STATE ETHICS COMMISSION

Rulings

Enforcement Actions

Advisory Opinions

1992

Published by The Massachusetts State Ethics Commission

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COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 438

IN THE MATTER
OF
JOHN L. GRIFFITH

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John L. Griffith (Griffith) pursuant to §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 December 12, 1990, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Griffith, an environmental engineer with the Department of Environmental Management (DEM). The Commission concluded its inquiry on September 11, 1991, and by a majority vote, found reasonable cause to believe that Griffith violated G.L. c. 268A.

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

1. At all relevant times, Mr. Griffith was a DEM employee working for the Office of Safe Waste Management (OSWM). His responsibilities as an OSWM engineer included analyzing hazardous waste management and technologies in proposed facilities for their conformance with sound engineering principals and for environmental impact.

2. In April 1987, Clean Harbors Inc. (CHI) filed a Notice of Intent with the Hazardous Waste Facility Site Safety Council (Safety Council)[1/] regarding a proposal to construct a rotary kiln incinerator (RKI) in Braintree. (The RKI would dispose of hazardous waste.) The Safety Council gave initial approval to the project in October 1987.

The project then moved to the so-called "MEPA stage," which involved compliance with the Massachusetts Environmental Protection Act. This involved two simultaneous tracks. One was the development of a standard Environmental Impact Report (EIR) to be reviewed by the Executive Office of Environmental Affairs (EOEA). Parallel to that, the Safety Council developed its own analysis which included input into the EIR.

The scope of the EIR was agreed upon in April of 1988. Thereafter, CHI developed the EIR in three phases. The first, submitted in the summer of 1988, was a study protocol which described how they were going to do their analysis. The second stage, developed in the fall of 1988, concerned baseline reports. The baseline reports involved CHI's analyzing the status quo at the time. The final stage involved developing impact studies; in other words, how the incinerator would affect what was there. As CHI finished draft phases of the EIR, it filed copies with the Safety Council and various community groups.[2/]

The role of OSWM in the foregoing regulatory process was as follows: DEM is a statutory member of the Safety Council. The Commissioner or his designee is an official member of the Council. The DEM commissioner designated the OSWM director as his designee to sit on the Council. Consequently, OSWM received and reviewed the CHI study protocol, baseline reports, and impact studies. Griffith's job, as an OSWM engineer, was to review and comment on each of the submissions, as is further discussed below.

3. At all times relevant herein, Griffith taught courses in business management at Northeastern University.

4. In or about January or February 1988, Griffith began discussing with CHI's training and development representative the possibility of his teaching management training courses for CHI personnel.

5. After some back and forth discussion, Griffith submitted a written proposal to CHI on October 25, 1988, to teach 22 training sessions. On October 26, 1988, Griffith and the CHI representative further discussed the training arrangement. On October 27, 1988, the CHI representative made a formal offer to Griffith as to the scope and compensation of such a training arrangement. By the end of November 1988, Griffith and CHI agreed on the scope of his employment arrangement with CHI.[3/] Pursuant to the above arrangement, Griffith taught courses at CHI on a once a week basis beginning on January 11, 1989, and ending on May 9, 1989.

6. Griffith billed CHI for and was paid $7,723.50 for teaching the foregoing courses.

7. By memo dated August 17, 1988, Griffith wrote to the OSWM Director offering certain comments on CHI's draft study protocol.[4/] The memo made specific recommendations as to actions that CHI should take.[5/]

8. Beginning on November 22, 1988, Griffith, pursuant to the OSWM Director's request, began a review of the CHI baseline report.

9. By memo dated December 29, 1988, Griffith wrote to the OSWM Director evaluating the above CHI baseline report. In his memo, Griffith raised a number of questions regarding the adequacy of the report.

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

11. The determinations by OSWM regarding CHI's various RKI submissions were particular matters as defined in G.L. c. 268A, §1(k).

12. When, in February of 1988, Griffith began discussing with CHI an arrangement by which he would provide management training courses for CHI personnel, he was negotiating for employment with CHI within the meaning of c. 268A, §6.[7/]

13. Griffith and CHI continued to negotiate such an arrangement between February 1988 and November 1988 (when an agreement was reached). Notwithstanding the fact that these negotiations were occurring, Griffith participated in the review of the CHI RKI proposal by preparing the August 17, 1988 written evaluation memo of CHI's draft study protocol.

14. CHI had an obvious financial interest in OSWM's determination as to the adequacy of CHI's draft study protocol.

15. Therefore, Griffith violated G.L. c. 268A, §6 when he so participated after beginning negotiating for employment with CHI.

16. As stated above, by no later than the end of November 1988, Griffith and CHI had agreed upon an arrangement for employment (which would begin in January 1989). Nevertheless, Griffith continued to participate in the review of CHI's RKI proposal by, beginning on November 17, 1988 and culminating in his December 29, 1988 memo to the OSWM Director, reviewing the CHI baseline report. Again, CHI had an obvious financial interest in OSWM's determination as to the adequacy of the baseline report. Therefore, Griffith violated §6 when he so participated while having an arrangement for employment with CHI.

17. The Commission has found no evidence to suggest that in his capacity as a DEM employee, Griffith acted to provide any special or favorable treatment to CHI while he was negotiating for or had an arrangement for employment with CHI.[8/]

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

1. that he pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil fine for violating G.L. c. 268A, §6; and

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

Date: March 3, 1992

[1/]Pursuant to G.L. c. 21D, §4, the Safety Council's responsibilities include reviewing all proposals for the construction and operation of hazardous waste facilities on proposed sites.

[2/]After these dealings with the Safety Council and community groups, CHI filed their EIR with the EOEA Secretary in July of 1989. The Secretary determined that the EIR was not adequate. He asked for more information. CHI prepared a supplemental EIR which was filed in January of 1990. The Secretary ruled that the EIR was adequate in May, 1990. In September 1990, however, the EOEA Secretary determined that the site was not suitable. Consequently, the RKI was not built.

[3/]It is unclear exactly when this agreement was reached.

[4/]It is unclear when Griffith first began reviewing the draft study protocol.

[5/]For example, he recommended that the background air quality be considered.

[6/]Section 6 provides the following exemption for a state employee whose duties require participation in a particular matter in which there is a prohibited financial interest: (1) he must advise his appointing official and this Commission in writing of the nature and circumstances of the particular matter and make full disclosure of his 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.

[7/]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.")

[8/]No such evidence, however, is necessary to establish a §6 violation. As the Commission said *In re 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."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 417

IN THE MATTER
OF
RICHARD BURGESS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Richard Burgess (Mr. Burgess) pursuant to §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 Mr. Burgess. The Commission has concluded that inquiry and, on November 14, 1990, found reasonable cause to believe that Mr. Burgess violated G.L. c. 268A, §19.

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

1. At all times material herein, Mr. Burgess was a member of the Swansea Planning Board, and its chairman since 1985. As such, he was a municipal employee within the meaning of G.L. c. 268A, §1.

2. Among his responsibilities as a planning board member was the review and approval of subdivision plans pursuant to G.L. c. 41, §81. That process involved the planning board first accepting the plan (which set in motion certain time periods for approval), having a public hearing, approving or disapproving the plan, and ultimately endorsing the plan with respect to the question of whether the construction of roads and installation of utilities was adequately secured by an appropriate surety or bond. The planning board would also be called on to review and approve certain so-called "approval not

required" (ANR) plans where the only role of the board was to determine that each lot shown on the plan had adequate frontage on an approved way.

3. Beginning in or about April 1986, Mr. Burgess became associated as a real estate agent with Michael McNally (McNally), the sole proprietor of M.J. McNally and Associates of Fall River. McNally did not compensate Burgess as a conventional employee, rather he treated him as an independent contractor. Under this arrangement, McNally's agency would receive the sales commissions for those sales made by Burgess, and then compensate Burgess with 50% of those commissions. McNally lists and sells real estate in the Swansea, Fall River, Freetown, and Berkeley areas.[1/]

I. Cheryl Drive

4. On February 23, 1987, McNally sold a certain piece of raw land in Swansea to Dillon Lane Construction.

5. Mr. Burgess was aware of the above sale. He also knew that under normal trade practice whenever a realtor sold raw land to a developer, if that land was later developed as a subdivision, it was reasonably forseeable the realtor would be the broker regarding the sale of the individual lots.

6. On April 21, 1987, Dillon Lane Construction filed a subdivision plan (Cheryl Drive Subdivision) regarding the foregoing raw land.

7. McNally had Cheryl Drive Subdivision lots under purchase and sale agreements as follows: two of the lots on May 22, 1987, and one additional lot on May 26, 1987; June 16, 1987; August 6, 1987; and August 21, 1987. Each lot sold for approximately $50,000. According to the purchase and sales agreements, McNally would receive a total of $23,200 in commissions for the sales of these lots. All purchase and sale agreements were contingent upon the approval of the subdivision plan by the planning board. (Mr. Burgess did not act as an agent for the Cheryl Drive Subdivision and received no commissions for the sales of the subdivision's lots).

8. On June 8, 1987, Mr. Burgess, as a planning board member, along with two other planning board members, conducted the required public hearing regarding the Cheryl Drive Subdivision plan. On June 15, 1987 and on July 20, 1987, respectively, Mr. Burgess with two other members voted to approve and then endorse the Cheryl Drive Subdivision plan. (A quorum of three members is required to vote on planning board business.) At this time, there were four active members on the planning board.[2/] One active member, Steven Torres, was not present for the June 8, 1987 and July 20, 1987 meetings.[3/] (No board member, present or absent, ever sought to disqualify himself from the Cheryl Drive matters).

9. Section 19 of G.L. c. 268A provides in relevant part that except as otherwise permitted in that section,[4/] a municipal employee is prohibited from participating[5/] in a particular matter[6/] in which a business organization by which he is employed has a financial interest.[7/]

10. The decisions to approve and endorse the Cheryl Drive Subdivision plan were particular matters.

11. Mr. Burgess participated in these particular matters by conducting the June 8, 1987 public hearing and by voting to approve and then endorse the plan on June 15, 1987 and July 20, 1987, respectively.

12. When he acted as described above, Mr. Burgess knew that McNally had a financial interest in those particular matters inasmuch as he knew that McNally would be selling the lots in the subdivision which was the subject of those particular matters, and that their sale was contingent on planning board approval. Indeed, by the June 8, 1987 public hearing, McNally already had several lots under agreement.

13. McNally, as a sole proprietor, is a business organization for purposes of §19.

14. By participating in these various Cheryl Drive Subdivision decisions in which he knew McNally had a financial interest, Mr. Burgess participated in particular matters in which he knew a business organization by which he was employed[8/] had a financial interest, thereby violating §19.

II. Warhurst Park

15. On June 27, 1986, Mr. Burgess, as McNally's agent, sold certain raw land known as Warhurst Park to P&H, Inc. Mr. Burgess knew that P&H's owners intended to develop the land for a subdivision. He also knew that being the real estate agent who sold the raw

property to P&H, it was reasonably forseeable he would have the opportunity to sell the individual lots if and when they were developed as part of the subdivision.

16. On June 15, 1987, P&H filed a subdivision plan for Warhurst Park with the planning board. Mr. Burgess abstained at that meeting from the vote to accept the filing of the plan because of his financial interest in the eventual sale of the lots in that proposed subdivision.[9]

17. Ultimately, Mr. Burgess did sell 15 of the 16 lots in the Warhurst Park Subdivision, earning $24,984.00 in commissions.

18. The purchase and sale agreements were contingent on planning board approval.

19. On July 20, 1987, Mr. Burgess, along with two other planning board members, conducted the required public hearing as to the Warhurst Park Subdivision. Thereafter, on October 26, 1987, Mr. Burgess voted as a planing board member to approve modifications to the Warhurst Park plan. (Absent the board's October 26, 1987 vote, it is likely the Warhurst subdivision plan would have been constructively approved on October 28, 1987[10]).

20. The decision to approve the Warhurst Park Subdivision modifications was a particular matter.

21. Mr. Burgess participated in this particular matter by attending the public hearing and by voting to approve the plan modifications.

22. Mr. Burgess knew that he had a personal financial interest as the real estate agent regarding these lots when he so participated, in that the purchase and sales agreements were contingent on planning board approval. (At the July 20, 1987 hearing, Mr. Burgess disclosed this financial interest).

23. By participating as a planning board member in decisions affecting the Warhurst Park Subdivision at a time when he knew he was likely to receive a future financial interest from those decisions, Mr. Burgess participated in particular matters in which he had a financial interest, thereby violating §19.

24. By way of defense, Mr. Burgess contends that the Rule of Necessity should apply to his participating in the Cheryl Drive and Warhurst Park particular matters. He contends that at the time he took each of the actions described above, there were only three planning board members present. Consequently, in order to create the required quorum of three so that the board could act, he invoked the Rule of Necessity which, in his view, allows a board member who has a conflict to participate if his participation is necessary to create a quorum. Moreover, Assistant Town Counsel, Kevin Waldron, was present at the July 20, 1987 meeting and did not object to Burgess' participation.

25. Two responses are in order. First, Mr. Burgess did not, in fact, explicitly invoke the necessity rule on any of the above-described occasions, except as to his July 20, 1987 participation in the public hearing on the Warhurst Park subdivision matter. Second, Mr. Burgess' basic premise -- that the Rule of Necessity may be invoked to create a quorum -- is not correct as applied to these facts. The rule cannot be invoked where the mere absence of a member prevents a quorum. *See, Graham v. McGrail*, 370 Mass. 133, 138 (1976); *Commission Fact Sheet, Rule of Necessity*. Efforts must be made to reschedule the matter so that a quorum of members (without conflicts) can be obtained.[11]

26. In participating in the Cheryl Drive and Warhurst Park matters, Mr. Burgess' purpose appears to have been to facilitate town business by providing a quorum. Thus, the evidence suggests Mr. Burgess' violation of G.L. c. 268A, §19 was unintentional.[12]

III. ANR Plan

27. On August 21, 1986, McNally and Charles Baldwin entered into a purchase and sale agreement to buy a certain parcel of property on Route 6 and Old Fall River Road, Swansea. They arranged this purchase using Charles Baldwin's spouse, Patricia Baldwin, as the nominal purchaser.

28. On November 17, 1986, an ANR plan was submitted to the planning board by which the above parcel would be divided into three separate lots. On that same date, the planning board, with Burgess participating, voted to approve the ANR plan.

29. The division of the parcel into three lots would make the parcel more valuable.

30. Mr. Burgess knew that McNally and Charles Baldwin had this property under agreement at the time he so voted.

31. The decision to approve the ANR plan was a particular matter.

32. Mr. Burgess participated in the above ANR decision by voting to approve the application.

33. When he so voted, he knew that McNally had a financial interest in the vote in that McNally, along with Baldwin, had signed a purchase and sale agreement to buy the property.

34. By approving the ANR plan at a time when he knew McNally had a financial interest in the decision, Mr. Burgess participated in a particular matter in which he knew a business organization by which he was associated had a financial interest, thereby violating §19.

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

1. that he pay the Commission a sum of five hundred dollars ($500.00)[13/] forthwith 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 to which the Commission is a party.

Date: March 24, 1992

[1/]Before joining McNally Associates, Burgess sought advice on potential employment conflicts with his planning board duties from assistant town counsel, Kevin Waldron. Waldron orally advised Burgess to avoid participating in planning board matters that affected his financial interest, his family's financial interest, and the financial interest of businesses he owned or managed. Only written legal advice, however, made a matter of public record and filed with the Commission constitutes a valid conflict of interest defense. *See*, G.L. c. 268A, §22; *In re Lavoie*, 1987 SEC 286; *In re Deleire*, 1985 SEC 236.

[2/]After March 24, 1986, a fifth member, Brian Gingras, rarely attended meetings.

[3/]Torres attended meetings on June 15, 1987, June 22, 1987, June 29, 1987, July 7, 1987 and July 13, 1987.

[4/]None of the exceptions apply here.

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

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

[7/]The term "financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. *See, Graham v. McGrail*, 379 Mass. 133, 138-39 (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 a negative way. *See, EC-COI-84-86.* Burgess was unaware of *Graham*.

[8/]Mr. Burgess argued that on these facts he was not employed by McNally, rather his relationship was that of an independent contractor. The Commission, however, will construe the term "employed" broadly so as to include independent contractor relationships where a significant portion of the subject's annual compensation as an independent contractor is derived from that relationship. *See, EC-COI-83-34* (portion of income earned from business organization and time spent serving organization determining factors whether official is "employee"). Here, virtually all of Mr. Burgess' annual income was received from McNally.

[9/]As of June 15, 1987, Mr. Burgess, through McNally, had 10 such lots under purchase and sale agreements.

[10/]G.L. c. 41, §8U provides in relevant part, "the failure of a planning board either to take final action or to file with the city or town clerk a certificate of such action regarding the definitive plan submitted by an applicant

within one hundred thirty-five days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof." The Warhurst Subdivision plan was submitted on June 15, 1987.

[11]In fact, Burgess need only have waited less than forty minutes for the tardy Torres to appear on June 15, 1988 to have obtained a quorum of members without conflicts to vote on the Cheryl Drive Subdivision. At that time, Burgess did not know when Torres would arrive.

In the case of the October 26, 1988 meeting, an effort to reschedule would have been futile due to public meeting notice requirements and the imminent constructive approval on October 28, 1987.

[12]Ignorance of the law is no defense to the conflict of interest law. *In re Doyle*, 1980 SEC 11, 13, *See also, Scola v. Scola*, 318 Mass. 1, 7 (1945).

[13]Pursuant to G.L. c. 268B, §3, the Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. Here, the Commission has imposed only $500 because it found substantially mitigating Mr. Burgess' assertions that in the majority of the instances where he participated, he believed his involvement was necessary in order to establish a quorum so the board could act, and that before starting as a real estate agent he sought advice from town counsel in an attempt to avoid violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 439

IN THE MATTER
OF
JOAO M. V. DIAS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Joao Dias (Mr. Dias) pursuant to §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, 1992, 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. Dias. The Commission has concluded that inquiry and, on February 19, 1992, found reasonable cause to believe that Mr. Dias violated G.L. c. 268A, §17, or in the alternative that he violated c. 268A, §19.

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

1. Mr. Dias has been a member of the Ludlow Planning Board (Board) since 1988. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1.

2. Since 1985, Mr. Dias has been a practicing attorney with his offices located in Ludlow. Mr. Dias' clients include Jose Genovevo (Genovevo) and Coleman Development Corporation (CDC). In 1990, Genovevo developed a Ludlow subdivision called "Cedar Hills Estates." In connection with the Cedar Hills subdivision, Mr. Dias represented Genovevo in a conveyance and an eviction. In 1991, CDC attempted to develop a Ludlow subdivision called "Timber Ridge." In association with the Timber Ridge Development, Mr. Dias provided CDC with conveyancing, title search, and other legal services.

3. On July 10, 1990, Genovevo appeared before the Board requesting a waiver for subdivision regulations dictating the minimum width and height of roadways. Mr. Dias was present at that meeting. Mr. Dias disclosed that he represented Genovevo and stated that he would only join in the Board meeting to the extent he would translate for Genovevo (Portuguese is Genovevo's primary language). Mr. Dias, however, participated in the meeting beyond merely translating for Genovevo. The Ludlow Conservation Commission had raised wetland concerns about a road running through Genovevo's subdivision. Mr. Dias explained to the Board three options by which Genovevo could address the Conservation Commission's concerns. Mr. Dias related that only one of the three options was acceptable to Genovevo, that being the regulations waiver. Mr. Dias specifically requested that the Board reduce the height of the road from a 100-year flood level to a 10-year flood level. Mr. Dias also requested that the Board allow

Genovevo to narrow the road from 28 feet to 18 feet. The Board granted Genovevo's waiver request by a 4-0 vote, with Mr. Dias abstaining.

4. CDC appeared before the Board at its February 26, 1991 meeting, seeking guidance on how to gain subdivision approval for the second phase of their Timber Ridge development. Mr. Dias attended the meeting. Mr. Dias disclosed that he represented CDC, and, consequently, he would be unable to represent CDC in their hearing. Nevertheless, Mr. Dias joined in the meeting. Since CDC had altered a road from the approved Phase I subdivision plans, the Board debated whether a second public hearing was necessary on Phase I. Mr. Dias informed the Board that the law did not require a second public hearing, rather a notation of the alteration could be inserted in the Phase II subdivision plans. The Board went on to discuss whether CDC could accomplish a second exit by connecting their new 50-foot-wide road into an existing 20-foot-wide way on abutting land. Mr. Dias joined this discussion and opined that CDC had a legal right to lay their road to their property line. Mr. Dias also promised to research the title of the 20-foot-wide way to determine whether CDC or the town had access rights over it. The Board took no official action on CDC's Phase II subdivision plans.

5. CDC appeared before the Board at their April 23, 1991 meeting to request guidance on how they could achieve subdivision approval for the second and third phases of their Timber Ridge development. Mr. Dias attended this meeting. At the outset of the CDC matter, Mr. Dias stated he would only participate in the discussion to the extent he would read from an insurance company letter to CDC. Mr. Dias did, in fact, read from the letter. Mr. Dias, however, also joined in the remainder of the discussion. The Board's discussion focused on how CDC could achieve a second emergency means of access to its subdivision. Mr. Dias informed the Board that he had researched the title history of the land abutting CDC's subdivision. Mr. Dias explained that an existing 20-foot-wide way leading to the subdivision land was merely an easement by prescription, which would not entitle the town or the subdivision owners to travel over it. Mr. Dias also informed the Board that a way from an unrecorded plan connected the subdivision land to Alden Road, and that this way could establish the needed emergency access. Finally, Mr. Dias noted that the Board should obtain some form of guarantee from CDC that the second means of access would be maintained in the future.

6. Mr. Dias did not receive compensation from CDC or Genovevo for appearing at the July 10, 1990, February 26, 1991, and April 23, 1991 Board meetings.

7. General Laws c. 268A, §17(c) prohibits a municipal employee from acting as an agent or attorney for anyone other than the municipality in connection with a particular matter in which the same municipality has a direct and substantial interest. Under G.L. c. 268A, §1(g), Mr. Dias is a municipal employee for purposes of the conflict of interest law. The Board's July 10, 1990 vote on Genovevo's waiver request is a particular matter under G.L. c. 268A, §1(k). Likewise, the February 26, 1991 and the April 23, 1991 meetings involved particular matters, as the Board engaged in the process of making a decision as to whether CDC could adequately accomplish a second means of access to their subdivision. Ludlow, through the Board, possessed a direct and substantial interest in these particular matters.

8. Within the meaning of the conflict of interest law, a municipal employee acts as an agent where he acts on behalf of some other person or entity. *In re Zora*, 1989 SEC 401, 407; aff'd. No. 89-0937B (Mass. Super. Ct., Plymouth, January 2, 1991). The mere speaking or writing on behalf of another party satisfies the agency element of §17. *Id.; EC-COI-84-6.* Thus, by speaking on behalf of CDC and Genovevo at the Board meetings, Mr. Dias acted as their agent.[1/]

9. At each meeting, Mr. Dias disclosed his representation of CDC or Genovevo. In addition, Mr. Dias abstained from participating in the meetings as an official Board member. Disclosure and abstention from official participation, however, do not constitute a defense to a G.L. c. 268A, §17 violation. *In re Townsend*, 1986 SEC 276, 278; *In re Bingham*, 1984 SEC 174, 175. By speaking on behalf of Genovevo and Coleman at the Board meetings on matters in which Ludlow had a direct and substantial interest, Mr. Dias violated G.L. c. 268A, §17(c).[2/]

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

1. that he pay the Commission a civil fine of one thousand dollars ($1,000.00) forthwith for violating G.L. c. 268A, §17; 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 to which the Commission is a party.

Date: March 31, 1992

[1/]If the conduct of the parties is such that an inference is warranted that one is acting on behalf of and with the consent of another, an agency exists as a matter of law. *Choates v. Board of Assessors of Boston*, 304 Mass. 298, 300 (1939); *In re Sullivan*, 1987 SEC 312, 314. Here, Mr. Dias disclosed that he served as CDC's and Genovevo's attorney. He then joined in Board discussions and expressed comments generally favorable to CDC's and Genovevo's positions. Genovevo and CDC were present at the meetings and did not contradict Mr. Dias' assertion that he was their attorney. Consequently, the Commission finds that Mr. Dias acted as CDC's and Genovevo's agent.

[2/]Section 17 reflects the maxim that a person cannot serve two masters. Whenever a town employee acts on behalf of private interests in matters in which the town also has an interest, there is a potential for divided loyalties, the use of insider information and favoritism, all at the expense of the town.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 415

IN THE MATTER
OF
CYNTHIA B. COBB

DISPOSITION AGREEMENT

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

On April 12, 1989, the Commission initiated, 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. Cobb. The Commission has concluded its inquiry and, on December 12, 1990, by a majority vote, found reasonable cause to believe that Ms. Cobb violated G.L. c. 268A.

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

1. Ms. Cobb was, during the time here relevant, the health agent for the Charlton Board of Health (Board of Health). As health agent, Ms. Cobb was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Ms. Cobb resigned as health agent in 1991.

2. Elliot Burlingame (Mr. Burlingame) is, and was during the time here relevant, a builder and developer in Charlton. For several years ending in May 1988, Mr. Burlingame was also a member and the chairman of the Board of Health. As a member and the chairman of the Board of Health, Mr. Burlingame was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. Ms. Cobb was appointed as health agent in late 1985. Mr. Burlingame participated in Ms. Cobb's hiring as a member and chairman of the Board of Health. Ms. Cobb's municipal position was full-time and salaried.

4. As health agent, Ms. Cobb was responsible for witnessing percolation tests of the land in Charlton pursuant to Title V of the State Sanitary Code and the provisions of the Charlton Sanitary Code. Ms. Cobb also had official responsibility for reviewing septic system plans submitted to the Board of Health for approval and for making recommendations to the Board concerning those plans. In addition, Ms. Cobb as health agent inspected septic systems for compliance with the approved plans prior to their being covered. Ms. Cobb also inspected and signed the occupancy permits for newly constructed houses on behalf of the Board of Health.

5. From December 1985 through May 1988, Ms. Cobb as health agent participated in numerous official Board of Health matters affecting Mr. Burlingame's interests as a private developer, including the review and approval of septic system designs, the witnessing of percolation tests, and the inspection and signing of occupancy permits for homes constructed in Charlton by Mr. Burlingame. During the same period, Mr.

Burlingame, as a Board of Health member, was Ms. Cobb's employer and a supervisor of her work as health agent.

6. In September 1986, Ms. Cobb became a tenant in an apartment building owned by Mr. Burlingame on Ram's Horn Road in Charlton. In approximately March 1987, Mr. Burlingame sold the Ram's Horn Road apartments. In May 1987, Ms. Cobb moved from Ram's Horn Road to an apartment on Carroll Hill Road in Charlton, not owned by Mr. Burlingame.

7. By early 1987, Mr. Burlingame and Ms. Cobb discussed a "package deal" pursuant to which he would sell her a lot of land and build her a house for a below-market price that she could afford. By February 1987, Mr. Burlingame and Ms. Cobb were actively considering a lot of land (Lot 12) on Morton Station Road owned by Mr. Burlingame as the potential site for Ms. Cobb's house. By mid-1987, Ms. Cobb and Mr. Burlingame had a mutual understanding that he would construct for her and sell to her a house on Lot 12 at a below-market price that she could afford.

8. At the time Mr. Burlingame and Ms. Cobb first considered Lot 12, the lot lacked the road frontage required for a house to be built on it. On July 28, 1987, Mr. Burlingame purchased Lot A Morton Station Road (Lot A) to provide the required road frontage to make Lot 12 buildable. Mr. Burlingame paid $5,000 for Lot A and agreed to reroof the lot owner's house as additional payment for the lot. Mr. Burlingame then combined Lot 12 and Lot A into a single house lot of approximately 66,706 square feet, designated as 12 Morton Station Road.

9. In January 1988, Mr. Burlingame applied for a building permit to construct a house at 12 Morton Station Road. Between January 1988 and June 1988, Mr. Burlingame, his employees and contractors constructed a two bedroom, one-and-one-half bath cape style woodframe house at 12 Morton Station Road. The land and construction costs for the house exceeded $45,000.

10. On June 24, 1988, Mr. Burlingame transferred ownership of the 12 Morton Station Road house and land to Ms. Cobb for the recited consideration of $60,000. In connection with the transaction, no downpayment was made by Ms. Cobb and Mr. Burlingame provided Ms. Cobb with 100% financing of the purchase price. Mr. Burlingame retained a $60,000 mortgage on the property at a 10% annual fixed rate of interest for 30 years. Under the terms of the mortgage, the mortgage interest is, however, charged only on $45,000 of the mortgage principal amount; and the agreement between Mr. Burlingame and Ms. Cobb provides that $15,000 of the $60,000 mortgage principal indebtedness will be forgiven if Ms. Cobb does not sell the property prior to the year 2008.

11. At the time Mr. Burlingame transferred ownership of the house and land at 12 Morton Station Road to Ms. Cobb, the property was worth substantially more than the purchase price paid by Ms. Cobb.

12. Between mid-1987 and mid-1988, Ms. Cobb as health agent inspected at least twelve new homes in Charlton built by Mr. Burlingame as a private developer and signed occupancy permits on behalf of the Board of Health for each of the homes.

13. 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 her favor in the performance of her official duties, or that she is likely to act or fail to act in her official position as a result of kinship, rank, position or undue influence of any party or person.

14. By entering into an understanding with Mr. Burlingame that he would sell her a house and land for a below-market price, while she was the health agent and he was a private developer subject to her official authority, and by continuing to repeatedly act as health agent on matters concerning Mr. Burlingame as a private developer, including inspecting and signing occupancy permits for at least twelve houses newly constructed by Mr. Burlingame, after she had entered into the understanding with Mr. Burlingame, Ms. Cobb repeatedly 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 she could be unduly influenced by Mr. Burlingame, and/or that Mr. Burlingame could unduly enjoy her favor in the performance of her official duties as health agent. In so doing, Ms. Cobb repeatedly violated G.L. c. 268A, §23(b)(3).

In view of the foregoing violations of G.L. c. 268A by Ms. Cobb, 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. Cobb:

1. that Ms. Cobb pay to the Commission the sum of five thousand dollars ($5,000.00) as a civil penalty for violating G.L. c. 268A, §23(b)(3); and

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

Date: April 27, 1992

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 416

IN THE MATTER
OF
ELLIOT BURLINGAME

DISPOSITION AGREEMENT

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

On April 12, 1989, the Commission initiated, 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. Burlingame. The Commission has concluded its inquiry and, on December 12, 1990, by a majority vote, found reasonable cause to believe that Mr. Burlingame violated G.L. c. 268A.

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

1. Mr. Burlingame is, and was during the time here relevant, a builder and developer in Charlton. For several years ending in May 1988, Mr. Burlingame was also a member and the chairman of the Charlton Board of Health (Board of Health). As a member and chairman of the Board of Health, Mr. Burlingame was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Cynthia B. Cobb (Ms. Cobb) was, during the time here relevant, the health agent for the Board of Health. As health agent, Ms. Cobb was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Ms. Cobb resigned as health agent in 1991.

3. Ms. Cobb was appointed as health agent in late 1985. Mr. Burlingame participated in Ms. Cobb's hiring as a member and chairman of the Board of Health. Ms. Cobb's municipal position was full-time and salaried.

4. As health agent, Ms. Cobb was responsible for witnessing percolation tests of land pursuant to Title V of the State Sanitary Code and the provisions of the Charlton Sanitary Code. Ms. Cobb also had official responsibility for reviewing septic system plans submitted to the Board of Health for approval and for making recommendations to the Board concerning those plans. In addition, Ms. Cobb as health agent inspected septic systems for compliance with the approved plans prior to their being covered and also inspected and signed the occupancy permits for newly constructed houses on behalf of the Board of Health.

5. From December 1985 through May 1988, Mr. Burlingame as a Board of Health member was Ms. Cobb's employer and a supervisor of her work as health agent. During the same period, Ms. Cobb as health agent participated in numerous official Board of Health matters affecting Mr. Burlingame's interests as a developer, including the review and approval of septic systems designs, the witnessing of percolation tests and inspection and signing of occupancy permits for houses constructed in Charlton by Mr. Burlingame.

6. In September 1986, Ms. Cobb became a tenant in an apartment building owned by Mr. Burlingame on Ram's Horn Road in Charlton. In approximately March 1987, Mr. Burlingame sold the Ram's Horn Road apartments. In May 1987, Ms. Cobb moved from Ram's Horn Road to an apartment on Carroll Hill Road in Charlton, not owned by Mr. Burlingame.

7. By early 1987, Mr. Burlingame and Ms. Cobb discussed a "package deal" pursuant to which he would sell her a lot of land and build her a house for a below-market price that she could afford to pay. By February

1987, Mr. Burlingame and Ms. Cobb were actively considering a lot of land (Lot 12) on Morton Station Road in Charlton owned by Mr. Burlingame as the potential site for Ms. Cobb's house. By mid-1987, Mr. Burlingame and Ms. Cobb had a mutual understanding that he would construct for her and sell to her a house on Lot 12 at a below-market price that she could afford.

8. At the time Mr. Burlingame and Ms. Cobb first considered Lot 12, the lot lacked the road frontage required for a house to be built on it. On July 28, 1987, Mr. Burlingame purchased Lot A Morton Station Road (Lot A) to provide the required road frontage to make Lot 12 buildable. Mr. Burlingame paid $5,000 for Lot A and agreed to reroof the lot owner's house as additional payment for the lot. Mr. Burlingame then combined Lot 12 and Lot A into a single house lot of approximately 66,706 square feet, designated as 12 Morton Station Road.

9. In January 1988, Mr. Burlingame applied for a building permit to construct a house at 12 Morton Station Road. Between January 1988 and June 1988, Mr. Burlingame, his employees and contractors constructed a two bedroom, one-and-one-half bath cape style woodframe house at 12 Morton Station Road. The land and construction costs for the house exceeded $45,000.

10. On June 24, 1988, Mr. Burlingame transferred ownership of the 12 Morton Station Road house and land to Ms. Cobb for the recited consideration of $60,000. In connection with the transaction, no downpayment was made by Ms. Cobb and Mr. Burlingame provided Ms. Cobb with 100% financing of the purchase price. Mr. Burlingame retained a $60,000 mortgage on the property at a 10% annual fixed rate of interest for 30 years. Under the terms of the mortgage, the mortgage interest is, however, charged only on $45,000 of the mortgage principal amount; and the agreement between Mr. Burlingame and Ms. Cobb provides that $15,000 of the $60,000 mortgage principal indebtedness will be forgiven if Ms. Cobb does not sell the property prior to the year 2008.

11. At the time Mr. Burlingame transferred ownership of the house and land at 12 Morton Station Road to Ms. Cobb, the property was worth substantially more than the purchase price paid by Ms. Cobb.

12. Between mid-1987 and mid-1988, Ms. Cobb as health agent inspected at least twelve new homes in Charlton built by Mr. Burlingame as a private developer and signed occupancy permits on behalf of the Board of Health for each of the homes.

13. 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 in his official position as a result of kinship, rank, position or undue influence of any party or person.

14. By, while he was simultaneously a Board of Health member with supervisory authority over Ms. Cobb and a private developer subject to Ms. Cobb's official authority as the health agent, entering into an understanding with Ms. Cobb that he would sell her a house and land for a below-market price, Mr. Burlingame 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 he could be unduly influenced by Ms. Cobb and/or that Ms. Cobb could unduly enjoy his favor in the performance of his official duties as a member of the Board of Health. In so doing, Mr. Burlingame violated G.L. c. 268A, §23(b)(3).

In view of the foregoing violation of G.L. c. 268A by Mr. Burlingame, 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. Burlingame:

1. that Mr. Burlingame pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §23(b)(3); and

2. that Mr. Burlingame waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial

proceedings to which the Commission is or may be a party.

Date: April 27, 1992

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 440

IN THE MATTER
OF
WILLIAM J. STANTON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William J. Stanton (Stanton) 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 16, 1987, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Stanton, the former manager of the Speaker's business office at the House of Representatives. On May 25, 1988, Stanton and the Commission entered into a letter agreement by which he agreed to enter into a disposition agreement regarding his violations of G.L. c. 268A and/or 268B while he was such business manager. Thereafter, at the request of the Department of the Attorney General, the Commission deferred taking any further civil action regarding Stanton's conduct pending that office's criminal investigation of that conduct. In April, 1991, Stanton plead guilty in the Superior Court to four counts of violating G.L. c. 268A and one count of violating G.L. c. 266, §67A (submitting false invoices). On September 11, 1991, the Commission formally concluded its inquiry and found reasonable cause to believe that Mr. Stanton violated G.L. c. 268A, §§2 and 3.

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

1. Between January, 1985 and February, 1987, Stanton was the manager of then Speaker George Keverian's State House business office. As such, Stanton was a state employee within the meaning of G.L. c. 268A, §1. His responsibilities as business manager included the ordering of all furniture and supplies for the House.

2. Between January 1985 and April 1988, Gregory Delcore was employed by the Speaker's office as the chief of staff.

3. Between February, 1985 and February, 1987, Tony Ciaramataro (Ciaramataro) was employed by the Speaker's Office as the assistant House photographer.

4. Between early 1985 and February, 1987, Ciaramataro ordered and the House paid for approximately $50,000 in photographic equipment and supplies from General Photographic Supply, Inc. (General Photo), a Boston photographic supply vendor owned by Milton Mishara (Mishara).

5. At some point in 1985 Delcore, Ciaramataro and Mishara created a "substitution scheme" whereby Delcore and Ciaramataro could substitute, and keep for personal use, any item they wanted instead of the item appearing on a state purchase order. At some later point, Stanton became a participant. As business manager, Stanton approved each purchase order for equipment and/or supplies the House purchased from General Photo. Ciaramataro signed General Photo's invoices certifying that the goods had been delivered to the state. In turn, Stanton, as business manager, approved the invoices for payment. The state would subsequently pay for the item in the amount indicated on the invoice, and this payment would cover the items the participants in the scheme personally received from General Photo.

6. Through this "substitution scheme" Mr. Stanton received a number of consumer goods, including a wide-screen Sony color television set, the total value of which was approximately $1,600.00.

7. Section 2 of G.L. c. 268A, in pertinent part, prohibits a state employee from corruptly soliciting or accepting anything of value for himself from another person in return for being influenced to commit or aid in committing a fraud on the commonwealth.

8. The consumer goods referenced above were obviously of value. Mr. Stanton accepted them in return for his committing or aiding in committing a fraud on the commonwealth, i.e., the above described "substitution scheme." Stanton aided the scheme by his approving first the purchase order, and then the invoices for payment. Stanton corruptly accepted these items because he knew they were given to him in exchange for his aiding the "substitution scheme."

9. By corruptly accepting these consumer goods in exchange for his being influenced to commit or aid in committing a fraud on the commonwealth, Stanton violated §2.

10. According to Stanton, the Samuel Bluestein Company is a furniture and office supply company located in Malden. Between July, 1986 and February, 1987, it sold approximately $42,000 in office furniture to the House. This furniture was ordered by Stanton as the Speaker's business manager. In addition, he approved the invoices for payment upon proof of delivery of the furniture.

11. According to Stanton, in the fall of 1986, the Samuel Bluestein Company offered Stanton a Henry Miller leather chair and ottoman (valued at approximately $3,500) as a gratuity in appreciation for Stanton's purchases of furniture from the company. Stanton accepted the offer.

12. Section 3 of G.L. c. 268A, prohibits a state employee, except as otherwise provided by law for the proper discharge of official duties, from soliciting or accepting any item of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him.

13. The chair and ottoman were items of substantial value. They were given to Stanton in appreciation for his having done substantial business with the Samuel Bluestein Company and to create goodwill in the hopes that he would continue to do business with the Samuel Bluestein Company.

14. By accepting an item of substantial value (the chair and ottoman) for himself for or because of the business he had or would do with the Samuel Bluestein Company as a House vendor, Stanton violated §3.

15. According to Stanton, in or about November or December, 1985, Stanton, along with the then Speaker's Office Chief of Staff, Gregory Delcore, took two personal trips to Vermont, along with certain family members and guests. While in Vermont, they and their invitees, dined at local restaurants. On two occasions, Stanton, at Delcore's direction, used his American Express card to pay for dinners, where the cost of each dinner was approximately $300. Delcore told Stanton he would take care of the costs of the meals later.

16. According to Stanton, in or about February, 1986, State House lobbyist Joseph Grant approached Stanton in his State House office and gave him an envelope containing $300 in cash. Grant indicated that he was doing this at Delcore's direction. Stanton reviewed his American Express records and realized that the $300 would not cover the costs for the dinners in question. Stanton then told Delcore that the money he received was not enough to pay for the meals. Subsequently, in or about March, 1986, Grant gave Mr. Stanton another $300 cash payment in Stanton's office.

17. In his capacity as business manager, Stanton was in a position to indirectly affect Grant's interests as a lobbyist.

18. Stanton accepted the $600 in cash knowing that Grant was seeking to establish goodwill with Stanton and Delcore in their official positions.

19. By accepting an item of substantial value ($600 cash) for himself for or because of official acts he had or would perform within his official responsibility, Stanton violated §3.

20. During all times relevant herein, Richard Sousa was the State House carpenter.

21. As business manager, Stanton had some official responsibilities for Mr. Sousa's job performance.

22. According to Stanton, in or about 1986, Stanton asked Sousa to construct a cabinet and shelves for Stanton's personal residence. Sousa did this. The value of the materials and labor was in excess of $50. Stanton did not pay anything for the labor or materials.

23. Stanton accepted the cabinet and shelves knowing that Sousa was giving them to him in the hopes of generating goodwill in Stanton's official capacity.

24. By accepting an item of substantial value (the cabinet and shelves) for himself for or because of his official business relationship with Sousa, Stanton violated §3.

25. 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 Stanton:

1. that he pay to the Commission the amount of $3,500 (three thousand five hundred dollars) as a civil penalty for his violations; 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: April 28, 1992

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 413

IN THE MATTER
OF
STATE STREET BANK AND TRUST COMPANY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and the State Street Bank & Trust Company (State Street) pursuant to §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 March 8, 1989, the Commission initiated a preliminary inquiry, pursuant to G.L. c. 268A, §4(a), into possible violations of the conflict of interest law, G.L. c. 268A, by State Street. The Commission concluded that inquiry and, on November 9, 1989, found reasonable cause to believe that State Street violated G.L. c. 268A, §3(a).

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

1. State Street is a Massachusetts trust company chartered under the laws of Massachusetts to engage in the business of banking. Its principal place of business is Boston, Massachusetts.

2. The City of Boston Retirement Board is a State Street client. The Boston Retirement Board invests the approximately $800 million in funds contributed by city workers towards their pensions. State Street's Trust Department serves as the custodian of those funds. In fiscal years 1987 and 1988, State Street received from the City of Boston $198,817.00 and $367,194.00, respectively, in custodian fees.

3. From March 1, 1987 to March 4, 1987, State Street hosted its ninth annual Master Trust Client Conference at the Arizona Biltmore Resort in Phoenix, Arizona. From February 28, 1988 to March 2, 1988, State Street hosted its tenth annual Master Trust Client Conference at the Westin La Paloma Resort in Tucson, Arizona. State Street invited its Trust Department's private and public sector clients to the conferences.

4. The Master Trust Client Conferences included morning investment seminars and lectures between approximately 8:00 a.m. and noontime, afternoon recreational events, and evening dinners and entertainment.

5. State Street used the conferences as educational events for its clients, and as a means to generate and maintain good will and client relations.

6. In 1987 and 1988, State Street Vice-President John Houlihan invited City of Boston Auditor Leon Stamps to the Master Trust Client Conferences. As Auditor, Stamps was one of the three members of the Boston Retirement Board.

7. Stamps attended the conferences. State Street paid for Stamps' on-site hotel, recreation and entertainment expenses, including extra nights immediately before or after the formal conferences, aggregating five nights for the 1987 and 1988 conferences. Stamps' on-site expenses totaled $1,716.67. State Street did not pay for Stamps' airfare.

8. Section 3(a) of G.L. c. 268A prohibits, other than as provided by law, the giving or offering of anything of substantial value to any municipal employee for or because of any official act performed or to be performed by such employee.[1/] The Commission may impose a fine up to $2,000 for each violation of §3.

9. By paying for Stamps' lodging, recreation and entertainment expenses when Stamps was in a position as a member of the Boston Retirement Board to vote to

award custodian business to the bank, State Street violated §3(a).[2/]

10. In this case, there is no evidence that State Street had a corrupt intent,[3/] nor that it intentially violated G.L. c. 268A, §3. Additionally, there is no evidence that the conduct of Auditor Stamps was improperly influenced by the conferences.

11. In view of the foregoing and 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 State Street:

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

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

Date: April 30, 1992

[1/]In the past, the Commission has considered entertainment expenses totalling $50 or more to constitute "substantial value." *Public Enforcement Letter 88-1.*

[2/]State Street has since restructured its conference arrangements to conform to the conflict of interest law as applied and interpreted by the Commission.

[3/]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 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, 68-9 (3rd Cir. 1978). *See also United States v. Evans*, 72 F.2d 455, 479-80 (5th Cir. 1978).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 441

IN THE MATTER
OF
KEVIN MULLEN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Kevin Mullen (Mr. Mullen) pursuant to §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. Mullen. The Commission has concluded that inquiry and, on April 8, 1992, found reasonable cause to believe that Mr. Mullen violated G.L. c. 268A.

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

1. At all times here relevant, Mr. Mullen was employed by the Massachusetts Department of Public Utilities (DPU) as an inspector assigned to the Commercial Motor Vehicle Division (CMVD).

2. The principal functions of the CMVD relate to the administrative enforcement of the Massachusetts Motor Carrier Act, G.L. c. 159B. That chapter regulates persons transporting property for compensation by motor vehicles, and provides for administrative and criminal sanctions for violation of its provisions.

3. General Laws c. 159B and the regulations promulgated pursuant thereto require all common carriers operating in Massachusetts to file with the DPU written

tariff schedules showing their current prices for their services.

4. Mr. Mullen's official duties and responsibilities as a CMVD inspector included the periodic inspection of records of common carriers for compliance with applicable state laws and regulations, the investigation of all complaints involving those common carriers, and the gathering of evidence for administrative and/or criminal prosecution of violations of the above-cited laws and regulations. Those duties also included assisting carriers with any questions they had with respect to the preparation of their written tariff schedules.

5. On five occasions during 1989, Mr. Mullen participated in a scheme by which he received from each of the common carriers listed below $100 for preparing and filing tariff schedules:

a. John's of Freetown, Inc.;
b. John's Autobody;
c. Canton Auto & Truck Repairs, Inc.;
d. Matthers Service Station; and
e. C&F Towing Service.

6. In each of the above identified instances, Mr. Mullen suggested to a representative of the common carrier that he could arrange to have James Gould, Jr., a person he represented to be a former DPU employee, prepare the tariff certificate for $100. On each such occasion Mr. Mullen accepted a check payable to James Gould, Jr. in the amount of $100. Mr. Mullen deposited those checks in a joint account which he shared with Gould. Mr. Mullen and Gould then split the proceeds from those checks. Mr. Mullen prepared and filed the tariff certificate on each occasion.

7. Chapter 268A, §4(a) provides that no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the Commonwealth or a state agency in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

8. At all times here relevant, Mr. Mullen was a "state employee" as that term is defined in G.L. c. 268A, §1(q).[1/]

9. It was not within the proper discharge of Mr. Mullen's official duties to receive private compensation from anyone in connection with the preparation of a tariff certificate.

10. A tariff certificate is a particular matter[2/] in which the Commonwealth has an obvious direct and substantial interest.

11. The $100 Mr. Mullen shared with Gould on each of the above-described occasions was compensation[3/] for Mullen's services in preparing and filing the tariff certificate.

12. By receiving $100 on each of the five occasions described above for the preparation and filing of a tariff certificate, Mr. Mullen otherwise than as provided by law for the proper discharge of official duties received compensation from a person other than the Commonwealth or a state agency in relation to a particular matter in which the Commonwealth had a direct and substantial interest, thereby violating §4(a).[4/]

In view of the foregoing violations of G.L. c. 268A, §4(a), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Mr. Mullen:

1. that he pay to the Commission the sum of two thousand dollars ($2,000.00) for his course of conduct in violating G.L. c. 268A, §4(a);

2. that he pay the Commission the sum of five hundred dollars ($500.00) as a forfeiture of the unlawful benefit he and Gould received by violating §4(a); and

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

Date: May 11, 1992

[1/]Mr. Mullen resigned his CMVD investigator position on November 17, 1989.

[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/]"Compensation" is defined as "any money or 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).

[4/]As the Commission stated *In re Bagni*, 1980 SEC 30, 32: "Whenever state employees receive compensation from a private interest or represent them in matters in which the state also has an interest, there is the potential that employees will favor those private interests at the expense of the state. Such favoritism is especially pernicious where the state employee is receiving compensation from a private party which has dealings with, has a matter pending before, or is regulated by the state employee's own agency or where the employee represents the private party in its dealings with his or her own agency. No state employee could ever in good faith think it appropriate to conduct private business with the very people he is duty-bound to regulate."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 442

IN THE MATTER
OF
DAVID CROSSMAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and David Crossman (Mr. Crossman) pursuant to §5 of the Commission's **Enforcement Procedures.** This Agreement constitutes a final Commission order enforceable in the Superior Court pursuant to G.L. c. 268B, §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. Crossman. The Commission concluded its inquiry and, on July 11, 1991, voted to find reasonable cause to believe that Mr. Crossman violated G.L. c. 268A, §§17, 18, 19 and 23.

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

1. Mr. Crossman served on the Hudson Conservation Commission (ConCom) from May 1984 until June 1989. This was an unpaid, part-time position. Mr. Crossman was the chairman of the ConCom from 1986 until he resigned from the ConCom on June 12, 1989. As a member of the ConCom, Mr. Crossman was a special municipal employee as that term is defined in G.L. c. 268A, §1(n).

2. During the times here relevant, Mr. Crossman was self-employed as an engineer and was the president and owner of the engineering firm B&C Associates (B&C). During the period here relevant, Mr. Crossman and B&C had one employee, Jim Fougere (Fougere), who was hired by Mr. Crossman in June 1988. Ninety percent of B&C's clients hire B&C to do environmental consulting work relating to the state Wetlands Protection Act.

3. In early spring 1989, the Hudson Portuguese Club (the Club) began widening a soccer field on its property on Port Street in Hudson, resulting in the destruction of wetlands. As ConCom chairman, Mr. Crossman, on April 10, 1989, signed and issued a ConCom Enforcement Order to the Club ordering the Club to immediately cease and desist from all work in wetlands on its property.[1/]

4. On April 13, 1989, B&C was hired by Robert Veo (Veo) of Veo Associates (an engineering firm) to delineate the wetlands on the Club site.[2/] Mr. Crossman made the decision for B&C to accept the contract for the Club work, however, Fougere actually did the engineering work on the Club project for B&C. Fougere began the Club work on April 13, 1989, which consisted primarily of the determination of the extent of the wetlands which had existed on the Club property prior to the illegal construction work. Fougere did additional work at the Club site on April 28, 1989. On May 3, 1989, Fougere went to a ConCom public hearing regarding the Club matter, and on May 6, 1989, Fougere attended a ConCom

site walk at the Club site. On May 17, 1989, a second public hearing was held on the Club matter at which Fougere and Veo made a presentation to the ConCom on behalf of the Club. On that same date, the ConCom issued an Order of Conditions to the Club. Mr. Crossman did not participate in the ConCom public hearings or in the issuance of the Order of Conditions to the Club. B&C did a substantial amount of additional work on the Club project after May 1989. During August, September and October 1989, B&C did a total of over 25 hours of work on the Club project.

5. Although B&C was hired by Veo for the Club work, B&C billed and was paid by the Club directly. On May 26, 1989, B&C billed the Club $360 for the work it did in April and May 1989. B&C received payment in full on June 14, 1989. In September 1989, B&C billed the Club $912.50 for the additional work done after May 1989, which amount was paid on October 20, 1989. On November 3, 1989 B&C billed the Club a further $187.50, which was paid on November 16, 1989. Mr. Crossman personally received a substantial portion of the fees billed and received by B&C for the work on the Club matter in 1989. All B&C billing was done and payments received by Mr. Crossman.

6. General Laws c. 268A, §17(a), in pertinent part, prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly, requesting or receiving compensation from anyone other than the municipality in connection with a particular matter of direct and substantial interest to that municipality.[3/] For a special municipal employee, such as Mr. Crossman, §17's prohibitions apply only in relation to particular matters (a) in which the employee has participated, as such, or (b) which are or within one year have been the subject of his official responsibility, or (c) which are pending in his municipal agency.[4/]

7. The ConCom's proceedings relating to the Club's destruction of wetlands were a particular matter in which the Town of Hudson had a direct and substantial interest. As set forth above, Mr. Crossman participated in those proceedings as a ConCom member.

8. By B&C's May 26, 1989 billing of $360 for the April and May 1989 work on the Club matter, which was either done by Mr. Crossman or under his direction and control, Mr. Crossman, while a municipal employee, indirectly requested compensation from someone other than the Town of Hudson in relation to a particular matter of direct and substantial interest to that municipality in which Mr. Crossman had participated as a municipal employee. In so doing, Mr. Crossman violated G.L. c. 268A, §17(a).

9. General Laws c. 268A, §18(a) prohibits a former municipal employee from receiving compensation, directly or indirectly, from anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest and in which the former municipal employee participated while so employed.

10. By, in June, October and November 1989, after Mr. Crossman had ceased to serve as a ConCom member, receiving compensation from the Club, indirectly through B&C, for work done by B&C for the Club, Mr. Crossman, as a former municipal employee, received compensation from someone other than the Town of Hudson in connection with a particular matter in which that municipality had a direct and substantial interest and in which Mr. Crossman had participated as a municipal employee. In so doing, Mr. Crossman violated G.L. c. 268A, §18(a).

11. General Laws c. 268A, §19, in relevant part, prohibits a municipal employee from participating, as such, in a particular matter in which he or a business organization in which he is serving as an officer, director or employee has a financial interest.

12. In that B&C's work for the Club was occasioned by the ConCom Enforcement Order issued by Mr. Crossman on April 10, 1989, B&C (and Mr. Crossman) clearly had a financial interest in the ConCom's ratification of that order on April 19, 1989. Thus, Mr. Crossman's participation as a ConCom member in the ConCom's vote to confirm the Enforcement Order to the Portuguese Club violated §19.

13. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, 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.[5/]

14. By undertaking to have B&C provide engineering services to the Club after he had acted officially concerning the Club as a ConCom member and while the

Club matter was pending before the ConCom, Mr. Crossman acted in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that Mr. Crossman could be improperly influenced in the performance of his official duties. In so doing, Mr. Crossman violated §23(b)(3).

15. During the time that Mr. Crossman was a ConCom member after he formed B&C in 1985, Mr. Crossman repeatedly contracted with private parties to have B&C perform Wetlands Act consulting work in Hudson in connection with matters which were subject to his official responsibility as a ConCom member.[6/] For example: (a) between March 1988 and October 1989, B&C delineated wetlands and did other engineering consulting work on the Indian Rock project on Manning Street, Hudson, which was the subject of a ConCom Order of Conditions issued in 1985. B&C billed its private client a total of over $3,800 for this work prior to June 1989 and received a substantial partial payment of the billed amount during that period; (b) in December 1988, B&C billed and received payment in the amount of $75 for wetlands delineation work done for Hugo Guidotti on his property off Brigham Street in Hudson. At that time, Guidotti was seeking an Order of Conditions from the ConCom for the construction of a single family home on the property; and (c) on June 9, 1989, B&C received payment of approximately $100 for engineering services done in May 1989 at the Casaceli Trucking site in Hudson in connection with a May 1989 ConCom Enforcement Order in whose issuance Mr. Crossman had participated. Mr. Crossman did these billings and received these payments for B&C. In requesting and receiving compensation for these and other projects, Mr. Crossman, while a special municipal employee, requested and received compensation from someone other than the Town of Hudson in connection with particular matters in which that municipality was a party and had a direct and substantial interest and which were the subject of his official responsibility. In so doing, Mr. Crossman violated §17(a).

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

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

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

Date: May 22, 1992

[1/]On April 19, 1989, the ConCom, with Mr. Crossman present and presiding as chairman, unanimously voted to confirm the Enforcement Order issued to the Club by Mr. Crossman.

[2/]The purpose of such a wetlands delineation is to ascertain whether there are wetlands present subject to ConCom jurisdiction and to determine the parameters of those wetlands.

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

[4/]Clause (c) does not apply in the case of a special municipal employee who serves on no more than 60 days during any period of 365 consecutive days.

[5/]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. Crossman in connection with his actions affecting the Club and B&C.

[6/]From 1987 through 1990, B&C did approximately 36 private jobs in Hudson.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 420

IN THE MATTER
OF
MARK A. BREEN

DISPOSITION AGREEMENT

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

On May 31, 1989, the Commission, pursuant to G.L. c. 268B, §4(a), initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Mr. Breen. The Commission has concluded its inquiry and, on July 19, 1989, found reasonable cause to believe that Mr. Breen violated G.L. c. 268A.

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

1. At all times material to this matter, Mr. Breen was a staff attorney at the Massachusetts Housing Finance Agency (hereafter "the MHFA"). As such, he was a state employee within the meaning of G.L. c. 268A, §1.

2. The MHFA issues bonds to finance housing loans. The money raised is distributed to qualified borrowers through banks which participate in the agency's programs. The MHFA is divided into two divisions dealing with single-family and multi-family dwellings, respectively. Although his job description encompasses single-family dwelling mortgages, Mr. Breen primarily works in the multi-family division, providing legal advice on various issues.

3. In 1987, Mr. Breen hired Cornelius Fahy (Mr. Fahy), a mason, to repair the chimney and front steps of his home. Mr. Fahy was an Irish national, legally in the United States on a temporary work visa. Mr. Fahy was employed by the Empire Masonry Company, but took on additional freelance masonry work.

4. In September or October 1987, Mr. Fahy began doing masonry work on Mr. Breen's property. He worked evenings and weekends and became friendly with Mr. Breen, who was often around while Mr. Fahy worked.

5. Mr. Breen was satisfied with Mr. Fahy's work to the extent of commissioning additional projects. Mr. Fahy continued to work on Mr. Breen's property until November 1987.

6. In November 1987, Mr. Fahy was forced by problems with his visa to return to Ireland to reapply for admission to the United States. He left Mr. Breen's projects uncompleted until he returned in March 1988, with his visa problem resolved.

7. On June 3, 1988, Mr. Fahy and his wife (the Fahys) entered into a purchase and sale agreement for a single-family house. The Fahys planned to apply for a low interest loan ("the loan") funded by the MHFA under the First-Time Home Buyer Program ("FTHB").[1/]

8. On June 14, 1988, Mr. Fahy gave Mr. Breen a check for $2500. Mr. Fahy claims that the check was given to Mr. Breen for acts Mr. Breen would take as a private attorney regarding the loan. Mr. Breen maintains that the $2500 was for past legal services unrelated to the loan provided to Mr. Fahy and for Mr. Breen's willingness to be Mr. Fahy's attorney in the future. Both Mr. Fahy and Mr. Breen agree, however, that whatever legal services were tendered by Mr. Breen to Mr. Fahy prior to June 14, 1988, Mr. Fahy was under no legal obligation to pay for them. Mr. Breen provided no legal services to the Fahys unrelated to the loan after receiving the $2500.

9. Mr. Breen did not report the $2,500 on his 1988 income tax returns.[2/] In addition, no documentation exists (i.e., a file, retainer, notes, etc.) memorializing an attorney/client relationship between Mr. Breen and Mr. Fahy involving legal services unrelated to the loan.

10. Mr. Breen subsequently provided Mr. Fahy with MHFA literature (available to the general public), including a list of banks which administered money.

11. Toward the end of June 1988, the Fahys sought a FTHB loan at a bank in Canton, Massachusetts. The Fahys were told that the bank had distributed all its funds.

Mr. Fahy went back to Mr. Breen, who told him to apply to the People's Federal Bank in Brighton, which still had FTHB funds available.

12. On or about July 1, 1988, the Fahys filed an application with the People's Federal Bank in Brighton. Mr. Breen assisted the Fahys in filling out the required financial documentation.

13. In July 1988, after Mr. Fahy complained to him of the length of time the loan application was taking, Mr. Breen went to the MHFA lender representative in the FTHB program who was responsible for the loans granted by the bank to which the Fahys had applied. Mr. Breen identified himself as a fellow employee of the MHFA, seeking information on the status of the loan application made by the Fahys. In response to Mr. Breen's inquiry, the MHFA lender representative telephoned the bank and then explained to Mr. Breen that the bank was having some trouble getting certain information regarding the Fahys' finances.

14. Thereafter, Mr. Breen met with the Fahys on several occasions to discuss their difficulties with the bank. He also telephoned and met on several occasions with the MHFA lender representative and supplied him with financial information provided by Mr. Fahy, including a copy of a pay stub from the Empire Masonry Company and a wage verification form.

15. On September 1, 1988, the bank rejected the Fahys' mortgage application.

16. Section 4(c) of G.L. c. 268A prohibits a state employee 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.

17. The Fahys' loan application was a particular matter[3/] in which the Commonwealth, as provider of the funds, had a direct and substantial interest. When Mr. Breen acted as a private attorney for the Fahys in relation to their loan application, he acted as an attorney for someone other than the Commonwealth in connection with a particular matter of direct and substantial interest to the Commonwealth. Therefore, Mr. Breen violated §4(c).

18. 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.

19. By accepting the $2500 from the Fahys under the circumstances detailed in paragraphs seven through nine above, at or about the time when he began assisting them as a private attorney in relation to their loan application, Mr. Breen knowingly, or with reason to know, acted in a manner which would cause a reasonable person knowing these facts to conclude that the Fahys could unduly enjoy Mr. Breen's favor in the performance of his official duties. Therefore, Mr. Breen violated §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. Breen:

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

2. that he pay to the Commission the amount of two thousand dollars ($2,000.00) as a civil penalty for his violation of G.L. c.268A, §23(b)(3); and

3. that he waive all rights to contest the findings of facts, 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: July 6, 1992

[1/]MHFA provides below market interest rate mortgages to income eligible, credit worthy, first-time home buyers seeking to purchase property within specific statutory acquisition costs.

[2/]Mr. Breen reported the $2,500 on his 1989 income tax returns.

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 444

IN THE MATTER
OF
FREDERICK FORESTEIRE

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Frederick Foresteire (Mr. Foresteire) pursuant to §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 11, 1991, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Foresteire, the Everett School Superintendent. The Commission concluded that inquiry and, on March 12, 1992, found reasonable cause to believe that Mr. Foresteire violated G.L. c. 268A, §§23(b)(2) and 23(b)(3).

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

1. At all times relevant to this matter, Mr. Foresteire was the Superintendent of the Everett Schools, and as such, a municipal employee as defined in G.L. c. 268A, §1(g). As superintendent, Mr. Foresteire was directly accountable to the Everett School Committee (School Committee). The superintendent's duties include directing and supervising the entire school system (teachers, maintenance, and support staff) and working on the school department budget. Additionally, the superintendent, as the secretary of the School Committee, makes recommendations but has no vote on the School Committee.

2. At all times relevant to this matter, John Shay (Shay) was a School Committee member. As a School Committee member, Shay's responsibilities include determining Everett School Department (School Department) policy, discussing and voting on budgetary matters and annually voting on various personnel matters.

3. In April 1990, Shay was in the process of moving into a new apartment. On April 4, 1990, Shay telephoned Mr. Foresteire to discuss School Committee matters. During that conversation, Shay told Mr. Foresteire that he was having trouble with the workers he had hired to paint his new apartment and that he feared the apartment would not be ready for the upcoming weekend move.

4. The next day, Mr. Foresteire approached a School Department painter (painter) who was working in the school administration building and asked him to take a look at Mr. Shay's apartment and provide advice as to what could be done to finish on time.

5. Later that day, Mr. Foresteire and the painter travelled to and examined Mr. Shay's apartment. The painter told Mr. Foresteire that a significant amount of work needed to be done prior to the weekend move. The painter agreed to assist in the apartment painting and requested a personal day, which Mr. Foresteire granted.[1/]

6. Over the next three days, the painter worked over 22.5 hours and expended approximately $300 in labor and supplies.[2/] Prior to painting Shay's apartment, the painter had never personally met Mr. Shay, although he knew he was a School Committee member.

7. Shay encountered the painter working in his apartment on two or three occasions. Shay became aware through these encounters that the painter was a School Department employee. Shay never offered to and ultimately never did compensate the painter.

8. On April 9, 1990, Mr. Foresteire approached the painter at the school and inquired as to whether he was compensated for his services. The painter informed Mr. Foresteire that he had not been compensated for his services.

9. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances,

to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties.

10. By soliciting the School Department painter's services for Shay, Mr. Foresteire acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that either Shay[3/] or the painter could improperly influence or unduly enjoy his favor in the performance of his official duties. Therefore, Mr. Foresteire violated G.L. c. 268A, §23(b)(3).

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

1. that he pay to the Commission the amount of two hundred and fifty ($250.00) as a civil fine for violating G.L. c. 268A, 23(b)(3);

2. that he will act in conformance with the requirements of G.L. c. 268A in his future conduct as a municipal employee; and

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

Date: July 7, 1992

[1/]A School Department employee is allocated two personal days a year.

[2/]The painter worked in Mr. Shay's apartment on Thursday, April 5 from 4:00 p.m. to 10:30 p.m.; on Friday, April 6 from 7:30 a.m. until 3:30 p.m. (personal day); and on Saturday, April 7 from 8:00 a.m. to 4:00 p.m. for a total of approximately 22.5 hours. The estimated value of the labor is $225. and the painter's own supplies is $24.

[3/]Shay's receipt of the free paint job also raises conflict of interest issues for Shay. *In re Shay*, 1992 SEC 589 (school committee member fined $750 for violating §3 by receiving gratuitous paint job from subordinate school department employee).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 445

IN THE MATTER
OF
JOHN SHAY

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John Shay (Mr. Shay) pursuant to §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 11, 1991, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Shay, an Everett School Committee member. The Commission concluded that inquiry and, on March 12, 1992, found reasonable cause to believe that Mr. Shay violated G.L. c. 268A.

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

1. At all times relevant to this matter, Mr. Shay was an Everett School Committee (School Committee) member, and as such, a municipal employee as defined in G.L. c. 268A, §1(g). As a School Committee member, Mr. Shay's responsibilities include determining Everett School Department (School Department) policy, discussing and voting on budgetary matters, and annually voting on various personnel matters.

2. At all times relevant to this matter, Fred Foresteire (Foresteire) was Superintendent of the Everett Schools. Foresteire was directly accountable to the

School Committee. The superintendent's duties include directing and supervising the entire school system (teachers, maintenance, and support staff) and working on the school department budget. Additionally, the superintendent, as the secretary of the School Committee, makes recommendations but has no vote on the School Committee.

3. In April, 1990, Mr. Shay was in the process of moving into a new apartment. On April 4, 1990, Mr. Shay telephoned Foresteire to discuss School Committee matters. During that conversation, Mr. Shay told Foresteire that he was having trouble with the workers he had hired to paint his new apartment and that he feared the apartment would not be ready for the upcoming weekend move.

4. The next day, Foresteire approached a School Department painter (painter) who was working in the school administration building and asked him to take a look at Mr. Shay's apartment and provide advice as to what could be done to finish painting the apartment on time.

5. Later that day, Foresteire and the painter travelled to and examined Mr. Shay's apartment. The painter told Foresteire that a significant amount of work was needed to finish the job prior to the weekend move. The painter agreed to assist in the apartment painting and requested a personal day,[1/] which Foresteire granted.[2/]

6. Over the next three days, the painter worked over 22.5 hours and expended approximately $250 in labor and supplies.[3/] Prior to painting the apartment, the painter had never personally met Mr. Shay, although he knew he was a School Committee member.

7. Mr. Shay encountered the painter working in his apartment on two or three occasions. Mr. Shay was aware that the painter was a School Department employee. Mr. Shay never offered to and ultimately never did compensate the painter.

8. G.L. c. 268A, §3, in pertinent part, prohibits a municipal employee from accepting anything of substantial value for or because of any official act or acts within his official responsibility performed or to be performed by him.[4/]

9. By receiving a gratuitous paint job of substantial value from a School Department painter, while as a School Committee member he was in a position to take official action concerning School Department employees which could affect the painter's interest,[5/] Mr. Shay received a gift of substantial value for himself for or because of acts within his official responsibility performed or to be performed by him. In doing so, Mr. Shay violated G.L. c. 268A, §3(b).[6/]

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 and conditions agreed to by Mr. Shay:

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

2. that he pay to the Commission the sum of two hundred and fifty dollars ($250) as a forfeiture of the unlawful benefit he received in accepting the gratuitous paint job;[7/]

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

4. that he 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 proceedings to which the Commission is or may be a party.

Date: July 7, 1992

[1/]A School Department employee is allocated two personal days a year.

[2/]Superintendent Foresteire's solicitation of a subordinate painter's services also raises conflict of interest issues for Foresteire. *In re Foresteire*, 1992 SEC 588.

[3/]The painter worked in Mr. Shay's apartment on Thursday, April 5, from 4:00 p.m. to 10:30 p.m.; on Friday, April 6, from 7:30 a.m. until 3:30 p.m. (personal day); and on Saturday, April 7, from 8:00 a.m. to 4:00 p.m. for a total of approximately 22.5 hours. The estimated value of the labor is $225 and the painter's own supplies is $24.

[4/]Anything with a value of $50 or more is an item of substantial value for the purpose of §3. *See Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584 (1976).

[5/]The School Department was facing several lay-offs at the time the painter performed the services in Mr. Shay's apartment, however, there is no evidence that Mr. Shay took any action on the painter's behalf.

[6/]As the Commission stated in *In re Michael*, 1981 SEC 59, 68:

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

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 446

IN THE MATTER
OF
HAROLD PARTAMIAN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Harold Partamian (Mr. Partamian) pursuant to §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, and the financial disclosure law, G.L. c. 268B, by Mr. Partamian. The Commission has concluded its inquiry and, on March 13, 1992, found reasonable cause to believe that Mr. Partamian had violated G.L. c. 268A and G.L. c. 268B.

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

1. Mr. Partamian is the executive secretary of the state Board of Registration in Pharmacy (Board), a full-time, salaried position he has held since July 1987. Prior to becoming the Board executive secretary, Mr. Partamian was a pharmacy investigator for the state Division of Registration (Division), from 1980 until July 1987. As the Board executive secretary and as a pharmacy investigator, Mr. Partamian was at all times here relevant a state employee as that term is defined in G.L. c. 268A, §1(q).

2. In addition to his state employment, Mr. Partamian is a licensed pharmacist. Since 1982, Mr. Partamian has worked part-time (9:00 a.m. to 5:00 p.m. on Saturdays) as a pharmacist, first at the Hill View Pharmacy in North Reading, and since 1984 at a pharmacy in Woburn owned by Insta-Care Pharmacy Services Corporation (Insta-Care). From this private part-time work, Mr. Partamian has annually earned between $5,000 and $8,000 during the period here relevant.

3. In 1982, Mr. Partamian requested and received an Advisory Opinion (EC-COI-82-95) from the Commission concerning possible conflicts between his work for the Division and his part-time private employment. The Commission informed Mr. Partamian that he would be unable to participate as a Division investigator in any matters concerning the pharmacy for which he worked or concerning any of its geographical competitors. In 1987, when Mr. Partamian became the Board executive secretary, he asked the Commission to update the opinion previously issued to him. In a Commission staff later letter dated June 19, 1987, the Legal Division of the Commission reaffirmed EC-COI-82-95 stating "... you must continue to refrain from

participating as [the Board executive secretary] in any matter affecting either the pharmacy which employs you on Saturdays or its geographic competitors."

4. In 1986, Mr. Partamian, acting as a Division investigator, investigated a complaint which had been filed with the Division against Insta-Care. In 1987, Mr. Partamian, acting as a Division investigator, investigated a second matter concerning Insta-Care. Both the 1986 and 1987 matters were settled as recommended by Mr. Partamian. In August 1987, Mr. Partamian, acting as Board executive secretary, signed a report on behalf of the Board relating to a third investigation concerning Insta-Care indicating that the Board had resolved that investigation without a finding of a violation.

5. Except as otherwise provided in that section,[1/] §6 of G.L. c. 268A prohibits a state employee from participating as such in a particular matter in which, to his knowledge, a business organization by which he is employed has a financial interest. None of the exemptions provided in §6 is applicable in this case.

6. The two investigations concerning Insta-Care that Mr. Partamian conducted as a Division investigator in 1986 and 1987, and the third investigation concerning Insta-Care, the investigative report concerning which Mr. Partamian signed as the Board executive secretary in 1987, were particular matters within the meaning of G.L. c. 268A.[2/]

7. Mr. Partamian's part-time employer, Insta-Care, had a financial interest[3/] known to Mr. Partamian in each of the above-described particular matters concerning it, which were before the Board or were the subject of investigation by the Division, given that each involved investigations of Insta-Care which might have resulted in the Board's taking action prejudicial to Insta-Care's pharmacy business activities in the Commonwealth.

8. By, as a Division investigator, investigating matters concerning Insta-Care in 1986 and 1987, and by, as the Board executive secretary, signing an investigation report concerning Insta-Care on behalf of the Board in August 1987, Mr. Partamian participated[4/] officially as a state employee in matters in which, to his knowledge, his private employer had a financial interest. In so doing, Mr. Partamian violated G.L. c. 268A, §6.

9. As the Board executive secretary, Mr. Partamian annually files Statements of Financial Interests (SFIs) with the Commission, pursuant to G.L. c. 268B. On his 1987 and 1988 SFIs, Mr. Partamian did not disclose his part-time employment with Insta-Care or the income he derived from that part-time employment. This information omitted by Mr. Partamian from his 1987 and 1988 SFIs was information which was required to be reported on those forms, pursuant to G.L. c. 268B, §5(g)(1).[5/]

10. Section 7 of G.L. c. 268B prohibits the filing of a false SFI. A false SFI filing need not be willful or intentional to violate G.L. c. 268B, §7. The statute requires a commitment to a reasonable degree of care and diligence in filing SFIs. See *In re Logan*, 1981 SEC 40, 49. Mr. Partamian failed to exercise reasonable care and ordinary diligence by not disclosing the above-stated information. In so doing, Mr. Partamian violated G.L. c. 268B, §7.

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

1. that Mr. Partamian 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 Mr. Partamian pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268B; and

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

Date: July 9, 1992

[1/]Section 6 provides the following exemption for a state employee whose duties require participation in a particular matter in which there is a prohibited financial interest: (1) he must advise his appointing official and this Commission in writing of the nature and circumstances of the particular matter and make full disclosure of his 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.

[2/]"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).

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

[4/]"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).

[5/]Mr. Partamian first reported his employment with Insta-Care and his earnings from that employment on his 1989 SFI, after he became the subject of investigation (by state law enforcement officials.)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 447

IN THE MATTER
OF
RUDY BANKS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Rudy Banks (Mr. Banks) pursuant to §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 12, 1992, 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. Banks. The Commission has concluded its inquiry and, on May 14, 1992, found reasonable cause to believe that Mr. Banks violated G.L. c. 268A.

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

1. Mr. Banks was, during the time here relevant, a member of the Board of State Examiners of Plumbers and Gas Fitters (Board). As such, Mr. Banks was a state employee as that term is defined in G.L. c. 268A, §1. Mr. Banks has continued to serve on the Board to the present time.

2. The Board consists of nine members. It is responsible for regulating plumbers and gas fitters, which it does in part by administering licensing examinations. The Board is also responsible for promulgating a state plumbing code and granting variance requests from that code's requirements.

3. The Board has a seven-member Plumbing Subcommittee (Subcommittee) which specializes in plumbing issues only. The Subcommittee makes recommendations regarding various plumbing matters, including the granting of variance applications (from the State Plumbing Code) to the Board.

4. Mr. Banks is a master plumber. During the time here relevant, while sitting as a member of the Board, he has also served on the Subcommittee.

5. In early 1990, Napoli Pizza of Westfield, Massachusetts applied for a liquor license before the local licensing commission. That commission informed Napoli Pizza that it would have to install a handicapped restroom. In July 1990, Napoli Pizza applied for a building permit to install a unisex handicapped bathroom (by enlarging one of its two existing bathrooms). The Westfield Building Department informed Napoli Pizza that it would need a variance from the State Plumbing Code (248 CMR

§2.10 19(h)), which requires a commercial establishment such as Napoli Pizza to have a bathroom for each sex. On July 25, 1990, the Subcommittee approved Napoli Pizza's variance application. Banks was present and voted in favor. On August 1, 1990, the Board voted to ratify the Subcommittee's action. Banks voted in favor.

6. By letter dated August 21, 1990, the Board notified Napoli Pizza and the Westfield plumbing inspector that on August 1, 1990, the Board voted to grant Napoli Pizza a variance from 248 CMR §2.10(19)(h) provided the unisex facility was kept locked.

7. Mr. Banks has a son Raymond who is also a master plumber. In early September 1990, Raymond applied to the Westfield plumbing inspector for a plumbing permit for the unisex bathroom at Napoli Pizza. At or about the same time, the Westfield plumbing inspector denied the permit, because he had not received a satisfactory written explanation from the Board as to the variance.

8. By letter dated September 5, 1990, the Westfield plumbing inspector wrote to the Board questioning the granting of the variance. He represented that he was being informed by the attorney for Napoli Pizza that the Board had voted to allow one unisex and one men's bathroom. The inspector insisted that the law requires that a commercial establishment maintain one men's bathroom and one women's bathroom, as well as the unisex handicapped bathroom.

9. In late September, 1990, Raymond reapplied for the plumbing permit for Napoli Pizza. At or about the same time, Raymond informed Mr. Banks of the problem he was having with the local plumbing inspector.

10. Thereafter, at its September 26, 1990 Subcommittee meeting, the Subcommittee voted to allow a variance based on the handicapped unisex bathroom being used by the public and the remaining bathroom being designated a unisex bathroom for employees. Mr. Banks voted in favor of the variance. On October 3, 1990, the Board approved the Subcommittee's decision to clarify the variance. Mr. Banks voted in favor.

11. On October 12, 1990, the Westfield plumbing inspector granted the permit to Napoli Pizza for construction of a unisex bathroom.

12. General Laws chapter 268A, §6 prohibits a state employee from participating as such in a particular matter in which to his knowledge a member of his immediate family has a financial interest.

13. The decisions by the Subcommittee and then the Board to ratify the Napoli Pizza variance were particular matters.[1/]

14. Mr. Banks participated[2/] in those particular matters by voting to approve the variance.

15. At the time he so voted, he was aware that his son would be doing the plumbing work which was the subject of the variance. Therefore, he knew that his son had a financial interest in those particular matters.

16. Therefore, by voting in late September and early October as a Board member to approve the Napoli Pizza variance, Mr. Banks participated as a state employee in particular matters in which to his knowledge an immediate family[3/] member had a financial interest, thereby violating §6.

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

1. that Mr. Banks pay to the Commission the sum of two hundred and fifty dollars ($250.00) as a civil penalty for violating G.L. c. 268A, §6; and

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

Date: July 9, 1992

[1/]"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts

for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

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

[3]/A son is an immediate family member. G.L. c. 268A, §1(e).

John Marchesi
c/o Ralph Cianflone, Jr., Esquire
Cianflone & Cianflone
59 Bartlett Avenue
P.O. Box 1405
Pittsfield, MA 01202

RE: PUBLIC ENFORCEMENT LETTER 92-3

Dear Mr. Marchesi:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that you utilized City of Pittsfield Department of Recreation employees to perform typing services for the Massachusetts Amateur Softball Association (MASA), an organization for which you serve as state commissioner. The results of our inquiry (discussed below) suggest that the conflict of interest law may have been violated. Due to a number of mitigating circumstances (also discussed below), the Commission has determined that further proceedings are not warranted. Rather, the Commission and you have agreed that the public interest would be better served by disclosing the facts revealed during our inquiry and explaining the applicable provisions of the law with the expectation that this will ensure both your and other government employees' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not necessarily admit to the facts and law as discussed below. The Commission and you have agreed that there will be no formal action against you, and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

Since 1965 you have served the City of Pittsfield as the Parks Department Director, and have worked for the same department since 1956. Your responsibilities have included the supervision of a secretary and an assistant recreation department supervisor.

In 1977 the National Amateur Softball Association appointed you as the state commissioner of MASA. MASA is a non-profit unincorporated organization existing to promote amateur softball in Massachusetts. As the state commissioner, you essentially serve as the chief administrator for MASA. Currently, there are 1700 MASA registered teams. You do not draw a salary from MASA, and the organization has no employees.

Your MASA administrative duties peak during the months of May, June and July. While you perform most of this administrative work yourself on your own time, you have occasionally assigned work to the recreation department secretary and the recreation department supervisor. This work involved the typing of letters, team rosters and umpire lists. The great majority of MASA teams and leagues are located outside the City of Pittsfield. From 1988 to 1991, the department secretary performed approximately 80 hours of MASA work (1 to 1.5 hours a week during the busy three months). In 1991, the assistant recreation department supervisor performed approximately two hours a week of MASA work during a ten week period, or roughly 20 hours. All parties interviewed during the Commission's inquiry stated that the department's performance of MASA work did not interfere with regular City of Pittsfield business.

II. The Conflict of Interest Law

As the City of Pittsfield Recreation Department Director, you are a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. General Laws c. 268A, §23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for others unwarranted privileges which are of substantial value[1]/ and which are not properly available to similarly situated individuals. The Commission has routinely interpreted §23(b)(2) as forbidding public officials from using public resources for their private interests. *See, e.g., P.E.L. 89-4* (Undersecretary of Economic Affairs violated §23(b)(2) by using state secretarial services and stationary to help obtain a free trip to the Soviet Union to promote world

peace); *In re Buckley*, 1983 SEC 157 (City of Boston employee violated §23(b)(2) by using city stationery to further private landlord interest); *Commission Advisory No. 4* (public resources such as office equipment, telephones and typewriters cannot be used to advance personal, private or political interests of public employees). The essence of §23(b)(2) is that public resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees, even if those concerns are public-spirited in nature. By directing city employees to devote approximately 100 hours of city time towards MASA's administrative needs that were unrelated to city business, you extended an unwarranted privilege of substantial value to MASA. Thus, it appears that you may have violated §23(b)(2).

As indicated above, the Commission has determined that a public adjudicatory proceeding is not necessary to resolve this case.[2/] In choosing to resolve this case by means of a public enforcement letter only, the Commission was mindful of the following mitigating factors:

1. You did not obtain any personal financial benefit as the MASA state commissioner.

2. It was determined the purpose of your securing city secretarial services for MASA was to promote amateur softball throughout Massachusetts, a public-spirited endeavor, not unlike your official recreation duties to the City of Pittsfield.

3. You cooperated fully throughout our inquiry.

4. The use of public resources for MASA's benefit was balanced by your working long hours for the Recreation Department and accruing hundreds of hours of unused compensatory time.

5. You have agreed to contribute to the City of Pittsfield 100 hours of your compensatory time.

III. Disposition

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

Date: August 20, 1992

[1/]Anything valued at $50 or more is substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976).

[2/]The Commission could have authorized adjudicatory proceedings which can result in fines up to $2000 per ethics violation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 449

IN THE MATTER
OF
GUY TARDANICO

DISPOSITION AGREEMENT

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

On March 12, 1992, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of conflict of interest law, G.L. c. 268A, by Dr. Tardanico. The Commission has concluded its inquiry and, on June 16, 1992, found reasonable cause to believe that Dr. Tardanico violated G.L. c. 268A.

The Commission and Dr. Tardanico now agree to the following findings of facts and conclusions of law:

1. Dr. Tardanico was, during the time here relevant, the Stoughton School Committee (School Committee) chairman. As such, Dr. Tardanico was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As an elected member of the School Committee, Dr. Tardanico had the responsibility for, among other matters, establishing the policies of the Stoughton School Department (School Department), reviewing and approving its annual budget, and negotiating and approving contracts with School Department employees.

3. The School Department employees are represented by six different bargaining units, each unit representing a certain type of employee. Unit A represents the school teachers.

4. The School Committee designates a subcommittee consisting of certain members of the School Committee to negotiate with each bargaining unit.

5. In or about late 1989 the School Committee designated three of its members to serve on a subcommittee to negotiate a new contract with Unit A. (The prior three-year contract was to end in the spring of 1990.) Dr. Tardanico was not a member of this subcommittee. The Stoughton Teachers Association (STA) represented the teachers regarding the Unit A negotiations.

6. At all relevant times, Dr. Tardanico's spouse was a Stoughton teacher and member of the Unit A bargaining unit.

7. Between the fall of 1989 and April 4, 1990, the subcommittee met on numerous occasions with Unit A representatives to negotiate the new contract. On April 4, 1990, the subcommittee and STA reached a tentative agreement. Basically, the agreement provided for a three year extension of the existing contract with two percent across-the-board salary increases in each of the first two years and a six percent increase in the third year.

8. By a memorandum of understanding dated June 4, 1990, the School Committee approved the actions of the subcommittee. Dr. Tardanico signed the memorandum as School Committee chairman.

9. At or about the same time, the Stoughton Town Meeting declined to fund the new contract.

10. At the October 2, 1990 School Committee meeting, Dr. Tardanico voted with the other School Committee members to petition the Board of Selectmen to call for a special town meeting for the purpose of funding the Unit A contract. Dr. Tardanico stated at that meeting that his colleagues who had negotiated with the Unit A negotiating team had done so in good faith and assured those present that, one way or another, what had been negotiated would happen, that the School Committee was obligated to meet the Unit A negotiated contract.

11. At the January 28, 1991 special town meeting, Dr. Tardanico moved as School Committee chairman to transfer $350,406 from free cash to implement the collective bargaining agreement between the School Committee and Unit A. The motion was defeated.

12. At the February 5, 1991 School Committee special meeting, Dr. Tardanico, as chairman, encouraged the School Committee members to join with the STA in filing for arbitration.

13. At the March 5, 1991 School Committee meeting, Dr. Tardanico informed the other School Committee members that the STA was concerned about the School Committee's failure to sit down and negotiate regarding the Unit A contract. Dr. Tardanico encouraged the School Committee to resume negotiations before a March 21, 1991 arbitration hearing took place. He asked that someone make a motion to this effect. The School Committee then voted that "legal counsel be contacted and advised of the desire of the School Committee to sit down with the [STA] negotiating team to discuss and, hopefully, resolve problems with regard to teachers' contracts prior to the matter going to arbitration on March 21, 1991." Dr. Tardanico voted in favor of that motion.

14. By a memo dated March 7, 1991, Dr. Tardanico, on behalf of the School Committee, wrote to the STA stating, "It is the Committee's desire to meet with the bargaining team of the STA and discuss the ongoing situation involving the successor collective bargaining agreement between the School Committee and the STA."

15. On or about March 21, 1991, an arbitration hearing was held. The arbitrator directed the parties to resume negotiating. The parties did so.

16. At the May 9, 1991 School Committee executive session, such negotiations continued. The School Committee caucused several times. During one of those caucuses, Dr. Tardanico advocated that the teachers be given the increases that had been previously agreed to for years one and two of the three year contract extension.

17. On June 17, 1991, the School Committee made a written proposal to the STA. Dr. Tardanico did not sign that offer. The STA accepted the offer on June 19, 1991.

Shortly thereafter, the School Committee, with Dr. Tardanico not participating, ratified the agreement. A written memorandum of understanding was entered into between the School Committee and the STA on or about June 25, 1991. Dr. Tardanico refrained from voting on or signing that memo of understanding, citing a conflict of interest.[1/]

18. Except as otherwise permitted in that section, G.L. c. 268A, §19 prohibits a municipal employee from participating[2/] as such in a particular matter[3/] in which to his knowledge a member of his immediate family has a financial interest.

19. As set forth above, the new Unit A contract was a particular matter. In addition, the various decisions and determinations by the School Committee regarding the new Unit A contract were particular matters. Moreover, the ongoing controversy regarding whether and to what extent a new contract would be funded was also a particular matter.

20. Dr. Tardanico participated in those particular matters by his involvement in signing the June 4, 1990 memorandum of understanding, and thereafter advocating that certain action be taken regarding funding the contract, resuming negotiations, agreeing to salary increases, voting on those actions, and so forth.

21. At the time he so acted, he was aware that his wife was a Stoughton teacher and member of the Unit A bargaining unit. Therefore, he knew that she had a financial interest in these particular matters.

22. Therefore, by participating, as described above, in the process by which the Unit A 1990-1993 contract was approved, Dr. Tardanico participated as a municipal employee in particular matters in which to his knowledge an immediate family[4/] member had a financial interest, thereby violating §19.

23. The Commission is unaware of any evidence to suggest that Dr. Tardanico, in his actions as described above, acted other than on the merits, or was improperly influenced by virtue of his wife being a member of the bargaining unit.

In view of the foregoing violations of G.L. c. 268A by Dr. Tardanico, 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 Dr. Tardanico:

1. that Dr. Tardanico pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §19; and

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

Date: August 27, 1992

[1/]In May 1991, a fellow School Committee member raised a concern about Dr. Tardanico being in conflict of interest by his advocating that the School Committee negotiate with the STA and that it grant certain salary increases. Consequently, counsel for the School Committee contacted the Commission regarding the issue of whether Dr. Tardanico could remain in the room when contract issues were being discussed, if he did not take part in those discussions. A Commission staff attorney advised counsel, who in turn advised Dr. Tardanico, that the best course was for him to leave the room when contract issues were discussed.

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

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

[4/]A spouse is an immediate family member. G.L. c. 268A, §1(e).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 450

IN THE MATTER
OF
WILLIAM BUTTERS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William Butters (Mr. Butters) pursuant to §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 19, 1992, the Commission initiated a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, involving Mr. Butters, a Norwood Selectman. The Commission concluded that inquiry and, on July 14, 1992, found reasonable cause to believe that Mr. Butters violated G.L. c. 268A.

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

1. At all times relevant to this matter, Mr. Butters was a selectman of the Town of Norwood. Mr. Butters served as a Norwood selectman from 1971 to 1977 and from 1980 to the present. Mr. Butters was, therefore, during the period here relevant, a municipal employee as defined in G.L. c. 268A, §1(g).

2. Mr. Butters' son, Paul Butters, has been a Norwood firefighter at all times relevant to this matter.

3. The Norwood firefighters serve pursuant to successive contracts with the town. The firefighter contracts are negotiated by town counsel and the firefighters' union. Mr. Butters has not been involved in these negotiations.

4. On December 12, 1989, at a regular selectmen's meeting, the selectmen, including Mr. Butters, unanimously approved and signed the firefighter contract. The contract raised Paul Butters' salary $1,682.76.

5. On June 12, 1990, at a regular selectmen's meeting, Mr. Butters seconded the motion to approve a new fire department contract. The selectmen unanimously approved the contract. The contract raised Paul Butters' salary $2,481.[1/]

6. On June 14, 1990, the town meeting approved the fire department contract. Shortly thereafter, however, a referendum petition was initiated to overturn the town meeting vote approving the fire department contract and other municipal employee contracts.

7. On July 2, 1990, at a regular selectmen's meeting, Mr. Butters participated extensively in a discussion concerning whether to call for a referendum on the municipal employee contracts. The selectmen split 2-2 on the motion, with Mr. Butters voting against holding the referendum.

8. On August 21, 1990, at a regular meeting, the selectmen, including Mr. Butters, again unanimously approved and signed the firefighter contract.

9. Except as otherwise permitted, §19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge his immediate family has a financial interest.[2/]

10. The fire department contracts were particular matters as that term is defined in G.L. c. 268A, §1(k).

11. As a firefighter, Mr. Butters' son had a financial interest in the approval of the contracts. At all relevant times, Mr. Butters was aware of that financial interest.

12. Mr. Butters participated in the fire department contracts by voting in favor of and signing the fire department contracts in both 1989 and 1990, and by voting against holding the referendum on the contract in 1990.

13. By acting as described, Mr. Butters participated in matters in which to his knowledge his son had a financial interest. Therefore, Mr. Butters violated §19.

14. Mr. Butters held a Norwood liquor license for South Norwood Pharmacy, Inc. from 1987 to 1991. The South Norwood Pharmacy is owned and operated by Butters' immediate family. Butters serves as an employee of the corporation.

15. Mr. Butters, as a selectman, signed the following liquor license renewal applications or renewal licenses:

a. in 1988, his and six competitors' licenses and applications;

b. in 1989, his and five competitors' licenses;

c. in 1990, one competitor's license; and

d. in 1991, six competitors' applications.[3/]

16. The decisions of the board of selectmen to approve the above liquor licenses were particular matters.

17. Mr. Butters' association with[4/] and his immediate family's ownership of South Norwood Pharmacy, Inc. gave him and his family a financial interest in the above liquor license matters. At all times relevant herein, Mr. Butters was aware of those financial interests.

18. Mr. Butters participated in the liquor license process by signing the application and licenses of South Norwood Pharmacy, Inc. and those of his competitors from 1988 through 1991, as described above.

19. By acting as just described, Mr. Butters participated as a selectman in matters in which to his knowledge he and his immediate family had a financial interest. Therefore, Mr. Butters violated §19.[5/]

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

1. that he pay to the Commission the amount of one thousand dollars ($1,000.00) as a civil fine for violating G.L. c. 268A, §19 by participating as a selectmen in matters in which his firefighter son had a financial interest;

2. that he pay to the Commission the amount of five hundred dollars ($500.00) as a civil fine for violating G.L. c. 268A, §19 by participating as a selectmen in liquor license matters in which he had a financial interest;

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

4. that Mr. Butters 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 9, 1992

[1/]Paul Butters was treated the same as all other firefighters holding the same position under both the December 12, 1989 and June 12, 1990 contracts.

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

[3/]Although Mr. Butters abstained from liquor license hearings citing his holding of a liquor license as the rationale, Mr. Butters improperly invoked the Rule of Necessity at a December 15, 1987 selectmen's meeting and affirmatively voted for a competitor's liquor license transfer.

[4/]Section 19 also prohibits a municipal employee from participating in a particular matter in which a business organization for which he is an employee, officer or director has a financial interest.

[5/]The statute covering the aforementioned liquor licenses, G.L. c. 138, §16A, provides that a license will be renewed absent a showing of cause not to, but as a practical matter, selectmen can refuse to grant renewals, even without cause, requiring licensees to appeal the denials. The Commission has found that selectmen who participate in such liquor license renewals when they have a financial interest violate §19. *In re Lavoie*, 1987 SEC 286.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 451

IN THE MATTER
OF
ARTHUR L. HILSON

DISPOSITION AGREEMENT

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

On January 16, 1992, 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. Hilson. The Commission has concluded its inquiry and, on June 16, 1992, by a majority vote, found reasonable cause to believe that Mr. Hilson violated G.L. c. 268A, §§3 and 23.

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

1. Mr. Hilson was, during the time here relevant, the Director of the Department of Public Safety (Department) at the University of Massachusetts in Amherst.[1/] As such, Mr. Hilson was a state employee as that term is defined in G.L. c. 268A, §1.

2. As the Department Director, Mr. Hilson had supervisory authority over Department personnel. Mr. Hilson's supervisory responsibilities included signing off on all promotions and personnel evaluations, and acting as the appeal authority for disciplinary matters.

3. In 1990, Mr. Hilson's duties as the Department Director also included serving as the Chief of the University of Massachusetts Police Department.

4. Until April 19, 1990, Erma Rocasah worked for the Department in its payroll division. She did not work directly for Mr. Hilson during the times relevant here. While subject to his authority, Rocasah developed a friendship with Mr. Hilson.

5. In March 1990, Mr. Hilson executed a $1,367 personal check to Choice Meats of Greenfield, Massachusetts for the purchase of beef. Mr. Hilson lacked sufficient funds in his checking account to cover the check.

6. On March 26, 1990, Mr. Hilson approached Rocasah and borrowed $1,000 from her to augment his checking account. Mr. Hilson signed a promissory note for the loan. The loan was made payable by April 30, 1990, but called for no interest payments.

7. Both Mr. Hilson and Rocasah maintain that friendship motivated their participation in the loan transaction.

8. On April 13, 1990, the wife of a Department special police officer complained to Department personnel that her husband's W-2 forms reflected wages far greater than income he had actually earned.

9. On April 19, 1990, Mr. Hilson ordered an investigation into the suspected embezzlement of $15,000 worth of special police officer detail checks by Rocasah. On April 19, 1990, Rocasah resigned from her position with the Department.

10. Also on April 19, 1990, the Department's investigator informed the Northwestern District Attorney's office of the Department's probe. The District Attorney's office played no role in the investigation until September 1990.

11. Mr. Hilson informed his supervisor, a University of Massachusetts Vice-Chancellor, of the investigation and his Department's contact with the District Attorney's office. Due to adverse media concerns, the Vice-Chancellor criticized Mr. Hilson for contacting the District Attorney's office and for not handling the matter internally by referring it to the university's attorney.

12. On April 20, 1990, Mr. Hilson telephoned Rocasah at her home. Rocasah inquired when she was going to be arrested and taken to jail. Mr. Hilson responded that Rocasah was not to worry as the university only wanted its money back and that the matter in all probability would be handled internally.[2/]

13. On April 24, 1990, Mr. Hilson authorized an audit of the Department's payroll division as part of the ongoing investigation.

14. On May 1, 1990, Mr. Hilson repaid $500 of the March 26, 1990 $1,000 loan from Rocasah. He has not repaid the outstanding $500 balance.

15. On June 11, 1990, Rocasah mailed a letter and a $1,000 check to Mr. Hilson. The letter stated that the check was "[a] token of sincere appreciation for standing by me and turning a deaf ear to all the voices of discontentment with me." Rocasah explained she offered the gift partially to thank Mr. Hilson for his support during her resignation, and partially to thank him for his support and efforts during problems she encountered with her former immediate Department supervisor.

16. Mr. Hilson deposited the $1,000 check into a personal bank account on June 13, 1990.

17. The Department investigator completed his probe on September 12, 1990, and furnished his findings to the District Attorney.

18. In December 1990, the District Attorney indicted Rocasah on larceny charges in Superior Court.

19. At all times during the investigation, Mr. Hilson as the Department Director possessed the authority to terminate the Department's investigation. After interviewing 20 university employees and law enforcement officials, however, the Commission has found no evidence that Mr. Hilson ever attempted to interfere with the investigation, or advocate lenient treatment for Rocasah.

$1,000 Gift

20. General Laws c. 268A, §3(b) forbids a public official, except as otherwise provided by law, from accepting an item of substantial value[3/] for or because of an official act performed or to be performed. An official violates §3 when he accepts a gift from a person he is in a position to officially benefit, and the giver is motivated to extend the gift because of the official's public duties.[4/]

21. By accepting a $1,000 gift from a criminal suspect being investigated by his police department when he was in a position to terminate that investigation, Mr. Hilson violated §3.

$1,000 Loan

22. General Laws c. 268A, §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 anyone can improperly influence or unduly enjoy his favor in the conduct of his official duties.

23. By securing an immediate, no-interest $1,000 loan from his subordinate, Mr. Hilson acted in a manner which would cause a reasonable person to conclude that Rocasah could unduly enjoy his official favor in personnel evaluation, promotion and disciplinary matters. Thus, Mr. Hilson violated §23(b)(3).[5/] Mr. Hilson exacerbated this appearance of an impropriety by failing to repay the $500 loan balance, especially when his failure to do so occurred while the Department's investigation of Rocasah was pending.

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

1. that Mr. Hilson pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating §3 by accepting the gift; and

2. that Mr. Hilson pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §23 by soliciting the loan and failing to fully repay it; and

3. that Mr. Hilson forfeit to the Commission one thousand dollars ($1,000.00) as the improper benefit of the June 1, 1990 gift; and

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

Date: October 5, 1992

[1/]Following the Commission's reasonable cause finding, Mr. Hilson resigned his position as Director, effective September 30, 1992.

[2/]Mr. Hilson asserts that he responded to Rocasah's question by stating that the matter was out of the university's hands, and within the control of the District Attorney. As noted in paragraphs 10 and 17, the Commission determined that the District Attorney's office played no role in this matter until September 1990. The Commission also determined that Mr. Hilson in November 1990 stated to Rocasah's husband that his wife's case was out of the university's hands, and now in the District Attorney's control.

[3/]Anything valued at $50 or more is an item of substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. 584, 587 (1976).

[4/]The Commission will not consider a gift to have been given "for or because of an official act" where a subject establishes that friendship was *the* motive for the gift. *In re Ackerley Communications*, 1991 SEC 518, 520 n.5. Where friendship partly motivates a gift, the gift is still prohibited if the giver is also motivated by a desire to create official good will. Here, Rocasah's letter makes clear that friendship was not the motive for the $1,000 gift.

[5/]*See In re Lannon*, 1984 SEC 208 (school superintendent violates §23(b)(3) by borrowing money from subordinate). Mr. Hilson's assertion that the loan was motivated by friendship is not a defense since no matter how thoroughly this matter is investigated, some uncertainty will remain as to whether the loan was motivated in part by job considerations. Absent the friendship factor, the loan would probably be an unwarranted privilege violating G.L. c. 268A, §23(b)(2) or an unlawful gratuity violating G.L. c. 268A, §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 452

IN THE MATTER
OF
ROBERT F. SHEEHAN, JR.

DISPOSITION AGREEMENT

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

On February 19, 1992, 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. Sheehan. The Commission has concluded its inquiry and, on June 16, 1992, found reasonable cause to believe that Mr. Sheehan violated G.L. c. 268A.

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

1. Mr. Sheehan was, during the time here relevant, a Board of Health (BOH) member in the town of Granby. As such, Mr. Sheehan was a municipal employee as that term is defined in G.L. c. 268A, §1.

Repair Percolation Tests

2. Among other public health issues, the BOH oversees town septic system matters. BOH approval is necessary at several stages in the construction of a new septic system and the repair of an existing one.

3. The state environmental code requires that contractors locate septic systems in suitable soil. Consequently, engineers must conduct soil percolation tests to measure imperviousness. The environmental code mandates that a BOH representative witness percolation tests. Absent a successful percolation test, the BOH cannot approve an application for a disposal works permit for the construction of a septic system.

4. When an existing septic system fails, the code requires that a property owner conduct new or "repair" percolation tests before installing a new system. A BOH representative must witness these repair percolation tests. Following a successful repair percolation test, a land owner or developer hires an engineer to design the septic system (in some instances, however, the engineer has already designed the system). Conversely, there is no need for engineering design services when a property has failed a percolation test. In Granby, land owners and developers usually retain the same engineer who performed the percolation tests to provide the design services.

5. Mr. Sheehan's father, Robert Sheehan, Sr., is a registered professional engineer whose company, R.F. Sheehan Associates, performs engineering work involving septic systems in Granby. Typically, Sheehan Sr.'s fee for engineering services for repair septic systems is between $300 and $400.

6. Upon joining the BOH in 1987, Mr. Sheehan sought advice from town counsel as how to avoid conflicts of interest presented by his father's business. Town counsel correctly advised Mr. Sheehan to abstain from voting on BOH matters affecting his father's company,[1/] but neglected to inform him also to refrain from conducting field inspections of R.F. Sheehan Associates' work.[2/]

7. During the period from January 1, 1990 to August 1, 1990, Mr. Sheehan officially witnessed eleven repair percolation tests conducted by R.F. Sheehan Associates.

8. General Law chapter 268A, §19 prohibits[3/] a municipal employee from participating as such in a particular matter[4/] in which to his knowledge a member of his immediate family has a financial interest.

9. By witnessing the percolation tests, Mr. Sheehan participated[5/] in particular matters.

10. At the time he witnessed the percolation tests, Mr. Sheehan was aware that engineers who conducted percolation tests were usually retained to design the anticipated septic systems. Therefore, Mr. Sheehan knew his father had a financial interest in the percolation tests.

11. By witnessing the percolation tests, Mr. Sheehan participated as a municipal employee in particular matters in which to his knowledge an immediate family member[6/] had a financial interest, thereby violating §19.

12. The Commission found no evidence that Mr. Sheehan was improperly influenced in his review of the percolation tests, or that he misrepresented test data. Since the witnessing of repair percolation tests necessarily involves land that has already been subject to prior successful percolation tests, there was a great likelihood that the eleven tests would be successful. In addition, other BOH members independently reviewed the eleven percolation test results before issuing the respective disposal works permits.

13. Given town counsel's limited advice, the evidence also indicates Mr. Sheehan was unaware he was violating the conflict of interest law when he witnessed the eleven tests.[7/]

Top Soil/Sub Soil Inspection

14. The state environmental code mandates that a septic system be located at least four feet above the water table or ledge formations. Whenever a septic system is engineered so that fill material must be added to create a four-foot layer beneath the system, the code requires that the installer use clean granular material free from impervious material to surround the system in a ten foot radius in all directions. A BOH representative ensures this requirement is satisfied by conducting a topsoil/sub-soil inspection of the material surrounding the system.

15. A septic system installation may require anywhere between 300 and 1500 yards of clean material. Generally, clean fill costs between $4.00 and $7.00 a yard.

16. From April 1990 to December 1990, Mr. Sheehan was employed by contractor Greg Orlen as an equipment operator. During this time period, Mr. Sheehan conducted one top soil/sub soil inspection of a septic system installed by Orlen.

17. General Laws, c. 268A, §19 also forbids a municipal employee from participating as such in a particular matter in which to his knowledge a business organization in which he is serving as an employee has a financial interest.

18. By conducting the topsoil/sub-soil inspection, Mr. Sheehan participated in a particular matter.

19. At the time he performed the inspection, Mr. Sheehan was aware his employer could not complete the septic system installation for his client without the topsoil/sub-soil inspection approval. Therefore, Mr. Sheehan knew that his employer possessed a financial interest in the inspection.

20. By conducting the topsoil/sub-soil inspection, Mr. Sheehan participated as a municipal employee in a particular matter in which to his knowledge his employer had a financial interest, thereby violating §19.

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

1. that Mr. Sheehan pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268A, §19; and

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

Date: October 6, 1992

[1/]Mr. Sheehan has consistently abstained from BOH votes involving his father's engineering business.

[2/]Only written legal advice made a matter of public record and filed with the Commission constitutes a valid conflict of interest defense. *See, e.g., 930 CMR 1.03(3); In re Burgess*, 1992 SEC 570; *In re Lavoie*, 1987 SEC 286.

[3/]Except as otherwise permitted in §19. None of the exceptions, however, are applicable here.

[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). The Commission has determined that the witnessing of a percolation test is a particular matter. *See In re Lawrence*, 1987 SEC 284, 285.

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

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

[7/]Ignorance of the law is no defense to a violation of the conflict of interest law. *See e.g. Scola v. Scola*, 318 Mass. 1, 7 (1945); *In re Burgess*, 1992 SEC 570; *In re Doyle*, 1980 SEC 11, 13.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 453

IN THE MATTER
OF
EUA COGENEX

DISPOSITION AGREEMENT

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

On June 16, 1992, 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 Cogenex. The Commission concluded that inquiry and, on, September 10, 1992, found reasonable cause to believe that Cogenex violated G.L. c. 268A.

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

1. Cogenex is a Massachusetts corporation engaged in the business of energy management.

2. At the time here relevant, Boston Edison offered a program entitled the Encore Program to assist large energy consumers to significantly reduce their energy consumption costs. Institutions that participate in the program select an electrical contractor to retrofit and/or replace existing equipment. Boston Edison incurs all expenses under the program.

3. Cogenex was the successful bidder under the Encore Program for Worcester County[1/] and the following municipalities: Holliston, Newton, Walpole and Arlington. As such, Cogenex receives a percentage of avoided costs for generation savings realized from Boston Edison.[2/]

4. On July 17, 1991, Cogenex hosted a Boston Harbor cruise on a custom designed cruising yacht. The explicit purpose of the cruise was for customer appreciation and to foster goodwill. The cruise included cocktails and dinner. Cogenex spent approximately $2,229 hosting the event at a cost of $79.06 per person.

5. Cogenex extended invitations to approximately 40 individuals, including seven public officials involved with the aforementioned contracts.

6. Two of the 28 individuals who attended the cruise were public officials.

7. Section 3 of G.L. c. 268A prohibits, otherwise than as provided by law, the giving or offering of anything of substantial value to any public official for or because of any official act performed or to be performed by such employee.[3/] The Commission has found that private parties violate §3 when they entertain government officials (who are in a position to benefit them) in an effort to generate good will. *See e.g., In re State Street Bank*, 1992 SEC 580; *In re Stone & Webster*, 1991 SEC 552; *In re Rockland Trust*, 1989 SEC 416.

8. By providing a Boston Harbor cruise for public officials with the intent to generate and maintain good will and good customer relations with municipal officials, Cogenex violated G.L. c. 268A, §3.[4/]

In view of the foregoing violation of G.L. c. 268A by Cogenex, 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 Cogenex:

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

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

Date: October 14, 1992

[1/]Unlike the three-way contracts under the Encore Program (Boston Edison, Cogenex and the municipality), the Worcester County contract was directly between the county and Cogenex.

[2/]The present values of the contracts are as follows: Holliston, $252,200; Newton, $1,171,100; Walpole, $471,800; Arlington, $470,000 and Worcester County, $1,121,000. Cogenex expects to realize a profit of 5 to 15 percent of the present values of the contracts over the life of the contracts.

[3/]In the past, the Commission has considered entertainment expenses in the amount of $50 to constitute "substantial value." *P.E.L. 88-1. See Commission Advisory No. 8 (Free Passes)*(issued May 14, 1985).

[4/]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 that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. *See Commission Advisory No. 8. See also United States v. Standerfer*, 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. 454

IN THE MATTER
OF
MASSACHUSETTS CANDY & TOBACCO
DISTRIBUTORS, INC.

DISPOSITION AGREEMENT

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

On April 13, 1992, 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 MCTD. The Commission has concluded its inquiry and, on June 16, 1992, by a majority vote, found reasonable cause to believe that MCTD violated G.L. c. 268A, §3.

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

1. MCTD is a Massachusetts non-profit corporation incorporated under G.L. c. 180 to foster and advance the best interests of those engaged in the wholesale distribution of cigars, cigarettes, candy, tobacco and smokers' requisites and sundries by promoting and maintaining high standards on the part of such distributors. Twenty-one Massachusetts companies and one New York company engaged in the distributing business comprise MCTD's membership.

2. In 1991, MCTD paid a lobbyist $12,000 to monitor legislative developments in Massachusetts. MCTD is opposed to any legislative measure that would increase the cost of doing business in its industry, such as increased unemployment insurance premiums or cigarette tax hikes. MCTD paid the lobbyist an additional $10,500 in 1991 to actively promote an amendment to G.L. c. 64C, §13(c).[1/]

3. On August 13, 1991, MCTD hosted its third annual Sweet Charity Golf and Tennis Invitational (Invitational) at the Ocean Edge Resort in Brewster, Massachusetts.

4. The Invitational included a barbecue lunch, an afternoon of golf or tennis, a cocktail hour, a clambake dinner and a post-dinner raffle to benefit the Jimmy Fund.

5. Attendance at the event was by invitation only. MCTD extended invitations to its members, representatives of their wholesale suppliers and approximately 180 members of the state Legislature. Roughly 160 individuals attended the invitational, including over 50 state legislators, staffers and members of their families.

6. Attendance at the Invitational was free.[2/] MCTD spent just over $29,000 in hosting the event. Attendees who participated in all the day's events received an estimated $141-$152 on average each in free food, alcohol, golf and entertainment. Many attendees participated in the Jimmy Fund raffle, which raised $6,338.27, and thus "paid" in some fashion for a portion of their attendance costs by contributing on average $35.

7. The Invitational served a variety of purposes. MCTD used the Invitational as a way to bring together its members for an enjoyable social gathering. MCTD also employed the event as a means by which its industry could enhance its image with the Legislature. Finally, the MCTD utilized the Invitational to raise money for charity.

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

9. The Commission has held that private parties violate §3 when in an effort to generate good will they entertain government officials who are in a position to benefit them. *See, e.g., In re State Street Bank*, 1992 SEC 580; *In re Stone and Webster*, 1991 SEC 522; *In re Rockland Trust*, 1989 SEC 416; *see also Commission Fact Sheet: Business and Entertainment Expenses for Public Officials* (following the U.S. Trust Public Enforcement Letter, *P.E.L. 89-1*, the Commission included the payment of fees for recreational activities such as golf as a prohibited activity).

10. By providing a free day's outing to over 50 legislators, staffers and family members with an intent[4] of enhancing their industry image with the Legislature when the legislators were in a position to benefit it, MCTD violated §3(a).

11. MCTD asserts that its primary purposes for hosting the Invitational were to provide a social event for its employees and raise money for charity. The Commission will not consider a gift to have been given "for or because of an official act" where a subject establishes that a legitimate purpose was *the* motive for the gift. *In re Ackerley Communications*, 1991 SEC 518, 520 n. 5. Where a legitimate purpose only partially motivates a gift, the gift is prohibited if the giver is also motivated by a desire to create official good will, as MCTD concedes was the situation in the instant case.[5]

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

1. that MCTD pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §3; and

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

Date: October 14, 1992

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[1]General Laws c. 64C prohibits predatory cigarette pricing. The amendment sought to refine the definition of cigarettes' "cost to wholesalers." The amendment was inserted as an outside section of the FY 1992 general appropriations act, which was approved by both chambers of the legislature and then signed into law by the Governor on July 10, 1991. Mass. St. 1991, c. 138, §377. Due to a language error, however, the amendment to G.L. c. 64C, §13(c) was rendered ineffective.

[2]MCTD paid for the Invitational by soliciting donations from its wholesale suppliers.

[3]In the past, the Commission has considered entertainment expenses totalling $50 or more 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 would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether or not that public official 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. Sup. 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).

[4]While MCTD intended to enhance its image with the Legislature, the Commission found no evidence that it intended to violate the conflict of interest law. Ignorance of the law, however, is no defense to a violation of the conflict law. *See, e.g., Scola v. Scola*, 318 Mass. 1, 7 (1945); *In re Burgess*, 1992 SEC 570; *In re Doyle*, 1980 SEC 11, 13.

[5]MCTD also points to the law applicable to federal legislators, which does not consider the waiver of fees and payment of travel expenses a gift where a member of congress plays as a "celebrity" in a golf tournament and provides substantial services to the sponsor to help attract a maximum amount of paying customers. *H.R. Report 95-1837*, p.9; *Ethics Manual for Members, Officers, Employees of the U.S. House of Representatives*, pp.37-8. MCTD asserts that the state legislators it invited likewise provided a celebrity-draw service. The Commission, however, does not share MCTD's view. Whatever celebrity service the legislators provided, it cannot be considered substantial since they gave no speeches on behalf of the Jimmy Fund, sold no tickets at the raffle and their participation was not even noted in the event's invitations or programs. Moreover, the Invitational was not designed strictly as a fundraiser to maximize the amount of money raised for charity as MCTD knew from prior invitationals that their "take" from the raffle would not cover the costs of allowing participants to attend the event for free.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 455

IN THE MATTER
OF
P.J. KEATING COMPANY

DISPOSITION AGREEMENT

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

On September 11, 1991, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 10, 1992, found reasonable cause to believe that Keating violated G.L. c. 268A, §3, through the acts of its employees.

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

1. Keating is an asphalt manufacturing and construction corporation doing business in Massachusetts. During the times here relevant, a substantial portion of Keating's business consisted of municipal paving contracts.

2. In the Town of Winchendon, the town paving contract (herein after referred to as "the contract") is put out to bid and awarded annually by the selectmen. The contract covers Winchendon's paving needs for a 12 month period.

3. At all times here relevant, Michael Murphy (Murphy) was the Winchendon Department of Public Works (DPW) superintendent. As such, Murphy was a municipal employee as that term is defined in G.L. c. 268A, §1.

4. As the DPW superintendent, Murphy is responsible for the maintenance and reconstruction of the town roads in Winchendon and for the operation of the Winchendon Highway Department. As the DPW superintendent, Murphy also participates in the annual bidding and contract award process. Winchendon annually advertises the availability of the contract. When the bids are received, Murphy reviews them and makes a recommendation to the selectmen. The contract is generally awarded to the lowest bidder. After the contract is awarded, Murphy is responsible as the DPW superintendent for determining town paving needs covered by the contract (i.e. for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

5. In June 1987, Keating submitted the low bid for the Winchendon contract. Murphy reviewed the bids and recommended the selectmen award the contract to Keating, which they did on June 22, 1987. Murphy supervised Keating's performance of the contract.[1/] Thus, he insured that the proper thickness of asphalt was laid down, signed delivery slips acknowledging the town's receipt of specified amounts of materials, and reviewed and approved Keating's bills regarding the materials delivered.

6. At some point in 1987, Murphy approached one of Keating's employees (who was involved in paving Winchendon streets pursuant to the contract) and asked him if Keating would pave Murphy's driveway at his personal residence in Winchendon.

7. On the morning of July 29, 1987, Keating did a certain amount of paving in Winchendon pursuant to the contract. After completing that paving, Keating employees went to Murphy's house, waited for the asphalt material to be delivered from the Keating plant and then paved Murphy's driveway.

8. Approximately 60 tons of asphalt materials were used to pave Murphy's driveway at a fair market cost of approximately $2,000 (labor and materials).

9. Murphy never expected to pay nor was he ever billed by Keating for the driveway. Keating absorbed the material and labor costs associated with Murphy's driveway.[2/]

10. In giving Murphy a free driveway, Keating employees were motivated in part by the fact that Murphy was the Winchendon DPW superintendent who, as such, had and would perform official acts regarding Keating's paving contracts with the town.

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

12. By giving Murphy a free driveway, while Murphy as the Winchendon DPW superintendent was supervising Keating's contract performance, and where Murphy was involved in and would be involved in contract awards in which Keating was or would be a bidder, Keating employees gave Murphy an item of substantial value for or because of Murphy's official acts performed or to be performed by him.[4/]

13. As a corporation, Keating acts through and is responsible for the acts of its agents and employees. This conclusion applies even if these acts are unauthorized. Thus, Keating violated G.L. c. 268A, §3(a) when its employees provided Murphy with the free driveway, notwithstanding Keating's claim that their policy prohibited gratuities to public officials and that the act was not authorized by that policy.[5/]

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 Keating:

1. that Keating pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §3(a);

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

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

Date: October 20, 1992

[1/]Keating received the following amounts from Winchendon for street paving: FY 87 - $229,554.86; FY 88 - $203,745.16; FY 89 - $52,711.17; and FY 90 - $56,824.22.

[2/]The Town of Winchendon did not pay for either the materials or the labor involved in Murphy's driveway.

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

[4/]As the Commission stated in *In re Michael*, 1981 SEC 59, 68,

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

[5/]*See In re Ackerley*, 1991 SEC 518 (corporation liable for agent's act under §3 even if unauthorized or against corporate policy).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 456

IN THE MATTER
OF
MICHAEL MURPHY

DISPOSITION AGREEMENT

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

On September 11, 1991, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 10, 1992, found reasonable cause to believe that Mr. Murphy violated G.L. c. 268A, §3.

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

1. At all times here relevant, Mr. Murphy was the Winchendon Department of Public Works (DPW) superintendent. As such, Mr. Murphy was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As the DPW superintendent, Mr. Murphy is responsible for the maintenance and reconstruction of the town roads in Winchendon and for the operation of the Winchendon Highway Department.

3. In the Town of Winchendon, the town paving contract (herein after referred to as "the contract") is put out to bid and awarded annually by the selectmen. The contract covers Winchendon's paving needs for a 12 month period.

4. As the DPW superintendent, Mr. Murphy participates in the annual bidding and contract award process. Winchendon annually advertises the availability of the contract. The advertising is conducted by the town manager. When the bids are received, Mr. Murphy reviews them and makes a recommendation to the town manager. The contract is generally awarded to the lowest bidder. After the contract is awarded, Mr. Murphy (as the DPW superintendent) and the town manager are responsible for determining town paving needs covered by the contract (i.e. for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

5. The P.J. Keating Company (Keating) is an asphalt manufacturing and construction corporation doing business in Massachusetts. During the times here relevant, a substantial portion of Keating's business consisted of municipal paving contracts.

6. In June 1987, Keating submitted the low bid for the Winchendon contract. Mr. Murphy reviewed the bids and recommended the selectmen award the contract to Keating, which they did on June 22, 1987. Mr. Murphy supervised Keating's performance of the contract.[1/] Thus, he insured that the proper thickness of asphalt was laid down, signed delivery slips acknowledging the town's receipt of specified amounts of materials, and reviewed and approved Keating's bills regarding the materials delivered.

7. At some point in 1987, Mr. Murphy approached one of Keating's employees (who was involved in paving Winchendon streets pursuant to the contract) and asked him if Keating would pave Mr. Murphy's driveway at his personal residence in Winchendon.

8. On the morning of July 29, 1987, Keating did a certain amount of paving in Winchendon pursuant to the contract. After completing that paving, Keating employees went to Mr. Murphy's house, waited for the asphalt material to be delivered from the Keating plant and then paved Murphy's driveway.

9. Approximately 60 tons of asphalt materials were used to pave Mr. Murphy's driveway at a fair market cost of approximately $2,000 (labor and materials).

10. Mr. Murphy never expected to pay nor was he ever billed by Keating for the driveway. Keating absorbed the material and labor costs associated with Mr. Murphy's driveway.[2/] Mr. Murphy informed the town manager on the day of the paving that Keating was going to pave his driveway, however, Murphy did not tell the

town manager that Keating was providing the driveway to him (Murphy) without charge nor did he put the disclosure in writing.

11. In paving Mr. Murphy's driveway without charge, Keating employees were motivated in part by the fact that Mr. Murphy was the Winchendon DPW superintendent who, as such, had and would perform official acts regarding Keating's paving contracts with the town. While Mr. Murphy believes that the driveway was in part given to him by Keating because of a past relationship he had with Keating when he was in the private sector, Mr. Murphy acknowledges that Keating gave him the driveway in part because of his DPW superintendent position and to foster goodwill.[3/]

12. Section 3(b) of G.L. c. 268A prohibits a municipal employee from accepting anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[4/]

13. By receiving a free driveway from the Keating employees, while, as the Winchendon DPW Superintendent, he was supervising Keating's contracts, and was involved in prior and would be involved in future contract awards to which Keating was or would be a bidder, Mr. Murphy received a gift of substantial value for himself for or because of acts within his official responsibility performed or to be performed by him.[5/] In so doing, Mr. Murphy violated G.L. c. 268A, §3(b).[6/]

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

1. that Mr. Murphy pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §3(b);

2. that Mr. Murphy pay to the Commission the sum of two thousand dollars ($2,000.00) as a forfeiture of the unlawful benefit he received in accepting the free driveway;[7/]

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

4. that Mr. Murphy waive all rights to contest the findings of facts, conclusions of law and terms and conditions contained in this Agreement or any other related administrative or judicial proceedings to which the Commission is or may be a party.

Date: October 20, 1992

[1/]Keating received the following amounts from Winchendon for street paving: FY 87 - $229,554.86; FY 88 - $203,745.16; FY 89 - $52,711.17; and FY 90 - $56,824.22.

[2/]The Town of Winchendon did not pay for either the materials or the labor involved in paving Mr. Murphy's driveway.

[3/]Even when a private relationship exists between the giver and the public employee who is in a position to affect the giver's interests, the evidence must show that the private relationship was the motivating factor for the gift or §3 is violated. *See In re Flaherty*, 1990 SEC 498.

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

[5/]As the Commission stated in *In re Michael*, 1981 SEC 59, 68,

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

[6/]In a similar disposition agreement, Keating acknowledged violating §3(a) when its employees provided the above free driveway to Mr. Murphy, who as the DPW superintendent had and would perform official acts regarding Keating's paving contracts with the town.

In re Keating, 1992 SEC 610.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 457

IN THE MATTER
OF
JOHN FORRISTALL

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and John Forristall (Mr. Forristall) pursuant to §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, 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. Forristall. The Commission has concluded its inquiry and, on March 12, 1992, by a majority vote, found reasonable cause to believe that Mr. Forristall violated G.L. c. 268A. The Commission and Mr. Forristall now agree to the following findings of fact and conclusions of the law:

1. Mr. Forristall was, during the time here relevant, a member of the Town of Winthrop Recreation Commission. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Mr. Forristall was Recreation Commission Chairman between 1986 and 1989. In July, 1989, he was not reappointed as a Recreation Commission member.

2. The Recreation Commission is a part-time, six-member board appointed by the board of selectmen to oversee the operation of the Recreation Department.

3. During the time here relevant, Mr. Forristall worked for Lamco Chemical Company (Lamco), a business located in Chelsea. Lamco manufactures janitorial supplies. Mr. Forristall was employed by Lamco as a salesman. He received a weekly salary, and on average, a 15% commission on any sales he made.

4. Between July 1, 1985 and June 30, 1989, the Town of Winthrop Recreation Commission purchased approximately $7,500 in goods from Lamco.

5. Mr. Forristall was the salesman for Lamco on all of the above sales. Mr. Forristall earned approximately $1,125 in commission on these sales.

6. Recreation Commission purchases occurred as follows: The Recreation Commission, with Mr. Forristall participating, would decide what janitorial supplies they needed. The Recreation Commission would then issue a purchase order to Lamco. A Recreation Commission designee would sign the purchase order. Lamco would deliver the product, with someone from the Recreation Commission signing the packing slip indicating receipt. Lamco would then send an invoice for payment to the Recreation Commission. The Recreation Commission would review and approve the invoice. A Recreation Commission designee would sign the invoice indicating it was approved by the Recreation Commission for payment. The invoice would then be placed on a schedule of bills payable by the Recreation Commission, which schedule would be signed by a member of the Recreation Commission indicating the Commission had approved all of the bills for payment. The schedule of bills along with the supporting bills themselves would go to the Board of Selectmen for approval and ultimate payment.

7. Mr. Forristall was substantially involved as a Recreation Commission member in virtually every decision by the Commission to purchase goods from Lamco or pay Lamco bills. In addition, the majority of the Recreation Commission/Lamco purchase orders, packing slips, invoices, and schedules of bills payable (including Lamco invoices) were signed by Forristall as Recreation Commission Chairman.[1/]

8. Except as otherwise permitted in that section,[2/] G. L. c. 268A, §19 in relevant part prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he or a business organization by which he is employed has a financial interest.

9. The various decisions and determinations by the Recreation Commission to purchase goods from Lamco, to signify the receipt of those goods, and to pay for those goods, were all particular matters.[3/]

10. Inasmuch as Mr. Forristall either collectively with other commissioners or individually made those purchasing and payment decisions, he participated[4/] in these particular matters.

11. Inasmuch as he made a commission on each sale and his employer, Lamco, made a profit on each sale, both he and a business organization by which he was employed had a financial interest in those particular matters. Mr. Forristall was, of course, aware of those financial interests at the time he so participated as described in ¶10.

12. Therefore, by participating in the purchasing and payment decisions as described above, Mr. Forristall repeatedly participated in particular matters as a Recreation Commission member in which to his knowledge either he or a business organization by which he was employed had a financial interest, thereby violating §19.

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

1. that Mr. Forristall pay to the Commission the sum of $1,500 as a civil penalty for violating G.L. c. 268A, §19;

2. that Mr. Forristall disgorge the economic benefit he received by violating G.L. c. 268A, §19, namely the $1,125 in commissions he earned; and

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

Date: October 21, 1992

[1/]For example, of the 18 Recreation Commission/Lamco packing slips that were found in the town's records, 11 were signed by Mr. Forristall. Of the 53 Recreation Commission/Lamco invoices, Mr. Forristall signed 30.

[2/]None of the exceptions applies here.

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

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 448

IN THE MATTER
OF
THOMAS C. NORTON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Thomas C. Norton (Senator Norton) 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 December 12, 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 Senator Norton. On January 16, 1991, the Commission initiated a second preliminary inquiry

into possible violations of the financial disclosure law, G.L. c. 268B, by Senator Norton. The Commission concluded these inquiries and, on February 19, 1992, found reasonable cause to believe that Senator Norton had violated G.L. c. 268A and G.L. c. 268B, and authorized the initiation of adjudicatory proceedings. On August 5, 1992, the Commission's Enforcement Division (Enforcement Division) issued an Order to Show Cause, commencing adjudicatory proceedings. The Order to Show Cause alleged that Senator Norton had violated G.L. c. 268A, §6 and §23(b)(3), by and in connection with his supervision of his sister during her employment by the Senate, and G.L. c. 268B, §7, by failing to disclose certain information on his annual Statements of Financial Interests filed with the Commission. On August 25, 1992, Senator Norton answered the Order to Show Cause, denying that he had violated the law and stating several affirmative defenses.[1/]

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

1. Senator Norton is a Massachusetts state senator, an elected and salaried office which he has held since January 1985. As a senator, Norton is a state employee as that term is defined in G.L. c. 268A, §1(q). Prior to his election as a senator, Senator Norton was a state representative from 1973 through 1984.

2. Senator Norton has a sister named Elizabeth Bevilacqua (Bevilacqua). From 1978 through 1984, Bevilacqua was employed full-time by the state House of Representatives (House) as a legislative aide. Bevilacqua was hired as a legislative aide by the House Rules Committee. While she was employed by the House, Bevilacqua was assigned to the Energy Committee, which was co-chaired by Senator Norton, who was then serving in the House. From January 1985 through 1991, Bevilacqua was employed full-time by the state Senate as a legislative aide. Bevilacqua was hired as a legislative aide by the Senate Rules Committee. During her employment by the Senate, Bevilacqua was assigned to the Government Regulations Committee, which was co-chaired by Senator Norton.

3. Bevilacqua was one of seven Senate employees, including legislative aides and secretaries, assigned to the Government Regulations Committee. As committee co-chairman, Senator Norton directly supervised the Senate employees assigned to the Government Regulations Committee, including Bevilacqua. As co-chairman of the Government Regulations Committee and Bevilacqua's direct supervisor, Senator Norton assigned work to Bevilacqua, determined where and when Bevilacqua would perform her work for the Senate, and approved Bevilacqua's vacation schedule. While employed by the Senate, Bevilacqua was assigned by Senator Norton to work at his district office in Fall River.[2/]

4. Except as otherwise permitted by that section, G.L. c. 268A, §6 prohibits a state employee from participating as such in any particular matter in which, to his knowledge, a member of his immediate family has a financial interest. None of the exceptions to G.L. c. 268A, §6 apply in this case.

5. Bevilacqua is a member of Senator Norton's immediate family and had a financial interest, known to Senator Norton, in her supervision as a Senate legislative aide. For example, Bevilacqua had a financial interest in her work assignments as a legislative aide, including where she was assigned to work, and in the approval of her vacation schedule. The supervision of Bevilacqua's Senate employment encompassed particular matters within the meaning of G.L. c. 268A.

6. By supervising Bevilacqua, as set forth above, Senator Norton participated officially in particular matters in which a member of his immediate family had a financial interest which was known to him. In so doing, Senator Norton violated G.L. c. 268A, §6.

7. In January 1986, Senator Norton moved his district office into office space at the South Main Place mall (the Mall) in Fall River.

8. Also in January 1986, Senator Norton organized Patrick Marketing, Inc. (Patrick Marketing) as a Massachusetts corporation. According to the corporation's articles of organization, the purpose of Patrick Marketing was to provide advertising, public relations and marketing services. The corporation's address was the same as that of Senator Norton's district office. Senator Norton was the sole owner and the president of Patrick Marketing.

9. In early 1986, Senator Norton, acting privately as a licensed real estate broker, was instrumental in a Chinese restaurant becoming a tenant in the Mall. The Mall's operator paid Senator Norton a $4,500 commission for his assistance in this real estate matter. Subsequently in early 1986, Senator Norton deposited the $4,500 commission into a checking account for Patrick Marketing which he had opened.

10. The initial $4,500 deposited into the Patrick Marketing checking account was substantially expended by April 1987, by which time the checking account had a balance of less than $500. The checking account funds were expended for various purposes, including to pay for a telephone system for Senator Norton's district office, to purchase a camera and other photographic equipment for the district office and to pay the corporation's state and federal taxes.

11. In May 1987, Patrick Marketing began to receive monthly payments of $200 from Senator Norton's campaign committee, "Friends of Tom Norton." According to the campaign committee's campaign finance reports, filed with the Office of Campaign and Political Finance (OCPF), these payments were for "rent." These payments ceased after November 1988, following OCPF's informing the campaign committee that the payments were prohibited. During the nineteen months that Patrick Marketing received these payments from Senator Norton's campaign committee, the corporation's checking account funds were expended to pay for the rental of Senator Norton's district office's telephone system and to pay the corporation's state and federal taxes. Thereafter, a small balance was maintained in the Patrick Marketing checking account and the district office's telephone system continued to be paid for out of that account through 1990.

12. State and federal tax returns for the years 1986 through 1990 were filed for Patrick Marketing. The Patrick Marketing tax returns were signed by Senator Norton as corporate president. The 1986, 1987, 1988 and 1989 tax returns reported annual gross receipts of $4,500, $2,080, $2,468 and $1,738 respectively. The 1990 tax returns reported no receipts. Patrick Marketing was dissolved as a corporation in late 1990.

13. As a state senator, Senator Norton has annually filed Statements of Financial Interests (SFIs) with the Commission pursuant to G.L. c. 268B. On his 1986 SFI, prepared and filed in 1987, Senator Norton did not disclose that he had received $4,500 in income as a result of the commission paid to him in connection with his facilitating the Chinese restaurant becoming a tenant at the Mall. Nor did Senator Norton disclose on his 1986 SFI that he had a financial interest in Patrick Marketing. On his 1987, 1988, and 1989 SFIs, respectively prepared and filed in 1988, 1989 and 1990, Senator Norton did not disclose his financial interest in Patrick Marketing. The information omitted by Senator Norton from his SFIs was required to be disclosed on those forms, pursuant to G.L. c. 268B, §5(g)(1).[3/]

14. Section 7 of G.L. c. 268B prohibits the filing of a false SFI. A false filing need not be willful or intentional to violate G.L. c. 268B, §7. The statute requires a commitment to a reasonable degree of care and diligence in filing SFIs. *See In re Logan*, 1981 SEC 40, 49. By not disclosing the information on his SFIs as set forth above, Senator Norton negligently, rather than willfully or intentionally, failed to exercise reasonable care and ordinary diligence in filing those SFIs. In so doing, Senator Norton violated G.L. c. 268B, §7.

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

1. that Senator Norton pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §6;

2. that Senator Norton will amend his 1986, 1987, 1988 and 1989 SFIs to include the above-stated previously omitted information; and

3. that Senator Norton waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceeding to which the Commission is or may be a party.[4/]

Date: December 15, 1992

[1/]The Order to Show Cause alleged that Senator Norton violated G.L. c. 268A, §23(b)(3), in his supervision of his sister by acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that his sister could unduly enjoy his favor in the performance of his official duties, in that Senator Norton had allegedly allowed his sister to work under conditions which made it impossible to determine whether or not she had performed her duties as a Senate employee. This allegation was based upon information obtained during the Enforcement Division's investigation of this matter, including evidence that no records were kept of the hours that Senator Norton's sister worked or of the work that she performed as a Senate employee. Following a pre-hearing conference in this matter on October 8, 1992, the Enforcement Division

and Senator Norton exchanged discovery, formally and informally, and Senator Norton provided further evidence, satisfactory to the Enforcement Division, that his sister had performed substantial work as a Senate employee and that her terms and conditions of employment were the same as those of the other Senate employees supervised by Senator Norton. Accordingly, the Enforcement Division and Senator Norton have agreed to dismiss the allegation of the Order to Show Cause that Senator Norton violated G.L. c. 268A, §23(b)(3). Therefore, the Commission accepts the agreement of the parties and dismisses that allegation.

[2/]During the period that Senator Norton has been a senator, he has maintained a district office at various locations in Fall River. Senator Norton's district office is staffed by several of the Senate employees who are assigned to the Government Regulations Committee. The district office staff members perform various services for Senator Norton's constituents. From 1986 until 1991, Senator Norton's District office was located at the South Main Place mall in Fall River.

[3/]Senator Norton asserts that, in making the above-stated omissions, he acted in reliance upon the erroneous advice of his attorney, now deceased, that the information omitted need not be reported because Patrick Marketing was essentially inactive. The Enforcement Division's investigation confirmed that Senator Norton consulted with his former attorney in connection with the preparation of his SFIs. The Commission finds, however, that any such reliance by Senator Norton upon his attorney's erroneous advice was not reasonable given Patrick Marketing's continued, albeit limited, activities through 1990.

[4/]No civil penalty is being imposed for Senator Norton's violations of G.L. c. 268B, §7. Consistent with Commission precedent, no civil penalty is being imposed for Senator Norton's 1986 SFI omissions because they were made in 1987, prior to the Commission's making clear that negligent SFI omissions are subject to public sanction. *See O'Brien Disposition Agreement*, 1989 SEC 418, 421 ftnt. 11. No civil penalty is being imposed for Senator Norton's 1987, 1988 and 1989 negligent SFI omissions because the Commission finds this Disposition Agreement itself to be an adequate sanction for those violations in light of all of the circumstances of this case, including the fact that Patrick Marketing was relatively inactive after 1986.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 459

IN THE MATTER
OF
PAUL GAUDETTE

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Paul Gaudette (Mr. Gaudette) pursuant to §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 10, 1992, 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. Gaudette. The Commission has concluded its inquiry and, on November 4, 1992, by a majority vote, found reasonable cause to believe that Mr. Gaudette violated G.L. c. 268A.

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

1. Mr. Gaudette was, during the time here relevant, the Dracut Building Inspector. As such, Mr. Gaudette was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As building inspector, Mr. Gaudette was responsible for issuing all building permits, conducting construction inspections and serving as Dracut's zoning enforcement officer.

3. Draco Homes (Draco) is a development company located in Dracut. It is a major, if not the largest, developer of new residential homes in Dracut. Douglas Dooley is a co-owner of Draco.

4. Mr. Gaudette and Mr. Dooley both frequent Laudi's, a coffee shop located near the Dracut Building Department and Draco's office. While at Laudi's, Mr. Dooley and Mr. Gaudette often shared friendly twenty-

minute conversations about their mutual interest in flying. Both are private pilots. They do not otherwise socialize together.

5. Mr. Dooley owns a vacation home in Edgartown, 1/2 mile away from the Katama grass airstrip. During a conversation about the difficulty of landing a plane at Katama, Mr. Dooley noted that he kept the key to his house under the doormat and offered the use of the house to Mr. Gaudette if he ever was flying in the area.

6. Sometime in the spring of 1990, Mr. Gaudette's relatives expressed an interest in seeing Martha's Vineyard during their upcoming June visit to attend Gaudette's son's high school graduation. Mr. Gaudette then approached Mr. Dooley at Laudi's and asked if he could rent the vacation home for a number of days in June. Mr. Dooley gave Mr. Gaudette permission to use the house, but refused to accept any rent as he always allowed friends to use the house for free.

7. Mr. Gaudette and his family arrived at the house on June 9, 1990, and departed on June 13, 1990. Similar houses in the neighborhood were being rented for $600 - $700 a week at that time.

8. During the twenty-two years it has been in business, Draco has built approximately 700 homes. The majority of their work has occurred in Dracut. At the time Mr. Gaudette received the free use of the Martha's Vineyard vacation home, Draco had six residential homes under development and within the regulation of the Dracut Building Department. Mr. Gaudette issued the building permits to each of the six projects. Additionally, he conducted all framing and final inspections of the properties. Lastly, Mr. Gaudette issued occupancy permits to the Draco built homes.

9. General laws, c. 268A, §23(b)(3) 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 improperly influence or unduly enjoy his favor in the performance of his official duties.

10. By accepting the rent-free use of a developer's Martha's Vineyard vacation home, at a time when that developer's company had a number of projects subject to the building inspector's regulation, Mr. Gaudette engaged in conduct whereby reasonable people could conclude that he can be improperly influenced.[1/] Thus, Mr. Gaudette violated §23(b)(3).[2/]

11. The Commission determined that Mr. Gaudette believed Mr. Dooley's generosity was motivated out of fellowship. In the Commission's view, however, friendship and personal ties only serve to enhance the appearance of favoritism that arises when a public official accepts an item of substantial value from someone who is subject to his official regulation.[3/]

In view of the foregoing violation of G.L. c. 268A by Mr. Gaudette, 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. Gaudette:

1. that Mr. Gaudette forfeit to the Commission the sum of three hundred dollars ($300.00) as the value of the benefit he received by violating G.L. c. 268A, §23(b)(3) and;

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

Date: 12/30/92

[1/]The Commission found no evidence that Mr. Gaudette was, in fact, improperly influenced.

[2/]A municipal official can avoid a §23(b)(3) violation by disclosing in writing to his appointing authority all of the facts giving rise to the conclusion of improper influence.

[3/]Had the Commission determined Mr. Gaudette believed Mr. Dooley's gift was motivated in part for or because of an official act performed or to be performed, a more serious violation of G.L. c. 268A, §3 would have occurred.

Included are:

Summaries of all Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters regarding G.L. c. 268A, the conflict of interest law, issued in 1992.

Note: Enforcement actions regarding violations of G.L. c. 268B, the financial disclosure law, are not always included in the Rulings publications.

In the Matter of John L. Griffith
(March 3, 1992)

The State Ethics Commission fined John L. Griffith, an environmental engineer with the Department of Environmental Management (DEM), $1,000 for violating the Massachusetts conflict law by participating in a review of an Environmental Impact Report submitted by Clean Harbors, Inc., while he was simultaneously negotiating with the company for prospective employment.

Griffith admitted in a Disposition Agreement that his actions violated Section 6 of G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 6 prohibits state employees from participating in their official capacity in any particular matter in which a business with which they are negotiating for employment has a financial interest.

Griffith's DEM job, as an engineer for the Office of Safe Waste Management (OSWM), included analyzing hazardous waste management and technologies in proposed facilities for their conformance with sound engineering principals and environmental impact, the Disposition Agreement said.

In April of 1987, the Disposition Agreement said, Clean Harbors filed a proposal to construct a rotary kiln incinerator (RKI) in Braintree. The project was subject to review for compliance with the Massachusetts Environmental Protection Act (MEPA), the Disposition Agreement said. Griffith's role in the MEPA process was to review and comment on each of Clean Harbors' submissions.

In addition to his state job, Griffith also teaches courses in business management. In early 1988, the Disposition Agreement said, Griffith began discussions with Clean Harbors' training and development representative about the possibility of his teaching management training courses to Clean Harbors' personnel. By the end of November, 1988, the Disposition Agreement said, Griffith and Clean Harbors had agreed on the scope of his employment arrangement with the corporation, and Griffith subsequently taught courses at Clean Harbors, the Disposition Agreement said.

Both during and after his discussions with Clean Harbors regarding teaching courses for the corporation, Griffith participated as a DEM engineer in reviews and recommendations concerning Clean Harbors' RKI project.

The Commission found no evidence to suggest that Griffith acted in his capacity as a DEM employee to provide any special or favorable treatment to Clean Harbors, either while he was negotiating for or after he had reached an arrangement for employment with the company, the Disposition Agreement said. The Agreement added, "No such evidence, however, is necessary to establish a Section 6 violation."

In the Matter of Richard Burgess
(March 24, 1992)

Richard Burgess, a real estate agent and Swansea Planning Board member, was sanctioned $500 by the Ethics Commission for violating the Massachusetts Conflict of Interest Law by acting as a planning board member on plans for properties that were ultimately sold by Burgess or his private sector employer.

The Ethics Commission's Enforcement Division had charged Burgess with violating the conflict law in an Order to Show Cause issued in June of 1991.

In a Disposition Agreement reached with the Commission, Burgess admitted that his actions violated Section 19 of the conflict law and agreed to pay the civil penalty. Section 19 prohibits municipal employees from participating in particular matters in which they, or a business organization with which they are associated, have a financial interest.

According to the Disposition Agreement, Burgess violated the conflict law on at least three occasions when he acted as a planning board member regarding certain plans that came before the board. Those plans involved lots under purchase and sale agreement by either Burgess himself or by his employer, M.J. McNally and Associates of Fall River.

However, with regard to Burgess' participation in two of the matters -- developments known

respectively as the Cheryl Drive and Warhurst Park subdivisions -- the Commission found Burgess' violations of the law to be unintentional, and therefore considered the relatively small sanction to be appropriate, the Agreement said.

In the Matter of Joao Dias
(March 31, 1992)

The Ethics Commission fined Ludlow Planning Board member Joao Dias $1000 for violating the Massachusetts Conflict of Interest Law by representing clients of his private practice law firm before the planning board.

In a Disposition Agreement reached with the Commission, Dias admitted that his actions violated Section 17 of G.L. c. 268A and agreed to pay the fine. Section 17 prohibits municipal employees from representing third parties before any municipal board in matters that are of direct and substantial interest to their city or town.

On three occasions in 1990 and 1991, the Disposition Agreement said, Dias spoke before the Board on behalf of two of his private legal clients, Jose Genovevo and Coleman Development Corporation (CDC). On each occasion, Dias disclosed that he represented Genovevo or CDC, and stated that he would therefore not be able to participate in the meeting, the Agreement said. Although he did abstain in his capacity as a Board member, Dias did participate in each of the meetings by speaking on behalf of his clients, in violation of Section 17.

"Section 17 reflects the maxim that a person cannot serve two masters," the Disposition Agreement said. "Whenever a town employee acts on behalf of private interest in matters in which the town also has an interest, there is a potential for divided loyalties, the use of insider information and favoritism, all at the expense of the town."

In the Matters of Cynthia Cobb and Elliot Burlingame
(April 27, 1992)

Cynthia Cobb, the former health agent for the town of Charlton, was fined $5,000 for violating the Massachusetts Conflict of Interest Law by accepting a house at a below-market price from her former town employer, developer and former Charlton Board of Health Chair Elliot Burlingame. Burlingame was fined $2,000 for violations of the same law.

In separate Disposition Agreements reached with the Ethics Commission, both Cobb and Burlingame admitted that their actions violated Section 23(b)(3) of Massachusetts G.L. c.268A, the conflict law, and agreed to pay the fines. 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 or be unduly influenced by anyone in connection with carrying out their official duties.

Both Cobb and Burlingame, by entering into the agreement to transfer the property and land to Cobb at a below-market price while Cobb was health agent and Burlingame was a private developer subject to her official authority, acted in a way that would cause an objective observer to conclude that either or both of them could be unduly influenced by the other in the performance of their official duties, and/or that either or both of them could unduly enjoy the other's favor in their official capacities, thereby violating Section 23 of the Conflict of Interest Law, the Disposition Agreements said.

In the Matter of William J. Stanton
(April 28, 1992)

William J. Stanton, former manager of House Speaker George Keverian's State House business office, was fined $3,500 for violating the conflict of interest law by accepting a bribe and several gifts from individuals with whom Stanton had official dealings.

Stanton had previously pleaded guilty to four counts of violating G.L. c. 268A and one count of G.L. c. 266, §7 (submitting false invoices) in connection with the Attorney General's prosecution of Stanton on the same conduct.

In a Disposition Agreement reached with the Ethics Commission, Stanton admitted that he violated Section 2 of the conflict law by accepting a $1,600 Sony color television set as part of a "substitution scheme" under which several state employees, including Stanton, received merchandise that was

billed falsely to the state. Section 2 of G.L. c. 268A prohibits public employees from corruptly soliciting or accepting anything of "substantial value" ($50 or more) that is given to them in return for being influenced to commit or aid in committing a fraud on the Commonwealth.

Stanton also admitted to violating Section 3 of the conflict law by accepting a leather chair and ottoman, $600 to cover personal meal expenses and remodeling work at his residence from various individuals with whom he had official dealings.

In the Matter of State Street Bank & Trust Co.
(April 30, 1992)

The Ethics Commission fined State Street Bank and Trust Company (State Street) $2,000 for violating the Massachusetts Conflict of Interest Law by paying for meals, accommodations and entertainment expenses for the former Auditor of the City of Boston during two State Street client conferences in Arizona.

In a Disposition Agreement reached with the Commission, State Street, through its Senior Vice President and General Counsel, admitted that its actions violated Section 3 of M.G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 3 prohibits anyone from giving a public employee anything of substantial value ($50 or more) for or because of their official position, or for or because of anything they could do in their official capacity.

Leon Stamps, the former City of Boston Auditor, was fined $1,500 in May of 1991 for accepting the meals, accommodations and entertainment from State Street. An Order to Show Cause alleging State Street had also violated the law was issued by the Ethics Commission at the same time.

The City of Boston Retirement Board (retirement board) is a State Street client, according to the Disposition Agreement. The retirement board invests the approximately $800 million in funds contributed by city workers toward their pensions. State Street's Trust Department serves as the custodian of those funds. In fiscal years 1987 and 1988, State Street received $198,817.00 and $367,194.00, respectively, in custodian fees from the City of Boston, the Agreement said.

The Commission found no evidence that State Street had a corrupt intent in paying for Stamps expenses, nor that it intentionally violated the conflict law. There was also no evidence that Stamps' conduct was improperly influenced by the conferences, according to the Disposition Agreement. However, for purposes of Section 3 of the conflict law, it is unnecessary to prove that the gratuities were given for some specific identifiable act performed or to be performed. The prohibitions are prophylactic in nature and apply where the parties act without corrupt intent and even though no official act is improperly influence by the benefit conferred.

In the Matter of Kevin Mullen
(May 11, 1992)

Former Department of Public Utilities (DPU) inspector Kevin Mullen was fined $2,000 for violating the Massachusetts Conflict of Interest Law through a scheme in which he "sold" the preparation and filing services of a third person to five businesses required to file tariff schedules with the DPU, then prepared and filed the tariff schedules himself. Mullen was also required to forfeit to the state the $500 he made through the scheme.

Mullen admitted in a Disposition Agreement with the Ethics Commission that his actions violated Section 4(a) of G.L. c. 268A, the conflict law, and agreed to pay the fine and the forfeiture. Section 4(a) prohibits state employees from receiving compensation from anyone other than the Commonwealth in connection with matters in which the Commonwealth has a direct and substantial interest.

According to the Disposition Agreement, Mullen worked as an inspector for DPU's Commercial Motor Vehicle Division, which is largely responsible for regulating "common carriers" in Massachusetts. Common carriers are businesses that transport property via motor vehicle for compensation. State law state law requires all such common carriers to file with the DPU written tariff schedules showing their current prices for their services.

In 1989, Mullen, whose duties as a DPU inspector included the periodic inspection of records of common carriers for compliance with applicable state laws and regulations, prepared and filed tariff schedules for five common carriers for $100 each. In every instance, the Disposition Agreement said, Mullen suggested to a representative of the carrier that he could arrange to have James Gould Jr., a person Mullen represented to be a former DPU employee, prepare the carrier's tariff certificate for $100.

Mullen accepted checks payable to James Gould Jr., and deposited the checks in a joint account he shared with Gould, the Disposition Agreement said. Mullen and Gould split the proceeds from the checks, and Mullen prepared and filed the tariff schedules, the Agreement said.

In the Matter of David Crossman
(May 22, 1992)

The State Ethics Commission fined David Crossman, a former member and chair of the Hudson Conservation Commission, $2,000 for numerous violations of the Massachusetts Conflict of Interest Law resulting from Crossman's private consulting work in connection with the state's Wetlands Protection Act.

In a Disposition Agreement reached with the Commission, Crossman admitted that his actions violated Sections 17(a), 18(a), 19, and 23(b)(3) of G.L. c. 268A, the conflict law, and agreed to pay the fine.

According to the Disposition Agreement, Crossman served on the Hudson Conservation Commission (ConCom) from 1984 until 1989. The ConCom post was a part-time, unpaid position, and was designated as a "special municipal employee" position. Crossman was also self-employed as an engineer and was the president and owner of the environmental consulting firm B&C Associates (B&C) in Hudson from 1985 through his remaining tenure on the ConCom, the Agreement said. Ninety percent of B&C's clients hire the company to do work relating to the Wetlands Protection Act, the Disposition Agreement said.

Crossman's participation as a ConCom member in the board's vote to confirm a 1989 Enforcement Order when he knew B&C would be hired to satisfy the conditions of that order violated Section 19 of the conflict law, the Agreement said. Section 19 prohibits municipal employees from participating in their official capacity in any particular matter in which they or a business organization in which they serve as officer, director or employee has a financial interest.

B&C received payment for work done pursuant to the Enforcement Order over several months, both while Crossman was a ConCom member and after he resigned from the board. Crossman personally received a substantial portion of the fees billed and received by B&C for the work at the club, and in doing so violated both Sections 17(a) and 18(a) of the conflict law, the Disposition Agreement said.

Section 17(a) prohibits municipal employees -- including "special" municipal employees -- from directly or indirectly requesting or receiving compensation from someone other than the municipality in connection with a particular matter that is of direct and substantial interest to that municipality and in which public employees have participated in their official capacity. Section 18(a) prohibits the same conduct for <u>former</u> municipal employees.

By undertaking to have B&C provide environmental consulting services to one particular business after he had acted officially concerning the business as a ConCom member and while matters concerning the business were pending before the ConCom, Crossman violated Section 23(b)(3) of the law, according to the Disposition Agreement. Section 23(b)(3) prohibits public employees from acting in a manner that would cause an objective observer to conclude they would be improperly influenced in the performance of their official duties.

The Disposition Agreement also noted that Crossman violated Section 17(a) of the conflict law on a number of other occasions from 1985 through 1989, by contracting with private parties to have B&C perform Wetlands Act consulting work in Hudson, in connection with matters that were subject to his official responsibility as a ConCom member. The Commission declined to impose an

additional fine for these violations, choosing instead to impose one maximum $2,000 fine for Crossman's entire course of conduct.

In the Matter of Mark Breen
(July 6, 1992)

The Massachusetts State Ethics Commission fined Massachusetts Housing Finance Agency (MHFA) staff attorney Mark Breen $4,000 for violating the state's Conflict of Interest Law by acting as a private attorney for an Irish immigrant in his attempt to obtain an MHFA mortgage.

In a Disposition Agreement reached with the Commission, Breen admitted that his actions violated Sections 4(c) and 23(b)(3) of G.L. c. 268A, the Massachusetts conflict law, and agreed to pay the fine. Section 4(c) prohibits state employees from representing anyone other than the Commonwealth in a matter that is of substantial interest to the Commonwealth. 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 or be unduly influenced by any person or entity in carrying out their official duties.

According to the Disposition Agreement, Breen hired Cornelius Fahy, a mason, to repair work on Breen's home in 1987. Fahy is an Irish national, who was living and working in the United States on a temporary work visa. Fahy worked evenings and weekends and became friendly with Breen, who was often at home when Fahy was working on the property. Breen was satisfied with Fahy's work to the extent that he commissioned additional projects from Fahy.

On June 3, 1988, Fahy and his wife entered into a purchase and sale agreement for a single family house, the Agreement said. The Fahys planned to apply for a low interest loan funded by the MHFA under the "First-Time Home Buyers Program" (FTHB).

On June 14, 1988, Fahy gave Breen a check for $2,500. Fahy claimed the check was given to Breen for acts Breen was to take as the Fahys' private attorney regarding the MHFA loan. Breen maintained the money was for past legal services, unrelated to the loan, that Breen provided to Fahy, as well as for Breen's willingness to be the Fahys' attorney in the future. However, both Fahy and Breen agreed that whatever legal services were tendered by Breen to Fahy prior to June 14, 1988, Fahy was under no legal obligation to pay for them. Breen provided no legal services to the Fahys unrelated to the loan after receiving the $2500, the Disposition Agreement said. In addition, no documentation exists to clarify the attorney/client relationship between Breen and the Fahys involving legal services unrelated to the loan.

Breen subsequently provided the Fahys with MHFA literature, including a list of banks that administered MHFA money. Toward the end of June, 1988, the Fahys sought a FTHB loan at a bank in Canton, Massachusetts. They were told the bank had distributed all of its FTHB funds. Fahy returned to Breen, who told him to apply to People's Federal Bank in Brighton, Massachusetts, which still had FTHB funds available.

On or about July 1, 1988, the Fahys filed an application with People's Federal Bank, the Disposition Agreement said. Breen assisted the Fahys in filling out the required financial documentation. Later that month, Fahy complained to Breen about the length of time the loan application was taking. Breen then went to the MHFA lender representative in the FTHB program who was responsible for the loans granted by People's Federal, and, identifying himself as a fellow MHFA employee, asked about the status of the Fahys loan application, the Disposition Agreement said.

Thereafter, Breen met with the Fahys on several occasions to discuss their difficulties with the bank, and also telephoned and met on several occasions with the MHFA representative and supplied him with financial information provided by Fahy. On September 1, 1988, the bank rejected the Fahys' mortgage application.

In the Matters of John Shay and Frederick Foresteire
(July 7, 1992)

The Ethics Commission fined Everett School Committee member John Shay and Everett School Superintendent Frederick Foresteire for violating the Massachusetts Conflict of Interest Law when Foresteire arranged for a "free" paint job for Shay's apartment done by a school department painter.

In separate Disposition Agreements reached with the Ethics Commission, both Shay and Foresteire admitted that their actions violated G.L. c. 268A, the conflict law, and agreed to pay the fines. Shay admitted to violating Section 3 of the conflict law, which prohibits public employees from accepting anything of substantial value ($50 or more) that is given to them for or because of their official position. Shay agreed to pay a $500 fine for the violation, and also agreed to pay an additional $250 forfeiture to the Commonwealth for the unlawful benefit of the paint job.

Foresteire admitted to violating Section 23(b)(3) of the conflict law by asking a school department painter to paint Shay's apartment, and agreed to pay a $250 civil penalty for the violation. Section 23(b)(3) prohibits public employees from acting in a manner that would cause an objective observer to conclude that they would act with bias in the performance of their official duties.

According to both Disposition Agreements, in April of 1990 Shay was in the process of moving into a new apartment. On April 4, Shay telephoned Foresteire to discuss School Committee matters. During the conversation, Shay mentioned that he was having trouble with the workers he had hired to paint his new apartment and feared the apartment would not be ready for the upcoming weekend move.

The next day, the Agreements said, Foresteire approached an Everett School Department painter who was working in the school administration building and asked him to look at Mr. Shay's apartment and give advice regarding what could be done to finish the job on time. Later that day, the painter and Foresteire travelled to and examined Shay's apartment. The painter told Foresteire that a significant amount of work was needed prior to the scheduled weekend move. The painter agreed to assist in the apartment painting and requested a personal day, which Foresteire granted. Everett School Department employees are allocated two personal days a year.

Over the next three days, the painter worked more than 22.5 hours and expended approximately $300 in labor and supplies, according to the Disposition Agreements. Shay encountered the painter working in his apartment on two or three occasions, and became aware through these encounters that the painter worked for the school department. Shay never offered to compensate the painter.

In the Matter of Harold Partamian
(July 9, 1992)

The State Ethics Commission levied a $1,500 fine against Harold Partamian, the executive secretary of the state Board of Registration in Pharmacy, for his involvement in the investigation of several complaints against the pharmacy corporation that employed him as a part-time pharmacist, and for failing to report his part-time employment on his Statement of Financial Interests (SFI).

Partamian admitted in a Disposition Agreement reached with the Commission that his actions violated Sections 6 of G.L. c. 268A, the Massachusetts Conflict of Interest Law, and Section 7 of 268B, the Financial Disclosure Law, and agreed to pay the fine. Section 6 of the conflict law prohibits state employees from participating in their official capacity in particular matters that affect the financial interests of a business organization for which they work. Section 7 of the Financial Disclosure Law prohibits the filing of a false SFI.

According to the Disposition Agreement, Partamian was a pharmacy investigator for the state Division of Registration from 1980 until July of 1987. In addition to his state employment, Partamian worked part-time as a pharmacist. Since 1984, the Disposition Agreement said, Partamian worked on Saturdays at a pharmacy in Woburn owned by Insta-Care Pharmacy Services Corporation.

In 1982, Partamian had requested and received an Advisory Opinion (EC-COI-82-95) from the Ethics Commission concerning possible conflicts between his work for the Division and his part-time private employment. The Commission informed Partamian he would be unable to participate as a Division investigator in any matters concerning the pharmacy for which he worked or concerning any of its geographical competitors.

In 1987, when Partamian became the executive secretary of the Board of Registration in Pharmacy, he asked the Commission to update the opinion previously issued to him. The Commission's Legal Division reaffirmed the earlier opinion, stating, "... you must continue to refrain from participating as (the Board executive secretary) in any matter affecting either the pharmacy which employs you on Saturdays or its geographic competitors."

In 1986 and 1987, Partamian, acting as a Division investigator, investigated complaints filed against Insta-Care. Both matters were settled as recommended by Partamian.

In August 1987, Partamian, acting as Board executive secretary, signed a report on behalf of the Board relating to a third investigation concerning Insta-Care indicating that the Board had resolved the investigation without finding a violation.

As the executive secretary of the Board of Registration in Pharmacy, Partamian annually files SFIs with the State Ethics Commission. On his 1987 and 1988 SFIs, Partamian failed to disclose his part-time employment with Insta-Care.

"A false SFI need not be willful or intentional to violate (the Financial Disclosure Law)," the Disposition Agreement said. "The statute requires a commitment to a reasonable degree of care and diligence in filing SFIs. (Citation omitted). Mr. Partamian failed to exercise reasonable care and ordinary diligence by not disclosing the above stated information. In so doing, Mr. Partamian violated G.L. c. 268B, §7."

Partamian was fined $1,000 for his violations of the conflict law, and $500 for his financial disclosure omissions.

In the Matter of Rudy Banks
(July 9, 1992)

The Ethics Commission fined Rudy Banks, a member of the Board of State Examiners of Plumbers and Gas Fitters (Board), $250 for violating the Massachusetts Conflict of Interest Law by acting as a board member on a variance application when Banks knew his son would be working on a plumbing project for which the variance was needed.

In a Disposition Agreement reached with the Commission, Banks admitted his conduct violated Section 6 of G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 6 prohibits state employees from participating in their official capacity in any particular matter that affects the financial interests of an immediate family member.

The Board is responsible for regulating Massachusetts plumbers and gas fitters, which it does in part by administering licensing examinations. The Board is also responsible for promulgating a state plumbing code and granting variance requests from that code's requirements. The Board has a seven-member Plumbing Subcommittee that specializes in plumbing issues. The Subcommittee makes recommendations to the full Board regarding various plumbing matters.

On July 25, 1990, the Plumbing Subcommittee approved a variance application for Napoli Pizza of Westfield, Massachusetts, allowing the restaurant to install a unisex handicap access bathroom. Without the variance, the state plumbing code would have required a commercial establishment such as Napoli Pizza to have separate bathrooms for each sex. On August 1, 1990, the Board voted to ratify the Subcommittee's action. Banks was present at both meetings and voted in favor of both actions, the Disposition Agreement said.

In September of 1990, Banks' son, Rudy Banks, applied to the Westfield plumbing inspector for a plumbing permit for the unisex bathroom at Napoli Pizza, the Agreement said. The plumbing inspector denied the permit because he had not received a satisfactory written explanation from the Board regarding the Board's granting of the variance.

The plumbing inspector then wrote to the Board and insisted the law required one men's bathroom and one women's bathroom, as well as the unisex handicap access bathroom.

In late September Raymond Banks reapplied for the plumbing permit for Napoli Pizza, and at about the same time informed his father of the problem he was having with the local plumbing inspector, the Disposition Agreement said.

At its September 26, 1990, meeting, the Plumbing Subcommittee voted to allow a variance based on the handicap access unisex bathroom at Napoli Pizza being used by the public and the remaining bathroom being designated a unisex bathroom for employees. Banks voted in favor of the variance. On October 3, 1990, the full Board approved the Subcommittee's decision to clarify the variance, and again, Banks voted in favor. On October 12, the Westfield plumbing inspector granted the permit to Napoli Pizza for construction of the unisex bathroom.

In the Matter of Guy Tardanico
(August 27, 1992)

The Massachusetts State Ethics Commission fined Stoughton School Committee member Guy Tardanico $1,000 for violating the Conflict of Interest Law by participating in school department contract negotiations with the bargaining unit to which his wife belonged.

Tardanico admitted in a Disposition Agreement reached with the Commission that his actions violated Section 19 of G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 19 prohibits municipal employees from officially participating in particular matters in which a member of their immediate family has a financial interest.

In late 1989 the School Committee designated three of its members to serve on a subcommittee to negotiate a new contract with Unit A, the bargaining unit representing the school teachers, the Disposition Agreement said. Tardanico, whose wife is a teacher in the Stoughton school system, was not a member of the subcommittee. The subcommittee and the Stoughton Teachers Association (STA) reached a tentative contract agreement on April 4, 1990.

In a memorandum of understanding dated June 4, 1990, the School Committee approved the actions of the subcommittee, and Tardanico signed the memorandum as chair of the School Committee, according to the Disposition Agreement. At around the same time, Stoughton Town Meeting declined to fund the new contract.

At an October 2, 1990, School Committee meeting, Tardanico voted with the other School Committee members to petition the Board of Selectmen to call for a special town meeting for the purpose of funding the Unit A contract. At a special town meeting in Stoughton the following January, Tardanico moved as School Committee chair to transfer $350,406 from free cash to implement the collective bargaining agreement. The motion was defeated.

At a School Committee special meeting in February 1991, Tardanico, as the committee's chair, encouraged the other School Committee members to join with STA in filing for arbitration. At School Committee meeting a month later Tardanico informed the other committee members that the STA was concerned about the committee's failure to negotiate regarding the Unit A contract, and encouraged the School Committee to resume negotiations before a March 21, 1991, arbitration hearing took place. He asked that someone make a motion to this effect, and the committee then voted that "legal counsel be contacted and advised of the desire of the School Committee to sit down with the (STA) negotiating team to discuss and, hopefully, resolve problems with regard to teachers' contracts prior to the matter going to arbitration," with Tardanico voting in favor of the motion.

In March, Tardanico sent a memo on behalf of the School Committee stating the Committee's desire to meet with the Unit A bargaining team, and at a School Committee meeting in May of 1991, Tardanico advocated for giving the teachers the increases that had been previously agreed to for the first two years of the three-year contract extension, the Agreement said.

In May of 1991, a fellow School Committee member raised a concern about Tardanico being in conflict of interest because of his advocacy of the School Committee negotiating with the STA and granting certain salary increases. Counsel for the School Committee contacted the State Ethics Commission on the matter, and a Commission staff attorney advised that the best course of action was for Tardanico to leave the room when contract issues were discussed. Tardanico subsequently refrained from participating as a School Committee member in STA contract matters.

In the Matter of William Butters
(September 9, 1992)

Norwood Selectman William Butters was fined $1,500 for violating the Massachusetts Conflict of Interest Law by participating as a selectman in matters that affected his firefighter son's financial interest, and in liquor license matters in which he himself had a financial interest.

In a Disposition Agreement reached with the Ethics Commission, Butters admitted that his actions violated Section 19 of G.L. c. 268A, the conflict law, and agreed to pay the sanction. He was fined $1,000 for his actions in connection with his son's financial interest, and $500 for his actions regarding local liquor licenses.

Section 19 of the conflict law prohibits municipal officials from participating in their official capacity in any particular matter in which they, or a member of their immediate family, have a financial interest.

Butters' son, Paul, is a firefighter in Norwood. The Norwood firefighters serve pursuant to successive contracts with the town, which are negotiated by Norwood town counsel and the firefighters' union. Butters has not been involved in the firefighters' contract negotiations, the Disposition Agreement said.

However, on December 12, 1989, the selectmen, including Butters, unanimously approved and signed the firefighter contract at a regular selectmen's meeting. The 1989 contract raised Paul Butters' salary $1,682.76.

On June 12, 1990, Butters seconded the motion and, along with the other selectmen, voted to approve a new fire department contract. The contract raised Paul Butters' salary $2,481. On June 14, 1990, town meeting approved the fire department contract; but shortly thereafter a referendum petition was initiated to overturn the town meeting vote regarding several municipal contracts, including the fire department's.

Butters participated extensively on July 2, 1990, in a discussion during the selectmen's meeting concerning whether to call for a referendum on the municipal employee contracts. The selectmen split 2-2 on the motion, with Butters voting against holding the referendum. On August 21, 1990, the selectmen, including Butters, unanimously approved and signed the firefighters' contract.

From 1987 through 1991, Butters held a liquor license for South Norwood Pharmacy, Inc., the Disposition Agreement said. The pharmacy is owned and operated by Butters' immediate family. Butters serves as an employee of the corporation.

As selectman, the Disposition Agreement said, Butters signed the following liquor license renewal applications or renewal licenses:

* in 1988, his own and six competitors' licenses and applications;
* in 1989, his own and five competitors' licenses;
* in 1990, one competitors' license; and
* in 1991, six competitors' applications.

In addition, although Butters abstained from liquor license hearings, citing his holding of a liquor license as a rationale, he improperly invoked the Rule of Necessity at a December, 1987, selectmen's meeting and voted on a competitor's liquor license transfer, the Agreement said.

In the Matter of Arthur Hilson
(October 5, 1992)

The State Ethics Commission fined Arthur Hilson, former Director of the Department of Public Safety at the University of Massachusetts in Amherst (UMass-Amherst), $4,000 for violating the Conflict of Interest Law by first soliciting a $1,000 no-interest loan from one of his employees and failing to fully repay it, and by later accepting a $1,000 gift from the same employee at a time when she was a criminal suspect being investigated by Hilson's police department. Hilson was also required to forfeit the $1,000 gift to the Commonwealth.

In a Disposition Agreement reached with the Ethics Commission, Hilson admitted his actions violated Sections 3 and 23 of the conflict law, G.L. c. 268A, and agreed to pay the fine. Section 3 prohibits public employees from seeking or accepting anything of substantial value ($50 or more) given to them for or because of their official position or duties. Section 23 prohibits a public employee from acting in a manner that would cause an objective observer to conclude the employee could be unduly influenced in his or her official capacity, or that anyone could unduly enjoy the employee's favor in official dealings.

Following the Ethics Commission's finding there was "reasonable cause" to believe Hilson's actions violated the conflict law, Hilson resigned his position at UMass-Amherst, effective September 30, 1992.

According to the Disposition Agreement, Erma Rocasah worked for the UMass-Amherst Department of Public Safety in its payroll division at all times relevant to the Ethics Commission investigation. Although she did not work directly for Hilson, the two became friends, the Disposition Agreement said.

In March 1990, Hilson wrote a personal check in the amount of $1,367 for the purchase of beef. Hilson did not have enough money in his checking account at the time to cover the check. On March 26, 1990, Hilson approached Rocasah and borrowed $1,000 from her, the Disposition Agreement said. He signed a promissory note for the loan, made payable by April 30, 1990. However, the promissory note did not call for interest payments, the Agreement said.

On April 13, 1990, the wife of one of the UMass-Amherst Department of Public Safety's special police officers complained to the department that her husband's W-2 forms reflected wages far greater than the income he actually earned. On April 19, the Agreement said, Hilson ordered an investigation into the suspected embezzlement of $15,000 worth of special police officer detail checks by Rocasah. Rocasah resigned from her state employee position that same day.

Also on April 19, 1990, the Department of Public Safety's investigator informed the Northwestern District Attorney's office of the department's probe. The DA's office played no role in the investigation until September 1990, according to the Agreement.

Hilson informed his supervisor, a Vice-Chancellor at UMass-Amherst, of the investigation and the department's contact with the District Attorney's office, the Disposition Agreement said. The Vice-Chancellor criticized Hilson for not handling the matter internally due to concerns about adverse media coverage.

On April 20, 1990, Hilson telephoned Rocasah at her home. Rocasah inquired when she was going to be arrested and taken to jail. According to the Disposition Agreement, Hilson told Rocasah not to worry because the university only wanted its money back and that the matter would probably be handled internally. At all times during the UMass-Amherst internal investigation of the alleged embezzlement, Hilson as the Public Safety Department Director possessed the authority to terminate the department's investigation.

On May 1, 1990, Hilson repaid $500 of the March 26, 1990 loan from Rocasah, the Disposition Agreement said. He did not repaid the outstanding $500 balance.

On June 1, 1990, Rocasah mailed a letter and a $1,000 check to Hilson, according to the Disposition Agreement. The letter stated that the check was "(a) token of sincere appreciation for standing by me and turning a deaf ear to all the voices of discontentment with me."

Rocasah explained she offered the gift partially to thank Hilson for his support at the time of her resignation, and partially to thank him for his support and efforts during problems she encountered with her former immediate supervisor at the Department of Public Safety, the Agreement said.

Hilson deposited the $1,000 check from Rocasah into a personal bank account on June 13, 1990, the Disposition Agreement said.

The UMass-Amherst Department of Public Safety investigator completed his probe on September 12, 1990, and furnished his findings to the District Attorney's office. In December 1990, the District Attorney indicted Rocasah on larceny charges in Superior Court.

The Ethics Commission found no evidence that Hilson ever attempted to interfere with the investigation or advocate lenient treatment for Rocasah. Nevertheless, "by accepting a $1,000 gift from a criminal suspect being investigated by his police department ... Mr. Hilson violated Section 3 (of the conflict law)," the Disposition Agreement said.

In addition, the Agreement said, "by securing an immediate, no-interest $1,000 loan from his subordinate, Mr. Hilson acted in a manner which would cause a reasonable person to conclude that Rocasah could unduly enjoy his official favor in personnel evaluation, promotion and disciplinary matters. Thus, Mr. Hilson violated Section 23(b)(3) (of the conflict law). Mr. Hilson exacerbated this appearance of an impropriety by failing to repay the $500 loan balance, especially when his failure to do so occurred while the Department's investigation of Rocasah was pending."

In the Matter of Robert Sheehan
(October 6, 1992)

Granby Board of Health (BOH) member Robert Sheehan Jr., was fined $500 by the State Ethics Commission for violating the Massachusetts Conflict of Interest Law by witnessing 11 percolation tests done by his father's company and witnessing one top soil/sub soil inspection performed by his employer.

In a Disposition Agreement reached with the Commission, Sheehan admitted that his actions violated Section 19 of the conflict law, G.L. c. 268A, and agreed to pay the fine. Section 19 prohibits municipal employees from participating in their official capacity in particular matters in which members of their immediate family or a business organization for which they are serving as an employee have a financial interest.

During the period from January 1, 1990, to August 1, 1990, Sheehan officially witnessed 11 repair percolation tests conducted by his father's company, R.F. Sheehan Associates. The Commission found no evidence that Sheehan was improperly influenced in his review of the perc tests, or that he misrepresented the data. In addition, other BOH members independently reviewed the 11 test results before issuing the respective permits.

From April to December of 1990, Sheehan was also employed by contractor Greg Orlen as an equipment operator. During this time period, Sheehan conducted one top soil/sub soil inspection of a septic system installed by Orlen, thereby violating Section 19.

Although Sheehan faced a maximum penalty of $2,000 for each of the 12 violations, the Disposition Agreement indicated important mitigating circumstances. According to the Agreement, when Sheehan joined the Board of Health in 1987, he sought advice from town counsel as to how to avoid conflicts of interest presented by his father's engineering business. Town counsel correctly advised Sheehan to abstain from voting on BOH matters affecting his father's company, but neglected to inform him also to refrain from conducting field inspections of R.F. Sheehan Associate's work.

In the Matter of EUA Cogenex
(October 14, 1992)

EUA Cogenex (Cogenex), an energy management company, was fined $2,000 by the State Ethics Commission for violating the Massachusetts Conflict of Interest Law by offering and providing entertainment to public officials in an effort to engender good will.

In a Disposition Agreement reached with the Ethics Commission, Cogenex -- through its senior official -- admitted to violating Section 3 of G.L. c. 268A, the conflict law, by inviting and hosting the officials on the cruise. Section 3 prohibits anyone in the private sector from offering or giving anything of "substantial value" ($50 or more) to any public official for or because of any official act performed or to be performed by that official.

According to the Disposition Agreement, Cogenex was the successful bidder under an energy savings plan called the Encore Program for Worcester County and the municipalities of Arlington, Holliston, Newton and Walpole, the Disposition Agreement said. Under the Encore Program, offered through Boston Edison, large energy consumers can significantly reduce their energy consumption costs by selecting an electrical contractor to retrofit and/or replace existing equipment, with Boston Edison incurring all expenses. As the successful bidder on the above-mentioned contracts, Cogenex received a percentage of the savings generated by the equipment improvements.

On July 17, 1991, Cogenex hosted a Boston Harbor cruise on a custom designed cruising yacht. The explicit purpose of the cruise was for customer appreciation and to foster goodwill. The cruise included cocktails and dinner, and Cogenex spent approximately $2,229 hosting the event, the Agreement said.

Cogenex extended invitations to approximately 40 individuals, including seven public officials involved with the municipal and county contracts mentioned above, according to the Disposition Agreement, and two of the 28 individuals who attended the cruise were public officials.

In the Matter of Massachusetts Candy & Tobacco Distributors, Inc.
(October 14, 1992)

The State Ethics Commission fined Massachusetts trade association Massachusetts Candy & Tobacco Distributors, Inc. (Mass. Candy & Tobacco) $2,000 for violating the Conflict of Interest Law by providing entertainment to public officials in efforts to engender good will.

The senior executive of Mass. Candy & Tobacco signed a Disposition Agreement with the Ethics Commission, admitting that the business' actions violated Section 3 of the conflict law, which prohibits anyone in the private sector from offering or giving anything of "substantial value" ($50 or more) to any public official for or because of any official act performed or to be performed by that official.

Mass. Candy & Tobacco is a Massachusetts non-profit corporation created to foster and advance the best interests of wholesale distributors of cigars, cigarettes, candy, tobacco and other smokers' products by promoting and maintaining high standards for such distributors. Twenty-one Massachusetts companies and one New York company comprise Mass. Candy & Tobacco's membership. In 1991, the Disposition Agreement said, Mass. Candy & Tobacco paid a lobbyist $12,000 to monitor legislative developments in Massachusetts, and paid the lobbyist an additional $10,500 in 1991.

On August 13, 1991, Mass. Candy & Tobacco hosted its third annual "Sweet Charity Golf and Tennis Invitational" at the Ocean Edge Resort in Brewster, Massachusetts, the Disposition Agreement said. The event included a barbecue lunch, an afternoon of golf or tennis, a cocktail hour, clambake dinner and a post-dinner raffle to benefit the Jimmy Fund.

Attendance at the invitational was by invitation only. Mass. Candy & Tobacco extended invitations to its members, representatives of their wholesale suppliers, and approximately 180 members of the Massachusetts Legislature. Approximately 160 individuals attended, including more than 50 state legislators, staffers, and members of their families.

There was no charge to the individuals attending the invitational, the Disposition Agreement said. Mass. Candy & Tobacco spent just over $29,000 hosting the event. Those who attended the invitational received an estimated $141-$152 on average each in food, alcohol, golf/tennis, and entertainment. Many attendees also participated in the Jimmy Fund raffle, which raised $6,338.27, and thus "paid" in some fashion for a portion of their attendance costs by contributing an average of $35 per person, according to the Agreement.

Mass. Candy & Tobacco used the invitational to serve a variety of purposes. It served to bring together the group's members for an enjoyable social gathering, was a means for Mass. Candy & Tobacco to enhance its image with the legislature, and was used to raise money for charity.

"Mass. Candy & Tobacco asserts that its primary purposes for hosting the Invitational were to provide a social event for its employees and raise money for charity. The Commission will not consider a gift to have been given "for or because of an official act" where a subject establishes that a legitimate purpose was *the* motive for the gift," the Disposition Agreement said. "Where a legitimate purpose only partially motivates the gift, the gift is prohibited if the giver is also motivated by a desire to create official good will as Mass. Candy & Tobacco concedes was the situation in the instant case."

In the Matters of Michael Murphy and P.J. Keating Co.
(October 20, 1992)

The State Ethics Commission fined Winchendon's Department of Public Works (DPW) superintendent and a Massachusetts asphalt manufacturer $2,000 each for the company's free paving of the superintendent's driveway.

The DPW superintendent, Michael Murphy, was also required to forfeit $2,000 to the Commonwealth for the fair market value of the paving.

In separate Disposition Agreements with the Ethics Commission, both Murphy and P./J. Keating Company, through company treasurer Paul J. Keating, admitted that their actions violated Section 3 of Massachusetts G.L. c. 268A, the conflict law, and agreed to pay the fines and forfeiture. Section 3 of the conflict law prohibits public employees from seeking or accepting anything of substantial value that is given to them because of their official position, and also prohibits private sector entities from offering or providing such gifts.

As DPW superintendent, Murphy is responsible for the maintenance and reconstruction of the town roads in Winchendon and for the operation of the Winchendon Highway Department. The town's paving contract is put out to bid and awarded annually by the selectmen. Murphy reviews submitted bids and makes a recommendation on awarding the contract, the Disposition Agreement said.

In June of 1987, P.J. Keating Co. submitted the low bid for the Winchendon paving contract. Murphy reviewed the bids and recommended the contract be awarded to Keating, the Disposition Agreements said. Keating Co. was ultimately awarded the Winchendon contract and was paid a total of $229,554.86, the Agreements said. Murphy supervised Keating's performance of the contract, the Agreements said.

At some point in 1987, Murphy approached a Keating employee who was involved in paving Winchendon streets pursuant to Keating's town contract, and asked him if Keating would pave the driveway of his personal residence in Winchendon.

On the morning of July 29, 1987, Keating employees did a certain amount of paving in Winchendon pursuant to the municipal contract. After completing that paving, the Agreement stated, Keating employees went to Murphy's house, waited for the asphalt material to be delivered from the Keating plant and then paved Murphy's driveway.

Approximately 60 tons of asphalt materials were used to pave Murphy's driveway, and labor and materials for the job had a fair market value of about $2,000. The town of Winchendon did not pay for either the materials or the labor involved in paving Murphy's driveway, the Agreement said. P.J. Keating Co. absorbed the costs associated with paving Murphy's driveway.

In the Matter of John Forristall
(October 21, 1992)

Winthrop Recreation Commission member John Forristall was fined $1,500 by the State Ethics Commission for selling janitorial supplies to the Recreation Commission and collecting $1,125 in commissions for the sales. Forristall was also required to forfeit the $1,125 to the Commonwealth.

In a Disposition Agreement reached with the Ethics Commission, Forristall admitted that he violated Section 19 of G.L. c. 268A, the Massachusetts Conflict of Interest Law, and agreed to pay both the fine and the forfeiture. Section 19 of the conflict law prohibits municipal employees from participating in their official capacity in any particular matter in which they or a business that employs them has a financial interest.

The Winthrop Recreation Commission is a part-time, six member board appointed by the Board of Selectmen to oversee the operation of the town's Recreation Department. During the time relevant to the Ethics Commission's investigation, Forristall worked as a salesman for Lamco Chemical Company (Lamco) in addition to his post on the Recreation Commission. Lamco is a Chelsea-based business that manufactures janitorial supplies.

Between July 1, 1985, and June 30, 1989, the Recreation Commission purchased approximately $7,500 in goods from Lamco. Forristall was the salesman on all of the sales, and earned approximately $1,125 in commissions on the sales, the Disposition Agreement said.

In the Matter of Thomas Norton
(December 15, 1992)

The Ethics Commission fined Massachusetts state Senator Thomas C. Norton (D-Fall River) $1,000 for violating the so-called "nepotism" section of the Conflict of Interest Law by supervising his sister, Elizabeth Bevilacqua, in her job as a legislative aide to the Senate.

The Commission's Enforcement Division had issued an Order to Show Cause against Norton in August of 1992, but the parties resolved the matter with a Disposition Agreement prior to the case going to a public hearing. The Disposition Agreement dismissed allegations that Norton's sister appeared to be a "no-show" employee.

In the Disposition Agreement, Norton admitted that his actions with regard to his supervision of his sister violated Section 6 of Massachusetts G.L. c. 268A, the conflict law, and agreed to pay the fine. Section 6 of the conflict law prohibits state employees and officials from participating in their official capacity in any particular matter that affects the financial interests of a member of their immediate family.

According to the Agreement, from January 1985 through 1991, Bevilacqua was employed full-time by the state Senate as a legislative aide assigned to the Government Regulations Committee. Senator Norton co-chairs this committee.

Bevilacqua was one of seven Senate employees, including legislative aides and secretaries, assigned to the Government Regulations Committee. As committee co-chair, Norton directly supervised the Senate employees assigned to the committee, and as Bevilacqua's direct supervisor, he assigned work to Bevilacqua, determined where and when she would perform her work for the Senate, and approved Bevilacqua's vacation schedule, the Agreement said. While she was employed by the Senate, Bevilacqua was assigned by Norton to work at his district office in Fall River.

The Commission noted in the Disposition Agreement that the Enforcement Division's original Order to Show Cause alleged that Norton's supervision of his sister also violated an additional section of the conflict law, Section 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 or be unduly influenced by kinship, friendship, rank or position in the course of his official duties. This allegation was based upon information obtained during the Enforcement Division's investigation, including evidence that no records were kept of the hours that Bevilacqua worked or of the work that she performed during her tenure as a Senate employee, the Disposition Agreement said. Following a pre-hearing conference in the matter, Norton provided further evidence, satisfactory to the Enforcement Division, that his sister had performed substantial work as a Senate employee and that her terms and conditions of employment were the same as those of the other Senate employees supervised by Norton. Accordingly, the allegation of a Section 23(b)(3) violation against Norton was dismissed.

Norton also admitted in the Disposition Agreement that his failure to disclose his interests in Patrick Marketing, Inc. on his 1986, 1987, 1988, and 1989 Statements of Financial Interests (SFIs), as well as

his failure to disclose a $4,500 commission he received in 1986, constituted violations of Section 7 of the Financial Disclosure Law, G.L. c. 268B, which prohibits the filing of a false SFI. The Commission noted that the filing of a "false" SFI does not need to be willful or intentional to violate the law, but only requires the failure to exercise reasonable care and ordinary diligence in completing and filing the forms.

The Commission declined to impose an additional fine on Norton for the Financial Disclosure Law violations because at the time of the initial omission in 1987, the Ethics Commission had not yet made clear that negligent SFI omissions would be subject to public sanction, and the Commission found the Disposition Agreement itself to be an adequate sanction for the subsequent omissions. Norton agreed to amend his financial disclosure forms to reflect his interests in Patrick Marketing and receipt of the commission as part of the Disposition Agreement.

Norton organized Patrick Marketing, Inc. as a Massachusetts corporation in January 1986, the Disposition Agreement said. According to the corporation's articles of organization, the purpose of Patrick Marketing was to provide advertising, public relations and marketing services. The corporation's address was the same as that of Norton's district office at the South Main Place mall in Fall River, and Norton was the sole owner and president of Patrick Marketing, the Disposition Agreement said.

In early 1986, the Agreement said, Norton, acting privately as a licensed real estate broker, was instrumental in a Chinese restaurant becoming a tenant in the mall. The mall's operator paid Norton a $4,500 commission for Norton's assistance in this matter. Norton then deposited the $4,500 into a checking account for Patrick Marketing. Norton did not disclose either his interest in Patrick Marketing or his receipt of the $4,500 commission in his 1986 SFI, the Agreement said, Norton also failed to disclose his interest in Patrick Marketing on his 1987, 1988, or 1989 SFI. Patrick Marketing was dissolved as a corporation in late 1990.

In the Matter of Paul Gaudette
(December 30, 1992)

The State Ethics Commission required a $300 forfeiture from Dracut Building Inspector Paul Gaudette, who violated the Conflict of Interest Law by accepting the rent-free use of a Martha's Vineyard vacation home from Dracut developer Douglas Dooley.

Gaudette admitted in a Disposition Agreement reached with the Ethics Commission that his use of the vacation home violated Section 23(b)(3) of G.L. c. 268A, the conflict law, and agreed to forfeit the value of the benefit he received. Section 23 of the conflict law prohibits public employees from acting in a manner that would cause an objective observer to conclude the employees could be unduly influenced in their official capacity by any person or entity.

"The Commission determined that Mr. Gaudette believed Mr. Dooley's generosity was motivated out of fellowship," the Disposition Agreement said. "In the Commission's view, however, friendship and personal ties only serve to enhance the appearance of favoritism that arises when a public official accepts an item of substantial value from someone who is subject to his official regulation."

Included are:

All Advisory Opinions issued in 1992, page 365,
and
Commission Advisories No.4 and No. 14,
revised and re-issued in 1992.

Cite Advisory Opinions as follows:

EC-COI-92-(number)

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

CONFLICT OF INTEREST OPINION
EC-COI-92-1

FACTS:

You are currently a city councillor. You wish to accept a simultaneous salaried position as director of a community action agency (ABC).

ABC is a non-profit corporation and a "community action agency" as that term is used in 42 U.S.C. §9902(1) and G.L. c. 23B, §24. A group of private individuals organized ABC in response to the federal Economic Opportunity Act of 1964. ABC's by-laws state as its purpose, in part, "to work toward the reduction of poverty and the causes and effects thereof by making the city as well as other public institutions and organizations aware of the needs and interests of low-income people." ABC receives most of its funding from the state and federal governments, and small amounts from the city and from private sources. The city sometimes contracts with ABC using part of the city's allocation from the federal Community Development Block Grant (CDBG) program, as well as other federal, state, or city funds.

Your proposed position is funded solely by the federal Department of Energy, with funds passed through only the state government. The position is not funded at all from city funds, nor from state or federal funds over which the city exercises any discretionary control.

QUESTION:

Does G.L. c. 268A allow you to serve as both a city councillor and an ABC employee?

ANSWER:

Yes, subject to the following limitations.

DISCUSSION:

As a city councillor, you are a "municipal employee." G.L. c. 268A, §1(g). Your request raises the following issues under the conflict of interest law.

Threshold question: is ABC a "municipal agency"?

Whether ABC is a "municipal agency" will significantly affect our analysis. We must therefore decide that issue first.

Our statute defines a "municipal agency" as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, §1(f). To construe this definition (and the substantially identical ones of "county agency" and "state agency"), particularly the use of the word "instrumentality," we have generally examined four factors:

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 or expends public funds; and

4. the extent of control and supervision exercised by government officials or agencies over the entity. *See EC-COI-91-12; 88-2; 85-22; 84-65.*

Here, the second and third factors are certainly present to a considerable extent: ABC performs some governmental functions, and its budget depends almost entirely on government funds. But one or both of these statements are equally true of many other private, non-profit organizations, including several we have previously determined not to be government agencies. *See, e.g., EC-COI-88-19* (non-profit cable television public-access corporation, which received funds under city contract, not a "municipal agency"); *EC-COI-87-28* (advisory neighborhood council not "municipal agency"); *EC-COI-86-5* (state agency's informal advisory committee not a "state agency"); *EC-COI-85-78* (non-profit "health systems agency" established under federal statute, which performed state health planning functions and received state funding, not a "state agency").

We turn, then, to the first and fourth factors. As to the means of its creation, ABC was established by private citizens as (in the words of its present by-laws) "a private non-profit corporation." *See EC-COI-90-7* (unless government agency creates entity to further its own purposes, purely private instrument generally does not establish government agency). It does receive federal and state grants, and to that extent federal and state statutes prescribe certain minimum standards, largely in terms of board composition as discussed below, that such "community action agencies" must meet. 42 U.S.C.

§§9902(1) (defining "eligible entity" for federal Community Services Block Grant [CSBG] program funds to include a community action agency), 9904(c)(3) (regulating board composition of grant recipients); G.L. c. 23B, §24 (defining "community action agency," prescribing board structure, and authorizing state contracts and grants under federal CSBG program). These grants and contracts place ABC in the same category of "at most a vendor corporation with respect to the state" as the health systems agency we concluded was not a "state agency" in *EC-COI-85-78*.

The history of community action agencies further supports this conclusion. "Community action programs," as they were then known, resulted from sections 201 to 211 of the federal Economic Opportunity Act of 1964, Pub. L. 88-452, 78 Stat. 508, which first authorized federal grants to them. That Act's language[1] and legislative history[2] make clear Congress's intent to funnel most of these federal "anti-poverty" funds directly to organizations of low-income people rather than to municipal governments. In this respect, too, community action agencies are most similar to the health systems agencies that federal law required to be private, non-profit corporations. *EC-COI-85-78*, at 1, 3. They are unlike, for example, community development corporations established under a state statute. *See EC-COI-85-66* (such a CDC established at instance of city government is a "municipal agency").

Our fourth factor, control and supervision, is decisive here. The above federal and state statutes, and ABC's own by-laws, explicitly require that no more than one-third of the members of its Board of Directors be city officials or their designees. The remainder must be representatives of low-income neighborhoods or of private organizations including business, labor, and social service groups, and there is no suggestion here that these non-municipal representatives are in any way under the control, supervision, or influence of city officials. In this respect, ABC is similar to the non-profit holding company established by a state institution, which we recently concluded was not a "state agency" because "state-affiliated directors may comprise one-third or less of the total number of voting directors." *EC-COI-91-12*, at 5 (emphasis original; footnote omitted). ABC thus differs from such government "instrumentalities" as a government agency's retirement fund (*EC-COI-90-7*), a state college's financial support foundation (*EC-COI-90-3*), a support corporation for a city redevelopment authority (*EC-COI-88-24*), and the regional employment boards entirely selected by municipal officials under federal law (*EC-COI-89-20; 83-74*), all of which we found were controlled by the "parent" agency.

We conclude that ABC is not a "municipal agency." We therefore proceed to analyze your situation as if it were any other business organization.

Section 17

Section 17 of c. 268A prohibits a municipal employee from acting as an agent or attorney for, or receiving compensation[3] from, anyone other than the city or a municipal agency in connection with any particular matter[4] in which the city is a party or has a direct and substantial interest.

This section generally prohibits you from representing or personally appearing on behalf of a private third party (including ABC) before any municipal agency. "Personally appearing" includes any contact (telephone, letter, appearances) with the intent to influence. *EC-COI-87-27*. Thus, you may not contact on behalf of ABC any office of city government, not only the city council. For example, you could not lobby the mayor to increase the allocation of CDBG funds to ABC.

Section 17 also prohibits you from receiving compensation from ABC in relation to particular matters in which the city has a direct and substantial interest. This means that you may not be involved as a salaried ABC employee in such activities as the obtaining of city building permits and the approval of completed weatherization work by city inspectors. You may not supervise or approve the work of other ABC employees to the extent that they are engaged in these activities. However, §17 will not prevent your receiving a salary from ABC for your work on the weatherization program that is not related to these city permits and inspections, including your general management and supervision of the program, since we have previously decided that not all work done pursuant to such permits is "in relation to" the permit. *EC-COI-90-13; 87-31*.

Section 19

In relevant part, §19 of c. 268A prohibits a municipal employee from participating[5] in any particular matter in which he, or a business organization in which he is serving as an employee, has a direct or a reasonably foreseeable financial interest. The financial interest may

be of any size, and may be a positive or a negative interest. In addition, this section prohibits participating in matters which affect competitors' financial interests.

This section would prohibit you from, among other things, participating in any way in city decisions about funds for which ABC might be eligible. For example, you could not vote on or otherwise participate in any decision about a budget line item that explicitly or implicitly appropriated funds for ABC; you should leave the room before discussion of any such line item begins. *Graham v. McGrail*, 370 Mass. 133, 138, 140 (1976). You could, however, vote on and participate in decisions about the budget as a whole. *Id.* at 140. The same analysis would apply to any city decisions about allocating funds. For example, you could not participate in any decision about whether to allocate a CDBG low-income housing grant to ABC or to one of its competitors for such funds.

You are also prohibited from acting, as a city councillor, on any other matter in which you or ABC have a direct or reasonably foreseeable financial interest, such as a zoning change affecting property abutting ABC's property.

Section 20

Section 20 of c. 268A prohibits a municipal employee from having a direct or indirect financial interest in a contract made by a municipal agency of the same city, unless an exemption applies. Some of ABC's funding arrangements with the city constitute "contracts" with a municipal agency, since they require ABC to perform certain obligations in return for the funds. *EC-COI-88-1; 87-40.* However, you will have no financial interest in these contracts if, as you state, your ABC compensation will derive entirely from sources other than the city and over which the city exercises no control. *EC-COI-88-1; 87-4.* Under these conditions, §20 would not prevent you from accepting this position with ABC.

Section 20 would also prohibit you from, for example, contracting with other city agencies to provide any type of services for a fee. Nothing in your request raises any other issue under this section at this time.

Section 23

Section 23 contains other provisions which apply to you as a municipal employee. First, §23(b)(2) prohibits you from using or attempting to use your city councillor position to secure for yourself or others unwarranted privileges of substantial value ($50 or more) which are not available to others similarly situated. For example, you may not use public resources, time, facilities, personnel or equipment, to benefit ABC. This section also requires that a municipal employee use objective criteria when deciding matters before him, and must keep independent any private relationship.

Furthermore, §23(c) prohibits disclosure or use of confidential information (i.e., information which is not accessible through a public records request) to benefit yourself or others, including ABC. For example, this section would prohibit your use of materials developed on city time to benefit ABC if those materials could not be used by others in the same manner (i.e., through a public records request).

Date Authorized: January 16, 1992

[1/] *See* §§201, 202(a), 205(d) of the Act.

[2/] The principal congressional committee report asserts that "community action program" grants are "based on the belief that local citizens know and understand their communities best and that they will be the ones to seize the initiative and provide sustained, vigorous leadership." H. Rep. No. 1458, 88th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 2900, 2909.

[3/] "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).

[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).

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

CONFLICT OF INTEREST OPINION
EC-COI-92-2*

FACTS:

You are counsel for a group of private-sector individuals who are supporters of State Representative Timothy O'Leary and who wish to solicit funds to provide financial assistance to him and his family. This committee does not include any state employees and is different from Representative O'Leary's political committee organized under G.L. c. 55. Representative O'Leary has authorized this committee's activities, and has consented to receive funds that it raises.

The committee proposes to accept contributions of less than $50 from any person, and contributions above that amount from anyone other than:

(a) persons with an interest in legislative business (as defined below), including legislation that has (i) come before the Ways and Means Committee[1/] in 1991, (ii) been presented to the House floor in 1991, or (iii) been filed for consideration in the 1992 legislative year;

(b) legislative agents registered on any such measures; and

(c) state employees (including state legislators).

Contributions from legislative agents who are not included in (b) will be limited to $100. To ensure that contributions meet these conditions, you have devised a disclosure form for all contributors, asking among other things whether they "have an interest (other than a general one shared by other citizens) in a bill, an appropriation, or another matter (such as a constituent service) which Mr. O'Leary considered in 1991 or may consider in 1992 or some future date." You propose to disclose to this Commission a list of donors who arguably have interests in legislative matters.

The funds are being solicited, and received by Representative O'Leary, because of his serious financial difficulties. He is currently under indictment in Middlesex County for, among other things, embezzling his legal clients' funds and using his campaign finance committee's funds for personal purposes. The proceeds of this solicitation will be used principally to aid in his legal defense and to make restitution to his legal clients. They are not intended to supplement his salary as a public employee. They will also not be used for any political purpose (i.e., for the purposes of G.L. c. 55, as interpreted by the Office of Campaign and Political Finance).

The solicitation is not occurring through a formal, mailed letter. Rather, a small group is approaching Representative O'Leary's family, friends and professional acquaintances, including lawyers who know and sympathize with him. No reference is made to his position as a State Representative. Therefore, you have reason to believe that contributions received from the solicitation are not connected with Representative O'Leary's official acts.

QUESTION:

Does G.L. c. 268A allow the proposed solicitation and receipt of funds on Representative O'Leary's behalf?

ANSWER:

Any such solicitation and receipt of funds must comply with all the following prohibitions and limitations.[2/]

DISCUSSION:

As a State Representative, Mr. O'Leary is a "state employee." G.L. c. 268A, §1(q).

Section 3(a) of G.L. c. 268A, in relevant part, prohibits anyone from directly or indirectly giving, offering, or promising anything of substantial value to a state employee "for or because of any official act performed or to be performed by such an employee," otherwise than as provided by law for the proper discharge of official duty. Section 3(b) similarly prohibits a state employee from directly or indirectly asking, soliciting, seeking, accepting, receiving, or agreeing to receive anything of substantial value "for or because of any official act or act within his official responsibility performed or to be performed by him." Anything valued

at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*

This Commission has consistently read §3 broadly to effectuate the legislative purpose. As the Commission stated *In re 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. *Public Enforcement Letter 92-1*, 1991 SEC 548, 558 (December 9, 1991). As the Commission explained in *Advisory No. 8*:

> [E]ven 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, we 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.[3/]

Thus, in order to avoid violating §3, Representative O'Leary must avoid accepting any such contribution "for or because of any . . . act within his official responsibility." In the Commission's view, such official acts by a state legislator include constituent services. *Public Enforcement Letter 92-1*, 1991 SEC at 559-60. We have thus adopted a comprehensive test for an "interest in legislative business" that asks whether the giver has any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus, motives for giving include expressing gratitude for past acts or engendering future "good will."

Therefore, Representative O'Leary must not accept any contribution of (or any contributions aggregating) $50 or more from any person or entity that discloses any such interest, or that he otherwise knows has such an interest, such as any state employee (who has an automatic interest in state appropriations). It follows that you must amend your disclosure form to include the above definition of "interest in legislative business" in substantially the words used here, and without limitation to the years 1991 and 1992.

Furthermore, §3 does not confer a "right" to accept up to $49.99 from every individual with an interest in legislative business. Unlike the campaign contribution limitations in G.L. c. 55, §§1, 7, the prohibition on solicitation or receipt by public employees of "anything of substantial value" in G.L. c. 268A, §3(b) omits any reference to donation by each "individual." Rather, §3(b) emphasizes the nexus between the gift or gifts and the "official act or act within [the] official responsibility" of the employee. Therefore, even if gifts originate from several individuals with a common interest in legislative business (as defined broadly above), or if persons with such a common interest jointly solicit gifts, we will aggregate the total amount of such gifts based on a common interest in applying the "substantial value" test of §3(b). *See In re Flaherty*, 1990 SEC 498 (aggregating value of free sports event tickets received from two individuals with common interest). For example, such aggregation would certainly occur if partners in a law firm or officers of a corporation all contributed because of their common interest in the same legislative matter, even if (as explained above) the "matter" were simply the hope of future favorable treatment by Representative O'Leary in some constituent service. Moreover, individuals with a common interest in the same legislative subject need not work for the same business organization. For instance, we would aggregate donations from members of an association of securities dealers if they had

a common interest in opposing legislation regulating their activities. Although none of the facts in your opinion request present any such question, you should seek further advice from us if such facts arise.

In addition, any legislative agent who may somehow not have an interest in any legislative business would nonetheless be limited to giving $100 in any calendar year. G.L. c. 268B, §6. Of course, virtually all legislative agents will have some interest in legislative business, and so could not give $50 or more. We read the more fact-specific $50 limit of G.L. c. 268A, §3 as controlling the more general $100 limit of G.L. c. 268B, §6.

Section 23 of G.L. c. 268A contains general standards of conduct that apply to all public employees, and imposes other limitations in this situation. Section 23(b)(2) provides that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. We have interpreted this provision to prohibit use of official resources or title to further a private or personal interest. *E.g., EC-COI-90-9* (public employee could not invite to campaign meeting vendors with whom his agency contracted); *Public Enforcement Letter 89-4* (state employee could not use official stationery and state resources to promote private trip resulting in free travel for him).

Therefore, Representative O'Leary must take care that he, and any fundraising committee he authorizes or consents to receive funds from, do not use any state facilities or resources (including telephones, office supplies, copying or printing facilities, and the time of state employees), nor his title as a State Representative, to solicit these funds or to promote this fundraising effort. He must also avoid "targeting" for solicitation any person or class of persons with an interest in legislative business, as defined above. *See Compliance Letter 82-2*, 1982 SEC 80 (solicitation of municipal vendors and employees). To the extent that he knows or learns that persons have such an interest, he is prohibited from soliciting them at all, and from receiving funds "of substantial value"[4/] from them. *See EC-COI-87-7; Public Enforcement Letter 88-1.* Your disclosure form should aid in avoiding such solicitations.

Section 23(b)(3) prohibits a public employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties. An elected official can avoid violating this provision, however, by publicly disclosing the facts that might otherwise lead to such an impression. Therefore, Representative O'Leary should disclose his fundraising plans in a public letter to the Clerk of the House of Representatives and to this Commission. Since §23(b)(3), unlike §§3 and 23(b)(2), does not exempt gifts of less than $50, he should also disclose in a similar public fashion a list of <u>all</u> contributors to this fundraising effort who have disclosed, or who he knows have, an interest in legislative business, with the amount each has donated and the nature of the interest.[5/] In addition, if a person who did not have an interest in legislative business at the time of the gift later acquires such an interest to Representative O'Leary's knowledge, §23(b)(3) also requires that he disclose in a similar public fashion that interest, the giver's name, and the amount of the gift.

In conclusion, because we are concerned that any solicitation of funds by a public employee raises serious problems under our statute, we emphasize the limited nature of the factual circumstances and of our advice here. These funds are being given because of Representative O'Leary's legal difficulties, principally to assist with the costs of representation and to make restitution to his former clients; they are not intended as a supplement to his salary as a public employee. As explained in detail above, any solicitation or receipt of funds on Representative O'Leary's behalf must satisfy all the following prohibitions and limitations:

1. Individuals who disclose or who are known to have any interest in legislative business may not be solicited at all. "Interest in legislative business" means any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus, motives for giving include expressing gratitude for past acts or engendering future "good will."

2. A gift of $50 or more may not be accepted from anyone with such an interest in legislative business, or from any combination of persons with a common interest in the same legislative business.

3. Representative O'Leary must disclose, in public letters to the House Clerk and this Commission:

a) his solicitation plans;

b) the names of, amounts donated by, and interests of all individuals who have disclosed, or who he knows have, an interest in legislative business, as defined above; and

c) the name of, amount donated by, and interest of anyone else who acquires an interest in legislative business after making a gift.

Date Authorized: January 16, 1992

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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/]Representative O'Leary recently resigned as Vice-Chairman of the House Committee on Ways and Means.

[2/]This advice is limited to the conflict of interest law, G.L. c. 268A, and the financial disclosure law, G.L. c. 268B, the two statutes about which the Commission is authorized to give advice. *Id.* §3(g). We cannot advise you about any other requirement of law. In particular, we understand that you have also sought and received advice about the state campaign finance law, G.L. c. 55, from the responsible agency, the Office of Campaign and Political Finance. *Id.* §3.

[3/]"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 re Flaherty*, 1990 SEC 498, 500 n.6.

[4/]We again emphasize what we said about §3, which also applies to our §23(b)(2) analysis: to the extent that the individuals soliciting or giving funds share a common interest in legislative business, we will aggregate the amounts of those funds in applying the statute's "substantial value" test.

[5/]Representative O'Leary must, of course, also disclose in his annual statement of financial interests all such contributions that are "gifts" aggregating more than $100 in a calendar year, together with the name and address of the donor and the fair market value, if the donor has a direct interest in legislative business. G.L. c. 268B, §§1(g), 5(g)(5). Based on the discussion above, there should be no such donors.

CONFLICT OF INTEREST OPINION
EC-COI-92-3

FACTS:

You are a state employee interested in exploring the possibility of employment with the federal government. You have provided the following background. You are currently responsible for certain litigation on behalf of the Commonwealth. This litigation has been undertaken jointly with two agencies of the federal government, Agency X and the Department of Justice (the Department). A settlement agreement has been entered into with a portion of the defendants. An allocation agreement has also been signed between the Commonwealth and Agency X which establishes the formula for dividing the monies recovered in settlement. You inform us that this allocation agreement does not require Court approval. As we understand it, the allocation agreement involves the use of a formula to divide the proceeds from the litigation. You state that, to your knowledge, this allocation agreement would not be re-negotiated, except as an extraordinary event, although the absolute dollar figure may change if additional proceeds are added to the settlement.

Until recently, it appeared likely that the litigation would soon be completed. However, a third-party recently challenged the settlement agreement and an appeal was filed in the First Circuit. No date for oral argument has been set and the case could continue for months without a final decision on the validity of the settlements. You maintain that the financial issues and "interests" of the public will have been settled by written agreement on file with the Court. It is your opinion that only in the event that the governmental entities lose the appeal, and the settlements are thereby overturned, is there any expectation that the "financial interests" of the public and the settlement agreements would have to be re-opened for negotiation.

You have also informed us that the litigation has not involved any United States Attorney's Office, nor will any such office receive any part of the settlement proceeds

under any scenario. To your knowledge, all United States Attorney's Offices conduct hiring practices independent of the Department although apparently routine background checks are handled in Washington. To your knowledge, the Department does not exercise oversight or control over the hiring or daily operations of United States Attorney's Offices. You suggest that there is not the same unity of interest or control that characterizes, for example, the role of a parent corporation that would reasonably associate these two offices as a single "person or organization."

With your consent, this Commission contacted the United States Attorney's Office in Boston in an effort to understand the role of the Department in the hiring process. We were informed that the Department and the Federal Bureau of Investigation conduct a background check on all applicants to United States Attorney's positions. The Department's input into the hiring decision is limited, however, to a veto of those persons who do not pass the background check. The Department otherwise plays no role in recommending whether a candidate is hired. The candidate must, however, receive a commission from the United States Attorney General, and, as we understand it, can be terminated only by the Department, not by the local United States Attorney.

QUESTION:

Given the above facts, what restrictions does the conflict of interest law place on you if you should seek employment with the federal government at this time?

ANSWER:

The conflict of interest law would require you to make written disclosures to your appointing authority prior to contacting federal agencies under certain conditions, as described below.

DISCUSSION:

You are a state employee for purposes of the conflict of interest law. As such, two provisions of the conflict of interest law, §6 and §23, apply to you in your current situation.

Section 6

Section 6 of c. 268A prohibits a state employee from participating[1/] in any particular matter[2/] in which he, an immediate family member, or any business organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or a reasonably foreseeable financial interest. You should note that the financial interest may be of any size, and may be either positive or negative. *See, e.g., EC-COI-91-14.*

Section 6 further provides, however, that:

> Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either
>
> 1. assign the particular matter to another employee, or
>
> 2. assume responsibility for the particular matter, or
>
> 3. make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the Commission for a period of six years.

The reasons for the §6 disclosure/determination process were articulated in *Commission Advisory No. 14* (Negotiation for Prospective Employment). *Advisory No. 14*, quoting from the Report of the Special Committee on the Federal Conflict of Interest laws of the Association of the Bar of the City of New York, *Conflict of Interest and Public Service* 280 (1960), stated that:

> [t]he risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter

around, the greatest public risks arising from post-employment conduct may well occur during the period of government employment.

The Commission has treated prior violations of this section as a serious offense. Even where no evidence is found that the state employee has acted to provide any special treatment to the prospective employer, a fine will be imposed if the state employee has entered into negotiations with that prospective employer while participating in a matter affecting its financial interests. *See Disposition Agreement, Docket No. 421, 1991* ($500 fine); *see also 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"); *1986 SEC 253, 255* (these disclosure provisions are more than mere technicalities because they protect the public interest from potentially serious harm. The procedures are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision).

In the present case, you participate as a state employee in litigation in which at least two federal agencies have an interest. Consequently, issues under this section would need to be addressed if you were to negotiate for employment with the federal government while the litigation is ongoing or the settlement agreement remains open to challenges. *See EC-COI-82-8; Commission Advisory No. 14.*

Several points should be addressed here. First, §6 draws a clear distinction between the financial interests of a "business organization" in which the state employee is serving as an officer, director, trustee, partner, or employee, and those financial interests of a "person or organization" with whom the state employee is negotiating for prospective employment. *See* Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. L. Rev. 299, 357-358 (1963) ("there is no evident justification . . . for reading [the terms person or organization] to mean a person engaged in business or a business organization." Emphasis in original).[3/] This distinction, of course, makes it possible to cover a broader class of entities in the negotiation for employment context -- including governmental agencies and charitable entities, for example. Consequently, our focus in the present case is whether the federal government is a person or an organization (or organizations) within the meaning of this section.

Second, a "person" is defined, by statute, as a corporation, society, association or a partnership. G.L. c. 4, §7, cl. twenty-third (definitions of statutory terms; statutory construction). The term does not, however, include either governmental subdivisions or governmental agencies. On the other hand, an "organization" does include governments, governmental subdivisions, and governmental agencies, in addition to corporations, business trusts, estates, partnerships or associations, two or more persons having a joint or common interest, or any other legal or commercial entity. *Black's Law Dictionary*, Fifth Edition, 1979. Consequently, in the present case, §6 is implicated because the federal government is considered an organization within the meaning of this section even though it is neither a business organization nor a person.

Third, the Commission concludes that the entire federal government is not a single organization for purposes of this section. A contrary position would mean that any state employee who has any dealings with a branch or division of the federal government, no matter how minimal the dealings, no matter how distinct the agency, and no matter how far removed from the particular matter in question, would find that §6 is implicated by each and every contact concerning prospective employment made with every other branch of the federal government. For the reasons stated below, such a result is both unreasonable and unnecessary.

The conflict of interest law must be given a workable meaning. *Graham v. McGrail*, 370 Mass. 133, 140 (1976). In light of the fact that the definition of an organization can be applied to each separate governmental entity without difficulty, and in light of the distinctions already made by this Commission between various agencies of state governments, we find that the federal government is not a single organization within the meaning of §6. *See, e.g., EC-COI-91-5; 90-5* (for purposes of §4 of the conflict of interest law, the state agency served by a special state employee was the Board with which he had contracted, not the supervisory agency within which the Board was located); *85-35* (DSS special state employee could not receive compensation in connection with matters which were referred by DSS; however, that same restriction would not apply to clients referred from DMH, even though both DSS and DMH are part of the same Secretariat); *84-146* (for purposes of determining the "governmental body" under §5(e), the governor's office is a distinct agency from the various Secretariats . . . the critical focus is on the name and

organizational location of the agency, not on the functional accountability of one agency to another . . . in view of the intervening state agency layers between the budget bureau, an agency within Administration and Finance, and the governor's office, the governmental body is the governor's office, rather than the entire executive administration).[4/]

The above cases illustrate that the Commission has, from time to time, considered how closely allied one agency is to another for purposes of determining agency separateness when applying various sections of c. 268A. In light of the above, the Commission concludes that, for purposes of the employment negotiation context under §6, it will look to whether one agency of government has substantial control over the hiring process of another agency. If substantial control exists, the two agencies will be treated as if they are a single organization for purposes of §6.

In the present case, the Department includes, among other divisions, the Federal Bureau of Investigation, the Office of Immigration and Naturalization, and the United States Attorneys' Offices. Each of those agencies has a distinct function and separate mission from the Department although each agency ultimately reports to the Department. Accordingly, the Commission finds that each such agency should be treated as a separate organization for hiring purposes unless the Department can be shown to have substantial control over the hiring process within each of these agencies, whether by statute or by actual practice.[5/]

As we understand the facts in the present case, the Department has little input into the hiring practices of a given United States Attorney's Office. Accordingly, the Commission finds that United States Attorney's Offices are separate and distinct organizations from the Department for purposes of the §6 employment negotiation context. This conclusion results from the fact that the Department does not have substantial control over the hiring of United States Attorneys. We find that the separation of hiring functions protects the public's interest from the harm contemplated by the restrictions established in §6.

Consequently, employment negotiations with Agency X or the Department would raise issues under this section because both of those agencies have an interest in the litigation in question. On the other hand, negotiations for employment with other federal agencies (i) which do not have a interest in the litigation, or (ii) whose hiring procedures are not substantially controlled by Agency X or the Department, will not raise issues under this section.

However, in order for §6 to be applicable it is not enough that the agency in question has an interest in the litigation. The interest must be a financial one. For the reasons stated below, we conclude that individual governmental agencies involved in litigation have a financial interest in that litigation even if the agency itself will not be receiving the benefit of the proceeds derived from the litigation.

In the present case, you maintain that none of the agencies in question will share in the proceeds of the litigation because all monies will ultimately be deposited into the federal treasury. You have also suggested that the allocation agreement signed by the agencies in question, in effect, insulates the agencies from any financial interest. That agreement splits the litigation proceeds among the various agencies by way of a set formula. In other words, you maintain that the allocation formula eliminates any "financial interest." However, we conclude that any federal agency actively involved in pursuing the litigation has a direct or a reasonably foreseeable financial interest in the outcome of that litigation because the federal government has such an interest. The federal government's financial interest will be attributed to the agency or agencies actively involved in pursuing that litigation on the federal government's behalf. The federal government would receive nothing unless the agency or agencies involved pursued the litigation. Accordingly, §6 is implicated in the present case and would require a public disclosure once you reach the point of negotiations with an interested federal agency. (A different rule applies concerning the application of §23(b)(3) as described below.) Based upon your facts, the two agencies which trigger the §6 disclosure requirements are Agency X and the Department.

Section 23

In addition to the above, §23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person 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. This is the so-called "appearances" section of c. 268A. The appearance of a conflict of interest can be dispelled by making a full written disclosure to the state employee's appointing authority.

This section has been cited in at least two recent Commission cases which have involved a public employee who has had official dealings with third parties while simultaneously having private dealings with these same parties. *See In re Keverian*, 1990 SEC 460; *In re Garvey* 1990 SEC 478. Specifically, *In re Keverian* 1990 SEC 460, 462 stated the reasons why §23(b)(3) is implicated whenever a public employee has a private relationship with a third party:

> In the Commission's view, the reason for this [§23(b)(3)] prohibition is two fold: first, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cut-backs are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy any such relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse.

A §23(b)(3) disclosure is necessary whenever there exists a potential for serious abuse of a public position by a public employee. This potential for serious abuse need not involve any financial interest on the part of the other party.

You maintain that you can no longer influence the settlement of the litigation and would therefore argue that no "appearance" of a conflict of interest will arise requiring your disclosure. However, we find that, because the settlement has now been challenged, and because you are required to continue having overall responsibility for the matter, an appearance of a conflict of interest arises if you were to contact an interested federal agency for employment.

This conclusion is based upon the fact that it may appear that you would somehow act in a manner designed to place your own interests ahead of those of the Commonwealth, even if, in fact, no such bias exists. For example, a situation might arise where the federal government agency wishes to settle the litigation as to a challenger, but the Commonwealth's interests require further actions. It could appear that you might agree with the federal agency's assessment in an effort to curry favor with the very people with whom you are seeking employment. Again, this results even if no financial interest is present. Consequently, a §23(b)(3) disclosure is necessary in order to dispel any appearance of a conflict of interest.

You should also be aware that, while the §6 disclosure requirements are triggered at the point of negotiations for a specific job, *see Commission Advisory No. 14*, the point at which an appearance of a conflict of interest arises for §23(b)(3) purposes is at the moment that you contact, for employment, an interested federal agency while you are responsible for any aspect of the conduct of the litigation.

Please also be aware that §23 has application to you whenever you must officially participate in matters involving persons or organizations with whom you have recently terminated negotiations. *See Commission Advisory No. 14.* In addition, §23(c) prohibits the use or disclosure of confidential information to benefit a private interest. Confidential information is any information which cannot be obtained through a public records request.

Finally, certain restrictions will apply to your activities after you leave state service. Those restrictions are found in G.L. c. 268A, §5. You should make an additional opinion request if you seek guidance on §5.

CONCLUSION:

In summary, based upon the facts you have provided to this Commission, a §6 disclosure is not necessary if you negotiate for employment with a federal agency unless (i) that agency has a financial interest in, or is actively pursuing, the litigation in question, or (ii) the agency's hiring procedures are substantially controlled by an agency described in (i) above. We find, for example, that no §6 disclosure is necessary if you were to negotiate for employment with a United States Attorney's Office even though the Department has a financial interest in the litigation unless the United States Attorney's Office in question is actively involved in pursuing the litigation. However, a §6 disclosure is necessary if you begin negotiations with either Agency X or the Department.

Further, a disclosure under §23(b)(3) would be required whenever you contact, for employment, a federal agency which is a party to, or has some other interest in, the litigation, regardless of whether the agency has a financial interest. We find, for example, that Agency X and the Department have such an interest.[6/]

On the other hand, neither §6 nor §23(b)(3) is implicated where (i) the settlement agreement is finally approved by the Courts and/or no legal challenges or appeals remain; or (ii) you contact a federal agency which has no interest (financial or otherwise) in the outcome of the lawsuit, including a United States Attorney's Office which has had no involvement with the litigation.

Date Authorized: February 19, 1992

[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/]Although this Commission has held in previous opinions that municipalities and municipal agencies are "business organizations" within the meaning of §6, *see, e.g., EC-COI-81-56; 81-62; 82-25; 85-67; 89-2; 90-4; 90-8*, other governmental agencies apparently are not considered "business organizations." For example, while municipalities are established for the purpose of conducting business, other public entities (the Commonwealth or its agencies, for example) appear not to be so established. *See G.L. c. 40, §1*, which establishes that cities and towns are "bodies corporate." *See also, Attorney General Conflict of Interest Opinion No. 613*, February 5, 1974. *Cf. The Preamble to the Constitution of the Commonwealth of Massachusetts*, which establishes the Commonwealth as a "body politic [ ] formed by a voluntary association of individuals: it is a social compact"; *Attorney General Conflict of Interest Opinion No. 30*, April 25, 1963 (state agencies are not business organizations within the meaning of §6). However, because the present opinion does not concern the meaning of a business organization, we need not reach any conclusion on the meaning of any such distinctions.

[4/]Nothing in this opinion should be construed as holding that the various subsidiaries, divisions, or the like, of a corporation should be treated as distinct and separate entities for purposes of negotiating for prospective employment. For example, the Commission would conclude that a state employee who is participating in a matter involving one of General Motors' wholly-owned manufacturing subsidiaries must observe the §6 disclosure and determination procedures if he is simultaneously negotiating for employment with another division of the same company. This is because the parent company is a person within the meaning of this section. On the other hand, various governmental agencies can be treated as separate and distinct entities within the definition of an "organization." The Commission finds that the public interest is not injured by establishing a distinction between private corporations and agencies of the federal government for purposes of the §6 employment negotiation context.

[5/]Nothing in this opinion should be construed to find that a governmental agency which has branches in different jurisdictions can be further distinguished by locale or internal division. For example, if Agency X is one agency which triggers the application of §6 in your case, we would find that it makes no difference whether your work distinctly involved only one branch or division of Agency X, or its main office in Washington. The entire agency would be considered a single organization for the purposes of §6. Similarly, unless it is clear that the [name deleted] Division of the Department is a distinct and separate agency from the Department itself (that is, unless the Department does not have substantial control over the hiring within the Division), the entire Department will be treated as a single organization for purposes of §6.

[6/]To the extent that a §23 disclosure is necessary once you contact the agency anyway, you may choose to file a §6 public disclosure. The §6 disclosure would require your appointing authority to provide you with written guidance as to your continued participation in the litigation. A §23(b)(3) disclosure would not require your appointing authority to provide that guidance.

CONFLICT OF INTEREST OPINION
EC-COI-92-4*

FACTS:

You are the Secretary to the Board of Trustees of Roxbury Community College ("Roxbury" or "the College"). You have submitted, on Roxbury's behalf, the following facts. In making this request, you have waived confidentiality. We also understand that this request has been submitted to us with the knowledge and permission of Dr. Hubert Jones.

In the wake of the termination of the previous president of Roxbury, the Roxbury Trustees, while searching for a new president for the College, believe it incumbent upon them to take advantage of this interim period to undertake an independent and professional assessment of the policies, operations of, and educational programs offered at Roxbury. In order to accomplish those tasks, the Trustees have decided to appoint an Acting President. Several candidates, including Dr. Hubert Jones of Boston University, either applied for the position or were brought to the attention of the Board as qualified and interested in the position. Roxbury's Trustees reviewed the submitted resumes and interviewed two candidates, one of whom was Dr. Jones.

You inform us that Dr. Jones is the Dean of the Boston University Graduate School of Social Work and a professional educator and college administrator with a long and distinguished record of achievement and accomplishment in the fields of education and educational administration. Dr. Jones also shares the Roxbury Trustees' view that the College should take advantage of this interim period to engage in a thorough-going self-study and to take steps to correct any misdirection or other problems in mission, policies, administration or operations that may be found to exist.

The Roxbury Trustees, finding Dr. Jones to be the candidate best able to undertake the work just described for the College, offered him the position of Acting President. Dr. Jones then obtained a paid leave of absence from his present employer, Boston University, and accepted the position. We understand that Dr. Jones has no written contractual right to take a paid leave of absence from Boston University. However, Boston University has, from time to time, granted paid leave in the past to certain of its employees on a selective basis. We also understand from you that Dr. Jones' paid leave of absence was granted by Boston University prior to his negotiations over the details of his employment arrangement with Roxbury, but that Boston University was aware of the reasons why Dr. Jones sought the paid leave.

The arrangement worked out between the Roxbury Trustees and Dr. Jones is as follows. For a period of several months, Dr. Jones will serve as Acting President of Roxbury while on a paid leave of absence from his position of Dean of the Graduate School of Social Work at Boston University. During this time, Dr. Jones will work at his Roxbury responsibilities at least four days per week, and he will be available to Boston University for any matters which may arise in connection with the Graduate School of Social Work up to one day per week. Dr. Jones will serve at Roxbury on a pro bono basis, not receiving any salary or benefits from Roxbury, other than reimbursement for expenses incurred in the course of his duties for Roxbury. It is understood and agreed that, notwithstanding the paid aspect of his leave from Boston University, Dr. Jones will serve as Acting President of Roxbury as if he were a full-time employee of Roxbury, with his full focus and loyalty to the College. Thus, as Acting President of Roxbury, Dr. Jones will not be acting in any capacity relating to Boston University, nor will Boston University or any other personnel of the University have any role in Dr. Jones' position as Acting President or the policy and management of the affairs of Roxbury, except as may be expressly approved by the Roxbury Trustees. (You inform us that from time to time over the years, Boston University personnel, as well as personnel from other area colleges and universities, have consulted with or advised Roxbury on various matters.) Finally, Dr. Jones' service at Roxbury will be at the pleasure of the Trustees of the College. The Trustees retain the right to terminate Dr. Jones' services at any time. These terms and conditions were negotiated between the College's Trustees and Dr. Jones without input from Boston University.

Dr. Jones has served as a Trustee of the Roxbury Community College Foundation. He has stated his intention to resign from the Foundation Board as soon as his appointment as Acting President of Roxbury is approved. He has so notified the Foundation Board, which understands and also supports the arrangement. Accordingly, Dr. Jones has not asked the Commission to consider what effects, if any, his membership on the Foundation would have on him under the conflict of interest law while serving as Acting President of Roxbury.

The College does not offer any program in competition with the programs of Boston University's Graduate School of Social Work. Moreover, the College is not aware of any pending proposals that would arise during Dr. Jones' limited period of service for the College that would conflict with programs of Boston University. Further, during the period of his service as Acting President of Roxbury, Dr. Jones would not participate in any negotiations with any state agencies on behalf of Boston University.

In addition, Boston University has disclosed to this Commission that a wholly-owned subsidiary has a contract with Roxbury to operate Roxbury's bookstore. We have been advised that the contract, by its terms, will not be up for renewal or consideration during Dr. Jones' tenure as Acting President. In any event, we have been informed that Dr. Jones will not participate, as Acting President, in any discussions or actions which concern that contract or the bookstore.

The Commission has conducted no independent investigation of the facts. However, we understand that Boston University concurs with the facts as described herein by you on Roxbury's behalf.

QUESTION:

Is the proposed arrangement between Dr. Jones and Roxbury Community College permissible within the confines of the conflict of interest law?

ANSWER:

Yes, provided that a statute or regulation authorizes the arrangement. In addition, certain other restrictions are applicable to Dr. Jones as described herein.

DISCUSSION:

In his capacity as Acting President of Roxbury Community College, Dr. Jones would become a "special state employee" as that term is used in the conflict of interest law.[1] As such, certain provisions of G.L. c. 268A, the conflict of interest law, would become applicable to Dr. Jones, as discussed below.[2]

Section 4

Except as otherwise provided by law for the proper discharge of official duties, §4 of c. 268A prohibits a state employee from acting as agent or attorney for, or being compensated by, anyone other than the Commonwealth in relation to any particular matter[3] in which the Commonwealth or a state agency is a party or has a direct and substantial interest. As to special state employees, this section will apply to only those matters in which he participates[4] as a state employee, or which are under his official responsibility[5] as a state employee, or which are pending in his agency. This last restriction applies only if he serves as a special state employee for more than sixty days in any consecutive period of three hundred and sixty-five days. *See EC-COI-91-5; 85-49.*

Section 4, in brief, is designed to prohibit divided loyalties. In other words, a state employee is a state employee first and foremost and owes a duty of loyalty to the Commonwealth. Consequently, §4 is designed to prohibit an individual from splitting his loyalties between a state job and a private interest. *See generally EC-COI-90-12; 90-16; see also* Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 322 (1965) (whenever a person is both a private and a public employee, "[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result").

This section has two pertinent applications to Dr. Jones' arrangement. First, Dr. Jones, as a special state employee, cannot represent (whether or not for compensation) Boston University, or any non-state third party, before any state agency if the matter on which he is personally appearing is one in which he participates as Roxbury's Acting President, or one which falls within his official responsibility as Roxbury's Acting President, or one which is pending in Roxbury (provided that the sixty day period is met). You should know that "personally appearing" includes not only physical appearances, but also telephone contact, correspondence, or any contact made with the intent to influence. *EC-COI-87-27.*

Second, and more critical to the entire proposed arrangement itself, Dr. Jones cannot receive compensation[6] from Boston University, or any non-state third party, "in relation to" his pro bono services at Roxbury because the Commonwealth has a direct and substantial interest in who is chosen to serve as Roxbury's President or Acting President. The concern is that Dr. Jones might feel beholden, first and foremost, to the

private employer who is continuing to pay his salary (Boston University), at the expense of his public employer (Roxbury).

You maintain that the restrictions of §4 do not apply to the present arrangement because Dr. Jones' paid leave was granted by Boston University "by virtue of his tenure and seniority at the institution and his agreement to be available to the School of Social Work on a minimal but on-going basis throughout the leave." It is clear, however, that Dr. Jones has no specific contractual or other entitlement to a paid leave of absence. Consequently, we must conclude that absent a prior written policy or contractual arrangement which explicitly establishes the conditions under which Boston University employees are entitled to take a paid leave of absence, Dr. Jones' paid leave case was granted "in relation to" a particular matter in which the Commonwealth is a party or has a direct and substantial interest.

Any other determination in the present case would mean that the Commission, in all similar future cases, would be required to determine the subjective intention of the parties who seek to create such arrangements. In other words, we would have to determine whether paid leave was given in relation to the state employee's work on a case-by-case basis, necessarily expending limited staff resources to investigate all of the circumstances surrounding the proposed arrangement. On the other hand, by requiring that paid leave policies be established in writing and in advance of a request for such leave, we can establish a standardized way to review all future situations on an equal basis. That review could then clearly establish whether a given paid leave was granted in relation to the state services to be provided.[7/]

Consequently, because Boston University has no prior written policy which clearly articulates the conditions under which Dr. Jones is eligible for a paid leave, we must find that the above §4 analysis is applicable. Therefore, the contemplated arrangement is prohibited by §4 because Boston University would be paying Dr. Jones compensation in relation to his services at Roxbury.

Notwithstanding the above, however, §4 provides that the arrangement would be permissible if it were "as provided by law for the proper discharge of official duties." In other words, if Dr. Jones' arrangement with Boston University is authorized by statute or regulation, §4 would not prohibit it. *See EC-COI-84-119* (enabling statute contemplated the type of employment arrangement proposed whereby a private corporation would provide the services of one of its employees to a state agency and would continue to pay his salary and benefits); *EC-COI-88-5* (regulation can substitute for statutory requirement that an arrangement be "as provided by law").

In *EC-COI-88-5*, this Commission recognized that the "as provided by law" language of §3 can be met by the promulgation of a regulation. Similarly, we hold here that the "as provided by law" language of §4 can also be met by a regulation duly promulgated by a governmental agency authorized to do so.

For example, a regulation which would authorize the contemplated arrangement as "provided by law for the proper discharge of official duties" might include the following:

> the community colleges, from time to time as necessary to carry out and discharge their official duties, may appoint volunteer administrative and/or other personnel who shall receive no compensation from the Commonwealth; provided, however, that such volunteer personnel may receive compensation from their private employer, if any, for the period of time during which they are providing voluntary services to the Commonwealth.[8/]

Accordingly, if an appropriate statute or regulation authorizes the proposed voluntary arrangement -- that is, Dr. Jones continues to receive compensation from Boston University while providing voluntary services at Roxbury -- §4 would not prohibit the proposed arrangement on the terms described above.[9/]

Finally, assuming that Dr. Jones' arrangement is permissible as described above, other provisions of the conflict of interest law will apply to Dr. Jones.

Section 6

Section 6 prohibits a state employee from participating in a particular matter in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. Such a financial interest can be of any size and may be either positive or negative.

This section would prohibit Dr. Jones from acting in his state position at Roxbury in any matter which could affect Boston University's financial interests. You have advised the Commission that Dr. Jones will not so participate, including matters involving Roxbury's bookstore or its contract with a wholly-owned Boston University subsidiary to operate that bookstore. If, however, such a matter should come before him, he is advised that he must disclose the nature of the matter and the financial interest to the State Ethics Commission and his appointing authority (the Board of Trustees). The Board must then either (i) assign the matter to another employee; (ii) assume responsibility for that matter itself; or (iii) make a written determination that Boston University's interest is not so substantial as to be deemed likely to affect the integrity of the services the Commonwealth may expect from Dr. Jones. *See EC-COI-85-32.* Both the disclosure and the determination must be filed with this Commission as public documents. *G.L. c. 268A, §6(a)(3); EC-COI-90-12; 90-16.*

Section 23

Finally, there are several sections of §23 of which Dr. Jones should be made aware. First, §23(b)(2) prohibits a state employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value ($50 or more) which are not available to others similarly situated.

This section would, for example, prohibit the use of public resources to benefit a private interest. Also, in making any official decisions, he must keep separate his own private interests, i.e., that Boston University is continuing to pay him during his leave of absence. *See EC-COI-91-3.* He may not use state time, personnel, facilities, equipment (telephones, copiers, fax machines), titles, etc. in conducting a private business, and must arrange his schedule with his private employer, Boston University, so that it does not conflict with his responsibilities at Roxbury. *EC-COI-91-6; 91-7.* For example, he must use care that, in the event of an emergency at Boston University which demands his attention, Dr. Jones not forego his obligations at Roxbury in order to respond to Boston University's needs. He may, of course, work on such matters on his own time.

Section 23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person to conclude that any person could improperly influence or unduly enjoy his favor in the performance of his official duties. This appearance of a conflict of interest can be dispelled, however, by making a full written disclosure to the appointing authority concerning the facts of the matter. Nothing in your letter raises an issue under this section at this time.

In addition, §23(c) prohibits a state employee from disclosing or using confidential information gained on his state job for a private benefit. Confidential information is any information which cannot be obtained through a public records request.

You should also be aware that §7 of c. 268A prohibits a state employee from having a direct or an indirect financial interest in a contract made by a state agency, unless an exemption applies. For example, Dr. Jones, as a special state employee at Roxbury, cannot provide any compensated services to other state agencies (whether on his own or through Boston University), unless he first complies with an exemption found in §7. Two sub-sections in particular, §7(d) and §7(e), apply to special state employees, although other exemptions may also apply. Nothing in your opinion request raises an issue under this section at this time. Please renew your opinion request if you seek further guidance on this section.

Finally, certain restrictions will arise under G.L. c. 268A, §5 after Dr. Jones completes his services at Roxbury. He should renew his opinion request if he has any specific questions concerning §5.

Date Authorized: February 19, 1992

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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/ "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).

Dr. Jones' status as a special state employee results from paragraph (2)(a), above. Accordingly, a proper disclosure of such classification or permission must be filed with this Commission. If you so choose, we can treat your opinion request as the appropriate disclosure.

[2/]You should also be advised that the reporting requirements of G.L. c. 268B, §5, the financial disclosure law, will be applicable to Dr. Jones if he serves more than thirty days in any calendar year in certain designated major policy-making positions, including the Acting Presidency of Roxbury. He may wish to contact the Commission's Financial Disclosure Division for more detailed information as to his obligations and rights under c. 268B.

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

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

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

[6/]"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).

[7/]We emphasize that a written policy would not be required in those situations where a private employer intentionally seeks to fund a state position by supplying one or more of its employees to a governmental agency for an interim period of time. In that case, it is clear that the restrictions of §4 will apply and that a statute or a regulation is needed to authorize the private compensation. *See EC-COI-84-119.* On the other hand, where the parties maintain that paid leave is not being granted "in relation to" the government services to be provided, a written paid leave policy or contractual arrangement must have been previously established by the employer if the Commission is to find that §4 does not apply. The Commission may, however, later determine that a given paid leave policy or contractual arrangement does not protect the compensation from the restrictions of §4.

[8/]This Commission will make its staff available to Roxbury or HECC in order to provide further guidance as to the contents of any regulation issued pursuant to this opinion, and we would encourage you to use this method of working within the confines of §4. Roxbury must determine, of course, whether it, HECC, or some other entity, is empowered to promulgate an appropriate regulation which would encompass the proposed arrangement.

[9/]We conclude, however, that G.L. c. 15A, §22, as appearing in St. 1991, c. 142, §7, an amended statute which established the Higher Education Coordinating Council (replacing the Board of Regents) (HECC), would not provide the necessary statutory relief required in the present case.

Specifically, §22 of c. 15A states that:

> [e]ach board of trustees of a community college or state college shall be responsible for establishing those policies necessary for the administrative management of personnel, staff services and the general business of the institution under its authority.

We find that §22 is not specific enough to justify a reliance on it for purposes of authorizing the contemplated

arrangement "as provided by law," because it does not reflect explicit legislative authorization of this sort of arrangement.

CONFLICT OF INTEREST OPINION
EC-COI-92-5

FACTS:

You are a member of the General Court and have sought advice concerning the use of the Great Seal of the Commonwealth (Seal).[1]

QUESTION:

Under what circumstances may public officials who are seeking reelection or other office[2] display the Seal on private stationery for fundraising or other campaign purposes?

ANSWER:

The Seal may not be displayed by public officials seeking reelection or higher office on private stationery for fundraising or other campaign purposes.

DISCUSSION:

As a member of the General Court, you are a "state employee" as that term is used in the conflict of interest law.[3] *EC-COI-91-14.*

Section 23 of G.L. c. 268A, the conflict of interest law, contains general standards of conduct that apply to all public employees. It provides, in pertinent part, that no state employee may use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not available to others similarly situated. §23(b)(2).

In previous opinions concerning the above prohibition, the Commission has emphasized as its main concern whether the activity or conduct benefits a private or personal, as distinct from a public, interest. *See EC-COI-84-127* (member of the judiciary may not lend the prestige of his judicial office to a corporate advertising campaign). The Commission has previously determined that a public employee's use of his official position to promote political or campaign related matters is unwarranted where such political activity falls outside the scope of his official duties. *See EC-COI-85-29* (use of a student intern by a member of the General Court to perform tasks which would for the most part benefit his re-election efforts and his political campaign was outside the scope of his office and was therefore unwarranted); *90-9* (appointed state official may not use official position to sign a letter of endorsement for a political candidate using his official title or official stationery). Moreover, a solicitation by a public employee for a private purpose would violate G.L. c. 268A if such solicitation could reasonably be perceived as an endorsement by a public agency of the solicitation or gives the appearance that the solicitation is officially sponsored. *See Public Enforcement Letter 89-4* (state employee's use of official stationery and state resources in an attempt to promote a private trip from which the employee would benefit was an unwarranted use of official position in addition to presenting an unwarranted appearance of state sponsorship or endorsement); *In re Buckley*, 1983 SEC 157 (municipal housing agency employee who was also a private landlord violated §23(b)(2) by using official agency stationery to communicate with her private tenants).

In contrast, the Commission has held that where solicitations are authorized by statute or regulation, or where they are within the scope of official duties, a public employee would not violate §23 by using his official title or public agency letterhead. *See EC-COI-84-128* (state official, pursuant to statutory authorization, may solicit contributions for state program); *83-102* (member of the General Court may sign gift solicitation letter for voter registration drive raffle where endorsement is within the range of activities customarily expected of legislators).

With regard to the question presented, we find that the use by a public official of the Seal for political fundraising or other campaign purposes exceeds the proper use of a public employee's office.[4] Such campaign activity benefits a personal rather than a public interest. The recipients of such solicitation could reasonably infer that the solicitation was supported or endorsed by the Commonwealth, when in fact it is intended to benefit a personal purpose (an individual's political campaign).[5] Because displaying the state seal may foster a sense of credibility or obligation which the solicitation might not otherwise have had, the use of the state Seal is an unwarranted privilege in violation of §23.[6]

This opinion is consistent with other pertinent statutory and regulatory provisions in that it restricts the use of the Seal of the Commonwealth to official communications of the Commonwealth or its subdivisions, or such other uses as are authorized by the Secretary of State. Pursuant to G.L. c. 2, §5, the state secretary is charged with issuing regulations regarding the proper use and display of the state Seal. In addition to providing specifications to which any replication of the Seal must conform, regulations promulgated by the Secretary of State permit, in pertinent part, the use of the Seal to authenticate official documents. The Seal may also be displayed on any building, monument, equipment or structure of any governmental entity, and may be displayed during an event sponsored by a governmental entity. 950 CMR 34.11(1)(c). The regulations prohibit the use of the Seal for commercial or advertising purposes. Moreover, under G.L. c. 264, §5, it is a criminal offense to use the Seal of the Commonwealth for any advertising or commercial purpose. The foregoing statutory and regulatory provisions evidence an intent to limit use of the Seal to identification and authentication of state property, official state documents or state sponsored events. This opinion under G.L. c. 268A furthers that legislative intent.

Date Authorized: March 12, 1992

[1/] This opinion also applies to use of the "coat of arms" of the Commonwealth as described in 950 CMR 34.01(1)(a) promulgated by the Secretary of State.

[2/] With regard to a private citizen seeking public office, the activities of such an individual are not within the jurisdiction of the Ethics Commission. However, we would caution such an individual that use of the Great Seal is subject to G.L. c. 264, §5 as well as regulations promulgated by the Secretary of the Commonwealth.

[3/] "State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

[4/] In deciding when the Seal is being used for campaign (rather than official) purposes, the Commission will look by analogy to decisions by the state Office of Campaign and Political Finance (OCPF) interpreting G.L. c. 55. In particular, OCPF interprets *Anderson v. City of Boston*, 376 Mass. 178 (1978), *appeal dismissed*, 439 U.S. 1069 (1979), to prohibit the use of public resources for purposes of influencing the nomination or election of a candidate or in connection with promoting or opposing a ballot question. *See OCPF-IB-91-01.*

[5/] Campaign use of the Seal thus differs in kind from an elected official's mere campaign statement that he already holds the office, a statement allowed even on the official ballot by the election laws. G.L. c. 53, §§34, 45; c. 54, §41.

[6/] We note that for purposes of §23(b)(2), the raising of $50 or more (for example) would constitute substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*

CONFLICT OF INTEREST OPINION
EC-COI-92-6*

FACTS:

You are counsel for Nicholson Construction Company (Nicholson), a corporation specializing in underground construction and excavation support work.

As general contractor, Nicholson bid on, and was awarded, a contract with the Massachusetts Department of Public Works (DPW).[1/] This contract, part of the Central Artery/Third Harbor Tunnel Project (CA/T Project), requires investigating the performance of tiedown anchors and anchor piles before construction of certain Central Artery tunnel segments begins.

The contract's bid documents did not require, and Nicholson did not provide to DPW, the names of any individual Nicholson employees who might help perform the contract. The contract did require Nicholson to submit to DPW for its approval, after the contract award, the names and "detailed experience records" of at least two supervisory personnel with sufficient experience, and of an "authorized person" with authority to act for Nicholson. Nicholson maintains a permanent staff of over 200 employees, of whom more than one-third are experienced supervisory personnel. After the contract award, Nicholson did submit several names and "records" to DPW at various times. DPW either routinely approved these submissions or took no action (which Nicholson took to be approval). To Nicholson's knowledge, no one at DPW knew any of the personnel whose names Nicholson submitted.

Nicholson wishes to perform work as a subcontractor on one or more CA/T contracts over the next year.

QUESTIONS:

1. Is Nicholson or any of its employees a "state employee" under G.L. c. 268A?

2. If neither Nicholson nor any of its employees is a "state employee," do the second and third sentences of G.L. c. 268A, §1(q) apply to any of them?

ANSWERS:

1. No.

2. No.

DISCUSSION:

1. Is Nicholson or any of its employees a "state employee"?

For the conflict law to apply here at all (except for the possible interpretation presented by your second question and discussed in part 2), Nicholson or one or more of its employees must be a "state employee," defined by G.L. c. 268A, §1(q) as:

> a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.

This question can be answered simply by considering the first sentence of this definition. As to Nicholson itself, "[t]he Commission has long recognized that a . . . contract between a [state or municipal government entity] and a corporation will not render the corporation a '[government] employee.'" *EC-COI-89-6. See EC-COI-84-5; 83-89.* The Commission has followed the Attorney General's previous view that "the provisions of the conflict of interest statute are primarily directed at the activities of individuals . . . ." *AG Conflict Opinion Nos. 852* (1978), *756* (1977). Therefore, Nicholson itself is not a "state employee."

When a corporation contracts with a state agency, the corporation's employees will also not be considered "state employees," unless the agency "specifically targets a certain individual within the corporate structure to perform the services . . . ." *EC-COI-89-6.* For this purpose, the Commission will examine the following five factors:

> (a) are the individual's services expressly or impliedly contracted for?
>
> (b) how large is the entity? how many employees? what types of services are provided by it?
>
> (c) to what degree is specialized knowledge or expertise required in the performance of the services?

(d) to what extent does the individual personally perform the services under the contract, and to what extent does he or she control and direct the terms of the contract or the services provided thereunder?

(e) has the person performed similar services in the past to the public entity?

EC-COI-89-35; 89-6; 87-19; 87-8.

Here, DPW's contract did not specify or otherwise "target" any particular Nicholson employee. DPW's routine approval of (or non-action on) Nicholson's submissions after the contract award supports the view that it had no interest in any particular individual's services. Nicholson is a sizable corporation employing many different supervisory employees capable of performing the contract. Although some expertise might well be required, no particular Nicholson employee could be expected in any substantial way to control or direct the contract services, as shown by occasional changes in supervisory roles, all acquiesced in by DPW. Finally, there is no evidence that DPW knew or cared that any Nicholson employee had performed similar services for it in the past.

We conclude that neither Nicholson nor any of its employees is a "state employee" as defined by §1(q).

2. Do the second and third sentences of §1(q) apply to Nicholson or any of its employees, although none of them is a "state employee"?

The second and third sentences of the definition of "State employee" in G.L. c. 268A, §1(q) exempt from the first sentence's principal definition certain construction contractors and their personnel who participate as consultants in engineering and environmental analysis of major state construction projects. The third sentence's proviso then requires that "no such contractor or personnel" may bid on or be awarded a construction contract for the same project for which they participated in that analysis. Although the Commission has considered the scope of this exemption once before, *see EC-COI-83-165* (exhibit design was not "engineering and environmental analysis"), we have never had occasion to consider the scope of application of the third sentence's proviso.

Your question asks, in essence, whether this proviso should be read merely as a limitation on the exemption contained in the remainder of these two sentences (thus limiting its reach to persons, not including Nicholson or its employees, who would otherwise be "state employees" under the first sentence), or whether instead it was meant to bar all contractors (presumably including corporations like Nicholson) and their personnel from bidding on state construction contracts if they participated as consultants in the engineering and environmental analysis of the same construction project. The statute's plain language, structure, and legislative history cause us to reject this sweeping second interpretation in favor of the narrower first construction.

We are conscious that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). Here, the plain language of these second and third sentences is designed to address the concerns of construction contractors and their personnel, who might under some circumstances be considered "state employees" under the first sentence because of their prior consultant role in engineering and environmental analysis for major state construction projects. Such "state employees" might be barred from participating in other state construction contracts either by G.L. c. 268A, §5 (as former state employees) or by §7 (as present state employees). The second and third sentences allow such persons, who would otherwise be "state employees" under the first sentence, to participate in state construction contracts for projects other than those in which they participated in the engineering or environmental analysis.

The word "such," modifying "contractor or personnel" in the proviso, may be thought ambiguous: it could refer to all contractors or personnel who participate in the engineering and environmental analysis mentioned in the second sentence (thus supporting the broader second interpretation). Alternatively, it could refer only to contractors or personnel who participated in that analysis and who would be "state employees" under the first sentence but for this exemption (thus supporting the narrower first construction). This ambiguity is resolved by noticing that the same phrase, "[s]uch contractors or

personnel," appears at the beginning of the third sentence. This phrase's use there, allowing award of state construction contracts and continuation of existing state construction contracts, makes sense only if the narrower meaning is intended, since the concern motivating this exemption applied only to "state employees" under the original first sentence. The same phrase must be given the same meaning when used later in this sentence. *See Beeler v. Downey*, 387 Mass. 609, 619 (1982).

The structure and location of the third sentence's proviso are noteworthy. First, the Legislature placed it in the conflict law's definition of "state employee," certainly an odd place to insert a substantive restriction on contractors who are, by the broader interpretation's hypothesis, not state employees otherwise subject to G.L. c. 268A; a more likely location if the broader interpretation were intended would be in another statute concerning construction contract bidding procedures, such as G.L. c. 30, c. 30B or c. 149. Second, it is phrased as a proviso that explicitly modifies the preceding exemption, a sentence structure that is sensible only if the narrower construction is intended. *See EC-COI-87-36; 82-106* (both concluding that provisos limiting "selectman's exemption" from G.L. c. 268A, §20 did not apply to selectmen who are special municipal employees and thus not in need of this exemption).

The legislative history of this statute is also helpful. When G.L. c. 268A was originally enacted, by St. 1962, c. 779, §1, the definition of "state employee" consisted solely of the present first sentence. The present second and third sentences were added by St. 1977, c. 245, entitled "An Act authorizing certain construction contractors to participate in state projects."[2/] The Act resulted from a substantially identical bill, House No. 2843 (1977), sponsored by then-Representative William Q. MacLean, Jr., and originally entitled "An Act to expedite the employment of construction tradesmen on major construction projects." This original bill contained the following preamble explaining its purpose:

> Whereas, the provisions of Chapter 268A restrict the participation of construction contractors as consultants or members of a consulting group in the engineering and environmental analysis for major construction projects, and
>
> Whereas, the best interest of the Commonwealth require [sic] such participation, and
>
> Whereas, such participation can be permitted without impairment of the legislative purpose in the enactment of General Laws Chapter 268A.

The only written comment on the bill in the Governor's legislative file was from the Executive Office of Administration and Finance. After urging the Governor to sign the bill, it briefly referred to the third sentence's proviso as a "necessary safeguard" that was thought "satisfactory," an afterthought hardly describing a sweeping new restriction on bidding by construction contractors.

This unusually clear and consistent legislative history discloses no legislative purpose to impose further restrictions on any construction contractors. Rather, the clear intent was to carve out an exemption for certain contractors who had done engineering and environmental analysis, but to avoid "impairment of the legislative purpose" of G.L. c. 268A by limiting this exemption to those whose analysis was not for the same project.

Our duty is to "give the statute a workable meaning." *Graham v. McGrail*, 370 Mass. 133, 140 (1976). For the above reasons, we conclude that the 1977 amendment, adding the second and third sentences of §1(q), was intended solely to create an exception from the pre-existing first sentence, thus tempering the conflict law's application to construction contractor employees under the specified circumstances. It follows that the second and third sentences, and particularly the third sentence's proviso, cannot apply to a person or entity (including Nicholson and each of its employees) that is not a "state employee" as defined by the first sentence.[3/]

Date Authorized: March 12, 1992

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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/]As of April 8, 1992, the state DPW becomes known as the state Department of Highways. St. 1991, c. 552.

[2/]Courts have looked to an act's title for aid in ascertaining legislative intent. *See Hemman v. Harvard Community Health Plan, Inc.*, 18 Mass. App. Ct. 70, 73 (1984).

[3/]Since by answering your first and second questions we have concluded that G.L. c. 268A does not apply at all to Nicholson or any of its employees, it is unnecessary to answer your remaining questions.

CONFLICT OF INTEREST OPINION
EC-COI-92-7

FACTS:

You are a legislative aide for a member of the General Court, who is a candidate for re-election. You are also a partner in a small business that occasionally does political consulting. Through this business, you wish to engage in campaign work for the legislator's re-election campaign, with compensation from his campaign political committee to your business. You may also wish to do such compensated campaign work for other incumbent legislative candidates and for other candidates.

The possible campaign work would include general campaign management, and writing letters and releases. It would not directly or indirectly include fundraising activities. You would conduct this campaign work away from the State House and on your own time.

QUESTIONS:

1. Does G.L. c. 268A allow a member of the General Court to compensate you for this campaign work while you are his legislative aide?

2. Does G.L. c. 268A allow you to do such compensated campaign work for other candidates?

ANSWERS:

1. No, unless (a) your decision to engage in this work is entirely voluntary, (b) you initiated the business relationship, and (c) the legislator publicly discloses in writing the facts clearly showing (a) and (b).

2. Yes, if an incumbent candidate is not your direct or indirect supervisor, and subject to the limitations discussed below. If an incumbent candidate is your direct or indirect supervisor, the answer is the same as for Question 1.

DISCUSSION:

The state conflict of interest law, G.L. c. 268A, applies both to you as a state legislative aide, and to the member of the General Court, as "state employees."[1/] Section 23 of G.L. c. 268A contains standards of conduct that apply to all public employees. In particular, §23(b)(2) provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value for himself or others. Section 23(b)(3) prohibits a public employee from engaging in conduct that 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.

In a long series of opinions and adjudicatory decisions, we have applied these broad provisions to private business relationships between public employees and those whom they oversee in their official duties -- subordinate employees, vendors, and persons subject to their regulatory jurisdiction. First, we have consistently held that §23(b)(2) and its predecessors[2/] flatly prohibit public employees from soliciting such private business relationships from those whom they oversee. *EC-COI-81-66* (state corrections officer could not solicit catalogue orders from inmates he supervised); *EC-COI-82-64* (state employee who had side business selling household products could not sell them to employees and consultants that he supervised); *EC-COI-82-124* (county commissioner could not solicit private insurance business from county vendors); *EC-COI-84-61* (legislator could not market tax shelters to persons with an interest in legislative business); *In re Burke*, 1985 SEC 248 (fining official for using his official position to obtain access for private purposes to persons his agency regulated);[3/] *In re Singleton*, 1990 SEC 476 (fining a fire chief for attempting to use his official position to obtain private business). Such solicitations inevitably involve unwarranted privileges by virtue of the supervisory employee's power over the person under his jurisdiction.

Moreover, we have recognized that the inherently exploitable nature of public employees' private business relationships with those under their jurisdiction presents serious problems even without an actual finding that the public employee actively solicited the business. In these situations, we have construed §23(b)(3) and its predecessors[4/] to require at least public written disclosure of the private business relationship. *Advisory No. 1* (1983) (public employees should "refrain altogether from

using the private services of a vendor/consultant over whom that person has official responsibility," at least without disclosing); *In re Keverian*, 1990 SEC 460 (Speaker of the House admitted that private business relationships with office employees and vendors, without disclosure, violated §23[b][3]); *In re Garvey*, 1990 SEC 478 (same for Sheriff). We have explained the reasons for our concerns, even in the absence of actual solicitation by the supervising employee, as follows:

> The Commission has consistently stated that public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

In re Garvey, 1990 SEC 478, 479-80; *In re Keverian*, 1990 SEC 460, 462 (citations omitted).

Because of the above concerns we have expressed about the inherently coercive nature of these relationships, even when the supervisory employee did not actually solicit the private business, we have occasionally suggested that §23(b)(2) and (3) should be read together to require something more than the usual disclosure. *See, e.g., EC-COI-90-9*, n.9 (§23[b][2] suggests that state official should not attend campaign meeting at which his agency's vendors are present, because the circumstances might "inevitably be construed as coercive"). We now clarify that a public employee's private business relationship with a subordinate employee, a vendor whose contract he supervises, or a person or entity within his regulatory jurisdiction, violates §23, unless (1) the relationship is entirely voluntary; (2) it was initiated by the person under the supervisory employee's jurisdiction; and (3) the supervisory employee's public written disclosure under §23(b)(3) states facts clearly showing elements (1) and (2).[5] Thus, failure to meet elements (1) or (2) will violate §23(b)(2); failure to make the disclosure required by (3) will violate §23(b)(3).

It remains to apply this rule to your situation. Your employment supervisor is a member of the General Court and has substantial authority to change your working conditions and even to terminate your state employment. His hiring you or your company to do campaign work would thus constitute just the sort of private business relationship with a subordinate that §23(b)(2) and (3) closely regulates.[6] Therefore, your legislator may not agree with you to undertake such campaign work for compensation,[7] unless the legislator makes a written disclosure to the Clerk of the respective chamber of the General Court and to this Commission, clearly showing that you initiated an entirely voluntary relationship.

Whether you could do paid work for another legislator's re-election campaign without such a disclosure would depend on whether that legislator directly or indirectly supervises your work or otherwise exercises substantial influence over your employment future, wages, benefits, or working conditions. For example, the Speaker probably exercises such supervisory influence over most House employees. Under such circumstances, the same analysis as for your own legislator would apply to this private business relationship.

Otherwise, you are free to do compensated campaign work for any incumbent or non-incumbent candidate. Any campaign work you do while a public employee is subject to the following limitations. As you recognize, §23(b)(2) prevents you from using your paid time as a state employee, and other state resources and facilities, to benefit any such candidate. *See Commission Advisory No. 4 (Political Activity)* (1984); *EC-COI-92-5; 92-8* (both also authorized today). You could not act as agent or attorney for, or receive compensation from, any campaign committee in connection with any particular matter in which the state was a party or had a direct and substantial interest, such as a matter relating to the administration of the election itself. G.L. c. 268A, §4. (For example, a campaign could not pay you to review an opponent's nomination signatures as part of an objection proceeding before the State Ballot Law Commission under G.L. c. 55B.) Finally, G.L. c. 55 also regulates your campaign

activities as a state employee;[8] for details, you should contact the state Office of Campaign and Political Finance.

Date Authorized: March 12, 1992

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[1]"State employee" is defined in relevant part as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, §1(q). "State agency," in turn, is defined as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town." *Id.* §1(p).

[2]*See* G.L. c. 268A, §23(d), as appearing in St. 1962, c. 779, §1, and as amended by St. 1975, c. 508; G.L. c. 268A, §23(¶2)(2), as appearing in St. 1982, c. 612, §14.

[3]The Commission relied primarily on §3 in this case, which was decided at a time when the Commission lacked authority to enforce §23. *See Saccone v. State Ethics Commission*, 395 Mass. 326 (1985); St. 1986, c. 12, §§2, 6 (rewriting §23 and conferring Commission jurisdiction to enforce it as of April 8, 1986). *See also in re Burke*, 1985 SEC 248, 249 nn.4 & 5, 253 n.12.

[4]*See* G.L. c. 268A, §23(e), as appearing in St. 1962, c. 779, §1; G.L. c. 268A, §23(¶2)(3), as appearing in St. 1982, c. 612, §14. The present §23(b)(3), as appearing in St. 1986, c. 12, §2, for the first time added the defense of written disclosure.

[5]Because the Commission has not previously stated this rule clearly, it will apply only prospectively. *See EC-COI-91-14* (advising legislator to disclose his private employment of his administrative aide, but not specifying elements of disclosure). Furthermore, the rule will not apply to a private business relationship that began before the supervisor's public employment. Finally, the rule may not apply in certain situations where objective standards governing the private business relationship remove or substantially mitigate the risk of coercion or improper influence (for example, to a routine purchase at retail by a state regulator, from a business subject to his regulation).

[6]The violation of §23 would be principally the legislator's, not yours. Although the Commission usually renders advice only to the affected public employee, see G.L. c. 268B, §3(g), analyzing the law's application to the legislator is necessary here to advise you about your conduct.

[7]This analysis would not apply to your work for the campaign of your legislator (or any other candidate) without compensation, as this is not the sort of private business relationship that §23 closely regulates. Of course, proof that a public employee coerced another public employee (or anyone else) to work for a campaign without compensation would still violate §23(b)(2). *See* G.L. c. 56, §§33-36 (criminal statutes regulating use of official authority to influence political action).

[8]For example, G.L. c. 55, §13 prohibits appointed, compensated public employees from directly or indirectly soliciting or receiving funds for any political purpose.

CONFLICT OF INTEREST OPINION
EC-COI-92-8

FACTS:

You are the campaign treasurer for a Selectman in a Town who is also a public school teacher. The Selectman is also a candidate for the General Court.

QUESTIONS:

1. May the Selectman continue serving as a Selectman and as a public school teacher while running for a position in the General Court? and

2. Assuming that he wins the election to the General Court, may the Selectman serve as both a Selectman and a member of the General Court simultaneously?

ANSWERS:

1. Yes, subject to certain restrictions under G.L. c. 268A, §23; and

2. Yes, for the reasons stated below.

DISCUSSION:

1. As a Candidate

The Selectman's first question concerns the application of the conflict of interest law to his activities as a public official and as a candidate for the General Court. As a Selectman and a public school teacher, he is a municipal employee as that term is used in the conflict of interest law.[1] As such, the restrictions set forth in G.L. c. 268A apply to him. Although nothing in c. 268A would prohibit the Selectman from running for the office in the General Court while simultaneously serving as both a Selectman and as a public school teacher, he should be advised that §23(b)(2) of c. 268A prohibits a current officer or employee of a municipal agency from knowingly, or with reason to know:

> us[ing] or attempt[ing] to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value[2] and which are not properly available to similarly situated individuals.

In *Commission Advisory No. 4 (Political Activity)*, the Commission advised that the use of public resources, available by virtue of one's public employment, for the purpose of conducting or supporting a political campaign, violates §23(b)(2). For example, a public employee may not use publicly-provided stationery, office supplies, utilities, telephones, office equipment (e.g., copying machines, typewriters, or word processors), office space or other facilities. These resources are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees. As *Advisory No. 4* makes clear, the taxpayers of the Commonwealth should not be forced to subsidize the political activities of those employed in government agencies.

Accordingly, while the Selectman may run for a seat in the General Court while employed as a public school teacher and a Selectman, he may not use public resources to assist his campaign.

The Selectman should also be advised that the above advice is limited to an application of the conflict of interest law, G.L. c. 268A, to his circumstances. Other laws, restrictions, or contractual provisions may also apply to him. For example, he must determine whether anything in his teachers' contract will require him to take a leave of absence while campaigning for office. In addition, issues may arise under G.L. c. 55, the campaign finance law. The Selectman should contact the Massachusetts Office of Campaign and Political Finance directly for further information on the application of c. 55 to him. *See, e.g., EC-COI-92-2.*

2. As a State Representative

The Selectman's second question concerns the application of the conflict of interest law to his activities as a member of the General Court and as a Selectman.[3] Assuming that he wins election to the General Court, the Selectman would become a state employee as that term is used in c. 268A.[4] *See, e.g., EC-COI-91-14; 89-35; 89-8.* As such, the restrictions set forth in c. 268A, §§ 4, 6 and 23 would apply to him.[5]

(a) Section 4

Section 4 of c. 268A prohibits a 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 relation to a particular matter[6] in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

Without the application of some exemption, state employees would generally find that the restrictions of §4 would forbid their active participation at the municipal level. Prior to 1980, for example, §4 was applied to prohibit state employees from outside employment with municipalities where the Commonwealth had a direct and substantial interest in the matters on which the employees worked in their municipal capacity. *See EC-COI-83-26* (discussing St. 1980, c. 10, which became the municipal exemption, described below). For the reasons stated below, however, §4 will not prohibit a member of the General Court from simultaneously serving as an elected or appointed municipal official.

Members of the General Court who wish to serve as municipal officials may rely upon one of two exemptions found in §4: (i) the legislators' exemption (described below), *see, e.g., EC-COI-91-14; 89-31; 83-137; 82-137,*

or (ii) the so-called "municipal exemption," applicable to all state employees. Reliance on either exemption would mean that any restrictions of the other exemption would not apply to the circumstances described. *See, e.g., EC-COI-87-36; 82-106.*

Specifically, the legislators' exemption provides that a member of the General Court is exempted from the restrictions of §4(a) and §4(c) except that no such member shall personally appear for any compensation[7] other than his legislative salary before any state agency, unless:

1. the particular matter before the state agency is ministerial in nature;[8] or

2. the appearance is before a court of the Commonwealth; or

3. the appearance is in a quasi-judicial proceeding.

This exemption makes the substantive restrictions of §4 inapplicable to members of the General Court in most instances. Accordingly, members of the General Court may rely upon the above exemption if they wish to simultaneously serve as municipal officials. As a consequence, we find that legislators need not be constrained by the limitations delineated in the other exemption to §4, the municipal exemption. The municipal exemption, applicable to all state employees, provides that §4:

> [s]hall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the [state] agency by which he is employed or over which he has official responsibility.[9]

See, e.g., EC-COI-86-2 (employee of the Department of Environmental Quality Engineering (DEQE), who wished to serve as a member of the Board of Health in a town, may hold both positions provided that, as a Board of Health member, he abstains on matters which DEQE regulates); *see also 90-8; 84-103; 80-102.* This exemption was designed to limit, but not entirely eliminate, the effects of the §4 restrictions regarding acts of agency and receipt of compensation.[10] The municipal exemption, in effect, is a somewhat more restrictive exemption than is the legislators' exemption. We find, however, that it is unnecessary to apply its limitations to state legislators because §4, by its own terms, does not apply to them in the first place, except in the very limited way described above. Consequently, members of the General Court may serve as elected or appointed municipal officials without being constrained by language of the municipal exemption because those members are entitled to rely upon a separate and distinct exemption which contains no such language. *Cf. EC-COI-82-39* (a legislative employee of the General Court who was also running for Selectman would be affected by the §4 municipal exemption).

In summary, should the Selectman be elected to the General Court, he may continue to serve as a Selectman and act on all matters before his Board, even if those matters come within the "purview" of the General Court. He may not, however, appear before state agencies, including the legislature, for compensation on behalf of his Town or other parties, except as provided in §4. Consequently, if the Selectman contemplates that he might be called upon to act on the Town's behalf before state agencies as a Selectman, he might find it advantageous to forego his Selectman's income, if any. By foregoing any such compensation, he can avoid issues arising under the legislators' exemption described above.

(b) Section 6

In addition to the above, a state employee, including a member of the General Court, is prohibited from participating[11] in a particular matter in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or a reasonably foreseeable financial interest.

Municipalities are "business organizations" within the meaning of this section. *See, e.g., EC-COI-92-3; 90-8; 90-4; 89-2; 85-67; 84-120; 82-25; 81-62; 81-56.* Consequently, if the Selectman should become a member of the General Court, he must abstain from participating in any particular matter which will directly or foreseeably affect his Town if he remains a Selectman. He should bear in mind that, while the enactment of general legislation and "petitions of cities, towns, counties, and districts for special laws related to their governmental organizations, powers, duties, finances and property" would not, by definition, be particular matters, the enactment of special legislation is a particular matter. *See*

EC-COI-89-8 (discussing the distinction between general and special legislation); *82-39* (prohibition applies to special legislation affecting legislative aide's town in which he serves as a Selectman). *See also EC-COI-90-8.*

(c) Section 23

Finally, the Selectman should be aware of how issues under §23(b)(2) may arise for him in connection with his service as a member of the General Court. For example, he must refrain from using his official position as a member of the General Court to secure unwarranted privileges or exemptions of substantial value for himself or his Town. *See EC-COI-90-8.* To comply with §23(b)(2), he must continue to conduct Town activities entirely outside of his legislative work and refrain from using any state resources in connection with his Town activities. *Id.; see also 91-6; 91-7.*

Date Authorized: March 12, 1992

[1/] "Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

[2/] The Commission has determined that substantial value is $50 or more. *Commission Advisory No. 8 (Free Passes). See also, Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584 (1976).

[3/] We assume, for purposes of this opinion, that the Selectman intends to resign as a public school teacher should he win election as a member of the General Court. If our assumption is incorrect, the Selectman should renew his opinion request to seek further guidance under c. 268A.

[4/] "State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

[5/] While other restrictions under c. 268A would also apply to a member of the General Court -- for example, §§ 2, 3, 5, and 7 -- nothing in your opinion request raises an issue under any of those sections. Consequently, we need not review their application to his circumstances at this time. Should he seek additional guidance on any of those other restrictions, he should renew his opinion request.

[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/] "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).

[8/] The statute further describes those matters which are considered "ministerial." *See* G.L. c. 268A, §4.

[9/] "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).

[10/]It is clear that the municipal exemption, as applied to members of the General Court, would be of little use given the legislature's broad regulatory powers. As a member of the General Court who was also a Selectman in a town, the Selectman would find that many matters coming before the Board of Selectmen could be characterized as within the purview of the General Court. *See, e.g.*, Mass. Const. Pt. 1, C. 1, §1, Art. IV (which empowers the General Court to "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions . . . as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same").

[11/]"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).

CONFLICT OF INTEREST OPINION
EC-COI-92-9*

FACTS:

Quincy Hospital is a municipal hospital, established pursuant to St. 1919, c. 134 (as amended and supplemented by ordinances of the City) to "construct and maintain a hospital for the reception, care and treatment of persons who by reason of misfortune or poverty may require temporary medical or surgical relief and treatment for sickness or injuries." Among the hospital's objectives are to develop a community hospital, to fulfill community service needs, to attract physicians, to promote and participate in scientific research, and to provide hospital facilities and services for the care and treatment of persons who are acutely ill and who require the care and services "customarily furnished most effectively by hospitals which may be financed pursuant to Section 242 of the National Housing Act." See Quincy Hospital By-laws Preamble. The Hospital is governed by a Board of Managers (Board) appointed by the Mayor. The Board is responsible for, among other things, the general management of the Hospital, appointing the Hospital's director, establishing a budget, requiring the Medical staff to establish by-laws, charging the medical staff with providing a high quality of medical care, and determining the standards for and verifying the qualifications of physicians who request privileges to practice medicine at the Hospital. Quincy Hospital By-laws Article II.

Physicians who wish to practice medicine or admit patients to the Hospital are required to apply for privileges and appointment to the Medical Staff. According to Joint Commission for Accreditation of Hospitals (JCAHO) standards, each hospital is required to form "a single organized medical staff that has overall responsibility for the quality of the professional services provided by individuals with clinical privileges as well as the responsibility of accounting..to the governing body." 1987 JCAHO Accreditation Manual for Hospitals, MS.1.[1/] Individuals who are granted privileges to admit to the Hospital are required to be members of the Medical Staff. Quincy Hospital Medical Staff By-laws, JCAHO Standard MS. 4.3. JCAHO defines clinical privileges as "permission to provide medical or other patient care services in the granting institution, within well-defined limits, based on the individual's professional license and his experience, competence, ability, and judgment." 1987 JCAHO Accreditation Manual for Hospitals, MS.1.

At the Hospital, physicians apply for privileges and medical staff appointment at the same time. Most of the physicians at the Hospital also hold appointments and privileges at other hospitals. Members of the medical staff will review a physician applicant's credentials and will provide a recommendation to the Board of Managers concerning appointment and privileges. The Board of Managers may accept the recommendation, reject the recommendation or seek further information. Quincy Hospital Medical Staff By-laws. Articles VI. An initial appointment is valid for a period of one year. Each re-appointment is valid for a two year period. Medical Staff By-laws, Article VI. Each physician is granted specific delineated privileges and the scope of the physician's practice within the hospital is defined by those privileges. Medical Staff By-laws, Article III.[2/]

There are various categories of medical staff membership. Most physicians are members of the active Medical Staff. Active staff members, who are voting members of the Medical Staff, may admit patients to the Hospital, hold positions within the Medical Staff, become Chairmen of the clinical departments, and serve on medical staff committees. Physicians who are appointed to the Courtesy Medical Staff are not eligible to vote or hold office in the Medical Staff, are limited to admitting no more than six patients during a twelve month period and are not required to serve on Committees. Consulting Staff Members are physicians who are considered to be

experts in their fields. These physicians may not admit patients to the hospital, are not eligible to vote or hold office within the Medical staff, and are not required to sit on Committees. These physicians are permitted to perform special procedures or examinations on patients at the request of a member of the Active or Courtesy staff. Members on the Honorary Staff are senior physicians who have been recognized for their service to the Hospital, or their reputation, or contributions to patient care. These physicians do not have admitting privileges, are not eligible to hold Medical Staff office, or to vote, or to serve on Committees. Medical Staff By-laws, Article IV.

Physicians on the Medical Staff elect their officers and appoint Committee members without input from the Hospital Board of Managers. Physicians within each clinical department elect a department Chairman who is subject to approval by the Board of Managers, but the Board does not select, hire or interview the Department Chairmen. Medical Staff By-laws, Article XI. Active and Courtesy staff members are required to pay dues to the Medical staff, which dues are used for a general fund and an education fund. These monies are controlled by members of the Medical Staff, which has its own bank accounts and manages its own funds, separate from any City revenues. Medical staff members are required to establish by-laws, subject to the approval of the Board of Managers, but neither the Medical Staff nor the Board may unilaterally amend the medical staff by-laws. JCAHO Accreditation Manual MS.2.1. The Medical Staff does not receive any funding from the Hospital or the City. The primary purpose of the medical staff as an organization is to ensure that all patients receive optimal care, to monitor the quality of care and to account to the Board for quality of care issues. Medical Staff By-laws, Article II. To fulfill its purpose, the Medical Staff has established various committees, such as a physicians' credentials committee, quality assurance committee, infection control committee, critical care committee, operating room committee. Medical Staff By-laws, Article XII.

The physicians ordinarily bill their patients or the patients' insurers directly for their services and do not receive any fee from the Hospital, unless they have a contract directly with the Hospital to provide services. The amount of time that a physician spends in the Hospital is a function of the physician's specialty and the number of patients she has admitted at any given time.

QUESTION:

Are physicians who receive appointment to the Medical Staff and are granted clinical privileges considered to be municipal employees for purposes of the conflict of interest law?

ANSWER:

In the absence of additional circumstances, physicians who are appointed to the medical staff and granted clinical privileges at the hospital are not considered to be municipal employees under G.L. c. 268A, §1(g).

DISCUSSION:

This opinion presents an opportunity for the State Ethics Commission to re-evaluate and refine a prior Commission opinion, *EC-COI-85-31*, within the context of an expanded factual record. In *EC-COI-85-31*, the Commission concluded that physicians who were members of the Medical Staff were always municipal employees under the conflict of interest law. That decision focused on the medical staff as an entity, without regard to the different categories of staff membership, and focused on the role played by the medical staff in monitoring hospital quality of care issues. The opinion did not address the nature of clinical privileges. We now conclude that mere status on the Medical Staff for the purpose of exercising clinical privileges, without other factors, is insufficient to confer municipal employee status on physicians for purposes of the conflict law.

Under G.L. c. 268A, §1(g), a municipal employee is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." One of the underlying themes in prior Ethics Commission cases where individuals have been found to be public employees is that the individuals are able to exercise governmental power, participate in governmental functions, or provide services directly to a public body. *See, e.g., EC-COI-90-3* (raising funds to support and subsidize a public college); *89-1* (search for new revenue producers for public hospital); *88-24* (perform functions traditionally performed by redevelopment authority); *87-17* (advisory committee with substantive role in regulation process); *86-4* (same); *85-66* (assisting governmental function). In

contrast, where individuals are not appointed or elected to perform government functions or to exercise the power of governmental office, the Commission has not found that these individuals are public employees. *See e.g., EC-COI-88-19* (agency not a municipal entity where it is performing a public service but not a function that is inherently or exclusively governmental); *88-2* (individuals elected at municipal election not expected to perform public service, but rather to serve on political committee); *84-76* (non-profit corporation not performing function expected of a municipality); *84-65* (trust's purpose excludes trust funds from being used for essentially governmental purpose).

A physician who is appointed to the medical staff[2/] of a public hospital like Quincy and who is granted privileges at said hospital is not performing an inherently governmental function when she exercises those privileges. In essence, granting privileges is granting a physician permission to practice medicine within the hospital.[4/] Upon receiving privileges, a physician's loyalty does not shift to the City, but rather remains with her individual patient.[5/] While a hospital is required to provide supportive facilities and services to patients, a hospital cannot practice medicine.[6/] *See*, G.L. c. 6A, §72. The Hospital does not supervise or control the details and clinical decisions made in medical treatment and does not assign or select the physician's patients.[7/] The Hospital does not usually bill patients for the physician's services, does not compensate physicians to be members of the Medical Staff, and does not compensate or select Department Chairmen.

We also conclude that a physician's obligation, as a Medical Staff member, to monitor care is incidental to the exercise of privileges in the treatment of patients and does not confer public employee status on the physician. The function of the Medical Staff is to monitor the quality of care provided to patients and review the professional practice of Medical Staff physicians. M. MacDonald, K. Meyer, B. Essig, *Health Care Law*, §15.02[3] (1989). Similar to other ad hoc advisory committees, a physician's obligation in medical staff committees is to provide outside expert advice in the review of other physician care and treatment of patients and to recommend improvements. This is not a function ordinarily expected of government employees as the practice of medicine is within the exclusive domain of physicians, not public hospitals. *See e.g., EC-COI-87-28; 80-49. See also, 11A Aspen Systems, Hospital Law Manual*, ¶2-2 (1982) (governing Board relys on judgment of Medical Staff in quality of care).

In conclusion, granting staff privileges and Medical Staff appointment does not per se create public employee status, but we emphasize that if a member of the Medical Staff has additional public duties or contract obligations to the City and/or the Hospital, she will be deemed to be a municipal employee for purposes of G.L. c. 268A. For example, if a physician is hired by the City as an employee, or if the Hospital bills for the physician's services, she will be considered a municipal employee. *EC-COI-85-56.* Also, if the Hospital contracts with a physician or a physician group to provide specific services to the Hospital, each physician in the group may be a municipal employee. *See EC-COI-87-19; 86-21; 80-84* (contract specifically contemplates that all of the partners will provide services, so that each partner will be considered special state employee).

Date Authorized: March 12, 1992

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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/]Failure to comply with JCAHO standards would jeopardize a hospital's accreditation and ability to receive government payments.

[2/]Under certain circumstances, a physician may be granted temporary privileges for no longer than thirty days to attend a specific patient or to attend patients while the physician's application is pending.

[3/]For purposes of this opinion, we view appointment to the Medical Staff and the granting of staff privileges as synonymous because appointment only confers delineated privileges and a physician cannot admit or attend patients at the hospital without receiving an appointment. According to the Medical Staff By-laws, "[m]embership on the medical staff ... is a privilege extended by the Hospital and is not the right of any practitioner ... appointment to and membership on the Medical Staff shall confer on the appointee or member only such clinical privileges and prerogatives as recommended to the Board of Managers by the Executive Committee of the Medical Staff and granted by the Board of Managers in accordance with these By-laws. No practitioner shall admit or provide services to patients to [sic] this Hospital unless he

is a member of the Medical Staff." Medical Staff By-laws, Article III. Further, for physicians who are members of the courtesy, consulting or honorary staff, appointment is largely symbolic because said members are not eligible to vote, hold office in the Medical Staff, and are not required to serve on Medical Staff Committees. *See also, 11A Aspen System, Hospital Law Manual*, ¶2-2 (1982); M. MacDonald, K. Meyer, B. Essig, *Health Care Law*, §15.02[1], 1989.

[4/] An analogy can be made between the relationship of physicians to this public hospital and the relationship of attorneys to the court system. The court system is a governmental entity. Lawyers are licensed by the Commonwealth, subject to Disciplinary Rules promulgated by the Supreme Judicial Court, hold a title as Officers of the Court, and have permission to practice their profession within the Courts. Yet, a lawyer's loyalty during practice remains with her client, not the Commonwealth, and she is not considered to be a state employee solely because she is licensed to practice and does practice law in the state court system.

[5/] We note that *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987) is distinguishable from your situation. The *Quinn* case involved a state employee who also served as a bail commissioner but whose compensation, similar to Medical Staff physicians, was paid by third parties, not the Commonwealth. *Id.* at 212-213. However, unlike the Medical Staff physicians, the bail commissioners perform a governmental function when they conduct bail hearings and their loyalty is to the Commonwealth, not to the individual requesting bail. According to the Supreme Judicial Court, "[t]he fact that a prisoner pays the commissioner's fee and may receive a benefit from the commissioner's services does not alter the fact that the commissioner is performing a service for the Commonwealth in the same way a judge or a clerk magistrate does. The bail commissioner's duty is owed to the judicial department of the Commonwealth, and it is to conduct the bail proceedings according to law." *Id.* at 213. Also, the bail commissioner's duties and compensation, unlike a physician's, are required by statute. *Id.* at 212-213.

[6/] We note that a hospital may limit or deny privileges if it is unable to provide adequate services for the physician/applicant and her patients. 1987 JCAHO Accreditation Manual MS.1.2.3.

[7/] The issue of governmental control is the primary question asked when a Court considers whether a physician is a public employee for purposes of G.L. c. 258, §2, the Massachusetts Tort Claims Act. *See Hopper v. Callahan*, 408 Mass. 621, 634 (1990); *Smith v. Steinberg*, 395 Mass. 666, 668 (1985); *Kelly v. Rossi*, 395 Mass. 659, 662-665 (1985). The Supreme Judicial Court has acknowledged that "the very nature of a physician's function tends to suggest that in most instances he will act as an independent contractor. Another person, unless a physician himself, would have no right ... to exercise control over the details of the physician's treatment of a patient; the profession is distinct and requires a high level of skill and training; and the physician must use independent judgment." *Kelly*, 395 Mass. at 662.

CONFLICT OF INTEREST OPINION
EC-COI-92-10

FACTS:

You are the members of the Board of Selectmen in a town (Town). For several years, the Town has actively opposed the development of a privately owned project to be located in a neighboring town (Town II), just over the Town's border. The Town has retained a law firm as special town counsel in connection with this matter. Similarly, a citizens group composed of Town and Town II citizens has also opposed the project and has retained another law firm (the "law firm") for the same purpose.

Presently pending in Superior Court are two actions filed by the Town and the private group which seek to overturn approval given to the project developer by a state agency. These two actions have been consolidated, and the Town and the private group have jointly prepared pleadings and memoranda.

The Town would like to pool its resources with the private group through an appropriate Town Meeting mechanism to fund the services of the law firm for future administrative and judicial litigation. Both the Town and the private group have limited resources available to oppose the project and believe that the pooling of resources would advance a compelling interest of the Town. In connection with this desire, the Town has proposed the adoption of a by-law to ensure compliance with G.L. c. 268A, §17. The by-law, if adopted, would

define the official duties of a special town counsel to include, on a case-by-case basis, representation of individual citizens in matters in which the Town is also a party. Specifically, the by-law states that:

> The purpose of this by-law is to allow the Town from time to time to retain counsel who may also represent individual citizens in matters in which the Town is also a party without violating G.L. c. 268A, §17(a) and §17(c). Such dual representation allows the Town to pool resources for a common purpose and preserve scarce Town funds.
>
> Pursuant to this by-law, the official duties of special town counsel include representing individual citizens in administrative and judicial proceedings in which the Town is also a party, provided the interests of the Town would be advanced by such dual representation and provided that such dual representation would not cause a violation of rules governing attorney conduct. Special town counsel shall discharge such duties only when requested to do so in writing by the Board of Selectmen. Prior to making such a request, the Board of Selectmen shall consult with town counsel, who shall advise the Board as to whether the interests of the Town would be advanced by such dual representation. Town counsel shall also supervise special town counsel in such instances and from time to time shall render advice to the Town as to whether this dual representation advances the interests of the Town and conforms to law.

QUESTION:

Assuming that the above by-law is duly adopted by the members of the Town Meeting, would the by-law permit a special town counsel to represent, and be compensated by, both the Town and private parties in connection with the same particular matters within the confines of G.L. c. 268A, §17?

ANSWER:

Yes, because the by-law, which requires a case-by-case determination as to whether the dual representation would advance the interests of the Town, reflects an explicit legislative authorization for all such contemplated arrangements.

DISCUSSION:

Section 17(a) of c. 268A, the Massachusetts conflict of interest statute, provides that no municipal employee[1] shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation[2] from anyone other than the city or town or municipal agency in relation to any particular matter[3] in which the same city or town is a party or has a direct and substantial interest.

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

Together, these sub-sections of c. 268A are designed to prohibit divided loyalties. In other words, a municipal employee is a municipal employee first and foremost and owes a duty of loyalty to the municipality. Consequently, §17 is designed to prohibit an individual from splitting his loyalties between a municipal job and a private interest. *See EC-COI-92-4* (discussing state counterpart provision, §4); *see also EC-COI-92-1; 90-12; 90-16*; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 322 (1965) (whenever a person is both a private and a public employee, "[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result"); *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (dissent) (§17(a) reflects the maxim that "a man cannot serve two masters." It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest).

In *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984), the Massachusetts Supreme Judicial Court held that a private attorney[4] was barred by §17 from simultaneously acting as attorney for private parties

and for the Town of Edgartown in a "common defense effort on liability" in an Indian land claim case pending in federal court, even though the interests were not adverse. The Court found that the

> language of the statute unambiguously prohibits the multiple representation at issue here. Had the Legislature intended that these prohibitions be limited to matters in which the municipal employee is an *adverse* party or has a direct and substantial *adverse* interest, the Legislature easily could have accomplished that by inserting the word "adverse" before "party" and before "interest," or by employing some other equally simple language.

Id. at 87 (emphasis in original); *see also Commission Advisory No. 13(Agency).*

Even *Edgartown* makes clear, however, that §17 provides for such dual representation under certain circumstances. *Id.* at 87 ("[t]he only limitation on the statute's broad prohibition of multiple representation is for conduct by an employee 'as provided by law for the proper discharge of official duties'"). If the dual representation is provided by law for the proper discharge of official duties, §17 will not proscribe the conduct. G.L. c. 268A, §17(a), (c).[5/]

We find that a by-law duly enacted by a municipality is a "law" within the meaning of §17. *See* Amendment Article 2, §6 (as appearing in Amend. Art. 89) of the Amendments to the Massachusetts Constitution which provides that:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

In addition, the Supreme Judicial Court has often defined the word "law" broadly in appropriate contexts. "The word 'law' imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject." *Cohen v. Attorney General,* 357 Mass. 564, 570 n. 4 (1970); *Opinion of the Justices,* 262 Mass. 603, 604-605 (1928); *see also Pace v. City of Atlanta,* 135 Ga. Ct. App. 399, 218 S.E.2d 128, 129 (1975) (municipal ordinance is a "special law" because application is limited to municipality).

Further, the legislature has provided that violations of by-laws can be made punishable by a fine of up to $300 for each offense, and that all such by-laws are "binding upon all inhabitants [of the city or town] and all persons within their limits." G.L. c. 40, §21.

In the present case, the Town has proposed the enactment of a by-law in order to permit special town counsels to also represent private third parties under certain specified circumstances. We find that the adoption of a by-law, which specifically provides for a case-by-case determination as to whether dual representation advances the interests of the Town, would cause the dual representation and compensation as contemplated thereunder to be "as provided by law for the proper discharge of official duties" within the meaning of §17. *See EC-COI-92-4* (a specifically tailored regulation would be sufficient to permit compensation by third parties under equivalent state statute, §4). Such a by-law would reflect an explicit legislative authorization of the contemplated arrangement each time the Town must address a similar issue. *Cf. EC-COI-92-4, n. 9* (G.L. c. 15A, §22 did not reflect an explicit legislative authorization of the proposed third party compensation arrangement and, therefore, was not sufficient to make the proposed arrangement "as provided by law"). Consequently, if the proposed by-law is duly adopted by the Town, the Town may hire special counsel who may also represent private parties in connection with the same particular matters in which the Town is a party or has a direct and substantial interest.

We note that the proposed by-law is not inconsistent with the purposes of §17 as interpreted in *Edgartown, supra,* in that the by-law would, in effect, authorize a form of "lead counsel" arrangement. *Edgartown* at 90. Thus, we need not decide whether a by-law purporting to authorize some other representation of private parties by municipal employees would pass muster under §17.

This opinion is limited to the application of c. 268A to the circumstances described. Nothing in this opinion should be construed as commenting on the disciplinary rules governing the conduct of attorneys. The Town should undertake a separate inquiry with the Board of Bar

Overseers or the Massachusetts Bar Association for further information concerning rules subject to their jurisdiction and expertise.

Date Authorized: April 13, 1992

[1/]"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

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

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

[4/]The Court noted, in a footnote, that although it was clear that the attorney was retained by Edgartown only for the one case, the attorney was considered by the parties to be a town employee within the meaning of the statute. Generally, an attorney providing legal services to a municipality will become a municipal employee for purposes of the conflict of interest law. *See, e.g., EC-COI-82-46; 92-6* (which lists factors used by the Commission to determine public employee status); *89-35* (same); *cf. EC-COI-89-6* (employees of a large institution, who were not named in contract with public entity, were not public employees). *See also* Buss, *supra* at 311 (the statute "leaves no doubt that a lawyer, architect or the like, rendering professional services to a municipal agency whether paid or not would be a 'municipal employee'").

In the present case, it is clear that any individual who is appointed as a special town counsel would become a "municipal employee" within the meaning of c. 268A.

[5/]By its own terms, §17(a) prohibits compensation from third parties unless it is provided "by law for the proper discharge of official duties." On the other hand, §17(c) proscribes acting as agent or attorney, whether compensated or not, unless such actions are within the "proper discharge of his official duties," without reference to the necessity of a "law." *Edgartown* held that there are "no meaningful distinctions among these alternative qualifying phrases in the context of this case. [Both] focus on the proper discharge of official duties." *Id.* at 87, n. 5. However, "the specific application of this qualifying application is not clear." *Id.*

Compare, however, *EC-COI-83-20* (an attorney employed in the legal department of a state agency may represent a former employee of that agency, for no compensation beyond his own salary, in connection with matters arising from the former employee's actions as a state official. The attorney's representation is within the proper discharge of official duties as determined by his superiors and would not violate §4(c)); and *EC-COI-92-4* (a statute or regulation is required to permit a third party to compensate a state employee in relation to matters in which the Commonwealth is a party or has a direct and substantial interest in order to avoid a violation of §4(a)).

CONFLICT OF INTEREST OPINION
EC-COI-92-11*

FACTS:

The Wampanoag Tribe of Gay Head (also known as "Aquinnah") (Tribe) is a federally recognized Indian tribe which is the successor to the Wampanoag Tribal Council, Inc., a non-profit charter corporation of Massachusetts. According to the findings of the Bureau of Indian Affairs which formed the basis for federal recognition, the Gay Head Wampanoags have been identified as being American Indians from historical times until the present and have inhabited the Gay Head area since the first sustained contact with European settlers in 1642. The Wampanoags have historically continued to maintain social and tribal relations among themselves and tribal political influence over tribe members. After obtaining federal recognition, the tribe enacted a Constitution which

superseded the by-laws of the Council and the Council ceased to exist. According to the Wampanoag Constitution,

> We, the native Wampanoag people of Aquinnah, in order to sustain and perfect our historic form of tribal government, do proclaim and establish this constitution for the Wampanoag Tribe of Gay Head (Aquinnah).
>
> Our tribal government shall be dedicated to the conservation and careful development of our tribal land and other resources, to promote the economic well-being of all tribal members, to provide educational opportunities for ourselves and our posterity, and to promote the social and cultural well-being of our people.

Members of the tribe are those individuals who can document their descent from a specifically identified Gay Head Wampanoag Indian on the 1870 census roll of the tribe compiled by Richard L. Pearse and included in a report submitted to the State of Massachusetts on May 22, 1871. *See Wampanoag Constitution.*

The Tribe is governed by a Tribal Council whose members are elected by all tribal members who are at least 18 years of age. There are also two ceremonial positions which consist of a chief and a medicine man. The Tribal Council has sovereign powers to govern the tribe, except as are limited by the Settlement Act granting the Indian land and the laws of the United States. For example, the Council may establish an ordinance creating a judicial branch of government with jurisdiction over "all cases and matters in law and equity arising under the settlement act, this constitution, and the ordinances of the tribe" subject to limitations imposed by the laws of the United States. *See Wampanoag Constitution.*

Some tribal officials are also members of municipal boards in Gay Head or members of other public entities, such as the Martha's Vineyard Land Bank.

QUESTION:

Is the Wampanoag Tribe of Gay Head a "business organization" for purposes of G.L. c. 268A, §19 so that officials of the Tribe who are also municipal officials must abstain in matters affecting the Tribe's financial interest?

ANSWER:

The Wampanoag Tribe of Gay Head is not a "business organization" for purposes of G.L. c. 268A, §19. Members of the Tribe who are also municipal officials are not required to abstain in matters affecting the financial interest of the Tribe, but they are required to make a public disclosure prior to participating in such matters in accordance with G.L. c. 268A, §23(b)(3).

DISCUSSION:

G.L. c. 268A, §19 states, in pertinent part, that a municipal employee may not participate as such an employee in any matter in which he, his immediate family or a partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest. The underlying principle upon which this section is based is that a government official should not be in a position to act on a matter in which his private financial interests are involved or the financial interests of individuals close to him are involved. *See, Perkins, The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1129 (1963). Section 19 does not apply to every relationship which a public employee has. For example, not every family relationship is covered. See, G.L. c. 268A, §1(e) (immediate family defined as the employee and his spouse, their parents, children, brothers and sisters). In addition, we have previously noted that the Legislature made a distinction within §19 between the narrower category of a business organization in which a public employee is an officer, director, trustee, partner, or employee and the broader category of any person or organization with whom the employee is negotiating or has an arrangement for prospective employment. *EC-COI-92-3.*

When construing statutory language, we are guided by the canon that "[t]he intent of the Legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous." (citations omitted) *Int'l Organization of*

Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984); *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance, Co.*, 371 Mass. 186, 190 (1976). Accordingly, we look to the language of the statute and conclude that the plain meaning of the term " business organization" is an organization whose purpose is to engage in "commercial activity for gain, benefit, advantage, or livelihood." *Black's Law Dictionary*, Fifth Edition, 1979. *See, EC-COI-88-4* ("if the purpose of an organization is to conduct business, it is within the terms of the statute"); *84-43* (same); *84-44* (bank is business corporation); *83-105* (private law firm).

In the past we have not limited the term's application to profit-making entities. The Commission has extended this analysis to include municipalities, as municipalities are organized as "bodies corporate,"[1/] for the purpose of engaging in municipal business. G.L. c. 40 §1. *See, EC-COI-89-2; 84-7; 81-62; 82-25* (regional school district organized as "body politic and corporate" a business organization); *81-119* (state agency organized as "body corporate" a business organization); *Attorney General Conflict of Interest Opinion No. 613*, February 5, 1974 (town and various town departments are business organizations). In comparison, other government entities, such as the federal government, which are not organized as "bodies corporate" may not be considered business organizations. *EC-COI-92-3*. Although early Commission opinions indicated that the Commonwealth was a business organization for purposes of §19, later Commission decisions have not so concluded. *Compare, EC-COI-82-13* (Commonwealth a business organization) with *EC-COI-85-67* (two state board members affiliated with municipal entities required to abstain but board member whose state agency had financial interest not required to abstain); *Attorney General Conflict of Interest Opinion No. 30*, April 25, 1963 (state counterpart to §19 excludes business of a public state entity).

Applying these principles to the Wampanoag Tribe we conclude that the Tribe is not a business organization for purposes of §19. The United States has defined the term "tribe" to be " a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1900); *United States v. Candelaria*, 271 U.S. 432, 431 (1925); *Mashpee Tribe v. New Seabury*, 592 F.2d 575, 582 (1st Cir. 1979).[2/] As one court has noted, "[t]he term 'tribe' is most commonly used in two senses, an ethnological sense and a political sense although it may also be used in a social sense." *United States v. State of Washington*, 476 F.Supp. 1101, 1103 (W.D. Wash. 1979). According to 25 USC §1771f, the Tribe enjoys a "government to government relationship with the United States."[3/] Indian tribes have the power to regulate intratribal affairs, to establish tribal courts, to manage the use of their territory, to regulate economic activity within the reservation and to levy taxes within the reservation on tribal members and non-members. See generally, 42 C.J.S. Indians §23 et. seq.; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983). Thus, the Tribe is not organized for the primary purpose of engaging in commerce or as a "body corporate", but rather, is organized to advance the goals of a particular society whose members share blood ties and which possesses attributes of political entities, such as the federal government or state government.

We therefore conclude that the Tribe is not a business organization for purposes of §19, and that tribal officials who are also municipal officials are not required to abstain in particular matters affecting the Tribe's financial interest.[4/] However, these officials will be required to make a full public disclosure under §23(b)(3) prior to participating in a matter in which the Tribe has an interest. Section 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 or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. Issues are raised under this section because of the municipal official's affiliation with the Tribe. This relationship creates an appearance of a conflict of interest or bias in one's official actions as a result of one's private interests. *EC-COI-89-16* (past friendship relationship); *88-15* (private dealings with development company); *85-77* (private business). In order to dispel the appearance of a conflict, §23 (b)(3) requires that an appointed Wampanoag municipal employee file a full written disclosure with his appointing authority prior to participating in a matter affecting the Tribe. Elected Wampanoag municipal officials are required to file a full written disclosure with the town clerk prior to any participation. *See EC-COI-91-3; 90-2; 89-19.*

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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 definition of "body corporate" is " a public or private corporation." *Black's Law Dictionary*, Fifth Edition 1979.

[2/]Relevant factors in a determination of whether a particular group of Indians will be considered a tribe are: "the extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community; the extent of Indian governmental control over their lives and activities; the extent and nature of the members' participation in tribal affairs; the extent to which the group exercises political control over a specific territory; the historical continuity of the foregoing factors; and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and the Indians." *United States v. State of Washington*, 476 F.Supp. 1101, 1110 (W.D. Wash. 1979).

[3/]The relationship of the United States to the Indians is basically a trust relationship. *See, Winton v. Ames*, 255 U.S. 373, 391-392 (1921). Indian tribes are subject to the exclusive authority of Congress and, in the absence of federal law to the contrary, Indian tribes are not subject to the laws of the state or territory where the tribe is located. See generally, 42 C.J.S. Indians §§ 25, 38, 54.

[4/]Our conclusion is based on the facts which you have presented. Were the Tribe, as an entity, to become involved in significant business activity, you should renew your opinion request. Furthermore, we note that under certain circumstances, tribal members who are also municipal employees may be required to abstain under §19. For example, if the Tribe established a non-profit or other corporate entity for the purpose of developing real estate, and a Wampanoag municipal employee was an officer of the corporation, he would be required to abstain if the corporation sought a permit from his municipal board.

CONFLICT OF INTEREST OPINION
EC-COI-92-12

FACTS:

You are a member of state regulatory board (Board). You are entitled to a stipend as a Board member, but you have chosen not to accept this compensation.

You are also employed by a private employer. You are a member or officer of several professional associations.

You wish to solicit funds for various political and charitable purposes from Massachusetts residents, some of whom are under the Board's regulatory authority. These purposes include federal and state political campaigns, and your own efforts to obtain positions in professional, charitable, or political organizations.

QUESTIONS:

1. When may you participate in a Board matter that concerns a professional colleague or a fellow association member?

2. How does G.L. c. 268A limit your political and charitable fundraising activities?

ANSWERS:

1. If a Board matter could affect in a reasonably foreseeable way the financial interests of your private employer, or a professional association of which you are an officer, you may not participate, unless the Governor exempts you as discussed below. Otherwise, you may participate, but if your ties to a particular professional colleague or fellow association member who comes before the Board are close enough to create a reasonable impression of undue influence, you must disclose this in a public letter to the Governor.

2. You may not solicit from persons under your Board's regulatory jurisdiction, and you may not use any state facilities or resources in your solicitations.

DISCUSSION:

Even though you do not accept compensation as a Board member, the state conflict of interest law applies to you as a "state employee."[1/]

1. Participation in Board matters

Section 6 of G.L. c. 268A generally prohibits a state employee (unless exempted by his appointing authority)[2] from participating in any particular matter in which (among others) he, his immediate family or partner, or a business organization in which he is serving as officer, director, trustee, partner or employee, has a direct or foreseeable financial interest. Based on the facts you present, if the financial interest of your private employer, or a professional association of which you are an officer, could be affected in a reasonably foreseeable way, you would be prevented from participating.[3] The mere fact that the financial interests of your fellow employee or of your fellow member of an association would be affected would not prevent your participation.

However, §23(b)(3) of G.L. c. 268A prohibits a public employee from engaging in conduct that 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, but allows the employee to dispel any such impression by written public disclosure. If your ties to a particular professional colleague or fellow association member who comes before the Board are close enough to create such a reasonable impression,[4] you should disclose those ties in a public letter to the Governor (your appointing authority). *See, e.g., EC-COI-89-12, 15, 26.* You would then be free to participate fully.

2. Political and charitable fundraising

(a) Solicitations generally

Section 23(b)(2) of G.L. c. 268A provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value[5] for himself or others. The Commission has consistently held that this provision flatly prohibits public employees from soliciting anything of substantial value from persons within their regulatory jurisdiction, because of the "inherently exploitable nature" of these situations.[6] *See EC-COI-92-7* (canvassing authorities forbidding such solicitation of private business relationships). In *EC-COI-90-9*, the Commission specifically forbade a state official from soliciting political services from his agency's vendors, even if he did not use official stationery. And *EC-COI-92-2* held that a State Representative could not solicit funds for personal financial purposes from anyone with an interest in legislative business, broadly defined. Therefore, you may not solicit funds for any non-official purpose from any person you know is subject to the Board's regulatory jurisdiction, even if he or she is a friend or acquaintance of yours.[7]

Furthermore, even if you are not soliciting persons within the Board's regulatory jurisdiction, §23(b)(2) prohibits you from using any state facilities or resources (including telephones, office supplies, copying or printing facilities, and the time of state employees), or your title and stationery as a Board member, to solicit funds or to promote a fundraising effort that is not within your official duties.[8] *EC-COI-92-2; Commission Advisory No. 4 (Political Activity).* You may also not use the state seal or coat of arms for these purposes. *EC-COI-92-5.*

(b) Political fundraising

The Commission now clarifies[9] that the general solicitation analysis above, which we have previously applied in many other circumstances, also applies to solicitation of political contributions to federal, state, and local candidates and political committees, at least by an appointed public employee.[10]

Certainly, the language of §23(b)(2) contains no indication that the Legislature intended an exception for "political" solicitations from the statute's general application. And we have previously applied G.L. c. 268A in related contexts. In *EC-COI-90-9*, we specifically held that §23(b)(2) forbids a state official from engaging in "any campaign activity" with respect to his agency's vendors.[11] In *re Nolan*, 1989 SEC 415, we concluded that a mayor violated §§2(b) and 3(b) by promising city firefighters that he would defer scheduling a promotional civil service examination if the firefighters agreed to "support" him in his reelection campaign. A dictum in *EC-COI-84-128* says of §23(b)(2) that "a member of a state regulatory board may not solicit political contributions . . . from businesses subject to the board's regulation." (citation omitted)

The legislative history of §23 does not suggest otherwise. It is true that the special legislative commission report that proposed the original version of G.L. c. 268A states that the commission decided "not to include in the criminal section related subject matters such as . . . campaign contributions" because that subject "is covered in the Corrupt Practices Act," G.L. c. 55. Final Report of the Special Commission on Code of Ethics, H. 3650, at 9 (1962) (emphasis supplied). *See*

Moskow v. Boston Redevelopment Authority, 349 Mass. 553, 566-67 (1965) (relying on this language to hold campaign contributions to elected officials not within G.L. c. 268A, §§3, 17). But the very statement that the "criminal section" of G.L. c. 268A does not apply to campaign contributions suggests that §23, which then and now contains no criminal sanctions, may well apply.

Furthermore, even these early statements that the criminal provisions of G.L. c. 268A do not apply to campaign contributions have been undermined by subsequent events. First, a federal Court of Appeals, after a thorough analysis, held that provisions of 18 U.S.C. §201 analogous to G.L. c. 268A, §§2 and 3, do apply to campaign contributions under some conditions. *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). Recognizing that G.L. c. 268A, §§2 and 3 were modeled on this federal statute, the Massachusetts appellate courts have often looked to *Brewster* to aid in their interpretation. *Commonwealth v. Burke*, 20 Mass. App. Ct. 489, 508-09 (1985); *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 376 (1976); *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 586 (1976).

Second, in affirming a conviction under §2(b), the Supreme Judicial Court considered the defendant's argument that two cash payments, which the jury apparently believed were the final installment of a kickback arrangement, were instead "legitimate campaign contributions." *Commonwealth v. Borans*, 379 Mass. 117, 142 (1979). The court said:

> Campaign contributions to induce public officials promptly to perform their duties are unlawful. Nor can public officials condition the disbursement of government funds on the receipt of "campaign contributions."

Id. (citation omitted).

Third, in a related context, the Supreme Judicial Court rejected an argument based on the same passage of the 1962 special commission report quoted above, in which the special commission also stated that "nepotism" was not within the criminal provisions of G.L. c. 268A. Choosing to rely instead on the clear statutory language, the court held that §19 prohibited a municipal official from promoting his brother. *Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983). In short, whatever small doubt may remain that the criminal provisions of G.L. c. 268A apply to campaign contributions, nothing in this history even suggests that §23 should not apply.

Finally, the Federal Election Campaign Act, 2 U.S.C. §453, does not pre-empt applying §23 to the solicitation of federal campaign contributions by Massachusetts public employees. After examining the federal Act's legislative history, the Federal Election Commission, which is charged with its interpretation, has concluded that it does not pre-empt a state statute "regulating the political activity of a state employee." FEC AO 1989-27 (Dec. 11, 1989).[12/]

We conclude that §23(b)(2) applies to your solicitation of campaign contributions, as well as anything else of substantial value. As discussed above, it prohibits your solicitation from persons under your Board's regulatory jurisdiction, and also prohibits using any state facilities or resources in your solicitations.[13/]

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[1/]"State employee" is defined in relevant part as "a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, §1(q) (emphasis supplied).

[2/]If any matter (or class of matters, *see EC-COI-90-4; 90-5*) to which a §6 financial interest applies comes before the Board, you must fully disclose it to your appointing authority, the Governor, in writing beforehand, even if you decide not to participate. The Governor may then decide to allow your participation if he determines that this financial interest is not so substantial as will likely affect the integrity of your services to the state. §6(3). Copies of both your disclosure and the Governor's determination must be filed with this Commission.

[3/][example deleted]. You should seek further advice from us if you have questions about a particular situation, or seek an appropriate exemption from the Governor (see note 2).

[4/]For example, such an impression might arise if your own immediate supervisor, immediate subordinate, a colleague with whom you have a close working relationship, or a close personal friend came before the Board. *See, e.g., EC-COI-89-16.*

[5/]Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes).*

[6/]General Laws c. 268A, §3(b) also prohibits you from either soliciting or receiving anything of substantial value "for [your]self" from such persons. *EC-COI-92-2.* Because most of your proposed solicitations arguably are on behalf of others, this discussion focuses on §23(b)(2).

[7/]If a solicitation letter you sign is sent to a broad mailing list that you do not control, and is inadvertently received by a person subject to the Board's regulatory jurisdiction, you will not violate §23(b)(2). To the extent that you control the mailing list and are able with reasonable effort to remove the names of persons subject to the Board's regulatory jurisdiction, however, you must take reasonable steps to do so.

[8/]We have recognized that state officials may use official resources to solicit funds for public purposes. *EC-COI-84-128* (by Secretary of Public Safety, for state program to combat drug and alcohol abuse); *EC-COI-83-102* (by legislator, for voter registration drive).

[9/]We have apparently never been asked this question before, probably because the state campaign finance law, G.L. c. 55, §13, prohibits such political fundraising by appointed persons "employed for compensation" by the government. The state Office of Campaign and Political Finance (OCPF) can provide advice about whether this provision applies to you, in view of your declining the compensation to which you are entitled. Even if OCPF concludes that its statute applies in your circumstances, however, our opinion will have significance for other regulatory board members for whom no compensation is provided; they include, for example, all members of boards of registration (*see* G.L. c. 13, §9, last sentence, added by St. 1990, c. 150, §227) and of many unpaid local boards, such as planning boards, boards of zoning appeals, and conservation commissions.

[10/]We need not decide here to what extent this analysis should apply to elected officials. It may well be, however, that solicitation of political contributions is "warranted" under §23(b)(2) in different circumstances for elected than for appointed officials. *See* G.L. c. 55, §13 (exempting elected officials from prohibition against compensated public employees' soliciting or receiving political contributions); *United States v. Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974) ("Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official"); *United States v. Biaggi*, 909 F.2d 662, 695 (2d Cir. 1990) (line between lawful campaign contribution and illegal gratuity not always clear, citing *Brewster*).

[11/]The official apparently could not solicit campaign contributions themselves (as opposed to campaign services) because of G.L. c. 55, §13. *See* n. 9 above.

[12/]The state statute under review was, in fact, the first sentence of G.L. c. 55, §13.

[13/]As the discussion above makes clear, federal and state campaign finance laws may further restrict your activities. For more information, you should contact the state Office of Campaign and Political Finance, One Ashburton Place, Room 411, Boston, MA 02108, telephone (617) 727-8352; and the Federal Election Commission, 999 E Street, N.W., Washington, D.C. 63, telephone (800) 424-9530.

CONFLICT OF INTEREST OPINION
EC-COI-92-13

FACTS:

You are an officer of a private consulting corporation offering policy development and other management advisory services to government and health care providers. In particular, you have over ten years experience in mental health and hospital management. Your firm has had numerous contracts with various state agencies to provide expertise to the Commonwealth in the area of health and mental health planning and financial management.

Recently, the Commonwealth has received responses from acute general hospitals to a Request for Proposals (RFP) to provide psychiatric care as part of the Commonwealth's proposed privatization of mental health care. A new RFP has been released, seeking assistance in the evaluation of the hospital proposals and in the implementation of contracts with the hospitals. Your firm is one of the firms which has been selected to perform these services. The firm's responsibilities will include: formulating baseline data by reviewing the financial information provided by the hospitals and developing objective measures to judge the hospital's proposals; developing a risk analysis tool to assist the DMH in determining which of the hospital responses may present too much risk; and assisting DMH in its negotiations with the selected hospitals.

The executed contract expressly names you as the project director and names four other firm employees to be project managers. Each of these individuals' resumes is attached and incorporated by reference into the contract. Each of the named individual's qualifications in pertinent areas is diagramed in a chart in the response to the RFP. Each of the individuals is also noted on an organization chart for the program. According to your response to the RFP, which is incorporated into the contract, the project managers will: "manage the daily project tasks and administrative matters and act as liaison with the Commonwealth's designated contract persons; coordinate, direct, and supervise the conduct of work plan activities and tasks performed; manage the project budget, resource requirements, and work schedules; plan and monitor the execution of the project; manage the preparation of progress reports; and provide technical guidance." See Response, V-3. Your response notes that this project will require managers with expertise in health care and hospital financing, as well as expertise in the legal/regulatory and program policy aspects of the project. See Response V-4. Each of the named individuals has experience in each of these areas and most of the individuals have past experience working in other health policy projects involving the Commonwealth. Also, you agreed to obtain prior written approval from the Commonwealth prior to substituting management, supervisory, or key professional personnel named in the contract. Response I-3.

You state that all of the parties specifically seek your expertise in this project and that you will be considered a special state employee under G.L. c. 268A, but you question whether the other named individuals in your firm will also be considered state employees.

QUESTION:

Are the other four named individuals considered to be state employees under G.L. c.268A, §1(q), by virtue of the contract between the Commonwealth and the firm?

ANSWER:

Yes.

DISCUSSION:

In the enactment of G. L. c. 268A, the Legislature established an expansive definition of the term "state employee".[1/] This definition covers not only individuals who hold full-time employment with a state agency, but also consultants who provide services on an intermittent basis, whether or not they receive any compensation. *See, e.g., EC-COI-89-35* (private consultants state employees where services expressly contracted and agency contemplating specific expertise); *86-21* (private artist is a state employee where specific services contracted for); *85-4* (president of consulting group is a state employee where services being provided are within his expertise); *83-129*. However, the fact that a corporation contracts with the state, without more, does not confer state employee status on all of the employees of the corporation. *See, e.g., EC-COI-92-6; 86-21* (project manager without more is not a state employee by virtue of employer's contract with state agency); *83-39* (contract calls for services of firm as a whole, not individuals); *85-4* (same). For example, in *EC-COI-86-21* a question arose whether an individual who was named in a contract to perform artwork and an individual who was not specifically named but who was the project director were state employees for purposes of G.L. c. 268A. In finding that the named individual was a state employee, but that the project manager was not, the Commission stated that "such an employee is covered by the definition if the terms of the contract indicate that his specific services are being contracted for." *EC-COI-86-21; see also, EC-COI-83-165* (consultant specifically named, contract also identified compensation and personnel schedule for work); *83-129* (named project leader and state required to consent to any change of leader); *80-84* (contract specifically contemplates all partners in firm will work on project).

The Commission has established certain factors it will weigh in determining whether an individual who is an employee or officer of a private corporation which

contracts with a public entity will be deemed to be a public employee. *EC-COI-87-19; 87-8.* These factors include:

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

2. the type and size of the corporation;

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

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

5. the extent to which the person has performed similar services to the public entity in the past. *EC-COI-89-35; 86-21; 87-19.*

No one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances. After weighing your circumstances, we conclude that the individuals in your firm who are named in the contract are state employees under the conflict of interest statute.[2/] Of significance are the facts that each individual is expressly named in the contract, designated on the organization chart, and delegated specific tasks to perform under the contract. Additionally, you may not substitute other persons in these positions without notifying and, presumably, receiving permission from the Commonwealth. We also note that the contract emphasizes the expertise of the individuals in the area of healthcare financing and policy, which are the areas in which the Commonwealth is seeking assistance. *See, EC-COI-89-35* (where contract mentions references to health care management and consultant's prior experience in field, state agency could reasonably infer it was obtaining consultant's expertise in this area under contract).

This is unlike the situation where the officers of a corporation enter a contract with the state and provide no further services other than general oversight of their employees, or where a contract specifies a generic program manager. *See, EC-COI-89-6.* Viewing the totality of the contract, it is apparent that the Commonwealth is seeking specific expertise in health care management and financing, and by the selection of your firm, the agencies could reasonably infer that the named individuals would provide that expertise. Finally, we see no evidence in the contract that the agencies intended to treat your status differently from the other individuals so named or that the other individuals were not necessary to the performance of the contract.[3/]

Date Authorized: April 13, 1992

[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.

[2/]We call your attention to the conflict of interest provision in the Commonwealth contract which you signed, which states "The Contractor understands that any person individually named in Attachment C (key personnel) ... to provide services under this Contract may become a special state employee subject to the provisions of Chapter 268A of the General Laws." Each of the individuals in question was individually named in Attachment C.

[3/]While the parties may not, by contract, obviate the application of G.L. c.268A, they may amend or draft a contract based upon the firm's ability, rather than an individual's ability, to provide services. *See, EC-COI-86-21; 83-89* (contract calls for services of firm as a whole, not individuals); *82-134* (agency contracted for services of corporation, not individual).

CONFLICT OF INTEREST OPINION
EC-COI-92-14

FACTS:[1/]

Until recently, you were employed as a clinical psychologist at a State Hospital. You left state employment and established a private practice. While you were a state employee, you were the individual psychotherapist for a particular patient and you saw this patient twice a week for over a year. After you left state

employment, the patient's treatment team developed a discharge plan for the patient. Although you stated that you would not participate in the design of the discharge plan prior to your departure, you anticipated that it would include: DMH case management, residential placement, a day treatment program, outpatient psychotherapy and outpatient psychiatric follow-up.

When you left state employment, the patient remained an inpatient at the State Hospital and continued her treatment with another therapist. In connection with her pending discharge, the patient has indicated that she would like to use her Medicare benefits to see you in your psychotherapy practice.

QUESTION:

Does G.L. c. 268A permit you to accept a referral of this patient?

ANSWER:

Yes.

DISCUSSION:

When you left state government you became a former state employee who is subject to G.L. c. 268A, §5. Section 5(a) prohibits you, as a former state employee, from receiving compensation from or acting as agent for anyone, other than the Commonwealth, in connection with any particular matter[2/] in which the Commonwealth is a party or has a direct and substantial interest and in which you participated as a state employee. The Commission has previously recognized that

> Section 5 is grounded on several policy considerations. The undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. Moreover, §5 precludes a state employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182, 185; *see also EC-COI-88-14*. It is not relevant whether such dangers actually exist in a given situation, as the conflict of interest law is a remedial law which is intended to address situations of actual conflict as well as situations which present a potential for conflict. *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83, 88-89 (1984).

The Commission has previously determined that a proposed private activity is precluded if it is in connection with the same matter in which the individual participated as a state employee. *See, EC-COI-89-7* (former state employee's participation in environmental impact process precludes his private representation of applicant in latter stages of process as it involves same controversy); *84-31* (subsequent application identical to prior application); *87-34* (former state employee may not challenge policy or validity of draft regulations which he helped promulgate).

On the other hand, if the proposed activity is in connection with a matter which arose after the former employee left state service or is independent from a matter in which the employee participated as a state employee, it will not be precluded. *See, EC-COI-88-8; 85-74; 83-80.* For example, in *EC-COI-83-80*, a former state employee wanted to provide consulting services in connection with an environmental impact study. While he was a state employee he had participated in a prior environmental impact study on the same project, but after he left state service the scope of the project changed and included new alternatives. We concluded that the former employee could be compensated privately in connection with the second impact report if the considerations and conclusions in the new report were independent from the conclusions in the first report. Under these circumstances the new report would be a different particular matter from the first report. *See also, EC-COI-85-74* (project involving new bids on different set of buildings was new particular matter).

Applying these principles to your circumstances, we conclude that §5(a) will not preclude you from being privately compensated in connection with this referral since the referral resulted from a discharge plan developed after you left state service. We find your circumstances to be analogous to *EC-COI-83-80*, discussed above, based on your representation that it was the patient's subsequent therapist who was in a position to influence her discharge plan. Had the discharge plan been developed while you were seeing the patient, you would have participated in the plan even though you were

not part of the treatment team. Since the plan was not developed until after you left state service, and after another therapist began treating the client, the referral arising out of the discharge plan will not be considered a particular matter in which you participated. *Compare, EC-COI-85-74*, n.3 (if plan submitted a resubmission of initial contract would be considered same, not different particular matter).

Date Authorized: April 13, 1992

[1/] This opinion is based on facts you have provided and the Commission has conducted no independent investigation of the facts. If these facts changed subsequent to your opinion request, you should seek further guidance from this Commission.

[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).

CONFLICT OF INTEREST OPINION
EC-COI-92-15

FACTS:

You are the Administrator of a Town (Town).[1/] You inform us that the members of a Board (Board) are elected to that position. The Board's Clerk (Clerk) is appointed by the Board to a full-time, paid position.

QUESTION:

Does G.L. c. 268A allow a Board member to be appointed to a paid position under the direction of the Board?

ANSWER:

Yes, provided that the Board of Selectmen classifies the position of Board member as a "special municipal employee" position pursuant to G.L. c. 268A, §1(n) and provided that the appointment is approved at Town Meeting pursuant to §21A.

DISCUSSION:

Members of the Board are considered municipal employees for purposes of G.L. c. 268A. Two sections of the conflict of interest law are therefore relevant to your question.

Section 20

This section prohibits a municipal employee from having a financial interest in a municipal contract. The term contract includes any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other. Thus, the Commission has previously held that the term "contract" includes employment arrangements. *See EC-COI-84-91; In re Doherty, 1982 SEC 115. See Quinn v. State Ethics Commission*, 401 Mass. 210 (1987).

A Board member who is employed as the Clerk would have a financial interest in a municipal contract within the meaning of §20. Accordingly, a Board member would be prohibited from holding the position of Clerk unless one of the exemptions available in §20 applies.

If the position of Board member is designated by the selectmen as a special municipal employee position, a Board member may avail himself of the exemption found in §20(d). Upon his/her filing with the Board of a written disclosure of the Board member's financial interest in the Clerk's position as well as the approval of such an exemption by the selectmen, the Board member's financial interest in a municipal contract will be allowed.[2/]

Section 21A

This section prohibits a municipal board from appointing any of its members to any office or position under the supervision of that board unless such appointment is first approved by Town Meeting.[3/] Therefore, even upon compliance with the requirements of §20, the Board may not appoint one of its members to the Clerk's position unless the Town Meeting first approves the appointment.[4/]

Date Authorized: May 14, 1992

[1/]You are requesting this opinion on behalf of the Board of Selectmen, who are interested in, among other things, the necessity of designating certain Town positions as special municipal employee positions.

[2/]In the Clerk's position, the employee will not have a financial interest in the Board position because the Board members are elected and the Commission has previously determined that election to a public office does not create a contract. *EC-COI-82-26.*

[3/]Rather than seeking Town Meeting approval, it may also be possible to add the duties of the Clerk's position to the responsibilities of one member of the Board. In other words, the Board would be structured so that one member would be required to carry out the Clerk's functions as of part his/her role. Any additional compensation received by this particular Board member would be for additional responsibilities as a Board member rather than for holding a separate municipal position, thereby avoiding any issues under §§20 and 21A. Because such a change in the structure of the Board may need to be accomplished through adoption of a by-law, or may depend on other provisions of state law, we suggest that you contact Town Counsel if you choose to restructure the Board rather than follow the procedure set forth in this opinion.

[4/]Waiver of compensation in the Clerk's position would eliminate all issues under §20, but would not obviate the need for Town Meeting approval under §21A.

CONFLICT OF INTEREST OPINION
EC-COI-92-16*

FACTS:

You are the former General Counsel of the Massachusetts Department of Environmental Protection (DEP). You were last employed in that position on July 12, 1991. You are now considering submitting a bid for a contract to provide legal services to another state agency.

QUESTIONS:

Given the above facts:

1. will you be barred from appearing before any court or agency of the Commonwealth in connection with any particular matter which was under your official responsibility at DEP for a period of one year after your last employment in your contemplated contract position with another state agency?

2. if you become a special state employee by virtue of your contemplated contract with another state agency, for purposes of the application of §4 of G.L. c. 268A, would the clause limiting the scope of that section by virtue of the number of days of service during the past year apply only to time served as a special state employee?

ANSWER:

1. No, §5(b) of the conflict of interest law prohibits your appearance before any court or agency of the Commonwealth in connection with any particular matter which was under your official responsibility while at DEP for a period of one year from your last employment by DEP, notwithstanding any subsequent services provided to the Commonwealth or one of its agencies.

2. Yes, those provisions of §4 concerning special state employees refer only to service as a special state employee.

DISCUSSION:

Upon the termination of your position with the DEP, you became a former state employee for purposes of G.L. c. 268A. If you are successful in contracting with another agency of the Commonwealth, you will again become a state employee, but most likely, a special state employee.[1/]

1. Section 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 in connection with[2/] any particular matter[3/] in which the state or a state agency is a party or has a direct and substantial interest and the matter was one in which the employee officially participated.[4/] Therefore, in regard to matters in which you officially participated as a DEP employee, this section will restrict indefinitely your ability to act as agent or attorney for or receive compensation from anyone other than the Commonwealth.

We note that participation may be found with regard to legal matters which were pending during your DEP employment, where you did not personally handle the matter, but rather, you supervised the work of subordinates. *See EC-COI-89-7* (a state employee's participation in discussion or approval of subordinate's recommendation is more than ministerial in nature); *EC-COI-79-57* (in the case of a state agency general counsel who consulted occasionally with the Office of the Attorney General as well as his agency's legal staff concerning a particular case, that employee's awareness and tacit approval of the work of direct subordinates concerning the case constitutes participation).

2. Section 5(b)

Section 5(b) prohibits a former state employee from personally appearing[5/] before any court or agency of the Commonwealth within one year after leaving state service in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and if the matter was under the official responsibility[6/] of the employee within the two years prior to the termination of such state employment.

If, for example, you had official responsibility for several attorneys who made their own litigation decisions (you did not supervise their work) you would still be restricted from personally appearing before any court or state agency for a period of one year in connection with those matters handled completely by your subordinates during your final two years in your DEP position. Such matters were under your official responsibility as general counsel, notwithstanding the fact that you did not participate in them.

Based upon your facts, under §5(b), you may not appear before a court or agency of the Commonwealth until July 12, 1992 in connection with a particular matter which was under your official responsibility between July 12, 1989 and July 12, 1991. This is so because we will interpret the time limits set out in §5(b) to apply to your employment with the DEP, notwithstanding any future contract employment with an agency of the Commonwealth. *See EC-COI-79-8* (§§ 5(a) and 5(b) are not applicable to a contract with another state agency because employee is not receiving compensation from or acting on behalf of anyone other than the Commonwealth); *see also EC-COI-88-12* (former state employee provisions do not apply to one who resigns one state job in order to accept another concerning ability to act in second state position).

3. Section 4

The prohibitions of §4 will apply to you in your contract position as a special state employee. *See EC-COI-82-114.* Section 4 generally prohibits a state employee from receiving compensation from, or acting as attorney or agent for, anyone other than the Commonwealth in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest. *See EC-COI-92-2.* These restrictions apply in a less restrictive manner to special state employees. Accordingly, as a special state employee, you would be prohibited from receiving compensation from, or acting as an agent or attorney for, anyone other than the Commonwealth only in relation to a particular matter which (a) you have participated in as a state employee, (b) is or within one year has been a subject of your official responsibility, or (c) is pending within the state agency in which you are serving. We note that clause (c) is not applicable to a special state employee who serves (in his special state employee position) on no more than sixty days during any period of three hundred and sixty-five days.[7/]

Your opinion request raises the issue of the simultaneous applicability of the restrictions of §§4 and 5. In *EC-COI-79-2* the Commission advised a former assistant district attorney, who was engaging in private practice and then sought to contract with the district attorney's office as a special district attorney, that he would be subject to the prohibitions of §5(a) and §5(b) with regard to his private practice in light of his previous work as an assistant district attorney. The Commission went on to advise of the applicability of §4 to the attorney as a special state employee in light of his work as a special assistant district attorney, thus implicitly recognizing that the restrictions of §5 continue to operate even as to a current special state employee.

As applied to you as a special state employee, §4 is ambiguous because a literal reading of the statute does not make clear whether the restrictions on your private activities relate to your former state service (at DEP) in addition to your contemplated work as a special state employee (rather than merely from your special state employee work). For example, §4 prohibits a special state employee from receiving compensation from anyone

other than the Commonwealth in connection with a particular matter in which the employee has participated as a state employee. However, the statute does not specify that participation "as a state employee" refers to participation only in the current role as a special state employee. We find that the statute should be so construed, although the effect of such an interpretation appears to be of no relevance with regard to your situation. Because of the application of §5(a) to all matters in which you participated as a DEP employee, you are already prohibited under that section regardless of whether we interpret "as a state employee", as found in §4, to include matters in which you participated at DEP as opposed to only those matters in which you will participate as a special state employee.

With regard to the provision of §4 which applies to special state employees concerning matters that are or have been under their official responsibility, we will similarly interpret that language in §4 to apply only to matters under the official responsibility of the special state employee. *See EC-COI-79-2*. Therefore, in your case, you will be restricted by §4 as a special state employee from receiving compensation or acting as an agent or attorney for anyone other than the Commonwealth in connection with any particular matter which is or within one year has been under your official responsibility as a special state employee. We remind you, however, that §5(b) will continue to prohibit your appearance before any court or agency of the Commonwealth for a period of one year from the date when you left your DEP position in connection with matters which were under your official responsibility at DEP during your last two years of service at that state agency. However, §5(b) does not restrict your mere receipt of compensation in connection with those DEP matters which were under your official responsibility.

Date Authorized: May 14, 1992

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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/] "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).

[2/] We emphasize the "in connection with" language found in §§5(a) and (b). Compensation and/or representation may be prohibited if sufficiently related to the former state employee's prior work. We therefore advise that you seek additional advice from us if you contemplate working on a matter which is related to a particular matter in which you participated or which was under your official responsibility while at DEP.

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

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

[5/] The Commission has previously interpreted "personally appearing" to include, in addition to physically appearing before a court or agency of the

Commonwealth, contacting an agency or court in person or in writing. *See EC-COI-87-27.*

[6/] "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).

[7/] Presumably the 60 day limitation found in this portion of §4 applies to state employment in the special state employee position since it modifies clause (c), which refers to particular matters which are pending in the state agency in which the special state employee is serving (emphasis added). Therefore, the 60 days of service must also refer to the employee's service as a special state employee. In your case, if your contemplated contract employment will be for 60 days or less, then you will not be restricted by §4 concerning matters which are pending in the agency by which you will be employed, but in which you are neither participating as a special state employee, nor are part of your official responsibility in that position.

CONFLICT OF INTEREST OPINION
EC-COI-92-17

FACTS:

You were the public health agent for the Town. In that capacity, you participated in negotiating and implementing a contract ("the first contract") between the Town and ABC, Inc. (ABC) for disposal of waste at the Town's municipal landfill from ABC's site. That contract gives ABC the exclusive right to operate a portion of the municipal landfill (the ABC landfill) until the contract expires, and allows ABC to dump a specified volume of waste per year from the ABC site in the ABC landfill, in return for a specified fee per volume paid to the Town (and other consideration).

Because ABC did not dump as much waste as expected, the Town did not receive as much revenue in fees as it had hoped. Therefore, the Town recently issued a request for proposals (RFP) to dump additional waste. DEF, Inc. (DEF), of which ABC is a wholly owned subsidiary, was the only bidder for this "second contract," a result the Town expected because the first contract required ABC's consent for any other dumping in the ABC landfill. The Town and DEF are now negotiating the details of the second contract. According to the RFP's specifications, the second contract will not by its terms amend the first contract, but will in addition allow DEF to dump waste from sites other than ABC's in the same ABC landfill, in return for a higher fee per volume. The second contract's RFP contains numerous references to the first contract, including a limitation on the non-ABC waste to be dumped under the second contract, which will depend in part on the amount of ABC waste dumped under the first contract. The second contract, which will expire after the first contract, will also include an elaborate provision allowing DEF the option of assuming exclusive operation of the ABC landfill after the first contract expires.

Meanwhile, you left your Town position and became an employee of DEF. You now[1/] wish to participate in negotiating and implementing the second contract on behalf of DEF, including continued contacts with Town officials.

QUESTION:

May you receive compensation from DEF for your work in negotiating and implementing the second contract, and may you contact Town officials on DEF's behalf for this purpose?

ANSWER:

No.

DISCUSSION:

When you were the Town's public health agent, you were a "municipal employee" for the purpose of the conflict of interest law. G.L. c. 268A, §1(g). Therefore, you are now subject to G.L. c. 268A, §18(a),[2/] which forever prohibits you from

> knowingly act[ing] as agent or attorney for or receiv[ing] compensation directly or indirectly from anyone other than the same . . . town in connection with any particular matter in which the . . . town is a party or has a direct and substantial interest and in which [you] participated as a municipal employee while so employed . . . .

Since it is clear that you participated as a municipal employee in the first contract, a "particular matter"[3/] to which the Town is a party, the question presented is

whether your negotiating and implementing the second contract for DEF is "in connection with" the first contract. For the following reasons, we conclude that it is.

In deciding whether a former public employee's present work for private compensation is "in connection with" a particular matter in which he participated while a public employee, the Commission's analysis in previous opinions has varied.[4/] We have sometimes focused only on whether the former employee's present work related to a "new" or "different" government particular matter, without considering whether the work was also "in connection with" the previous particular matter in which he participated as a public employee. *See, e.g., EC-COI-89-34; 85-74; 85-52; 83-80.* In other opinions, especially more recently, we have engaged in an analysis of factors showing whether the employee's proposed private work is closely enough connected to the matter in which he participated to bar him from acting as agent or attorney or receiving compensation. *E.g., EC-COI-91-1.* Without implying that the result reached in any previous opinion was incorrect, we now clarify that the latter analysis is required by the statutory language.

We interpret the statute "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). *See EC-COI-92-6.* What we said of the statutory purpose of G.L. c. 268A, §5, the cognate section governing former state employees, also applies here to the identical limitations §18 establishes for former municipal employees:

> The undivided loyalty due from a [public] employee while serving is deemed to continue with respect to some matters after he leaves [public] service. Moreover, [the statute] precludes a [public] employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his own personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182, 185.

As this language suggests, and as we have previously recognized, §§5, 12, and 18 strike a balance between these concerns about former employees' disloyalty to the government and the Legislature's competing desire not to foreclose entirely the former public employee's private employment in the very area of his greatest expertise. *EC-COI-81-34* (quoting Jordan, *Ethical Issues Arising from Present and Past Government Service*, in ABA, *Professional Responsibility: A Guide for Attorneys* 196 [1978]). The legislative history of the federal statute on which these sections were modeled[5/] makes clear that subsection (a) strikes this balance by "protect[ing] the government where it needs realistic protection," i.e., in connection with "matters with which [former employees] had contact while in the government -- matters wherein they have true conflicts of interest." Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service* 228-29 (1960). *See* Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1121, 1153-55 (1963). In short, the statutory purpose is to bar the former employees, not from benefiting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer. *See* Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 20 (1964) (emphasizing the former employee's "access to confidential information which he might use against his former" employer); *see also* G.L. c. 268A, §23(c).

In an effort to be faithful to these purposes, we look to past opinions, identifying the factors we have previously applied to decide whether a former public employee's present work for private compensation (the "private work") is "in connection with" a particular matter in which he formerly participated while a public employee (the "government matter"). Most often, we have inquired whether the private work is "integrally related" to the government matter because they involve "the same parties, the same litigation, the same issues or the same controversy." *EC-COI-91-1* (not barred because different litigation raising different issues). *See EC-COI-89-7* (later stage of same environmental review process involves

same controversy); *87-34* (barring challenge to, but not interpretation of, regulations employee assisted in promulgating); *84-31* (resubmission of same application presents same controversy); *81-28* (barred from new litigation involving same controversy, parties, and challenge to same statute's validity); *80-108* (barred from different but "integrally related" litigation based on different individuals' complaints, but same claim, same issues, same businesses, and same time period). By contrast, we have allowed the private work if the issues have changed substantially from the former employee's government participation. *EC-COI-89-34* n.5 (substantially different legislative proposal); *85-74* (different buildings using changed plans); *83-80* (new alternatives, studied independently, for construction project).

In addition, we have examined the effect the proposed private work would have on the government particular matter. *See EC-COI-91-1* (not barred where new litigation did not seek to challenge or modify existing decree); *86-23* (not barred where work did not involve challenge or modification to existing escrow agreement). *See also EC-COI-87-34; 85-11; 81-34* (all holding that a former public employee who participated in drafting a regulation may later engage in private work to apply or interpret the regulation, but not to challenge its validity). This factor seeks to guard against potential abuse of past factual knowledge, confidential information, and personal associations in the context of the particular matter. It also expresses the legislative concern, which we recognized in *EC-COI-81-34*, about a former employee's "in essence seeking to tear down that which he had helped to build [or] taking advantage of a weakness that he discovered while in government service" (quoting *M. H. Gordon & Son, Inc. v. ABCC*, Suffolk Superior Court Nos. 38250, 37348, and Jordan, *supra*, at 196).

It remains to apply this analysis to your facts. First, your proposed work negotiating and implementing the second contract for DEF would be "integrally related" to the first contract. The amount of waste DEF will be allowed to dump will depend, by the explicit terms of the second contract's RFP, on the amount its subsidiary, ABC, dumps under the first contract. In fact, DEF's very ability to dump waste under the second contract depended (by virtue of the first contract's terms) on ABC's express written consent, consent ABC was willing to extend only to DEF.[1/] Ultimately, DEF will retain the option of actually operating the ABC landfill when ABC's (first) contract expires. It is clear that the two contracts involve, for practical purposes, the same parties and many of the same issues. *See EC-COI-91-1.*

The second factor discussed above is also significant here. The second contract will in effect modify the first contract in an essential respect: it will remove the first contract's limitation to ABC's site as the sole source of the waste to be dumped in the municipal landfill. Instead, the second contract will allow waste from the other DEF sites to be dumped as well, thereby substantially increasing the actual amount of waste dumped by ABC-DEF over time, and in addition will significantly increase the fee paid for dumping the additional waste. Indeed, this appears to be both the Town's and DEF's principal purpose in negotiating the second contract.[2/]

It is true that the second contract will not, in so many words, amend the first contract. As you point out, this appears to result from a provision of the state Uniform Procurement Act, G.L. c. 30B, §13(1), which prohibits amending an existing contract unless "the unit prices remain the same or less." The fact that c. 30B required a new contract, rather than an amendment to the existing contract, does not control our analysis under G.L. c. 268A. As we said at the outset, the question for us is not whether your private work would relate to a "new" or "different" particular matter. Rather, the only question, by the very language of §18(a), is whether your proposed private work would be "in connection with" the first contract, the government particular matter in which you concededly did participate while a public employee.

For the reasons stated above, we conclude that the answer to this question must be yes -- the factors that we have identified, as guides to the proper application of "in connection with," have clearly been satisfied. Therefore, G.L. c. 268A, §18(a) prohibits you from receiving compensation from DEF, and from acting as its agent, in negotiating and implementing the second contract.

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[1/]This opinion addresses only your future conduct. *See* G.L. c. 268B, §3(g).

[2/]Because you left town employment more than one year ago, §18(b), which concerns matters under your "official responsibility" in which you did not actually participate, no longer applies to you.

[3/]"Particular matter" is defined to include, among other things, "any . . . contract . . . ." G.L. c. 268A, §1(k).

[4/]In this discussion, we examine our precedents construing G.L. c. 268A, §§5, 12, and 18, the statutes governing former state, county, and municipal employees respectively, because these provisions are substantially identical.

[5/]Special Commission on Code of Ethics, *Final Report*, H. 3650, at 8 (1962). *See, e.g., Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536-37 (1974).

[6/]The extent of the integral relationship between the two contracts is perhaps most graphically revealed by the fact that the DEF Regional Vice President who signed DEF's response to the second contract RFP, also signed (as ABC Vice President) ABC's attached consent allowing DEF to dump additional waste in the ABC landfill, as required by the first contract.

[7/]Obviously, your negotiation and implementation of the second contract would require you to deal repeatedly, on many of the same factual issues, with the very municipal government colleagues with whom you participated as a public employee in negotiating the first contract.

CONFLICT OF INTEREST OPINION
EC-COI-92-18

FACTS:

The ABC County Retirement Board (Board) administers the public contributory retirement system for the employees of dozens of towns and districts, and the County of ABC. The Board is required to administer the retirement funds of its members, to invest the funds, and to service the members of the system in related retirement matters. Members of the Board are required to invest funds, interview investment managers, evaluate investment proposals, make investment choices, and regulate and review investment conduct on behalf of the Retirement System.

An elected member of the Board is a municipal employee from one of the County towns who is currently on leave of absence from that Town. He intends to retire as a municipal employee at the conclusion of his leave of absence. He has begun employment with a private sector investment firm (Firm) which is involved in the public pension market. This private employment involves the marketing, sales, and promotion of his employer's pension products and will require discussion, advisement and personal appearances before public retirement boards regarding his employer's services. According to the elected member, this firm is not presently involved with any investment activity concerning Board funds and no future investment activity is contemplated.

QUESTION:

May the elected Board member remain a Board member and continue private employment with an investment firm?

ANSWER:

G.L. c. 268A will permit the elected Board Member to remain a Board member and hold private employment with the Firm, but he will be subject to the following restrictions.

DISCUSSION:

For purposes of the G.L. c. 268A, the elected member is a special county employee,[1/] as Board members serve without compensation. See, G.L. c. 32, §20(3)(c). Four sections of the law are relevant.

1. Section 11

G. L. c. 268A, §11 provides, in pertinent part, that a special county employee may not receive compensation from or act as the agent for anyone, other than the county, in connection with any particular matter[2/] in which the county is a party or has a direct and substantial interest and in which he has at any time participated as a county employee, or which is or within one year has been the subject of his official responsibility, or which is pending in the agency in which he is serving. For example, the elected member may not receive compensation from the Firm for preparing proposals which the Firm will submit to the Board. *EC-COI-91-13*. In addition, he may not represent the Firm in any dealings before the Board nor solicit any Firm business from the

Board. *See EC-COI-85-60; 83-150.* Similarly, he may not receive compensation from the Firm or act as the Firm's agent in connection with soliciting business from municipalities in the County who are not members of the County Retirement System or who are members but may choose to leave. For example, if a municipality has notified the Board of a decision to leave the County system, the elected member will be prohibited from receiving compensation from the Firm or acting as the Firm's agent in any request for proposal or presentation to the municipality in order to gain the management business which the County has lost. The County has a direct and substantial interest in a municipal decision to use the Firm as an investment manager, rather than to join the County system. We note that we have previously concluded that "the distinguishing factor of acting as agent within the meaning of the conflict law is 'acting on behalf of' some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications." *In re Reynolds*, 1989 SEC 423, 427. *See Commonwealth v. Newman*, 32 Mass. App.Ct. 148, 150 (1992). It does not appear that issues will arise under §11 as long as the Member does not do business with any town in ABC County system or any business which implicates County retirement funds, or any business with municipal pension systems which are competitors of the County system.[3/]

2. Section 13

Section 13 provides that no county employee may participate as such an employee in any particular matter in which, to his knowledge, a business organization in which he is serving as an officer, director, trustee, partner, or employee has a financial interest. The definition of participation includes participating in the formulation of a matter for a vote, as well as voting on the matter. *Graham v. McGrail*, 370 Mass. 133, 138 (1978). Section 13 encompasses any financial interest without regard to the size of said interest, but the financial interest must be direct and immediate or reasonably foreseeable. *See EC-COI-89-19; 89-8; 86-26* (city councillor required to abstain from participating in school committee appointment as committee reviewing specific provisions that may affect councillor's employer). Financial interests which are remote, speculative or not sufficiently identifiable do not require disqualification under G.L. c. 268A. *See EC-COI-84-96; 87-16.* As the Firm is not involved with any investment activity involving any County Retirement funds and does not contemplate such activity in the future the elected member will not be required to abstain in Board investment matters. *See EC-COI-85-60* (County Commissioner required to abstain in any matters affecting municipalities which were his business clients and proposals submitted by private firm employing him); *83-150* (County Commissioner required to abstain in matters involving future insurance contracts on which Commissioner intended to bid as private insurance broker). However, the elected member will be required to abstain in any decisions, determinations or other matters concerning whether a municipality may join or leave the County system if said municipality has a prospective business arrangement with the Firm when it leaves the County system, or if the municipality has a present relationship with the Firm which will terminate upon entering the County system. In this respect, the Firm is a competitor to the County in the field of municipal pension management, and has a reasonably foreseeable financial interest in a Board decision to admit or terminate a municipal member of the system. *See EC-COI-86-13.*

3. 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 of substantial value for himself or others. G.L. c. 268A, §23(b)(2). Section 23(b)(2) will prohibit the Board member from using county resources, such as staff, equipment, or county time or his county title in order to further his private business activities. *See, Public Enforcement Letter 89-4* (state employee's use of official stationery and state resources in attempt to promote private trip from which employee would benefit was unwarranted use of official position); *in re Buckley*, 1983 SEC 157 (municipal housing authority employee who was also private landlord violated §23(b)(2) by using official agency stationery to communicate with private tenants); *EC-COI-86-13; 85-28.* This section would also prohibit the Board member from soliciting Firm business from the various public entities whose funds comprise the Retirement system. In past precedent the State Ethics Commission has held that public employees are prohibited from privately soliciting private business from those whom they oversee. *See EC-COI-92-7; 82-124* (county commissioner could not solicit private insurance business from county vendors); *84-61* (legislator could not market tax shelters to persons with interest in legislative

business); *in re Burke*, 1985 SEC 248 (fining official for using official position to obtain access for private purposes to persons his agency regulated).

Further, §23 (b)(3) prohibits a county employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of anyone. For example, issues under this section will arise if the Board member is required to make an investment decision affecting an investment firm which is currently competing with his firm for a non-County contract. In order to dispel the appearance of a conflict of interest, this section requires that an elected official disclose all of the relevant factors pertaining to the perceived conflict in a public manner prior to participating in a particular matter. This disclosure should be filed, in writing, in the County Clerk's or County Administrator's office. *EC-COI-90-2; 89-19.*

Additionally, §23(c) prohibits the Board member from disclosing confidential information which he has acquired in his public position or from engaging in professional activities which would require the disclosure of such information. *See EC-COI-84-26; 83-154.* The Commission has previously defined "confidential information" as information that is unavailable to the general public, as distinguished from information that, although not well known, is a matter of public record. *EC-COI-89-7.*

4. Section 12

When the Board member retires or resigns from the Board, he will be subject to the restrictions of §12, which governs the activities of former county employees. In general, he will be prohibited from receiving compensation from or acting as the agent for someone, other than the County, in connection with a matter in which the County is a party or has a direct and substantial interest and in which he had participated as a County employee. He will also be prohibited from personally appearing, before a County agency, on behalf of someone other than the County in connection with a matter which was under his official responsibility in the two years prior to his termination of County service.[4/]

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[1/]"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 law 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).

[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/]If these facts change, the elected member should seek further guidance from the State Ethics Commission.

[4/]The Board member should seek further guidance from this Commission regarding these restrictions if he leaves the Board and if the Firm decides to pursue business with the Board.

CONFLICT OF INTEREST OPINION
EC-COI-92-19

FACTS:

You are a manager of a private communications corporation, DEF. DEF rents a corporate box at Fenway Park for Red Sox games. The cost of the box, which can seat 14 individuals, is $700 per game. DEF spends an additional $225 per game for food and refreshments for

its guests. For federal taxation purposes, the Internal Revenue Service allows DEF to take a deduction of $16 per seat, per game as a business expense.

Mr. X and Mr. Y are selectmen in a town (Town). The Board of Selectmen serve as the local licensing authority with regard to the cable television system. Pursuant thereto, the Selectmen issued a provisional license to Cablevision, Inc. to provide cable television services in the Town. The Selectmen have the ability to revoke or renew Cablevision's license and/or monitor its activities. For approximately six years, the members of the Board of Selectmen were, to some extent, involved in negotiations between Cablevision and DEF regarding a contractual arrangement for the addition of DEF broadcasts to Cablevision's services in the Town.

QUESTION:

May DEF offer and may Mr. X and Mr. Y or any other similarly situated public official accept seats in DEF's corporate box for Red Sox games?

ANSWER:

No.

DISCUSSION:

Section 3(a) of G.L. c. 268A prohibits anyone from directly or indirectly giving, offering or promising anything of substantial value to any present or former state, county or municipal employee or any member of the judiciary for or because of any official act performed or to be performed by such an employee.

Section 3(b) of G.L. c. 268A prohibits a public employee from soliciting or accepting anything of substantial value[1/] for or because of any official act performed or to be performed.

In *Commission Advisory No. 8 (Free Passes)*, the Commission specifically stated that tickets to sporting events may be items of substantial value for purposes of §3. The giving of such tickets to a public employee by a party subject to that 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. As the Commission stated in *In re Michael*, 1981 SEC 59, 68:

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

Whenever a public employee is in a position to act on a matter affecting a party's interests, the Commission has found that the private party's gift of something of substantial value to the public employee and the employee's receipt thereof violate §3, even if the public employee and the party have a private personal relationship and even if the public employee abstains from all official matters concerning the party, unless it can be demonstrated by the evidence that a private relationship was the actual motive for the gift. *In re Flaherty*, 1990 SEC 498; *Commission Advisory No. 8.*

Section 3 is therefore implicated, if DEF gives or if Mr. X and Mr. Y accept sporting event tickets from DEF. One issue to be decided then becomes whether such tickets are being provided to Mr. X and Mr. Y for or because of their official position. Where Mr. X and Mr. Y as selectmen continue to have regulatory authority over the cable television industry in the Town, it would be difficult for Mr. X and Mr. Y to demonstrate that a personal relationship with a DEF executive is the actual motivation for such a gift.[2/] The Commission has previously held that where there is no prior social or business relationship between the giver and the recipient and where 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 the public official's influence could benefit the giver. *Commission Advisory No. 8.* In this case the public officials did in fact use their authority in a way which affected DEF, as evidenced by the past involvement of the Selectmen, and Mr. X and Mr. Y individually, in negotiations between DEF and Cablevision regarding service in the Town. Moreover, we must assume that the Selectmen could presumably take action in the future which could affect the current

relationship between Cablevision and DEF or which could otherwise affect DEF. We therefore find that the acceptance of sporting tickets (if of substantial value) by any Selectman would result in a §3 violation. Furthermore, DEF may not offer to any Selectman any sporting event tickets of substantial value. Similarly, with regard to any other public official, if a public official is in a position to act officially on a matter which affects the interests of DEF, §3 will be implicated. Only if no services or discretionary activity have been or are being performed, and if the public official is not in a position to use his or her authority in a manner which could affect DEF, then DEF may offer sporting event tickets of substantial value to a public official. *Commission Advisory No. 8.*

Another factor in determining whether §3 will be violated is whether the item being offered by DEF is of substantial value. In *Commission Advisory No. 8*, the Commission addressed the issue of valuing single admission tickets for sporting or entertainment events. The Commission held that for purposes of §3, the face value multiplied by the number of the tickets involved will be the value. If that value exceeds $50.00, it will be considered of substantial value. Moreover, in certain cases, the Commission may be inclined to look beyond the printed face value of a ticket in determining whether or not a ticket is of substantial value.[3/] Here, we are required to value tickets for seats in a corporate booth where there is no printed value on the tickets. Under these circumstances, we will use the actual cost of each corporate box seat in determining the value of the Red Sox tickets. Because DEF pays $700 per game for the booth which holds 14 seats, per seat cost is $50.00. Additionally DEF spends $225 per game for food and refreshments, a portion of which may be added to the value of each ticket. We therefore find that the value of a seat in a corporate box for Red Sox games is of substantial value.

This position is consistent with the Commission's valuation standards for purposes of making a disclosure on the Statement of Financial Interest. In *FD-COI-80-1*, the Commission held that for purposes of disclosing the value of free or discounted entertainment passes, the Commission will look first to value which appears on the pass or ticket. If the pass or ticket has no face value, but can be purchased, the ticket will be valued at the price at which the ticket is sold (or purchased).[4/]

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[1/]Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976).

[2/]We note that although Mr. X and Mr. Y have previously claimed a personal relationship with a certain DEF executive, the relationship has been described by that DEF executive as a "professional acquaintance" suggesting a business rather than a personal relationship.

[3/]For example, if a ticket is purchased through a special events ticketing agency, a service fee is often added to the face value of the ticket thereby increasing the cost of the ticket. Under such circumstances, the Commission need not restrict itself to the printed face value of the ticket in determining substantial value. The Commission does not suggest, however, that it will consider the purchase price of tickets obtained through potentially illegal means such as ticket scalping (*see e.g.* G.L. c. 140, §§ 185A - 185F).

[4/]We reject any valuation based upon the reported amount which DEF may deduct as a business expense for federal tax purposes as that amount may not reflect the actual value of the ticket.

CONFLICT OF INTEREST OPINION
EC-COI-92-20

FACTS:

You are the superintendent of a public school system. You are also a member of the ABC Users' Committee (Committee), a private organization apparently set up by a computer company. You have been invited to attend a meeting of the Committee. The computer company will pay for your travel, hotel and meals costs. You will receive no compensation or honorarium for attending the meeting. You state that you are the only school superintendent on the Committee this year and you feel that you can play an important role in private funding support for schools. Your appointing authority, the school committee, is pleased with your invitation and has instructed you to use work rather than vacation time for the conference. It was agreed that you would not be representing your school system at the meeting but rather that you will be representing a user group and you will be identified only as an "educator" or an "educational manager". Your school system has previously received

several pieces of equipment and software from the computer company. You state that as a superintendent, you have purchased their products for all of the school systems with which you have been associated.

QUESTION:

May you accept payment by the computer company of your travel, hotel and meals costs associated with your attendance at the meeting of the Committee?

ANSWER:

No, unless the town adopts a by-law or charter provision authorizing municipal employees to accept vendor payments of travel expenses.

DISCUSSION:

As Superintendent, you are a municipal employee for purposes of G.L. c. 268A, the conflict of interest law, and, as such, you are subject to the requirements of §3 of that law. Section 3(b) prohibits a municipal employee, otherwise than as provided by law for the discharge of his official duties, from soliciting or accepting anything of substantial value for or because of any official act performed or to be performed. Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.* Section 3 may be violated if a public official receives something of substantial value, whether the gift is given as a token of gratitude for a well-done job or is given out of a desire to maintain the public employee's goodwill. Even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. *Public Enforcement Letter 92-1.*

The Commission has consistently found that §3(b) is violated when a public employee receives direct payment or reimbursement of travel expenses from a vendor of the agency by which the public employee is employed. In *EC-COI-88-5*, the Commission rejected the contention that the value of the trip expenses accrues to the municipality rather than to the traveler. *See In re Pitaro*, 1986 SEC 271 (where Commission held that travel privilege of substantial value accrued to mayor himself). We have found that whenever a specific public employee is able to take a trip at the expense of a private entity, there is a benefit of substantial value to the individual traveler, thereby implicating §3.

Sound public policy supports the Commission's application of §3 to the receipt by public employees of vendor-paid travel expenses. As the Commission stated in *EC-COI-82-99* (where members of a state board of registration, traveling to view equipment proposed by a manufacturer, were prohibited from receiving travel expenses from the manufacturer),

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

The Commission has previously acknowledged that there may sometimes exist legitimate public purposes to justify a public employee's travel, and that the public interest may be served by allowing private entities to pay for a public employee's travel expenses. Nevertheless, the Commission believes that the restrictions placed on public employees by §3 ensure that the public employee's integrity is not compromised in the name of conserving public funds. However, §3 concerns may be overcome if the municipality adopts a by-law or charter provision allowing vendors to pay for travel if a municipal governing body pre-approves all vendor-funded travel expenses, thereby ensuring that the expenses are legitimate and minimizing the risk that the employee is being "wined and dined". *See Public Enforcement Letter 90-1; 90-2; see also EC-COI-92-10; 88-5.* Travel expenses paid by a vendor under such a by-law or charter provision would be "as provided by law" under G.L. c. 268A, §3 and would not give rise to a violation.

In your case, where you have previously entered into contractual relations with the donor, and where, in your position as Superintendent, you have the ability to act in the future to benefit the computer company, §3 is implicated. If you accept something of substantial value from the computer company, any future official action which you may take as Superintendent with respect to the computer company could reasonably be called into question. Even if you perform objectively as Superintendent, there would be an appearance that you could be influenced by your prior receipt of the travel

expenses. By prohibiting your receipt of a gift outright, §3 prevents any potential conflict of interest. *See EC-COI-87-38* (*citing In re Pitaro*, 1986 SEC 271). Absent a by-law or charter provision regulating vendor paid travel, you therefore may not accept anything of substantial value from the computer company, including your travel, hotel and meals costs valued at $50 or more.[1/]

We have reviewed your statements as to why you believe your receipt of travel costs should be permissible. Although we believe that your reasons for attending the committee meeting are meritorious and that your commitment to education is commendable, we must continue to assure the integrity of public service through our enforcement of the conflict of interest law. As explained above, the potential for abuse in connection with vendor-paid travel expenses outweighs those legitimate reasons that may make such an arrangement desirable.[2/]

Date Authorized: June 16, 1992

[1/]Even though the payment of your conference expenses by the computer company appears to stem from your position on the Committee, you may not accept a direct contribution from them because of the potential nexus between the motivation for the gift and your public duties. We note, however, that if the computer company were to make a gift to your Town consisting of an airline ticket, such a gift would not result in a violation of §3 since it would be a gift to a government agency rather than to an individual. *See EC-COI-84-114*. If the Town then utilizes the ticket to send you to the Committee meeting, an issue under §3 will not be raised.

[2/]Although your opinion request does not address the issue of a future computer purchase by your Town, we note that because of your membership on an advisory committee, if the computer company submits a bid proposal for a computer contract, an appearance of a conflict of interest may be created. In order to avoid such an appearance, you should at that time make a written disclosure to your appointing authority of your position on the Committee as well as the fact that the computer company is a bidder. See G.L. c. 268A, §23(b)(2).

CONFLICT OF INTEREST OPINION
EC-COI-92-21

FACTS:

You are a newly elected member of the Prudential Committee (Committee) of a Fire District (District). Your son is a full-time firefighter employed by the District. Full-time firefighters are members of a collective bargaining unit (union) and the Committee engages in collective bargaining with the union on behalf of the District. The collective bargaining agreement contains terms and conditions of employment for the firefighters, including salaries and working conditions.

QUESTION:

Given your son's employment as a firefighter, how will G.L. c. 268A affect you as a Committee member?

ANSWER:

As explained below, you may not participate in any matter in which your son has a financial interest.

DISCUSSION:

The Commission has previously concluded that districts supported by public funds to provide municipal services, although not specifically identified as municipal agencies under G.L. c. 268A, §1(f), are municipal agencies for purposes of the conflict of interest law. *See EC-COI-87-2*. Therefore as a member of the District's Prudential Committee, you are a municipal employee.[1/] *See McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421 (1992).

Section 19 prohibits a municipal employee from participating[2/] in a particular matter[3/] in which he or an immediate family member[4/] has a direct or reasonably foreseeable financial interest.

In your case, this section will prohibit you from taking any action as a Committee member concerning the collective bargaining agreement in question because that agreement will determine the salaries and working conditions for full-time firefighters of the District, including your son. You must, therefore, refrain from participating in any discussions or votes concerning the collective bargaining agreement, or any matter, which will affect your son's financial interest. This is so even if the

matter also affects some or all other District employees as well. Other such matters might include, for example, disciplinary matters affecting your son, health benefits affecting full-time firefighters, matters affecting seniority rights which will impact upon your son, or matters involving lay-offs or retirement which affect your son. *See Commission Advisory No. 11 (Nepotism); EC-COI-90-1; In re DeOliveira*, 1989 SEC 430. You are best advised to leave the room when such matters come before the Prudential Committee, making sure that your abstention is recorded in the minutes of the meeting. *See Graham v. McGrail*, 370 Mass. 133 (1976). This section will not, however, prohibit you from acting on matters of a general nature affecting the District, if such matters do not affect your son's financial interest (such as a contract for a new fire truck or other equipment, for example).

The standards of conduct found in §23 also apply to you as a municipal employee. That section prohibits you from using your position on the Committee to obtain unwarranted benefits for yourself or others. §23(b)(2). It would, for example, prohibit you from passing on to your son or any other person confidential information concerning the Committee's negotiations with the union. §23(c). In addition, before acting on those "general" matters in which your son has no financial interest, you should make a full public disclosure concerning your son's position with the District in order to dispel any "appearance" of a conflict which might arise under §23(b)(3). You should file your written disclosure with the District Clerk or in another appropriate public manner.

In summary, you must abstain, as a Committee member, on all matters which affect your son's financial interest, including the collective bargaining agreement in question.[5/]

Date Authorized: July 14, 1992

[1/]"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

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

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

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

[5/]You should consider the possibility that you will have to abstain on so many matters that your service on the Committee might become impracticable. However, that determination must be made by you after considering the scope of your duties and activities as a member of the Committee.

CONFLICT OF INTEREST OPINION
EC-COI-92-22*

FACTS:

You are the Chairman of the Board of Selectmen (Board) of Kingston (Town). Ronald L. C. Maribett, a full-time employee of the Massachusetts Department of Environmental Protection (DEP), serves on the Board. The Board has raised several conflict of interest questions concerning Mr. Maribett's ability to participate in certain environmental matters coming before the Board.[1/] The six major areas include questions about sewage treatment, landfill capping, earth removal permits, solid waste management and recycling, water supply, and appointments to town boards, committees, and commissions.

QUESTION:

Under what circumstances may Mr. Maribett participate as a Selectman in certain environmental matters in light of his DEP employment?

ANSWER:

Mr. Maribett may participate only in those matters which do not fall within DEP's purview or which are distinctly local in nature, as more fully described below.

DISCUSSION:

Although the conflict of interest law specifically provides that a state employee may hold any municipal position to which he may be elected or appointed, G.L. c. 268A, §4, the statute prohibits a state employee from acting as a municipal employee on "any matter which is within the purview of the [state] agency by which he is employed or over which such employee has official responsibility."

This is the so-called "municipal exemption" to G.L. c. 268A, §4, the agency section of the conflict of interest law. A brief background of the nature and purposes of §4 and the municipal exemption is necessary to answer your questions.

Section 4(c) of c. 268A provides that no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the Commonwealth or a state agency for prosecuting any claim against the Commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

The restrictions of §4 reflect the principle that a state employee should not assist any non-state party in its dealings with state government by acting as that party's agent. *EC-COI-83-26.* A state employee's duty of loyalty is owed first and foremost to the Commonwealth, not to any other party on whose behalf he also works. *See Town of Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984) (municipal counterpart); *EC-COI-92-4.* It makes no difference whether the individual, as a state employee, has any responsibility for the matter in question. The critical question is whether any agency of the Commonwealth has a direct and substantial interest in the matter.

Before 1980, §4 was interpreted to prohibit a state employee from holding municipal employment if the Commonwealth had a direct and substantial interest in the matters on which the state employee worked in his municipal capacity. *EC-COI-79-3* (state employee prohibited by §4 from holding selectman's position); *see also 79-123* (placing severe constraints on a state employee/selectman without reference to which state agency the state employee served). In response to this broad application of §4, the Legislature amended the section in 1980 by adding a municipal exemption which permitted the dual service under certain conditions. St. 1980, c. 10.

The municipal exemption was enacted to permit a state employee, who holds municipal employment or a municipal office, to participate as a local official in all matters coming before him as long as those matters are not ones over which *his* state agency has jurisdiction, or, in the word's of the statute, are within its "purview." *EC-COI-83-26; 86-2; 92-8.* As a result, only a fraction of the matters in which the Commonwealth as a whole is interested are restricted under this exemption.[2] Thus, the 1980 amendment represents a substantial departure from §4's general application.

The municipal exemption's "purview" restriction serves three purposes. First, it eliminates the potential for undue state agency influence over those local officials who also happen to be its employees. For example, a state employee who also serves as a local official may be compelled by his superiors to carry out his agency's wishes concerning an important local issue, even if that policy is not in the municipality's best interests. Second, it avoids compromising state agency action where one of its own employees has pre-judged the issue at the local level. Finally, because the state employee is prohibited from participating, as a local official, on matters of interest to his state agency, he is protected from being placed in an awkward political and personal situation.

Because only those matters which are in a state agency's purview continue to be restricted under §4, the key to understanding the municipal exemption is the definition of the term "purview."

"Purview" is defined as the range or limit of authority, competence, responsibility, concern, or intention. *Webster's Ninth New Collegiate Dictionary* (1987). In practice, the Commission has found that the term purview includes any matter which is regulated, reviewed, or supervised by the state agency in question. *See EC-COI-86-2; 83-26; 82-89.* In *EC-COI-82-89*, the Commission prohibited an employee of the Department of Revenue (DOR) from holding the position of part-time

Assessor in a town because the DOR Commissioner was empowered to enforce all laws relating to the valuation, classification, and assessment of property and to supervise the administration of such laws by local assessors (*citing* G.L. c. 58, §1A).

In other cases, however, the Commission has been able to discern subtle distinctions which have permitted the state employee to hold a local position even when there has been a substantial overlap with his state position. However, those employees have been cautioned to carefully observe all of the purview restrictions of the municipal exemption.

For example, in *EC-COI-86-2*, the Commission concluded that an employee of the Department of Environmental Quality Engineering (DEQE), now DEP, could serve on a local Board of Health, provided that he abstained on matters regulated by the DEQE. DEQE regulated subsurface disposal systems of greater than 15,000 gallons per day. The Board of Health was responsible for enforcing the state's sanitary code for subsurface disposal systems of up to 15,000 gallons per day. Notwithstanding that jurisdictional difference, the Commission held that all subsurface systems, regardless of size, were within DEQE's purview because the Board of Health *could* refer even the smaller size systems to DEQE. The Commission concluded, however, that the DEQE employee could participate in all matters "of a distinctly local nature. For example, permits to disposal companies or sewer hook-up requests by individuals would be considered local matters outside of the purview of DEQE."

Consequently, the state/municipal employee may participate as a municipal official if the matter in question is distinctly local in nature, or if it is otherwise not within the purview of his state agency. *See EC-COI-86-2*. As a general rule, the Commission will accord substantial deference to an agency's own determination that a matter falls within its purview. *Cf. EC-FD-89-1* (Commission must give substantial deference to agency making determinations as to who occupies a "major policy-making" position for purposes of c. 268B, the financial disclosure law).

With these principles in mind, we answer your specific questions below.

A. Sewage Treatment

First, DEP's jurisdictional basis for enforcing the Commonwealth's sewage treatment laws is quite broad. G.L. c. 21A, §13. The DEP Commissioner is empowered to adopt regulations which

> deal with matters affecting the environment and the well-being of the public of the Commonwealth over which the department takes cognizance and responsibility including, but not limited to, standards for the disposal of sewage.

Id.; see also G.L. c. 83, §6 (permitting town, with DEP approval, to take or purchase land for sewage disposal purposes).

Site selections on private or town-owned property are extensively regulated by DEP. *See, e.g.*, G. L. c. 21, §43. Consequently, site selections for sewage treatments facilities are matters within DEP's purview. Mr. Maribett may not, therefore, participate as a Selectman in discussions or votes concerning site selections for sewage treatment facilities.

On the other hand, we find nothing in the General Laws or in DEP's own materials which suggests that DEP has any regulatory oversight concerning the issue of the *financing* of sewage treatment sites when DEP is not otherwise involved. We find that, absent a state or federal grant, the financing of a sewage treatment facility is governed by provisions of municipal finance law (including, for example, G.L. c. 40, c. 44, and c. 59), and thus are not within DEP's purview. Mr. Maribett may, therefore, participate in discussions or votes concerning the financing of sewage treatment sites if DEP is not involved.

Mr. Maribett must exercise caution in two instances, however. First, if the matter before the Board is whether to seek DEP financing in the first place, he must abstain from any vote on, and from any discussions concerning, that financing. If the Board chooses not to request DEP's financial assistance (we understand that it is rare for DEP not to be financially involved), Mr. Maribett may participate in other financial aspects of the facility. If DEP's assistance is sought at any time, however, Mr. Maribett's participation in most, if not all, aspects of the facility must cease because of DEP's regulatory supervision in that case. DEP's jurisdiction over sewage treatment matters appears to be extensive once that agency

is involved in the financial arrangements. Second, once the initial, pre-permitting phase is completed, DEP would likely become involved with the facility even if it provided no financing. Mr. Maribett's participation must, of course, cease at that time.

DEP's approval is a prerequisite for the operation of sewage treatment facilities. G.L. c. 21, §43. Design review and selection of those facilities are matters within DEP's purview. Therefore, Mr. Maribett may not participate in those matters.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

B. Landfill Capping

General laws c. 21H, §1(c) provides that

> it is declared to be in the best interests of the citizens of the Commonwealth to enact legislation authorizing the department of environmental protection to provide financial assistance to public bodies for the closure of landfills or other solid waste facilities and for the expansion of landfill capacity or other solid waste facilities.

As a result, if DEP finances a landfill project, the landfill project would be within DEP's purview. If DEP does not provide the financing, the financing of the landfill project would not be within DEP's purview until the later DEP permitting phase. Therefore, Mr. Maribett may participate in the initial, pre-permitting stage if DEP is not involved. He must exercise caution if the Board were to later seek DEP financing in connection with landfill capping, and again when the permitting phase begins.

On the other hand, because of DEP's regulatory involvement in setting standards and monitoring municipal compliance, we find that project design review and selection are matters within DEP's purview. *See generally* G.L. c. 111 and c. 21H. Mr. Maribett may not, therefore, participate in project design and review selection for landfill capping matters. Furthermore, to the extent that financing decisions affect design review and selection, Mr. Maribett must abstain from participation on those matters.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

C. Earth Removal Permitting

We find that, except in certain instances, the earth removal permitting process is generally not within DEP's purview. *See* G.L. c. 40, §21 (17, 19) (towns are authorized to enact by-laws regulating earth removal); *but see* G.L. c. 131, §40 (placing certain state restrictions on removal, filling, etc. of land bordering waters).

Consequently, Mr. Maribett may participate in earth removal permitting matters where DEP is not concerned. This includes (i) the review of all applications concerning earth removal which do not fall within DEP's jurisdiction under G.L. c. 131, §40, and regulations promulgated under that statute (generally, DEP has no jurisdiction beyond Zone II or 100 feet of a wetland), (ii) the approval of earth removal applications for (i), above, (iii) the setting of conditions on earth removal permits for the above, and (iv) the enforcement of such earth removal permits.

D. Solid Waste Management and Recycling

If DEP does not finance a solid waste management and recycling facility, the financing of the facility would not be within DEP's purview during the initial, pre-permitting phase and Mr. Maribett may participate (unless, as indicated above, such financing matters affect determinations concerning the siting of the facility). He must exercise caution if the Board were to later seek DEP financing in connection with the project, and again when the permitting phase begins.

While we find that the siting of a solid waste facility is regulated by DEP, *see* G.L. c. 111, post-consumer drop off facilities appear to be exempt from DEP regulation by 310 CMR 19.013. Mr. Maribett may, therefore, participate in matters concerning the DEP-exempt facilities, including the review of facility design.

Finally, if DEP must give ultimate approval to, or if it has any input in, the proposed requests for qualifications (RFQs) or requests for proposals (RFPs), then any matters concerning the RFQs or RFPs would be within DEP's purview. Generally, the development of RFQs and RFPs, as well as contractor selection, are not within DEP's purview, unless DEP is somehow otherwise involved in the process by statute, regulation, or practice. DEP involvement would result, for example, from its financing of a facility.

We find that wage and personnel staff issues relating to solid waste management and recycling facilities are distinctly local matters. Mr. Maribett may, therefore, participate in those matters.

E. Water Supply

If DEP does not finance a water treatment or supply facility, the financing of the facility would not be within DEP's purview during the initial, pre-permitting phase. He must exercise caution if the Board were to later seek DEP financing in connection with the project, and again when the permitting phase begins.

However, the siting and maintenance of a water treatment or supply facility is regulated by DEP. Mr. Maribett may not participate in the operations of water treatment or supply facilities. *See, e.g.*, G.L. c. 111.

Wage and personnel issues related to the Town's Water Department are distinctly local matters. Mr. Maribett may participate in those matters.

F. Appointment to Town Boards, Committees and Commissions

We find that appointments to Town Boards, Committees and Commissions are distinctly local matters. Mr. Maribett may participate in appointments made to the Conservation Commission by the Selectmen, for example, even though the Conservation Commission must act on matters within DEP's purview. DEP has no jurisdiction over the identity or qualifications of a candidate for the Conservation Commission position. Merely because an appointee will act on DEP-related matters is not sufficient to bring the appointment process itself into DEP's purview, unless some other condition also exists (a DEP statute or regulation establishing selection criteria, for example).

We must address several other relevant issues. First, we caution that DEP may, in practice, actually be involved in a project even though it has no statutory or regulatory role. The Commission would consider DEP's purview to extend to those matters as well, notwithstanding the lack of a regulatory basis.

Second, this opinion is limited to the matters specifically raised in your letter. Other projects, or other aspects of *these* projects, may require additional analysis. For example, as each of the above projects is finished, they may, as completed sites, facilities, etc., then fall within DEP's regulatory purview. We understand that DEP usually becomes involved in the permitting process in most, if not all, of these specified projects, thus bringing the projects into its purview at some later point. Mr. Maribett has indicated that he will remove himself from any discussions and votes once a project moves into the regulatory or permitting phase. Mr. Maribett's proposed course of conduct is both correct and necessary in order for him to comply with c. 268A.

Finally, Mr. Maribett should be aware of the restrictions of G.L. c. 268A, §6. That section prohibits a state employee from personally and substantially participating in any particular matter in which a business organization with which he is affiliated as an officer, director, trustee, partner or employee, has a direct or a reasonably foreseeable financial interest. Because a municipality is a business organization within the meaning of §6, *see EC-COI-82-25*, Mr. Maribett cannot, as a DEP employee, work on matters which will affect the Town's financial interest.

Section 6 does, however, provide a public exemption mechanism. The state employee's participation is permitted if his appointing authority gives prior written approval. For example, if any matter (or class of matters, *see EC-COI-90-4; 90-5*) to which a §6 financial interest applies comes before Mr. Maribett at DEP, he must fully disclose it to his appointing authority, the DEP Commissioner, in writing beforehand, even if he decides not to participate. The DEP Commissioner may then decide to allow Mr. Maribett's participation if he

determines that this financial interest is not so substantial as will likely affect the integrity of Mr. Maribett's services to the state. §6(3). Copies of both Mr. Maribett's disclosure and the DEP Commissioner's determination must be filed with this Commission as public documents. Mr. Maribett should seek additional advice if he has further questions on this section.

Date Authorized: July 14, 1992

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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/]Mr. Maribett has joined in your opinion request. Mr. Maribett and Town Counsel also authorized the Commission staff to contact counsel for DEP to request assistance in answering your questions. Specifically, the Commission staff asked DEP to comment on whether any of the subject areas raised by your opinion request fall within DEP's jurisdiction. DEP responded by letter dated May 28, 1992. The Commission staff then contacted Town Counsel and asked counsel to respond to DEP's comments. Town Counsel responded by letter dated June 30, 1992.

[2/]One aspect of the exemption somewhat limits its broad application, however. The exemption does not use the specifically defined term "particular matter," G.L. c. 268A, §1(k), but rather refers to "any matter." We believe that the Legislature's use of the term "matter" was intentional and was meant to comprise a broader class of restricted items not otherwise covered by the term "particular matter." For example, while "particular matter" may exclude legislative or managerial actions like the adoption of a budget, *Graham v. McGrail*, 370 Mass. 133, 139 (1976), the term "matter" could apply. Thus, the municipal exemption would not eliminate restrictions on legislative or managerial matters if those matters are within the purview of the state agency in question. This narrow construction of the municipal exemption is consistent with the Commission's obligation to construe all exemptions to the conflict of interest law narrowly. *EC-COI-87-2; 91-7. See also Department of Environmental Quality Engineering v. Town of Hingham*, 15 Mass. App. Ct. 409, 412 (1983).

CONFLICT OF INTEREST OPINION
EC-COI-92-23*

FACTS:

You are the Town Clerk of Easthampton. You are also the President of the Massachusetts Town Clerks' Association (MTCA), a voluntary organization of most town clerks in Massachusetts.

The Town Clerk is the principal election official of a town, for both municipal and state elections. After the polls close on election night, election officers count the votes for each precinct and then publicly announce and post the results, G.L. c. 54, §§33H, 35B, 105, all under the Town Clerk's supervision. *Id.* §71A. The Town Clerk is responsible for correcting any errors in, and certifying, the official results, *id.* §111, and (after state primaries and elections) for transmitting the official results in writing to the state Secretary. G.L. c. 53, §52; c. 54, §112. Traditionally, the Town Clerk provides public information about the election results by making copies available and by answering telephone inquiries. Complete official results are not publicly available from the Secretary's office for at least several days after state primaries and elections.

News Election Service (NES) is a cooperative national news agency owned and operated jointly by the Associated Press and the four commercial television networks. NES's sole function is to collect, tabulate, and distribute unofficial election-night vote results in state and national elections. In most of the nation, NES hires a reporter (often a stringer for a local newspaper) for each county election office to phone in the results as they become available on election night. In the New England states, however, election results are tabulated at the municipal, rather than the county, level. Rather than hire 351 reporters for the various Massachusetts city and town election offices, NES has arranged with the MTCA to contribute funds to the Association in return for Clerks' calling NES. Specifically, NES requests each Clerk to call several times: when each precinct's results become available, and when the town's total is complete. NES pays the MTCA at a fixed rate (generally $4 per call, plus a comparable amount per precinct for the final total call) for each call made by a Clerk on election night. NES requires the election results in a specified format to comply with its computerized system. Both NES and the MTCA write to each Town Clerk before state primaries and elections to request these calls. After each election,

NES writes to each Clerk, reporting the number of requested calls made and not made, and reminding the Clerk that NES payments to the MTCA are based on the number of calls made.

The MTCA represents the interests of Massachusetts town clerks. It provides educational resources for them, including holding three annual conferences and publishing a newsletter, and retains a legislative agent. The MTCA's fiscal year 1992 budget is $34,865, of which NES contributes $4,600, approximately 13 percent. Clerks' dues amount to $13,500; some of these dues are paid by individual Clerks, some by their municipalities.

QUESTION:

May Town Clerks arrange to make telephone calls of election results requested by NES, in return for NES's making payments to the MTCA?

ANSWER:

No. However, we suggest a method for accomplishing similar results.

DISCUSSION:

Town Clerks are "municipal employees" under the state conflict of interest law. G.L. c. 268A, §1(g). As such, they are subject to §23(b)(2) of the conflict law, which prohibits current public employees from using their "official position[s] to secure for [themselves] or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals."

The Commission has consistently interpreted this provision as prohibiting public employees from obtaining a special advantage of substantial value, not authorized by law or by their official duties, by virtue of their public positions. For example, in *EC-COI-91-13*, we held that the Selectmen's acceptance of a private donation in order to qualify themselves for town health benefits not authorized by the Town violated §23(b)(2). In *EC-COI-87-7*, we advised a Mayor that he could not accept free travel arrangements offered to him because of his official position, although the giver had no interest in city business. In *EC-COI-86-11*, we held that a judge could not receive an honorarium for attending a seminar on a day when he was also receiving his judicial salary.

Public employees may not seek, in effect, to supplement their official salaries for performing public responsibilities. *See Commission Advisory No. 10 (Chiefs of Police Doing Privately Paid Details)* (1986) (§23[b][2] ordinarily prohibits additional compensation beyond official salary). As we said of the predecessor of §23(b)(2) in our *Advisory No. 8 (Free Passes)* (1985):

> Public employees are already compensated for the performance of their duties. To request or accept any item of more than nominal value . . . from private entities which have been, are, or may be subject to the public official's responsibilities and duties, is to use one's public position to secure an unwarranted privilege . . . .

It does not matter that the benefit is received by someone other than the public employee, because §23(b)(2) also prohibits securing such unwarranted benefits "for . . . others." Thus, in *EC-COI-92-12*, we prohibited an unpaid public official from soliciting contributions to various political campaigns from persons within his regulatory jurisdiction. We also found that a state legislator violated the predecessor of §23(b)(2) by using his position to pressure a state agency to make grants to private organizations. *In re Craven*, 1980 SEC 17, 23-24, *aff'd*, 390 Mass. 191 (1983).

Here, the MTCA receives payments from NES because of actions taken by Town Clerks in their official capacities. To the extent that Clerks do not make the calls requested by NES, NES does not make payments to the MTCA. Thus, Clerks are using their unique immediate access to election results to secure unauthorized financial benefits for their private Association.

This financial benefit to the MTCA, which for example amounted to $4,600 in fiscal year 1992, is clearly "of substantial value" because it exceeds $50. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)* (1985). Where many public officials are acting in concert (here, through their private Association) to secure the unwarranted privilege, we regard it as appropriate to consider the total value of the benefit to the recipient entity. *See EC-COI-92-2* (aggregating contributions from persons with "common interest"); *EC-COI-91-13* (actual value received, rather than nominal value, determines whether "substantial value"). Therefore, §23(b)(2)

prohibits Town Clerks from arranging to make the requested calls to NES in return for NES's payments to the MTCA.[1/]

Because we recognize the important public interest in prompt information about election results, we emphasize that nothing in G.L. c. 268A prevents Clerks from calling NES or anyone else with immediate election results. The conflict law simply prohibits doing so in return for payments to the Clerks as individuals or to other private parties (including the MTCA).

We also note existing (and apparently unused) statutory authority for the state Secretary to require City and Town Clerks to report immediate (if unofficial) election results by telephone on election night "to such central tabulation facilities as the state secretary shall designate." G.L. c. 54, §105, third paragraph. The Secretary (with the approval of the Governor and Council) is authorized to adopt rules for the administration of such facilities. *Id.* §110A. *See id.* §37, last paragraph (Secretary is to prescribe regulations governing procedures for "counting, tabulating and recording votes"). You may wish to discuss with the Secretary's office the use of this authority, conceivably to require election-night reporting to NES in return for authorized payments to the MTCA. Payments explicitly authorized by regulation would, of course, comply with §23(b)(2), because they would not be "unwarranted."[2/] *See, e.g., EC-COI-92-5.*

Date Authorized: July 14, 1992

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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/]Although we have analyzed this arrangement under §23(b)(2), it may well violate other provisions of G.L. c. 268A, at least in some circumstances.

Thus, if NES's payments to the MTCA allow a Clerk's dues to be reduced by $50 or more, and the Clerk individually (rather than the Town) pays the dues, NES would "indirectly" give substantial value to that Clerk "for himself," for or because of an act within his official responsibility, in violation of §3. *See, e.g., In re Collector-Treasurer's Office*, 1981 SEC 35 (payments to city officials to "expedite" municipal lien certificates violated §§3, 17).

If NES's promised payments to the MTCA create in the mind of a Town Clerk a "corrupt intent . . . to be influenced in his future performance of an official act," the arrangement would violate §2. *See Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976). The required "corrupt" intent is merely that "the bribe be [ ] the prime mover or producer of the official act." *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978); *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974). Unlike §3 (which requires that the recipient be the public employee, at least indirectly), §2 is violated if the payment is made "to any other person or entity." A requested call to NES could well be an "act within [a Town Clerk's] official responsibility." *See Public Enforcement Letter 92-1*, 1991 SEC 548, 559-60.

Finally, Town Clerks who call NES because of promised NES payments to the MTCA may be viewed as acting as NES's agents in relation to the election results, a particular matter in which the Town has a direct and substantial interest, in violation of §17(c). *See Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 607-11 (1984) (construing §4[c], the equivalent provision governing state employees); *In re Collector-Treasurer's Office*, 1981 SEC 35.

[2/]Payments authorized by regulation would also comply with the other provisions of G.L. c. 268A mentioned in note 1. They would be "as provided by law for the proper discharge of official duty" under §§3 and 17. *See EC-COI-92-4* (state regulation is "law" for purpose of §4, state equivalent of §17). They would comply with §2 because corrupt intent would necessarily be absent.

CONFLICT OF INTEREST OPINION
EC-COI-92-24

FACTS:

You are an elected member of a municipal Board of Health (Board). You wish to know whether you may participate in votes and discussions concerning a proposal for a facility (the project) which would be adjacent to your neighborhood. You state that you recently sold a home in the area and that the value of that home was directly affected by the project. You also recently purchased a new home within the same area (further from

the project but within the affected area) and have concluded that the purchase price was, in fact, affected by the operation of the project.

QUESTIONS:

1. May you participate in votes or discussion involving the project?

2. Would the Rule of Necessity permit you to participate in matters involving the project if other members of the Board are also affected by the project?

ANSWERS:

1. No, for the reasons stated below.

2. The Rule of Necessity, if properly invoked, would permit you to participate in matters involving the project, notwithstanding your foreseeable financial interest.

DISCUSSION:

Section 19

Section 19 of c. 268A provides that a municipal employee may not participate[1/] as such a municipal employee in any particular matter[2/] in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. The financial interest may be of any size, and may either be positive or negative. *See, e.g., EC-COI-89-33; 89-19; 84-96.* If the municipal employee's financial interest will be affected either directly or foreseeably, the municipal employee must abstain from the matter in question. *See, e.g., 89-19; Commission Advisory No. 11 (Nepotism); see also Graham v. McGrail*, 370 Mass. 133 (1976). Participation in a particular matter includes both discussions and votes concerning the matter. *See Graham*, 370 Mass. at 137-138. *Graham v. McGrail* concludes that, while not required by law, it is advisable for the municipal employee to leave the room whenever he is prohibited from participating because of the restrictions of §19. *Id.*, 370 Mass. at 138.

You have informed us that the value of the home you recently sold (prior to your becoming a member of the Board) was directly affected by the project, as was the value of the home recently purchased by you in the same area. In light of your facts, it is reasonable to conclude that the value of the home recently purchased by you within the same area will continue to be affected by matters involving the project.[3/]

Consequently, you may not participate in votes or discussions concerning the project because it is reasonably foreseeable that your financial interest will be affected as a result of your continued home ownership in an area near the project.

The Rule of Necessity

As an elected member of the Board, you may participate in votes or discussions concerning the project only if the Board has occasion to properly invoke the so-called Rule of Necessity.[4/] *See, e.g., EC-COI-82-10.* That judge-made rule permits governmental bodies to act on matters when a quorum cannot be obtained because of Board members' conflicts of interest.[5/] Thus, the Rule of Necessity permits governmental bodies to act when they otherwise would have been forced to forego their governing responsibilities.

However, as *82-10* stated:

> [t]he rule should only be utilized where so many members of a tribunal are disqualified that the body is incapable of acting because an insufficient number remain to constitute a quorum.

The Rule of Necessity is considered a rule of last resort and may not be invoked when a way can be found to provide a qualified tribunal, such as by excluding from the tribunal the disqualified member or by counting only the votes of the members who are qualified. 2 K. Davis, *Administrative Law*, §12.04; *EC-COI-82-10.* The mere absence of a quorum because of illness or absence of a member (for example) does not allow the Rule of Necessity to be invoked. *See Graham v. McGrail*, 370 Mass. at 138. Further, once a quorum has been obtained, the Rule of Necessity cannot be used to break a tie vote.

It is always advisable, although not required, that the Rule of Necessity be invoked by the Chairperson of the Board upon the written advice of town counsel, because

a Board member would violate §19 if the Rule is improperly invoked. Town counsel's advice should provide the reasons why the Rule of Necessity is being used, and explicitly indicate that a quorum can be obtained only by invocation of the rule. (It is advisable for town counsel to establish guidelines, in advance, describing the circumstances under which the rule should be invoked.) The minutes of the Board should also indicate that the Board was unable to obtain a quorum because of the disqualification of members and, as a last resort, each of those disqualified members will now participate under the authority of the Rule of Necessity.

Accordingly, if other members of the Board also have conflicts of interest involving the same particular matter such that a quorum cannot be obtained,[6/] you may participate in matters involving the project even if the value of your home will be affected by your participation in the matter *once* the Rule of Necessity is properly invoked by the Board.

Date Authorized: September 10, 1992

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

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

[3/]In an informal staff letter to you dated April 1, 1991, you were informed that you could submit additional information to this Commission which evidenced that your financial interest would not be affected by the project as a result of purchasing a new home in the area. Although you have now requested this formal Commission opinion, you have not asked the Commission to consider any additional facts concerning your financial interest. Thus, we must presume that you do not have any facts available which would indicate that your financial interest will not be affected by the project in question. *Cf. EC-COI-89-33* (presumption of financial interest can be rebutted by evidence to the contrary).

[4/]Section 19(b)(3) provides an exemption for municipal officials where the particular matter in question involves a determination of "general policy" *and* the financial interest of the municipal employee is shared with a substantial segment of the population of the municipality. However, we do not have sufficient facts in your case to make a determination under §19(b)(3). Consequently, based upon the facts presented to us, you may not rely upon the §19 exemption.

[5/]If the number for a quorum is not set by law, a quorum is generally considered to be a majority of the board's members.

[6/]The conflicts of interest need not be the *same* conflict which you have. For example, if you serve on a three member Board and you cannot participate for the reasons stated above, and another member cannot participate because she has a direct interest in the project, the Rule of Necessity may be invoked. The Rule of Necessity would permit all three members of the Board to participate, notwithstanding the various potential conflicts of interest.

CONFLICT OF INTEREST OPINION
EC-COI-92-25*

FACTS:

You are currently employed full-time as a police officer in the Division of Law Enforcement of the state Department of Fisheries, Wildlife and Environmental Law Enforcement (the Department). *See* G.L. c. 21, §6. It is the Department's (and your) duty "to enforce all penal laws which it is the duty of any agency within the executive office of environmental affairs to enforce . . . ." *Id.* §6A. One such agency is the Department of Environmental Protection (DEP), G.L. c. 21A, §7, which enforces the state Wetlands Protection Act, G.L. c. 131, §§40, 40A (the Act). Violation of the Act is punishable by a criminal fine (or a DEP civil penalty, *see* G.L. c. 21A, §16) of not more than $25,000 or by imprisonment for not more than two years. G.L. c. 131, §40, last paragraph. Therefore, you inform us that your duties as an environmental police officer include enforcing the Act.

You are also a resident of the Town of Erving, and wish the Selectmen to appoint you as a member of the Town's unpaid Conservation Commission. *See* G.L. c. 40, §8C. The Conservation Commission has primary responsibility for enforcing the Act within the Town by issuing "orders of conditions," subject to administrative appeal seeking a superseding order of conditions by DEP. G.L. c. 131, §40.

QUESTION:

May you serve as an unpaid Conservation Commission member while remaining employed as an environmental police officer?

ANSWER:

Yes, subject to the following limitations in each position.

DISCUSSION:

As an environmental police officer, you are a "state employee" for the purposes of the state conflict of interest law. G.L. c. 268A, §1(q). If you were appointed as a Conservation Commission member, you would also be a "municipal employee" in that capacity. *Id.* §1(g) (defining "Municipal employee" to include "a person . . . holding an office . . . in a municipal agency . . . by appointment . . . without compensation . . . on a . . . part-time . . . basis").

1. **Restrictions as a Conservation Commission member (§4).**

(a) The state/municipal "purview" limitation.

We must first decide, in effect, whether you may hold both positions simultaneously at all. The answer turns on the proper application of G.L. c. 268A, §4,[1/] and especially of the following provision of its second-to-last paragraph: "No such elected or appointed [municipal] official may vote or act on any matter which is within the purview of the [state] agency by which he is employed . . . ." Read in isolation, this provision might seem to prohibit you from virtually all activities as a Conservation Commission member, since that Commission's principal responsibility, enforcement of the Act within the Town, is also entirely within your state Department's "purview." *See EC-COI-92-22.* For the following reasons, however, we reject such a broad application of the §4 "purview" limitation to an unpaid municipal official, in favor of a narrower application limited to situations when you are "acting as agent" for the Town or its Conservation Commission.

We begin with the recognition that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). *See EC-COI-92-17; 92-6.* Thus, we first examine "all [the] words" of G.L. c. 268A, §4.

For present purposes, §4 contains two distinct operative restrictions on a state employee's outside activities. Section 4(a) generally prohibits a state employee from receiving compensation from anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest. In your role as a Conservation Commission member, §4(a) will not restrict you at all, because you will not receive any compensation in that position. In addition, however, §4(c) prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone in connection with any particular matter in which the state is a party or has a direct and substantial interest.

The "purview" limitation quoted above appears in §4 as part of the "municipal exemption," constituting the statute's second-to-last paragraph. That paragraph reads in its entirety:

> This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

Thus, this "municipal exemption" removes state employees who are also municipal officials from application of the operative provisions of §4(a) and (c), but only to a limited extent. That extent is specified in

the exemption's second sentence, the "purview" limitation. The language and structure of this paragraph indicates that the second sentence is meant solely as a limitation on the exemption granted by the first sentence. *See EC-COI-92-6. See also* 1990-1991 Op. Mass. Att'y Gen. No. 5 (June 12, 1991) (Legislature's placement of new sentence in paragraph of statute indicates intention to limit sentence's effect to that paragraph, rather than apply it to entire section). Therefore, the "purview" limitation will apply to you as an unpaid municipal official, not in all your Conservation Commission activities, but only in the narrow circumstances when you are acting as agent for the Commission or the Town.

This analysis is identical to that we have consistently applied to three similar provisions of G.L. c. 268A, all of them involving statutory limitations on exemptions. In each case, we construed the limitation's scope as no broader than the underlying operative provision from which the exemption is granted. Thus, in *EC-COI-87-36* and *EC-COI-82-106*, we concluded that provisions limiting the "selectman's exemption" from the multiple-office holding restrictions of §20 did not apply to selectmen who were special municipal employees and thus not in need of the exemption. In *EC-COI-92-6*, we read a limitation on an exemption of certain construction contractors and their personnel from the definition of "State employee" in §1(q) as not applying to persons who were not "State employees" initially under the primary statutory definition.

Most significantly, in *EC-COI-92-8*, we refused to apply this very "purview" limitation to a state legislator who was also a municipal official, because the legislator could rely instead on the separate "legislator's exemption" from §4, containing less restrictive limitations. In that opinion, citing *EC-COI-87-36* and *EC-COI-82-106*, we reasoned, "Reliance on either exemption would mean that any restrictions of the other exemption would not apply . . . ." This analysis controls your case; since the main operative provisions of §4 will restrict you as an unpaid Conservation Commission member only to the extent that you are acting as agent, you will be in need of the "municipal exemption," hence subject to its "purview" limitation, only to the same extent.

The legislative history of the "municipal exemption" also supports this conclusion. As we have previously recognized, most recently in *EC-COI-92-22*, the Legislature enacted this exemption in St. 1980, c. 10 to mitigate a harsh application of §4, which would otherwise virtually prohibit state employees from holding municipal office in some situations. Thus, immediately before this exemption's enactment, this Commission had held that §4(a) prohibited state employees from many activities as compensated selectmen, because these activities would necessarily be in relation to particular matters in which the state was a party or had a direct and substantial interest. E.g., *EC-COI-79-123; 79-3*. As discussed below, however, these opinions recognized that §4(c) would prohibit uncompensated municipal officials only from acting as agent in these state-related matters.

Thus, in order to adopt the broader reading of the "purview" limitation, as prohibiting uncompensated municipal officials from participating in all matters within their state agency's purview even when they are not "acting as agent," we would need to ascribe to the Legislature that enacted St. 1980, c. 10 an intention to restrict state employees' activities as uncompensated municipal officials further in some respects than the main operative provisions of §4 (specifically §4[c]), as construed in this Commission's prior opinions. But nothing in the legislative history of c. 10 indicates any intention to impose such further restrictions. Rather, the sole declared purpose of c. 10, in the words of both its title[2] and its emergency preamble, was to ensure "that a person shall not be prohibited from holding an elective or appointive office in a city, town or district because such person is a state or county employee." The bills that resulted in c. 10 (H. 1941 and H. 5893 of 1980) were advocated by municipal officials as a response to *EC-COI-79-123*. In fact, both houses amended the legislation to make its effective date retroactive to the date this Commission issued that opinion, November 14, 1979. *See* St. 1980, c. 10, §3; 1980 S. Jour. 88 (Feb. 21). In short, the c. 10 legislative history, very much like that we examined in *EC-COI-92-6*, is "unusually clear and consistent [and] discloses no legislative purpose to impose further restrictions" on the exempted persons.

Our narrow application of the "purview" limitation only to uncompensated municipal officials' "agent" activities is also consistent with our many prior opinions applying the "municipal exemption." *EC-COI-92-22; 92-8; 90-8; 90-4; 88-21; 86-2; 85-68; 85-41; 84-120; 84-103; 83-26; 82-173; 82-164; 82-89; 82-52; 82-39*. For, in virtually all these opinions, the municipal official was compensated.[3] Thus, §4(a), the "municipal exemption," and its "purview" limitation operated in these cases to

prohibit the state employees from all participation as municipal officials in matters within the purview of their respective state agencies.

(b) Acting as agent.

For the reasons just discussed, §4(c), operating with the "municipal exemption," will prohibit you, as an unpaid Conservation Commission member, from acting as agent in connection with particular matters within the purview of your state Department. It remains to define how you might "act as agent" as a Conservation Commission member.

In general, a public employee acts as agent for the purpose of G.L. c. 268A when he or she speaks or acts on behalf of another in a representational capacity. *See Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992); *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610-11 (1984), *habeas corpus granted on other grounds sub nom. Cola v. Reardon*, 787 F.2d 681 (1st Cir. 1986). We have repeatedly given as examples of acting as agent appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another's spokesperson. *See, e.g., EC-COI-92-18; In re Reynolds*, 1989 SEC 423, 427; *Commission Advisory No. 13 (Agency)* (1988).

The only prior discussion that we have found of a state employee's acting as agent in his or her position as a municipal official appears in *EC-COI-79-123* and its judicial review. That opinion is especially significant because, as discussed above, it was very much before the Legislature that enacted the "municipal exemption" in St. 1980, c. 10.[4/] Although that opinion dealt with a compensated selectman, its final paragraph considers how §4(c) alone would apply if the selectman "refused compensation." After paraphrasing §4(c), it continues:

> This section does not prohibit you from participating in these matters [in which the state is a party or has a direct and substantial interest] as a selectman but it does require you to refrain from acting as the agent for your community vis-a-vis the state. To the extent that your duties as a selectman, as described in your town's by-laws or as a matter of practice, require you to act as an agent in any such particular matters as and when they arise, you would be prohibited by section 4(c) from engaging in such representational activities. We suggest that you may want to take clear and definitive steps to indicate that you are abstaining from acting on behalf of the town in a representational capacity in order to avoid any suggestion that you may have violated this section of the law.

That opinion's requester and other plaintiffs promptly sought judicial review of the Commission's advice in the Supreme Judicial Court for Suffolk County. *McNamara v. Vorenberg*, No. 79-497 Civil. The Commission's memorandum opposing a preliminary injunction in that case, while again primarily directed to §4(a), summarized the Commission's application of §4(c) in this way: "he could participate as a selectman in matters which are of direct and substantial interest to the state provided he refrain[s] from acting as the agent for his community in dealings with the state." The single justice's December 17, 1979 memorandum denying the preliminary injunction,[5/] in part because no irreparable harm would befall the plaintiff selectmen or their town, observes: "No such harm can result from the appointment of an agent other than one of the plaintiffs to avoid violation of §4(c)." By thus implicitly recognizing that the ordinary activities of selectmen would not violate §4(c), the court agreed with the Commission's position that only "representational" activities are forbidden. Moreover, the views of that single justice, Robert Braucher, are entitled to special weight, as the Supreme Judicial Court itself later recognized,[6/] because he was previously a member of the Special Commission that drafted G.L. c. 268A, and an early and respected commentator on the new statute.[7/]

The Commission's and the court's view in that 1979 case, that a municipal official does not "act as agent" merely by discussing and voting as a board member, is consistent with judicial and Commission precedent in related contexts. First, before enactment in 1978 of the state Tort Claims Act[8/] rendered the distinction irrelevant, a long line of Supreme Judicial Court decisions held that, for municipal tort liability purposes, a municipal "officer" was not ordinarily an agent of the municipality. *See, e.g., Whitney v. City of Worcester*, 373 Mass. 208, 213-15 (1977) (discussing the history of this distinction[9/]); *Reitano v. City of Haverhill*, 309 Mass. 118 (1941).[10/]

Second, beginning in *EC-COI-81-158*, this Commission has consistently held that §4(c) and its municipal equivalent, §17(c), do not prohibit public employees who are unpaid board members of business organizations from participating in board discussions and votes even about subjects that are in connection with

government particular matters, so long as they avoid acting as the organization's "agent," i.e., in a representational capacity, such as by appearing before, signing correspondence to, or making a telephone call to, a government agency. *See EC-COI-89-15; 88-17; 85-21; 83-145; 82-45.* Given the legislative purpose in enacting the "municipal exemption," discussed above, it would be odd indeed if its enactment served to prohibit state employees from activities as unpaid members of municipal boards that would be allowed to them as unpaid members of profit-making corporate boards. We do not attribute any such intention to the Legislature.

It follows that an unpaid municipal board member does not "act as agent" merely by participating in the ordinary business of the municipal board, including discussion and voting. Therefore, you may serve as an uncompensated member of the Erving Conservation Commission and may participate fully in its ordinary business, including discussing and voting on matters, such as orders of conditions under the Act, that are within the purview of your state Department. You may not, however, act as the Conservation Commission's or the Town's agent in connection with any matter within the Department's purview. For example, you could not appear at a DEP hearing on the Town's behalf to defend an order of conditions issued by your Commission (although you could appear on your own behalf, if you first made it clear that you were speaking or writing in your personal capacity only).

2. **Restrictions as an environmental police officer (§§6, 17, 23).**

If you are appointed to the Conservation Commission, the conflict law will also restrict your activities in your role as an environmental police officer. Section 6 will generally prohibit you from participating as an environmental police officer in any particular matter in which the Town of Erving has a financial interest, because the Town, of which you will be an "officer," is a business organization for this purpose. *See, e.g., EC-COI-92-8; 89-2; 88-4.* Section 17 (the municipal equivalent of §4, discussed in part 1) will prohibit you from acting as an environmental police officer in relation to any particular matter in which the Town is a party or has a direct and substantial interest. Section 23 will prohibit you from using your position as an environmental police officer to secure an unwarranted privilege of substantial value for yourself or others (including the Town) (§23[b][2]), and from acting in that position in a manner that leaves a reasonable impression of undue influence resulting from your Town position (§23[b][3]).

While limited exemptions are available to you from each of these provisions,[1/] their cumulative effect will likely be to prevent you from performing your duties as an environmental police officer within the Town of Erving. *Cf. EC-COI-92-8* (advising potential state legislator of limits on his legislative work involving town where he was Selectman). You should discuss the practical implementation of this limitation with your Department superiors, if you pursue appointment to the Conservation Commission.

Date Authorized: September 10, 1992

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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/]Section 19 of G.L. c. 268A will not restrict your Conservation Commission activities on the ground that the state, your employer, may have a financial interest in some of them, because the Commission and the Attorney General have repeatedly held that neither the state nor any state agency is a "business organization" for this purpose. *EC-COI-92-11; 92-3* n.3; *85-67; AG Conflict Opinion No. 30* (Apr. 25, 1963).

[2/]An act's title is evidence of legislative intent. *See Hemman v. Harvard Community Health Plan, Inc.*, 18 Mass. App. Ct. 70, 73 (1984); *EC-COI-92-6* n.2.

[3/]In a few of these cases, the stated facts do not reveal whether the municipal official was compensated, and the opinions do not discuss the point. *EC-COI-88-21; 86-2; 84-120; 82-164; 82-89.* In only one prior opinion, *EC-COI-84-103*, is it clear from the discussion that the municipal official, a sewer commissioner, was unpaid. There, this Commission explicitly recognized that only §4(c) applied (as constrained by the "municipal exemption"), but then stated conclusorily that "board members necessarily function as agents of the town with regard to local sewage matters." Our discussion here in text below undermines that unexplained statement.

[4/]In addition to noting again that the Legislature made c. 10 retroactive to the date of that opinion, we also find it significant that a copy of the opinion is found in the

Governor's legislative file for c. 10, the permanent record of the act's legislative history in the State Archives.

[5/]The case never proceeded to argument on the merits before the full court, because the plaintiffs were satisfied with the Legislature's prompt enactment of St. 1980, c. 10, which the Governor signed on February 28, 1980.

[6/]*Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983).

[7/]Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* (1964).

[8/]G.L. c. 258, initially enacted by St. 1978, c. 512.

[9/]As the *Whitney* court pointed out (in criticizing the distinction as a basis of determining municipal tort liability), "many" of the court's earlier decisions ended the inquiry once the actor was classified as a "public officer," while other cases discussed municipal liability if public officers were engaged in "commercial" ventures on the municipality's behalf. 373 Mass. at 214.

[10/]We note that this line of cases is discussed at length in comprehensive memoranda by the the Winthrop Town Counsel that were before the Legislature and Governor when they enacted St. 1980, c. 10. These memoranda are found in the Governor's legislative file for c. 10. See note 5, above.

[11/]Section 6 will require you to disclose in writing your need to participate in any matter in which the Town has a financial interest to your Department appointing authority, who must then (1) assign it to another police officer; (2) assume it himself; or (3) determine that the Town's financial interest in that matter (or class of matters, *see EC-COI-92-12* n.2; *90-5; 90-4*) is not so substantial as to interfere with the integrity of your services to the state. Copies of your disclosure and this determination must be filed with this Commission.

The scope of the §17 prohibition would be limited to Conservation Commission matters if the Selectmen classified Conservation Commission members as "special municipal employees." *See* G.L. c. 268A, §1(n). This might not resolve many problems for you, however, since most Town matters that would pose conflicts with your work as an environmental police officer are probably within the Conservation Commission's jurisdiction.

Finally, you could avoid violating §23(b)(3) (though not §23[b][2]) by publicly disclosing your Conservation Commission membership to your Department appointing authority in writing.

CONFLICT OF INTEREST OPINION
EC-COI-92-26*

FACTS:

The Martha's Vineyard Collaborative (Collaborative) was formed under a letter of agreement between the school committees of the six Vineyard schools and the Regional High School, pursuant to G.L. c. 40, §4E and c. 7, §22B. The Collaborative is organized as a 501(C)(3) corporation devoted exclusively to educational purposes. The purpose of the Collaborative is to conduct joint educational programs, including, but not limited to, providing services to special needs children, cooperative purchasing of goods and materials, and coordinating and implementing in-service education. The Collaborative is run by a Board comprised of one person from each Town's school committee or the Committee's designee and an ex-officio designee of the state Department of Education. One of the Board's principal duties is to establish and manage the Collaborative Trust Fund which receives all funds and reimbursements from the municipalities, as well as grants or gifts from any source. The municipalities cover administrative costs of the Collaborative on a pro-rata basis and cover program costs on a per pupil cost basis.

The Chilmark School Committee wants to appoint an elected member of the Chilmark Finance Committee to serve as the Chilmark representative to the Collaborative.

QUESTION:

Does G. L. c. 268A permit an elected member of the Chilmark Finance Committee to serve as the School Committee's designee on the Collaborative?

ANSWER:

Yes.

DISCUSSION:

1. **Jurisdiction**

Members of the Chilmark Finance Committee are municipal employees[1] for purposes of the conflict law. An initial question arises whether a member of the Finance Committee is also a public employee as a Collaborative board member. We conclude that, within the meaning of G.L. c. 268A, the Collaborative is an instrumentality of each municipality which comprises the Collaborative, similar to regional school committees, and that the Chilmark representative is a municipal employee in that capacity.

In a determination whether an organization is a public entity under G.L. c. 268A the Commission has not considered the corporate structure of an entity to be dispositive of the issue. The Commission has weighed whether the entity is created by governmental means; whether the entity serves an inherently governmental purpose; whether the entity is controlled or supervised by government employees; and whether the entity is funded by the government or expends government funds. *See EC-COI-91-12; 89-1; 88-24; 88-19.*

For example, the Commission has found private non-profit entities to be public entities where the entity was created by a public agency to assist the agency in furthering its legislative mandate. *See EC-COI-91-12; 89-1; 88-24.* Similarly, the Commission found that a regional school district was an independent municipal agency for purposes of the conflict of interest law as the district was an entity supported by public funds, and its purpose was to provide a service which each municipality in the Commonwealth is required by law to provide. *EC-COI-82-25.*

Recently, the Appeals Court affirmed a Commission Decision and Order finding that members of a regional school committee are municipal employees under G.L. c. 268A. In doing so the Court concluded that a regional school district is an instrumentality of each municipal member under G.L. c. 268A, §1(f). *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). In reaching this conclusion the Court considered the ordinary and approved use of the word "instrumentality" in the statute; the formation, operation and purpose of a regional school district; and the purpose of G.L. c. 268A. *Id.* at 425-428. The Court found that the municipalities use the school district as a means to fulfill their statutory obligation to provide education and that the municipalities played a substantial role in the creation of the district and the district's financial matters. *Id.* at 427.

We now expressly follow the Appeals Court's reasoning in considering whether a regional entity, such as the Collaborative, is a municipal agency within the meaning of G.L. c. 268A, §1(f). The Commission will no longer consider regional municipal entities to be "independent" municipal entities.[2] *See EC-COI-92-15.* Rather we will consider whether such entities are instrumentalities of each municipal member based on the ordinary and approved usage of the statutory language, the purpose of G.L. c. 268A and the form, operation and purpose of the regional entity.

Applying this analysis to the case before us, we conclude that the Collaborative is a municipal agency within G.L. c. 268A, §1(f). In light of the purpose of G.L. c. 268A to assure integrity and honesty in government by eliminating actual and potential conflicts between a public official's duties and private interests, it is reasonable to conclude that c. 268A applies to the Collaborative, an entity with public attributes. The impetus for the creation of the Collaborative is in G.L. c. 40, §4E which permits municipal school committees to enter letters of agreement to form educational collaboratives. The purpose of the Collaborative is to assist school committees in their traditionally governmental function of providing public education. G.L. c. 40, §4E. The Collaborative receives substantial funding support from the member municipalities, and the funding is administered by a Board of municipal appointees from the member school committees. It is noted that any amendment to the agreement, such as the addition of a new member, must be approved by the other member municipalities. Finally, G.L. c. 40, §4E expressly contemplates that the Collaborative will be a public entity and that the Board will be a public employer. G.L. c. 40, §4E. In conclusion, the Collaborative is created by the municipalities as a means by which municipalities fulfill their educational responsibilities and is an instrumentality of those municipalities.

2. Application of the Conflict of Interest Law

A local municipal employee who is also serving as a Collaborative Board member will be considered to be serving on two municipal boards. This dual status eliminates certain conflict of interest issues which would otherwise arise in dealings between the employee's individual town and the Collaborative. Under G. L. c. 268A, §17(c) a municipal employee may not act as agent for anyone, other than the municipality, in connection with a matter in which the municipality is a party or has

a direct and substantial interest. Section 19, in relevant part, prohibits a municipal employee from participating in a matter in which a business organization[3/] in which he is serving as an officer, director, trustee, partner or employee has a financial interest.[4/] These sections of the conflict law will not prohibit a municipal employee from acting, as a Board member, in matters in which the individual municipality has an interest, or, as a local municipal employee, in matters in which the Collaborative has an interest, because in each capacity the employee is acting on behalf of the municipality. *See EC-COI-90-2; 88-24.*[5/]

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

[1/]"Municipal 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).

[2/]*See McMann, supra*, at 428, n. 5 (questioning the statutory basis for municipal entities as "independent" municipal entities). Also, note that the definition of "state agency" includes "any independent state authority, district, commission, instrumentality or agency..." (emphasis added), whereas the definition of municipal agency does not include the word "independent." G.L. c. 268A, §1(f) and (p).

[3/]Non-profit entities and municipalities are considered to be "business organizations" for purposes of §19. *See EC-COI-89-2; 88-4; 84-7; 81-62.*

[4/]We note that G.L. c. 268A, §20 may apply to the employee in his dual positions. We understand that the Finance Committee member will not be compensated in either position, and therefore §20 will not apply to his situation. However, §20 issues may arise in the future. For example, an appointed municipal employee may not serve as a Collaborative Board member and receive compensation in either position, unless an exemption applies. This section may be particularly relevant in the situation of a local school teacher who also wants to work part-time for the Collaborative. However, §20 will not prohibit a paid school committee member from also serving as a Collaborative Board member because G.L. c. 40, §4E expressly contemplates that school committee members, by virtue of their positions, are required to serve as municipal representatives on the Board. *See EC-COI-84-148* (one contract forms basis for state committee membership and agency employment). If issues arise under §20, you should seek further guidance from the Commission.

[5/]Sections 17 and 19 will apply to the municipal employee in his other private activities. For example, the Board member may not participate, under §19, in decisions to adopt or cancel a program in which his child is participating. Under §17, the employee may not represent private parties in their dealings with the Collaborative or the Town.

CONFLICT OF INTEREST OPINION
EC-COI-92-27

FACTS:

You are an elected, uncompensated member of the ABC Regional High School Committee (Committee). The ABC Regional School District (District) comprises the Towns of A, B and C. You represent the Town of A on the Committee. You are also the President of a construction company (Company). The Company, a Massachusetts-based corporation, is wholly owned by a holding company which in turn is owned by you and your brother (you own 50% of the holding company). The Company currently bids on many projects of various state agencies and most of the cities and towns in your county. The Company is interested in submitting a bid proposal for the removal of a fuel tank at the regional high school. The District's business manager will open and review the proposals and award the job to the lowest bidder. The Committee will ratify the contract award. You will not participate as a Committee member in this matter.

QUESTION:

Given your position on the Committee, can the Company enter into a contract with the District?

ANSWER:

No, unless the position of Committee member is designated as a special municipal employee position by the boards of selectmen of each of the member towns and you avail yourself of the exemption provided in G.L. c. 268A, §20(d).

DISCUSSION:

As we have decided on this date in *EC-COI-92-26*, regional school committees will no longer be considered independent municipal entities for purposes of G.L. c. 268A, but rather instrumentalities of each member municipality. As a member of the Committee, you therefore are a municipal employee of each of the member Towns.[1/]

Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, unless an exemption applies.

If the Company were to enter into a contract with the District, by virtue of your 50% ownership of the holding company, you would have a financial interest in a contract with a municipal agency (the same municipal agency in which you serve). *See EC-COI-89-22.* Section 20 prohibits such a financial interest unless an exemption applies.

Under §20(b), a municipal employee is not subject to the prohibitions of §20 provided, among other things, that the municipal employee does not participate in or have official responsibilities for any of the activities of the contracting agency. In your proposed situation, this exemption would not apply because the Company seeks to enter into a contract with the same municipal agency for which you have official responsibility.

Section 20, however, contains several additional exemptions which apply only to special municipal employees. The position of regional school committee member may be designated as that of a special municipal employee, if so classified by vote of the board of selectmen or city council of each of the member municipalities.

This result follows the analysis of *Commission Advisory No. 5*, where we explained that local water and fire district employees (where the district was contained within the boundaries of a single municipality) could be designated by the single municipality's board of selectmen or city council as special municipal employees, even though the selectmen or city councillors might not be involved in any way with the activities of the district.

We now extend this analysis (*Commission Advisory No. 5)* to regional districts containing more than one municipality, with regard to the designation of their employees as special municipal employees. We recognize that this analysis is inconsistent with our opinion in *EC-COI-87-2* where we held (in apparent contradiction to *Commission Advisory No. 5*) that members of a fire district prudential committee (located within a single municipality) were **not** eligible for classification as special municipal employees.[2/] However, we find that our current analysis is more appropriate in light of the recent decision by the Appeals Court in *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428, n. 5 (1992). *See EC-COI-92-26.*

If members of the Committee are designated as special municipal employees, you may avail yourself of the exemption provided by §20(d). Under that exemption a special municipal employee is exempt from the prohibition of §20, if he files with the appropriate clerk a disclosure of his interest in the contract and if the board of selectmen approves of the exemption. Therefore, as a special municipal employee in your Committee position, you would need to file with the District Clerk a written disclosure of your interest in a contract with the District. Moreover, you would need to receive the approval of the boards of selectmen of each of the member towns.

To summarize, in order for the Company to enter into a contract with the Committee, you must obtain from the selectmen of each member town (a) the designation of Committee members as special municipal employees; and (b) an exemption from the boards of selectmen pursuant to §20(d).[3/]

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

of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

[2]/In 1990, the Legislature amended G.L. c. 48 to add §90, which states that a fire district shall be considered a municipal agency and that part-time firefighters and any one who performs professional services for a fire district on a part-time, intermittent or consultant basis shall be considered a special municipal employee. St. 1990, c. 262. The Legislature simultaneously amended G.L. c. 268A, §20(d) to allow part-time employees of a fire district to avail themselves of the exemption provided by that section if approved by the fire district's prudential committee. This history further suggests moving away from our analysis in *EC-COI-87-2*.

[3]/We note that if the Company wishes to enter into a contract with any of the towns encompassed by the District (or any agency of any of the towns), you could qualify for the exemption provided by §20(c) once you have obtained special municipal employee status. Section 20(c) allows a special municipal employee to have a financial interest in a contract with a municipal agency without seeking the approval of the board of selectmen, so long as the municipal employee does not participate in or have official responsibility of any of the activities of the contracting agency. In your case, it is unlikely that the Committee participates in or has official responsibility for any of the activities of any of the other agencies of the member municipalities. Therefore, if you become a special municipal employee, you would need only file a written disclosure of your financial interest with the District Clerk and the Town Clerk upon contracting with agencies other than the Committee.

CONFLICT OF INTEREST OPINION
EC-COI-92-28*

FACTS:

A private, non-profit corporation called The Boston Organizing Committee (Committee) has been created by corporate leaders in the Commonwealth to organize an effort to bring a future international summer Olympics to the Boston area. The Committee believes that if the Commonwealth serves as a host to the Olympic games it will have a significant economic impact on the Commonwealth, will create new jobs, and will highlight the many physical, recreational and cultural assets in the area. The Committee is currently conducting fundraising activities in order to raise the capital necessary to "solidify its relationship with the U.S. Olympic Committee, lead and organize the many corporate, civic and athletic groups necessary to serve as hosts, and prepare Boston's bid." The Committee is also involved in public relations activity to increase the number of international athletic events in this area in support of its Olympic bid.

The Governor is interested in signing a Committee solicitation letter which will be sent to corporate entities in the Commonwealth, requesting that each corporation pledge a sum of money, such as $25,000 per year, over the next three years to the Committee. Other signers of the letter will include local and federal public officials and one of the corporate founding members of the Committee. The Committee plans to send the letter to many individuals and corporations that are within the regulatory jurisdiction of, or have contracts with, one or more state agencies under the Governor's authority.

QUESTION:

Does G.L. c. 268A permit the Governor to sign this solicitation letter?

ANSWER:

No.

DISCUSSION:

Whenever a public employee participates in a solicitation, issues are raised under G.L. c. 268A, §23, which contains standards of conduct for all state, county, and municipal employees. Specifically, G.L. c. 268A, §23(b)(2) provides that a state employee may not use his official position to secure unwarranted privileges of substantial value for himself or others which are not properly available to similarly situated individuals. This provision applies to the Governor as a "state employee." G.L. c. 268A, §1(q).

"The Commission has consistently held that this provision flatly prohibits public employees from soliciting anything of substantial value from persons within their regulatory jurisdiction, because of the 'inherently exploitable nature' of these situations." *EC-COI-92-12* (Board member prohibited from soliciting individuals

under his regulatory authority). We have also applied this principle to solicitations by public employees, in both their public and private capacities, from others "whom they oversee in their official duties [including] subordinate employees [and] vendors . . . ." *EC-COI-92-7* (legislator prohibited from soliciting private business relationship with legislative aide). *See also EC-COI-92-2* (legislator's financial aid committee prohibited from soliciting anyone with an interest in legislative business, broadly defined); *90-9* (state official prohibited from soliciting vendors of his agency to support political candidate); *82-124* (County Commissioner prohibited from privately selling insurance to county vendors whose contracts he oversees); *81-66* (Corrections officer prohibited from catalog selling to inmates within custody). We have repeatedly explained the rationale for this prohibition:

> First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

EC-COI-92-7; In re Garvey, 1990 SEC 478, 479-80; *In re Keverian*, 1990 SEC 460, 462 (citations omitted).

We now clarify that this principle applies to solicitations for the benefit of non-governmental entities that arguably perform a public purpose, unless a statute or regulation explicitly authorizes the solicitation. Regardless of the purpose of a solicitation, the dangers of compromising a public employee's impartiality and objectivity and of creating an atmosphere where potential vendors feel compelled to contribute to foster the agency's or the public employee's good will remain.[1/] Our prior opinions allowing solicitation support this conclusion. In *EC-COI-84-128*, our decision to permit a state Secretary to solicit private entities was based both on the presence of explicit statutory authorization and on the fact that the Secretary had limited regulatory authority over the private organizations. In *EC-COI-83-102*, we decided that a state legislator could sign a letter to be used to solicit local merchants to support a raffle in a voter registration drive, but we indicated that the solicitation may raise issues under §23 "where the solicitation is made to a merchant whose special legislation or other particular matter is about to be voted upon by the endorsing legislator."[2/]

Here, virtually all of the corporations and individuals to be solicited are inevitably within the regulatory jurisdiction of state agencies responsible to the Governor -- for example, the Department of Revenue, the Commissioner of which is appointed, and may be removed without cause, by the Secretary of Administration and Finance with the Governor's approval. G.L. c. 14, §2. Many other recipients of the solicitation will have present or prospective contracts with state agencies similarly under the Governor's control. While we do not suggest that any agency action would depend on a recipient's response to this solicitation, our concern about its "inherently exploitable nature" remains. Therefore, the Governor may not sign this solicitation letter, in either his public or private capacity.[3/]

Our decision would be different if the Legislature (or an agency authorized by the Legislature to adopt quasi-legislative regulations) explicitly authorized this solicitation, either generally or specifically.[4/] For example, the Legislature might authorize the formation of an Olympic Steering Committee and allow the Committee to solicit funds; authorize an executive agency to develop an Olympic bid; or merely authorize such solicitations on behalf of non-profit entities that promote tourism.[5/] Here, no such authorization exists; in fact, the grants to such entities authorized by G.L. c. 23A, §14 are explicitly made "subject to appropriation" by the Legislature. Under the Massachusetts Constitution, "the power to order social priorities, and to focus the energies of society into the accomplishment of designated objectives or programs is entrusted to the Legislature through the enactment of laws according to prescribed procedures." *Opinion of the Justices*, 375 Mass. 827, 832 (1978). *See* Part II, c. 1, §1, art. 4 of the Constitution. *See also* St. 1987, c. 371; St. 1989, c. 488 (statutes establishing "linkage" programs in Boston and Medford respectively, and thus authorizing municipal employees to require specified payments for public purposes from regulated developers).

We note that our conclusion is consistent with regulations recently adopted by the federal Office of Government Ethics, entitled "Standards of Ethical Conduct for Employees of the Executive Branch." 5 CFR part 2635. *See EC-COI-87-32* (looking to federal regulation for guidance in construing G.L. c. 268A). These regulations address the use of official position for private gain and fundraising by federal employees. Specifically, 5 CFR 2635.808 addresses fundraising in a federal employee's official and private capacities. The regulation defines fundraising as "the raising of funds for a non-profit organization, other than a political organization . . . ." A public employee may fundraise in his official position and use his official title and authority if he is authorized to participate in his official capacity by (among other things) a statute or regulation. A public employee may fundraise in his private capacity provided that he does not personally solicit from a subordinate or a "prohibited source." "Prohibited source" is defined as any person who is seeking official action by the employee's agency; does business or seeks to do business with the employee's agency; conducts activities regulated by the employee's agency; has interests which may be explicitly affected by performance or nonperformance of the employee's official duties; or is an organization with a majority of members whose interests are described above. In essence, unless specifically authorized, a public employee may not target for solicitation purposes those over whom he has authority or oversight or with whom he has a regulatory relationship.

We emphasize that our conclusion certainly does not prevent the Governor, or any other policy making public official, from publicly announcing his support for or endorsement of a non-profit endeavor that, in his judgment, furthers some public purpose. *See Anderson v. City of Boston*, 376 Mass. 178, 199 (1978), *appeal dismissed*, 439 U.S. 1069 (1979) (recognizing free speech rights of policymaking public officials, even during working hours, regarding ballot question campaign); *EC-COI-92-5* n.4 (referring to *Anderson* by analogy in applying §23[b][2] to campaign activities). The Governor, in other words, is free to state publicly his support of the goals and activities of the Boston Organizing Committee; what he may not do is sign a solicitation letter targeted, at least in part, to individuals or organizations subject to the regulatory authority of the Administration.

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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/]Such a solicitation is distinguishable from a vendor's offering to provide a gift to a government agency, which we have found does not violate §23. *See, e.g., EC-COI-89-23* (potential state vendor donated agency software); *89-3* (vendor donated actuarial services to agency); *84-114* (donation of artwork to agency). In contrast, this solicitation seeks to benefit, not a government agency, but a private entity.

[2/]Section 23(b)(2) also generally prohibits public employees from using official resources, including their official titles, to promote a private interest. *See EC-COI-92-12; 92-5; 84-127; 83-82; Public Enforcement Letters 92-3, 89-4; In re Buckley*, 1983 SEC 157. In view of the conclusion we have reached about the "inherently exploitable nature" of this solicitation, we have no occasion here to consider whether other circumstances, not of such an "inherently exploitable nature," might allow use of official resources to solicit for a private entity pursuant to some public purpose related to a public employee's official duties.

[3/]Of course, the Governor or any other public employee may solicit in his private capacity (i.e., without using his official title or other state resources), for example to benefit some charitable organization to which he belongs, so long as the solicitation is either general in nature (e.g., a newspaper advertisement) or otherwise not specifically directed to any person or entity that the public employee oversees. *See EC-COI-92-12* n.7.

[4/]In this connection, we note that the Legislature has in effect generally authorized elected public officials to solicit funds for political campaign purposes in their private capacities. G.L. c. 55, §13. *See EC-COI-92-12* n.10. The present opinion does not otherwise address political fundraising, which the Legislature has also regulated in G.L. c. 55, and which (as to G.L. c. 268A) we have discussed elsewhere. *See Commission Advisory No. 4* (1992); *EC-COI-92-12*.

[5/]Even when the law authorizes a solicitation, §23(b)(3) would apply if a contributor later had official discretionary dealings with the soliciting public employee (or another employee under that employee's authority). Section 23(b)(3) prohibits a public employee from engaging in conduct that 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, but allows the employee to dispel any such impression by written public disclosure.

CONFLICT OF INTEREST OPINION
EC-COI-92-29

FACTS:

You are a member of ABC Housing Authority (ABC). Chapter 121B of the General Laws sets up a structure whereby a housing authority compensates its members based upon a percentage of the rents from projects commenced prior to a certain date. The Executive Office of Communities and Development (EOCD), as the funding agency for housing authorities, pursuant to statute, is required to include such amounts in an authority's budget authorizations. In your opinion, EOCD has failed to comply with this requirement. The ABC is contemplating a lawsuit in which it will seek to enforce its statutory and contractual rights. The ABC, as plaintiff in the lawsuit, seeks to utilize its legal counsel. Although individual Members may implead as plaintiffs, it is not foreseen that the individuals will be represented by ABC's legal counsel.

Additionally, each Member has filed individually with the Town Retirement Board (Board) for membership and has been rejected by the Board. Each Member, using private legal counsel, has individually appealed this rejection. The case of one of the Members has already been decided by the Contributory Retirement Appeals Board in favor of acceptance and has been returned to the Board for consideration and compliance with the Board's own regulations. The ABC now intends to have its legal counsel represent all of its present and future special municipal employees, which includes the individual Member referred to above, with regard to the limited issue of the Board's compliance with its regulations and the eligibility for membership of ABC's special municipal employees. Any other issues of specific concern to the individual Member will be handled by the Member's private counsel.

According to the ABC, a number of benefits are conferred upon it by having its counsel prosecute this limited issue. Specifically you state that public policy requires that the employer seek to uphold statutorily granted rights common to classes of its employees. You further state that pursuit by the ABC of retirement benefits for its employees will encourage loyalty and foster a sense of common cause throughout the ABC, leading to better job performance by all employees. Also, you state that with regard to the position of Member, the availability of retirement benefits would encourage more and better qualified persons to run for this office. Finally, you state that the ABC would be protecting its employees from a discriminatory application of the law in that numerous similarly situated employees in Town and neighboring towns are allowed membership in the retirement system.

QUESTIONS:

1. Does G.L. c. 268A permit legal counsel for the ABC to pursue a lawsuit on behalf of the ABC against EOCD with regard to the fee used for compensating the Members?

2. Does G.L. c. 268A permit counsel for the ABC to represent an individual Member with regard to the limited issue of the Board's compliance with its own regulations and the eligibility of all ABC special municipal employees to be members of the local retirement system?

ANSWERS:

1. Yes.

2. Yes.

DISCUSSION:

The ABC's legal counsel is a municipal employee for purposes of the conflict of interest law.[1/] Section 17(c) generally prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone other than the municipality or a municipal agency in connection with any particular matter[2/] in which the municipality is a party or has a direct and substantial interest.

We must therefore determine whether the involvement of the ABC legal counsel in the two proposed actions would constitute a proper part of the official duties of the legal counsel. In that regard, we have previously held that G.L. c. 268A provides latitude to an employee's appointing official to determine what will constitute the proper discharge of official duties, and the Commission will customarily defer to the appointing official's

discretion. However, the Commission has also previously held that an appointing official's discretion is not unlimited.

Thus, in *EC-COI-83-137* the Commission decided that legal counsel for the chairman of a committee of the General Court could not file a lawsuit on behalf of plaintiffs (the chairman and other members of the Committee, and their employees), in their private capacity as residents of the Commonwealth, challenging a law which would affect them as private individuals.[3/] The Commission found that as a legislative employee, the attorney's responsibilities included research and drafting services for the Committee. The Commission went on to state that those responsibilities could reasonably extend to representing individuals in their capacity as legislators in a court suit, for example challenging a particular law or regulation as it affects the legislators or leadership in their official capacity. However, in that particular case, the Commission found that there was no "distinct institutional interest" which would be served by pursuing the lawsuit, and therefore the attorney's representation of the Chairman and other members of the Committee was prohibited by §17(c). *See also EC-COI 88-17; compare EC-COI-85-73* (consultant to Attorney General could concurrently represent creditors committee where purpose for employment by Attorney General could not be achieved without such representation of the committee); *EC-COI-83-20* (an attorney employed in the legal department of a state agency may represent a former employee of the agency, for no compensation beyond his own salary, in connection with matters arising from the former employee's actions as a state official, as such representation is within the proper discharge of his official duties as determined by his superiors).[4/]

With regard to the first proposed lawsuit to be brought against the EOCD to enforce the ABC's contractual rights, because ABC legal counsel will be representing the ABC rather than any of the individual Members, representation by ABC counsel is clearly not prohibited by §17(c).

As to representation of an individual Member by ABC legal counsel in the second proposed action, we find that the exemption provided by §17(c) applies. Given the litigation strategy as you describe it, wherein ABC legal counsel will only advocate the limited issue of the Board's compliance with its own regulations and the eligibility of the individual Member as well as all other ABC special municipal employees for membership in the retirement system, we find that such legal representation is a proper discharge of the official duties of the ABC legal counsel, and therefore is exempt from the prohibitions of §17(c).[5/] As the Commission has previously held, where a public official seeks to challenge a law or regulation as it affects him in his official capacity, the official duties of a public agency's attorney can reasonably extend to cover representation of the individual public official in such a matter. *EC-COI-83-137.* Moreover, where as here, you have specified several credible benefits to the ABC and its special municipal employees as a class, we find that this particular lawsuit serves a distinct institutional interest. The proposed representation by the ABC's legal counsel will not therefore violate §17(c).[6/]

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[1/]We note that pursuant to G.L. c. 121B, §7, an attorney who performs professional services for a housing authority on a part-time, intermittent or consultant basis is a special municipal employee for purposes of G.L. c. 268A. However, the fact that the legal counsel is a special municipal employee has no bearing on the analysis contained herein.

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

[3/]In *Commission Advisory No. 6 (Municipal Lawyers Representing Both a Municipal Employee and a Municipality in the Same Suit)*, the Commission concluded that "[a]s a matter of sound policy, . . ., the proper discharge of a municipal attorney's duties can also reasonably extend to representing a municipal employee in the employee's official and individual capacity, provided that the appropriate authorization has been given by the attorney's appointing official." We note however, that the advice contained in this Advisory pertains to a municipal official being sued in both his official and individual capacities. Because the circumstances surrounding representation by the ABC attorney are

distinguishable, we will not rely upon Advisory No. 6, nor should this opinion be read to alter the advice contained in that Advisory.

[4/]Section 17(a) prohibits compensation from third parties unless it is provided "by law for the proper discharge of official duties" (emphasis added). Therefore, §17(a) will prohibit ABC's legal counsel from receiving private compensation from the individual Member as well as the ABC, absent a statutory provision or by-law allowing such receipt of compensation. *See EC-COI-92-10* n.5. *See also EC-COI-88-6* (§17 [a] prohibits town counsel from receiving private compensation for representing town official in State Ethics Commission enforcement proceeding).

[5/]You tell us that representation of the individual Member as to any issues beyond the limited question of law which affects all of the ABC's special municipal employees will be handled by the Member's personal legal counsel.

[6/]This opinion is limited to the application of G.L. c. 268A to the circumstances described. In other words, nothing in this opinion should be construed as commenting on permissibility of the proposed representation of the individual Member under the disciplinary rules governing the conduct of attorneys. You should therefore inquire of the Board of Bar Overseers or the Massachusetts Bar Association whether the proposed representation by the ABC's legal counsel will be prohibited by any of the restrictions on the conduct of attorneys.

CONFLICT OF INTEREST OPINION
EC-COI-92-30

FACTS:

You are an elected City Councillor. The City Council will soon be voting to fill a vacancy in the office of City Clerk. You wish to be a candidate for this position.

QUESTION:

What limitations does G.L. c. 268A establish for you?

ANSWER:

1. The City Council may not elect you as City Clerk until thirty days after you cease to be a Councillor.

2. While you remain a Councillor, you may not participate, even informally, in matters related to your City Clerk candidacy.

DISCUSSION:

As a Councillor, you are a "municipal employee" under the state conflict of interest law. G.L. c. 268A, §1(g). Your request raises issues under the following sections of the conflict of interest law.

1. Section 21A

Section 21A of G.L. c. 268A provides in relevant part:

> [N]o member of a municipal 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.

Since you wish to seek election by the City Council's members as City Clerk, whether §21A applies will depend on (a) whether the City Council is a "municipal commission or board" and (b) whether the City Clerk is "under the [Council's] supervision."

(a) The City Council is a "municipal commission or board."

The term "municipal commission or board" is not explicitly defined in G.L. c. 268A or elsewhere in the General Laws. We therefore look to "the common and approved usage of the language." G.L. c. 4, §6 (Third). *See McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

Relevant definitions in Webster's Ninth New Collegiate Dictionary (1987) indicate that a "commission" is "a government agency having administrative, legislative, or judicial powers," and similarly that a "board" is "a group of persons having managerial,

supervisory, investigatory, or advisory powers." Certainly, a City Council, the municipal legislative body, easily fits within these terms.

Other provisions of the General Laws refer to a city council as a "board." G.L. c. 4, §7 (First); c. 39, §1. Indeed, some Massachusetts cities use the term "board of aldermen" to refer to their city councils, and the statutes just cited treat the two terms as interchangeable. *See also* G.L. c. 50, §1 (defining "aldermen"). In other contexts, we have held that the substance of an arrangement, rather than its name, is controlling, considering the broad remedial purposes of G.L. c. 268A. *See EC-COI-89-5; 83-81; 82-68; 80-43* (substance of relationship determines whether partnership exists).

In an analogous situation, the Supreme Judicial Court recently considered whether the state open meeting law, G.L. c. 30A, §11A, applies to the state executive Council as a "Governmental body." *Pineo v. Executive Council*, 412 Mass. 31, 34-37 (1992). The statute defined that term as "a state board, committee, special committee, subcommittee or commission, however created or constituted within the executive . . . branch of the commonwealth . . . ." The court first applied this statutory definition to the Council as an executive "board," citing *Scullin v. Cities Service Oil Co.*, 304 Mass. 75, 78-79 (1939). But the court then held that this application violated the constitutional separation of powers, because the Legislature had no power to regulate the Council's procedures. Here, where no such constitutional issue arises, the *Pineo* court's analysis suggests that the term "board" unambiguously applies to this "Council," since the court presumably would have resolved any ambiguity in favor of the statute's constitutionality, according to the usual rule of statutory construction. *See Weld for Governor v. Director of the Office of Campaign and Political Finance*, 407 Mass. 761, 769 (1990).

Finally, applying §21A to every multi-member municipal body is consistent with the statute's history and purpose.[1] *See McMann*, 32 Mass. App. Ct. at 427 (G.L. c. 268A should be read to effectuate fully its comprehensive purpose "to strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain"). Section 21A – and its state and county counterparts, §§8A and 15A – have their roots in the common law doctrine of incompatibility of offices. In *Gaw v. Ashley*, 195 Mass. 173 (1907), the Supreme Judicial Court first applied this doctrine to hold that a municipal board could not appoint its own member to a position under the board's supervision. While the court seemed chiefly concerned that the appointee would continue to sit on the board, and thus that his present colleagues would be supervising his performance, the court phrased the prohibition more generally, as prohibiting the appointment itself. Soon after the court again applied this prohibition, in *Attorney General v. Henry*, 262 Mass. 127, 132 (1928), the Legislature enacted a narrow exception, allowing the town meeting to approve an otherwise prohibited appointment.[2] St. 1929, c. 36, enacting G.L. c. 41, §4A. In *Mastrangelo v. Board of Health of Watertown*, 340 Mass. 491, 492 (1960), the court later held that this statute otherwise codified the common-law rule, and squarely rejected an argument (based on the reasoning of *Gaw* and its progeny) that the basic prohibition so codified should not apply if the member appointed resigned from the board immediately afterward.

Finally, in *Starr v. Board of Health of Clinton*, 356 Mass. 426, 428-29 (1969), the court again applied G.L. c. 41, §4A to prohibit a municipal board from appointing its own present member to a position under the board's supervision. The court noted the Legislature's enactment, subsequent to the events at issue there, of G.L. c. 268A, §21A (by St. 1967, c. 887, §2).[3] The court commented: "The legislative purpose behind the enactment of [§21A] seems to confirm the purpose which was contained in G.L. c. 41, §4A." 356 Mass. at 429 n.2.

The point of this history is that nothing in the rationale of the original common-law rule suggests limiting its application to any particular multi-member government bodies, however named or constituted. Since the Supreme Judicial Court has said that G.L. c. 41, §4A intended to codify this rule (with an exception irrelevant here), and that G.L. c. 268A, §21A sought to "confirm" that earlier statute, it follows that §21A should be read to apply to all multi-member municipal bodies. As explained above, this result also "take[s] into account the ordinary and approved usage of the statutory language . . . and the purpose of the [conflict] law . . . ." *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). We therefore conclude that a City Council is a "municipal commission or board" for the purpose of §21A.

(b) The City Clerk is "under the [Council's] supervision."

The city charter provides that the City Clerk shall be the clerk of the City Council. The Clerk is to give notice of all meetings of the City Council to its members and to the public, keep the journal of its proceedings, and perform such other duties as may be assigned by the charter, by ordinance or by other vote of the City Council. Furthermore, the City Clerk, as an "officer appointed or elected by the city council[,] may be removed by said council for cause . . . ." G.L. c. 39, §8A.

This relationship between the Council and the Clerk is the same as that described in the cases, including *Gaw*, *Henry*, *Mastrangelo*, and *Starr*, that prefigured §21A; it includes detailed direction and oversight of activities, amounting to an agency relationship, and (at least here) the power to discharge. We conclude that the City Clerk is "under the supervision of" the City Council for the purpose of §21A.

Therefore, you will not be eligible for election by the Council as City Clerk for as long as you remain a Councillor and for thirty days thereafter. No vote to elect you is valid unless it occurs more than thirty days after your service as a Councillor ends.

2. Sections 19 and 23(b)(2)

Even if you eventually resign from the Council in order to seek election as City Clerk more than thirty days later, other relevant provisions of G.L. c. 268A will apply to you for as long as you do remain a Councillor. Section 19 prohibits a municipal employee from participating in any particular matter in which he (among others) has a financial interest. Section 23(b)(2) prohibits a public employee from using his official position to obtain unwarranted privileges of substantial value for himself.

Together, these provisions prohibit you from participating, even informally, in matters related to your City Clerk candidacy. For example, if the Council were considering a statement of qualifications, notice, advertisement, or procedural rules for the City Clerk's position, you could not participate at all. Note that participation includes not only voting but discussion, including informal lobbying of other Councilors. *See* G.L. c. 268A, §1(j). When any such matter comes before the Council, therefore, in the words of the Supreme Judicial Court, "Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

Finally, these provisions prevent you from using your present position as Councillor to obtain other Councillors' later favorable consideration of your City Clerk candidacy. *See Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983) (state legislator violated G.L. c. 268A, §§6, 23 by pressuring a state agency to award grant that would benefit him and his brothers).

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[1/] We disavow any contrary suggestion in *EC-COI-83-84* n.3 or *EC-COI-82-156* n.4. *See* note 3 *infra*.

[2/] For cities, the prohibition is codified in G.L. c. 39, §8, which provides in relevant part: "No member of the city council shall, during the term for which he was chosen, either by appointment or by election of the city council . . . , be eligible to any office the salary of which is payable by the city." Whether this statute applies to your situation is beyond our jurisdiction. *See* G.L. c. 268B, §3(g). Even if it does independently prohibit your candidacy for City Clerk while you are a Councillor, *Rugg v. Town Clerk of Arlington*, 364 Mass. 264, 268 (1973) suggests that it would allow your election as City Clerk immediately after your resignation as a Councillor. Thus, we would still need to decide whether the thirty-day waiting period of §21A applies to you as well. (For similar reasons, we need not discuss the application of G.L. c. 268A, §20 to this situation.)

[3/] The state counterpart of §21A had been enacted earlier by St. 1964, c. 314. We have carefully examined the legislative history of both the 1964 and 1967 statutes, and find nothing in either to support any different result. Indeed, what emerges is legislative faithfulness to the rule's previous terms. Thus, the Legislature considering the 1964 bill (S. 466) first accepted a committee report reducing the proposed new waiting period from two years to thirty days, 1964 Sen. J. 790 (Apr. 2), and then rejected a Senate amendment limiting the rule's application to salaried positions. *Compare id.* at 820 (Apr. 6) *with* 1964 House J. 1446 (Apr. 8). The only substantive legislative change made in the 1967 bill extending the 1964 state prohibition to county and

municipal boards (H. 654) was to incorporate from G.L. c. 41, §4A the exception for town meeting approval. 1967 Sen. J. 2418-19 (Dec. 12).

CONFLICT OF INTEREST OPINION
EC-COI-92-31

FACTS:

You are currently employed by the ABC Housing Authority (Authority) as a leased housing inspector.[1] Apartments in the leased housing rental assistance program are inspected on an annual basis to ensure compliance with the building and sanitary codes.

You have recently purchased a two-family house. The property is being managed by your daughter. Your property was part of the Authority's leased housing program.[2] You did not inspect your own property, nor did you have any influence on the outcome of any inspection. Also, all rent payments are handled by your agent.

QUESTION:

Does G.L. c. 268A permit you to receive housing assistance payments from the Authority made on behalf of an eligible tenant pursuant to the Authority's leased housing program?

ANSWER:

Yes.

DISCUSSION:

As an inspector with the Authority, you are a municipal employee[3] for purposes of the conflict of interest law. G.L. c. 121B, §7.

Section 20

Section 20 prohibits a municipal employee from having a financial interest directly or indirectly in a contract with a municipal agency of the same city or town unless an exemption applies.

Because you would be receiving rental payments which are subsidized through the Authority's leased housing program, you would be deemed to have a financial interest in a contract with the same municipal agency by which you are employed.

Section 20, however, contains an exemption which may apply to your situation. Section 20(h) provides that the prohibitions of this section shall not apply:

> to a municipal employee who is the owner of residential rental property and rents such property to a tenant receiving a rental subsidy administered by a local housing authority, unless such employee is employed by such local housing authority in a capacity in which he has responsibility for the administration of such subsidy programs.

The sole issue which we must address is whether as an employee of the Authority, you have responsibility for the administration of the leased housing subsidy program.

We conclude that in your position as an inspector, you do not have "responsibility for the administration" of the Authority's leased housing subsidy program. We recognize that you do in fact play a role in the subsidy program. Nevertheless, we believe that the exemption was not designed to exclude all employees of a housing authority, particularly not those employees who have very limited participation in the authority's subsidy programs. Rather, we conclude that a housing authority employee would have to be in a position to make or influence determinations regarding an individual's receipt of a rental subsidy in order to have responsibility for the program.

The legislative history of this exemption appears to support our conclusion. In 1985, the Legislature considered a bill (House No. 1564) proposed by the Commission, which set forth an exemption allowing a municipal employee to receive housing assistance payments on behalf of an eligible tenant, provided that the municipal employee did not participate in or have official responsibility for the activities of the local housing authority. This exemption, which would have effectively barred most housing authority employees from renting property to subsidy recipients, was not enacted by the Legislature. In 1987, the §20(h) exemption in its present form was passed by the Legislature and became part of the conflict of interest law. The present exemption appears to expand the availability of the exemption because only those housing authority employees who have "responsibility for the administration" of the subsidy program are now restricted from receiving subsidized

rental payments. We therefore find our interpretation justified in light of the fact that the exemption as finally approved by the Legislature seems to reflect an intention to limit applicability of the exemption only in relatively narrow circumstances.

In summary, we find that as an inspector for the Authority, you will qualify for the exemption provided by §20(h) and therefore your receipt of rental income pursuant to the Authority's leased housing program will not violate §20.[4/]

Section 23

Under §23(b)(3) you are prohibited from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can unduly enjoy your favor in the performance of your official duties. However, this so-called appearance of a conflict of interest may be overcome if you make a public written disclosure of the circumstances leading to the appearance. An appearance of a conflict of interest will result from the fact that you work within the leased housing program in addition to owning property which was part of that program (and for which you will receive subsidized rental payments). You must therefore file with your appointing authority a written disclosure of your ownership of the property in order to dispel any appearance of a conflict of interest.

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[1/]As a leased housing inspector, your role in the subsidy program is limited to conducting on-site inspections (for code violations) of rental units. Your inspection reports are submitted to a supervisor. Furthermore, your inspection position in no way involves you in the financial structure or management of the subsidy program. For example, you inform us that you have no knowledge of the fair market rental values of the apartments which you inspect.

[2/]Your daughter has informed us that your rental property will no longer be part of the Authority's program. This opinion is nevertheless relevant to your ability to collect subsidy payments for the period during which your property was a part of the leased housing program. In other words, the subsidy payments in question arise from tenants who leased your property and were eligible for a subsidy pursuant to the Authority's leased housing program.

[3/]"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).

[4/]If your property were to remain in the Authority's subsidy program, §19 would prohibit you from participating as an inspector with regard to your property. Additionally, you could not be involved in directing others nor could you participate in your official capacity in any dispute before the Authority which concerned your property. *See In re Cellucci*, 1988 SEC 346; *aff'd.* Superior Court No. 88-3743 (Suffolk, March 10, 1992), *appeal docketed* C.A. No. 92-P-887, June 29, 1992. Because you did not participate in nor have dealings with the Authority concerning your property and because your property will no longer be a part of the Authority's leased housing program, an issue under §19 will not be raised.

CONFLICT OF INTEREST OPINION
EC-COI-92-32

FACTS:

You are writing on behalf of an organization (the Organization), a 501(c)(3) corporation under the Internal Revenue Code. The Organization is sponsoring a fundraising dinner. The Organization proposes to sell tickets to the dinner. Each ticket would cost $150. The Organization currently estimates that the actual cost for food and drinks, per ticket, is about $45. The remaining $105 would support other Organization activities.

The Organization wishes to invite several elected and appointed officials to the event, including members of the Legislature and the Executive branch (such as the Secretary of at least one cabinet office). The officials would not be required to pay either the actual $45 meal

cost or the $105 fundraising portion of admission. None of these officials would be asked to participate as a speaker at the event.

The Organization, as a 501(c)(3) corporation, is permitted to engage in lobbying activities. However, those activities are strictly limited by law. You inform us that the Organization does, from time to time, lobby the Legislature and Executive branch on issues of interest to it. You also inform us that you are registered with the Secretary of State's Office as a legislative agent (or "lobbyist") as a result of the Organization's lobbying activities.

QUESTION:

May the Organization invite elected and appointed state officials, with whom it occasionally has official business, to the fundraising dinner without charging them the $150 price of admission?

ANSWER:

No, unless it is clear that the Organization has not had, nor will have, official business before a particular elected or appointed official.

DISCUSSION:

Two questions are relevant to your opinion request. The threshold question concerns whether §3 of c. 268A applies at all to the present facts.[1/] Is the waiver of the admission charge being made "for or because of" some official duty performed or to be performed? Is there, in other words, some official nexus between the Organization and the public officials in question? The second question concerns whether the $150 price of admission constitutes something of "substantial value" where the actual cost of the meal is estimated to be only about $45 and the remainder supports other Organization activities. As discussed below, we answer yes to both of these questions.

"For or Because of"

The Commission has consistently read §3 broadly to effectuate the legislative purpose. As the Commission stated in *In re 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. *Public Enforcement Letter 92-1*, at 25 (December 9, 1991). As the Commission explained in *Advisory No. 8 (Free Passes)*:

> [E]ven 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:

> 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 re Ackerly Communications, 1990 SEC 518, 520 n.5.

Thus, where there is a connection -- an official nexus -- between the giver and the receiver, §3 prohibits the giving of anything of substantial value to the public employee. The Commission has held that the "gift" need not be tangible property. Rather, a "gift" can include such items as free admissions to events for which others must pay. *See Commission Advisory No. 8; EC-COI-92-19.*

Because the Organization has, from time to time, a direct interest in legislative business,[2/] and in other law-making mechanisms before the Executive branch, we conclude that there is a nexus between the Organization and the public officials in question sufficient to implicate §3. The Organization has had, and will likely later have, an interest in matters before these public officials. Only where it is clear that a particular public official is not in a position to use his or her authority in a manner which could affect Organization interests or issues would the waiver of the admission charge not implicate §3. In that case, nothing will have been given "for or because of" any official duty. *See EC-COI-92-19.*

Substantial Value

A second question must also be addressed. Does the waiver of the admission charge constitute "substantial value" to the public official? We conclude that it does.

Substantial value has been held to be anything worth $50 or more. *See, e.g., Commission Advisory No. 8; EC-COI-92-19.* Although the actual cost of the meal may be $45, the Commission has previously determined that it will look first to the face value of a ticket, unless the real value of the ticket far exceeds its printed face value. *See Commission Advisory No. 8; EC-COI-92-19.* The actual cost of admission here has been set at $150. Thus, substantial value is reached in this instance and §3 would prohibit the Organization from waiving the admission fee of any person with whom they have had, or may have, official dealings. *See EC-COI-92-2.*

The Commission could have concluded that, because the actual cost of this event is only the $45 cost of the meal, substantial value is not reached. For example, the Commission might have found that the $105 fundraising portion of the ticket is really a donation to the Organization, not a cost of admission. However, such an approach is incorrect for two reasons. First, we have consistently held that we must first look to the valuation placed on the event (as set by the ticket price, for example). *See, e.g., EC-COI-92-19.* Here, the price of admission is $150. Second, it is clear that *any other* person who wishes to attend the dinner must pay the full $150 cost, not $45 or some other intermediate cost. Other guests cannot simply refuse to make the $105 Organization contribution if they wish to attend the dinner. Thus we find that substantial value has been reached even though none of the $105 fundraising portion of the ticket would be given to the public officials in question (and thus, perhaps, represents an "intangible" value to him or her).[3/]

This conclusion establishes an objective test of substantial value on these facts. It would prove difficult (if not impossible) to place a subjective value on the worth of attending the Organization dinner or a similar event. Ultimately, the Commission must, in the present case, choose between two values, $45 or $150. Given that other guests must pay the $150 admission price, and that the $45 valuation is little more than an estimate (which could later change), the Commission finds that the proper course in this case is to use the acknowledged higher figure.

Because the present facts indicate that none of the public officials in question would participate in the event (as a speaker, for example), we distinguish prior Commission rulings which suggest a different result if they were to participate. *See, e.g., EC-COI-80-28* (public employees may receive reimbursements for reasonably related speaking expenses, notwithstanding the §3 restrictions); *Commission Advisory No. 2 (Guidelines for Legislators Accepting Expenses and Fees for Speaking Engagements)* (legitimate speaking engagement rules); *see also* 5 CFR §2635.204(g) (federal regulations which permit a public employee to accept unsolicited gifts of free attendance at widely-attended events under certain limited conditions).[4/]

Finally, given our conclusion under §3, we need not discuss the application of §23 to your facts.

Date Authorized: October 8, 1992

[1/]Section 3(b) of c. 268A prohibits a public employee (whether state, county, or municipal) from 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 him. Section 3(a) has a counterpart provision which applies to the *giver* of substantial value.

"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).

"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. G.L. c. 268A, §1(i).

[2/]In *EC-COI-92-2*, the Commission established a test for what constitutes an "interest in legislative business." The relevant question asks

> whether the giver has any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus motives for giving include expressing gratitude for past acts or engendering future "good will."

We find that the Organization meets this test because of its occasional lobbying activities.

[3/]If the cost of admission were less than $50, *or if* all other guests were required to pay the actual cost of meals and entertainment only (with donations to the Organization encouraged but not required as part of the admission price), then our conclusion would be different.

[4/]We also note that the conclusion expressed in this opinion would not apply to campaign fundraising activities, including those held by or on behalf of public officials. Those activities appear to raise issues addressed under G.L. c. 55, the Massachusetts campaign finance law. *Cf. EC-COI-92-12* (noting the possible §23[b][2] difference in fundraising activities applicable to elected officials in light of c. 55); *United States v. Brewster*, 506 F.2d 62, 73 n.26 (D.C. Cir. 1974) ("Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official").

CONFLICT OF INTEREST OPINION
EC-COI-92-33*

FACTS:

You are the City Solicitor of Waltham (the City). The City Council may request you or the City's Law Department (which you supervise) for legal advice whether the City may place "salary caps on Department heads and other senior managerial personnel" and also "place a temporary moratorium on promotions of City employees." You would likely be subject to a salary cap if one were adopted.

QUESTION:

May you or any other lawyer in the Law Department provide this advice?

ANSWER:

So long as it is reasonably foreseeable that you would be subject to a salary cap, you may not participate in this advice, unless the Mayor first makes a written determination under G.L. c. 268A, §19(b)(1), as explained below. Other lawyers in your Department could provide the advice, however, if it were not reasonably foreseeable that the Council action would apply to them, and if you did not participate.

DISCUSSION:

Section 19(a) of G.L. c. 268A generally prohibits a municipal employee from participating in a particular matter in which he knows he has a financial interest. As City Solicitor, you are a "municipal employee" under the conflict law. G.L. c. 268A, §1(g). This request for your Department's official legal advice, as a "request for a ruling or other determination," is a "particular matter." *Id.* §1(k). Since it is reasonably foreseeable that the salary cap would apply to you, you have a "financial interest" in the matter. *See, e.g., EC-COI-89-19; 86-25.* Therefore, you may not participate in giving this advice, whether by giving it yourself or by discussing it with others. *See* G.L. c. 268A, §1(j).

An exemption is available to you from this §19 prohibition. You may obtain this exemption only by advising your appointing authority, the Mayor,[1/] in writing of your financial interest in this matter. The Mayor could then give you an advance written determination that your

financial interest is not so substantial as will likely affect the integrity of your services to the City. §19(b)(1). You would then be free to participate fully in this matter.

Alternatively, other lawyers in your Department could give the requested advice, if it were not reasonably foreseeable that the Council action (either the salary cap or the promotion moratorium) would apply to them. You could not participate, however, even by assigning the matter to a particular lawyer in the Department. *See EC-COI-86-13*. Finally, of course, the City or the Council could retain special counsel to give this advice.

DATE AUTHORIZED: November 5, 1992

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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/]Although the City Council confirms your appointment by the Mayor, in such situations a determination by the official who initiates the appointment is sufficient. *See EC-COI-87-41; 88-16* n.1.

CONFLICT OF INTEREST OPINION
EC-COI-92-34*

FACTS:

You are a Selectman in New Ashford (the Town). You are also an employee of the Brodie Mountain Ski Area (Brodie), a corporation principally owned by your father.

The state statutes governing municipal property taxation provide in part that the local assessors are to classify real property by its use, including "residential" and "commercial" property. G.L. c. 59, §2A. The Selectmen may then annually adopt a "residential factor," which has the effect of applying a higher tax rate to commercial property than to residential property. G.L. c. 40, §56.

Your immediate family, and corporations it owns including Brodie, own "commercial" property in the Town that amounts to 28 percent of the Town's total valuation. The next largest commercial owner owns about 5 percent. The Town's 1990 federal census population is 192. Nineteen of these Town residents own commercial property in the Town in their individual names. Other commercial property in the Town is owned by a closely held family corporation, in which at least one shareholder is a Town resident. Therefore, in addition to your immediate family, at least 20 Town residents, constituting more than 10 percent of the Town's population, have a personal ownership interest in commercial property in the Town.[1/]

For the past several years, the Town's Selectmen have voted to adopt a residential factor that establishes a higher tax rate for commercial than for residential property. You expect the same issue to come before the Selectmen in future years.

QUESTION:

May you participate as a Selectman in the decision to adopt this residential factor?

ANSWER:

Yes.

DISCUSSION:

Section 19(a) of G.L. c. 268A generally prohibits a municipal employee from participating in a particular matter in which he knows that (among others) he, his immediate family, or a business organization that employs him, has a financial interest. As a Selectman, you are a "municipal employee" for the purpose of the conflict law. *Id.* §1(g). Brodie, as a major commercial property owner in the Town, has an obvious financial interest in the Selectmen's decision to adopt a residential factor. Your father, a member of your "immediate family" (*see id.* §1[e]), is Brodie's principal owner. In addition, you are a Brodie employee. Therefore, §19 will prohibit you from participating in the residential factor decision, unless this decision either is not a "particular matter" or is exempt under §19(b)(3) because it is a

> particular matter [that] involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

These two legal issues are closely related, as the history of the §19(b)(3) exemption shows. This exemption was not a part of §19 when the conflict law was first enacted. St. 1962, c. 779, §1. Rather, the exemption's language is taken nearly verbatim from a contemporaneous commentary on the newly enacted 1962 statute's definition of "particular matter."[2] Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 26-27 (1964). Because of its importance to the present discussion, we quote the relevant passage in full (omitting footnotes), emphasizing the words that inspired the §19(b)(3) exemption:

> *Determinations of General Policy.* The statutory definition of "particular matter" literally covers a legislative "proceeding" or "determination" other than "enactment of general legislation by the general court." But the word "particular," the exclusion of "general legislation" and the exclusion of elected town meeting members from the definition of "municipal employee" indicate an intention to exclude some determinations of general policy. Such an exclusion, together with some limitation on the literal meaning of "financial interest," seems essential if the statute is to be workable. Municipal officials and employees are commonly residents and taxpayers of the city or town. As residents and often as employees they have a financial interest in the expansion of municipal services; as taxpayers they have a financial interest in reducing municipal expenditures. Municipal policy making is largely concerned with the resolution of this inherent conflict of interest; a requirement that all municipal employees abstain from participation in any matter where such financial interests are at stake would simply destroy municipal government.
>
> It would seem, therefore, that **a municipal employee should not be held to have a "financial interest" in a "particular matter" where the proceeding or determination involves a matter of general policy and his interest and the interests of his family and business associates are shared by a substantial segment of the public.** As under the rules of the general court, the disqualifying interest should be a "private right, distinct from the public interest," and the connection should be more direct than that of the interests of municipal employees, residents or taxpayers in general. Examples of the application of the suggested standard [include] a general classification of municipal employees as "special" or not, using appropriate standards, should not be regarded as a particular matter; salary and pension payments by private employers do not necessarily relate to any particular matter. Other examples come readily to mind: recommendation of a comprehensive zoning by-law by a planning board, approval of the annual budget by a finance committee, recommendation of a new school building by a superintendent or a school committee. But the boundaries are not sharply drawn; judicial decisions indicate that the line between "legislative" and "quasi-judicial" is sometimes blurred.

Professor Robert Braucher, who wrote these words, had been a member of the special legislative commission that proposed the 1962 statute, and of that commission's three-member drafting subcommittee. Braucher, *supra*, at 6. Later, as an associate justice of the Supreme Judicial Court, he had occasion to return to this subject in *Graham v. McGrail*, 370 Mass. 133 (1976).[3] There, the court decided that §19 prohibited School Committee members from participating in a budget item in which their immediate family members (as school employees) had a financial interest, but did not then prohibit these members from considering the budget as a whole. *See EC-COI-87-25* (discussing this specific holding). Justice Braucher's opinion for a unanimous court rehearsed much of what Professor Braucher had written twelve years earlier about the terms "financial interest" and "particular matter." 370 Mass. at 138-40.

When this Commission later proposed the present §19(b)(3) language (as one of many recommended amendments to G.L. cc. 268A & 268B, *see* H. 1235, §15 [1982]), however, this language was cast as an exemption from §19, for reasons that are unclear.[4] The enactment of this proposed provision unchanged, in St. 1982, c. 612, §11, may imply that the Legislature regards at least some matters of general policy as "particular matters" (hence the need for an exemption), thus taking a more expansive view of the term "particular matter" than Professor Braucher or the *Graham* opinion. *Compare Graham*, 370 Mass. at 139 (dictum stating that "particular

matter" may refer "primarily to judicial or quasi-judicial proceedings rather than to legislative or managerial action" [emphasis added]) *with Sciuto v. City of Lawrence*, 389 Mass. 939, 947-48 (1983) (official's promotion of his brother was participation in "particular matter" violating §19, citing *Graham*).

Assuming that the Selectmen's decision here is a particular matter, we nonetheless conclude, in light of the legislative history and purpose just discussed, that your participation comes within this §19(b)(3) exemption. This exemption requires both (1) that the Selectmen's decision involve "a determination of general policy," and (2) that your and your family's interests be "shared with a substantial segment of the [Town's] population."

The decision to adopt a residential factor, although it has been described as "primarily executive" rather than legislative in nature,[5/] nonetheless involves a determination of general policy. Here, the policy is one in which every taxpayer of the Town has an interest.

The exemption's second requirement seems intended to prevent its application to a matter that, although couched in terms of general policy, in fact affects the financial interests of only relatively few town residents. *See Belin v. Secretary of the Commonwealth*, 362 Mass. 530 (1972) (purportedly general legislation that in fact affected only one city was "special" law for purpose of state constitution's Home Rule Amendment); *EC-COI-89-8* (applying this principle to define "general legislation" for purpose of G.L. c. 268A, §1[k]). We think the relevant classification must be one of kind rather than degree; here, it is the distinction suggested by the property tax classification statutes themselves -- whether a Town resident has an ownership interest in "commercial" property. The present facts indicate that more than 10 percent of all Town residents share such an interest. At least in the present circumstances,[6/] this represents a "substantial segment of the [Town's] population."[7/]

It follows that the §19(b)(3) exemption applies here.[8/] Therefore, you may participate fully in the Selectmen's discussion of and vote on the decision to adopt a property tax residential factor.

DATE AUTHORIZED: November 5, 1992

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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 Town's principal assessor, as you authorized, provided the facts in this paragraph.

[2/] "Particular matter" was then defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court." G.L. c. 268A, §1(k), as appearing in St. 1962, c. 779, §1. A further explicit exclusion of local petitions for special laws was added by St. 1982, c. 612, §1.

[3/] Because of his unique tri-partite role in the history of §19, the Supreme Judicial Court itself later explicitly recognized the special weight that Justice Braucher's views should be accorded in this area. *Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983).

[4/] The bill's "section-by-section summary," distributed by the Commission staff to both houses of the Legislature while each was considering the bill, described this provision merely as intended "to reflect the finding in *Graham v. McGrail*, 370 Mass. 133, 139 (1976)." Similarly, the Commission's official summary of the newly enacted statute, in a January 1983 special edition of our *Bulletin*, describes this provision as "in effect, a codification of existing case law. *See Graham v. McGrail*, 370 Mass. 133, 139 (1976)."

[5/] *Andrade v. City Council of Gloucester*, 406 Mass. 337, 340-41 (1989) (such a decision held not subject to municipal referendum, under charter allowing referenda only on quasi-legislative "measures").

[6/] *Cf. Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976) (in context, $50 was "substantial value" for purpose of G.L. c. 268A, §3).

[7/] "Population," as used in the General Laws, means the number of residents counted in the most recent census (here, the 1990 federal census). G.L. c. 4, §7(4l).

[8/] Because §19(b)(3) exempts your "activity" here from §19, §23(d) also exempts it from §23.

CONFLICT OF INTEREST OPINION
EC-COI-92-35*

FACTS:

You are the general counsel to the Department of Public Welfare (the Department). You wish to know under what circumstances a Department employee who owns rental property may rent her property to recipients of public assistance benefits. You have described various forms of public assistance benefits and request advice under each circumstance.

You inform us that various state and federal governmental entities administer a series of benefit programs designed to assist low-income individuals and families to meet their basic necessities. Some of these programs are designed to provide eligible individuals and families with a monthly grant which the recipient is then entitled to use as he or she sees fit. Other programs are intended to meet a particular living expense, so that the benefits can only be used for that particular purpose.

You also inform us that, for all the programs administered by the Department, caseworkers in the Department's 48 local offices determine eligibility and benefit levels pursuant to Department regulations and written procedures which implement state and federal law. Caseworkers have direct, face-to-face contact with welfare clients; their job responsibilities include taking applications for benefits, calculating eligibility, interviewing clients for redetermination of benefits, explaining a client's rights and responsibilities and authorizing appropriate benefit programs.

Benefits programs can be grouped into two categories: (1) those programs which provide a cash grant to the recipients, and (2) those programs in which the benefit can be used only for a specified purpose.

(1) Cash Grant Programs

Cash Grant programs include Aid to Families with Dependent Children (AFDC), Emergency Aid to the Elderly, Disabled and Children (EAEDC), and Supplemental Security Income (SSI). These programs are designed to meet general subsistence needs. Although one such need is the cost of housing, the amount of the monthly benefit paid to eligible recipients does not vary based on actual housing costs. Thus, you inform us, a family whose rent is $200 per month will receive the same grant as one whose rent is $400. However, there may be a small rental "add-on" to the grant for those living in private, unsubsidized housing.

AFDC is a program administered by the Department in which eligible families receive two checks per month. The grant is intended to meet the basic subsistence needs of the family, including housing, utilities, food, and clothing. Individual families may, however, choose to allocate the grant amount to meet their needs. The amount of the grant is fixed according to family size, and may vary depending on other sources of income. The program is partially funded by the federal government and is subject to federal regulations. Although funds have been appropriated for certain housing assistance "add-ons" for eligible recipients, the money may be used by the recipients in any way they wish.

EAEDC replaced the former General Relief program in Massachusetts. Its primary focus is to assist those who are elderly or disabled and who do not qualify for SSI, or who have children and do not qualify for AFDC. The amount of assistance may vary depending on other sources of income. Similar to AFDC add-on programs, EAEDC also provides for additional "rent allowances" which, in actuality, may be used by the recipient in any way they wish. This program is not subject to federal regulation.

SSI is a federal government program, funded in part by the Commonwealth. It provides a monthly check to individuals who are elderly, blind or disabled. The Commonwealth provides a supplement to the federal basic grant level. The amount of state supplement is fixed by regulation. A Department caseworker's contact with an SSI applicant is generally limited to those situations in which the recipient also receives a benefit that is administered by the Department, such as Medicaid or Food Stamps. (Eligibility for SSI automatically qualifies a recipient for Medicaid.)

(2) Targeted Assistance Programs

Targeted assistance programs involve benefits that can be used only for a specified purpose. Included among the described programs are those programs which are administered by the Department, but which may have no relationship to housing. Included among these programs are Food Stamps, Medicaid, Emergency Assistance (EA), Housing Subsidies, and Direct Vendor Payments.

The Food Stamps program is fully funded by the federal government but is administered by the Department. It provides food coupons which can be exchanged only for food products. The benefit level is determined by a variety of factors, including the amount of rent paid by a recipient. Although a food stamps recipient may also receive AFDC, EAEDC, SSI or Medicaid, that is not necessarily the case.

Medicaid is a federal/state cost-sharing program administered by the Department. The program provides for the payment of medical expenses for eligible recipients. Payments are made directly to the providers of medical services. Eligibility for Medicaid is determined by Department workers who review whether an applicant meets financial and categorical requirements. Families or individuals who receive AFDC or SSI receive Medicaid automatically. The amount of a recipient's rent is not a factor in determining eligibility.

EA is a federal/state cost-sharing program administered by the Department, and is intended to address one-time crisis situations. For example, a family facing a utility shut-off for non-payment of bills can receive a payment to the utility company for the arrearage. EA payments may also be made directly by the Department to a landlord to pay up to three months' back rent for recipients facing imminent eviction. The Department may also make payments for emergency shelter or mortgage arrearages. These benefits can generally be provided only once in a twelve month period. In these cases, the Department pays the actual charges submitted by the vendor (that is, there is no schedule of charges promulgated by the Department under such circumstances).

Housing subsidies consist of programs administered or regulated by the state Executive Office of Communities and Development (EOCD), or by local housing authorities. Benefits are designed to help low-income families meet their housing costs. Eligibility for these subsidies is not determined by Department staff, although Department staff may assist recipients of Department programs to apply for housing subsidies.

There are two basic sources of housing subsidies: federal and state. Federal subsidies (referred to as Section 8 assistance) and Massachusetts subsidies (described by you as Chapter 707 assistance) are paid by the administering agency directly to landlords. A recipient cannot receive either subsidy if her rent exceeds a maximum allowable rent, which is a standard established for each local community by EOCD or the federal Department of Housing and Urban Development. The amount of the subsidy is dependent upon the actual rent (subject to the maximum) and the recipient's income. For example, an eligible holder of a Chapter 707 certificate will pay thirty percent of her income to the property owner, with the balance of the monthly rent being paid by EOCD or the local housing authority. While recipients of such subsidies may also receive AFDC, EAEDC, SSI, Medicaid, Food Stamps, or some combination of these programs, subsidies are also available to those who receive no other public assistance.

Direct vendor payments are designed to assist AFDC or EAEDC recipients in managing their money so certain expenses, such as rent, do not go unpaid. Thus, an AFDC or EAEDC recipient who is having difficulty with cash management can choose to have her rent deducted from the cash grant and sent directly to the landlord by the Department. The Department, under certain conditions, may decide to place a recipient in the program if it determines that the recipient has mismanaged funds. You inform us that Department caseworkers make a subjective assessment about the client's ability to manage funds in such cases.

QUESTION:

Given the above facts, under what circumstances may a Department employee, who owns rental property, rent to recipients of public assistance benefits? What conditions apply?

ANSWER:

A Department employee may rent property to recipients of public assistance benefits *only if* the employee complies with all of the restrictions of G.L. c. 268A, §7 and §23. In addition, other restrictions under c. 268A may apply.

DISCUSSION:

Section 7

In order to determine whether Department employees may rent property to Department clients, it is necessary to first determine whether the public assistance programs described above constitute "contracts" for purposes of G.L. c. 268A, §7.

Section 7 of c. 268A prohibits a state employee[1] from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth or a state agency is an interested party, of which interest he has knowledge or has reason to know. *See, e.g., EC-COI-92-2.* Section 7 does, however, contain certain exemptions which would permit a state employee to hold such a financial interest under certain circumstances, as more fully described below.

Both the courts and this Commission have given the term "contract" a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value. *See Quinn v. State Ethics Commission,* 401 Mass. 210 (1987); *EC-COI-89-14* (agreement need not be formalized in writing to be a contract for §7 purposes); *EC-COI-81-64* (a state grant is a contract).

Section 7 does not, however, cover all situations in which a state employee receives money for goods and services which may be compensated out of funds derived from the state treasury. For example, if a state employee rents an apartment to a state consultant, the state employee will not be regarded as having a financial interest in the consultant's contract with the state for §7 purposes. The contract between the consultant and the state is independent of the consultant's lease agreement with the state employee. *See, e.g., EC-COI-83-173.*

The critical question in determining whether a contract exists has always focused upon whether the parties have agreed to an exchange of goods or services where that exchange is supported by some consideration. *See, e.g., Conley v. Ipswich,* 352 Mass. 201 (1967); *Quinn, supra; EC-COI-92-1; 89-14; 87-40.*

The Commission has previously suggested that the receipt of money under entitlement programs such as general relief might not be considered a contract where the funds are made available pursuant to statutorily defined criteria and eligibility guidelines and are administered by governmental bodies. *EC-COI-87-40* (funds distributed by agency lottery to award scholarships to eligible families for daycare were held to constitute a contract because funds were distributed to private providers who agreed to abide by a provider agreement in exchange for the funds).

Based upon the present facts, we conclude that cash grant public assistance program benefits such as AFDC, EAEDC, and SSI (as currently constituted), which are administered by state or federal governmental agencies, are not contracts for the purposes of G.L. c. 268A, §7. None of these program benefits is supported by consideration and each is made available pursuant to statutorily defined criteria and eligibility guidelines. Thus, no issues will arise under §7 for a state employee who has a direct or an indirect financial interest in such benefits.

On the other hand, several targeted assistance programs,[2] such as Chapter 707 (state) subsidies,[3] certain EA and direct vendor payments, do constitute contracts made by a state agency for purposes of §7, *see EC-COI-81-189,* where a state agency provides payments directly to a third party in exchange for goods or services for or on behalf of the recipient.[4] Thus, issues under §7 will arise for a state employee who has a direct or an indirect financial interest in such benefits. For example, a Department employee who wishes to rent property to a recipient of public assistance will (without an available exemption) violate §7 if the employee receives payments under Chapter 707 or some other program where payments are made directly to the employee and are specifically targeted for housing needs (for example, certain EA and direct vendor payments).

Possible Exemptions Under Section 7: §7(b) and Public Assistance

Because the Chapter 707 program is administered by a state agency other than the Department (EOCD), a full-time Department employee may rely upon a §7(b) exemption in order to rent property to a Department client (subject to other restrictions described below).[5] For each of those programs which are administered by the Department (including certain EA and direct vendor payments), however, a full-time Department employee must look to the "public assistance" exemption, if applicable, to determine whether the §7 restrictions apply to them.

> The public assistance exemption provides that the restrictions of §7 do not apply to a state employee who provides services or furnishes supplies, goods and materials to a recipient of public assistance, provided that such services or such supplies, goods and materials are provided in accordance with a schedule of charges

promulgated by the department of public welfare or the rate setting commission and provided, further, that such recipient has the right under law to choose and in fact does choose the person or firm that will provide such services or furnish such supplies, goods and materials.

The Commission has given the public assistance exemption a reasonable reading in the past, particularly in light of the purposes of the safeguards which were intended to insure that state employees do not misuse their insider status to take advantage of a vulnerable constituency. *See EC-COI-86-1.* Although the Commission has not previously addressed whether current Department landlord payment arrangements are sufficiently "scheduled" or "promulgated" by the Department for purposes of this exemption, we now conclude that they are. As long as there exist established Department standards for rental payment levels, whether on a state-wide or community-wide basis, the Commission will defer to the Department's conclusions that the public assistance exemption is satisfied. *See id.*[6/] However, without such standards, the public assistance exemption would not be available.

Aside from the public assistance exemption, there are no other exemptions which would permit a full-time Department employee to have a financial interest in a contract for direct housing payments administered by the Department. Other exemptions, however, may apply to certain Department employees who are not full-time state employees. *See* G.L. c. 268A, §§7(d) and 7(e) (exemptions applicable to special state employees).[7/]

Section 23 and Section 6 (Additional Restrictions)

In addition to the above, additional restrictions will arise under G.L. c. 268A, §23. Section 23 of G.L. c. 268A contains standards of conduct that apply to all public employees. In particular, §23(b)(2) provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value for himself or others. Section 23(b)(3) prohibits a public employee from engaging in conduct that 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.

In *EC-COI-92-7*, we clarified that a public employee's private business relationship with a subordinate employee, a vendor whose contract he supervises, or a person or entity within his regulatory jurisdiction, violates §23, unless (1) the relationship is entirely voluntary; (2) it was initiated by the person under the supervisory employee's jurisdiction; and (3) the supervisory employee's public written disclosure under §23(b)(3) states facts clearly showing elements (1) and (2). Thus, failure to meet elements (1) or (2) will violate §23(b)(2); failure to make the disclosure required by (3) will violate §23(b)(3).

Applying these principles to the present case, we conclude that Department employees may not **initiate** private business dealings (such as the renting of property) with Department clients with whom they have official dealings or over whom they exercise any regulatory authority.[8/] Moreover, even if the **client** voluntarily initiates the business relationship, the Department employee must make the §23(b)(3) disclosure referred to above, in addition to meeting the §7 requirements described above.

Further, §23(e) provides, in pertinent part, that nothing in §23 shall preclude any constitutional officer or head of a state agency from establishing and enforcing additional standards of conduct. Thus, the Department, if it chooses to do so, could prohibit all Department employees from having any private business relationships with Department clients or family members under any circumstances, regardless of the application of c. 268A.

Finally, given the scope of both §7 and §23, it is unnecessary to address fully how §6 would also affect Department employees. Briefly, however, §6 would prohibit a Department employee from participating[9/] in any particular matter[10/] which directly or foreseeably will affect his or her own financial interest, or the financial interest of an immediate family member.[11/] For example, a Department employee could not refer, in his or her official capacity, a Department client to rental property owned by the employee or an immediate family member. Section 6 further provides that any state employee whose duties would otherwise require him to participate in such a particular matter must make full disclosure of the financial interest to his or her appointing authority. The appointing authority would then have to determine whether the employee may participate in the matter in question. Copies of the written determination must be filed with the Commission.

DATE AUTHORIZED: November 5, 1992

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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/]A state employee is defined, in relevant part, as a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. G.L. c. 268A, §1(q).

[2/]We find that both Food Stamps and Medicaid payments, although described as targeted assistance programs, are not supported by consideration and are made available under statutory guidelines. Thus, these programs are similar to cash grant programs and do not constitute a contract made by a state agency under §7. Moreover, neither program implicates a housing subsidy issue under these facts.

[3/]The Commission has previously ruled that Section 8 contracts (federal subsidies) are not considered contracts made by a state agency for §7 purposes. *EC-COI-81-189.*

[4/]We find that a landlord provides "goods or services" by making an apartment available to a tenant who agrees to pay rent as consideration. *Cf. Boston Housing Authority v. Hemingway*, 363 Mass. 184, 190-191 (the Court is willing to imply a warranty of habitability because it is clear that a lease is essentially a contract in which the landlord promises to deliver a premises suitable to the tenant's purposes in exchange for the tenant's promise to pay rent -- i.e., the landlord and the tenant both have obligations under the lease agreement).

We also find that a third party arrangement to pay for the tenant's obligations under the lease constitutes a contract for §7 purposes. *Cf. EC-COI-89-14* (even where no written agreement exists, where there remains an expectation among all of the parties regarding the timing, purpose and ultimate outcome of the transaction, the Commission may find that the actions of a third party and a state agency rise to the level of a contract for §7 purposes which can affect the state employee).

[5/]Section 7(b) provides, in relevant part, that the restrictions of §7 will not apply to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the State Ethics Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract. We find that the remaining criteria described in §7(b) do not apply here because Chapter 707 subsidies do not constitute "personal services" contracts.

[6/]We note that, because EA payments are based upon actual charges submitted, EA payments would not be exempt under the public assistance exemption.

[7/]Where the restrictions of §7 would create a hardship for a tenant, however, the Commission has, in the past, been willing to defer enforcement of §7 until the completion of the tenancy. *See, e.g., EC-COI-82-12; 84-105; 84-109; see also EC-COI-91-2.* The Commission will, under appropriate circumstances, consider such a deferral of enforcement on a case-by-case basis.

[8/]For example, a full-time Department employee who works in Boston, and who does not have regulatory jurisdiction over Department clients outside of that area, would not generally be prohibited from renting property to a Department client who resides in the Worcester area under this section.

[9/]"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).

[10/]"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).

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

CONFLICT OF INTEREST OPINION
EC-COI-92-36*

FACTS:

You are Yarmouth town counsel. You have requested this advisory opinion on behalf of an alternate member[1]/ of the Yarmouth Board of Appeals (the Board). The Board is composed of five regular members, each of whom is appointed for a five year term, as provided for in G.L. c. 40A and Town of Yarmouth by-law §102.1. In addition, ten alternate members are appointed for one year terms under §102.1. Alternate Board members sit on occasion, by designation of the chairman, whenever a regular member is unavailable because of absence or conflict of interest. You inform us that the town has no specific by-law or charter provision which otherwise describes or defines the duties of alternate Board members. You state, however, that alternate members are rarely called upon to fill in for regular Board members and do not otherwise participate in Board meetings.

The alternate Board member in question has served in that position for the past several years and is scheduled for re-appointment. He is also a trustee of a realty trust (which was organized as a Massachusetts business trust with transferable shares). In the past, he has appeared before the Board as a representative of the trust. It is possible that the trust may need to petition the Board again in the future. Finally, you inform us that members and alternate members of the Board have been designated as special municipal employees by the Board of Selectmen.

QUESTION:

May an alternate Board member, who has been designated as a special municipal employee, represent his trust before town boards if he does not officially participate in the matter?

ANSWER:

Yes, subject to the conditions described below.

DISCUSSION:

Section 17(a) of c. 268A, the Massachusetts conflict of interest statute, provides that no municipal employee (including a Selectman) shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter[2]/ in which the same city or town is a party or has a direct and substantial interest.

Section 17(c) of c. 268A provides that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone (including a trust)[3]/ other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Together, these sub-sections of c. 268A are designed to prohibit divided loyalties. In other words, a municipal employee is a municipal employee first and foremost, and owes a duty of loyalty to the municipality. Consequently, §17 is designed to prohibit an individual from splitting his loyalties between a municipal job and a private interest. *See EC-COI-92-10; 92-4* (discussing state counterpart provision, §4); *see also EC-COI-92-1; 90-12; 90-16.*

Whenever a person is both a private and a public employee, "[t]he appearance of potential impropriety is raised - influence peddling, favoring his private connections, and cheating the government. Whether or not any or all of these evils result, confidence in government is undermined because the public cannot be sure that they will not result." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. L. Rev. 299, 322 (1965). Section 17(a) reflects the maxim that "a man cannot serve two masters." It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest. *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (dissent).

Consequently, a municipal employee may not represent a third party in connection with a particular matter if the town (not just the municipal employee's agency) is either a party to, or has a direct and substantial interest in, that matter.

The prohibitions of §17 are, however, somewhat alleviated in the case of a special municipal employee.[4] A special municipal employee may act as agent for, or receive compensation from, anyone other than his municipality in connection with a particular matter in which the municipality has a direct and substantial interest, *provided that* the particular matter is not one (a) in which *he* has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) applies only in the case of a special municipal employee who serves on more than sixty days during any period of three hundred and sixty-five consecutive days. With respect to alternate Board members for purposes of clause (c), we conclude that they "serve" only on those days on which they have been actually designated to sit on the Board. *Cf. EC-COI-91-5*; Buss, *supra*, at 340, n. 230 (the statute, §4 (state counterpart), provides "no answer more persuasive than the word 'serves' itself, which seems to suggest rendering service more than it does *availability* for services.") (Emphasis added). Because alternate Board members serve for less than sixty days, they are not constrained by clause (c).

In the present case, whether an alternate Board member (who is also a special municipal employee) may represent a third party before town boards depends upon the answer to the following question. Is the alternate Board member acting as an agent in connection with a particular matter in which he has either participated as an alternate Board member or which was under his official responsibility? Before we can answer that question, however, we must briefly review the terms "participation" and "official responsibility" as they relate to Board members and alternate Board members.

Participation

Whether a Board member has actually participated in a particular matter is relatively easy to determine. A Board member participates in any matter which is before him *if* he takes personal and substantial action with respect to that matter. For example, if the Board member discusses or votes on a given matter, he has participated in that matter. *See Graham v. McGrail*, 370 Mass. 133 (1976); *EC-COI-89-7* (participation in discussions are personal and substantial actions, not ministerial ones). This conclusion rests upon the definition of "participation" for purposes of c. 268A, §1(j).[5] In order for action to be deemed participation, the action must be both personal and substantial.

Participation includes the approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise concerning a particular matter. *See EC-COI-89-7* (participation that is superfluous, non-determinative, or not part of the decision-making process is more likely deemed to be ministerial and, therefore, not personal and substantial). If a Board member abstains on a matter by choosing not to discuss and vote on it, he will not have participated in the matter. Similarly, if a Board member is absent from the only Board meeting at which a particular matter arises, for whatever reason, he will not have participated in the matter.

It follows, therefore, that an alternate Board member can participate in a given particular matter *only if* he was both called to fill in for a regular Board member, *and* he actually discussed or voted on the matter before him. Alternate Board members may not, therefore, represent third parties in connection with matters in which they have actually participated.

Official Responsibility

The definition of official responsibility[6] is somewhat broader, however. Official responsibility turns on the authority to act, not whether that authority is, in fact, exercised. *See EC-COI-89-7; 84-48; see also* Buss, *supra*, at 321-322 (1965) (the general principle embodied in this definition is that public officials should not be permitted to step outside of their official roles to assist private entities or persons in their dealings with government), *quoting* Perkins, *The New Federal Conflict-of-Interest Law*, 76 Har. L. Rev. 1113 (1965). In *EC-COI-87-17*, this Commission held that the "keynote of official responsibility is the 'potentiality' of directing agency action and not the actual exercise of power." That opinion concluded that matters are the subject of *potential* action only if the governmental employee had the ability to take action on the matter in question.

Thus, while a regular Board member may decline to participate in a matter before him (and thus eliminate the c. 268A restrictions which implicate participation), *EC-*

COI-87-37, he or she can never forego "official responsibility" merely by inaction or absence. Regular Board members retain official responsibility for matters which are pending in the Board, whether or not they have actually worked on the matter and whether or not they actually sat on the Board on a given day. *See, e.g., EC-COI-89-7; 84-48.*

On the other hand, we find that the general rule applicable to regular Board members need not apply to alternate Board members given the limited nature of their status and responsibilities in Yarmouth as described by you. Yarmouth alternate Board members have no authority or *potential* ability to act on matters pending before the Board unless and until they are designated by the chairman to fill in for a regular Board member. *See* G.L. c. 40A, §12.[7/]

Further, it is clear from your facts that Yarmouth alternate Board members rarely, if ever, are called upon to serve. In effect, they constitute nothing more than a pool of qualified and willing volunteers to which the Board may turn in an emergency. They have no other duties or responsibilities and might not even attend Board meetings on a regular basis. Yarmouth alternate Board members do not have the *potential* of directing agency action, within the meaning of *EC-COI-87-17*, unless they are first designated to serve.[8/] (Where, however, a city's or town's alternate Board members are more frequently called upon to serve, we might conclude otherwise.)

Accordingly, based upon the present facts, because Yarmouth alternate Board members are not authorized to exercise any authority until they have been designated by the Board, we find that they do not have official responsibility for Board matters generally. *EC-COI-84-48* (official responsibility turns on the ability to act). Instead, we find that the alternate Board members' official responsibility encompasses only those matters which were pending before the Board on the day or days on which they were designated to serve, even if they decline to serve once so designated.

Applying the above to your circumstances we find the following. The alternate Board member/special municipal employee may represent the trust before town boards provided that two circumstances are present: (i) he has not participated, as an alternate Board member on the matter (such participation would violate §19 of c. 268A as well as §17), and (ii) the matter did not come before him, anytime within the past year, on a day when he was filling in for a regular Board member even if he chose not to participate in it (that is, the matter was not under his official responsibility).[9/]

In the present case, the alternate member in question must exercise caution, however, so that no trust-related matters will come before the Board on days when he is called to fill in for a regular member. As illustrated above, although an alternate Board member may decline to participate in a matter by abstention, abstention will not eliminate official responsibility. Accordingly, the chairman (or the Board, by amending its rules under G.L. c. 40A, §12) may want to institute a policy which would prevent the alternate member's service on the Board on a day when he might have to appear on behalf of the trust.

Finally, you should be aware of the restrictions of G.L. c. 268A, §23. Section 23(b)(2) prohibits other Board members (whether alternate or regular) from giving an unfair advantage to the alternate Board member if and when he comes before the Board representing the trust.[10/] The other Board members must use objective criteria when evaluating the alternate Board member's matter and must leave aside any consideration of the alternate Board member's status. *See EC-COI-91-3.*

In addition, §23(b)(3) prohibits the creation of the appearance of a conflict of interest.[11/] A public disclosure of all of the relevant facts would dispel the appearance of a conflict. Consequently, it is advisable for any Board members sitting on a day when their (alternate) colleague appears before them on a trust-related matter to file a letter with their appointing authority stating all of the relevant facts. The disclosure will dispel any appearance that the Board may somehow act to the alternate Board member's undue advantage.

Finally, §23(c) prohibits the use of confidential (that is non-public) information to benefit a private interest.

DATE AUTHORIZED: November 5, 1992

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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/]Although the statute, G.L. c. 40A, refers to such members as "associate members," you have described them as "alternates." For reasons of consistency, we use the term alternate member throughout this opinion.

[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/]*See EC-COI-84-117; In re Reynolds*, 1989 SEC 423.

[4/]"Special municipal employee," a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

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

[6/]"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).

[7/]G.L. c. 40A, §12 provides, in relevant part:

> if provision for associate members has been made the chairman of the board may designate any such associate member to sit on the board in case of absence, inability to act or conflict of interest on the part of any member thereof, or in the event of a vacancy on the board until said vacancy is filled in the manner provided in this section.

[8/]We compare alternate Board member status to that of a president of the board of aldermen or common council who, under G.L. c. 39, §5, may be called upon to exercise the powers of a mayor because of the mayor's death, resignation, absence or inability to serve. Merely because the mayor's powers *may* later "devolve" upon the official as acting mayor does not mean that he has had official responsibility for all matters pending in the mayor's office even on those days when he is not acting mayor.

We also compare this status to some private attorneys hired by a public entity to provide legal services. Not all of the legal matters arising in the agency automatically fall within the attorney's official responsibility. Rather, only those matters which are specifically referred to the attorney would fall under his or her official responsibility. *Cf. EC-COI-85-50* (city charter explicitly gave official responsibility to city solicitor for matters not ordinarily handled by him); *see also EC-COI-87-17*. Further, in responding to requests for proposals for law services, law firms regularly limit the scope of their official responsibility by contract in order to clarify that they have no authority over other matters which may arise in the agency. We find those arrangements comparable to the present situation.

[9/]We emphasize, however, that nothing in this opinion, or §17, should be construed as permitting regular Board members to act as an agent or attorney for, or to receive compensation from, anyone other than

Yarmouth in connection with any particular matter (including appearing before his own board) (a) in which he has at any time participated as a municipal employee, or (b) which is, or within one year has been, the subject of his official responsibility, or (c) which is pending in the Board, except as provided by law for the proper discharge of his official duties. *See, e.g., EC-COI-92-1; 92-10; Commission Advisory No. 13 (Agency).*

[10/]Section 23(b)(2) prohibits a municipal employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value ($50 or more) and which are not properly available to similarly situated individuals.

[11/]Section 23(b)(3) provides that a municipal employee shall 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, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

CONFLICT OF INTEREST OPINION
EC-COI-92-37

FACTS:

You are a member of the General Court. It is traditional for members of the General Court, particularly those legislators whose districts are not within close geographical proximity to the State House, to establish offices in the district which they represent. The purpose of a district office is to provide easier access for a legislator's constituents so that they may bring their problems to a legislator's office without having to travel to Boston. The Legislature has not provided any funding for district offices.[1/] Some legislators hold office hours in the Town halls within their district, or establish district offices in their homes or place of business.

You question whether a legislator may accept free or discounted office space for a district office or office furnishings and equipment from a donor who may be a political subdivision of the Commonwealth, a business or real estate venture with which the legislator is associated, or a constituent. The donor of the space or discount is aware of the legislator's status and may be interested in establishing good will with the legislator.

QUESTIONS:

1. Does G.L. c. 268A permit a legislator to accept free or discounted office space from an individual or organization who is making the offer as a gesture of goodwill?

2. Does G.L. c. 268A permit a legislator to use a district office for campaign activities?

ANSWERS:

1. No.

2. Use of a legislator's district office for campaign purposes raises issues under G.L. c. 268A, §23(b)(2), but in light of the recent enactment of St. 1992, c. 133, §79 which amends G.L. c. 55, the Commission will defer to the Office of Campaign and Political Finance initially to address this question.

DISCUSSION:

1. Acceptance of Discounted Office Space and Furnishings

As a member of the General Court, you are a state employee for purposes of the conflict law. G.L. c. 268A, §1(q). G.L. c. 268A, §3(b) prohibits a state employee from accepting anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is considered to be of "substantial value" for purposes of §3.[2/]

For §3 purposes it is unnecessary to prove that the gratuity is given for some specific identifiable act which was performed or will be performed. A donor has an interest in business before the Legislature if "the giver has any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service: thus, motives for giving include expressing gratitude for

past acts or engendering future good will." *EC-COI-92-2* (legislator's defense committee prohibited by §3 from soliciting those with interest in legislative business under §3). *See In re Ackerley*, 1991 SEC 508; *Public Enforcement Letter 88-2* (senator violated §3 by accepting rifle as gesture of good will); *EC-COI-85-42* (state employee prohibited from accepting discount mortgage). As the Commission has stated,

> 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 an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do--a good job. *In re Michael*, 1981 SEC 59, 68

The Commission has identified a narrow exemption to §3 where a donor provides a gift to the agency, which is not targeted directly to a particular public employee. *See EC-COI-89-23* (software loaned to the agency); *89-3* (actuarial services provided to agency on pro bono basis); *84-114* (art work provided to agency); *83-110* (computers loaned to joint Legislative Committee for its work). In each of these cases, the gift was donated, not for the personal use of an individual, but for the use of an entire agency. Further, use of the gift was subject to the control and oversight of the agency, thus dispelling an appearance that the donor was attempting to gain the goodwill of any particular employee. *See EC-COI-87-38.*

Applying these precedents to your situation we conclude that §3 prohibits acceptance of free or discounted office space and furnishings from an individual or a private or public entity who has an interest in legislative business as defined above. *See EC-COI-84-14* (car purchase discount); *85-42* (state employee prohibited by §3 from accepting offer of discount mortgage from individual where employee could use authority to affect donor). We also conclude that the circumstances which you present do not fall within the exemption permitting the acceptance of gifts to an agency. We find that the relevant agency for §3 purposes is not the office of the individual legislator, but rather the General Court. *See EC-COI-84-67* (for §4 purposes agency in which consultant to joint legislative committee serving is General Court). The definition of "state agency" in G.L. c. 268A, §1(p) expressly includes the legislative department. Unlike our agency gift cases, this offer of free or discounted office space and furnishings was not made to the General Court (or even to a branch of the Legislature), is targeted to benefit a particular legislator, and is not subject to control or oversight of the General Court. Compare G.L. c. 23A, §8 (Massachusetts Office of Business Development may accept gifts but money to be held in trust by Secretary of Economic Affairs; G.L. c. 6A, §6 (Secretary of Public Safety may accept gifts but gifts subject to regulation by Secretary of Administration and Finance.[3/] Such an offer would derive to your personal benefit because, absent the offer, you would be required to pay personally for the office or use campaign funds to pay for the office. We note that the Legislature impliedly recognized that district offices, in part, serve each Legislator's personal political interests when it enacted St. 1992, c. 133, §379, permitting members of the Legislature to use campaign funds to open and maintain a district office.

We note that our conclusion would be different if the Legislature enacted a statute permitting the establishment of district offices and establishing guidelines for financing such offices. *See, e.g.*, 2 USC §59 (permitting the Sergeant at Arms to acquire office space for each U.S. Senator in state which they represent and establishing maximum size and rental for each office); House Bill No. 5676, §§8,9 (May 1992) (permitting members of General Court to enter leases with state agencies or cities and towns for district offices). If the Legislature enacted such a statute, the arrangement with a public entity or the establishment of, and guidelines for, a district office would be "as provided for by law for the proper discharge of official duties" and would not violate §3 or any other provision of G.L. c. 268A. *See e.g., EC-COI-92-20; 92-10.* We do not find that St. 1992, c. 133, §379 provides the necessary express authorization. This legislation concerns only the permissible uses of campaign funds.

2. Use of District Office Space for Campaign Purposes

G.L. c. 268A, §23(b)(2) provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value for himself or others. The Commission has consistently held that this section prohibits a state official from using his

state position, state time and state resources, such as staff and equipment for campaign purposes. *See EC-COI-92-12; 92-5* (use of state seal on campaign literature prohibited); *90-9; 85-29* (student intern in legislative office prohibited from doing tasks primarily benefitting re-election effort); *82-112* (state representative prohibited from using word processor in office for personal or campaign purposes even though representative personally leased the equipment). Accordingly, a legislator may not use his state house office or equipment for campaign purposes. A legislator may not use his district office and equipment for campaign purposes if the office or equipment is funded by the Commonwealth or located in a state building. *See Commission Advisory No. 4 (Political Activity)* (1992).

However, the Commission has indicated that if a statute expressly authorizes state time or state resources for a particular purpose then such use would not be unwarranted. *See EC-COI-92-28; 91-13; 84-128.* The Legislature has recently enacted legislation which appears to permit the use of campaign funds for expenses relating to the provision of constituent services or to the opening and maintaining of a district office. G.L. c. 55, §6, ¶5, inserted by St. 1992, c. 133, §379. Although your question raises issues under §23(b)(2), it also raises issues under G.L. c. 55, the campaign finance law. Any interpretation concerning the scope of G.L. c. 55 (and recent amendments to c. 55) is within the jurisdiction of the Office of Campaign and Political Finance (OCPF). We find it advisable to permit OCPF initially to address your question in light of the recent enactment of St. 1992, c. 133, §379.

DATE AUTHORIZED: November 5, 1992

[1/]Recent legislation appears to permit a legislator to use campaign funds to provide constituent services or to open and maintain a district office. St. 1992, c. 133, §379, amending G.L. c. 55, §6.

[2/]For purposes of this opinion we assume that the substantial value requirement is met.

[3/]Because of the Commission's conclusion that the proposed arrangements are prohibited by §3(b), it is unnecessary to consider whether it also raises serious questions under G.L. c.268A, §23(b)(2) which prohibits a state employee from using his official position to secure an unwarranted privilege for himself or others and §23(b)(3) which prohibits a state employee from, by his conduct, giving reasonable basis for the impression that any person can improperly influence or unduly enjoy his favor in the performance of his official duty, or that he is unduly affected by the kinship, rank, position or influence of any party or person. Issues are raised under §23 when a public employee receives a discount or a benefit which is provided solely because the recipient is a public official, is not available to other public and private individuals, is not expressly authorized by statute, or made available by common industry wide practice to all employees of a participating organization. *See EC-COI-91-13; 87-37; 92-17; 86-14.*

CONFLICT OF INTEREST OPINION
EC-COI-92-38*

FACTS:

The Executive Office of Economic Affairs (EOEA) proposes to develop an Industry Specialist Program (Program). This program will be administered by the Massachusetts Office of Business Development (MOBD), which is an agency within EOEA. The purpose of the program would be to hire, as independent state contractors, a biotechnology specialist and a telecommunications specialist to provide companies with information concerning the Commonwealth's permitting and regulatory processes, to assist in expediting the Commonwealth's review processes and to coordinate any financial assistance to which the companies may be eligible. The specialists will also assist in marketing the Commonwealth as a site for biotechnology and telecommunications, assist in the development of international business for Massachusetts biotechnology and telecommunications companies, and assist the Secretary of EOEA in the development of policy concerning the biotechnology and telecommunications industries.

EOEA proposes to fund these positions by soliciting funds from industry representatives in the biotechnology and telecommunications industries. Funds received through this solicitation from the biotechnology industry may be earmarked for the biotechnology specialist and solicited funds from the telecommunications industry may be earmarked for the telecommunications specialist, but no funds will be earmarked for a specific, named

individual. The Director of MOBD will disclose all of the names of the contributors to the program to the Secretary of EOEA and to the State Ethics Commission.

Any companies or trade associations which donate funds will not refer or recommend specific individuals for the specialist positions. However, MOBD is considering a plan to consult with one or more of the executives from the contributing companies concerning the finalist for a specialist position. MOBD would ask the executives to review the finalist's resume and interview the finalist in order to provide MOBD with an opinion concerning the individual's depth of knowledge of the industry. The final decision regarding whether to hire a particular candidate would remain with MOBD.

QUESTION:

Does G.L. c. 268A permit EOEA and MOBD to solicit funds from private businesses within the telecommunications and biotechnology industry in order to fund this agency program?

ANSWER:

Yes.

DISCUSSION:

Employees of MOBD and EOEA are state employees under the conflict of interest statute. G.L. c. 268A, §1(q). Section 3 of G.L. c. 268A provides, in pertinent part, that a state employee may not, otherwise than as provided for by law for the proper discharge of official duties, ask, demand, seek, solicit or accept anything of substantial value for himself, for or because of any official action or action to be performed.

The Commission has previously recognized that the prohibitions of §3 apply only if the official is receiving something for himself, and that §3 is not violated where a donor provides for the use of an agency a gift which is not targeted to a particular public employee. *See EC-COI-87-23* (§3 not violated where public official received no personal benefit from fee which reverted to trust established by official); *92-7; 89-23* (potential state vendor donated software for use of agency, not individual); *84-114* (donation of art work to agency, not employee). In each of the Commission's agency gift cases, the donation was not targeted directly for the personal use of a particular employee, and the gift was subject to the control and oversight of the agency, thus dispelling an appearance that the donor was attempting to gain the goodwill of any particular employee. *See EC-COI-87-38. Compare, EC-COI-92-37* (discount targeted for use of particular state employee and subject to control of individual, not agency).

We conclude that the proposed solicitation will not violate §3 because the solicitation is not for the benefit of an individual, but rather will go into a government fund which will benefit the agency. *See EC-COI-92-28 n.1; 89-23; 89-3; 84-114.* The selection process for the specialists and the allocation of the funds is within the control of EOEA, and no funds will be specifically earmarked for an individual.

Additionally, we have consistently stated that, under §3, a public employee may solicit or accept funds from a private entity with whom the employee has (or may have) official dealings if a statute or regulation expressly authorizes the agency to accept gifts or permits a public employee to solicit funds. *See e.g., EC-COI-92-28; 92-20; 92-10.* In these limited circumstances, the gift or solicitation is "as provided by law for the proper discharge of official duty."

We conclude that the proposed solicitation by MOBD is "provided by law for the proper discharge of official duty." G.L. c. 23A, §8 provides that "MOBD may accept gifts or grants of money or property from any source, which shall be held in trust for the use of MOBD by the secretary of economic affairs as custodian." Implicit in the language of this statute is the idea that, if the agency may accept a grant, then it may seek out grant sources and apply for funds. *See EC-COI-84-128* (soliciting funds on behalf of government program a reasonable extension of state official's official duties where statute authorized official to apply for and accept gifts or grants). Further, the proposed use of the solicited funds is consistent with MOBD's statutory mandate[1] and will directly further the agency's work.

The proposed solicitation also presents issues under G.L. c. 268A, §23. Section 23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges or exemptions for himself or others. Under this section, MOBD employees must take care, in their future official dealings with any of the contributing companies, to

review matters affecting those companies using the same objective standards that they use for all such matters. *EC-COI-89-23; 89-3.*[2/]

Section 23(b)(3) prohibits a state employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. *EC-COI-89-23; 89-19; 84-128.* In their future dealings with contributing organizations, MOBD employees should avoid giving the impression that contributing companies can influence their discretion or decisions in any way. *EC-COI-89-3* (to dispel appearance of undue favoritism agency should publicly disclose that vendor provided agency with a gift); *EC-COI-84-114* (if agency has subsequent dealings with donor should notify appointing authority of gift to the agency). In order to dispel the appearance of a conflict, §23 (b)(3) requires that EOEA and MOBD employees who will have official dealings with the contributors in the future file a written disclosure with their appointing authority prior to participating in such a matter. *See EC-COI-91-3; 90-2; 89-19.* Your proposed procedure to file a disclosure, identifying all of the contributing companies, with the Secretary of EOEA and the State Ethics Commission complies with the requirements of §23(b)(3).[3/]

DATE AUTHORIZED: November 5, 1992

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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/]According to G.L. c.23A, §2,

> MOBD shall serve as the principal agency of the government of the commonwealth for the following purposes:
>
> (a) promoting, developing and expanding all sectors of the economy by capitalizing on and fostering the technological, industrial, manufacturing, educational, cultural and geographic advantages of the commonwealth in the world economy.
>
> (b) providing a full and effective range of business services to Massachusetts' businesses, including assuring the availability of the capital and human resources required for growth and development in the commonwealth...
>
> (f) attracting new and expanding manufacturing industries to Massachusetts, especially to those regions of the commonwealth with an eroding traditional manufacturing base.

[2/]We note that the proposed solicitation will not violate G.L. c. 268A, §23(b)(2) because the solicitation is authorized by statute, and thus is a reasonable extension of MOBD employees' official duties. In addition, the solicitation is solely for the benefit of a government program and not to benefit a private party. *Compare EC-COI-92-28* (solicitation prohibited under §23 as not authorized by statute and benefits a private non-profit organization) with *EC-COI-84-128* (state Secretary permitted to solicit private entities based on presence of explicit statutory authorization and benefit to government sponsored initiative).

[3/]You question whether MOBD or EOEA employees may consult with contributors concerning the finalist for the specialist position. G.L. c. 268A will not prohibit such a consultation. This advice is limited to an application of G.L. c. 268A and is not intended to comment on the appropriateness of such a hiring policy by MOBD.

CONFLICT OF INTEREST OPINION
EC-COI-92-39

FACTS:

You are an appointed state official.[1/]

QUESTIONS:

1. May you use your official title in endorsing a candidate for public office?

2. May you as a private citizen endorse a candidate, without using your official title?

3. May you use your official title on Christmas cards that you and your spouse send, using your personal funds?

ANSWERS:

1. No.

2. Yes.

3. Yes.

DISCUSSION:

As an appointed state official, you are a "state employee" for the purpose of the conflict of interest law. G.L. c. 268A, §1(q). As such, you are subject to §23(b)(2) of the conflict law, which prohibits every public employee from using or attempting to use "his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals."

The Commission has consistently interpreted this provision to prohibit public employees from using public resources for political or other private purposes. *E.g., Commission Advisory No. 4 (Political Activity)* (1992) (public resources "are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees"); *Public Enforcement Letter 92-3* ("public resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees, even if those concerns are public-spirited in nature); *EC-COI-92-5* (using state seal or state coat of arms for campaign purposes "benefits a personal rather than a public interest," hence prohibited by §23[b][2]).

We have previously considered a public employee's official title to be one of the "public resources" to which this principle applies. Thus, in *EC-COI-84-127*, we advised a judge that he could not use his official title to endorse a commercial product. In *EC-COI-90-9*, we concluded that an appointed state official could not use his official title, among other public resources, to solicit support for a political candidate from his agency's vendors. *See also EC-COI-92-4.*

An official title does not possess a quantifiable cash value. In such circumstances, we have nevertheless found "substantial value" based on "substantial prospective worth and utility value." *EC-COI-83-70* (unpaid faculty appointment). *See also In re Burke*, 1985 SEC 248, 251 (access to limited time of hospital executives). Since your official title, like the state seal in *EC-COI-92-5*, "may foster a sense of credibility" and of official support that your name alone would not, we conclude that its use to endorse a political candidate would be of "substantial value."[2/] Therefore, §23(b)(2) prohibits you from using your official title to endorse a political candidate.[3/]

On the other hand, nothing in G.L. c. 268A prevents you from endorsing a political candidate in your private capacity -- i.e., without using your official title or other public resources. Of course, you remain subject to the other restrictions on public employees' political activity summarized in our *Advisory No. 4*, including the fundraising prohibitions found in G.L. c. 55 and administered by the state Office of Campaign and Political Finance.

DATE AUTHORIZED: December 10, 1992

[1/][footnote omitted]

[2/]By contrast, use of your official title on Christmas cards that you and your spouse send using your personal funds, even if "unwarranted," would not in our judgment be of substantial value, since this mere greeting would not foster the same sense of credibility or of official support for a private purpose as would use of your title in an unauthorized endorsement or solicitation. Therefore, §23(b)(2) does not prohibit this use of your title.

[3/]This conclusion would not apply to an elected official. An elected official's title in effect forms an inherent part of his or her political identity because it connotes the important political fact of a successful electoral candidacy and is, in any event, inevitably connected with the elected official's name in the mind of the voting public. *See* G.L. c. 54, §41 (identifying the names of elected incumbents on election ballots); *Clough v. Guzzi*, 416 F. Supp. 1057, 1068 (D. Mass. 1976) (three judge court) (upholding constitutionality of this provision, on ground that "the most important decision which the voter must make is whether to retain or to replace the incumbent"). *Cf. EC-COI-92-12* n.10 (suggesting that, although §23[b][2] prohibits certain solicitation of political contributions by appointed public employees, such solicitation would be "warranted" for elected officials). Furthermore, it would be appropriate for even an appointed official to include a present or former official title as part of biographical information in campaign literature. *See EC-COI-89-31* (§23[b][2] allows

state legislator's law firm to include his title in press release announcing his affiliation with firm). *Cf.* G.L. c. 53, §§34, 45 (allowing titles of candidates' present and former elected and appointed public offices to appear on primary ballots). Of course, we do not suggest that elected or appointed public employees are free to use any other public resources of substantial value for campaign purposes, under any circumstances. *See Advisory No. 4* (1992).

CONFLICT OF INTEREST OPINION
EC-COI-92-40*

FACTS:

You are the Executive Director of the Martha's Vineyard Land Bank Commission and you seek an opinion concerning the activities of real estate brokers who also serve as Land Bank Commissioners or town advisory board members. In 1990 you requested an opinion from this Commission concerning whether G.L.c. 268A applied to the Land Bank Commission and, if the conflict law did apply, you asked us to address various situations under the law. In response to your request the Commission issued *EC-COI-90-2* which concluded that the Land Bank Commission was an independent municipal entity for purposes of G.L. c. 268A. In light of recent developments in the case law and Commission precedent we now are re-evaluating some of our conclusions in *EC-COI-90-2* within the context of your recent opinion request.

The Martha's Vineyard Land Bank (Land Bank) was established by Chapter 736 of the Acts of 1985 "for the purpose of acquiring and holding and managing land and interest in land." §2. The land interests identified in the statute are: "land to protect future and existing well sites, aquifers and recharge areas; agricultural lands; forest lands; fresh and saltwater marshes and other wetlands; ocean and pond frontage, beaches, dunes, and adjoining backlands; land to protect scenic vistas; land for nature or wildlife preserves; easements for trails and publicly owned land; land for passive recreational use." §5. According to the enabling legislation, the Land Bank is a public instrumentality and the Land Bank's exercise of its statutory powers is deemed to be "the performance of an essential governmental function." §2.

The Land Bank is administered by a seven member Commission composed of a member from each of the towns of Martha's Vineyard and the state Secretary of Environmental Affairs or her designee. §3. Each of the member towns elects one member to the Commission. The Commission has authority to acquire interests in land, exercise eminent domain powers, accept gifts of funds to further the Land Bank's purposes, incur debt, collect statutory fees and issue bonds and notes. §4. If authorized by a two-thirds town meeting vote, the Commission may, when incurring debt or securing an issue of bonds and notes, pledge the full faith and credit of each of the towns which comprise the Land Bank. §4. Each town is authorized to appropriate money for the Land Bank fund and to provide funds to repay bonds and notes. §4A.

The majority of the Land Bank's funding is derived from a 2% statutory fee based on the purchase price of any real estate property transfer in each of the member towns.[1/] §10. The statutory fee is the responsibility of the purchaser of real property. The fee is required to be paid to the Land Bank Commission and the purchaser is also required to provide a copy of the deed and an affidavit attesting to the purchase price or to the facts concerning why the transfer is exempt from the fee. §11. Upon receipt, the Land Bank Commission staff reviews the filing and will execute a certificate. The Dukes County Register of Deeds is prohibited from recording, registering, or accepting for recording any deed (except a mortgage deed) relating to a real property transfer which has not received a certificate from the Land Bank. §10. A list of land transfers, the value of the transaction and any exemptions is reviewed by the Land Bank Commission at its weekly meeting. The Commissioners may question the applicability of an exemption in a particular case or the validity of an affidavit but they do not review the sales agreements between the parties.

The Land Bank Commission has the authority to assess fines and penalties for failing to pay the fee and may hold hearings on the imposition of a fee, fine or penalty. The Land Bank Commission may institute court proceedings to collect fees and penalties and may file or register a lien in favor of the Land Bank against any of the purchaser's property for the amount of the statutory fee, including interest and penalties. §§13, 14.

Other funding sources include appropriations by the member towns, appropriations by the county, private contributions, and proceeds from the sale of property by the Land Bank. Fifty percent of the revenues collected

remain in the Land Bank fund and are directly administered by the Land Bank Commission. The remaining revenues are placed in individual town accounts, according to a proportional formula, but the accounts are administered for the benefit of the Land Bank and title to the funds remains with the Commission until such time as the Commission dissolves. §8A.

Upon dissolution of the Land Bank, any of its land interests will be transferred to the town in which the land is located and placed under the management of the local conservation commission for continued protection. Any remaining funds will revert to the towns to be held in trust for the management and preservation of conservation land.

Chapter 736 of the Acts of 1985 also created town advisory boards in each member town, which assist the Land Bank Commission in administering the Land Bank. Each town's advisory board includes a representative appointed by each local conservation commission, planning board, board of assessors, board of health, park and recreation committee, board of selectmen and water commission. §1. Under c. 736, each advisory board exercises advisory duties, as well as binding veto powers over the Land Bank Commission regarding land located in said town. For example, each land acquisition by the Commission must be approved by the town advisory board in the town where the land is located, and any disposition of the Land Bank's interest or change in the use of the land must also be approved by the advisory board of the town in which the land is located and by the Secretary of Environmental Affairs. §§3, 6. A majority of the advisory boards are required to approve the Land Bank Commission's budget.

QUESTIONS:

1. May a town advisory board member or a Land Bank Commissioner engage in outside employment as a real estate broker in land transactions which are subject to the statutory 2% fee?

2. May town advisory board members or Land Bank Commissioners serve as real estate brokers in land transactions in which the Land Bank is seeking to purchase the property?

3. May town advisory board members and Land Bank Commissioners participate in board discussions concerning lands which the Land Bank is seeking to acquire if they believe they will market the property as real estate brokers?

ANSWERS:

1. Yes.

2. A Land Bank Commissioner may not act as the real estate broker in a transaction where the Land Bank is a purchaser. A town advisory board member may not act as the real estate broker in a transaction involving the Land Bank unless he has received special municipal employee designation and is able to comply with an exemption under §17 and §20.

3. Land Bank Commissioners may not participate. An advisory board member may not participate unless he receives a written determination from his appointing authority pursuant to G.L. c. 268A, §19(b)(1).

DISCUSSION:

The Land Bank Commission As A "Municipal Agency"

In November, 1990 the Commission issued *EC-COI-90-2*, which concluded that the Land Bank Commission is an independent municipal entity for purposes of G.L. c. 268A. Since that time, the Massachusetts Appeals Court affirmed a Commission decision that members of a regional school committee are municipal employees under G.L. c. 268A. In doing so the Court concluded that a regional school district is an instrumentality of each municipal member under G.L. c. 268A, §1(f). *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). In reaching this conclusion the Court considered the ordinary and approved use of the word "instrumentality" in the statute; the formation, operation and purpose of a regional school district; and the purpose of G.L. c. 268A. *Id.* at 425-428. The Court found that the municipalities use the school district as a means to fulfill their statutory obligation to provide education and that the municipalities played a substantial role in the creation of the district and the district's financial matters. *Id.* at 427.

This Commission has expressly followed the Appeals Court's reasoning in considering whether a regional entity is a municipal agency within the meaning of G.L. c. 268A, §1(f). *EC-COI-92-26; 92-27.* The Commission no longer considers regional municipal entities to be

"independent" municipal entities.[2] *See EC-COI-92-26; 92-27; 92-15.* Rather, the Commission will consider whether such entities are instrumentalities of each municipal member based on the ordinary and approved usage of the statutory language, the purpose of G.L. c. 268A and the form, operation and purpose of the regional entity.

Based on this precedent, we reaffirm our conclusion that the Land Bank Commission is a municipal agency within the meaning of G.L. c. 268A, §1(f) but we no longer will consider the Land Bank Commission to be an "independent municipal entity." The Land Bank Commission is an instrumentality of each of the member municipalities. We conclude that the member municipalities play a significant role in the substantive work of the Land Bank Commission and control (through approval) the Land Bank's budget. The Land Bank Commission serves the traditional role of the municipality in preserving and conserving land, particularly for purposes of future water supply protection and recreational use. By joining together as members of the Land Bank, the municipalities recognize the mutual land interests they share in protecting the coastline and preserving open space. Thus, as an instrumentality of each member municipality, the Land Bank Commission is analogous to any local board in the municipality. Further, for the reasons stated in *EC-COI-90-2* we reaffirm our conclusion that the Land Bank Commission shares more attributes with the municipal level of government than with other levels of government.

1. Land Bank Commissioners And Town Advisory Board Members Serving As Real Estate Agents In Land Transactions Subject To The Statutory Fee.

G.L. c. 268A, §17(a) prohibits a municipal employee from receiving compensation[3] from anyone, other than the municipality, in connection with a particular matter[4] in which the municipality is a party or has a direct and substantial interest. Members of the Land Bank Commission and town advisory boards are municipal employees under the conflict of interest law. G.L. c. 268A, §1(g). The determination that a fee is owed or that an exemption applies is a particular matter in which the Land Bank and each municipality has a direct and substantial interest.[5] *See Attorney General Conflict Opinion No. 28* (Commonwealth has direct and substantial interest in collection of taxes for revenue purposes).

At issue is whether the real estate broker's commission is "in connection with" this determination. In past opinions we have recognized that not all work performed concerning a government matter is "in connection with" the matter. *See EC-COI-92-1; 90-13* (work performed incidental to the permit); *87-31*, n.7. In the sections of G.L. c. 268A pertaining to former public employees the Commission has identified certain factors to apply in deciding whether a former public employee's private compensation is "in connection with" a particular matter in which he had participated as a public employee. We have considered the effect the proposed work would have on the government matter and whether the private work is "integrally related" to the government matter because they involve the "same parties, the same litigation, the same issues or the same controversy." *EC-COI-92-17. See, e.g., EC-COI-91-1; 89-7; 86-23.*

We conclude that any compensation received by the real estate broker from a private land transaction is not "in connection with" the Land Bank Commission's determination. Although the broker's commission, similar to the statutory fee, is traditionally based upon the selling price, the commission is for services rendered in making the sale and is the obligation of the seller. The Land Bank has no authority or oversight of private land transactions on the Martha's Vineyard (unless the Land Bank is a party to the transaction) other than to collect the fee. *See EC-COI-90-13* (Commonwealth will have direct and substantial interest where agency exercises substantial oversight or regulatory authority of an activity); *85-46* (Registry of Deeds has no substantial interest in filing of deed beyond ministerial filing). As a general rule, a municipality will not have the requisite interest as the real estate contract and the broker's contract are between private parties and concern a private parcel of property. *Cf. EC-COI-86-23.*

If the broker's commission is solely for services rendered in negotiating the sale, the broker will not be receiving compensation in connection with a matter in which the Land Bank or a municipality has a direct and substantial interest. Our conclusion would be different if the broker received compensation for preparation of the affidavit or other papers to be reviewed by the Land Bank.

Accordingly, Land Bank Commissioners and advisory board members may conduct a private real estate practice and receive broker's fees from transactions in which seller and purchaser are private parties. To the

extent that *EC-COI-90-2* reaches a different conclusion, the Commission now declines to follow that aspect of *EC-COI-90-2*.

2. Town Advisory Members And Land Bank Commissioners Participating As Real Estate Agents In Transactions For Land Which the Land Bank Seeks To Acquire

Land Bank Commissioners

A Land Bank Commissioner may not act as a real estate broker in a transaction in which the Land Bank is the purchaser under G.L. c. 268A, §17(c). Section 17(c) prohibits a municipal employee from acting as the agent or attorney for anyone, other than the municipality, in connection with a matter in which the municipality is a party or has a direct and substantial interest. Here, the Land Bank Commissioner, as the real estate broker for the seller, will be acting as the seller's agent in dealings with the Land Bank in a matter in which the Land Bank is a party.[6/]

If the Land Bank is the seller of the property, a Land Bank Commissioner may represent the Land Bank as the broker and receive a commission if he is a special municipal employee[7/] and receives an exemption under §20(d). Generally, G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency, in which the municipality is an interested party. An agreement for the purchase, sale or disposition of a piece of property is a contract for §20 purposes. *EC-COI-84-51*. A Land Bank Commissioner will have a financial interest in a purchase and sale agreement between a property owner and the Land Bank Commission if he receives a brokerage fee based on the selling price. *EC-COI-90-2*. Each municipality would be an interested party to the transaction as the Land Bank is an instrumentality of each of its members. Therefore, Land Bank Commissioners must seek the §20(d) exemption[8/] from the boards of selectmen of all of the member towns and file a disclosure with the Town Clerk in all of the member towns. *EC-COI-92-27*.[9/]

Town Advisory Board Members

A town advisory board member will be prohibited by §17(c) from representing the seller in a transaction with the Land Bank, unless the advisory board on which he serves has been granted special municipal employee designation. G.L. c. 268A, §1(n). The §17 prohibitions apply to special municipal employees only in connection with particular matters in which the municipal employee has participated, or matters which are or within one year have been the subject of his official responsibility, or (if the employee serves more than 60 days in a calendar year) which is pending in the agency in which he is serving.

If the advisory board has received special municipal employee designation by the municipality's Board of Selectmen, a board member may act as the real estate broker for the seller provided that the transaction does not involve land which is subject to review by the board on which the member sits. Each advisory board is required to review purchases by the Land Bank in its town, so these matters are within the board member's official responsibility or are matters in which he will participate as a board member. Consequently, he may not act as the broker in land transactions in which the Land Bank is the purchaser of land and which will be reviewed by the board on which he serves.

Additionally, the advisory board member will be required to seek an exemption under G.L. c. 268A, §20 as he will have a financial interest in a contract made by a municipal agency, in which the municipality is an interested party. Therefore, the town advisory board members may not receive compensation from a sale of land to the Land Bank, unless an exemption applies.[10/]

If the town advisory board members receive special municipal employee designation, members of the Boards may participate as real estate brokers in a sale involving the Land Bank as they will be eligible for an exemption under §20(d). Town advisory board members must seek the exemption from their local board of selectmen. In conclusion, if the Land Bank is the purchaser of the property, an advisory board member may act as the broker if he is a special municipal employee, the land is not located in the town in which he serves and he receives an exemption under §20(d). If the Land Bank is the seller of property, an advisory board member, similar to the Land Bank Commissioner may represent the Land Bank in the transaction if he is a special municipal employee and receives a §20(d) exemption.

To the extent that *EC-COI-90-2* reaches a different conclusion concerning transactions in which a Land Bank

Commissioner or advisory board member is the broker and the Land Bank is a party, we now decline to follow *EC-COI-90-2.*

3. Town Advisory Board Members And Land Bank Commissioners Officially Participating In Discussions Regarding Property They May Market As Real Estate Agents

Under G.L. c. 268A, §19, a Land Bank Commissioner or advisory board member must abstain in matters, such as a determination to purchase land, if he or a business organization in which he is serving as an officer, director, trustee, partner, or employee has a reasonably foreseeable financial interest. *In re Burgess*, 1992 SEC 570 (Planning Board member violated §19 by participating in matters concerning land which he knew or should have known that his employer, a real estate firm, would be marketing). We note that associates in a real estate firm are ordinarily considered to be "employees" for purposes of §19. *See In re Burgess*, 1992 SEC n.8; *EC-COI-89-30; 83-34.* If a Land Bank Commissioner knows, or if it is reasonably foreseeable, that he will market any land under discussion for acquisition by the Land Bank, he must abstain from such discussions.[11/] Also, a Commissioner must abstain from participating in any review and determination of fees and exemptions pertaining to a property transaction if he or his firm played a role in the sale and will collect a commission from the sale.

Advisory board members may obtain an exemption under §19(b)(1) which would permit them to participate in a matter, notwithstanding the conflict of interest. An advisory board member may participate in a particular matter involving his financial interest or his firm's financial interest if, prior to participating, he (1) advises his appointing official of the nature and circumstances of the particular matter; (2) makes a full written disclosure to his appointing authority of the financial interest; and (3) receives a written determination in advance from his appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of his services to the Town. This determination may vary depending on the facts and, absent an exemption, an advisory board member must abstain from matters in which he or a real estate firm with which he is associated has a reasonably foreseeable financial interest. As elected officials, Land Bank Commissioners are not eligible for this exemption and will be required to abstain in all matters in which they have, or a business organization in which they are a partner, trustee, director, officer or employee has, a financial interest.

Finally, G.L. c. 268A, §23(c) prohibits a municipal employee from accepting employment or engaging in any business or professional activity which will require him to disclose confidential information[12/] which he has gained by reason of his official position and from improperly disclosing such material or using such information to further his private interests. This section will prohibit a Land Bank Commissioner or advisory board member from using data developed during executive session board meetings to further his private real estate business. *See EC-COI-82-17* (photographer employed by state agency may not privately sell reprints of photographs taken as part of his state duties where the negatives are not generally available to the public or catalogued in a manner which permits public access).[13/]

Comparison With *EC-COI-90-2*

In light of recent developments in the case law and Commission precedent, this opinion changes the analysis of *EC-COI-90-2* as follows. For purposes of G.L. c. 268A jurisdiction the Land Bank Commission is a municipal agency and is an instrumentality of each of the member municipalities. Land Bank Commissioners may receive "special municipal employee" designation from the Board of Selectmen of all member municipalities.

Land Bank Commissioners may also accept outside employment as private real estate brokers but Land Bank Commissioners may not receive compensation or act as the broker in connection with a land transaction in which the Land Bank is the purchaser. An advisory board member may not receive compensation as a broker in connection with a sale to the Land Bank, unless he is a special municipal employee, the land is not located in the town in which he serves and he receives an exemption under §20(d). If the Land Bank is the seller of the property, a Land Bank Commissioner or an advisory board member may represent the Land Bank as the broker and receive a commission if they are special municipal employees and receive an exemption under §20(d).

Land Bank Commissioners who also hold other local municipal positions may participate in their official capacity as Land Bank Commissioners in a matter in which their municipality has a financial interest because they are serving the municipality in each capacity.

Similarly, Land Bank Commissioners who also serve as town advisory board members may participate in their official capacity as advisory board members in a matter in which the Land Bank has a financial interest.

AUTHORIZED: December 10, 1992

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

[1/]Certain land interests are exempt. St. 1985, c. 736, §12.

[2/]*See McMann, supra.*, at 428, n. 5 (questioning the statutory basis for municipal entities as "independent" municipal entities). Also, note that the definition of "state agency" includes "any **independent** state authority, district, commission, instrumentality or agency..." (emphasis added), whereas the definition of municipal agency does not include the word "independent". G.L. c. 268A, §1(f) and (p).

[3/]"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).

[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).

[5/]Each member municipality has an interest in the revenues received by the Land Bank as the amount will affect each municipality's contribution to the fund, any debt in which the full faith and credit of the municipalities has been pledged, and the extent to which the Land Bank, as an instrumentality of each member town, may fulfill its land acquisition mandate.

[6/]We note that, even if the position of Land Bank Commissioner is designated as a "special municipal employee", (as discussed below) §17 will prohibit a Commissioner from serving as the seller's broker because the sale is a matter within his official responsibility as a Land Bank Commissioner and is pending in the agency in which he is serving.

[7/]In order for Land Bank Commissioners to receive this designation, they must be so designated by the boards of selectmen of all member municipalities. *EC-COI-92-27.*

[8/]Section 20(d) permits a special municipal employee to have a financial interest in a contract with the municipality, involving the board on which he serves, if he files a full disclosure with the town clerk and receives the approval of the Board of Selectmen.

[9/]This advice is limited to an application of G.L. c. 268A and is not intended to comment on the appropriateness of a policy permitting Land Bank Commissioners to act as paid real estate brokers for the Land Bank. We note that if the Land Bank Commissioners designate a member to act as a broker, G.L. c. 268A, §19 will prohibit the designated Land Bank Commissioners from participating in the designating decision. Further, the other Land Bank Commissioners will be required to comply with G.L. c. 268A, §§23(b)(2) and 23(b)(3), when making the decision. These Commissioners will be required to make a full written disclosure under §23(b)(3).

[10/]If a real estate firm in which the advisory board member or Land Bank Commissioner is affiliated receives a commission from such a sale, the firm should segregate its fees from any compensation paid to the municipal employee. *EC-COI-89-5.*

[11/]In a related issue under §19, we note that a Land Bank Commissioner who is also a local municipal employee may participate in matters in which his municipality has a financial interest. *EC-COI-92-26.* In this situation, the employee is considered to be serving two municipal agencies and, in each capacity, is acting on behalf of the municipality. We now decline to follow our opinion in *EC-COI-90-2* where we stated that a Land Bank Commissioner who is also a local municipal employee may not participate in matters affecting his town because we no longer consider the Land Bank to be an independent municipal entity.

[12/]These materials are defined as "materials or data within the exemptions to the definition of public records as defined by [G.L. c. 4, §7]."

[13/]The questions that you have asked are generic in nature. We recommend that Land Bank Commissioners and advisory board members seek further guidance regarding specific fact situations and conflict issues about themselves that arise in the future.

CONFLICT OF INTEREST OPINION
EC-FD-92-1

FACTS:

You are a candidate for public office and are required to complete and file a Statement of Financial Interests form (SFI) for the calendar year 1991. In 1991, you and your spouse, doing business through two separate realty trust entities, filed a Chapter 11 reorganization bankruptcy petition.[1/] That petition was later converted to a Chapter 7 liquidation petition. Together, these realty trusts contained numerous pieces of real property located in Massachusetts, and one parcel of land located in New Hampshire. In addition, two items of personal property, an automobile and a boat, were included in your bankruptcy petition. Each of these pieces of property was surrendered to the trustee in bankruptcy in June, 1991. Although you have now completed all necessary hearings in the proceedings and anticipate that a discharge will be *pro forma*, you are still awaiting a final discharge of your debts from the court. You are also, currently, the 100% owner of a corporation which, in turn, owns three time-share properties which are leased to third parties. Finally, you inform us that each of the debts held by your businesses were incurred in the ordinary course of business.

QUESTION:

Given the above, what information are you required to report on your 1991 SFI concerning the properties which were transferred in bankruptcy and the three time-share properties?

ANSWER:

You are required to report certain information as indicated below in response to Questions 12, 13, 15, and 16 on the SFI form.

DISCUSSION:

Question 12

Question 12E requires that certain information concerning real property worth $1,000 or more held in a trust be reported if that property was owned by the filer or an immediate family member[2/] as of December 31, 1991. Question 12E is based upon the requirements of G.L. c. 268B, §5(g)(2) (securities and other investments) and (6) (real property). Notwithstanding the date requirement described above, any real property located in Massachusetts which was *transferred* during the calendar year must be reported separately in Question 12G, along with the name and address of the person furnishing consideration to the reporting person or receiving it from him in respect to such transfer. *See* G.L. c. 268B, §5(g)(6). Nothing in Question 12E or Question 12G would, however, require the reporting of real property which was located outside of the Commonwealth and which was transferred during the calendar year.

Because your Chapter 11 reorganization petition was later converted to a Chapter 7 liquidation petition, we need not resolve the question of how a Chapter 11 filing would have affected you. For example, in a Chapter 11 filing, because the business entity may be reorganized, the debtor may have some, as yet unknown, future interest remaining in the property. Questions could arise as to whether a filer actually "owns" the property on December 31 for SFI filing purposes if the property was transferred to a trustee in bankruptcy during the year in a Chapter 11 filing. By contrast, a Chapter 7 liquidation filing requires that the debtor transfer his interest in the property to a trustee in bankruptcy for liquidation.[3/] Ordinarily, there is no expectation that the debtor will regain an interest in the property once the transfer to the trustee has been made, except for certain property which may be covered by the debtor's right of redemption, or the rare instance where a debtor may attempt to seek a dismissal from bankruptcy.[4/]

We find that any interest in property which has been transferred to a trustee in bankruptcy for liquidation pursuant to Chapter 7 of the federal Bankruptcy Code automatically terminates on the date of the transfer of the interest for SFI filing purposes.[5/]

In the present case, your interest in the real properties in question was transferred to the trustee in bankruptcy in June, 1991 in a Chapter 7 liquidation filing.

Consequently, you did not own any of the properties as of December 31, 1991. Therefore, you need not report anything in Question 12E in connection with the transferred properties because your interest in those properties terminated in June, 1991.[6/]

However, Question 12G would still require that you separately report the fact that each of the real properties *located in Massachusetts* was transferred to the trustee in bankruptcy during the calendar year.

You need not report anything in Question 12E (including information on the transfer) concerning the property which was located in New Hampshire. Nor need you report anything in Question 12 with respect to the boat or the automobile because those items were personal property and they were not owned by you on December 31, 1991. Finally, to the extent that you held any mortgages on the properties in question which were not discharged as of December 31, 1991, you are required to report that mortgage information in Question 12F.

Question 13

Question 13A. Question 13 concerns the ownership of real property not held in a trust. Question 13A is based upon the requirements of G.L. c. 268B, §5(g)(6), and requires the reporting of similar types of information as is reported in Question 12E. Section 5(g)(6) requires that certain information concerning real property located in the Commonwealth, not held in a realty trust and worth $1,000 or more, be reported if that property was owned by the filer or an immediate family member as of the last day of the calendar year (December 31).[7/] Nothing in Question 13A requires the disclosure of information concerning properties located outside the Commonwealth.

Because each of the real properties owned by you which were located in Massachusetts were transferred to a trustee in bankruptcy in June, 1991, you need not report anything in Question 13A, based upon the facts as you have described them.

On the other hand, Question 13C (similar to Question 12G, above), requires the disclosure of any properties which were *transferred* during the calendar year. Because you are required to report that same information in Question 12G (as realty trust interests), you need not report that information again in Question 13A.

Question 13B. Question 13B requires that certain information concerning investment or rental (real) property, not held in a realty trust and worth $1,000 or more, be reported, regardless of whether the property is located in the Commonwealth or elsewhere, if such interest were owned on December 31, 1991. *See* G.L. c. 268B, §5(g)(2) and (6).

Nothing in Question 13B would require the reporting of the New Hampshire property because, even though it was likely considered an investment or rental property and, therefore, normally reportable, you did not own it on December 31, 1991 because of the Chapter 7 liquidation bankruptcy filing in June, 1991.

In addition, in 1991, you were the 100% owner of a corporation which, in turn, owned three time-share investments worth $1,000 or more on December 31, 1991. We find that you need not report your ownership interest in the three time-shares in Question 13B because you owned those assets indirectly through your company, even though you were the sole stockholder.[8/]

Finally, to the extent that you held any mortgages on the properties in question which were not discharged as of December 31, 1991, you are required to report that mortgage information in Question 13D.

Question 15

Question 15 requires that certain information concerning creditors to whom more than $1,000 was owed by the filer or an immediate family member be reported if owed as of December 31, 1991. Question 15 is based upon the requirements of G.L. c. 268B, §5(g)(3). Question 15 also requires that a filer report any debt owed by a business in which she is at least a 10% owner.[9/]

In the present case, you state that, because of the bankruptcy filing, neither you nor your spouse owed any personal debts as of December 31, 1991. To the extent, however, that your discharge in bankruptcy was not made final as of December 31, 1991, you are advised that you will be required to report any personal debts which were in existence on that date in Question 15, if any, even if those debts were part of your bankruptcy petition for relief. Once the discharge has been received, however, you would no longer owe any personal debts which are reportable under Question 15.

In addition, you wish to know whether the debts of a company in which you were an officer or director must be reported. You need not report such debts. You are required to report only those debts which are owed by a business in which you held an equity interest of 10% or more as of December 31, 1991. *See* Instructions to SFI form (Question 15). Accordingly, you need not report any debts owed by a company in which you merely served as an officer or director.

In any event, even if you were an equity holder of 10% or more of such a business, debts which are incurred in the ordinary course of that business need not be reported regardless of the equity interest owned or the debt owed. *See* G.L. c. 268B, §5(g)(3) and Instructions to SFI form (Question 15). You have represented to this Commission that all debts held by you which are now subject to the Chapter 7 filing, were, in fact, incurred in the ordinary course of business. Based upon that representation, you need not report any such debts.[10/]

Question 16

Question 16 requires that certain information concerning debts of $1,000 or more which were forgiven during the calendar year be reported. Question 16 is based upon the requirements of G.L. c. 268B, §5(g)(8).

In the present case, because the bankruptcy proceedings are still technically on-going (because you have not yet received a final discharge of indebtedness), you need not report anything in Question 16. Such debts would not have been "forgiven" by December 31, 1991 and, therefore, are not reportable in Question 16. Remember, however, that it may be necessary for you to make a disclosure of the forgiveness on your 1992 SFI form if you are required to file a statement of financial interests for calendar year 1992.

DATE AUTHORIZED: April 13, 1992

[1/]*See* 11 U.S.C. §§101 *et seq.* (the federal Bankruptcy Code).

[2/]For purposes of G.L. c. 268B, an "immediate family member" is defined as a spouse and any dependent children residing in the reporting person's household.

[3/]*See* 11 U.S.C. §704 (duties of the trustee in bankruptcy include the "collect[ion] and reduc[tion] to money the property of the estate for which such trustee serves, and [the closing] of such estate as expeditiously as is compatible with the best interests of the parties in interest").

[4/]The right of redemption is found in 11 U.S.C. §722. Property entitled to redemption must be intended primarily for personal, family or household use. A dismissal from a bankruptcy petition sought by the debtor is a rare occurrence and can be made only with notice to all interested parties.

[5/]The trustee in bankruptcy succeeds to the debtor's interest in his property upon the filing of the bankruptcy petition. *See, e.g., Skelton v. Clements,* 408 F.2d 353, 354 (9th Cir. 1969), *cert. denied,* 394 U.S. 933 (1969) (the trustee in bankruptcy is vested with the causes of action pending at the date of the filing of the bankruptcy petition and with the bankrupt's personal property).

[6/]The conclusions expressed in this opinion would differ if you know, or have reason to know, that you would be seeking either a right of redemption as to certain personal property, or a dismissal of the bankruptcy petition, at the time of the filing of your 1991 SFI form. We understand that you have no current intention to redeem any of the property in question or to seek a dismissal of the bankruptcy petition.

[7/]We note that Question 13A incorrectly requires that any such property be reported if held by the filer or an immediate family member at any time during the calendar year. An appropriate change to the form will be made in time for the 1992 calendar year filing requirement.

[8/]This conclusion has no bearing, however, on issues which might arise under Questions 6 (Business Ownership/Equity) or 15 (Other Creditor Information). For example, Question 6 requires that a filer, under certain circumstances, report the ownership interest *of a business* whether held directly or through a corporation, partnership, or other Business. In the present case, the time-share holdings are not owned as a separate business interest which must be reported. Rather, they are held as an asset of a corporation which you own. Assets of a corporation are normally held only indirectly by the shareholders through stock ownership and are, therefore, generally not reportable. Assets of trusts, on the other hand, are reportable under certain conditions because the trustee normally has a direct ownership interest in those assets. *See generally EC-COI-FD-87-2.*

[9/]The amount of debt personally owed, however, will vary in proportion to the ownership of the filer's (or immediate family member's) equity interest. For example, a 10% owner of X corporation will be considered personally liable, potentially, for 10% of the debts of the corporation while a 50% owner would report 50% of the debt.

[10/]Debts incurred in the ordinary course of business would include, among other things, loans or debts used to finance the day-to-day operations of a business (the purchase of goods, services, or raw materials from a vendor, for example) and loans to purchase equipment or other assets used to operate a business. Such debts are, in other words, incurred on a regular basis in running the business and are incurred in the ordinary course.

On the other hand, loans or debts of a business for the purpose of financing an item or service used by a stockholder, director, officer, trustee, partner or employee of a business primarily in her personal or private capacity, or any business loan which is personally guaranteed by such persons (for the start-up of a business, for example), would not generally be deemed to have been incurred in the ordinary course of business within the meaning of §5(g).

CONFLICT OF INTEREST OPINION
EC-FD-92-2

FACTS:

You are the State Ethics Commission's Chief Financial Officer. As such, you supervise the filing with the Commission of statements of financial interests (SFIs) by candidates for public office, public officials, and public employees, as required by G.L. c. 268B, §5.

You are concerned that it is unclear whether a member of a county charter commission must file an SFI, if he or she is appointed by the elected members to fill a vacancy.

QUESTION:

Must a member of a county charter commission file an SFI, if he or she is appointed by the elected members to fill a vacancy?

ANSWER:

Yes.

DISCUSSION:

A county charter commission studies a county's form of government and, if the members consider it appropriate, recommends changes or a new form of county government. G.L. c. 34A, §§8, 11. *See Commission Advisory No. 12 (County Charter Commissions)* (1987). A county charter commission consists of fifteen elected members, chosen by the voters at a state election either in a district or county-wide,[1/] and also includes *ex officio* the three elected county commissioners and the chairman of the county advisory board or their respective designees. G.L. c. 34A, §6(A). The commission's elected members are chosen at the same state election at which the voters decide a ballot question (initiated by the county commissioners, the county advisory board, or a voter petition, *id.* §3) asking whether to establish the county charter commission; the commission members take office if the question passes. *Id.* §4.

If a county charter commission member dies, resigns, or ceases to be a registered voter of the county or district (for district members), or if there is a failure to elect a member (because no candidates ran, or because there was a tie vote), the remaining commission members fill the vacancy by choosing a registered voter of the county or district, respectively. *Id.* §7, second paragraph. The question is whether these members appointed to fill vacancies must file SFIs.

Every "public official"[2/] must file an SFI on or before the last Tuesday in May of the year in which such officials first take office and of each year they hold office, and on or before May 1 of the year after they leave office (unless they serve for fewer than thirty days in that last year). G.L. c. 268B, §5(b). A "public official" is "anyone who holds a public office . . . ." *Id.* §1(q). A "public office" includes "any position for which one is . . . chosen at a state election . . . ." *Id.* §1(p).

It is clear that county charter commission members (except the *ex officio* members[3/]) are elected at a state election. G.L. c. 34A, §§3-7. *See* G.L. c. 50, §1 (defining "state election" to include "any election at which a . . . county officer . . . is to be chosen by the voters . . ."). Thus, the "position" to which one of these fifteen

commissioners is elected is a "public office." A member appointed to one of these positions to fill a vacancy clearly holds the same public office as someone elected to the position. Therefore, by the plain statutory language, such an appointed member is a "public official" required to file an SFI. In other words, the statutory scheme is to follow the office, rather than the method by which the official came to hold it.[4/]

This result is consistent with the legislative purpose in enacting G.L. c. 268B, §5. By requiring the filing of SFIs in order to disclose personal financial interests that could influence the discharge of public duties, the Legislature intended to "assur[e] the people of impartiality and honesty of public officials." *Opinion of the Justices*, 375 Mass. 795, 807 (1978) (quotation and citation omitted). In deciding to require all elected state and county officials to file, the Legislature presumably recognized that, if a position were important enough to be elected, the holder of that position should automatically be among those of whose "impartiality and honesty" the people should be assured. (We note that the capacity to recommend to the Legislature or the voters sweeping changes in the structure of county government certainly is an important power.) But, once the importance of the position is recognized, it should not matter how the position is filled. This supports our conclusion that county charter commission members appointed to fill vacancies must file SFIs, just as their elected counterparts must.[5/]

DATE AUTHORIZED: April 13, 1992

[1/]The proportion of district and at-large seats among the fifteen elected members depends on the county's population. G.L. c. 34A, §6.

[2/]It is clear that county charter commission members appointed to fill vacancies must file SFIs only if they are "public officials." They are not "public employees," required to file SFIs by G.L. c. 268B, §5(c), because they "serve without compensation." G.L. c. 34A, §7, last sentence. *See* G.L. c. 268B, §1(o) (defining "public employee" to exclude, among others, "any person who receives no compensation other than reimbursement for expenses").

[3/]But the county commissioners, who are *ex officio* members of the county charter commission unless they choose to appoint a designee (*see* G.L. 34A, §6[A], second sentence), are themselves elected at the state election, G.L. c. 34, §4; c. 54, §158, and are thus required to file SFIs as "public officials." G.L. c. 268B, §§1(o), (p), 5(b). (A county commissioner appointed to fill a vacancy under the last paragraph of G.L. c. 54, §144 would also be such a "public official" under this opinion's analysis.) We recognize that the final *ex officio* member, the chairman of the county advisory board, apparently need not file an SFI, because he is not compensated as a county employee, *see* G.L. c. 35, §28B, hence is not a "public employee." G.L. c. 268B, §1(o). A designee either of a county commissioner or of the county advisory board chairman would be required to file an SFI if, as might often occur, the designee held a compensated county position designated as a "major policymaking position." *Id.* §§1(h), (l), (o), 3(j)(11); 930 CMR 2.00. *See Commission Advisory No. 12.*

[4/]Any other result would allow an elected commission member to avoid the SFI filing requirement entirely by resigning and then being appointed by his colleagues to fill the vacancy thus created.

[5/]Because the Commission has not previously given clear advice on this issue, we conclude that our advice should apply only prospectively. Therefore, present county charter commission members who were appointed to fill vacancies must file 1991 SFIs on or before May 26, 1992, but need not file SFIs for previous years.

COMMISSION ADVISORY NO. 4

POLITICAL ACTIVITY

INTRODUCTION

The Commission has received numerous inquiries regarding the application of Chapter 268A of the Massachusetts General Laws (the conflict of interest law) to the political activities of public employees. Although the conflict law does not explicitly address political activity by public employees, certain provisions apply to conducting or participating in a political campaign. The purpose of this Advisory is to explain to public employees (i.e., all current officers and employees of Massachusetts state, county, and municipal government agencies, full-time and part-time, paid and unpaid) how G.L. c. 268A applies to their political activities.

In most cases, public employees are free to engage in political activities on their own time as individuals, subject to the limitations discussed in this Advisory (including the campaign finance law's prohibition against political fundraising by appointed, compensated public employees). Nothing in G.L. c. 268A prohibits a public employee from running for any public office, including seeking re-election. The conflict law does not require a candidate to take a leave of absence from his or her public job, but the employee's own agency may require such a leave or establish other limitations stricter than those of G.L. c. 268A. If a public employee is elected to another public office, certain restrictions (not discussed in this Advisory) may apply to holding both jobs at the same time; the Commission's Legal Division can provide advice about multiple office holding.

For the first three subjects discussed in this Advisory (campaign use of public resources, campaigning on the job, and solicitation and fundraising), the state campaign finance law (G.L. c. 55) often, but not always, establishes stricter standards than G.L. c. 268A. The state Office of Campaign and Political Finance (OCPF) administers and enforces G.L. c. 55, and can provide complete advice about its interpretation (see Appendix B).

Section 23 of the conflict law contains standards of conduct that apply to all public employees in the Commonwealth. Two of those standards provide that current public employees may not:

- use or attempt to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or others (§23[b][2]); or

- act in a manner that would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are unduly affected by the kinship, rank, position or influence of any party or person. It is unreasonable to so conclude if the officer or employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, discloses in a manner that is public in nature, the facts that would otherwise lead to such a conclusion. (§23[b][3])

In various advisory opinions issued to state, county and municipal employees, the Commission has discussed the specific application of these standards in connection with political activity. *See, e.g., EC-COI-92-12; 92-7; 92-5; 90-9; 85-29.*

SUMMARY

In summary, as explained in detail below, the Massachusetts conflict of interest law (G.L. c. 268A)[1/] **prohibits** all state, county and municipal public employees, whether compensated or not, from:

- using any public resources or facilities, or the state seal or coat of arms, for campaign purposes.

- engaging in any campaign activities during their normal public working hours.

- (for appointed employees) soliciting campaign contributions or services, or anything else of substantial value, from subordinate employees, vendors they oversee, or anyone within their regulatory jurisdiction.

- representing a campaign (or anyone else) in connection with some matter in which the employee's own level of government (state or local) has a direct and substantial interest (unless they are "special" employees).

I. CAMPAIGN USE OF PUBLIC RESOURCES

The Commission has consistently ruled that the use of public resources of substantial value ($50 or more), available by virtue of one's public employment, for the purpose of conducting or supporting a political campaign amounts to the use of one's official position to secure an unwarranted privilege for oneself or another.[2/] These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment (e.g. copying machines, typewriters, word processors, fax machines), office space or other facilities. These are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees. The taxpayers of the Commonwealth should not be forced to subsidize the political activities of those employed in government agencies.

Moreover, the Commission has ruled that candidates who are public officials or employees may not use the state seal (or state "coat of arms") even on privately

purchased stationery, for fundraising or other campaign purposes. The seal may be used solely for official state purposes, not for the private purpose of a campaign.

II. CAMPAIGNING ON THE JOB

Public employees may not engage in political activities during their normal working hours. While employed by the taxpayers, they are to be doing the taxpayers' work, and not politicking for themselves or individual candidates, or in support of or opposition to election ballot questions. For appointed public employees, normal working hours are those set by the employer through regulations or otherwise, or as designated in the applicable collective bargaining agreement. Where such hours have not been clearly defined, the employee is responsible for resolving any ambiguity with his or her appointing official before engaging in political work.

III. SOLICITATION AND FUNDRAISING

The Commission has also repeatedly held that the conflict of interest law (§23[b][2]) forbids public employees from soliciting anything of substantial value from those they oversee, because of the "inherently coercive" nature of such solicitations. The Commission has applied this principle to political campaigns. Thus, appointed public employees may not solicit campaign assistance from persons they regulate or who are under their supervision. For example, they may not use their official title or authority, or their presence at a meeting under coercive circumstances, to solicit campaign assistance. They may also not solicit private, paid business relationships with such persons they oversee (including, for example, the provision of paid political consulting services); even if persons under the public employee's jurisdiction choose to establish such private business relationships, the supervisory public employee must publicly disclose in writing the existence of the private business relationship, and the facts that the person under his jurisdiction initiated it and entered into it entirely voluntarily.

The same principle applies to campaign fundraising. Thus, appointed public employees (whether compensated or not) may not solicit political contributions from other public employees whom they supervise, vendors that they oversee, or anyone over whom they may have regulatory power.[3/]

It should be noted again that the most significant restrictions on campaign fundraising by Massachusetts public employees are not enforced by the State Ethics Commission; they are found in the state campaign finance law (G.L. c. 55), which is administered by the state Office of Campaign and Political Finance (OCPF). Among other things, these restrictions prohibit public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone;[4/] prohibit anyone from giving, soliciting or receiving political funds in any public building; and forbid requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B below).

IV. REPRESENTING CAMPAIGNS IN DEALINGS WITH THE GOVERNMENT

The conflict of interest law (G.L. c. 268A, §§4, 11, 17) also prohibits a public employee from acting as agent or attorney for, or receiving compensation from, anyone other than the government in connection with a particular matter in which the same level of government (state, county or municipal) is a party or has a direct and substantial interest. Both the state and municipalities have a direct and substantial interest in some election-related matters, including the regulation of campaign finances and the conduct of elections. Thus, a full-time state or municipal employee may not represent a campaign (or anyone else) in dealings with the same level of government. For example, a full-time municipal employee could not (even as an unpaid volunteer) sign a municipal campaign finance report, to be filed with the town clerk;[5/] nor could the employee be paid to help prepare the report, even if he did not sign or deliver it. A full-time state employee could not act as a candidate's lawyer (even on her own time and without a fee) before the State Ballot Law Commission; nor could the employee be paid to review signatures on nomination papers in preparation for such an objection proceeding, even if she never appeared before the state Commission.

This prohibition is much narrower in scope for part-time or unpaid public employees who are "special" employees.[6/] Since the prohibition applies only to representation in connection with matters relating to a "special" employee's own agency, it will prohibit such election-related representation only if the "special" employee is employed by the election agency itself.

APPENDIX A. CAMPAIGN ACTIVITIES BY ELECTION OFFICIALS

"Election officials" are the public employees who actually conduct elections; they include the Secretary of State and the Secretary's election staff, State Ballot Law Commissioners, and at the municipal level, city and town clerks, election commissioners, registrars, and their full-time and part-time staffs, including the election officers who staff the polls on election day. In addition to establishing the general restrictions above that apply to all public employees,[7] the conflict of interest law applies to these election officials in other ways.

First, candidates for compensated offices have a financial interest in their own election. Therefore, §§6 and 19 of the conflict law ordinarily[8] prohibit election officials from participating in decisions that can affect the outcome of an election at which a candidate for a compensated office is the official himself or herself, or the official's immediate family member[9] or business partner; or in which a political committee for which the official is an officer or a paid employee has an interest; or in which the official otherwise has a financial interest in the outcome. Examples of these decisions (which the conflict law calls "particular matters") are decisions about counting votes or absentee ballots, about eligibility to vote or to register, and about certifying, filing and objecting to nomination papers and ballot question petitions. Participation includes not only making the decision, but discussing or advising about it. If an election official is unable to participate, the election laws often provide for a substitute.[10] For example, an elected town clerk who is a candidate for re-election may not participate in decisions that may affect his or her own election, because other officials are available to make these decisions (depending on the decision, an assistant or temporary clerk, other registrars or election officers).

Second, G.L. c. 268A, §23(b)(2) (discussed in the Introduction above) prohibits election officials from using their official positions to secure an unwarranted privilege for a candidate or anyone else. Thus, while this section does not prohibit election officials who have publicly supported a candidate (or a position on a ballot question) from participating in official election-related decisions, they must base such decisions solely on the merits, using the same objective standards they would apply to all similar decisions. These objective standards are found, for example, in the election statutes, relevant case law and regulations of the Secretary of State. Furthermore, §23(b)(3) requires election officials who have actively participated in campaigns or publicly supported a candidate (or a position on a ballot question) to make a public, written disclosure[11] of these facts before they participate in any decision that can affect the outcome of the relevant election.

Finally, §23(e) allows election officials' supervisors to establish and enforce additional standards of conduct. A May 1990 advisory from the State Secretary's Elections Division, for example, advises that "in most cases, election officials should choose between publicly displaying support for a candidate (or a position on a ballot question) and participating in official decisions that may affect that candidate (or ballot question)." In this connection, the Secretary's advisory notes that some city and town clerks have prohibited election officers from displaying political buttons and bumper stickers even on their "off hours," although this policy is not required by the state conflict of interest or election laws.

APPENDIX B. OTHER AGENCIES

The State Ethics Commission can give advice only about the state conflict of interest law, G.L. c. 268A. Other state and federal laws regulate the political activities of Massachusetts public employees; they are administered by the agencies listed below. Furthermore, individual public agencies may also place limitations on the political activities of their employees. Public employees should determine what restrictions apply to them in their own public jobs.

For more information about these other laws and related subjects, contact:

for state campaign finance law (G.L. c. 55):

Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108
(617) 727-8352 or 1-800-462-OCPF

for campaign finance law for federal office only:

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
1-800-424-9530

for federal Hatch Act (applies to state and local employees paid at least partly from federal funds):

Office of Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20005
1-800-872-9855

for state laws about election procedures (G.L. cc. 50-54):

Elections Division
Office of the Secretary of State
One Ashburton Place, Room 1705
Boston, MA 02108
(617) 727-2828 or 1-800-462-VOTE

For more information about the state conflict of interest and financial disclosure laws (G.L. cc. 268A & 268B), including the subjects discussed in this Advisory, please contact:

Legal Division
State Ethics Commission
One Ashburton Place, Room 619
Boston, MA 02108
(617) 727-0060

Date Authorized: May 8, 1984
Revised: June 16, 1992

[1/] In addition, as explained below, the state campaign finance law (G.L. c. 55) sometimes establishes stricter standards. Among other things, it prohibits public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibits anyone from giving, soliciting or receiving political funds in any public building; and forbids requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B).

[2/] Although the State Ethics Commission has reached the conclusions in parts I and II under the state conflict of interest law, G.L. c. 268A, §23(b)(2), OCPF has reached similar conclusions under the state campaign finance law, G.L. c. 55, as interpreted by a state Supreme Judicial Court decision, *Anderson v. City of Boston*, 376 Mass. 178 (1978), *appeal dismissed*, 439 U.S. 1069 (1979). *See OCPF-IB-91-01* (available from OCPF; see Appendix B below). Note that G.L. c. 55 and *Anderson* prohibit campaign use of public resources even if they are not of "substantial value."

[3/] Sections 2 and 3 of G.L. c. 268A prohibit both appointed and elected public officials from soliciting or accepting campaign contributions or political services in return for being influenced in their official acts. *In re Nolan*, 1989 SEC 415. *See Commonwealth v. Borans*, 379 Mass. 117, 142 (1979). *See also* G.L. c. 55, §§16-17; c. 56, §§33-36 (criminal statutes not enforced by Commission).

[4/] For example, OCPF has applied this statute, G.L. c. 55, §13, to prohibit appointed, compensated public employees from using their homes for a fundraising event, selling or distributing fundraising tickets, or including their names on the letterhead of a fundraising letter or on an invitation to a fundraising event. *See also OCPF-IB-92-01* (applying this statute to prohibit acting as a featured speaker or panelist at a political fundraising event).

[5/] OCPF has interpreted G.L. c. 55, §13 to prohibit an appointed, compensated public employee from being a treasurer for a candidate or a political committee.

[6/] A "special state employee" is an appointed state employee who is unpaid, or is allowed to do personal or private work during normal working hours (and discloses this in writing beforehand to the State Ethics Commission), or in fact earns compensation for no more than 800 hours during the preceding 365 days. G.L. c. 268A, §1(o). A "special municipal employee" is an elected or appointed municipal employee (except a mayor, alderman, councillor or a selectman in a town of more than 10,000 population) who meets the same requirements (except for disclosure to this Commission) and holds a position so designated by vote of the City Council or Selectmen. *Id.* §1(n).

[7/] Note that G.L. c. 268A, §§4, 17 (discussed in part IV above) prohibit even election officials who are "special" employees from representing anyone in dealings with their own election agency.

However, designating part-time municipal election officials, such as registrars, assistant registrars, and election officers, as "special municipal employees" is important for another reason. If they are not so designated, G.L. c. 268A, §20 prohibits them from also

holding full-time paid municipal positions. *See Commission Advisory No. 7 (Multiple Office Holding at the Local Level).* If part-time election officials are designated as "specials," they may continue to hold their regular full-time, municipal jobs if: (1) their election official positions are filled after public notice, (2) they make public written disclosure to the city or town clerk of their salaries in both jobs, (3) their election supervisor files with the clerk a written certificate that no regular employee of the supervisor's office is available, and (4) the city council or selectmen vote to exempt them by name. *See* G.L. c. 268A, §20(b), (c), (d).

[8/] An election official may participate nevertheless in two situations. First, an appointed official's appointing authority could determine in writing beforehand that the financial interest was not so substantial as to interfere with the integrity of the official's services (for state officials, this determination and the official's written disclosure must be filed with the Commission). Second, if no substitute is available (see footnote 10), the "rule of necessity" may allow the official to participate under some circumstances; consult the State Ethics Commission for details.

[9/] An official's "immediate family" is the official and his or her spouse, and their parents, children, brothers and sisters.

[10/] For example, the first deputy Secretary would substitute for the Secretary of State (G.L. c. 9, §3). An assistant clerk, or a temporary clerk appointed by the mayor or selectmen, would substitute for the city or town clerk (G.L. c. 41, §§14, 18, 19). A temporary registrar or election commissioner could similarly be appointed (G.L. c. 51, §20).

[11/] Appointed election officials make this disclosure to their appointing authority. The Secretary makes it to the State Ethics Commission. An elected town clerk posts it in his or her own office.

COMMISSION ADVISORY NO. 14

NEGOTIATION FOR PROSPECTIVE EMPLOYMENT

I. INTRODUCTION

The conflict of interest law, G.L. c. 268A, attempts to insure that a public employee's loyalty to the public interest will not be clouded by potentially competing private loyalties. There is a substantial risk of conflicting loyalties whenever a public employee negotiates for prospective employment with a party with whom the employee has concurrent official dealings.[1/] The purpose of this Advisory is to explain how G.L. c. 268A applies when public employees are either contemplating or commencing negotiations for prospective employment.

II. THE LAW

All public employees, whether state, county or municipal employees, are subject to similar restrictions under G.L. c. 268A. Section 6 prohibits a state employee from participating[2/] officially in any particular matter[3/] in which any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment has a financial interest. County and municipal employees are subject to parallel restrictions under §§13 and 19, respectively.

The conflict of interest law does not prohibit a public employee from seeking prospective full or part-time employment. The law does require, however, that certain abstention and/or disclosure requirements be observed if the employee would customarily be expected to participate officially in a matter affecting the financial interests of the person or organization with whom the employee is negotiating. In these situations, the employee must abstain from participation in the matter. Further, state and county employees must also notify in writing both the State Ethics Commission and their appointing official of the nature and circumstances of the particular matter and make full disclosure of the financial interest affected.[4/] For the purposes of notification, the appointing official is the official with the statutory authority to make the appointment of an employee, and is not necessarily the employee's immediate supervisor.[5/]

At this stage, the law shifts responsibility onto the employee's appointing official to determine how the public agency should handle the matter. Under §§6, 13

and 19, the appointing official, following notification of the financial interest, can exercise one of three options. The official may either: (1) assign the matter to another employee; or (2) assume responsibility for the particular matter; or (3) grant written permission to the employee to participate. The written permission must include a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the public expects from the employee. In the case of state and county employees, the appointing official must also file with the Ethics Commission a copy of the written permission granted under (3), above. Following receipt of the appointing official's permission and, for a state or county employee, after notifying the Ethics Commission, the employee may participate in the matter.[6]

The law establishes substantial consequences for an employee who violates G.L. c. 268A by participating in a matter without complying with the notification requirements and without receiving from his or her appointing official written permission to participate. Not only is the employee subject to civil and criminal penalties under G.L. c. 268A, §§6, 13, 19 and G.L. c. 268B, §4, but also any governmental action that was substantially influenced by the employee's participation may be rescinded. *See G.L. c. 268A, §§9, 15 and 21.* While the Commission is sensitive to the potential difficulty state and county employees may experience in having to disclose to their current appointing official prospective employment negotiations with another person or organization, the disclosure requirements protect the public interest from potentially competing personal loyalties.

III. NEGOTIATING FOR PROSPECTIVE EMPLOYMENT

The abstention and notification requirements of G.L. c. 268A, §§6, 13 and 19 accrue when an employee is negotiating for prospective employment with "any person or organization." The term "person" includes individuals, corporations, societies, associations, and partnerships. The term "organization" includes corporations, business trusts, estates, partnerships, associations, two or more persons having a joint or common interest, and any other legal or commercial entity, as well as federal, state or local governmental agencies and subdivisions. For example, the IRS, the federal EPA, and the United States Department of Justice would each be considered an organization within the meaning of §6.[7] 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.[8]

The key operating principle is mutuality of interest. Where a public employee and a person or organization have scheduled a meeting to discuss the availability of a position and the employee's qualifications for that position, the employee will be regarded as negotiating for prospective employment with that person or organization. *See EC-COI-82-8* (where an employee affirmatively responds to an inquiry from a prospective employer and meets with the employer, the employee is negotiating for future employment); Department of the Attorney General, *Personnel Manual* (1988), p. E-8 ("employment negotiations exist as soon as both the employee and the prospective employer show any interest in the employee working for the prospective employer. For example, disclosure must be made as soon as an employment interview is scheduled.")[9]

For the purposes of G.L. c. 268A, §§6, 13 and 19, prospective employment negotiations are synonymous with discussions and are not limited to the final meetings during which the parties review salary and other terms of employment. *See In re Esposito* 1991 SEC 529. Nor does negotiation require a face to face meeting. *See In re Hatch*, 1986 SEC 260 (a state employee violates §6 by officially participating in a contract with a company with whom she is concurrently discussing prospective employment by telephone).

Not all employment interest inquiries, however, rise to the level of negotiations for G.L. c. 268A purposes. For example, an employee who submits an application in response to an advertisement that does not identify the prospective employer will not be considered to be negotiating with that employer until the prospective employer identifies itself and arranges for an interview with the employee. Similarly, meetings with professional or social acquaintances (commonly referred to as networking) to discuss general opportunities in a professional field will not ordinarily be treated as negotiations. Where the meetings involve individuals who have a role in the hiring process for an organization, however, an employee will be regarded as "negotiating" if the discussions focus on the availability of a specific position within the organization and the employee's qualifications for that position. Where there is a mutuality of interest between a public employee and a prospective employer for a particular position, the

employee's loyalty may become divided between the public interest and personal interest when dealing with matters affecting the prospective employer's financial interests. In such situations, the employee must abstain from participating in these matters unless and until the employee receives from his or her appointing official written permission to participate.

IV. OUTCOME OF NEGOTIATIONS

If the negotiations lead to an offer of full or part-time employment that the public employee accepts, the employee has an arrangement for future employment. The employee must, therefore, abstain from official participation in any matter affecting the financial interests of a person or organization with whom the employee has an arrangement for future employment. The employee must continue to observe the abstention and disclosure requirements of G.L. c. 268A, §§6, 13 and 19 discussed previously, unless and until the employee receives written permission to participate. *See In re Hatch*, 1986 SEC 260 (state employee violates §6 by participating in contract involving company for whom she had accepted a job offer).

If, by objective standards, the negotiations have been terminated through the action of either the public employee or the prospective employer, the employee will no longer be considered to be negotiating for prospective employment with that employer. The employee should apprise his or her appointing official of the termination of negotiations to enable the appointing official to determine whether and when the employee may be assigned prospectively to handle matters involving the employer.

V. ADDITIONAL SAFEGUARDS

(a) Under G.L. c. 268A, §23(b)(3), a public employee may not act in a manner which would cause a reasonable person to conclude that any person can improperly enjoy the employee's favor in the performance of official duties, or that the employee is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. This appearance of conflict may be dispelled if the employee discloses the relevant facts to his or her appointing official.

An appearance of a conflict of interest arises in at least two distinct circumstances. First, when a public employee contacts someone or some entity regarding future employment, an appearance of a conflict of interest arises if the public employee is engaged in a particular matter for the government and knows that the person or organization he or she has contacted for possible future employment is either a party to, or otherwise has an active interest in, that matter. The appearance of a conflict arises regardless of whether the organization has a direct or foreseeable financial interest in the matter, or whether negotiations for prospective employment have actually begun. *EC-COI-92-3*. Rather, it is the act of having contacted the interested person or organization for possible future employment, while simultaneously having responsibility for a governmental matter in which the person or organization is interested, that triggers the disclosure requirements under §23.

The Commission has found that an appearance of a conflict arises under these circumstances because "it may appear that [public employees] would somehow act in a manner designed to place [their] own interests ahead of the [government's interest]." *EC-COI-92-3*.

For example, a state employee is involved with litigation for the Commonwealth. A federal governmental agency is also a party to the action (but not necessarily an adverse one). An appearance of a conflict of interest would arise if the state employee were to contact the federal agency for a job, while the litigation is pending, because it might be perceived that she will try to curry favor with the agency by agreeing to their litigation strategies and proposals, without concern for the affects on the Commonwealth's legal position.[10/]

Second, an appearance of a conflict of interest arises whenever a state employee has terminated negotiations with a person or organization but continues to exercise official responsibility over that person or organization. The law does not prescribe any particular "cooling off period" prior to an employee resuming participation in matters affecting a prospective employer with whom the employee has terminated negotiations.[11/] Following confirmation of the termination of negotiations, the employee's appointing official is presumably in a favorable position to evaluate the needs of the particular governmental agency, as well as the perception that a premature assignment might create. This determination rests within the sound discretion of the appointing official.

(b) A disclosure under §23(b)(3) may be appropriate when a public employee is about to participate in, but has not previously been assigned, matters involving a prospective employer with whom he or she has recently

terminated negotiations. For example, if negotiations have terminated the day before an employee is newly assigned a matter involving the same prospective employer, the employee should disclose to his or her appointing official the fact that negotiations have recently terminated with that employer. Alternatively, the employee may abstain entirely from participation in the matter, thereby avoiding any actual or apparent bias as well as the requirements of a disclosure. The public employee should contact the Commission for further advice about this type of disclosure.

(c) Under G.L. c. 268A, §23(b)(2), a public employee may not use his or her official position to secure an unwarranted privilege of substantial value for the employee or others. To comply with §23(b)(2), a public employee must avoid misusing his or her position to exploit the vulnerability of persons or organizations that are dependent on the public employee's official actions. A public employee must, therefore, exercise caution when pursuing prospective employment with persons or organizations with matters pending within the official responsibility[12/] of the employee. Any employee who wishes to receive more specific guidance concerning his or her compliance with §23(b)(2) may seek an advisory opinion from the Commission.

(d) Under G.L. c. 268A, §23(c), a public employee may not disclose to individuals or organizations any confidential information the employee has acquired in the course of his or her official duties, nor use such information to further the employee's personal interest. A public employee must observe this restriction in particular when negotiating for prospective employment. The disclosure of confidential information may not be used to advance the interests of the public employee at the expense of the public interest.

VI. CONCLUSION

The conflict of interest law attempts to balance a public employee's right to seek future employment with the public interest in assuring that an employee will make decisions in the public interest, rather than with an eye towards prospective employment. Where there is mutuality of interest between an employee and prospective employer, the law requires that a different agency employee participate in matters affecting the prospective employer, unless the disclosure and permission requirements of §§6, 13 and 19 have been observed. By observing the additional safeguards of §23, a public employee will avoid any actual or apparent risk that the employee's official conduct has been affected by private employment arrangements or negotiations.

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[1/]The relevant language in G.L. c. 268A also appears in the statute's federal counterpart, 18 USC 208. Both laws were derived from the comprehensive 1960 report of the Association of the Bar of the City of New York. *See* §3(b)(4) of the Bar Association's proposed statute. Special Committee on the Federal Conflict of Interest laws of the Association of the Bar of the City of New York, *Conflict of Interest and Public Service* 280 (1960). That report concluded:

> The risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter around, the greatest public risks arising from post-employment conduct may well occur during the period of government employment ...

Id. at 234.

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

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

[4/]Note that there are additional, and more stringent, disclosure requirements which may arise under §23(b)(3) in certain circumstances. These requirements are described below in Section V, Additional Safeguards.

[5/]Any employee who is uncertain as to the identity of the employee's appointing official for G.L. c. 268A purposes may seek advice from the Commission on this point. *See EC-COI-87-41.*

[6/]Elected state, county or municipal employees do not have an appointing official who can grant permission to participate in matters affecting the financial interests of persons or organizations with which the elected official is negotiating for prospective employment. Elected officials who wish to seek guidance as to appropriate steps to take beyond abstention in matters affecting such financial interests should seek an advisory opinion from the Commission.

[7/]The federal government is not considered a single organization for §6 purposes. Rather, each separate federal agency is considered an "organization." *EC-COI-92-3.*

[8/]*In United States v. Conlon*, 628 F.2d 150 (2nd Cir. 1980), *cert. den.* 454 U.S. 1149 (1982), the Court of Appeals concluded that the word negotiating was to be given a broad reading, rather than the narrow reading accorded by the district court. The Court's conclusion was based on its reading of the legislative history of 18 U.S.C. 208, which was intended to strengthen and expand existing prescriptions on official participation. General Laws c. 268A was derived from the same history. *See Final Report, Special Commission on Code of Ethics*, 1962 House Doc. No. 3650, p.8.

[9/]*See also* Perkins, *The New Federal Conflict of Interest Law*, 76 Harvard Law Rev. 1113, 1133 (1963)("The lure of a lucrative job following government employment is often great, and it is essential that a quarantine on official dealings with prospective employers be established as soon as future employment becomes a matter of discussion or understanding.")

[10/]Thus, a disclosure to the state employee's appointing authority under §23 may be required far earlier than might otherwise be necessary under §6. As described above, §6 requires a public disclosure only when a state employee who is required to participate in a particular matter has begun negotiations for prospective employment with a person or organization with a direct or foreseeable financial interest in that matter. The §23 disclosure, unlike the §6 disclosure, does not require any action on the part of the employee's appointing authority, however. Nor does it require a filing with the Commission.

[11/]It has been suggested that once negotiations have broken off, an employee would be well advised to steer a wide berth around participation. Buss, *The Massachusetts Conflict of Interest Law: An Analysis*, 45 B.U. Law Rev. 299, 359 n. 324. Buss also indicates that the standards of conduct now contained in §23 have a useful and appropriate role to play in these circumstances.

[12/]"Official responsibility," is defined in G.L. c. 268A, §1(i) 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.

Included are:

Summaries of all Advisory Opinions issued in 1992,
and summaries of Commission Advisories No.4 and No. 14,
revised and re-issued in 1992.

EC-COI-92-1 - A city councillor may also be employed by a "community action agency," subject to the usual limitations on a regular municipal employee's outside employment, because a community action agency is not a "municipal agency" under G.L. c. 268A.

EC-COI-92-2 - A state legislator may not solicit donations for personal financial assistance from anyone with an interest in legislative business, broadly defined. He may not accept unsolicited donations of $50 or more from anyone with such an interest, nor from any combination of persons with a common interest in the same legislative business.

EC-COI-92-3 - A federal agency is an "organization" (but not necessarily a "business organization") within the meaning of G.L. c. 268A, §6. Consequently, a state employee who negotiates for employment with a federal government agency may trigger the disclosure/ determinations requirements of §6. The federal government is not, however, treated as a single organization. Rather, each federal agency may be treated as a separate organization.

EC-COI-92-4 - A volunteer state employee may continue to receive compensation from his private employer, from whom he has obtained a leave of absence, provided that a specifically tailored state regulation authorizes the arrangement, notwithstanding the restrictions of G.L. c. 268A, §4. The regulation would make the arrangement "as provided by law for the proper discharge of official duties" within the meaning of §4. The state employee will, however, be subject to other guidelines under G.L. c. 268A.

EC-COI-92-5 - Public officials seeking reelection or higher office would violate §23 of G.L. c. 268A by displaying the Seal or Coat of Arms of the Commonwealth on private stationery for fundraising or other campaign purposes. Recipients might reasonably infer from such use of the state seal that the solicitation was supported or endorsed by the Commonwealth when in fact it is for the benefit of a personal interest.

EC-COI-92-6 - The provision of §1(q) that prohibits certain engineering and environmental consultants from bidding on later contracts for the same construction project applies only to individuals who are otherwise "state employees" under G.L. c. 268A.

EC-COI-92-7 - A state employee may not enter a private business relationship with a subordinate (nor with a vendor he supervises, nor a person within his regulatory jurisdiction) unless: (1) the relationship is entirely voluntary; (2) the subordinate initiates the relationship; and (3) the supervisor publicly discloses facts clearly showing (1) and (2).

EC-COI-92-8 - A member of the General Court may hold, and receive compensation for, an elective or appointive municipal office without the necessity of complying with the "purview" restrictions applicable to other state employees (found in G.L. c. 268A, §4). Members of the General Court are exempt from the restrictions of §4, except under limited circumstances.

EC-COI-92-9 - In the absence of additional circumstances, physicians are not considered to be municipal employees under G.L. c. 268A, §1(g) solely because they have been granted clinical privileges by Quincy Hospital and have been appointed to the hospital's medical staff.

EC-COI-92-10 - A municipality may, through the adoption of a by-law, permit a special town counsel simultaneously to represent private parties in connection with matters in which the municipality is also a party or has a direct and substantial interest, notwithstanding the restrictions of G.L. c. 268A, §17, and *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83 (1984). The by-law would make the arrangement "as provided by law for the proper discharge of official duties" within the meaning of §17. The by-law in question required that the town's regular counsel consult with the town's selectmen concerning whether the dual representation advanced the interests of the town. The by-law also required that the regular town counsel supervise the special town counsel's dual representation.

EC-COI-92-11 - The Wampanoag Tribe of Gay Head does not fall within the definition of a "business organization" for the purposes of G.L. c. 268A, §19. Thus, members of the Tribe who are

also municipal officials are not required to abstain in matters affecting the financial interests of the Tribe, but such municipal officials must comply with the safeguards in §23.

EC-COI-92-12 - An appointed state employee, even if unpaid, may not solicit campaign contributions from persons under his regulatory jurisdiction, nor use state facilities or resources in such solicitations.

EC-COI-92-13 - Employees of a private consulting firm who have been expressly designated in a state contract to perform specific services are considered to be "state employees" for the purposes of G.L. c. 268A.

EC-COI-92-14 - Section 5 does not prohibit a former state employee from accepting referral of a patient into the employee's private practice following the patient's discharge from a state hospital, as the discharge referral resulted from a discharge plan developed after the employee left state service.

EC-COI-92-15 - A member of a town's board of assessors may not be appointed to a paid position (assessors' clerk) under the supervision of the board of assessors unless: (1) the board of selectmen designates the clerk's position as a special municipal employee position; (2) the assessor complies with the §20(d) exemption; and (3) pursuant to §21A, the appointment is approved at an annual town meeting.

EC-COI-92-16 - Under some circumstances, a former state employee who later contracts with a different state agency is covered by the restrictions of both §4 and §5 of G.L. c.268A.

EC-COI-92-17 - Section 18(a) prohibits a former municipal employee, who participated in negotiating a contract for the municipality with a private vendor, from negotiating and implementing for the vendor a second contract that would in effect modify the first contract.

EC-COI-92-18 - An elected county retirement board member may remain a board member and continue private employment with an investment firm, if he complies with the provisions of §§ 11, 12, 13 and 23.

EC-COI-92-19 - Section 3 prohibits a private communications corporation from offering, and selectmen from accepting, seats in a corporate box for Red Sox games, because the tickets would be given for or because of the recipients' municipal positions and the cost per seat to the corporation would be of substantial value ($50.00 or more).

EC-COI-92-20 - The superintendent of a public school system who serves on a computer company's users' advisory committee could not accept from the company payment of her travel, hotel and meal costs to attend at an advisory committee meeting. The superintendent had previously entered into contracts with the computer company on behalf of the school system. Section 3 would not prohibit receipt of travel and associated costs if the municipality had a by-law or charter provision regulating vendor paid travel.

EC-COI-92-21 - Section 19 prohibits a fire district prudential committee member from participating in any matter in which his son, a firefighter in the district, has a direct and immediate or reasonably foreseeable financial interest. The committee member must refrain from participating in discussions or votes concerning the collective bargaining agreement for full-time firefighters, as well as any other matter which will affect his son's financial interest, including but not limited to seniority rights, lay-offs, retirement, health benefits and disciplinary matters.

EC-COI-92-22 - Section 4 permits an employee of the state Department of Environmental Protection (the Department) also to serve as a member of a local board of selectmen. He must, however, as a selectman, abstain on certain matters which fall within the purview of the Department.

EC-COI-92-23 - Section 23(b)(2) prohibits town clerks from arranging to provide immediate election results by telephone to a private news agency, in return for substantial payments by the news agency to the clerks' private association, unless a state statute or regulation explicitly authorizes the arrangement.

EC-COI-92-24 - Section 19 prohibits a member of a local board of health (the board) from participating in a particular matter in which his own financial interests will foreseeably be affected. Where other board members are also prohibited from participating in the same matter because of conflicts on interest (such that a quorum cannot be obtained), the Rule of Necessity may be invoked. If it is properly invoked, all board members who have conflicts of interest may participate in the matter.

EC-COI-92-25 - A state environmental police officer may also be appointed to an unpaid municipal conservation commission, but he may not act as that commission's agent in relation to any particular matter within his state agency's purview. In effect, he may also not perform his state environmental police duties within that town.

EC-COI-92-26 - The Martha's Vineyard Collaborative is a regional municipal entity under G.L. c. 268A and, as such, is an instrumentality of each member municipality. With this opinion, the Ethics Commission will no longer consider regional entities to be "independent municipal agencies" under the conflict law and adopts the reasoning of the Massachusetts Appeals Court in *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992). A member of the Chilmark Finance Committee may serve as the town's designee on the Collaborative and may, under §19, participate in Collaborative matters in which the town has a financial interest because he is representing the town's interests in both positions.

EC-COI-92-27 - A regional school committee member may enter into a contract with the regional school district only if regional school committee members are designated as special municipal employees by the boards of selectmen or city councils of all of the member municipalities. The committee member would also have to comply with the §20(d) exemption, which requires him to make public disclosure of his financial interest in the contemplated contract with the school district, and also requires the boards of selectmen or city councils of all of the member municipalities to approve the exemption.

EC-COI-92-28 - Under §23(b)(2), the Governor is prohibited from signing a solicitation letter to benefit a private non-profit organization that is seeking to attract the summer Olympics to Massachusetts, because the solicitation is targeted, in part, to individuals or organizations subject to the regulatory authority of the Administration, and because the solicitation is not authorized by statute or regulation.

EC-COI-92-29 - Legal counsel for a municipal housing authority may pursue a lawsuit against a state agency where legal counsel would be representing the authority in an attempt to enforce the authority's contractual rights. Legal counsel may also represent an individual member of the authority on a limited basis without violating §17(c), as long as the lawsuit serves the authority's distinct institutional interest and any aspects of the lawsuit that are of specific concern to the individual member and not to the agency as a whole are handled by the member's private legal counsel.

EC-COI-92-30 - A city council may not elect one of its members as city clerk until thirty days after he resigns as a councillor, because every multi-member municipal body, including this city council, is a "municipal commission or board" for §21A purposes. While he remains a councillor, §§19 and 23(b)(2) prohibit him from participating in matters related to his city clerk candidacy and from using his position to further his candidacy.

EC-COI-92-31 - A housing inspector for a housing authority may (as a private landlord) receive housing assistance payments made on behalf of an eligible tenant, because the inspector does not have responsibility for the administration of the subsidy program. Since the inspector's role in the subsidy program is limited to conducting on-site inspections, he qualifies for the exemption found in §20(h).

EC-COI-92-32 - Section 3 prohibits a non-profit organization from waiving an entrance fee to a fundraising dinner where the beneficiaries of the waiver are public employees who have had, or likely will have, official dealings with the organization. None of the public officials involved were to participate in the fundraising dinner as a speaker. In addition, the Commission found that,

for purposes of determining whether "substantial value" has been obtained, it will look to the full cost of attending the event as opposed to merely the actual cost of the meal served.

EC-COI-92-33 - Section 19 prohibits a city solicitor from giving legal advice about a management salary cap that would probably apply to him, unless the mayor (his appointing authority) gives him an advance written determination that his financial interest will not likely interfere with the integrity of his services to the city, as allowed by §19(b)(1).

EC-COI-92-34 - The §19(b)(3) exemption allows a selectman whose immediate family owns substantial commercial property to participate in the selectmen's decision to adopt a higher property tax rate on all commercial property in town, because this decision "involves a determination of general policy" and his family's ownership interest is shared with the more than 10 percent of town residents, which constitutes a "substantial segment of the population."

EC-COI-92-35 - Section 7 prohibits an employee of a state agency from having a financial interest in state subsidized rents (or other state benefits paid directly to the state employee in exchange for goods or services) unless she can rely upon an exemption to §7. In addition, §23 prohibits a state employee from initiating private business relationships with persons over whom she exercises official authority.

EC-COI-92-36 - In the circumstances described, an alternate member of a local board of appeals (the board) does not have official responsibility for matters under the Board's jurisdiction unless and until he is designated to serve on the board by its chairman. Accordingly, an alternate board member may appear before other town boards on a particular matter involving the board of appeals if he has not served on the board when that matter was pending before it.

EC-COI-92-37 - A member of the General Court is prohibited by §3 from accepting free or discounted office space and office furnishings for use as a district office if the office space and/or furnishings are given by an individual or private or public entity that is making the offer as a gesture of good will.

EC-COI-92-38 - G.L. c. 268A, §3 will not prohibit employees of the Executive Office of Economic Affairs from soliciting funds from private businesses who have official dealings with the agency in order to fund an agency program, where the solicitation is authorized by statute and is for the benefit of the agency, not a particular public employee. Section 23(b)(3) requires that state employees who have official dealings with contributing organizations file a disclosure with their appointing authority.

EC-COI-92-39 - Section 23(b)(2) prohibits an appointed public official from using his official title in endorsing a political candidate.

EC-COI-92-40 - Under recent case law and Commission precedent, this opinion reviews and modifies some of the Commission's conclusions in EC-COI-90-2. The Martha's Vineyard Land Bank is an instrumentality of each of the member municipalities and is a "municipal agency" for conflict law purposes. Land Bank Commissioners and Town Advisory Board members who are also private real estate brokers are subject tot he restrictions contained in §§17, 19 20 and 23.

EC-FD-92-1 - A Chapter 7 federal bankruptcy filing means that a person no longer owns the assets in question once the transfer to the trustee in bankruptcy has taken place. Consequently, such assets need not be reported on the Statement of Financial Interests, section requiring filers report assets owned as of December 31 of the calendar year, if the transfer occurred anytime during the year. In addition, this opinion cites several examples of the types of debt the Commission would view as having been incurred "in the ordinary course of business."

EC-FD-92-2 - Members of county charter commissions must file statements of financial interests, even if they are appointed by the elected members to fill a vacancy.

COMMISSION ADVISORY NO. 4 - Political Activity. The purpose of this Advisory is to explain to all Massachusetts county, municipal, state public employees and current officers (whether they are full-time, part-time, paid or unpaid) how G.L. c. 268A applies to their political activities. Issued May 8, 1984; Revised June 16, 1992.

COMMISSION ADVISORY NO. 14 - Negotiation For Prospective Employment. This Advisory explains how G.L. c. 268A applies when public employees are either contemplating or commencing negotiations for prospective employment. Issued February 28, 1990; Revised October 8, 1992.