.

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

[7]A special state employee qualifies for a §7(d) exemption where the financial interest is in a contract made by an agency in whose activities the employee neither participates nor has official responsibility as a state employee, and the employee discloses the financial interest to the Commission.

CONFLICT OF INTEREST OPINION
EC-COI-91-12

FACTS:

The Company is a non-profit, tax exempt holding company which was created subsequent to a resolution passed by the trustees of a state institution. The Company is comprised of four subsidiary non-profit entities. The Company derives most of its income from its programs, from its start-up loans and from fundraising. At present, around three-fourths of the Company's indebtedness consists of commercial bank loans and around one fourth is from state institution

loans. The current Board of Directors has nine voting members and two, ex-officio non-voting members. Three of the nine voting directors and one of the two ex-officio members are individuals associated with the state institution.

The Commission has twice determined, prior to this opinion request, that the Company is a state instrumentality, subject to the conflict of interest law, G.L. c. 268A. See, **EC-COI-84-147; 89-1.** In **EC-COI-84-147**, the Commission based its jurisdictional conclusion on facts that: (1) the Company was created pursuant to a resolution passed by the trustees of the state institution; (2) the Company performed a governmental function in searching means to raise revenues for the state institution to comply with that entity's legislative mandate to finance, manage and protect the economic viability of the institution; and (3) the Company was subject to substantial state control because the selection process and the composition of its board was dominated by directors with government (state) affiliations.

The sequel opinion, **EC-COI-89-1**, presented similar facts in addition to certain proposed changes to the Company's organizational structure. In particular, the proposed changes related to the voting requirements of certain board actions and a requirement that a minimum of one-third but less than one half of the Company's voting directors be individuals affiliated with the state institution. In evaluating the facts of **89-1**, the Commission found the stimulus for the creation of the Company and its mandate to raise funds remained governmental in nature - similar to the conclusions found in **84-147**. And, inasmuch as the proposed Company's organizational changes still resulted in substantial control by state-affiliated directors, the sum of these factors rendered the Company a public entity for the purposes of c. 268A.

The Company presently requests this opinion on changed facts. The Company has amended its by-laws regarding a provision pertaining to the number and qualifications of the Board of Directors.[1/] [Text of the amended version with footnote deleted]

Of significance to this opinion is the fact that the new by-law changes the size of the Board of Directors and alters the requirement that a minimum number of voting directors be state institution-affiliated individuals. In the new by-law, one third or less of the voting directors may be state-affiliated.

QUESTION:

Whether, in view of the above organizational changes to its by-laws, would the Company continue to be a state agency for the purposes of the conflict of interest law, G.L. c. 268A?

ANSWER:

No.

DISCUSSION:

Prior to this opinion, the Ethics Commission concluded on two occasions that the Company was a "state agency" under the conflict of interest law, G.L. c. 268A, §1(p).[2/] See, **EC-COI-84-147; 89-1.** In those opinions, the jurisdictional status of the Company was evaluated in light of criteria drawn from established Commission precedent.

The Commission has consistently stated that the application of the conflict law cannot be conditioned solely on an entity's organizational status. **EC-COI-88-19** (organization's corporate structure is not sufficient to exempt it from definition of a municipal agency); **EC-COI-88-24; In the Matter of Louis L. Logan**, 1981 SEC 40, 45. See also, **EC-COI-84-147** (the Company's non-profit corporate structure did not exempt it from being a state entity under the conflict law).

Therefore, the Company must be examined under the four factors the Commission has developed to determine whether an organization is a public entity under 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.**

The Commission recently applied these four factors in two opinions. In **EC-COI-90-3**, the Commission found a non-profit foundation organized to support a state college was a state entity for the purposes of c. 268A. The Commission determined that the foundation was: (i) created to further the legislative purpose of a state college; (ii) performing a governmental function in raising revenues to support a state institution; (iii) using state resources and funds for its operation; and (iv) subject to potential and actual control by state affiliated board members.

In **EC-COI-90-7**, the Commission reviewed the status of a state agency's retirement fund board. The Commission concluded that the board was: (i) a governmentally created entity springing from the trust agreement between a state agency and a union under the broad legislative authority accorded to that state agency; (ii) created to conduct a public function - the administration of pensions for state employees; (iii) significantly funded from or on behalf of a state agency; and (iv) governed by a board of directors composed of a plurality of officials from the state agency and who were accountable to that state agency.

Presently, we reconsider the Company's status under c. 268A in view of recent changes made to its bylaws. In our view, the impetus for the creation of the non-profit holding company remains governmental in nature inasmuch as the creation of the corporation, as described in 84-147 and 89-1, came about because of the resolution passed by the board of trustees of the state institution. See, **EC-COI-88-24; 89-24.** We would note, however, that with the passage of time, and compositional changes in the corporation, the so-called "impetus" factor diminishes in significance.

With respect to the second factor, while the function of the holding company has been clarified by the April 5, 1989 resolution passed by its Board of Directors, it does not alter our conclusions drawn in **89-1.** The resolution states that the Company is a separate entity operating solely as a non-profit corporation and not under the umbrella of the state institution. The resolution does not change the nature of the holding company's corporate purpose (to promote the purposes of the state institution), nor change the statutory language which gives the state institution's board of trustees responsibility for protecting the financial viability of the state institution.

The Company's financing is derived from both private and public funds. While start-up funds for the Company originally came from the state institution, current Company financing is largely derived from commercial bank loans which do not involve the state institution. Based upon this fact, we conclude that the third Commission factor (whether the entity receives and/or expends public funds) would be met minimally, if at all.

While the four Commission jurisdiction factors are relevant, the pivotal question presented in this reconsideration is whether state-affiliated institution members will retain control over the Company's operations under the current corporate by-laws. We conclude that the present organizational changes to the Company's by-laws significantly alter the nature and extent of governmental control exercisable over that entity. These changes lead us to a different result under the fourth jurisdictional factor inasmuch as governmentally affiliated board members are not now assured a position of control over the Company's actions.

Our conclusion is based on the fact that the board of directors may now be made up of a minimum of eight and a maximum of eleven voting members. Of those voting directors, state-affiliated directors[3/] may comprise one-third or less of the total number of voting directors. This by-law provision significantly impacts both the corporate organizational structure and its functional operation. First, there is no requirement that a minimum number of state-affiliated individuals serve as directors. Second, the ceiling placed on the number of state-affiliated voting directors is one-third or less of the total number of voting directors. State-affiliated voting directors thus would have reduced control, both actual and potential, over board decisions. The current by-law reduces the possibility of state employees' voting as a significant block to the Board's action and in their potential domination of a quorum of any particular board meeting.

We conclude the current Company's by-law effectuates more than mere compositional changes in the board of directors. **EC-COI-84-64; 88-19.** The potential for control of the Company by state employees is nearly eliminated since all board actions must be made by a majority of voting directors constituting a valid quorum. See, **EC-COI-90-3.**

In weighing all the factors as applied to the Company, above, we conclude given the lack of public funding currently available to the Company, and the lack of public control, the Company is now properly deemed to be a private, non-public entity falling outside of the jurisdiction of c. 268A.[4/]

Date Authorized: September 11, 1991

[1/]The Amendment was adopted by the Board of Directors on March 22, 1991.

[2/]"State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such 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).

[3/]"State affiliated" directors as defined in Footnote 2 above.

[4/]The possibility exists that a Company Board consisting of nine voting members could have three state-affiliated voting directors, all of whom are counted as part of a five-member quorum. The three state-affiliated directors would then comprise more than one-half of that particular quorum. We conclude that this potential scenario does not reach the threshold of continuing or substantial governmental control or supervision exercised by the public employees as evidenced in opinions **EC-COI-90-3** and **90-7.** The type of governmental control over the Company in this instance must be more than a fortuitous circumstance. If, however, the Commission were to review facts or circumstances pointing to a continued pattern of domination or control by state-affiliated directors, this jurisdictional conclusion may not apply.

CONFLICT OF INTEREST OPINION
EC-COI-91-13

FACTS:

You are presently a Selectman in the Town of Northbridge. In the FY1991 and FY1992 budgets, the Town Meeting approved a line item providing no compensation for Selectmen. The Selectmen had recommended this line item to assist in alleviating a budget crisis in Town. Although uncompensated, several of the Selectmen continued to receive health benefits through the Town's group insurance policy under a 1977 Town By-law which provided that compensated and uncompensated employees were eligible for health insurance if their respective boards met certain criteria, such as frequency of meetings.

Recently, the Northbridge Finance Committee has requested that uncompensated employees be removed from the group health insurance policy pursuant to G.L. c. 32B, the statutory contributory group insurance scheme for county and municipal employees. G.L. c. 32B defines an employee as a person in the service of any political subdivision of the Commonwealth and who receives compensation for such service. G.L. c. 32B, §2. The definition includes elected and appointed officials. Northbridge Town Counsel has confirmed that c. 32B is applicable to the Town and that the Selectmen must receive compensation in order to be eligible for health benefits. It is estimated that the municipality's contribution to each health insurance premium is approximately $5,000 per year.

At the time that the Selectmen relinquished their salaries, they were not aware that they would be ineligible for the group insurance coverage. At one of the Selectmen's meetings, a former Selectman offered to donate $5.00 for the purpose of creating a $1.00 salary for each Selectman so that the Selectmen would remain eligible for group insurance.[1]

QUESTION:

Does G.L. c. 268A permit the Selectmen to accept the $5.00 donation?

ANSWER:

No.

DISCUSSION:

Selectmen, as municipal officials, are subject to G.L. c. 268A, §23(b)(2), which prohibits a municipal official from using or attempting to use his position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. At issue is whether the Selectmen, by accepting the donation, are securing an unwarranted privilege of substantial value that is not available to other similarly situated individuals.

In past precedent, the State Ethics Commission and the Massachusetts courts have considered a benefit to be of substantial value if it is worth $50 or more. See **Commonwealth v. Famigletti**, 4 Mass. App. Ct. 584 (1976); **Commission Advisory No. 2; EC-COI-85-42.** In its cases, "the Commission has recognized that 'substantial value' is a standard to be dealt with by judicial interpretation in relation to the facts of the particular case and is more desirable than the imposition of a fixed valuation formula." **In the Matter of William A. Burke, Jr.**, 1985 SEC 248, 251. Among the factors the Ethics Commission will weigh in a determination of whether an item is of substantial value are: the cumulative value of multiple gratuities, any facts which would enhance the face value, and the prospective worth and utility value of a benefit. See **EC-COI-88-22** (cumulative value of car rental discounts exceeds $50); **83-70** (unpaid faculty appointment of substantial value); **In the Matter of William A. Burke, Jr.**, 1985 SEC 248 (access to hospital's CEO is of substantial value).

Under the circumstances you present, the Ethics Commission concludes that the intended benefit conferred on the Selectmen is not $1.00 salary, but rather, the eligibility for health benefits. This conclusion is based on the fact that the profferred donation is only a token salary and the real underlying purpose of the donation is to allow the Selectmen to continue health benefits. These health benefits are of substantial value.

Further, the Ethics Commission concludes that acceptance of this donation would constitute an unwarranted privilege. Under G.L. c. 41, §108, it is the responsibility of the town to set the salary and compensation of all elected officers and to revise any salary at a town meeting. See **Amerige v. Saugus**, 208 Mass. 51 (1911) (town, not selectmen, set compensation rates). At the Town Meetings, the Northbridge residents voted not to compensate their Board of Selectmen. Under these circumstances, a donation from a private party, which is used to obtain personal compensation and benefits that were not appropriated by a town meeting vote as required by law, constitutes an unwarranted privilege for purposes of G.L. c. 268A, §23(b)(2). Acceptance of this donation is also unwarranted as it is being offered for the personal use of the Selectmen solely because of their status as Selectmen and is not available to other similarly situated individuals, such as all other uncompensated Town personnel. See **EC-COI-87-7; 86-17; 86-14.**

The Ethics Commission is aware that G.L. c. 44, §53A permits selectmen to accept gifts on behalf of a municipality,[2] but we do not find that the statute is applicable where the Selectmen are approving a gift for their personal benefit. The Ethics Commission has suggested that c. 44, §53A may be used as a vehicle by which a private party may pay expenses for public officials without violating G.L. c. 268A. See **e.g., Public Enforcement Letters 90-1; 90-2; 90-5.** But, implicit in the Commission's suggestion, are the facts that donations under c. 44, §53A would be used to further

municipal purposes and that the Town's governing body would review the appropriateness of the gift.[3] For example, the Commission suggested that c. 44, §53A may apply to vendor payment of travel expenses for fire chiefs to inspect fire trucks because the travel may serve a legitimate public purpose as fire trucks are manufactured to meet the needs of a specific municipality and the c. 44 procedures would allow scrutiny of the reasonableness of the expenses by other municipal officials. **Public Enforcement Letter 90-2. See also, Public Enforcement Letter 90-1** (public interest in travel to inspect curriculum); **Public Enforcement Letter 90-5** (may be public purpose in accepting travel packages permitting the Director of Haverhill Council on Aging to make decisions regarding packages offered to the elderly).

Under the facts that you present, we do not find that the donation to the Board of Selectmen will be used to further municipal purposes. Rather, the donation will be used for the personal benefit of the individual selectmen to obtain health benefits. **Compare EC-COI-89-23** (§§3 and 23 not violated by donation of computer for benefit of agency, not particular employee); **84-114** (§§3 and 23 not violated by donation of artwork for permanent exhibition in government agency and not for personal use of any employee) **with EC-COI-87-7** (payment of trip expenses not connected with any municipal duties violates §23); **86-14** (private automobile purchase discount violates §23); **85-23** (private stock purchase violates §23). Accordingly, G.L. c. 268A, §23(b)(2) will prohibit the Northbridge Selectmen from accepting a token salary from a private party in order to continue health insurance benefits under a municipal group policy.[4]

Date Authorized: September 11, 1991

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[1]You state that the former Selectman made his offer because he believed that the Selectmen's loss of health benefits was unfair where the Selectmen relinquished compensation in order to assist the Town and where past practice permitted uncompensated employees to receive health insurance benefits. This former Selectman does not have any official dealings with the Board of Selectmen.

[2]G.L. c. 44, §53A provides, in pertinent part, that an officer or department of a town may accept grants or gifts from funds from the federal government or from a charitable foundation, a private corporation, an individual or the Commonwealth and may expend the funds for the purposes of the grant or gift with the approval of the Board of Selectmen without further appropriation.

[3]We note that c. 44, §53A is titled "An Act Providing that Officers and Departments of Cities, Towns and Districts May Accept Grants or Gifts For Municipal Purposes and May Expend the Same Without Appropriation." (emphasis added). According to legislative history this legislation was recommended in order to permit municipalities to accept all types of federal grants and to enable all municipal departments to accept grants and gifts for municipal purposes. Among the examples cited in the committee report were grants for public assistance or education. **1964 House No. 83.**

[4]We note that your facts also present issues under G.L. c. 268A, §3. Section 3(b) prohibits a public official from accepting an item of substantial value for or because of any official act performed or to be performed by such employee. This section would be violated if the donor of the gift had official dealings before the Board of Selectmen. Because we find that §23(b)(2) prohibits acceptance of the $5.00 donation, we need not decide, at this time, whether §3 is violated when a gift is offered solely because of a public official's status as public official, without any further nexus between the donor and the donee.

CONFLICT OF INTEREST OPINION
EC-COI-91-14

FACTS:

You are a member of the General Court. You plan to establish a business known as the Company. The Company will conduct seminars on government relations for small and medium sized businesses. The seminars will, for a fee, teach business leaders how to participate in and monitor public policy decision-making that affects them at both the federal and state levels of government. The seminars will focus on timely public policy issues which concern business leaders.

You would serve as the principal in the Company, which will be organized as a corporation. You would become the majority stockholder. You anticipate that the Company will have four other associates, each of whom will also own an equity interest in the Company. Depending on the terms of the financing arrangements, you anticipate that your equity interest in the Company would either be 50%, if a bank loan is required, or 28%, if outside investors are sought. Similarly, your four associates would each own either 12.5% or 7%, depending on the terms of the financing arrangements. Your spouse and your current Administrative Assistant would be among the four associates. You have informed us that you will not permit your Administrative Assistant to work for the Company during the business hours when he is otherwise working as a state employee.

Most of the anticipated seminars and consulting activity will relate to the federal government and issues of national policy or international trade. Most federal government seminars will be held in Washington, D.C. Some seminars will focus on government decision-making at the state level. Of these, some state level programs will focus on public policy issues in Massachusetts. In such instances, you would not personally discuss specific legislation which may be pending before the General Court, although other seminar

panelists may do so. Furthermore, if a client or seminar participant were to request the Company's services on legislative matters or matters pending before Massachusetts state agencies, the Company would decline to represent that client. That client would instead be referred to another appropriate source.

Seminar participants will receive a notebook containing information on how to communicate with executive branch agencies, the Congress, or the specified state legislature, how to track legislation and regulatory action, how to plan a lobbying strategy, and sources for further assistance on specific problems. Participants will learn about professional lobbyists, in-house government relations offices, and government relation efforts that can be undertaken by corporate managers and employees.

The Company will also be available to assist clients on a consulting basis in resolving specific issues faced by the client in its government relations. Assistance in preparing a lobbying strategy or in hiring a lobbyist or government affairs representative are also possible activities. The Company could serve as a consultant to government relations firms to refer clients as appropriate when services are needed for specific activities.

The Company does not expect to solicit contracts from any state agency for seminars or any other services. It is possible, however, that seminar participants may work for businesses which have state contracts. The Company will pay seminar speakers travel expenses and/or honoraria for their participation.

Seminar registrants are expected to be key business people. While legislative agents registered at the federal or state levels may be asked to serve as speakers or panelists at the seminars, they are not generally expected to be among those who would register as clients or seminar participants. However, the Company intends to make a good faith effort through its registration procedure to seek disclosure from all registrants if they have any direct financial interest in specific issues being considered by the Massachusetts legislature. Any such disclosures will be retained for at least three years as part of the Company's corporate records.

At no time will the Company use state facilities for its seminars except as may be available for rental on a competitive basis to all other businesses and organizations. For example, you would consider renting the Great Hall for a State House reception after usual business hours. You may also consider renting conference facilities at public colleges or the state archives.

You have requested guidance as to how the Massachusetts conflict of interest law, G.L. c. 268A, would affect your proposed business. You have included a copy of your Company's Business Profile for our review.

QUESTION:

May a member of the General Court own and operate the seminar/consulting company described above within the confines of the conflict of interest law?

ANSWER:

Yes, but only subject to certain conditions, the most restrictive of which prohibits the Company from any activity involving Massachusetts legislative matters.

DISCUSSION:

1. Jurisdiction

As a member of the General Court, you are a state employee for purposes of the conflict of interest law, G.L. c. 268A. See, e.g. **EC-COI-89-35; 89-8.** Your administrative assistant would also be a state employee. As such, several provisions of c. 268A would apply to you, your administrative assistant, and, potentially, to your proposed Company. You should also be aware that, because your Company might have dealings with legislative agents,[1/] you may want to discuss your proposed business with the Office of the Secretary of State, the state agency which regulates legislative agents and lobbyists. Finally, to the extent that any issues might arise under G.L. c. 55, the campaign finance law, you should also seek advice from the Office of Campaign and Political Finance.

2. The Conflict of Interest Law Applicable to You

(a) Section 3

Section 3(b) of c. 268A prohibits a state employee from directly or indirectly receiving anything of "substantial value" ($50 or more) from anyone for or because of any official act[2/] performed or to be performed by the state employee, unless otherwise provided by law for the proper discharge of his official duty. See, e.g. **Free Passes Advisory No. 8; In the Matter of George Michael**, 1981 SEC 59; **In the Matter of Charles F. Flaherty**, 1990 SEC 498. This section prohibits, among other things, gifts intended to foster "good will" for future acts or gifts intended as a "thank you" for acts which have already been performed. A reciprocal provision prohibits a donor from giving anything of substantial value. G.L. c. 268A, §3(a).

While this section does not prohibit your proposed business venture because your Company would be providing a service in exchange for a fee, we can conceive of certain circumstances where questions might arise. For example, if a seminar registrant or a client has a direct interest in legislation pending before the

General Court or one of your legislative Committees, and if the payment of a fee by that registrant or client were for services not actually contemplated or rendered (or for services rendered but which were significantly disproportionate to the size of the fee) an inference could arise that the fee was nothing more than an effort to circumvent the restrictions of §3. As Advisory No. 8 makes clear:

> "[W]here there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use their authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver. [Citation omitted]. In such a case, the gratuity is given for as yet unidentified 'acts to be performed.'"

We would point out that the registrant or client need not be a legislative agent or lobbyist to create the issue of a gift.[3/] Anyone with an interest, or a foreseeable interest, in Massachusetts legislation might create §3 issues in the circumstances described. You should bear in mind that this inference could arise even where the client has purchased services which involve issues or laws which are wholly unrelated to matters before the Massachusetts legislature. (See §23(b)(1), below, for a discussion on matters related to the Massachusetts legislature.) The critical question under this section is whether the person you are doing business with has, or foreseeably could have, an interest in legislation at the time that the services are purchased from your Company. If so, the inference of a gift could arise.[4/] See also §23(b)(3), below.

We note that one of the steps that your Company will undertake is a written disclosure by registrants concerning any interest which they may have in pending legislation. That good faith inquiry could help you to avoid questions arising under this section. Those disclosures should, at a minimum, be made available for public inspection during normal operating hours. Further, in order to later avoid other issues arising under this section, we would urge your Company to consider adopting a policy which would fully refund all registration fees to any registrant who is unable to attend a seminar for any reason if, to your knowledge, he or she has any interest in pending legislation or in matters before your legislative Committees. Of course, accurate and complete corporate records are essential and would serve as your best protection.

(b) Section 4

Section 4 of c. 268A prohibits a state employee from acting as an agent or attorney for, or receiving compensation[5/] directly or indirectly from, anyone other than the Commonwealth in connection with any particular matter[6/] in which the Commonwealth is a party or in which it has a direct and substantial interest.

A member or the General Court is not subject to the above restriction, except that no such member shall personally appear for any compensation other than his legislative salary before any state agency, unless:

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

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

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

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

(1) the action of the state agency is adjudicatory in nature; and

(2) the action of the state agency is appealable to the courts; and

(3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor counsel for the state agency conducting the proceeding. See, e.g. EC-COI-89-31; 86-15; 85-82; 79-68.

The above legislator's exemption would appear to alleviate most concerns for you as long as you do not personally appear[7/] before state agencies in connection with particular matters in which the Commonwealth is a party or in which it has a direct and substantial interest.

You should note, however, that the above exemption applies only to legislators. Section 4 could still restrict certain activities of your administrative assistant in his role as an employee of the Company. For example, he could not receive income or fees in connection with a seminar on how to lobby the Massachusetts Department of Environmental Protection in a given application or proceeding pending before that agency.

(c) Section 6

Section 6 of c. 268A prohibits a state employee from participating[8/] in a particular matter in which to his knowledge he, his immediate family[9/] or partner, a business organization in which he is serving as officer, director, trustee, partner, or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or a reasonably foreseeable financial interest. See, e.g. EC-COI-83-43; 86-15; 89-19; 90-17.

This section would prohibit you from acting as a legislator on special legislation which could affect the Company or one of your Company's clients. Note that

the definition of "particular matter" specifically excludes the enactment of general legislation. See EC-COI-89-8; 90-17. In addition, §6A requires that you make and file a full written disclosure with this Commission if you are required to knowingly take any action as a legislator which would substantially affect your own financial interests, unless the effect is no greater than the effect on the general public. See EC-COI-86-15; 83-43. This disclosure is required regardless of whether the matter in question is special or general legislation.

(d) Section 7

Section 7 of c. 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency, unless an exemption applies. See, e.g. EC-COI-84-108; 85-3; 89-31; 90-17; see also Conley v. Ipswich, 352 Mass. 201 (1967) (addressing §20 -- the reciprocal municipal section). This section would prohibit you or your Company from, among other things, contracting with any state agency to provide consulting or other services, or to lease facilities, equipment, etc., in the conduct of your business. For example, your proposed plan to lease the Great Hall or other state facilities would be prohibited even if the space is available to others under the same conditions or circumstances. No exemption would appear to be available to you. See, e.g. EC-COI-84-109; 91-2. Section 7(c) does permit certain exemptions for members of the General Court who own less than 10% of the stock of a corporation. In light of your proposed ownership interest in the Company, however, you would not be eligible for this de minimis exception. See EC-COI-90-17.

On the other hand, even though the Company may have clients who are state vendors, you would not necessarily have a financial interest in that contract. As long as your arrangement with the client is independent of any contract the client has with a state agency, you would not violate §7. EC-COI-90-17.

(e) Section 23

There are four parts of §23 which are pertinent to your question.

First, §23(b)(1) of c. 268A prohibits a state employee from accepting employment involving compensation of substantial value ($50 or more), the responsibilities of which are inherently incompatible with the responsibilities of his public office. Whenever your company provides consulting or other services to a paying client, you are engaged in employment within the meaning of this section. See, e.g. EC-COI-84-93.

We find that this section will prohibit your Company from conducting seminars or providing consulting services on any matters which involve the Massachusetts legislature. It would be inappropriate for you or your associates, for example, to advise clients or seminar participants on how to receive some advantage or favorable treatment before the legislature, or how to lobby colleagues, while you continued to serve in that body. See, e.g. In the Matter of Adam DiPasquale, 1985 SEC 239 (the private activity necessarily impaired the public employee's independence of judgment in the performance of his official duties); see also 84-93 (attorney's consulting services necessarily impaired his independence of judgment); 81-151 (in carrying out his official state responsibilities, the state employee must be free to exercise independent judgment and must maintain his loyalty solely to the interests of the Commonwealth. By accepting employment from certain private employers, a potential for the impairment of independence of judgment can arise which can call into question the credibility of the employee's state work); Cf. EC-COI-89-30 (services were not inherently incompatible).

We find that a Massachusetts legislator cannot properly give private advice to a paying client about Massachusetts legislative matters without also impairing his independent legislative judgment.[10] As a state legislator, your private business activities would be inherently incompatible with your public duties whenever those activities involve Massachusetts legislative matters.[11] Consequently, in order to avoid the potential for divided loyalty, your Company must refrain from involvement with all Massachusetts legislative matters. We also find that this section would prohibit your Company from referring such matters to other appropriate sources for the same reasons.

While §23(b)(1) will not prohibit you from providing services on matters which are not connected to the Massachusetts legislature (for example -- seminars on federal agencies or legislation, or seminars involving states other than Massachusetts), if a particular client has an interest in Massachusetts legislation, issues under §23(b)(3) can still arise. See below.

Second, §23(b)(2) of c. 268A prohibits a state employee from using or attempting to use his official position to secure for himself or others unwarranted privileges of substantial value ($50 or more) and which are not properly available to similarly situated individuals. This section would prohibit the use of state time, facilities, personnel, or equipment in the conduct of your business. EC-COI-83-43; 91-6; 91-7. To comply with §23(b)(2), you must conduct your Company's business entirely outside of state time and without the use of state resources. You must also refrain from using your state title or office in any way in an effort to solicit business for the Company. See EC-COI-84-127; 89-30; 89-31. This section would, of course, also apply to your administrative assistant and anyone else working for the Company who is also a public employee.

Third, §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. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public, the facts which would otherwise lead to such a conclusion. In effect, this section prohibits the creation of even an "appearance" of a conflict of interest. See EC-COI-91-2.

Given your role as a state legislator, and given your proposed business venture concerning the rendering of advice on how to conduct business with the government, questions under this section might arise for you. Accordingly, it would be appropriate for you to make a full public disclosure to this Commission and/or the House Clerk concerning your proposed business venture prior to beginning operation. That disclosure will dispel any appearance of a conflict arising under §23(b)(3). See, e.g. EC-COI-90-17.

In addition, issues under this section can arise in specific situations. For example, if your Company is providing consulting services to a person who also happens to have an interest in a matter pending before the Massachusetts legislature, an appearance of a conflict will arise because of the dual public/private relationship. A full public disclosure would be warranted under the circumstances to dispel any appearance of a conflict of interest.[12/] Alternatively, you could abstain as a legislator on those matters which are pending.

Further, this Commission recently held that a legislator who has private business dealings with someone over whom he also exercises authority as a state employee, violates this section unless he has first made a full public disclosure of the dual relationship. In the Matter of George Keverian, 1990 SEC 460. In the present case, because your administrative assistant will also have private financial dealings with you through the Company, it is advisable for you to make an additional public disclosure to this Commission and/or the House Clerk.

Fourth, §23(c) of c. 268A prohibits a state employee from disclosing confidential information which he has acquired through his public position. Confidential information is any information which cannot be obtained through a public records request pursuant to G.L. c. 4 and c. 66. See, e.g. EC-COI-89-30; 90-6.

Finally, you should also be aware that another section of c. 268A might also apply to the conduct of a private business where former state employees are involved (§5). Although nothing in your opinion request raises an issue under that section at this time, you should be aware that §5(e) will restrict any lobbying activities before the legislature which might later be conducted by you for a period of one-year from the time that you leave state service.

3. Conclusion

In summary, although nothing in the conflict of interest law will prohibit you from conducting the proposed business for matters other than those involving the Massachusetts legislature, certain strict guidelines must be kept in mind. The Commission does not, however, express any opinion as to the wisdom of your proposed course of conduct, or as to your Company's ability to maintain compliance with each of the provisions of c. 268A. Cf. EC-COI-91-1 (footnote 5).

These guidelines are intended solely as a broad outline of the types of issues which may arise under c. 268A from time to time. You should renew your opinion request whenever a specific fact situation arises which is not adequately addressed by the guidelines set forth herein. You should also renew your opinion request whenever you anticipate that a material change will affect the structure or mission of your proposed consulting business.

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[1/] "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).

[2/] "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

[3/] Where a legislative agent is involved, issues might also arise under G.L. c. 268B, §6. That section prohibits gifts of $100 or more per calendar year made by legislative agents and which are given to a public employee. Note also that c. 268B has certain reporting requirements. G.L. c. 268B, §5.

[4/] Cf. Commission Advisory No. 2 (Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements) ("[t]he critical question when a legislator receives expenses or fees is whether these items were either for, or made necessary by, the speaking engagement, or whether the speaking engagement was merely a pretext for an improper benefit or gratuity."

(Emphasis added). Advisory No. 2 lists several criteria for determining when an honorarium will be considered "legitimate" as opposed to a pretext to circumvent §3. In order to be considered legitimate, the speaking engagement must be: (i) a formally scheduled event, (ii) scheduled in advance of the legislator's arrival, (iii) before an organization which would normally have outside speakers, and (iv) significant to the event (that is, not perfunctory).

While none of these criteria are directly relevant to your particular business, they should provide you with an insight into when an inference of wrongdoing could arise under §3. If you are uncertain about any aspect of how §3 applies to a specific fact situation, you should renew your opinion request to this Commission.

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

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

7/ See EC-COI-87-27 (personally appearing includes any contact with any agency, whether written or oral, with the intent to influence).

8/ "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).

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

10/ Although matters which are pending before Massachusetts executive branch agencies would not be inherently incompatible with your responsibilities as a state legislator, your Company must exercise caution whenever such matters are discussed. Executive branch matters may, at times, foreseeably implicate your legislative duties.

11/ We recognize that legislators may, in exchange for an honorarium, address private parties about pending legislation. See Commission Advisory No. 2. Speaking engagements are an inherent part of a legislator's official duties. We must, however, distinguish such engagements from services which, for a fee, are being offered privately by a someone who is also a member of the general court. Your private business cannot be considered a part of your official duties as a legislator.

12/ To be explicit, we would find that the appearance issue arises whenever your Company provides any type of service to someone who also happens to have an interest in a matter pending before the legislature, even though the services which your Company would be providing are wholly unrelated to that pending matter. The appearance arises as a result of the dual, albeit permissible, public/private relationship. On the other hand, §23(b)(1) would outright prohibit your Company from providing services to anyone if those services involve Massachusetts legislative matters. See supra.

CONFLICT OF INTEREST OPINION
EC-COI-91-15

FACTS:

You are the Secretary/Treasurer for the ABC County Conservation District (District) Board of Supervisors (Board) and seek an opinion on behalf of the Board members. The Board is the governing body of the District and exercises the powers and duties provided in G.L. c. 21, §24. Certain Board members are interested in performing paid consultant services for the District in addition to their per diem compensation for serving as Board members.

QUESTION:

Does G.L. c. 268A permit a Board member to perform paid consultant services to the District?

ANSWER:

No.

DISCUSSION:

The District is a "county agency"1/ for the purposes of G.L. c. 268A since its boundaries are county-wide, its supervisors are elected by residents and landowners of the County, and the activities and expenditures of the District are controlled by the County, rather than the state. See, G.L. c. 21, §§22-24. Compare, EC-COI-83-157; 83-63. The members of the Board are therefore "county employees"2/ for the purposes of G.L. c. 268A.

Under G.L. c. 268A, §14, a county employee is prohibited from having a financial interest, direct or indirect, in any contract made by the District or any other County agency of the same county, unless an exemption applies. By performing paid consultant services to the District, a Board member would have a direct financial interest in a contract made by the District, a county agency, in violation of G.L. c. 268A, §14. EC-COI-81-27. Moreover, none of the exemptions in G.L. c. 268A, §14 are applicable to supervisors. Specifically, even if Board members could be considered special

county employees[3/] under G.L. c. 268A, §1(m), they do not qualify for an exemption under §14(c) since their financial interest is in a contract made by their own agency. Accordingly, Board members are prohibited from performing paid consultant services to the District.

Following his resignation, a Board member cannot immediately work for the District because of the restriction in G.L. c. 268A, §15A:

> No member of a county 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.

Accordingly, a Board member would not be eligible for appointment to any position under the supervision of the Board until thirty days after the member's resignation from the Board. Additionally, if the Board member will be seeking a consultant position with the Board after the termination of his services, he could not, while still on the Board, officially participate in any discussion, recommendation, or vote concerning the hiring of consultants. See e.g. **EC-COI-87-1; 86-13** (effect on competitors). The member could have a financial interest in the outcome. G.L. c. 268A, §13.

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[1/] "County agency," any department or office of county government or any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c.268A, §1(c).

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

[3/] "Special county employee," a county employee who is performing services or holding an office, position, employment or membership for which no compensation is provided; or who is not an elected official and (1) occupies a position which, by its classification in the county agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the State Ethics Commission and the office of the county commissioners prior to the commencement of any personal or private employment, or (2) in fact does not earn compensation as a county employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose, compensation by the day shall be considered an equivalent to compensation for seven hours per day. A special county employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(m).

Included are:

Summaries of all Advisory Opinions issued in 1991.

EC-COI-91-1 - A former state employee may represent private individuals in a guardianship proceeding. Prior participation as a state employee in a "Care and Protection" proceeding constitutes a distinct particular matter. A current guardianship proceeding is not in connection with the prior lawsuit because the guardianship matter involves different parties, different facts, and a different controversy in a different court, even though both matters concern the same children.

EC-COI-91-2 - Section 7(a) will not prohibit the Secretary of Transportation and Construction from divesting of a financial interest in a state contract after a thirty day period of assuming office because (i) the interest arose prior to his appointment; (ii) he had attempted to divest in good faith prior to assuming office; (iii) a legal requirement outside of his control prohibited divestment of the interest unless and until that requirement was fulfilled; (iv) the value of his interest was capped pursuant to an agreement which was entered into prior to his taking office; (v) he would not financially benefit from any delay in divesting; and (vi) he agreed to keep the Commission informed of the divestment process.

EC-COI-91-3 - Members of the Martha's Vineyard Commission are considered employees of an independent municipal agency for purposes of G.L. c. 268A. A commissioner may participate in a permit application when he is a party to a lawsuit challenging Commission approval of a prior permit if he complies with §23(b)(3).

EC-COI-91-4 - A state employee who serves as a member of the boards of directors for two private corporations may accept compensation and otherwise act in such positions because the companies' activities do not relate to any contract or other particular matter in which the Commonwealth or an agency thereof is a party or has a direct and substantial interest. Similarly, a state employee may provide consulting services to a quasi-public agency of another state where none of the agency's activities relate to a contract or other particular matter in which the Commonwealth is a party or has a direct and substantial interest.

EC-COI-91-5 - For purposes of G.L. c. 268A, §4, the 60-day period applicable to special state employees must be viewed over a "floating" period of 365 days. Consequently, one must look to both prior and subsequent service as a special state employee during a 365-day period to determine whether the 60-day rule is implicated. This result is required because the Commission must construe exceptions to the conflict of interest law narrowly.

EC-COI-91-6 - A county employee may engage in part-time employment with a private company which, by permit from a city and the Commonwealth, provides disposal and treatment services for waste water. For purposes of §11, the county employee's activities do not involve the interests of the county in any direct or substantial way because the company has no dealings with the county or any county agency.

EC-COI-91-7 - An associate professor at a state college who had a part-time, paid position coaching cross-country and track teams at the same college qualified for the "teaching" exemption from §7, as amended by St. 1990, c. 487 to include "performing other related duties."

EC-COI-91-8 - A town administrator could apply for and accept from town employees under his supervision a generally available federal housing rehabilitation grant for his personal residence. He was exempt from §20 by virtue of subsection (e), and §17 did not apply as he was acting on his own behalf. The town employees were required to disclose the relevant facts to avoid violating §23(b)(3).

EC-COI-91-9 - A City Councillor is prohibited by §20 from holding full-time municipal employment in the same City. A City Councillor cannot rely on the special municipal employee provisions of §20. In addition, §20(b) is not applicable to full-time municipal employment.

EC-COI-91-10 - For purposes of §5, the Commonwealth has a direct and substantial interest in all Workers' Compensation proceedings, even those matters involving private litigants, because of the Commonwealth's general interest in enforcing the Workers' Compensation law. Consequently, the restrictions of §§ 5(a) and 5(b) are applicable to a former employee of the Department of Industrial Accidents (DIA) who wishes to represent private parties who have appeared as litigants before the DIA.

EC-COI-91-11 - A state employee who chose to take required "furlough" time (under St. 1990, c. 6, §90) as unpaid leave continued to be a "state employee" under G.L. c. 268A, in view of the employee's receiving continued health insurance and other benefits and having a reasonable expectation of returning to work. However, the employee was a "special state employee" for the purpose of analysis under §§4 and 7.

EC-COI-91-12 - A private non-profit corporation is not a state agency for purposes of c. 268A where state employees do not control the board and where the majority of the funding is not public.

EC-COI-91-13 - G.L. c. 268A, §23(b)(2) prohibits selectmen from accepting a token donation from a private party for the purposes of eligibility in the municipal agency health insurance program.

EC-COI-91-14 - A member of the General Court may own and operate a consulting/seminar business within the confines of G.L. c. 268A. However, certain conditions apply to the business, the most restrictive of which prohibits the business from providing any services on matters involving Massachusetts legislative activities. Those services are prohibited by §23(b)(1) because they would be inherently incompatible with the office of a state legislator.

EC-COI-91-15 - Section 14 prohibits a County Conservation District Board of Supervisors from hiring one of its own members to provide paid consulting services for the district.