RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1993

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission

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The Massachusetts State Ethics Commission
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Included in this publication are:

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1993.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 19__ Ethics Commission (page number).

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

- **State Ethics Commission Formal Advisory Opinions issued in 1993.** Cite Conflict of Interest Advisory Opinions as follows: *EC-COI-93-(number)*. Cite Financial Disclosure Advisory Opinions as follows: *EC-FD-93-(number)*.

  Note: all 1993 Advisory Opinions regarding G.L. c. 268B, the financial disclosure law, are included in this volume.

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

TABLE OF CASES

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In the Matter of Charles J. Manca - Gardner Mayor Charles J. Manca was fined $500 in January for signing a $6,000 recycling contract with his brother's company. Manca admitted in a Disposition Agreement that his actions violated §23(b)(3) of the conflict of interest law, and agreed to pay the fine. Section 23(b)(3) prohibits a public official from acting, knowingly or with reason to know, in a manner that would cause an objective observer to conclude that anyone could improperly influence the official because of kinship, friendship, or any other reason.

Public Enforcement Letter 93-1 (In the Matter of Chief Donald Eunson) - The Massachusetts State Ethics Commission issued a Public Enforcement Letter in February stating that public agency department heads are prohibited from personally buying back vehicles traded in by their agencies. The letter, sent to Bedford Police Chief Donald Eunson, also clarifies the Commission's position that public employees cannot solicit or accept discounts of substantial value that are given to them for or because of their official positions. Eunson was cited by the Commission for possible violations of the conflict of interest law concerning his alleged assistance in getting his son a bargain purchase of a police vehicle being traded in to Natick Auto Sales.

In the Matter of Robert Burgmann - Former Sandwich Planning Board Chair Robert Burgmann was fined $1,000 in March for sending an official memorandum to the Sandwich Board of Health asking them to require that a local developer install a nitrate reducing septic system designed by a company Burgmann worked for and partially owned. Burgmann admitted in a Disposition Agreement that his actions violated §19 of the conflict law, which prohibits municipal officials from participating in their official capacity in matters which affect their own financial interest.

In the Matter of Robert Donaldson - In March, former Tolland Health Agent Robert Donaldson was fined $2,000 for witnessing numerous percolation tests on land that was either already listed with his real estate agency or that he knew or expected would be listed with the agency once the land "perced" successfully. The Commission also required Donaldson to forfeit $1,000 in fees he had received for witnessing the perc tests. Donaldson admitted in a Disposition Agreement that his actions violated §19 of the conflict law. Section 19 of the law prohibits municipal employees from participating in their official capacity in particular matters that affect the financial interests of business organizations that employ them.

In the Matter of Roland Seguin - Roland Seguin, a former member of the Fairhaven Tourism Committee, was fined $750 for purchasing a series of commemorative plates for the town from companies Seguin represented as a salesman, and for receiving commissions on the sales. Seguin was also required to forfeit $600, the approximate benefit he received from the illegal sales. Seguin admitted in a Disposition Agreement that his actions violated §19 of the conflict law, and agreed to pay the fine and forfeiture. Section 19 of the conflict law prohibits municipal employees from participating in their official capacity in any particular matter that affects their own financial interest.

In the Matter of Anthony Benevento - In May, former Swampscott assessor Anthony Benevento was fined $5,000 for unilaterally increasing the valuations on properties owned by individuals with whom he was on bad terms. Benevento increased the property values of four Swampscott residents at a time when valuations in the town had decreased approximately 10 percent across the board. At least three of the four individuals were connected with a dispute Benevento was having with a neighbor whose newly built house partially blocked his view of the ocean. Benevento admitted in a Disposition Agreement that his actions violated §23 of the conflict law, and agreed to pay the fine. Section 23(b)(3) prohibits public officials from acting in a manner that would cause an objective observer to conclude they would be unduly influenced by personal biases in carrying out their official duties.

In the Matter of Dominic DiVirgilio - Dedham Department of Public Works Commissioner Dominic DiVirgilio was fined $3,500 for allowing several local businesses to benefit improperly in their dealings with the town, either by receipt of town funds or use of town equipment. DiVirgilio also reimbursed $825 that was wrongfully billed to the town. DiVirgilio signed a Disposition Agreement with the Commission in May, admitting to violating §23 of the conflict law by billing the town of Dedham for repairs that John's Autobody Shop allegedly performed to a town truck when no such work was done; by receiving autobody work on his private car from John's Autobody; by awarding more than $25,000 in municipal diesel fuel business to a friend's company in violation of the competitive bid laws; and by allowing a town-owned cement mixer to be used free of charge by a private construction company.

In the Matter of Robert Columbus - The Massachusetts State Ethics Commission fined Stoneham Building Inspector Robert Columbus $750 for issuing building permits to himself and his two sons. Columbus admitted in a Disposition Agreement that he violated §19 of the conflict law by issuing the various permits, and agreed to pay the fine. Section 19 prohibits municipal employees from participating in their official capacity in any particular matter that affects either their own financial interests or the financial interests of members of their immediate family.

In the Matter of Leonard Mach - In June, Leonard Mach, former Acting Administrator for the Massachusetts Treatment Center at Bridgewater, was fined $500 for participating in his son's appointment to a more secure job at the facility at a time when layoffs were likely. Mach admitted in a Disposition Agreement that he violated §6 of the conflict law. Section 6 of the conflict law generally prohibits state employees from participating in their official capacity in any particular matter that affects the financial interests of an immediate family member.

In the Matter of Russell Smith - Former Chairman of the Gay Head Board of Selectmen Russell Smith was fined $500 for his involvement in a town inquiry into the federal criminal investigation of his brother. In a Disposition Agreement, Smith admitted he violated the conflict law by participating as a public official in matters affecting the financial interest of an immediate family member.

In the Matter of William Reinertson - In October, the Ethics Commission fined Former Hopkinton Tree Warden William Reinertson $10,000 for awarding town contracts to two companies he personally owned and operated, and for attempting to conceal his financial interest in the contracts. Reinertson admitted in a Disposition Agreement that, in his official capacity as Tree Warden, he had awarded town contracts to his own companies, certified that the work had been completed, and authorized payment to his own companies. He also admitted he had used a Natick mailing address in order to deliberately conceal the fact that he had a financial interest in the tree work contracts.

In the Matter of Stanley Bates - In December, Easton Police Chief Stanley Bates was fined $500 for awarding town contracts either to his son, Gerry Bates, or to Eastern Sound, a company wholly owned and operated by Gerry Bates. Section 19 of the conflict law prohibits municipal employees from participating in matters in which an immediate family member has a financial interest.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 461

IN THE MATTER
OF
CHARLES J. MANCA

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Mayor Charles J. Manca (Mayor Manca) pursuant to §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 July 14, 1992, 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, by Mayor Manca. The Commission has concluded its inquiry and, on December 10, 1992, found reasonable cause to believe that Mayor Manca violated G.L. c. 268A.

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

1. Mayor Manca was, during the time relevant, the Mayor of the City of Gardner. As such, Mayor Manca was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As mayor, Mayor Manca is required by law to sign all contracts of $5,000 or more. G.L. c. 43, §29.

3. Manca Brothers, Inc. is a Massachusetts corporation engaged in the business of trash removal and recycling. It is owned by Mayor Manca's brother, John F. Manca.

4. In or about August, 1991, the City of Gardner Board of Health issued a request for proposals for a container recycling contract (the Contract). Manca Brothers and one other vendor submitted bids. On August 28, 1991, the City's purchasing agent opened the bids and certified Manca Brothers as being the lowest qualified bidder. The value of the contract was approximately $6,000.[1/]

5. Once the Contract was awarded, it went through the customary city review and approval process. It was first signed by John F. Manca as president of Manca Brothers. It was then signed by the city auditor and purchasing agent. Finally, on September 17, 1991, Mayor Manca signed the Contract.[2/]

6. By affidavit dated October 30, 1992, Mayor Manca stated that he did not realize at the time he signed the Contract that it involved his brother's company. He also stated that he does not routinely look at the vendor's name or the vendor's signature on small contracts, since he feels assured by seeing the purchasing agent's signature that the vendor was the low bidder.

7. Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person knowing all of the facts to conclude that anyone 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.[3/]

8. By signing the Contract where it involved his brother's company, Mayor Manca created an appearance of impropriety, namely an appearance that his signing the contract may have been based in part on the fact that his brother had a financial interest in the contract. Therefore, Mayor Manca's signing the Contract under these circumstances would cause a reasonable person knowing all of the relevant facts to conclude that Mayor Manca's brother can unduly enjoy his favor in the performance of his official duties.[4/] Consequently, Mayor Manca violated §23(b)(3).[5/]

9. In his defense, Mayor Manca states that when he signed the contract, he was not aware that it involved his brother's company. Lack of knowledge, however, is not a defense to a §23(b)(3) violation. Section 23(b)(3) has a "knowingly or with reason to know" standard.[6/] In the Commission's view, Mayor Manca should have known what he was signing and who the vendor was. This is so for two reasons. First, the courts have made clear that a mayor's signing of a contract is not just a ministerial act. *Lumarose Equipment Corp. v. Springfield,* 15 Mass. App. Ct. 517, 520 (1983). It is intended to place a limit on the power of subordinate public officials in making contracts so as to unify control of the city's commercial transactions and guard against waste by departments of government. *Urban Transport, Inc. v. Mayor of Boston,* 373 Mass. 693 (1977). In other words, while one might not expect a mayor to read every word of what can often be a voluminous contract, one would expect a mayor to know what the

contract, one would expect a mayor to know what the contract was for, how much money was involved, and who the contractor was, before signing it. Second, unless a mayor takes the time to find out the nature of the contract and the identity of the vendor, he has no way of avoiding a conflict of interest situation such as occurred here. In short, it is incumbent on a mayor to establish a process by which any contracts or other particular matters in which he has a conflict of interest will be identified.

10. Mayor Manca also raises by way of defense the fact that on August 24, 1991, in a letter to the city clerk he disclosed the fact that Manca Brothers was in the fourth year of a five year contract to operate the city's landfill and that Manca Brothers was owned by his brother. Generally, an appropriate written disclosure to the city clerk does protect a municipal employee from a §23(b)(3) violation. A §23(b)(3) defense is not available here because to have been effective, the disclosure should have been made at the time Mayor Manca signed the Contract and it should have disclosed the particular circumstances of this contract, such as the nature and amount of the Contract and his brother's interest in the Contract. Indeed, even if the disclosure satisfied the §23(b)(3) requirements, it would not have avoided the conflict of interest problem where an immediate family member's financial interests were involved. In other words, in order for Mayor Manca to have made a proper disclosure, he would have had to have known that he was about to participate in a particular matter in which his brother had a financial interest. He would be barred from so participating under G.L. c. 268A, §19, cited above. Therefore, other than by abstaining, it would have been impossible for Mayor Manca to avoid a conflict of interest violation under these circumstances.

In view of the foregoing violation of G.L. c. 268A, §23(b)(3) by Mayor Manca, 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 Mayor Manca:

(1) that Mayor Manca pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §23(b)(3);[7] and

(2) that Mayor Manca 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: January 28, 1993

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[1] The exact value is indeterminable because the Contract was based on unit prices. In other words, Manca Brothers was to receive a certain amount each month for the rental of containers and then a certain amount on each occasion when it emptied and returned a container. The $6,000 is an estimate based on quotations requested and received by the Board of Health prior to the advertisement for bids, and actual costs.

[2] Pursuant to standard city procedures, there were actually six separate copies of the Contract, each one duly executed by all of the foregoing people.

[3] Section 23(b)(3) goes on to provide 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."

[4] As the Commission stated *In re Keverian*, 1990 SEC 460, 462, regarding situations where public officials have private dealings with people they regulate in their official capacities, "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." Here too, for the same reason, the appearance of impropriety unavoidably arises when a mayor signs a contract affecting an immediate family member, even if in fact no actual abuse occurs.

[5] The Commission is not aware of any evidence indicating (a) there was any personal gain to the Mayor in this matter, or (b) there was any harm to the City as a result of the Mayor signing the contract. Of course, no such findings are necessary to establish a violation of G.L. c. 268A.

[6] G.L. c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge an immediate family member has a financial interest. As a general rule, a municipal official signing a contract involving an immediate family member would violate §19. See, e.g., *In re Studenski*, Comm. Dkt. No. 211 (June 23, 1983). Here, Mayor Manca has asserted under oath that he did not have the requisite knowledge that the Contract involved his brother's company, but he concedes that he had reason to know.

[7] The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. Here,

however, the Commission has agreed to a relatively small fine because (1) this contract appears to have followed all the appropriate bid, review and approval procedures; (2) it is a relatively small contract in dollar amount; and (3) although not a defense, it is mitigating that Mayor Manca had disclosed in writing to the city clerk that his brother was the owner of Manca Brothers.

Chief Donald Eunson
c/o William J. Daily, Esq.
Sloane & Walsh
3 Center Plaza
Boston, MA 02108

PUBLIC ENFORCEMENT LETTER 93-1

Dear Chief Eunson:

As you know, the State Ethics Commission has conducted a preliminary inquiry regarding an allegation that, as the Town of Bedford Police Chief, you assisted your son in obtaining a bargain purchase of a police vehicle you were trading in to Natick Auto Sales, Inc. (Natick Ford). The results of our investigation (discussed below) show that the conflict of interest law may have been violated here. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not feel that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of your colleagues throughout the Commonwealth, the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. The Facts

1. At all relevant times, you were the Town of Bedford Police Chief.[1/] As such you were a "municipal employee" as defined in G.L. c. 268A, §1.

2. The Bedford Police Department (BPD) has a total of seven vehicles: four marked cruisers and three unmarked cars. Typically, the BPD's vehicles are only kept for two or three years, such that each year the BPD trades in three or four vehicles and purchases the same number of new vehicles.

3. As chief, you have the overall responsibility for these purchases, but, in fact, you have little, if anything to do with the details of the purchases. (As chief, you do sign all the necessary paperwork.) The details of deciding whether three or four cars will be traded in, what accessories will be transferred from old to new vehicles, and what, if any, new accessories will be purchased, are all left to Lt. Jack McGrath, who has worked for the BPD for some 26 years.

4. For the last several years, the BPD has both purchased its new vehicles from, and traded in its old vehicles to, Natick Ford. For several years, Natick Ford has been the winning bidder of the Greater Boston Police Council (GBPC) cooperative purchasing contract. The various towns that are a party to that contract can buy new vehicles, accessories and options at a set price that is very competitive. The contract also provides for set trade-in allowances, although those trade-in prices are subject to the vehicle's condition and mileage.[2/]

5. Generally speaking, Lt. McGrath dealt with Clay Chase of Natick Ford. At some point in the late spring of each year, Lt. McGrath would tell Chase how many new vehicles the BPD wanted to purchase. When those vehicles arrived at Natick Ford, Lt. McGrath would decide which accessories would be transferred from the old to the new vehicles and, what, if any, new accessories would be obtained. Lt. McGrath would turn in one used vehicle to Natick Ford at a time, transfer equipment if necessary to the new vehicle, and bring the new vehicle back to the BPD. This process would continue until all three or four new vehicles were received. Frequently, you, as chief, would accompany Lt. McGrath in turning in the used vehicles and picking up the new ones. On some of those occasions you would see Chase and talk to him. Those discussions were more social than business, however.

At the end of this process, Natick Ford would give Lt. McGrath a final bill which would reflect the net price the BPD owed Natick Ford after trade-in allowances were subtracted. Lt. McGrath would not negotiate regarding those trade-in allowances. According to Lt. McGrath, he took whatever Natick Ford allowed. He was aware that trade-in allowances were set out in the GBPC contract. However, he did not check to see what those prices were. He was not aware that those prices were subject to adjustment depending upon mileage and condition. Neither he nor

higher price if a trade-in was in particularly good condition.

6. In the late spring of 1991, the process as just described was followed. Thus, Lt. McGrath placed an order for three new vehicles from Natick Ford. As of approximately June 5, 1991, Lt. McGrath had turned in two used vehicles and picked up two new vehicles.

7. Shortly before June 5, 1991, your son David, who was at the time 29 years old and maintained his own separate residence, informed you that he would like to purchase your former chief's car which was being traded in.[3/]

At some point shortly before June 5, 1991, you talked with Chase (in person) and asked him whether you could buy back one of the BPD vehicles being traded in. He said that you could, but you would have to make your purchase from Natick Ford's wholesale division. Although your and Chase's memories are vague, your best recollection is that no price was discussed at that time.

8. On June 5, 1991, you, your son David and Lt. McGrath drove together in your police chief's car to Natick Ford. Lt. McGrath turned in that vehicle. Although memories of details are vague, according to David, he asked Chase how much it would cost to buy back your former chief's car. Chase said $600. There was no negotiating. David agreed to the price, wrote a check for that amount and gave it to Chase.[4/]

At the same time David was completing his purchase, Lt. McGrath was finalizing the details regarding the town's purchase of the three new vehicles. Thus, Chase gave Lt. McGrath the final bill for the three new vehicles.[5/] Thereafter, David drove your former chief's car home, and you and Lt. McGrath brought back the remaining new vehicle to the BPD.

9. According to Chase, your former chief's car was in very good shape. The combination of its condition, low mileage, and absence of police markings would have given it a retail value of $3,000 to $4,000, even as a former police car. According to Chase, however, Natick Ford does not sell these vehicles to the public. Rather, Natick Ford's practice is to quickly wholesale them, primarily to a company that, in turn, sells them to be used as cabs in New York City. That company looks for cars that have police packages, in particular the heavy suspension and vinyl seats which are prerequisites for them being used as cabs. According to Chase, although your former chief's car would have obtained an attractive price at retail, it was less desirable for Natick Ford's wholesale customers, because it lacked the requisite police package.

According to Chase, the only reason he was willing to sell the car to David was because David was your son. While, generally speaking, Natick Ford will not sell former police vehicles to the public, it will sell them to its client's employees and family members of those employees in order to maintain good customer relations.

Finally, according to Chase, Natick Ford only looks to make $200 to $400 in reselling these used police vehicles. When it would resell to a town employee, generally Natick Ford looked to make $200 over the trade-in allowance. Chase was not able to explain why Natick Ford charged your son only $100 over the trade-in allowance, although he noted that the $200 policy was an informal one, and at times they sought only to obtain $100 over the trade-in allowance. Chase provided us with information regarding four former police vehicles Natick Ford had resold to municipal employees in or about June 1991. That information indicates that in three of those four instances Natick Ford resold the vehicles for $200 over cost, and in the remaining situation for $100 over its cost.

10. The other two BPD vehicles traded-in on or about June 5, 1991, were a 1988 LTD cruiser with 93,666 miles and the 1990 LTD already described. These cars were wholesaled by Natick Ford as part of a lot of 23 vehicles for $34,000. (The price was for the entire lot. There was no individual breakdown.) Of those 23 vehicles, only three were 1989 or 1990 model years. Indeed, 14 of those vehicles were 1987 or older models. In any event, the average wholesale re-sale price of those cars was $1,478.

11. Under oath, both you and Chase stated that you did not attempt to place any pressure on Chase to give your son any preferential treatment in this sale. Furthermore, according to you and Chase, it has been a common practice for Town of Bedford employees to buy back town vehicles that are traded in to Natick Ford.

12. In the future, the town plans to sell its used vehicles at a public auction.

II. Discussion

As the Town of Bedford Police Chief, you have been a municipal employee for the purposes of the conflict of interest law, G.L. c. 268A. In the

Commission's view, the foregoing evidence supports a reasonable cause finding that you violated G.L. c. 268A as follows.

Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for anyone an item of substantial value not otherwise available to similarly situated people. The Commission has made clear that anything worth $50 or more is an item of substantial value. *Commission Advisory No. 8.* Chase's testimony suggests that Natick Ford generally looked to make a $200 mark-up on these police trade-ins. Indeed, three out of the four "comparables" showed $200 mark-ups. Consequently, it would appear that your son received at least a $100 discount by not having to pay that standard mark-up.

Even if, in fact, Natick Ford had a uniform practice of selling its trade-ins to public employees for $100 over the trade-in allowance, such sales would appear to involve substantial value in that the general public cannot buy them for those prices. The real value of the cars, as showed by Natick Ford's wholesaling of the 23-car lot in June 1991, is considerably more, on average, than would be reflected by either a $100 or $200 mark-up. Indeed, as that lot sale shows, the average per car profit is something more like $900 than $100 or $200.

We also note that as to this particular police car, it was described as being in very good condition. In fact, Chase's opinion was that at retail, even as a used police vehicle, it was worth $2,000 to $3,000. Therefore, for all the foregoing reasons, your son does appear to have received "substantial value" in this deal.

The next issue is whether you used or attempted to use your official position to obtain this "substantial value" for your son. There appears to have been no explicit connecting of your official position to the private accommodation. Compare *In re Singleton,* 1990 SEC 476 (fire chief violates §23(b)(2) by telling a builder that certain fire department inspections could take forever, while in the same conversation asking the builder to maintain its business with his son) and *In re Galewski*, 1991 SEC 504, 505 (building inspector knew or should have known that the effect of his conduct -- making requests during the course of inspections that a builder sell him a house that he could afford -- was to put pressure on the builder to make some sort of unwarranted private accommodation to the inspector). Your situation seems to fall short of the kind of overt pressure exemplified by *Singleton* and *Galewski*.[6] Nevertheless, the Commission has made clear that a public official may not solicit a vendor of his agency for a private commercial relationship without violating §23(b)(2). See, e.g., *Advisory #1.* This is because such situations are deemed to be inherently exploitable. Moreover, in your situation there was more than just the solicitation *per se* (even if there was no explicit pressure).

Thus, you made the initial inquiry during a visit to Natick Ford while official police business was being transacted. Later, you brought your son to Natick Ford in a police cruiser, and you were at least on the premises, if not actually accompanying your son, when he bought the trade-in, all while Natick Ford was completing its $45,000 transaction with the BPD. Moreover, it is clear that but for David being your son, Natick Ford would not have sold the car to David. Therefore, under all these circumstances, it seems fairly compelling that you used your position to obtain this accommodation.

Finally, there is no apparent justification for why your son should have been able to purchase such a car when members of the public could not. This is especially so where the purchase appears to have been at a discount. Therefore, the purchase appears to have involved an unwarranted privilege not available to similarly situated individuals. See, *EC-COI-86-14.*[7]

In summary, where the sale involved substantial value, where you used your position to effect the sale, and where the value was an unwarranted privilege not available to similarly situated people, there is reasonable cause to believe that you violated §23(b)(2).

Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, causing a reasonable person knowing all of the circumstances to conclude that anyone can unduly enjoy his favor in the performance of his official duties. Where you are responsible for your department's substantial contract with Natick Ford (an average of $50,000 a year), you should not get involved in seeking any kind of private commercial relationship with that vendor, even if the evidence was fairly convincing that no preferential treatment was provided. See, e.g., *In re Keverian,* 1990 SEC 460 (Speaker of the House violated §23(b)(3) by hiring his State House carpenter to do substantial work on his own residence, although work was paid for at the going rate); *Commission Advisory #1.* Here, the appearance of impropriety is exacerbated by the following factors: (1) you initiated the discussion, (2) you did so in the context of an official business transaction, (3) you accompanied your son and were at least on the premises (when the town's

town's purchase was being completed) when your son made his purchase, (4) there is considerable evidence to suggest that there was a substantial discount, and (5) the general public could not have purchased this car.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law. Although the Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A, the Commission chose to resolve this matter with a public enforcement letter for the following reasons: (1) you do not appear to have attempted to exert any pressure on Natick Ford to provide your son with preferential treatment; and (2) the practice of town employees purchasing used town vehicles when they are traded in by the town appears to be a systemic one, and the Commission has not previously made clear how the conflict of interest law applies in these situations.[8/] With those factors in mind, the Commission has chosen to resolve your situation with a public enforcement letter in order to communicate a clear message that department heads cannot buy back their agency's trade-ins from vendors with whom they have official dealings.

This matter is now closed.

Date: February 26, 1993

[1/] Indeed, you have been chief for 33 years.

[2/] For example, the 1991 contract provided that 1988 LTDs were to receive a trade-in allowance of $500. By comparison, a 1990 LTD had a trade-in allowance of $2,300, although an additional $1,000 could be allowed if the 1990 LTD had less than 60,000 miles.

[3/] This was a 1988 LTD with 50,438 miles at the time it was traded in. It had air conditioning and a radio. It was in good running condition. It was an unmarked car. It did not have the so called "police package" which includes a heavy duty suspension and vinyl seats. (Rather it had a regular suspension and cloth seats.) You had used this car for approximately one year when it was new. You then handed it down to the lieutenants who used it for a year. Thereafter, until it was traded in, it was used by the detectives. According to you, the mileage on the car did not reflect the numbers of hours on the engine because the lieutenants and detectives would frequently leave the car idling for long periods of time when they were on assignments.

There was testimony that the vehicle bought by your son required a new exhaust system shortly after it was purchased, that the electrical system has been a problem and that the automobile burns oil. Natick Ford sells the vehicles "as is" and the buyer accepts the risk that the vehicle may have problems.

[4/] The check is actually dated 6/4/91. David attributed that to an error on his part.

[5/] The final bill was for $44,190. This was a net bill, although it did not specify how much had been allowed for each trade-in. Chase informed us, however, that the trade-in allowance for the two 1988 LTDs was $500 each and the 1990 LTD was $2,700, the last being $400 over the GBPC set price. No one could satisfactorily explain why the 1990 LTD, which had only 49,069 miles on it, did not receive the $1,000 premium established by the GBPC contract. Indeed, no one could recall exactly how that trade-in allowance was determined.

[6/] Note that *Singleton* and *Galewski* involved disposition agreements in which the subjects paid fines of $1,000 and $1,250, respectively.

[7/] In *EC-COI-86-14*, cited above, dealing with a vendor's offer to sell law enforcement officers new cars at $100 "over invoice, "the Commission stated,

> A discount which is available to a discrete public group, such as law enforcement officers, raises a conflict under §23 because the discount is given solely because the recipients are public officials and for no other reason. *See EC-COI-83-4.* There is no statutory authorization or other justification for providing to law enforcement officers a privilege which is not available to private citizens or other public officials. The discount is unwarranted because it is a privilege "not properly available to similarly situated individuals, such as members of private groups and other public employees" [footnote omitted].

[8/] See, e.g., *In re U.S. Trust*, 1988 SEC 386 (systemic problem with banks wining and dining municipal treasurers); and *In re Whalen*, 1991 SEC 514 ("ticket fixing"), both of which were resolved with public enforcement letters.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 462

IN THE MATTER
OF
ROBERT BURGMANN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert Burgmann (Mr. Burgmann) 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 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. Burgmann. The Commission has concluded its inquiry and, on February 23, 1993, by a majority vote, found reasonable cause to believe that Mr. Burgmann violated G.L. c. 268A.

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

1. Mr. Burgmann was, during the time here relevant, the Sandwich Planning Board Chairman. As such, Mr. Burgmann was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. "RUCK" systems are nitrate reducing septic systems. SE RUCK Systems Inc. (SE RUCK) is a Massachusetts corporation licensed to design the RUCK system in Massachusetts for the patent holders. For several years, SE RUCK attempted to obtain the Department of Environmental Protection's (DEP) approval for installation of the RUCK system in Massachusetts.

3. During the time here relevant, Mr. Burgmann was an officer, director, employee and 20% owner of SE RUCK.

4. Ryder Woods Associates (Ryder Woods) was the developer of a proposed 76 single-family unit affordable housing subdivision in Sandwich.

5. On February 13, 1990, the Sandwich Zoning Board of Appeals (ZBA) granted Ryder Woods a comprehensive permit with 29 conditions to build the above-mentioned development. Due to the fact that the proposed project was located in a zone of contribution to a public water supply; that the project itself would not be serviced by town water but by individual wells; and concerns regarding nitrate loading created by this development, the ZBA imposed condition #26 which provided as follows:

> Should DEP authorize the utilization of a septic system designed to reduce nitrate loading[1/] prior to the completion of the development then the applicant shall be required to install these new type systems. No septic system shall be required to be removed after it has been installed.[2/]

6. On January 29, 1991, Mr. Burgmann, as Planning Board Chairman, wrote a memorandum on Planning Board stationery to the Board of Health (BOH) Chairman stating:

> This letter is to inform the BOH that the DEP has recently approved a nitrate reducing system. Condition #26 of the Ryder Woods Associates comprehensive permit requires all homes in the development shall be serviced by a nitrate reducing septic system. Therefore, the Planning Board requests, that the BOH require the developers to adhere to this Condition.

7. Depending upon the number of RUCK systems that would have been required to have been installed at the Ryder Woods project, the average fee per unit that would have been generated for engineering services by SE RUCK would have been between $200 and $500.

8. Mr. Burgmann, as a 20% shareholder, would ultimately have been a beneficiary of the fees generated by this project.

9. In a March 26, 1991 letter to Ryder Woods, the ZBA stated that it was not requiring Ryder Woods to install the RUCK system.

10. Section 19 of G.L. c. 268A, except as permitted by paragraph (b),[3/] prohibits a municipal employee from participating[4/] as such an employee in a particular matter[5/] in which to his knowledge he has a financial interest.

11. The determination or decision by the ZBA as to whether it would require the installation of a nitrate reducing septic system in the Ryder Woods affordable housing project in accordance with condition #26 was a particular matter in which the town had a direct and substantial interest.

12. Mr. Burgmann, by writing the January 29, 1991 memorandum to the BOH advocating installation of the RUCK system, was personally and substantially involved as the Planning Board Chairman in the just described particular matter. Therefore, he participated in that matter.

13. Mr. Burgmann, as an officer, director, employee and 20% owner of SE RUCK, had a financial interest in seeing the RUCK system installed in the Ryder Woods affordable housing project. Mr. Burgmann was aware of that financial interest.

14. Therefore, by writing the January 29, 1991 memorandum to the BOH, Mr. Burgmann participated as chairman of the Planning Board in a particular matter in which he had a financial interest, thereby violating §19.

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

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

(2) that Mr. Burgmann 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: March 15, 1993

[1/] "Nitrate loading" refers to nitrates produced by septic systems which can pollute the ground water.

[2/] Mr. Burgmann did not participate in the drafting of this condition nor is there any evidence that he did anything which would have influenced the ZBA to impose this condition. The project was modified and as reduced would generate 7.8 P.P.M. of nitrates, which was 56% higher than levels recommended by the Cape Economic and Development Commission and the Cape Cod Commission.

[3/] None of those exemptions applies here.

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

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 463

IN THE MATTER OF ROBERT DONALDSON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert Donaldson (Mr. Donaldson) 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 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. Donaldson. The Commission concluded its inquiry and, on January 26, 1993, voted to find reasonable cause to believe that Mr. Donaldson had violated G.L. c. 268A.

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

1. Mr. Donaldson served as the Tolland Health Agent from 1985 until 1991. Mr. Donaldson was appointed to this position by the Tolland Board of Selectmen, who are also the town's board of health. At the times here relevant, the position of health agent was a part-time position, which was unpaid except for the receipt of certain fees, including primarily those described below. Mr. Donaldson was also a Tolland Selectman and Board of Health member from 1983 to

1989. These positions were part-time and only nominally paid. As the Tolland Health Agent and as a selectman and board of health member, Mr. Donaldson was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. During the times here relevant, Mr. Donaldson was self-employed as a real estate broker and was the owner, with his wife, of the real estate firm Misty Mountain Realty (Misty Mountain), which was then located in Tolland. During the period here relevant, Misty Mountain was the only real estate firm located in Tolland and did business in Tolland and neighboring communities.

3. As Tolland Health Agent, Mr. Donaldson's primary duty was to witness percolation tests (perc tests) of land to determine whether the land was suitable for the installation of a subsurface sewage disposal system (septic system) and was thus buildable. As the town's perc test witness, Mr. Donaldson's role was that of an observer to make sure that the right property was tested and that the engineer or sanitarian doing the test conducted it properly according to Title V (the State Sanitary Code) and local ordinances. For each perc test he witnessed, Mr. Donaldson was paid a fee by the landowner or other person having the test conducted. The witness fee ranged from approximately $50 to approximately $100 during the time that Mr. Donaldson was health agent. This fee was paid to Mr. Donaldson regardless of the outcome of the perc test.

4. As a real estate broker, it is Mr. Donaldson's established practice to advise any potential client seeking to list land in Tolland or elsewhere for sale with Misty Mountain that a successful perc test of the land is required before he can represent it to potential buyers as buildable land.[1/] While he was the Tolland Health Agent, Mr. Donaldson routinely gave such advice to potential clients and then witnessed perc tests of the land as health agent. Mr. Donaldson would then, if the tests were successful, accept the listing of many of these properties with Misty Mountain. In addition, from time to time, Mr. Donaldson would accept a listing of land with Misty Mountain prior to the land being perc tested, and would then offer the land for sale subject to it passing a perc test. Subsequently, Mr. Donaldson would, as health agent, witness the perc testing of the land.

5. Accordingly, while he was the Tolland Health Agent, Mr. Donaldson engaged in a repeated pattern or practice of witnessing perc tests on land that was already listed for sale with his private real estate firm and of witnessing perc tests on land with the knowledge or expectation that the land would be subsequently listed for sale with his firm if it perced successfully.[2/] In many cases, Mr. Donaldson's firm brokered the sale of the land in question and received a broker's commission.[3/] Thus, for example:[4/]

(a) in or about June 1987, Mr. Donaldson as health agent witnessed successful perc tests on four Tolland lots (10 Colebrook River Rd., EO-19, TS-20 and TT-39) that were already listed with Misty Mountain (Misty Mountain brokered the sales of the first three lots in 1987 and the sale of the fourth lot in 1988);[5/]

(b) in or about June 1987, Mr. Donaldson as health agent witnessed successful perc tests on five Tolland lots (OPT-4, TF-5, ON-28, TT-30 and TT-32) and then, in July 1987, Misty Mountain entered into listing agreements for those lots (Misty Mountain brokered the sales of these five lots in 1987);

(c) on or about August 10, 1987, Mr. Donaldson as health agent witnessed successful perc tests on a Tolland lot (8 Burt Hill Rd.) and, on or about August 28, 1987, Misty Mountain entered into a listing agreement for the property (Misty Mountain brokered the sale of this lot in 1988);

(d) in or about June 1988, Mr. Donaldson as health agent witnessed successful perc tests on lot SV-17 in Tolland, which was already listed for sale with Misty Mountain (Misty Mountain brokered the sale of this lot in 1988); and

(e) in or about July 1989, Mr. Donaldson as health agent witnessed successful perc tests on as many as five lots on Clubhouse Road in Tolland owned by Nick Bonadies (Bonadies) that Bonadies either had already listed for sale with Misty Mountain or as to which Mr. Donaldson and Bonadies had an understanding that they would be listed for sale with Misty Mountain (Misty Mountain brokered the sales of two of these lots in 1989).[6/]

6. Except as otherwise permitted by that section, G.L. 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. None of the exceptions to G.L. c. 268A, §19 applies in this case.

7. The perc tests of the land referred to above were particular matters within the meaning of G.L. c. 268A.[7/] Mr. Donaldson had a financial interest within the meaning of G.L. c. 268A[8/] in the perc tests of land that was either listed for sale with Misty Mountain or which he had an understanding or a reasonable expectation would be listed for sale with Misty Mountain, if it perced successfully, in that Mr. Donaldson stood to sell and receive commissions on land which passed a perc test. Mr. Donaldson was aware of this financial interest at the time he witnessed the perc tests of the land referred to above. While Mr. Donaldson did not conduct the perc tests himself, his witnessing of those perc tests as the official representative of the town board of health was personal and substantial participation in the tests for the purposes of G.L. c. 268A.

8. Thus, by witnessing, as the Tolland Health Agent, perc tests of land which was already listed for sale with Misty Mountain or which he had an understanding or expectation would be so listed if it perced successfully, as described above, Mr. Donaldson participated officially, as health agent, in particular matters in which he had a financial interest. In so doing, Mr. Donaldson violated §19.

In view of the foregoing violation of G.L. c. 268A, §19 by Mr. Donaldson, 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. Donaldson:

(1) Mr. Donaldson will pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §19;

(2) Mr. Donaldson will pay to the Commission the sum of one thousand dollars ($1,000.00) as restitution of the perc test witness fees he received in violation of G.L. c. 268A, §19; and

(3) Mr. Donaldson waives 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 24, 1993

[1/] It is also Mr. Donaldson's practice to advise persons seeking to buy land through Misty Mountain to have the land perc tested as a condition of purchase.

[2/] Not all of the perc tests witnessed by Mr. Donaldson on land listed for sale with Misty Mountain, or expected to be listed for sale with Misty Mountain if the land perced successfully, were successful.

[3/] Generally, the commission received by Misty Mountain was 10% of the selling price.

[4/] This Disposition Agreement imposes sanctions only with regard to Mr. Donaldson's actions in witnessing perc tests since 1987, as the Commission's statute of limitations, 930 CMR 1.02(10)(f), bars the Commission's sanctioning of violations which occurred more than six years ago.

[5/] No broker's commission was received by Misty Mountain for the sale of lot EO-19, which was purchased by Mr. Donaldson and his wife.

[6/] As the Tolland Health Agent, Mr. Donaldson received approximately $1,000 in fees for witnessing the perc tests on the lots referred to in paragraph 5.

[7/] Section 1(k) of G.L. c. 268A, in pertinent part, defines "particular matter" to include any "... application, submission ... decision, determination, finding ..."

[8/] "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 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.*

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 464

IN THE MATTER
OF
ROLAND SEGUIN

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Roland Seguin (Mr. Seguin) pursuant to §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 23, 1993, 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. Seguin. The Commission has concluded its inquiry and, on March 30, 1993, found reasonable cause to believe that Mr. Seguin violated G.L. c. 268A.

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

1. Mr. Seguin was, during the time relevant, an elected member of the Town of Fairhaven Tourism Committee. As such, Mr. Seguin was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Fairhaven Tourism Committee (Committee) was established by the Fairhaven Board of Selectmen in 1984 to promote tourism in Fairhaven.

3. During the time here relevant, Mr. Seguin was a novelty items salesperson. The companies Mr. Seguin represented sold various items including commemorative plates. Mr. Seguin received, on average, a 10% commission on any sales he made.

4. In 1984, the Committee was looking to raise enough funds to create a map and brochure of the town. Mr. Seguin proposed the Committee sell a series of commemorative plates to raise the necessary funds.

5. Mr. Seguin, sometimes alone, and at times in conjunction with another Committee member, made each decision to purchase the plates and pay the bills on behalf of the Committee.

6. In each of the years 1984 through 1988 and in 1991, the Committee purchased a total of approximately $6,000 in plates from companies Mr. Seguin represented.

7. Mr. Seguin, as a salesperson for the companies, earned approximately $600 in commissions on these sales.

8. Except as otherwise permitted by that section,[1/] General Laws c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he has a financial interest.

9. The decisions to purchase the plates on behalf of the Committee were particular matters.[2/]

10. Because Mr. Seguin, either with another Committee member or individually as a Committee member, made those purchasing and payment decisions, he participated[3/] in these particular matters.

11. Mr. Seguin knew he had a financial interest in these particular matters because he stood to make a 10% commission on each such sale.

12. Therefore, by participating in the purchasing and payment decisions as described above, Mr. Seguin repeatedly participated in particular matters as a Committee member in which to his knowledge he had a financial interest, thereby violating §19.

13. In Spring 1992, the Fairhaven Selectmen removed Mr. Seguin from the Fairhaven Tourism Committee.

14. The Commission has no evidence to suggest that Mr. Seguin was aware that his actions violated G.L. c. 268A when he participated in the commemorative plate purchases.[4/]

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

(1) that Mr. Seguin pay to the Commission the sum of seven hundred and fifty dollars ($750) as a civil penalty for violating G.L. c. 268A, §19;

(2) that Mr. Seguin disgorge the economic benefit he received by violating G.L. c. 268A, §19, namely the $600 in commissions he earned; and

(3) that Mr. Seguin 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 9, 1993

[1/] None of the exceptions applies.

[2/] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other

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

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

4/ Ignorance of the law is no defense to a violation of G.L. c. 268A. *In re Doyle*, 1980 SEC 11, 13. See also, *Scola v. Scola*, 318 Mass. 1, 7 (1945).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 465

IN THE MATTER
OF
ANTHONY BENEVENTO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Anthony Benevento (Benevento) pursuant to §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 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 Benevento. The Commission has concluded its inquiry and, on March 30, 1993, found reasonable cause to believe that Benevento violated G.L. c. 268A.

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

1. Benevento was, during the time relevant, an elected member of the Board of Assessors of the Town of Swampscott (Board). As such, Benevento was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Board is composed of three elected members responsible for the valuation of real estate for tax purposes.

3. In 1984, Benevento purchased a house at 86 Blodgett Avenue in Swampscott. The house had an ocean view.

4. In 1985, Peter McCarriston (McCarriston) was interested in purchasing 84 Blodgett Avenue, which was at the time a vacant lot situated between Benevento's house and the ocean.

5. Based upon a letter from an attorney, Benevento believed the parcel at 84 Blodgett Avenue was an unbuildable lot.

6. McCarriston asked his friend, Attorney William Dimento (Dimento), if the lot was buildable. Dimento researched the history of the parcel and determined that the lot was grandfathered and therefore buildable.

7. Later in 1985, McCarriston purchased the lot and obtained the appropriate building permits. McCarriston built a house on the lot which partially blocked Benevento's view of the ocean from his house.

8. During construction of McCarriston's house and for the next few years thereafter, discussions occurred between Benevento and McCarriston concerning Benevento's access to the beach over McCarriston's property. McCarriston's and Benevento's versions differ as to whether McCarriston promised Benevento beach access rights. Ultimately, McCarriston did not deed a right of way to Benevento.

9. Dimento advised McCarriston throughout these right-of-way discussions.

10. At all relevant times herein, Thomas Belhumeur (Belhumeur) was a close friend and business associate of McCarriston. Benevento was aware of McCarriston's and Belhumeur's friendship. Belhumeur joked about McCarriston's house blocking Benevento's ocean view at Rotary Club meetings.1/

11. In the fall of 1990, Patriot Properties, a professional appraisal firm, re-evaluated the approximately 5,500 Swampscott properties for tax purposes.

12. Patriot Properties gave a copy of the preliminary valuations to the Board on October 9, 1990. Those valuations generally reflected an across-

the-board decrease (averaging approximately 10%) in residential property values.

13. On October 23, 1990, the Board voted to accept the valuations.

14. Later on October 23, 1990, Benevento unilaterally increased the valuation of McCarriston's 84 Blodgett Avenue house from $602,100 to $694,600 and increased the valuation of Dimento's 64 Bay View Drive house from $371,600 to $414,600.

15. On October 27, 1990, Benevento increased the valuation of Belhumeur's 423 Puritan Road house from $443,000 to $461,700.

16. Benevento only increased four of the 5,500 valuations.[2/]

17. Although the procedures were not in writing, the Board's standard policy at the relevant time required a majority vote to change any valuation. The other assessors were not aware of the increases Benevento made to the valuations.

18. On November 27, 1990, Patriot Properties submitted the valuations to DOR.

19. After the tax bills with the final valuations were released in January 1991, the increases Benevento made to the valuations were discovered.

20. In February 1991, McCarriston, Dimento and Belhumeur applied to the Board for and obtained (with Benevento abstaining) abatements of the above increases.

21. In July 1991, Benevento, Dimento and Assessor Ernest Mazola met to discuss the above increases. Dimento and Mazola testified that at this meeting, Benevento stated, in effect, that he had made the increases because he wanted to punish McCarriston and Dimento; and he would do it again if he had the opportunity. Benevento denies making this statement.

22. On March 1, 1992, Benevento resigned from the Board.

23. On June 2, 1992, DOR released a report concerning their investigation of the matter. The report found that although it could not say the values as increased by Benevento resulted in overvaluations, the unprofessional manner in which the changes were carried out, at the very least, gave the appearance of impropriety.

24. G.L. c. 268A, §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 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, position or undue influence of any party or person.

25. On each occasion he increased the valuations of McCarriston's, Dimento's and Belhumeur's properties, Benevento acted in a manner which would cause a reasonable person with knowledge of all the relevant circumstances to conclude that he could be improperly influenced in the performance of his official duties by his private relationship with these individuals, thereby violating G.L. c. 268A, §23(b)(3). This conclusion is based on two factors: (1) he substantially deviated from standard procedure - - he neither obtained a majority vote authorizing the changes, or, for that matter, even notified the other Board members of what he was doing; and (2) at the time he made these changes, Benevento was on bad terms with McCarriston, Dimento and Belhumeur. This conclusion of undue influence is underscored by the fact that these valuations went up significantly when there was, with the exception of one other property, an across-the-board decrease in residential valuations.

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

(1) that Benevento pay to the Commission the sum of five thousand dollars ($5,000) as a civil penalty for the violations of G.L. c. 268A, §23(b)(3);

(2) that Benevento 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 28, 1993

[1/] Benevento, McCarriston, Dimento and Belhumeur were all Rotary Club members.

[2/] Benevento also unilaterally increased the valuation of Peter Beatrice Jr.'s 39 Salem Street house from $192,500 to $214,700. Although Beatrice's son owns an insurance agency which competes with Benevento's insurance agency, Benevento's motivation for increasing the father's property valuation is unclear.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 466

IN THE MATTER
OF
DOMINIC DIVIRGILIO

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Dominic DiVirgilio (DiVirgilio) pursuant to §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. 268A, §4(j).

On April 13, 1992, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into alleged violations of G.L. c. 268A, by DiVirgilio. The Commission has concluded its inquiry and, on April 13, 1993, by a unanimous vote, found reasonable cause to believe that DiVirgilio violated G.L. c. 268A, §§23(b)(2) and 23(b)(3).

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

I

1. DiVirgilio was, during the time relevant here, the Commissioner of the Dedham Department of Public Works. As such, DiVirgilio was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In November 1990, DiVirgilio partially prepared, approved and submitted through channels for payment an $825 invoice from John's Autobody. The November 14, 1990 invoice stated that John's Autobody repaired the rear quarter panels and store boxes on DPW truck #8 (a Ford utility vehicle used by the mechanics). In accordance with the invoice and a payment voucher signed by DiVirgilio, the Town of Dedham paid John's Autobody $825.

3. John's Autobody performed no work to DPW truck #8. In a February 1990 interview with Commission staff, DiVirgilio asserted that he mistakenly filled out the invoice, and that the work was actually done to DPW truck #9 (the sewer department's flush truck). John's Autobody, however, performed no work to truck #9.

4. 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 of substantial value. By securing for John's Autobody $825 for work to a DPW vehicle that had not been performed, DiVirgilio violated G.L. c. 268A, §23(b)(2).

II

5. Since 1984, DiVirgilio has exclusively hired John's Autobody to perform autobody repairs to DPW trucks. DiVirgilio has never sought price comparisons from other shops for this work. In calendar year 1989, John's Autobody received $4,844.00 from the Town of Dedham for the repair of six DPW vehicles. In calendar year 1990, John's Autobody received $3,298.30 from the Town of Dedham for the repair of seven DPW vehicles. Prior to John's receiving payment, DiVirgilio reviewed each of its invoices and approved them for payment by endorsing a payment voucher.

6. In July 1990, John's Autobody restored a 1969 Ford Galaxy owned by DiVirgilio. The value of the work has been estimated to be between $1,500 - $2,500. DiVirgilio states he paid $1,500 cash to John's Autobody for the work. Neither DiVirgilio, nor John's Autobody, possesses a contemporaneously produced written document, such as a receipt or an invoice, that substantiates the $1,500 payment. Mr. DiVirgilio's credit union account, however, shows a $1,000 withdrawal on July 17, 1990 and John's Autobody's bank records indicate a $1,000 cash deposit on July 18, 1990.

7. General Laws c. 268A, §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. The

Commission has consistently interpreted §23(b)(3) as forbidding a public official from engaging in private dealings with individuals whom they officially regulate. See, e.g. *In re Pezzella*, 1991 SEC 523; *In re Keverian*, 1990 SEC 460; *In re Garvey*, 1990 SEC 478. Such private dealings create the appearance that the government vendor will give the regulating official private services (here, discounted autobody work) it would not otherwise provide, and that the vendor will receive preferential treatment (here, DPW autobody business) from the official. Thus, by having John's Autobody restore his Ford Galaxy, DiVirgilio violated §23(b)(3).

III

8. Since 1984, DiVirgilio has purchased diesel fuel for the DPW exclusively from the Prevett Oil Company. DiVirgilio has never placed the DPW's diesel fuel business out to competitive bid, or ever sought price comparisons from other fuel suppliers. The DPW purchased $9,892.08 worth of fuel and services from Prevett Oil in FY 1990, $8,092.56 in FY 1991, and $6,522.10 in 1992.

9. The owner of Prevett Oil, Anthony Prevett, and DiVirgilio are former classmates. They belong to the same social organization and have vacationed together at Mr. Prevett's Florida home.

10. Chapter 5 of the Dedham town by-law requires all town purchases exceeding $4,000 to be awarded pursuant to a written bid following an advertisement in a local newspaper.

11. As discussed earlier, §23(b)(2) prohibits a municipal official from using his official position to secure for another an unwarranted privilege of substantial value. By purchasing diesel fuel totalling over $25,000 over a three year period from a friend's company in contravention of competitive bid laws, DiVirgilio violated §23(b)(2).

IV

12. In December 1991, DiVirgilio allowed the Struzziery Construction Company to use the DPW cement mixer on a private job it was performing in the Riverdale section of Dedham. The cement mixer remained in the Struzziery Construction Company's possession until February 1993. The construction company paid no rental fee to the DPW.

13. The DPW purchased the cement mixer from the Parker - Danner Company for $1,700 in 1984. The Parker - Danner Company currently rents a similar model for $255 per week, or $550 per month.

14. By allocating public resources for the private use of the Struzziery Construction Company, DiVirgilio used his official position to secure for that company an unwarranted privilege of substantial value in violation of §23(b)(2).

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

(1) that DiVirgilio pay to the Commission the sum of $2,000 as a civil penalty for violating §23(b)(2) by knowingly, or with reason to know, using his official position to secure for John's Autobody an unwarranted privilege of substantial value, to wit, an $825 payment for work it did not perform; and

(2) that DiVirgilio reimburse the Town of Dedham $825 for the payment made to John's Autobody; and

(3) that DiVirgilio pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2) by purchasing diesel fuel for the DPW from the Prevett Oil Company without following proper bidding procedures while, at the same time, he had a private social relationship with the owner of Prevett Oil; and

(4) that DiVirgilio pay to the Commission a sum of $500 as a civil penalty for violating G.L. c. 268A, §23(b)(2) by allowing the Struzziery Construction Company the private use of the DPW cement mixer; and

(5) that DiVirgilio 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 29, 1993

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 468

IN THE MATTER
OF
ROBERT COLUMBUS

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Robert Columbus (Mr. Columbus) pursuant to §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 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 Columbus. The Commission has concluded its inquiry and, on March 30, 1993, found reasonable cause to believe that Columbus violated G.L. c. 268A. On May 21, 1993, the Commission's Enforcement Division issued an Order to Show Cause, commencing adjudicatory proceedings. The Order to Show Cause alleged that Columbus violated G.L. c. 268A, §19 by issuing building permits to himself or his sons. On May 25, 1993, the Enforcement Division and Columbus informed the Commission that they proposed to resolve the matter.

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

1. At all relevant times, Columbus was employed as a building inspector for the Town of Stoneham. As such, Columbus was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Columbus' official duties as the Stoneham Building Inspector include the issuing of building permits for construction being done in the town and ensuring all work performed pursuant to such permits complies with local building codes.

3. At all relevant times, Columbus owned property at 1 Brookbridge Road in Stoneham, his son Stephen Columbus (Stephen) owned Stoneham properties at 25 Washington Street and 76 Williams Street, and his son Robert Columbus (Robert) owned Stoneham property at 86 Pleasant Street.

4. On the following dates, and at the places indicated, Columbus, in his capacity as Stoneham Building Inspector, issued the following building permits:

(a) a November 6, 1987 building permit to Stephen for 25 Washington Street for a re-roof;

(b) a November 6, 1987 building permit to Robert for 86 Pleasant Street for a kitchen addition;

(c) an April 24, 1990 building permit to Stephen for 76 Williams Street for a re-roof and interior alterations; and

(d) an August 29, 1991 building permit to a contractor for Columbus' property at 1 Brookbridge for a re-roof.[1/]

5. Section 19 of G.L. c. 268A, except as permitted by paragraph (b),[2/] prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or an immediate family member has a financial interest.

6. The decisions to issue the building permits described in paragraph 4, above, were particular matters.

7. As set forth in paragraph 4, above, Columbus participated as a building inspector in those particular matters by issuing the building permits.

8. Either Columbus or one of his sons had a financial interest in each of the foregoing building permits.

9. Columbus, by issuing the building permits to himself or his sons, as set forth in paragraph 4, participated in his official capacity in particular matters in which he knew he or an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.[3/]

10. In connection with the above-described conduct, the Commission has found no evidence of corrupt intent.[4/]

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

(1) that Columbus pay to the Commission the sum of seven hundred and fifty dollars ($750) as a civil penalty for violating G.L. c. 268A, §19 as stated above;

(2) that Columbus will act in conformance with the requirements of G.L. c. 268A, §19 in the future; and

(3) that Columbus 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: May 26, 1993

[1/] The Order to Show Cause included a November 19, 1990 building permit to Robert for 86 Pleasant Street for a sunroom, woodburning stove and temporary kitchen. The Commission has decided not to pursue this matter based on evidence that Columbus was out of state when the permit issued and that his secretary typed his name in the signature space in his absence.

[2/] None of those exemptions apply here.

[3/] Columbus was also involved in a significant controversy in the spring of 1992, concerning a certificate of occupancy for property owned by Stephen at 76 Williams Street. On January 2, 1992, Columbus obtained a §19(b)(1) exemption from the town administrator to participate as building inspector in an addition Stephen was constructing at the above property. (Section §19(b)(1) provides that it shall not be a violation of §19 "if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.") Subsequently, questions arose concerning the size of the addition and whether the structure violated zoning regulations. On February 24, 1992, the town administrator wrote a memorandum to Columbus stating, "Any future requests for building permits involving your immediate family (spouse, child, mother, father, sisters and brothers) will be referred to this office because you are the only Building Inspector for the Town of Stoneham. I have previously felt that having only one Building Inspector would necessitate your issuance of permits for everyone including family members. Upon reflection and advice, I will appoint an Acting Building Inspector to issue future building permits to resolve any question for the potential of either a conflict of interest or the applicability of a concept of 'necessity' resulting from one Building Inspector." On March 7, 1992, a local inspector appointed by the town administrator denied Stephen's application for a certificate of occupancy and issued a cease and desist order. According to Columbus, on April 7, 1992, Columbus, relying on advice he received from private legal counsel indicating he could do so, signed a certificate of occupancy for 76 Williams Street but did not physically deliver the certificate to Stephen. The town administrator suspended Columbus for planning to issue the certificate of occupancy in violation of his directive. On April 14, 1992, Columbus signed a letter to the town administrator stating, "I am revoking the Occupancy Permit in recognition of the fact that its issuance was inappropriate given your legitimate contrary instructions as Town Administrator not to be involved in this matter involving my son and not on the specific merits as to whether a Certificate of Occupancy should be issued." Columbus contends that he signed the letter in order to get his job back and without the benefit of counsel.

Although the Order to Show Cause included the above matter, the Commission has agreed to the proposal of the Enforcement Division and Columbus not to pursue the matter further because Columbus showed sensitivity to the conflict issue by originally seeking and obtaining a §19(b)(1) exemption from his appointing authority, and because the town administrator and Columbus immediately took action to remedy the situation. The Commission also notes that Columbus acted in reliance on private legal advice (albeit incorrect), although we point out, as we have done in the past, that if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the opinion must be from town counsel, in writing and made a matter of public record, and forwarded to the Commission for review pursuant to 930 CMR 1.03(3). *In re Lavoie*, 1987 SEC 286, 287.

[4/] Corrupt intent is not an element of a §19 violation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 469

IN THE MATTER OF LEONARD MACH

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Leonard Mach (Mach) pursuant to

§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 November 5, 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 Mach. The Commission has concluded its inquiry and, on April 27, 1993, found reasonable cause to believe that Mach violated G.L. c. 268A.

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

1. Mach was, during the time relevant, the Massachusetts Treatment Center at Bridgewater (MTCB) Acting Administrator. He served in that position from February 1991 to February 1992. As such, Mach was a state employee as that term is defined in G.L. c. 268A, §1.

2. Mach's son, Gary Mach (Gary), became employed at MTCB as a Mental Health Case Worker in 1987. (The Commission knows of no evidence indicating Mach played a role in the hiring of his son.)

3. In February 1991, Mach was appointed MTCB Acting Administrator. As such, Mach became Gary's appointing authority.

4. In October 1991, the Department of Personnel Administration (DPA) authorized MTCB to certify two Mental Health Case Worker positions as temporary certified civil employee positions.[1/] Gary was only a provisional civil service employee at the time. Therefore, he was interested in obtaining one of these appointments.

5. A Selection Committee (Committee) interviewed each applicant and then recommended Gary and another candidate for the appointments. In doing so, the Committee found that the other six candidates for the position, all of whom had obtained higher scores on the DPA exam than Gary, failed to meet the requirements for the appointment.

6. After receiving the recommendations from the Committee, Mach signed the Entrance Requirement Verification Forms indicating that all the candidates, with the exception of his son and the other candidate recommended for the appointments by the Committee, failed to meet the entrance requirements. Additionally, Mach also signed (as the appointing authority) civil service forms indicating Gary and the other candidate recommended by the Committee were selected for the Mental Health Case Worker appointments.

7. Mach did not inform his appointing authority that he would be signing these documents concerning his son's appointment.

8. Section 6 of G.L. c. 268A, except as otherwise permitted in that section,[2/] provides in relevant part that a state employee is prohibited from participating as such an employee in a particular matter in which he knows his immediate family[3/] has a financial interest.[4/]

9. The documents Mach signed associated with his son's appointment involved determinations which were particular matters.[5/]

10. Because Mach signed these documents as his son's appointing authority, he participated[6/] in these particular matters.

11. Mach knew that his son had a financial interest in obtaining the appointment because he knew when he signed the above forms, that his son was likely to be laid off if he did not receive certified temporary employee status.

12. Therefore, by participating in the appointment process as described above, Mach participated in particular matters in which to his knowledge his son had a financial interest, thereby violating G.L. c. 268A, §6.[7/]

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

(1) that Mach pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §6;[8/] and

(2) that Mach 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: June 30, 1993

[1/] There are three different types of employees: (1) permanent civil service employees; (2) temporary certified civil employees; and (3) provisional employees. A provisional employee has less seniority than a temporary certified civil service employee, and would be released earlier if layoffs occurred.

[2/] None of the exceptions applies here.

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

[4/] Section 6 goes on to state that a state employee, whose duties would otherwise require him to participate in such a particular matter, must advise the official responsible for his appointment (the appointing official) and the Commission in writing of the nature and circumstances of the particular matter and fully disclose the financial interest. Pursuant to §6, the appointing official is, upon receipt of the employee's written disclosure, required to either assign the matter to another employee, assume responsibility for the matter himself, or make a written determination that the financial interest in issue is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee, in which case the employee is permitted to participate in the matter. A copy of the appointing official's determination must be filed with the Commission by the appointing official, who must also forward a copy of the determination to the disclosing employee.

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

[6/] "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).

[7/] It could be argued that Mach's participation was relatively ministerial in that he was only, in effect, rubber-stamping decisions made by the Committee. In fact, however, the DPA would not have accepted the job status changes without Mach's signature. Therefore, his was a substantive, and not just a reporting role. See, e.g., *In re Muir*, 1987 SEC 301 (state employee who participates in son's promotion by signing off and forwarding along the chain of command a recommendation made by subordinates violated §6).

[8/] While the Commission can impose up to a $2,000 fine for each violation of §6, it has determined that a small fine here properly reflects the mitigating factors. Thus: Mach appears to have tried to distance himself from the decision-making process when his son was involved, the Committee made the key appointment decisions, and there is no evidence that Mach attempted to influence the Committee's decision-making process. That it has insisted on a public resolution and fine reflects the emphasis the Commission places on proper compliance with §6's disclosure and exemption provisions. These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure -- particularly that the determination be in writing and a copy filed with the Commission -- are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision. See *In re Muir*, supra at 302.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 473

IN THE MATTER
OF
RUSSELL SMITH

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Russell Smith (Smith) pursuant to §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 22, 1993, 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 Smith. The Commission has concluded its inquiry and, on October 19, 1993, found reasonable cause to believe that Smith violated G.L. c. 268A.

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

1. Smith was, during the time relevant, the Chairman of the Gay Head Board of Selectmen

(Selectmen). As such, Smith was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. Smith's brother, Hollis Smith (Hollis), also lives in Gay Head.

3. On July 1, 1992, the federal Bureau of Alcohol, Tobacco and Firearms (ATF) executed a warrant to search Hollis's home. The search resulted in the seizure of narcotics and guns, and criminal charges being brought against Hollis.

4. The Selectmen serve as the police commissioners for the town. As such, the Selectmen participate in hiring, firing and disciplinary actions concerning police personnel and have the authority to investigate, in conjunction with the police chief, police action where necessary.

5. Shortly after the ATF search, Smith indicated to others in town, including the other two selectmen and the police chief, that he felt a certain Gay Head police officer and the Island Drug Task Force improperly initiated the action against his brother.

6. On July 13, 1992, some Gay Head residents complained at the Selectmen's meeting about the ATF search.

7. On August 10, 1992, the Selectmen met in executive session. Minutes from that meeting indicate that Smith asked the police chief for an update concerning the ATF search of Hollis's home and an explanation as to why a certain police officer was chosen to represent the town in the matter. The minutes also indicate that Smith wanted to know who issued the warrant in the case and how ATF knew there was a .222 caliber firearm in Hollis's home. According to the minutes, the other two selectmen felt that it was not the selectmen's place to question the police concerning the validity of the search. The discussion therefore ended.

8. After the meeting, town counsel told Smith there was a conflict of interest if he participated in matters involving the ATF search. Smith was advised to avoid any matter involving the search warrant executed at Hollis's home. Smith agreed to have no further involvement. The selectmen took no further action concerning the matter.

9. Except as otherwise permitted in that section, §19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge an immediate family has a financial interest.[1/] The potential or actual controversy concerning the ATF search and any subsequent action the selectmen acting as police commissioners may have had to take concerning their police officers' involvement in that action was a particular matter.[2/] As Hollis was facing pending criminal charges as a result of the ATF search, he had a financial interest in the Selectmen's actions concerning the search because his pending criminal court case could have been affected (either by discipline taken against the officer involved or the questioning of the validity of the process). At all relevant times, Smith was aware of his brother's financial interest. Smith participated[3/] in the matter by questioning, as a selectman, the ATF search and process which resulted in his brother facing criminal charges.

10. By acting as described above, Smith participated as a selectman in a particular matter in which to his knowledge his brother had a financial interest. Therefore, Smith violated §19.

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

(1) that Smith pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §19;

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

(3) that Smith 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 19, 1993

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

[2/]G.L. c. 268A, §1(k) defines "particular matter" as any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge,

accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 474

IN THE MATTER
OF
WILLIAM REINERTSON

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and William Reinertson (Reinertson) pursuant to §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 23, 1993, 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 Reinertson. The Commission has concluded its inquiry and, on October 19, 1993, found reasonable cause to believe that Reinertson violated G.L. c. 268A.

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

1. Reinertson was, during the time relevant, the elected Town of Hopkinton Tree Warden.[1/] As such, Reinertson was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As the tree warden, Reinertson was responsible for awarding contracts for tree work within the town, supervising the performance of those contracts and authorizing payment for work performed.

3. At all relevant times, Reinertson independently owned and operated two tree maintenance and landscaping companies, McDonald Tree Service and McRein Tree Service.

4. Reinertson, in his capacity as Hopkinton Tree Warden, awarded the following contracts to the above companies:

a. FY 1987: McDonald Tree Service, $3,226;[2/]
b. FY 1988: McDonald Tree Service, $4,416;
c. FY 1989: McDonald Tree Service, $6,794;
d. FY 1990: McDonald Tree Service, $7,835; and
e. FY 1991: McRein Tree Service, $6,691.

5. Reinertson, as the Hopkinton Tree Warden, was responsible for supervising whatever work was performed by McDonald Tree Service and McRein Tree Service pursuant to these contracts.

6. On behalf of McDonald Tree Service and McRein Tree Service, Reinertson prepared and sent the town bills for the above work. The bills were on McDonald Tree Service stationery and listed a Natick, Massachusetts address. The owner of the property at the Natick address was a laborer for Reinertson who had no financial interest in either McDonald Tree Service or McRein Tree Service.

7. As tree warden, Reinertson verified that work was done pursuant to the above contracts, authorized payment of the bills he had himself submitted and forwarded those bills to the selectmen for payment. The town thereafter sent checks to the Natick address. The owner of the property at that address contacted Reinertson when the checks arrived. Reinertson picked up the checks, endorsed them on the back using the name of the laborer and deposited them into his own personal checking account.

8. By using a Natick mailing address to bill for work performed by McDonald Tree Service and McRein Tree Service, Reinertson deliberately concealed the fact that he had a financial interest in those tree department contracts.

9. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he has a financial interest.

10. The decisions to award the tree department contracts, as well as the subsequent determinations that the work was properly done and that the bills should be paid as described above, were particular matters.

11. As set forth above, Reinertson participated as Hopkinton Tree Warden in those particular matters by awarding, supervising and authorizing payment of those contracts. Reinertson, as the owner of the companies, had a financial interest in each of these contracts.

12. Reinertson, by awarding, supervising and authorizing payment of the above contracts, participated in his official capacity in particular matters in which he knew he had a financial interest, thereby violating G.L. c. 268A, §19.

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

(1) that Reinertson pay the Commission the sum of ten thousand dollars ($10,000.00) as a civil penalty for the course of conduct violating G.L. c. 268A, §19 as stated above; and

(2) that Reinertson 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 19, 1993

[1/] Reinertson lost his bid for re-election in 1992.

[2/] Due to a lack of complete records, the contract amounts are estimates.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 480

IN THE MATTER
OF
STANLEY BATES

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Stanley Bates (Bates) pursuant to §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 October 19, 1993, 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 Bates. The Commission has concluded its inquiry and, on December 7, 1993, found reasonable cause to believe that Bates violated G.L. c. 268A.

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

1. Bates was, during the time relevant, the Town of Easton Police Chief. As such, Bates was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. During the time relevant, Bates' son Gerry owned and operated Eastern Sound & Security Company (Eastern Sound) located in Easton. Eastern Sound is in the business of automobile window tinting and selling and installing car accessories. Gerry also sold, as an independent agent, cellular phones.[1/]

3. In 1992 and 1993, Bates, acting as police chief, authorized and approved the purchase of and payment for $1,469 worth of goods and services for the town from Gerry.[2/]

4. The Commission has no evidence to suggest that Bates was aware that his actions violated G.L. c. 268A when he participated in the purchase of goods and services from his son.[3/]

5. Except as otherwise permitted by that section,[4/] General Laws c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he or an immediate family member has a financial interest.

6. The decisions to purchase the goods and services on behalf of the town were particular matters.[5/]

7. Because Bates made those purchasing and payment decisions, he participated[6/] in these particular matters.

8. Bates knew his son had a financial interest in those particular matters because he stood to make a profit on each such sale.

9. Therefore, by participating in the purchasing and payment decisions as described above, Bates repeatedly participated in particular matters as police chief in which to his knowledge his son had a financial interest, thereby violating §19.

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

(1) that Bates pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §19;

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

(3) that Bates 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: December 8, 1993

[1/] Gerry received a $150 commission for each telephone number sold.

[2/] Gerry (either independently or through Eastern Sound) provided the following tinting, telephone and radio repair services to the Easton Police Department or the town:

(a) October 8, 1992, $175.00 for window tinting;

(b) October 9, 1992, $175.00 for window tinting;

(c) November 2, 1992, $175.00 for window tinting;

(d) November 21, 1992, $75.00 for the labor involved in removal and reinstallation of a car telephone;

(e) April 5, 1993, $180 for 3 cellular telephones;

(f) May 8, 1993, $40.00 for cellular telephone, battery and charger;

(g) May 9, 1993, $169 for AM/FM Cassette ($99.00), mounting kit ($10.00), antenna ($10.00) and labor ($50.00);

(h) May 9, 1993, $40.00 battery charger; and

(i) May 30, 1993, $440.00 for 3 bag phones (3 @ $60.00 each = $180) and 3 battery chargers (3 @ $40.00 = $120.00), 1 mobile phone ($100.00) and 1 battery charger ($40.00).

[3/] Ignorance of the law is no defense to a violation of G.L. c. 268A. *In re Doyle*, 1980 SEC 11, 13. See also, *Scola v. Scola,* 318 Mass. 1, 7 (1945).

[4/] None of the exceptions applies.

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

[6/] "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).

State Ethics Commission
Advisory Opinions
1993

Summaries of Advisory Opinions
Calendar Year 1993

EC-COI-93-1 - Firefighters may not use official resources to promote vendor sales of a product, unless the use is authorized by a bylaw, or is an explicit contract provision, or the municipality is provided with reasonable reimbursement. Firefighters may not use their official position or title to endorse a product on behalf of a vendor.

EC-COI-93-2 - A non-profit corporation which will enter a lease with a county to establish a hospital on county land is not an instrumentality of the county for purposes of G.L. c. 268A, §1(c).

EC-COI-93-3 - The "Rule of Necessity" allows two municipal planning board members to participate in a particular matter in which they would otherwise be prohibited from participating by §19(a). Generally, the members would be prohibited from taking any action in which a business organization, for which the officials are serving as trustees, has a financial interest; however, the "Rule of Necessity" may be invoked since, without the two members' participation, the planning board would be unable to take any action on the matter.

EC-COI-93-4 - A Selectman may hold two additional municipal positions if the town's other Selectmen designate the two positions as being of "special municipal employee" status and approve his holding of the other positions, as required by §20(d). Alternatively, the Selectman must comply with the conditions of the Selectman's exemption.

EC-COI-93-5 - An agent of the Division of Registration assigned to the Pharmacy Board of Registration may be employed as a registered pharmacist outside of his normal state working hours, provided that he does not serve as the principal pharmacist for the pharmacy and will therefore not have dealings with any agency of the Commonwealth. Under §6, as an agent for the Division, he may not participate in inspections or investigations of the pharmacy by which he is privately employed, or of any of that pharmacy's geographic competitors.

EC-COI-93-6 - Charitable solicitations by police officers and police benevolent associations are primarily regulated by G.L. c. 41, §98E, but are further restricted by the "appearances" section of the conflict of interest law. G.L. c. 268A §23(b)(2) prohibits police officers, when soliciting for charitable contributions, from exploiting their official position, or implying that good or bad consequences might result from a decision whether or not to donate; it also prohibits police officers from appearing in uniform while soliciting, using a municipal or other official seal for the solicitation, or using other official resources (e.g., telephones, copying machines, paid time) to further the solicitation.

EC-COI-93-7 - Section 20 prohibits a full-time municipal highway department employee from holding the elected office of Alderman-at-Large, where as Alderman-at-Large he will have either regulatory control or will participate in the activities of the municipal highway department.

EC-COI-93-8 - G.L. c. 268A §3 will not permit a trade organization to provide legislators with an all-expenses-paid day at a resort, if the legislators pay a charitable contribution as an entrance fee, because the charitable contribution is not earmarked towards and does not cover the expenses of the event. Donations by manufacturers or suppliers which will be used to finance the event will violate §3 if each manufacturer, at the time of its donation decision, knows that legislators or other public officials will be attending the event, if the manufacturer has an interest in legislative business and if its contribution amounts to $50.00 or more per invited guest.

EC-COI-93-9 - A former state employee cannot receive private compensation in connection with particular matters in which he participated as a state employee. Where a company provides services that the former employee is prohibited from providing himself, mere investment income is not "compensation" unless the individual is active in the business. Such "compensation" (i.e., the proceeds from the prohibited sources) must be segregated from any pool of money which is used to pay the individual his salary or to determine his share of profits. Finally, fellow officers and shareholders of a corporation are not "partners" of the former state employee for purposes of §5(c), unless there is reason to disregard the corporate entity.

EC-COI-93-10 - Section 7 prohibits a full-time state employee from being employed by a private vendor pursuant to the vendor's contract with the same agency by which the state employee is employed.

EC-COI-93-11 - Generally, a state Legislator may, upon the request of a public works contractor, recommend various community organizations for the

contractor to work with on construction mitigation issues. Similarly, the Legislator may recommend that the contractor make financial contributions to community organizations as part of its construction mitigation measures. The Legislator may *not* take such actions if he or a member of his immediate family have a financial interest in the construction project, the mitigation efforts, or the community organizations; or if the Legislator is an officer, trustee, partner, board member or employee of an involved community organization.

EC-COI-93-12 - The "municipal exemption" to §4 prohibits a paid municipal employee who is also an employee in the Governor's Office from voting on or acting on any matter which is within the "purview" of the Governor's Office. Since the Governor's purview encompasses the entire Executive Branch, the purview limitation will restrict the municipal employee to a large degree. The municipal employee may wish to relinquish his municipal salary, as the municipal exemption restricts unpaid municipal employees only in the narrow circumstances when he acts as agent for a municipal agency or municipality. Thus, an unpaid municipal employee who is also a state employee will be subject to the "purview" limitation only where he acts as an agent for the municipality or a municipal agency.

EC-COI-93-13 - The "Rule of Necessity" allows a Selectman to vote on the issuance of a liquor pouring license, notwithstanding the Selectman's own financial interest. The Rule was applicable because a vacancy on the Selectmen's Board could not be filled in time for the Board to comply with a statutorily mandated time limit for acting on the matter. In a separate question, a Selectman whose partner is landlord to a liquor license applicant may act on the license application, provided that the issuance or denial of the license would not have a reasonably foreseeable impact on the partner's financial interests.

EC-COI-93-14 - The Commission re-affirms its conclusion that $50.00 is the threshold to be used by public employees in determining whether an item is "of substantial value" for purposes of G.L. c. 268A §3 and §23.

EC-COI-93-15 - A Town Selectman, who is also part owner of an engineering and surveying business, is prohibited by §17(a) from receiving compensation related to the preparation of documents which will be submitted to Town agencies. The Selectman is also prohibited, by §17(c), from placing his professional seal on documents which will be submitted to Town agencies, or otherwise acting as agent for clients appearing before Town boards.

EC-COI-93-16 - A former state manager who participated in the development of a bid process is prohibited by §5(a) from receiving private compensation, related to a contract awarded under the bid process, even though the contract was awarded several months after the employee left state service.

EC-COI-93-17 - A Selectman who is also a teacher cannot re-negotiate a Town Manager's contract (where re-appointment or conditions upon which a Manager can continue employment are at issue), but he may participate in the evaluation of the Manager's performance (where the Manager's re-appointment is not at issue).

EC-COI-93-18 - A full-time municipal employee is not ordinarily eligible for "special municipal employee" status, even where his hours are not 9:00 a.m. to 5:00 p.m. A full-time "regular" municipal employee who does not fit all of the requirements of §20(b) may not hold a second position with the same municipality.

EC-COI-93-19 - A full-time municipal employee may provide services to more than one municipal agency, when all duties to be performed are considered part of a single employment contract. If the employee is elected Selectman, she will [1] be required to obtain an exemption under §20(d) if she wishes to receive compensation for her appointed position; and [2] be unable to participate in any matters relating to her employment as Assistant to the Selectmen's Board. Further, if she is elected Selectman, her future re-appointment as Assistant must be approved by a vote of Town Meeting members, under the restrictions of §21A.

EC-COI-93-20 - An appointed Town Sewer Commissioner, who also owns several undeveloped acres of land on which he is planning to build residential units, has a financial interest in potential new sewer regulations and therefore may not participatein adopting the new regulations unless he receives prior, written approval from his appointing authority, as required by §19(b)(1).

EC-COI-93-21 - Members of school councils, established by the Education Reform Act of 1993, are considered "municipal employees" within the definition of G.L. c. 268A §1(g). Elected members of school committees may also serve on school councils without violating §17(c), §19, or §20. Note that, in the

instance where a school committee member is appointed rather than elected, the member would have to receive a §20(b) or §20(d) exemption in order to also serve as a member of a school council. Principals and teachers may serve as members of school councils without violating §20.

EC-COI-93-22 - Members of a Governor's advisory council are not considered "state employees" or "special state employees" for the purposes of the conflict of interest law. Members of the council principally serve to provide the Governor with outside viewpoints and advice, and do not perform tasks ordinarily expected of state employees.

EC-COI-93-23 - A municipal agency may enforce, as personnel policy, ethics standards that are more stringent than G.L. c. 268A.

EC-COI-93-24 - G.L. c. 268A and c. 268B would regulate the private law practice of a potential appointee to the State Ethics Commission. The potential appointee would be unable to take any official action on matters involving clients represented by her private law firm. Fellow members and associates of her firm are not "partners" for the purposes of §5(d), unless there is reason to disregard the corporate entity.

EC-FD-93-01 - Two county Deputy Sheriffs were properly designated as "public employees" required to file annual statements of financial interest.

CONFLICT OF INTEREST OPINION
EC-COI-93-1

FACTS:

You are the Chief of a municipal fire department in the Commonwealth. Two trade shows are held in Massachusetts for Fire Chiefs and are sponsored by the New England Association of Fire Chiefs, Inc. and the New England Division of the International Association of Fire Chiefs. These shows include over 100 vendor companies who exhibit fire apparatus, fire fighting equipment, emergency medical equipment, fire dispatching equipment and ambulances.

After a community receives delivery of a piece of new or refurbished equipment, the vendor may request that the equipment be displayed at a trade show. It is common practice for a Fire Chief to transport the equipment to the show and to use on-duty firefighters who remain at the show with the equipment. The vendor does not provide travel expenses or reimbursement for this service.

QUESTION:

Does G.L. c. 268A permit firefighters to lend official resources to a vendor for sales purposes or to provide an endorsement of a particular vendor?

ANSWER:

Firefighters may not use official resources (such as equipment and personnel) to promote vendor sales of a product, unless the use is authorized by a bylaw, or is an explicit contract condition, or the municipality is provided with reasonable reimbursement. Firefighters may not use their official position or title to endorse a product on behalf of a vendor.

DISCUSSION:

As a Fire Chief, you are a municipal employee for purposes of the conflict law. G.L. c. 268A, §23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using his official position to secure for himself or others an unwarranted privilege of substantial value[1/] which is not available to similarly situated individuals. The Ethics Commission has consistently interpreted this section to forbid public officials from using public resources to further private interests. See *Public Enforcement Letter 92-3* (public employee who used public resources to assist private non-profit organization violated §23(b)(2)); *EC-COI-93-6; 92-28; 92-12; Public Enforcement Letter 89-4; In re Buckley*, 1983 SEC 157. You will be using your official position to secure an unwarranted privilege for the vendor if you permit a private vendor, for sales purposes, to utilize fire department equipment and personnel at no charge.

We note that §23(b)(2) will not be violated if the Town, in its purchase contract with the vendor, expressly agrees to provide the equipment for display purposes. See *EC-COI-87-37* (state contract which included vendor discount to all state employees did not violate §23); compare *EC-COI-88-5* (contract conditions are not adequate for purposes of compliance with G.L. c. 268A, §3). Presumably, the contract price will reflect this provision. Further, if the vendor agrees to reimburse the municipality for the use of official resources and personnel, including a reasonable rental for use, the vendor will not receive an unwarranted privilege. Similarly, if the municipality passes a bylaw or ordinance permitting such a practice, §23 will not be violated. See *EC-COI-91-13; Public Enforcement Letter 90-4.*[2/] Finally, if the trade show was arranged so that the exhibit of municipal equipment was in a separate area from the vendor booths and exhibits, we would not have the same concerns under §23(b)(2).

Section 23(b)(2) also prohibits a public employee from using his official title or position to endorse a private commercial product. In applying §23(b)(2) to an endorsement by a public employee, the Commission considers whether the activity or conduct in question exceeds the scope of a public employee's official duties, "and whether the activity or conduct benefits a private or personal, as distinct from a public interest." *EC-COI-84-127; 83-82.* In *EC-COI-84-127*, the Commission concluded that a judge could not use his position in a paid advertisement for an oil company because the advertisement was not within the official duties of his office and the use of his name clearly benefitted a private interest. The Commission stated:

> ... the lending of the prestige of your office to the Corporation for the purpose of selling its products constitutes an unwarranted privilege to the Corporation. The appearance of your name and identity in a commercial might, in the eyes of some viewers, imbue the corporation's product with a degree of credibility it might not otherwise have.

The Commission's position 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-92-28* (Commission used these regulations for guidance in interpreting §23 within the context of private solicitation by a public official); *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. Particularly, 5 CFR 2635.702(c) prohibits a federal employee from using or permitting the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise except under certain limited circumstances.[3/]

Therefore, §23(b)(2) will prohibit you from using your official title in an advertisement which promotes a vendor's products or from serving as a representative in a vendor's booth at the trade show.[4/] This section will not prohibit you from responding to questions from your colleagues, speaking at a seminar concerning your experiences with a certain piece of equipment, or writing a letter of reference as required by another government agency's contract specifications. If you are asked to give a presentation you should take care that you do not provide an endorsement of a vendor or use your title and the prestige of your office to further the vendor's products.[5/]

DATE AUTHORIZED: January 26, 1993

[1/] The Commission has defined "substantial value" to be $50 or more. See *Commonwealth v. Famigletti*, 4 Mass. App. 584, 587 (1976); *Commission Advisory No. 8.*

[2/] If the use of official resources is warranted, issues may develop under §23(b)(3). Section 23(b)(3) provides that a municipal employee may not act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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-89-16* (past friendship relationship); *88-15* (private dealings with development company); *85-77* (private business). You may wish to file a full written disclosure with your appointing authority prior to participating in a matter affecting a vendor whom you are assisting. See *EC-COI-91-3; 90-2; 89-19.*

[3/] For example, an endorsement may be permissible if the agency's statutory mission includes assisting in the promotion of a product or service, such as the Department of Commerce, which is charged with assisting the export activities of United States companies, promoting United States products abroad. The other narrow exemption would permit an official, such as the Director of the Environmental Protection Agency, to send a letter to a company stating that the company was in compliance with EPA regulations. 5 CFR 2635.702(c), examples 2, 3.

[4/] This prohibition on endorsements applies to you even if the use of official resources, as discussed above, is warranted.

[5/] These examples are intended to be representative of situations that you may encounter and do not constitute an all-inclusive list. You are advised to contact the Commission for further advice if you question how §23 applies in a particular situation.

CONFLICT OF INTEREST OPINION
EC-COI-93-2

FACTS:

The ABC Hospital is a chronic disease hospital owned and operated by a county. A state statute authorized and directed the County Commissioners to construct a hospital for "the treatment of persons ill with tuberculous and other contagious diseases." Subsequent Acts provided that the hospital could treat patients who were able to pay the County and patients from outside of the County, provided that priority be given to "poor patients who are under the care of public health departments within the County," and permitted the hospital to also care for individuals with cancer and chronic diseases, including mental disorders. By statute, the hospital has a Board of Directors composed of the three County Commissioners, the County Treasurer, the County public health officer and six residents of the County appointed by the Commissioners.

In the late 1980's, the County Commissioners decided to explore the possibility of terminating county management of the Hospital because of significant financial losses which the Hospital had sustained, as well as the difficulty in keeping abreast of the complex health care issues and health financing issues today. However, the County wanted to assure that rehabilitation care would continue to be available to the residents of the County.

The County hired a consultant to determine the feasibility of developing a private rehabilitation hospital. When the consultant determined that such a hospital was feasible, it prepared a determination of need application, financed by the County, to submit to

the Department of Public Health. (The County hopes to be reimbursed the expense of the application at some time by the non-profit organization). A determination of need was granted for construction of a 60-bed comprehensive inpatient and outpatient rehabilitation facility on the existing Hospital site.

The County Commissioners were authorized to negotiate with a non-profit organization which was organized to establish a private, non-profit rehabilitation hospital. The County Commissioners were authorized to enter a Ground Lease, as well as other instruments to lease or sell the County buildings. The lease is "for the purpose of establishing on the ground-leased parcel a new hospital ... to provide special care, rehabilitation and other medical services." The lease is required to contain provisions giving priority in admitting patients to residents of the County and its neighboring counties, permitting members of the County Commissioners to participate in meetings of the non-profit Board as non-voting attendees, and providing that space in the new facility be made available to state, county, municipal, and other government entities to provide medical and social services to the population, if necessary. The County may subordinate its interest in the Ground Lease to the financing institution to facilitate the ability of the non-profit organization to obtain financing.

With the impetus of the consultant, a non-profit organization was created. The purpose of the non-profit is "to establish and maintain a special care and rehabilitation hospital on a tract of land owned by the County and to provide such other medical services and activities as are related to the needs and purposes of the hospital."

According to the non-profit organization's bylaws, the Board of Directors will include two residents of the County, one resident or employee of three neighboring counties, three designees of area hospitals, and seven designees of the consultant. The trustees may, by majority vote, elect other trustees or fill vacancies. The President, Treasurer and Clerk of the organization are elected annually by and from the trustees. The County Commissioners made recommendations concerning probable candidates to serve on the initial Board, but the County did not appoint any members of the first board.

The County Commissioners and the non-profit organization have entered an Agreement to Ground Lease which memorializes the relationship of the parties. The non-profit organization will develop, construct and operate a new rehabilitation hospital and in the process may demolish or renovate existing buildings or construct a new physical facility pursuant to the terms of the ground lease. If existing buildings are required to be renovated or demolished the County may either execute a quitclaim deed or lease the buildings on mutually acceptable terms. It is anticipated that the buildings will be conveyed or leased for nominal consideration.

The County has the right to review and approve the final design plans, including exterior design, placement of parking areas, utilities, height design and siting of every element of the hospital and landscaping. The County has approval rights of all architects, engineers and general contractors on the site. The County has the right to be notified before the non-profit applies for licenses, permits and approvals and the County will assist in obtaining such licenses and permits, if the non-profit agrees to pay the County's out of pocket costs. The County has the right to approve the terms of the mortgage obtained for the project financing. The County will not guarantee or underwrite any obligation of the non-profit corporation.

Members of the Board of County Commissioners will sit as non-voting attendees at Board meetings in order to monitor progress on construction and the transfer of patients to the new non-profit hospital as a result of the County's decision to close the current Hospital. The non-profit corporation will also use its best efforts to lease space to the County for the County's provision of medical services.

Under the lease, the consent of the County Commissioners must be obtained to any sub-lease, assignment, or transfer but consent will not be withheld if the transfer is to another non-profit. The County has right of first refusal if the hospital is sold. The County Commissioners have the right to approve any sale. At the termination of the lease, title to all physical structures, other improvements and all appurtenances will revert (with or without cost) to the County. The initial ground rent will be based upon the fair market value of the premises as determined by a disinterested professional appraiser or such lesser rent as the County may agree to.

The non-profit Board must receive the consent of the County Commissioners (which consent will not be withheld if another non-profit is involved) prior to merging, combining or affiliating with a person or organization; entering into a partnership or joint venture with a person or organization; transferring all or substantially all of the assets of the non-profit to a

person or organization; altering or amending the non-profit's organizational documents so that voting control is modified; changing its corporate membership or trustees so that voting control is altered. The County Commissioners have the right to consent to any transfer of the non-profit's rights under the lease. The non-profit may not amend the determination of need without the consent of the County Commissioners.

QUESTION:

Under G.L. c. 268A will the non-profit corporation be considered to be a "county agency"?

ANSWER:

No.

DISCUSSION:

The issue before the Commission is whether the new non-profit corporation, which will be the lessee under the Ground Lease with the County, is a "county agency" for purposes of G.L. c. 268A. G.L. c. 268A, §1(c) defines " county agency" as "any department or office of county government or any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G.L. c. 268A, §1(c).

Thus, we are required to consider whether the non-profit organization is an "instrumentality" of the County. The Commission does not consider the corporate structure of an entity to be dispositive of the issue. Rather, we weigh such factors as: whether an 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.*

Recently, the Massachusetts Appeals Court has had the opportunity to interpret the term "instrumentality" in conjunction with analogous language within the definition of "municipal agency" and employed an analysis similar to that of the Ethics Commission. *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421 (1992). In reaching the conclusion that a regional school district is an instrumentality of each municipal member under G.L. c. 268A, §1(f), 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, that the municipalities delegate their statutory educational duties to the school district, that the municipalities played a substantial role in the creation of the district and in the district's financial matters, and that the municipalities fund the district. *Id.* at 427. The Commission's recent jurisdiction opinions have expressly followed the Appeals Court's analysis in the *McMann* case. *EC-COI-92-40; 92-27; 92-26.*

Applying this precedent to the non-profit corporation, we conclude that the corporation lacks sufficient indicia of a government entity to be considered a "county agency." Initially, in order to determine jurisdiction, we have examined the presence or lack of a statute, rule, regulation, or other direct agency action in furtherance of its statutory mandate in the creation of a non-profit organization. See *EC-COI-91-12* (agency passed resolution to assist in creating non-profit organization); *90-3* (primary purpose on non-profit to provide fundraising support to University furthering legislatively mandated purpose); *88-24* (non-profit created by the agency to administer its statutory mandate). The non-profit hospital corporation was not established by statute, rule or regulation but rather by private parties. The County Commissioners were authorized to enter a lease with a non-profit corporation, not specifically to create the corporation. In the past, we have been reluctant to find jurisdiction where a non-profit corporation is created in response to a private contract or other private action. See *EC-COI-88-19* (no jurisdiction where stems from a private contract, notwithstanding the participation of governmental officials in organizational efforts); *84-65* (no jurisdiction where entity created pursuant to terms of a private will); compare *EC-COI-90-7* (government creation found where there was indirect legislative authorization to formulate a trust agreement).

However, we note that the County created the need for the non-profit corporation, in a preliminary management agreement with the consultant, had substantial input into the initial determination to create the non-profit corporation and had obtained the determination of need so that the project would be viable. We also note that the non-profit corporation is assisting the County in fulfilling its statutory mandate to provide medical care to County residents, although the scope of the new hospital's services is significantly greater than the County's mandate, which is to provide chronic care. See *EC-COI-84-76,* n.7 (although a non-profit corporation was chartered by act of General

Court, its purpose is not an essentially governmental function). Thus, the factors relating to governmental creation and purpose are not clear in these circumstances; however, we do not find it necessary to resolve these issues in light of the conclusions we reach under the remaining factors.

We do not find that the corporation will expend or receive county funding. The corporation is required to seek private financing to build the new hospital and will pay a fair market rental under the lease. Although the County may subordinate its interest in the ground lease to the private financing institution, it will not guarantee or underwrite any of the new hospital's obligations. See *EC-COI-84-76,* n.7 (factor in not finding jurisdiction was that non-profit required to raise own revenues and may not pledge Commonwealth's credit). The County also expects to be reimbursed for expenses it has accrued to date in obtaining the determination of need.

Finally, the factor which we consider to be the most significant basis of our conclusion in this case is the lack of county governmental control over the new hospital. See *EC-COI-92-1; 91-12.* The Commission has traditionally examined the nature of governmental control exercisable over an entity's internal operations through government participation in the selection of the non-profit's Board of Directors or the presence of a bloc of government employees on the Board who are capable of controlling Board actions. See e.g., *EC-COI-91-12* (government presence on Board not sufficient to control Board decisions and no jurisdiction found); *90-3* (potential for government control of Board decisions); *89-1* (same); *89-24.* While there is governmental regulation by the County over the non-profit corporation by virtue of the lease arrangement, the purpose of this oversight is to protect the County's investment and rights under the contract and is not control over Board decisions or supervision over the administration and operation of the hospital. Under the hospital corporation bylaws, the County Commissioners may participate at Board meetings only as non-voting attendees and no county employee may serve as a Board member during county employment. Unlike the current County Hospital Board, the County Commissioners did not select the initial new hospital Board and do not have the authority to select future members. See *EC-COI-88-19; 84-76,* n.7.

In conclusion, the scope and nature of control exercisable by the County, and the lack of public funding, are sufficient to find that the non-profit corporation is not an instrumentality of the County and thus not a "county agency" for purposes of G.L. c. 268A, §1(c).

DATE AUTHORIZED: January 26, 1993

CONFLICT OF INTEREST OPINION EC-COI-93-3*

FACTS:

You and Joseph F. Zgrodnik[1/] are both elected members of the Hadley Planning Board (the Board). Cumberland Farms, a convenience store chain, has applied to the Board for a special permit approving its site plan to expand its existing use on a parcel of land it owns in Hadley. The Board may issue the special permit only if four of its five members so vote. G.L. c. 40A, §9, tenth paragraph.

Both you and Dr. Zgrodnik are also members of the Board of Trustees of Hopkins Academy (the Academy). The Academy owns land immediately abutting the subject Cumberland Farms parcel.

QUESTION:

May you and Dr. Zgrodnik participate in the Board's consideration of and vote on this special permit?

ANSWER:

Yes, by virtue of the rule of necessity.

DISCUSSION:

Section 19(a) of G.L. c. 268A, in relevant part, generally prohibits a municipal employee from participating in a particular matter in which he knows that he, or a business organization in which he is serving as "trustee," has a financial interest. As Board members, you and Dr. Zgrodnik are "municipal employees."[2/] The application for this special permit and the Board's decisions about it are "particular matters."[3/] The Academy is a "business organization"[4/] of which you and Dr. Zgrodnik are trustees.

In previous opinions, we have presumed that an abutter of a parcel that is the subject of a particular matter has a financial interest in that matter. See *EC-*

COI-89-33; 84-96.[5/] Here, the Academy is an abutter, and you and Dr. Zgrodnik are among its trustees. Therefore, in the absence of evidence that rebuts this presumption by showing clearly that the Board's decision will not (positively or negatively) affect the value of the Academy's abutting land, §19 would ordinarily prohibit both of you from participating in this matter.[6/]

Here, however, the Board may issue the special permit only if four of its five members so vote. G.L. c. 40A, §9, tenth paragraph. If neither you nor Dr. Zgrodnik may participate, the Board would be unable to issue the special permit.[7/] Thus, we must consider whether the "rule of necessity" allows both of you to participate despite §19.

The courts have established the rule of necessity to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice, or interest, when no other official or agency is available to make the decision. See, e.g., *Mayor of Everett v. Superior Court*, 324 Mass. 144, 151 (1949); *Moran v. School Committee of Littleton*, 317 Mass. 591, 593-94 (1945). Otherwise, the legislative purpose in having an important public decision made would be frustrated. See 3 K. Davis, *Administrative Law Treatise* §19:9 (2d ed. 1980); 38 A. Cella, *Mass. Practice: Administrative Law and Practice* §321 (1986).

We have previously applied the rule of necessity to G.L. c. 268A. E.g., *EC-COI-92-24; 82-10; 80-100*. See *Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that rule would apply to G.L. c. 268A in proper circumstances). In each case, we have stressed the narrow circumstances in which the rule of necessity may be invoked: for example, that no other qualified tribunal can be found, and that the governmental body's inability to act is not due in part to the mere absence or illness of a member.

We have also sometimes referred to the body's inability to obtain a "quorum," usually a majority of its members, because in the circumstances we have so far considered, that was the number of members required for the body to act. See *EC-COI-92-24; 82-10*. Here, we must instead consider a statute that requires a "super-majority" to accomplish one of the possible outcomes.[8/]

The very case in which the Supreme Judicial Court formulated a rule of necessity in Massachusetts involved just such a "super-majority" requirement. In *Moran v. School Committee of Littleton*, 317 Mass. 591 (1945), a teacher challenged his removal, asserting that two of the three voting School Committee members were disqualified because they had earlier testified at the Committee's removal hearing. The statute required a two-thirds vote of the entire Committee for removal. The court held that the challenged members were entitled to participate under a rule of necessity that it established in these terms:

> The general rule is that a member of an administrative board who is biased or prejudiced against one on trial before the board is not required to withdraw from the hearing if no other board can hear and determine the matter, especially if his withdrawal would deprive the board of the number of members required to take a valid affirmative vote.

Id. at 593 (emphasis added).[9/]

Although the *Moran* case preceded the conflict law's enactment, the court's later *Graham* opinion cites *Moran* as authority for the rule of necessity that *Graham* then suggests may apply to G.L. c. 268A. 370 Mass. at 138.[10/] This formulation of the rule is also consistent with the rule's purpose as stated in our prior opinions. See *EC-COI-92-24* (rule "permits governmental bodies to act when they would otherwise [be] forced to forego their governing responsibilities"); *EC-COI-82-10* (rule did not apply because "remaining members could approve the matter before them by a majority vote"). See also *Graham*, 370 Mass. at 140 ("if the step can be taken without the member's participation, he must not participate"); note 8 *supra* (discussing *EC-COI-84-96*).

Disqualifying both you and Dr. Zgrodnik "would deprive the [B]oard of the number of members required to take a valid affirmative vote." Therefore, the rule of necessity applies here.[11/] In order to invoke the rule, and to comply with §23(b)(3) of G.L. c. 268A,[12/] both of you must first publicly disclose your capacities as Academy trustees and the Academy's presumed financial interest in this matter.[13/] The Board's minutes should reflect that the rule of necessity was invoked to allow both of you to participate.[14/] See *EC-COI-92-24*. Both of you may then participate fully in this matter.[15/]

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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/ Dr. Zgrodnik has authorized you to obtain this advice on his behalf.

2/ The conflict law's definition of "municipal employee" includes "a person ... holding an office ... or membership in a municipal agency ... by election ... without compensation, on a ... part-time [or] intermittent basis ..." G.L. c. 268A, §1(g).

3/ "Particular matter" is defined to include "any judicial or other proceeding, application, submission, request for a ruling or other determination, . . . decision, determination, finding . . . ." G.L. c. 268A, §1(k).

4/ Although the Academy is a non-profit corporation, this Commission and the Attorney General before us have consistently concluded that non-profit organizations that do business are "business organizations" for this purpose. See *EC-COI-88-4* and authorities cited.

5/ The cited opinions also apply this presumption to a person entitled to notice of the matter under the Zoning Act (G.L. c. 40A, §11), or a "person aggrieved" by the matter under the Wetlands Protection Act.

6/ As elected officials, no exemption under §19(b)(1) is available to you. See *District Attorney v. Grucci*, 384 Mass. 525, 528 n.3 (1981).

7/ It is true that G.L. c. 40A, §9 also provides that a special permit is constructively granted if the Board does not act within ninety days of its public hearing (or whatever additional time the Board and applicant may agree). Thus, it might be argued that the remaining three Board members could effectively decide to issue the permit simply by taking no action within the required time. This, however, would deprive the Board of its ability to impose conditions in issuing the permit (an outcome you inform us the Board often favors), and the absence of written reasons for the permit might well compromise the Board's defense of its decision in court.

8/ In *EC-COI-84-96*, we considered the same statutory requirement that four members of a five-member Planning Board approve a special permit. There, we concluded that the rule of necessity did not apply, because only one member was disqualified by §19. We strongly suggested the result we reach today, however, when we advised the sole disqualified member: "you would only be able to participate if another member were disqualified from participation and not merely absent from the Board meeting at which the matter is considered. The fact that there may not be unanimous agreement among the four remaining member[s] as required by G.L. c. 40A, §9 is not a reason to invoke the rule of necessity." (emphasis added)

9/ The court went on to hold, apparently as an alternative rationale, that the two members were not disqualified by testifying. 317 Mass. at 594-95.

10/ That the *Moran* formulation of the rule remains good law is also suggested by the Appeals Court's recent quotation of it, again in a context not explicitly invoking G.L. c. 268A. *Town of Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272, 277-78 (1990).

11/ In general, before invoking the rule of necessity, public employees should receive written advice (such as this opinion) either from municipal counsel or this Commission, because participation based on improper reliance on the rule would violate G.L. c. 268A. See *EC-COI-92-24*.

12/ 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.

13/ Prior Commission opinions under §23(b)(3) suggest disclosure both in writing to the Town Clerk and orally at the first relevant Board meeting for inclusion in the meeting's minutes. *EC-COI-91-3; 90-2*. Both of you should follow that procedure here.

14/ When the rule of necessity applies, all members may participate, regardless of the nature of their conflicts. See *EC-COI-92-24*. The rule, of course, does not require any member to participate or to vote for a particular outcome; it merely creates the opportunity for a board to make an affirmative decision.

15/ Other provisions of the standards of conduct for all public employees in §23 of G.L. c. 268A apply to your and Dr. Zgrodnik's participation in this matter, however. Thus, §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. This provision requires both of you to apply the same objective standards to this matter that you apply to all other matters, without allowing your affiliation with the Academy to influence your judgment. See *EC-COI-92-38; 89-23; 89-3*. In addition, §23(c)(2) prohibits a public employee from disclosing confidential material or data acquired by him in his official duties. Confidential materials are those not contained in a "public record," as defined in G.L. c. 4, §7(26). Thus, neither of you may disclose confidential information about this or any other matter that you may acquire as Board members.

CONFLICT OF INTEREST OPINION
EC-COI-93-4

FACTS:

You are an elected Selectman in a Town. The Town's population, according to the 1990 federal census, is under 1,000.

For many years, you have also been a part-time police officer in the Town, a position appointed by the Board of Selectmen and classified as that of a "special municipal employee." Since becoming a Selectman, you have declined all compensation as Selectman and have abstained from participation as a Selectman in matters affecting the Police Department.

You now wish to work part-time plowing snow for the Town's Highway Department whenever your services are needed.[1/]

QUESTION:

Does G.L. c. 268A allow you, while you remain a Selectman, to receive compensation for one or more appointed municipal positions?

ANSWER:

If the remaining Selectmen are willing to take the steps required for exemptions under §20(c) and (d) as explained in part 1 below, you may receive compensation for more than one appointed position while remaining a Selectman. If the remaining Selectmen do not take these steps, the §20 selectman's exemption will allow you to be paid for only one municipal position of your choice, and will establish other limitations as explained in part 2 below.

DISCUSSION:

Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest in a contract with a municipal agency, unless an exemption applies. Since §20 applies to municipal employment contracts, it generally prohibits a municipal employee from holding another municipal position that is both appointed and compensated, unless an exemption applies. See *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987) (so interpreting §7, the equivalent section for state employees); *Commission Advisory No. 7 (Multiple Office Holding at the Local Level)* (1990).

In each of your three positions -- Selectman, police officer, Highway Department employee -- you are a "municipal employee" for the purpose of the conflict law. G.L. c. 268A, §1(g). Because you wish to hold and be paid in all three positions, §20 requires us to examine your financial interest in each of your municipal employment contracts from the viewpoint of each of the other municipal positions you wish to hold. In each such position, §20 will prohibit you from receiving compensation in any other position (except your elected Selectman's position[2/]), unless you qualify for exemptions from §20. You may do so in either of the following two alternative ways.

1. Section 20(c) and (d) exemptions.

In your Selectman's position, you have a financial interest in both your police officer and Highway Department employment contracts. As a Selectman in a town with a population of 10,000 or fewer persons, you are automatically a special municipal employee. G.L. c. 268A, §1(n). Therefore, §20(d) exempts these interests if both (1) you file with the Town Clerk a written public disclosure of your financial interest in these two appointed positions, and (2) the remaining Selectmen[3/] approve this exemption for you.[4/]

In addition, in each of your police officer and Highway Department positions, you have a financial interest in your employment contract in the other appointed position.[5/] In your police officer position, you are a special municipal employee. Therefore, if (1) the remaining Selectmen[6/] also classify all Highway Department on-call snow-plowing positions as "special municipal employee" positions, and (2) you have filed the written public disclosure with the Town Clerk mentioned in the preceding paragraph, §20(c) exempts these interests, because in neither of these two positions do you "participate in or have official responsibility for any of the activities of the [other position's] contracting agency."

Note that, in order to be paid in all three positions, you must comply with all the conditions mentioned in the two preceding paragraphs.[7/]

2. Selectman's exemption.

As discussed above, the §20(d) exemption requires approval by the remaining Selectmen. Because it is possible that the Selectmen will not approve this exemption, we must consider whether the "selectman's exemption" in the fourth paragraph of §20, which does not require the Selectmen's approval, is also available to you. Without either §20(d) or the selectman's exemption, you may not be paid for any appointive Town position while remaining a Selectman.

The fourth paragraph of §20 provides in relevant part:

> This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter.

As discussed at length in *EC-COI-82-106*, the plain language and legislative history of this exemption indicate that it was intended to mitigate what the Legislature viewed as a harsh application of §20, as prohibiting many selectmen who previously held appointed town positions from continuing to be paid in those positions. That 1982 opinion in effect construed the then-new exemption not to repeal other exemptions, under §§20(c) and (d), already available to selectmen in smaller towns who were special municipal employees. The point of our 1982 opinion was that the conditions attached to the selectmen's exemption did not apply to selectmen who qualified for some other exemption from §20. This analysis is consistent with later Commission opinions applying the conditions attached to other statutory exemptions from provisions of G.L. c. 268A. See, e.g., *EC-COI-92-25* (municipal exemption from §4); *92-8* (municipal and legislator's exemptions from §4); *92-6* (construction consultant exemption from "state employee" definition in §1[q]).

In *EC-COI-87-36*, we were asked whether the selectman's exemption's six-month waiting period applied to "special" selectmen. Following our earlier reasoning in *EC-COI-82-106*, we decided that it did not, because such "special" selectmen were not generally in need of this exemption. We said there in dictum that the selectmen's exemption "applies only to regular selectmen," but this statement was based on our stated assumption that "'special' selectmen . . . already could hold two jobs and be paid for both," citing §20(c) and (d). But this assumption depends on the remaining selectmen's willingness to take the steps necessary for these exemptions; when these other exemptions are not obtained for any reason, the plain language and purpose of the selectman's exemption suggest that it should be available to "special" as well as regular selectmen.

Therefore, without disturbing in any way our main holdings in *EC-COI-82-106* and *EC-COI-87-36*, we now clarify that the §20 selectman's exemption is available, at their election, to "special" selectmen who cannot (or choose not to) qualify for the §20(c) or (d) exemptions. Of course, it follows that all the conditions attached to the selectman's exemption also apply in this situation.

Thus, if you wish to remain a Selectman while being paid for an appointive Town position you held before becoming a Selectman, you must either:

1. Qualify for a §20(d) exemption (including the remaining Selectmen's approval) as discussed in part 1 above. If you wish to be paid for more than one appointed position, you must also take the steps necessary to receive a §20(c) exemption (including the remaining Selectmen's classification of every such appointed position as that of a "special municipal employee"), also discussed in part 1; or:

2. Comply with the conditions of the selectman's exemption, which requires that you: (a) decline compensation for all but one of your Town positions (for example, you may continue to be paid as a police officer, but not as either a Selectman or a Highway Department employee); (b) not vote or act as a Selectman on any matter within the purview[3/] of any Town agency that employs you (with or without compensation); and (c) not accept appointment to any additional Town position (for example, the Highway Department position) while you remain a Selectman and for six months thereafter.[2/]

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[1/] This opinion addresses only your future conduct. See G.L. c. 268B, §3(g); *EC-COI-92-17* n.1.

[2/] Since *EC-COI-82-26*, the Commission has consistently held that an elected official's compensation is not received pursuant to any "contract."

[3/] Section 19 of G.L. c. 268A, which prohibits a municipal employee from knowingly participating in a particular matter in which he (among others) has a financial interest,

requires that you not participate as a Selectman in the decision whether to approve this exemption for yourself. Note that participating includes discussion, voting, and informal lobbying of your colleagues (of course, you may apply for the exemption itself). See *id.* §1(p); *EC-COI-92-30.* Whenever this matter comes before the Selectmen, therefore, your best course of action is to leave the room. *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

4/ The §20(c) exemption, discussed in text below, is not available to you here because, as a Selectman, you inevitably have "official responsibility" for at least some activities of both the Police and Highway Departments. See *EC-COI-91-9; 84-125* n.6.

5/ As explained in note 2 above, in these positions you do not have a financial interest in any "contract" as a Selectman.

6/ As explained in note 3 above, you may not participate as a Selectman in this decision.

7/ Qualifying for the indicated §20(c) and (d) exemptions is the simplest method for you to accomplish this result. More limited exemptions may be available under §20(b) and (f) and under the last paragraph of §20, but each of these also requires action by the remaining Selectmen, and some require additional procedures.

8/ For detailed discussion of the meaning of an agency's "purview" (there, in the context of the §4 municipal exemption), see *EC-COI-92-25; 92-22* and other opinions they cite.

9/ Thus, the six-month waiting period applies to a "special" selectman only if he requires the benefit of the selectmen's exemption to receive compensation for an appointed Town position he held before becoming a Selectman.

CONFLICT OF INTEREST OPINION
EC-COI-93-5*

FACTS:

You are a full-time Agent (Agent) in the Investigative Unit of the Division of Registration. In addition, you are a registered pharmacist. You are assigned matters involving individuals and facilities regulated by the Pharmacy Board of Registration (Board). As an Agent, you initiate and receive complaints concerning registered pharmacists in addition to nurses, dentists, nurse practitioners, respiratory therapists and veterinarians. You also conduct inspections of controlled premises, including retail pharmacies, chain pharmacies, institutional pharmacies, clinics and wholesale pharmacies. You sometimes coordinate investigations in conjunction with the Massachusetts State Police and the federal Drug Enforcement Agency.

Regulations promulgated by the Board provide standards of conduct as well as various procedures concerning records keeping and the filling of prescriptions by pharmacists. 247 CMR 3.00 et seq. Pharmacies are subject to inspection on a regular basis to assure compliance with these regulations. Specifically, with regard to records keeping detailing the refilling of prescriptions, state inspectors confirm only the existence of daily logs as required by Massachusetts regulation. Any examination of the content of the logs would occur on the federal level in the nature of a Drug Enforcement Agency audit. Additionally, records or other data required to be submitted to other state agencies such as the Department of Public Welfare (for Medicaid billing purposes) or to the Department of Public Health (for monitoring the prescription writing habits of physicians or other practitioners) would not be the responsibility of the dispensing physician, but rather would be handled by the pharmacy owner or other administrators.

You are contemplating working on a part-time basis for a pharmacy which is subject to regulation by the Board. You would not, however, be the "principal" registered pharmacist for the pharmacy. As a part-time dispensing pharmacist, it is therefore unlikely that you would have dealings with the Board or any other agency of the Commonwealth.

QUESTION:

May you be employed as a registered pharmacist outside of your normal state working hours in a pharmacy regulated by the Board?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

As a full-time Agent of the Division, you are a state employee for purposes of the conflict of interest law. G.L. c. 268A, §1(q).

Section 4

Section 4(a) prohibits a state employee from receiving compensation from anyone other than the Commonwealth in relation to a particular matter1/ in

which the Commonwealth or one of its agencies is a party or has a direct and substantial interest.

Although pharmacies are owned by private entities, the operation of a retail pharmacy is nevertheless regulated by the Board. G.L. c. 112, §37. By statute, a retail drug business must obtain a permit or license to operate from the Board. The Commonwealth therefore has a direct and substantial interest in the application for and issuance of an operation permit, a "particular matter" under the conflict of interest law. G.L. c. 268A, §1(k). The issue, therefore, is whether the compensation you receive as a part-time pharmacist would be "in relation to" the permit or license to operate.

In *EC-COI-87-31*, n.7, the Commission first recognized that certain work done pursuant to a permit may not be considered "in relation to" that permit for purposes of applying the conflict of interest law. The Commission in that case stated:

> For example, a municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated "in relation to" the permit which allows the construction.

More recently in *EC-COI-92-1* the Commission again noted that "not all work pursuant to such permits [city building permits] is 'in relation to' the permit." See also *EC-COI-92-40.*

The Commission has previously distinguished between cases where a public employee would be part of a privately paid crew and those instances where the public employee is doing all of the work pursuant to a permit himself. Where the public employee is presumably the person who will have to interact with public officials, the Commission has been more likely to find that the privately paid for work is in connection with the permit, i.e. the particular matter in which a public agency will have a direct and substantial interest. See *EC-COI-88-9* (carpentry work would be completed by public employee himself rather than by him as part of a crew, therefore work would be done pursuant to the building permit).

In addition, in *EC-COI-90-13* we recognized that where an agency exercises substantial regulatory authority and oversight of an activity, the Commonwealth may have a direct and substantial interest in the activity. However, regulatory authority and oversight of an activity alone are not sufficient to find a particular matter in which the Commonwealth has a direct and substantial interest. Rather we must determine whether the regulated activity itself involves a "particular matter" (as defined by the conflict of interest law) in which the employee is likely to become involved[2/] -- such as the submission of reports for approval; a submission to a state agency is a particular matter in which the Commonwealth has a direct and substantial interest. The Commission has previously held that regulations, in and of themselves, are not particular matters. *EC-COI-81-34.*

Applying this precedent to your circumstances, we find that the compensation you will receive in your contemplated private employment is not "in relation to" the permit to engage in the retail sale of drugs. We so conclude because you will serve as one of several registered pharmacists employed by the private pharmacy, and you yourself are unlikely to have responsibility for dealing with the Board or another state agency on any matters concerning the retail sale of drugs. The compensation for your services would not therefore be in relation to the pharmacy's operating permit. We note nevertheless, that should you discover that you are required to deal with state agencies as a part-time pharmacist, the §4 restriction will prohibit your proposed employment.

Additionally, while we recognize that the Board's regulations require various procedures for the dispensing of drugs and related records keeping, this does not, without more, result in our finding that the compensation of an individual pharmacist is "in relation to" a particular matter in which the Commonwealth has a direct and substantial interest. Because regulations are not in and of themselves particular matters, regulatory compliance alone will not raise an issue under §4(a). See *EC-COI-87-34* (under §5, former state employee could receive private compensation in case involving interpretation or application of regulation in which he had previously participated in drafting as a state employee; absent a challenge to the validity of the regulation, private compensation not "in connection with" the promulgation of the regulation); *81-162; 81-34.*

We might, however, find that certain of your required tasks as a registered pharmacist involve particular matters in which the Commonwealth has a direct and substantial interest were you, yourself responsible for reporting information or otherwise making submissions to the state. Again, should you find yourself responsible for making such submissions to the state, §4 will prohibit your proposed employment.

In summary, we conclude that your activities as a privately compensated registered pharmacist will not be in connection to the private pharmacy's operating permit if you will not be serving as the principal pharmacist and will not have dealings directly with the Board or any other agency of the Commonwealth. In addition, your proposed activities as a part-time (assistant) pharmacist, although prescribed by regulation, would not themselves involve particular matters in which the Commonwealth or one of its agencies has a direct and substantial interest. Under these circumstances, your proposed private compensation will not therefore violate §4(a).[3/]

Section 6

Section 6 provides that a state employee may not participate as such in any particular matter in which, among others, his private employer, or any person with whom he is negotiating or has any arrangement for prospective employment, has a financial interest. If a state employee's duties would normally require him to participate in such a matter, he must in writing advise his appointing authority and the Ethics Commission of the nature and circumstances of the particular matter and the financial interests involved. The appointing authority must thereafter assign the matter to another employee, assume responsibility for the matter himself or 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. A copy of such a determination must be filed with the Ethics Commission.

The Commission has previously held that a pharmacy has a financial interest in Board inspections and investigations of pharmacies with which it is in geographic competition. *EC-COI-82-95.* Therefore, the §6 restrictions will apply to you with regard to inspections or investigations of the pharmacy by which you are privately employed or of any of the geographic competitors of that pharmacy. Therefore, before inspecting or investigating your pharmacy or any such competitive pharmacy, you must disclose the financial interest of your private employer in that matter to your appointing authority and the Ethics Commission and then your appointing authority must comply with the requirements of §6. Your appointing authority should determine which retail pharmacies are the geographic competitors of the pharmacy by which you seek to be employed. See *EC-COI-86-13.*

Section 23

Section 23 imposes standards of conduct applicable to all public employees. Specifically, §23(b)(2) prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or for others.

In applying §23 to your facts, you may not use your state position to secure any unwarranted privileges for yourself or for others. For example, you could not use your relationship with other agents to seek to influence the outcome of an inspection or investigation of the pharmacy by which you are employed. In addition, pursuant to §23(c), you may not disclose any confidential information to which you may have access as a state employee. Confidential information is information which is not available to the public in a "public record" as defined by G.L. c. 4, §7(26).[4/]

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* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

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

2/ We recognize that a literal reading of §4(a) provides a prohibition against receiving compensation "in relation to," rather than compensation which is "likely" to be in relation to a particular matter in which the Commonwealth has a direct and substantial interest. We nevertheless are satisfied that in interpreting and applying the "in relation to" statutory requirement, it is appropriate to examine whether a state employee, in his private employment, is "likely" to have dealings with a state regulator or agency in a particular matter on behalf of a private party. The underlying principle behind §4 is that "public officials ... should not in general be permitted to step out of their official roles to assist private entities or person in their dealings with government." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 322, n.135 (1965) citing Perkins, *The New Federal Conflict of Interest Law*, 76 Harvard L.Rev. 1120 (1963). In seeking to effectuate this statutory purpose, we find it useful to determine the likelihood that a public employee will be placed in a position where the employee will have an opportunity to have dealings with government officials on behalf of a private party. Where we find such a likelihood, we will apply the restrictions of §4.

[3] We note that §4(c) prohibits you from acting as agent for anyone other than the Commonwealth in connection with a particular matter in which the Commonwealth or one of its agencies is a party or has a direct and substantial interest. It appears unlikely, however, in light of the duties of a part-time pharmacist and the §4(a) restriction, that you will have any contact with a state agency as agent for the pharmacy by which you will be employed. Moreover, submissions made by the pharmacy to the Department of Public Welfare and the Department of Public Health do not contain the names of the dispensing pharmacists among the data required to be reported. We caution you, however, that you may not act as agent for the pharmacy before any non-state entity as well (such as at a press conference or before a federal agency) in connection with matters in which the Commonwealth is a party or has a direct and substantial interest.

[4] Section 23(e) provides that the head of a state agency may establish and enforce additional standards of conduct. You should therefore consult with your agency before beginning your proposed private employment to ascertain whether the agency has adopted any such additional standards.

CONFLICT OF INTEREST OPINION
EC-COI-93-6

FACTS:

You are a police officer in the Town of ABC and the President of the ABC Police Relief Association (the Association). The Association is a private, voluntary organization of ABC police officers that raises funds for charitable purposes, including a drug and alcohol abuse prevention program and special events for children.

The Association wishes to solicit donations from ABC residents and businesses. It may wish to employ a professional solicitor for this purpose.

QUESTION:

What limitations does G.L. c. 268A establish for your and the Association's solicitation activities?

ANSWER:

You and the Association may solicit funds from the public, but §23(b)(2) of G.L. c. 268A prohibits police officers,[1] in their solicitation of funds from the public, from:

1. Making statements or engaging in conduct exploiting official police powers, i.e., that would lead reasonable persons to infer that good or bad consequences in official dealings with the police might flow from a decision whether or not to donate.

2. Using official resources of substantial value, including paid time as on-duty police officers, or (even when off-duty) official telephones, copying or fax machines, other public supplies or facilities, official stationery or letterhead, any municipal seal or coat of arms, or badges or uniforms.

In addition, G.L. c. 68, §§18-35[2] and G.L. c. 41, §98E,[3] statutes not administered or enforced by this Commission, apply to your and the Association's solicitation activities.

DISCUSSION:

You and other ABC police officers are "municipal employees" for the purpose of the state conflict of interest law. G.L. c. 268A, §1(g). As such, you and 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."

Whenever public employees solicit anything of substantial value[4] for a non-governmental purpose, the Commission has consistently scrutinized the solicitation for compliance with §23(b)(2). In particular, we have examined whether public employees are soliciting from those with whom they have official dealings, and whether the solicitation is using public resources for non-governmental purposes. We must therefore analyze your solicitation activities in both of these respects.[5]

1. Soliciting from regulated persons.

The Commission has consistently held that §23(b)(2) prohibits public employees, in both their public and private capacities, from soliciting anything of substantial value from persons within their regulatory jurisdiction[6] for a non-governmental purpose, unless the solicitation is specifically authorized by law.[7] See, e.g., *EC-COI-92-28* (Governor may not solicit donations to non-governmental entity from corporations subject to state regulation); *92-12* (state board member prohibited from privately soliciting individuals under his regulatory authority); *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). The

Commission has based this conclusion on its long experience with what the opinions just cited call the "inherently exploitative" or "inherently coercive" circumstances of such solicitations. For examples of Commission enforcement actions presenting such circumstances, see *In re Pezzella*, 1991 SEC 526, 528 (disposition agreement fining Governor's staff member for unauthorized solicitation of Governor's appointee to advance friend's private interest); *In re Singleton*, 1990 SEC 476 (disposition agreement fining a fire chief for attempting to use his official position to solicit private 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);[8/] *In re Lannon*, 1984 SEC 208 (disposition agreement fining school superintendent for soliciting loans from subordinate teacher);[9/] *In re Antonelli*, 1982 SEC 101 (fining county treasurer for soliciting personal loan from banks seeking deposits of county funds); *Compliance Letter 82-2*, 1982 SEC 80 (soliciting city employees, vendors and city-regulated businesses for contributions to Mayor's wife's "birthday party" violated predecessors of §23[b][2], [3]).[10/]

Our usual concern about solicitation by public employees is exacerbated here by the substantial and pervasive authority of police officers over all residents of and businesses in the municipality, including the statutory powers to carry weapons and make arrests, see G.L. c. 41, §98, and to make warrantless administrative inspections of certain regulated businesses. See G.L. c. 140, §66; *Commonwealth v. Eagleton*, 402 Mass. 199 (1988). In this connection, we note that the Attorney General's Division of Public Charities has officially warned of the special problems that solicitations by police and firefighter organizations pose, and has cautioned citizens "not [to] feel threatened or intimidated by [such a] solicitation, or pressured to make a donation." Attorney General, *Report on Charitable Fundraising* 8 (Nov. 1992).

On the other hand, the Legislature has specifically addressed these solicitations by enacting G.L. c. 41, §98E, which provides in its entirety: "No person or persons shall solicit the public in any manner or form using the word 'police' or 'firefighter' or any derivative thereof without using the name or names of the city or town police or firefighters organization sponsoring such solicitation." Conscious of our duty to construe statutes relating to the same subject together "so as to constitute an harmonious whole consistent with the legislative purpose," *Saccone v. State Ethics Commission*, 395 Mass. 326, 334 (1985), we recognize that §98E in effect condones some solicitations by police and firefighter organizations, subject to the identification requirement it establishes. See *EC-COI-92-28* n.4; *92-12* n.10 (both suggesting that campaign finance law's exemption of elected officials from prohibition against compensated public employees' soliciting or receiving political campaign contributions, in G.L. c. 55, §13, in effect generally allows such officials to solicit political contributions in their private capacities for purpose of §23(b)(2)). In effect, notwithstanding our usual "per se" interpretation of §23(b)(2) as prohibiting all unauthorized solicitations by public employees of those they oversee, §98E allows private solicitations by police and firefighter associations under certain conditions.

It does not follow from §98E, however, that no other statute regulates solicitations by associations of police officers. "Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect." *Kargman v. Commissioner of Revenue*, 389 Mass. 784, 788 (1983). Certainly, G.L. c. 68, §§18-35 apply; these statutes are concerned, for example, with false or deceptive solicitations, and are enforced by the Attorney General's Division of Public Charities.

The same rule of construction applies to §23(b)(2) of the conflict law. See, e.g., *EC-COI-92-12* (comprehensive statutory regulation of campaign finance in G.L. c. 55 did not prevent applying §23(b)(2) to soliciting campaign contributions in some contexts). This is especially true in view of the courts' consistent recognition of the conflict law as "comprehensive legislation [enacted to] strike at . . . inequality of treatment of citizens and the use of public office for private gain." *Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536 (1974); *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992) (both quoting Special Commission on Code of Ethics, *Final Report*, H. 3650, at 18 [1962]). Here, §23(b)(2) at least forbids statements or conduct by police officers that exploit their official powers. Since §23 (as appearing in St. 1986, c. 12, §14) imposes liability for violations committed "knowingly, or with reason to know," the test is not whether the public employee subjectively intends the statement or conduct to be coercive, but whether reasonable persons would infer from it that good or bad consequences in their official dealings with the police might flow from their decisions whether or not to donate.

Thus, examples of prohibited solicitation activities would include: representing that a donation (including purchasing tickets to a fundraising event or purchasing an advertisement in a publication) could result in

preferential police treatment, or that failure to donate could result in police reprisals;[11] implying that a decision whether or not to donate could affect the timing or quality of police services;[12] and the practice (mentioned in our public request for comments, see note 5 *supra*) of sending stickers or decals intended for display on donors' private automobiles, from which, in our judgment, reasonable persons would infer the hope of favorable treatment -- or of avoiding adverse treatment -- by the police.[13] On the other hand, if police officers (personally and through their association and agents, see part 3 below) do not engage in such prohibited activities, and do not use official resources (see part 2 below), G.L. c. 268A will not prohibit them from soliciting funds for their private association from the public -- whether through advertisements, telephone or door-to-door solicitations, or fundraising events.

2. Prohibited use of official resources.

We have also consistently held that §23(b)(2) prohibits public employees from using official resources for 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"); *EC-COI-92-5* (using state seal or state coat of arms for campaign purposes "benefits a personal rather than a public interest," and is therefore prohibited by §23(b)(2)).

Far from limiting this principle, G.L. c. 41, §98E (quoted in part 1 above) supports it. That statute seems clearly intended to distinguish police officers' private solicitations from their public duties; that is the same purpose served by §23(b)(2) in prohibiting use of public resources for private purposes. While we recognize and commend the many beneficial purposes for which police associations raise funds, §23(b)(2) -- and the principle it embodies, of public employees' accountability for their use of public resources -- applies "even if [these purposes] are public-spirited in nature." *Public Enforcement Letter 92-3*.

Therefore, police officers may not solicit for their private association while on duty. Even when off duty, they may not use official resources of substantial value, including official telephones, copying or fax machines, or other public supplies or facilities.[14] They may not use official stationery or letterhead, any municipal seal or coat of arms, or badges or uniforms, in their private solicitation activities, because these public insignia "could reasonably be perceived as an endorsement by a public agency of the solicitation [or give] the appearance that the solicitation is officially sponsored ... [or] foster a sense of credibility which the solicitation might not otherwise have had." *EC-COI-92-5*. See *Public Enforcement Letter 89-4*, 1988 SEC 369; *In re Buckley*, 1983 SEC 157. For similar reasons, they may not use their official police rank,[15] since we have found an appointed public employee's official title to be a public resource for this purpose. *EC-COI-92-39* and cases cited.

3. Application to associations and agents.

Section 23(b)(2) applies not only to personal acts of public employees, but also to acts of their agents, so long as the public employees know or (in the words of §23) have "reason to know" of those acts taken on their behalf. Thus, we have previously applied §23(b)(2) to public employees' associational activities. In *Compliance Letter 82-2*, 1982 SEC 80, we attributed to Boston Mayor Kevin White the solicitation activities of a "Birthday Celebration Committee" composed of his close associates, since he knew the general nature of the solicitation activities, although he did not know exactly whom the "Committee" was soliciting.[16] More recently, in *EC-COI-92-23*, we advised Town Clerks that they would violate §23(b)(2) if their private association accepted funds from a private news service in return for the Clerks' calling the service with immediate election results.

We acknowledge the constitutional rights to associate and to solicit funds for charitable purposes. See, e.g., *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). However, narrowly tailored regulation is permissible to promote the compelling government interest in the integrity of public employees. See *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *National Treasury Employees Union v. United States*, 788 F. Supp. 4 (D.D.C. 1992). There is an important public interest in regulating even the off-duty activities of police officers to promote public integrity, especially if (as here) the activities do not constitute "pure" speech. See *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *Broderick v. Police Commissioner of Boston*, 368 Mass. 33 (1975); *Wilmarth v. Town of Georgetown*, 28 Mass. App. Ct. 697, 701-03, *further appellate review denied*, 408 Mass. 1103 (1990). We are satisfied that our narrow application of §23(b)(2) here, to prohibit both specific exploitation of official police powers and the use of official resources for the

purpose of private solicitations, easily meets the constitutional standard.[17/]

Therefore, this opinion's advice applies to police officers when acting through the Association and its agents, including any "professional solicitor" (defined in G.L. c. 68, §18) that it retains. We note that G.L. c. 68, §22 requires most contracts between charitable organizations and professional solicitors to be in writing and to be filed with the Attorney General's Division of Public Charities, and you would be well advised to include contract provisions that incorporate this opinion's conclusions in order to indicate reasonable efforts to seek compliance with §23(b)(2) by the association's professional solicitor.

DATE AUTHORIZED: January 26, 1993

[1/] This advice applies to police officers' private solicitation activities whether taken personally or through their private association or agents, acting on their behalf with their knowledge or reason to know, as discussed in part 3 below.

[2/] These statutes regulate charitable solicitations in general and are enforced by the Attorney General. You may obtain information about them from the Attorney General's Division of Public Charities.

[3/] As discussed in part 1 below, §98E requires anyone soliciting the public using the word "police" or "firefighter" (or any derivate thereof) to use the name of the police or firefighters organization (here, the "ABC Police Relief Association") sponsoring the solicitation.

[4/] 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) (1985)*. Since amounts solicited for a common purpose are aggregated, see *EC-COI-92-23; 92-2*, we assume in this opinion that the total value of all the donations you solicit will be at least $50 and thus "of substantial value."

[5/] Because the application of G.L. c. 268A to solicitations by associations of police officers is an important question of first impression, we publicly invited legal arguments from any interested person. We acknowledge helpful submissions by the law firms of Sandulli, Grace, Shapiro & Horwitz (on behalf of the Massachusetts Coalition of Police, AFL-CIO); Roche, Carens & DeGiacomo; Brooks & Lupan; and Cosgrove, Eisenberg & Kiley, P.C. (on behalf of the Massachusetts Police Association).

[6/] The Commission has reached the same conclusion about soliciting others with whom a public employee has official dealings, including subordinate employees and agency vendors. See *EC-COI-92-7*.

[7/] General Laws c. 268A, §3(b) also prohibits a public employee from either soliciting or receiving anything of substantial value "for himself" from such persons. See *EC-COI-92-2*. Because your and the Association's solicitations seem from your facts to be on behalf of others than the member police officers themselves, this discussion focuses on §23(b)(2).

In addition, §23(b)(3) may apply. It 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. However, its requirements are no more restrictive here than those of §23(b)(2), and in any event could be satisfied by written public disclosure to the police officers' appointing authority.

[8/] 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 (amending and reenacting §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.

[9/] The Commission relied on the predecessor of §23(b)(3) here, in circumstances where it would also find a violation of §23(b)(2) today. See *EC-COI-92-7*.

[10/] We decline to abandon this longstanding interpretation of §23(b)(2) and its predecessors, as we have been urged on various grounds. In particular, any interpretation of "privileges" that excludes gifts of money is belied by the Legislature's 1986 reenactment of what is now §23(b)(2), see note 8 *supra*, adding the "knowingly, or with reason to know" and "substantial value" requirements, following our well publicized *Compliance Letter 82-2*. See *Lorrilard v. Pons*, 434 U.S. 575, 580-81 (1978) (when, after agency construes statute, legislature reenacts it without material change, legislature is presumed to adopt agency construction); *Commonwealth v. Miller*, 385 Mass. 521, 524 (1982) (same for judicial construction); 2B N. Singer, *Sutherland on Statutory Construction* §49.09 (5th ed. 1992). Furthermore, the "privilege" here may be best viewed, not as the gifts of money themselves, but as the special consideration from potential donors that police officers are able to obtain for private purposes by exploiting their official powers. Finally, any reading of the phrase "similarly situated individuals" (also added in the 1986 reenactment) to refer only to other police officers would deprive the statute of much of its meaning; instead, we read it here to apply to others soliciting charitable donations.

[11/] In a civil action by the Attorney General under G.L. c. 68 and c. 93A, the Superior Court recently enjoined a professional solicitor for a police organization from "falsely" making such a representation. *Commonwealth v.*

Suffolk Apr. 22, 1992). Our construction of §23(b)(2) forbids such representations whether they are true or false, if reasonable persons would infer that they might be true.

12/ See, e.g., *In re Singleton*, 1990 SEC 476, 477-78 (fire chief told contractor from whom he was soliciting private construction business that "it could take forever to obtain [necessary Fire Department] inspections").

13/ In *State Police Ass'n of Massachusetts v. Massachusetts Police Ass'n*, No. 79-2219 (Mass. Super., Middlesex 1979), a consent judgment enjoined an organization of municipal police officers and its professional solicitor from (among other things) falsely representing that automobile bumper stickers sent to donors would give them "a break" if stopped by a state police officer, a representation which the plaintiff state police union alleged to be the defendants' practice. We also note the following statement in a January 15, 1993 letter to this Commission from Kenneth T. Lyons, National President, International Brotherhood of Police Officers, NAGE, AFL-CIO: "I can assure you that many citizens respond . . . because they believe the window decals prove beneficial if they are involved in any kind of traffic violation."

14/ For example, the telephone number printed on the Association's stationery appears to be that of the Police Department. This use of public resources for your Association's private purposes must be discontinued (unless authorized by statute or bylaw).

15/ We believe they may truthfully answer questions asking whether they are police officers.

16/ By reenacting what is now §23(b)(2) following this widely publicized compliance letter, adding only requirements that would not alter the result, the Legislature is presumed to have adopted this construction of §23(b)(2). See note 10 *supra*.

17/ Since your facts indicate that the Association raises funds solely for charitable purposes, we need not consider here what effect, if any, G.L. c. 150E might have on our analysis if the Association engaged in collective bargaining.

CONFLICT OF INTEREST OPINION
EC-COI-93-7*

FACTS:

You are a full-time employee of the City of Chicopee Highway Department (Department).

QUESTION:

Can you run for and, if elected, hold office as an Alderman-at-large while serving as a full-time employee of the Department?

ANSWER:

Although G.L. c. 268A will not prohibit you from running for the office of Alderman-at-large, if you are elected to that position, you may not be compensated in your current Department position.

DISCUSSION:

Section 20 prohibits a municipal employee from having a financial interest in a contract with a municipal agency, unless an exemption is available. Section 20 applies whenever an individual holds more than one position (at least one of which is appointed and compensated) in the same municipality. Therefore, if you are elected as Alderman, you will have a financial interest in your employment contract with the Department. See *EC-COI-80-89* (selectman has a financial interest in employment contract as a teacher).1/

Applying the restrictions of §20, if you are elected to the position of Alderman-at-large, you will have a prohibited financial interest in your Department employment contract. In other words, unless an exemption applies, §20 will prohibit you from receiving compensation in your Department position. By definition, the position of alderman may not be designated as a special municipal employee position. G.L. c. 268A, §1(n).2/ The only exemption therefore available to an alderman who seeks to receive compensation in an appointed municipal position is found in §20(b). That exemption requires that the municipal employee meet certain specified criteria. Among the criteria are:

(1) the employee must not be employed in an agency which regulates the activities of the contracting agency;

(2) the employee cannot participate3/ in or have official responsibility4/ for any of the activities of the contracting agency;

(3) the contract must be made after notice or competitive bidding;

(4) the employee cannot be compensated for more than 500 hours in the second position during a calendar year.

As Alderman-at-large, it appears that you would have either regulatory control over, or you would participate in, activities of the Highway Department. See *EC-COI-91-9* (city councilors regulate and/or participate in activities of municipal agency); *83-158* (discussing meaning of "regulate"). Moreover, an alderman cannot receive compensation in a full-time appointed municipal position because the §20(b) exemption restricts additional compensated municipal employment to 500 hours during the course of a year. See *EC-COI-89-28* (full-time police officer cannot also hold city council position without violating §20); *85-66*. No other exemption from §20 is available to you. We note that §20 contains exemptions that allow a member of a board of selectmen or town council to hold an appointed municipal position provided that the selectman or town councillor complies with certain restrictions. No similar exemption to the §20 prohibition, however, is available to members of a board of alderman or city council.

Because you will not qualify for the §20(b) exemption and because no other exemptions are available to you, if you are elected to the position of Alderman-at-large, §20 will prohibit your receipt of compensation in your Department position. The §20 prohibition will not apply until you assume the office of Alderman-at-large. Furthermore, the conflict of interest law will not prohibit you from running for the office of Alderman-at-large. However, the Highway Department or the City of Chicopee may impose additional restrictions on running for political office or otherwise engaging in political activities. §23(e).

DATE AUTHORIZED: February 23, 1993

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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/ However, an elected official's compensation is not received pursuant to an employment contract. *EC-COI-82-26*. Any compensation you may receive as Alderman will not be pursuant to an employment contract with the City. As a Department employee, you would not therefore have a prohibited financial interest in a municipal contract by virtue of your compensation as an Alderman.

2/ Similarly, the definition of "special municipal employee" excludes members of a city council as well as members of a board of selectmen in a town with a population in excess of 10,000 persons. G.L. c. 268A, §1(n). However, members of a board of selectmen in a town with 10,000 or fewer inhabitants are, by definition, special municipal employees.

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

4/ "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).

CONFLICT OF INTEREST OPINION
EC-COI-93-8

FACTS:

You represent ABC, Inc. ABC, Inc. is a private non-profit corporation devoted to fostering and advancing the interests of certain wholesale distribution companies. ABC, Inc. retains a lobbyist to monitor legislation of concern to its members.

ABC, Inc. intends to host a sporting event at a resort on Cape Cod. The event will include a barbecue lunch, sports activities, a cocktail hour, a clambake dinner, and a post-dinner raffle to benefit a local charity. Attendance at the event will be by invitation only and invitees will include members of the legislature, their staffs and spouses, ABC, Inc. members, suppliers, sports figures and other celebrities.

ABC, Inc. intends to pay for the event by soliciting donations from its wholesale suppliers. Prior events have cost approximately $150 per person. ABC, Inc. hopes to ask corporate sponsors to increase the amount of their contributions over the amount that they have previously contributed in order to expand the raffle to benefit the charity and to increase their donation. Additionally, ABC, Inc. plans to charge invitees an entrance fee correlated to the actual expenses of the event. ABC, Inc. will request that the entrance fee check be made payable to the charity. ABC, Inc. also expects that attendees will purchase raffle tickets which will also benefit the charity.

QUESTIONS:

1. Under G.L. c. 268A may an organization provide legislators with an all-expense-paid day at a resort if the legislators pay a charitable contribution as an entrance fee?

2. Under G.L. c. 268A may manufacturers and suppliers contribute funding to a trade organization which is organizing an event to which legislators will be invited?

ANSWERS:

1. The proposed arrangement by ABC, Inc. will violate G.L. c. 268A, §3 because ABC, Inc. will be providing benefits of substantial value to legislators to promote good will. The entrance fee does not alleviate the §3 problem where the fee is not earmarked towards and does not cover the expenses of the event.

2. The manufacturers and suppliers' donations will violate §3, if each manufacturer, at the time of its donation decision, knows that legislators or other public officials will be attending the event, if the manufacturer/supplier has an interest in legislative business and if its contribution amounts to $50.00 per invited guest or greater.

DISCUSSION:

G.L. c. 268A, §3(a) prohibits, other than as provided by law for the proper discharge of official duties, directly or indirectly, giving anything of substantial value to any state employee for or because of any official act performed or to be performed by such employee. Section 3(b) places similar restrictions concerning the receipt of items of substantial value by state employees.

The Commission has interpreted "substantial value" to be $50 or more, and will aggregate the amount of gifts which originate from several individuals with common interests or which are given by a donor on a repeated basis. See e.g., *EC-COI-92-2*; *Public Enforcement Letter 89-1*, 1988 SEC 356. The Commission has also attributed to a legislator gifts to the legislator's spouse or guest. See *EC-COI-89-4*; *Commission Advisory No. 2* (Guidelines For Legislators Accepting Expenses and Fees for Speaking Engagements). In determining substantial value the Commission has, among other things, looked to the face value of tickets, the cost to the donor, and the actual benefit and worth to the employee. See *EC-COI-92-32*; *92-19*; *91-13*.

The principal question raised by your request is whether the "substantial value" requirement is met for purposes of §3, or, rather, whether a charitable contribution will offset any value received by a public employee participating in the event. Since none of the charitable contributions collected at the event will offset the expenses of the event, we conclude that the legislators will receive the full value of the entertainment and that ABC, Inc. will be giving a gratuity of substantial value, based on the estimated costs. The legislators will also benefit from the ability to take a charitable tax deduction for the event. We note that, at many charitable events, the ticket price covers the expenses of the event as well as a charitable contribution. See *EC-COI-92-32* (ticket of $150 included $45 cost of food and drinks and $105 contribution to the non-profit organization). Our conclusion would be different if the ticket price were used to defray the costs of the event.

Further, we do not find that the facts which you present are analogous to our limited precedent concerning charitable contributions under §3. In two prior opinions, we have advised public employees who have been offered compensation in appreciation for services rendered that §3 will not be violated if the compensation is donated to a charity or used to create a charitable trust from which the public employee will not benefit in any way. Also, the public employees were not permitted to take a tax deduction for the contribution. *EC-COI-87-23*; *83-75*. Our reasoning in these cases was based on the fact that the public official received nothing of personal benefit for himself. Here, in comparison, although the legislators will make a charitable contribution, they will also receive a full day at a resort and a tax deduction.

We also conclude that the nexus requirement is met for purposes of §3. We do not find that the charitable fundraising is the sole motive for the gift, but rather that other motives include engendering good will with legislators who must act on numerous matters of interest to the industry. See, e.g., *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609; *In re State Street Bank*, 1992 SEC 582; *In re Stone and Webster Engineering Corporation*, 1991 SEC 522; *In re Ackerley Communications*, 1991 SEC 518, 520 n.5. For purposes of this opinion we presume that ABC, Inc. will have the requisite interest[1/] in legislative business.

We note that the raffle held to benefit the charity will not violate §3. A raffle prize awarded in a random drawing is generally not given for or because of an official's duties. *EC-COI-82-161; 83-39.*

Finally, you have asked us to comment upon the application of the conflict law to the suppliers and manufacturers who will donate the funds for the event. We consider these organizations to be co-donors with

considering whether receipt of honoraria permissible, Commission will examine whether the sponsor of the event or the source of the honoraria is a person or official with whom employee reasonably expected to have official dealings); *80-28*. If the manufacturers, as the source of the funding, know, at the time of their donation, that legislators are invited to the event which they are funding and if the manufacturers have the requisite interest in legislative business, then we conclude that the nexus requirement is met for purposes of §3. In these circumstances the presumption is that the motive for giving is to engender good will with legislators who must act on matters of interest to the industry. See, e.g., *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609; *In re Stone and Webster Engineering Corporation*, 1991 SEC 522; *In re Ackerley Communications*, 1991 SEC 518, 520. Under §3 it is not necessary for the manufacturers to give a gratuity directly to a legislator. Section 3 expressly prohibits the direct and indirect giving of a gratuity to a public official. We reiterate that

> for §3 purposes it is unnecessary to prove that any gratuities given were generated by some specific identifiable act performed or to be performed. In other words no specific quid pro quo or corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner which could affect the gift giver, received a gratuity to which he was not legally entitled, regardless of whether or not that public official ever actually exercised his authority in a manner that benefitted the gift giver. *In re Stone and Webster Engineering Corporation*, 1991 SEC 522, 523, n.1.

Under these circumstances, §3 places a responsibility upon each manufacturer and supplier to limit its contributions to less than $50 per invited guest if it is known that the funds will be used (at least in part) to benefit legislators, and if it has an interest in legislative business. When making a contribution decision, each supplier may need to ascertain the estimated costs of the event and the number of guests invited (including the number of public employees). Alternatively, each manufacturer may require that ABC, Inc. limit the benefits provided to the legislators at the event so that its contribution does not exceed the substantial value requirement. Similarly, each manufacturer may limit its contribution by requiring that the invited guests pay ABC, Inc. for the benefits they receive.[2/]

Date Authorized: February 23, 1993

[1/] The test used by the Commission to determine an "interest in legislative business" is "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 goodwill." *EC-COI-92-2*.

[2/] We note that issues may arise concerning whether certain manufacturers' contributions should be aggregated for §3 purposes, if some of the manufacturers shared a common interest in legislative business and are aware that each is making a contribution to the event. See *EC-COI-92-2* (discussing aggregation as to recipient's violation of §3[b]). However, this question is not before us and thus need not be addressed at this time.

CONFLICT OF INTEREST OPINION
EC-COI-93-9

FACTS:

You are counsel for Mr. A, Mr. B, Mr. C and Ms. D, and requested a formal advisory opinion from the Commission on their behalf pursuant to G.L. c. 268A, §10, and c. 268B, §3(g). Mr. A was the Executive Director of a state agency (Agency One) until December 31, 1992, when his resignation became effective. Mr. A has entered into a consultant contract with Agency One, for the period of January 1, 1993 through March 1, 1993. This contract allows for private employment during normal business hours, and specifies that he will perform services on no more than sixty days during the contract period. His consultation consists of responding to specific questions posed by his successor. He does not have the authority to approve any agency matters, and does not know whether his advice is or will be implemented. Agency One is a "state agency"[1/] within the meaning of the conflict of interest law, G.L. c. 268A. Mr. A continues to be a "state employee" by virtue of his regular consultation to Agency One.

Upon Mr. A's departure as Executive Director of Agency One, he filed the appropriate paperwork creating Mr. A & Company, Inc. (the Corporation),

an incorporated company of which he is sole shareholder, president, treasurer and clerk.

Mr. B, Mr. C and Ms. D are private citizens who are interested in forming a business organization with Mr. A after he leaves state service. They want to amend the articles of incorporation of the Corporation, so that Ms. D will be listed as Treasurer, Mr. C will be registered as Secretary, and Ms. D, Mr. B and Mr. C will each have the option to purchase $16\ ^2/_3\%$ of the Corporation, leaving Mr. A with 50% ownership. Ms. D, Mr. B and Mr. C will pay start-up costs for consideration of the purchase option.

Ms. D, Mr. B and Mr. C are the principals of a separate business organization, (Company X). Mr. A does not have any ownership interest in Company X, although he may enter into a short-term personal services contract with Company X after he leaves state service, while this opinion is pending.

Company X has had contact with Agency One on two matters during Mr. A's tenure at Agency One. In early 1992, Company X represented a development group that was interested in responding to a request for proposals (RFP) to build a computer facility in a city (the City) for a second state agency (Agency Two). Mr. B and Mr. C, as representatives of Company X, approached Agency One for information concerning Agency One's interest in providing financing for the Agency Two project. Mr. A met with Mr. B and Mr. C in or about January 1992 to discuss these matters. He also had a telephone conversation with one of Company X's competitors regarding the Agency Two project. Other employees of Agency One met with or had telephone conversations regarding the Agency Two project with another Company X competitor. In August 1992, another state agency (Agency Three) issued an Addendum to the original RFP (Amended RFP). Neither Mr. A, nor anyone else at Agency One (to Mr. A's knowledge) has had any other involvement in the original or Amended RFP since the various requests for information in early 1992. The Amended RFP involves a super-computer facility in the City to be used by Agency Two and other state agencies. Mr. A does not intend to have any connection to either the original or amended computer facility projects while he is in a private capacity.

The second matter involves a proposal to develop and construct a new construction project (the Project) for a fourth state agency (Agency Four). Company X represents a potential bidder on this project. Representatives of Company X met with Mr. A in early 1992 and the summer of 1992, to solicit information regarding Agency One's interest in and capacity to provide financing for the Project. On December 17, 1992, Mr. B and Mr. C met with staff members and the General Manager of Agency Four regarding their Project proposal. Agency One personnel were also present to provide information about Agency One financing. Mr. A abstained from participation in this December 17, 1992 meeting, and any further Company X matters, as he had commenced "nascent discussions" regarding prospective business associations with Mr. B, Mr. C and Ms. D.[2/] At present, Agency Four has not issued an RFP. If the Project does go forward, Company X would presumably be compensated for its efforts. The Corporation would receive no monies from the Project.

QUESTIONS:

1. Are there any restrictions on Mr. A's private activities after the termination of his appointment as Executive Director of Agency One on December 31, 1992?

2. Are there any restrictions on the private activities of Mr. B, Ms. D and Mr. C if they become officers and/or part owners in the Corporation?

ANSWERS:

1. Yes, as set forth below.

2. No, as they are not "partners" under §5.

DISCUSSION:

Restrictions on Mr. A's Private Activities Under §4

As Mr. A will be employed by Agency One as a consultant immediately upon his resignation as Executive Director of Agency One, Mr. A will not become a "former state employee" until the termination of his consultation with Agency One.[3/] The prohibitions of §4 will apply to Mr. A as a current special state employee[4/] because of his consultation for Agency One.

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. This reflects the basic principle that a person cannot serve two masters. Whenever an

matters in which the state also has an interest, there is a potential for divided loyalties. *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977); *In re Bagni*, 1980 SEC 30, 32. This prohibition applies in a less restrictive manner to special state employees. Accordingly, as a special state employee, Mr. A 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 in which (a) he had participated in as a state employee, (b) is or within one year had been a subject of his official responsibility[5/], or (c) is pending within a state agency in which he is serving. Note that clause (c) is not applicable to a special state employee who serves (in his special state employee position) on no more than 60 days during any period of 365 days.

As Executive Director of Agency One, Mr. A had comprehensive official responsibility for agency matters, whether he participated in them or not. Thus, while he is consulting for Agency One, he may not receive compensation from or act as agent or attorney for anyone other than the state in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest, if it was within his official responsibility during the previous year. Thus, he may not receive compensation or act as agent for a private party in relation to particular matters in which he had official responsibility, such as the original Agency Two RFP or the Agency Four project. While he is consulting for Agency One, if he chooses to enter simultaneously into a contract with Company X, he may not receive compensation or act as agent in relation to any matters, for any private party, which were under his official responsibility at Agency One for the previous year, or in which he had at any time participated as a state employee.

In *EC-COI-92-25*, the Commission held that in general, a public employee acts as agent for the purpose of G.L. c. 268A when he 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); *In re Reynolds*, 1989 SEC 423, 427. See also *Commission Advisory No. 13* (Agency). 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*. Of course, Mr. A may act as an agent for Company X or any other private entity if his private activity is not in relation to a matter in which the state has an interest, or is otherwise not within the scope of §4 as discussed above.

Restrictions on Mr. A's Private Activities Under §5(a)

Section 5(a) prohibits a former state employee from acting as an agent or attorney for or receiving compensation[6/] directly or indirectly from anyone other than the Commonwealth in connection with any particular matter[7/] 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.[8/] Therefore, in regard to matters in which Mr. A officially participated as a Agency One employee, this section will permanently restrict his ability to act as agent or attorney for or receive compensation from anyone other than the Commonwealth, after he terminates state employment. Again, Mr. A will only become a "former state employee" after termination of his consultation for Agency One.

We note that participation may be found with regard to matters which were pending during Mr. A's Agency One employment, where he did not personally handle the matter, but rather, he 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*.

Mr. A participated in both the original Agency Two RFP and the Agency Four project, as he personally advised Company X about Agency One's interest in and capacity to finance these projects. Thus, he is forever precluded from receiving compensation from anyone other than the Commonwealth or a state agency for any private activity that is "in connection with" these matters. We need not discuss whether or not there are limitations on Mr. A's ability to participate in the Amended Agency Two RFP, as he has indicated that he does not intend to participate in the Amended RFP in his private capacity.[9/] Additionally, nothing in §5 will prohibit Mr. A from participating in either the Agency Three or Agency Four projects as a consultant to Agency One, as he will be acting as a state employee.

Finally, Mr. A cannot receive income that is based upon services provided by the Corporation's employees or officers, that Mr. A could not provide himself. The Commission has held that if one is merely an investor, and receives nothing more than a return on an investment, the return on investment is

not "compensation," as it is not "in return for services rendered by another." See G.L. c. 268A, §1(a). See also, *EC-COI-89-13*; *86-03*; *85-17*. However, if an individual is active in the business, he cannot receive a share of profits related to a particular matter from a prohibited source, even if he did not work on that particular matter himself, as it is deemed the receipt of money in return for services rendered by another, and is therefore "compensation." See *EC-COI-85-38*; *85-21*; *85-20*.

In the present case, Mr. A is an active member of the Corporation, and not merely an investor. While Mr. A may not receive compensation in connection with particular matters in which he participated as a state employee, that ban does not extend to other members of the Corporation. Mr. A may not receive any income from these prohibited sources. Therefore, the proceeds from the prohibited sources must be segregated from any pool of money which is used to pay the individual his salary or to determine his share of profits. See *EC-COI-89-5*; *85-38*; *85-21*; *85-20*. You have indicated that the Corporation (through employees or officers other than Mr. A) has no intention at this time to engage in private work in connection with these matters. However, these principles would apply to any other particular matter that Mr. A participated in as a state employee.

Restrictions on Mr. A's Private Activities Under §5(b)

Section 5(b) prohibits a former state employee from personally appearing[10/] 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 of the employee within the two years prior to the termination of such state employment.

If, for example, Mr. A had official responsibility for the work of several employees, and did not personally supervise their work, he 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 his subordinates during his final two years at Agency One. Such matters were under Mr. A's official responsibility, notwithstanding the fact that he did not participate in them.

Based upon your facts, under §5(b), Mr. A may not appear before a court or agency of the Commonwealth until one year from the termination of his consultation for Agency One, in connection with a particular matter which was under his official responsibility during the two years before the termination of his consultation. The one year waiting period does *not* begin on December 31, 1992 (the day Mr. A's resignation as Executive Director of Agency One becomes effective) because §5 specifies that the waiting period begins one year after his *last* employment has ceased. Mr. A's consultation is with the same state agency, to take effect upon (or shortly after) his resignation as Executive Director; therefore, he is continuing his employment with Agency One (although in a different capacity). Cf. *EC-COI-92-16*. Thus, Mr. A's consulting post with Agency One in effect tolls the one-year bar of §5(b).

Partners of a Former State Employee: Restrictions on the Private Activities of Mr. B, Ms. D and Mr. C Under §5(c)

The same restrictions that apply to Mr. A under §5(a) will apply to his partners during the one-year period following Mr. A's completion of state services. G.L. c. 268A, §5(c). Thus, the issue is whether Mr. B, Ms. D and Mr. C can be considered Mr. A's "partners" under §5.

The term "partner" is not specifically defined in G.L. c. 268A. However, the Commission has construed the term in previous opinions. See *EC-COI-87-34*; *87-29*; *86-03*; *85-62*; *84-78*. In order to advance the purposes of the conflict of interest law, which "was enacted as part of 'comprehensive legislation...[to] strike at corruption in public office ... for private gain,'" *McMann* at 427, the term "partner" is not restricted to those who enter formal partnership agreements. Thus, where business ties are indeterminate, the Commission has held that a partner is any person who joins with another, formally or informally, in a common business venture, and that the substance of the relationship is what matters, not merely the terms the parties use to describe the relationship.[11/] *EC-COI-84-78*.

While our broad interpretation of the word "partner" under G.L. c. 268A has proved helpful in clarifying situations in which business ties are either unclear or misleading, it is not our function to revise the terms of statutorily defined business arrangements. See G.L. c. 108A (partnerships), G.L. c. 156B (business corporations).[12/] "[A] statute must 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." *Commonwealth v. Galvin*, 388 Mass. 326, 328 (1983); *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992) (emphasis added). The language and history of the conflict of interest law indicates that the drafters discerned a difference between partnerships and other forms of business arrangements. While §5 of G.L. c. 268A discusses only "partners" of a state employee, §6 addresses both "partners" *and* "business organization[s] in which [the state employee] is serving as officer." See also *Report of the Special Commission on Code of Ethics*, 1962 House Doc. No. 3650, at 13-4; Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 350-351 (1965).

In the present case, a corporation is contemplated. While we reserve the right to review the substance of a corporate entity according to the principles enunciated in *Evan v. Multicon Const. Corp.*, 30 Mass.App.Ct. 728, *further appellate review denied*, 410 Mass. 1104 (1991) (disregarding a corporate entity),[13/] it is too speculative for us to comment on the substance of an organization that has not yet been formed. Therefore, we will presume that the proposed Company will be properly incorporated, with an eye towards the *Evan* factors.

All four individuals will thus be officers of a corporation. Mr. A will be the sole owner while the others will have the option to purchase a set percentage of ownership interests in the corporation. Therefore, Ms. D, Mr. B and Mr. C are not "partners" under §5, even in light of the broad purposes of this section.[14/] On the present facts, then, the conflict of interest law does not prohibit these activities.

Date Authorized: March 30, 1993

[1/] "State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

[2/] Mr. A filed a §6 disclosure with this Commission with respect to this matter. This opinion addresses only his future conduct. See G.L. c. 268B, §3(g).

[3/] This is true whether or not he is compensated for his consulting work by Company X. *Cf. EC-COI-92-16* (State employee who resigned from one state agency and a year later, was hired by a second state agency, was both a former and current state employee, implicating §4 and §5 simultaneously).

[4/] "Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

[5/] "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/] "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).

[8/] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval,

disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[9/] If Mr. A were interested in private work regarding the Amended RFP, we would need to determine whether that work was "in connection with" the particular matter in which he participated as a state employee. We would make this determination by analyzing 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," and the effect the proposed private work would have on the government matter. *EC-COI-92-17.*

[10/] 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.*

[11/] This opinion does not overrule precedent which involves this principle, in cases where a particular business association's classification is vague or misleading.

[12/] In fact, G.L. c. 108A, §4, which defines "partnerships" as an association of two or more persons who carry on as co-owners of a business for profit, specifically states that any association formed under any other statute of this state is not a partnership under this chapter. Thus, a corporation formed under G.L. c. 156B cannot be a partnership under c. 108A.

[13/] The twelve factors which should be considered in deciding whether to penetrate the corporate form are: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at time of litigated transaction; (9) siphoning away of corporate assets by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of corporation for transactions of the dominant shareholders; (12) use of corporation in promoting fraud.

[14/] Professional corporation and limited partnership issues are not before the Commission at this time. Thus, this opinion does not address those matters.

CONFLICT OF INTEREST OPINION
EC-COI-93-10*

FACTS:

You are a full-time employee of the Department of Environmental Management (DEM). The Janas Skating Rink (Rink) is owned by the Commonwealth and operated by DEM. DEM has contracted with a private vendor to manage the Rink's operation. You have been offered a part-time employment position with the Rink's management vendor as a Zamboni driver.

QUESTION:

Can you be employed by a private vendor on a part-time basis at the Janas Rink?

ANSWER:

No, unless your current DEM position is structured to qualify as a special state employee position and the Governor approves of your exemption pursuant to G.L. c. 268A, §7(e).

DISCUSSION:

Section 7 prohibits a state employee from having a direct or indirect financial interest in a contract with a state agency, unless an exemption is available. Your contemplated part-time employment by the Rink management vendor would result in you having an indirect financial interest in the vendor's management contract with DEM.

A general exemption provided in §7(b) is available to a state employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency if the contract is made after public notice, and who files a disclosure with the State Ethics Commission.[1/] See *EC-COI-90-3.* This exemption, however, is unavailable to you because you are currently employed by the contracting agency, the DEM. See *EC-COI-85-81* (full-time state employee who sought to be employed by agency vendor under state contract could not avail himself of §7(b) exemption where his full-time employment was with contracting agency).

If your DEM position is restructured to allow you to engage in personal or private employment during normal business hours, you will qualify for special state employee status.[2/] You must, however, file with the State Ethics Commission a written disclosure of your part-time classification or permission to be privately employed during normal working hours prior to engaging in any such private employment. As a special state employee, you could overcome the §7 prohibition by relying upon the exemption found in §7(e). That exemption, however, requires that you

file a written disclosure with the State Ethics Commission of your financial interest in the vendor's management contract with DEM. In addition, in order to avail yourself of the §7(e) exemption, you would need to receive approval of the exemption from the Governor.[3/]

In conclusion, because you will not qualify for the §7(b) exemption as a full-time employee of DEM, you cannot be employed on a part-time basis by the Rink management vendor. Only as a special state employee, and with the approval of the Governor, could you engage in your contemplated part-time employment without violating §7.

DATE AUTHORIZED: March 30, 1993

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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/ If the contract is for personal services, additional requirements must be met.

2/ "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).

3/ We note that even if you were a special state employee, you could not avail yourself of another exemption, provided by §7(d), because that exemption requires that you, as a special state employee, not participate in or have official responsibility for any of the activities of the contracting agency. In your case, because you are employed by the DEM, you necessarily participate in the activities of the contracting agency.

CONFLICT OF INTEREST OPINION
EC-COI-93-11

FACTS:

You are a member of the General Court. Your district serves as the host to a number of public service projects, regional highways, and state agencies.

Your district will soon experience a large increase in construction activity. You further state that it is now possible for community organizations in your district to work with state agencies and the contractors, to build in binding mitigation requirements for projects affecting the community.

As a Legislator, you are both an elected official and a political leader in your community. You expect that when project proponents seek to discuss mitigation issues with the community, they will ask you for recommendations as to which community groups they should deal with and which mitigation efforts are most important to the community. You view this activity as being within the scope of your official duties and within the range of activities customarily expected of legislators.

In addition to your elected position, you currently serve as one of many members of an advisory committee (Committee), a non-profit entity created by special legislation. The ABC PAC was established to provide community-based advisory assistance to state agencies and others with community input on projects affecting the community.

Neither you nor any member of your immediate family (as defined in G.L. c. 268A, §1[e]) has any financial interest in ABC PAC. Neither you nor any member of your immediate family would have any financial interest in any project. ABC PAC does not contribute to or participate in any individual political fundraising events or individual political campaigns.

ABC PAC will soon appoint some directors of a non-profit community organization's Board of Directors (the "non-profit community organization"). The non-profit community organization is a community-based organization made up of concerned

citizens from your district and has been established to aid the community in connection with construction mitigation matters. We presume that the non-profit community organization would benefit, at least in part, from your recommendations and advice concerning community mitigation efforts. Neither you nor any member of your immediate family is a member, director, officer, or employee of the non-profit community organization. Moreover, neither you nor any member of your immediate family would receive any direct or indirect remuneration from the non-profit community organization.

The non-profit community organization will not contribute to or participate in any individual political fundraising events or individual political campaigns. ABC PAC would not derive profit or funding from the non-profit community organization. The non-profit community organization will conduct itself as an organization exempt from federal taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, and will make application to the IRS for recognition of such status.

Finally, as a Legislator, you have no authority over or regulatory relationship with any project bidder. You have neither regulatory jurisdiction nor control over agency or authority decisions concerning bidders or their contracts, nor will you directly participate in any negotiations between any bidder and the non-profit community organization.

QUESTIONS:

1. Does G.L. c. 268A permit you to respond to a request from a private party bidding or seeking to bid (a "Bidder") on a public works project or a project of a public authority which may directly or indirectly impact your district (collectively, the "Project") for a recommendation as to non-profit community organizations which a Bidder may wish to work with on community mitigation issues?

2. Does G.L. c. 268A permit you to recommend certain mitigation efforts in response to an inquiry from a Bidder on a Project for suggestions of mitigation efforts which may either increase community support for the Project or decrease community opposition to the Project, which mitigation efforts may include contributions to certain non-profit community organizations for use in community projects or programs?

ANSWERS:

1. Yes, subject to any relevant limitations discussed below.

2. Yes, subject to any relevant limitations discussed below.

DISCUSSION:

As a member of the General Court, you are a state employee as that term is used in the conflict of interest law. Certain provisions of G.L. c. 268A are relevant to your questions.

Section 23

The Commission has long held that when a public employee solicits anything of substantial value[1/] from persons within his regulatory jurisdiction an issue is raised under §23 of G.L. c. 268A. *EC-COI-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 his custody). This is because G.L. c. 268A, §23(b)(2) prohibits a state employee from using his position to secure unwarranted privileges of substantial value for himself or others which are not available to similarly situated individuals. The Commission has recognized in applying this provision the "inherently exploitable nature" of the situation where a public official is soliciting from someone within his regulatory jurisdiction. See *EC-COI-92-12* (Board member prohibited from soliciting individuals under his regulatory authority).

Applying §23(b)(2) in *EC-COI-92-28*, the Commission concluded that certain proposed business solicitations, which would have been made by the Governor, would have violated §23(b)(2) -- unless specifically permitted by law -- because those solicitations would have resulted in a non-state entity receiving an unwarranted privilege of substantial value. In the present case, not only is there no regulatory nexus between the Bidders and your office, but also your proposed actions would not appear to constitute a "solicitation" within the meaning of *EC-COI-92-28*. Rather, your actions appear to be more consistent with your official duties as a state legislator

performing constituent services. See, e.g., *Public Enforcement Letters 92-1* and *92-2*; see also *Advisory No. 13 (Agency)*.

Where your proposed actions would be limited to making recommendations and responding to requests, we find that you would not be engaging in active solicitation or using your official state office for personal or private (non-public) purposes. Accordingly, your situation is distinguishable from *EC-COI-92-28* and *92-5* (use of state seal prohibited for fundraising or campaign purposes as such activities benefit personal rather than public interest) and therefore does not raise an issue under §23(b)(2). Should you later seek to actively solicit Bidders, you should seek further advice from this Commission.

Section 6

Section 6 prohibits a state employee (including a member of the General Court) from participating[2/] as a public official in any particular matter[3/] in which he, his immediate family members,[4/] or a partner or a business organization which he is serving as an officer, director, trustee, partner or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.[5/]

As a member of the General Court, you would participate in a particular matter whenever you interject yourself, as a state representative, into mitigation or other matters. See, e.g., *Craven v. State Ethics Commission*, 390 Mass. 191 (1983), and *In re Craven*, 1980 SEC 17. Accordingly, if you, an immediate family member, or an organization (including a non-profit) in which you serve as an officer, director, trustee, partner or employee, have a direct or a reasonably foreseeable financial interest in a given matter, §6 would prohibit your participation in that matter. For example, issues will arise for you under §6 if (i) you serve as a member of the Board of Directors of the non-profit community organization established by ABC PAC, and (ii) that non-profit has a financial interest in a mitigation matter, and (iii) you intervene as a state representative (by making recommendations or responding to vendors or state agencies, for example), in that mitigation matter. Assuming, however, that you (as well as members of your immediate family) will not have any personal financial interest in the construction projects or related mitigation matters, and provided that you do not serve as an officer, director, partner or employee of any business organizations with a financial interest in the construction projects or the mitigation matters, an issue under §6 will not be raised as a result of your proposed activities.

This opinion is based solely on the facts as you have presented them. Should the scope of your activities concerning community mitigation efforts or your relationship with the non-profit community organization or any other interested organizations change, you should seek further advice from the Ethics Commission.

Date Authorized: April 27, 1993

1/ Anything valued at $50 or more. *Commonwealth v. Famigletti*, 4 Mass. App.Ct. 584, 587 (1976); *Commission Advisory No. 8.*

2/ "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

3/ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. 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/ Note that the definition of a "particular matter" expressly excludes the enactment of *general* (as opposed to "special") legislation.

CONFLICT OF INTEREST OPINION
EC-COI-93-12

FACTS:

You are an employee in the Governor's office. In this position, you report to a supervisor, on a wide range of issues pending before the Governor, and which need her review and comment. She then advises the Governor. You are involved in inter-agency coordination, and research and preparation of

materials for your supervisor's review, and you are also assigned specific tasks by her.

You are also an elected municipal official in the City of ABC. This is a part-time, salaried post. You state that in your role as an employee in the Governor's Office, you intend to abstain from all matters regarding ABC.

QUESTION:

What restrictions are there on a municipal official who is also an employee in the Governor's Office?

ANSWER:

As a municipal official, you may not vote or act on any matter which is within the "purview" of the Governor's office.

DISCUSSION:

Section 4(a) generally prohibits a state employee from receiving compensation from anyone other than the state in relation to any particular matter[1/] in which the state is a party or has a direct and substantial interest. Section 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. Section 4 is based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law*, 79 Harvard L. Rev. 1113, 1120 (1963).

However, a "municipal exemption" was adopted by the Legislature in 1980 to limit (but not entirely eliminate) the effects of §4. 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. Under this exemption, a state employee may hold an elective or appointive office in a city, town or district, and §4 will not prohibit such an employee from performing the duties of, or receiving the compensation provided for, such office. Nonetheless, 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.[2/] G.L. c. 268A, §4. It makes no difference whether the individual, as a state employee, has any responsibility for the matter in question. *EC-COI-92-22*. 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 words of the statute, are within its "purview." *EC-COI-92-22*; *92-8*; *86-2*.

As we stated in *EC-COI-92-22*, 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 the state agency's employees. For example, a state employee who also serves as a local official may be compelled by his state agency 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. *EC-COI-92-22*.

The critical question here, is what matters are "within the purview" of the Governor's office. The Commission has held that "purview" includes any matter which is regulated, reviewed, or supervised by the agency in question. See *EC-COI-92-22*; *86-2*; *83-26*; *82-89*. The Constitution of Massachusetts gives the Governor broad executive powers. Mass. Const. Pt. 2, C. 2. §1. Such authority includes the ability to pardon, and to nominate and appoint judicial officers. More important, under G.L. cc. 6, 6A, and 7, the Legislature has placed executive offices, departments and agencies under the Governor's jurisdiction. A *partial* list of offices under the Governor's jurisdiction includes the Executive Office for Administration and Finance (which is composed of the Department of Revenue, the Office of the Comptroller, the Massachusetts Commission Against Discrimination, among others), the Executive Office of Communities and Development, the Executive Office of Consumer Affairs and Business Regulation, and the Executive Office of Higher Education, to name a few. See e.g., *EC-COI-92-28* (reach of Governor's control extends to Executive agencies). Additionally, the Governor's purview would include all legislation since the Governor reviews and either signs or vetoes all legislation.

Thus while the conflict of interest law will not prevent you from holding both the post in the Governor's Office and the elected, paid municipal

position, as a municipal employee, you may not act or vote on any matter[3/] which involves the Executive Branch of the State Government. For example, if ABC was considering opening a landfill, you would be unable to act or vote on such matter, as it would require a permit from the Department of Environmental Protection, an agency under the Governor's purview. Similarly, you could not act or vote on the issuance of local liquor licenses, as that matter falls within the jurisdiction of the Alcoholic Beverages Control Commission, an agency under the Governor's purview. Likewise, you may not participate, as a municipal official, in drafting legislation or sponsoring legislation of interest to the City. These examples are intended to be representative only. If you are unsure in a particular situation whether the local matter is within the purview of the Governor's office, you may contact us at that time with specific facts.[4/]

Section 4 applies less restrictively for an *unpaid* municipal employee. As an employee in the Governor's office, the municipal exemption limits your ability to act or vote on a broad range of matters. Therefore, you may wish to relinquish your municipal salary, as §4 applies less restrictively to an uncompensated municipal employee. See *EC-COI-92-25*. As stated above, §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. If you are uncompensated as a municipal official, §4(a) will not restrict you at all, because you will not receive any compensation in that position.

However, §4(c) prohibits a state employee 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 language and structure of the municipal exemption indicates that the "purview" limitation of the "municipal exemption" will apply to an *unpaid* municipal official *only* in the narrow circumstances when he acts as agent for a municipal agency or municipality. Thus, if you are unpaid in your municipal post, the general prohibitions of §4 will restrict you only to the extent that you act as an agent[5/] for the municipality or a municipal agency. Where you act as an agent, you will need the "municipal exemption," and the "purview" limitation of the municipal exemption would apply. For example, you would be unable to lobby the Legislature on behalf of the municipality, as you would be acting as an agent in connection with a matter under the Governor's purview. However, if you are unpaid, you may fully participate in any municipal business in which you are not acting as an agent for the municipality or a municipal agency in connection with a matter within the purview of the Governor's office. *EC-COI-92-25*.

Date Authorized: April 27, 1993

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

3/ Because the Legislature did not specifically use the term "particular matter" in the municipal exemption, the intent was to incorporate a broader class of items. For example, "matter" applies to legislative or managerial actions such as the adoption of a budget, which is not a "particular matter." *Graham v. McGrail*, 370 Mass. 133, 139 (1976).

4/ Normally, a state employee who holds a municipal post will also have issues under §6 (which prohibits a state employee from participating in particular matters in which a business organization in which he is serving as an employee has a financial interest), as a municipality is considered a business organization. *EC-COI-92-03*. However, as a state employee, you have voluntarily agreed to abstain in all matters concerning ABC. Therefore, §6 is not implicated.

5/ The Commission has held that in general, a public employee acts as agent for the purpose of G.L. c. 268A when he speaks or acts on behalf of another in a representational capacity. See, e.g., *EC-COI-92-25; see also, Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992). Some examples of acting as agent are: 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*, and *Commission Advisory No. 13 (Agency)*.

CONFLICT OF INTEREST OPINION
EC-COI-93-13*

FACTS:

You are the Town Counsel for the Town of North Brookfield (Town). Due to the recent death of one of the members of the Town's Board of Selectmen (Board), the Board is currently composed of two selectmen. A special election to fill the vacant Board seat is scheduled for July of 1993.[1/]

On April 21, 1993, the American Legion applied for a pouring license for use in a building which is owned by one of the selectmen and which will be leased to the American Legion, contingent upon the American Legion's receipt of the pouring license from the Board. If the American Legion does not obtain a pouring license, it will seek to lease property in another location.

In an unrelated case, on April 23, 1993, a restaurant owner who is currently leasing property from a partner of one of the selectmen (the other sitting selectman) applied for a pouring license. You tell us that, for the reasonably foreseeable future, the restaurant's current leasing arrangement is likely to be unaffected by the Board's decision on a pouring license. The leasing arrangement, by its own terms, is not contingent upon the lessee's ability to obtain a pouring license. In addition, you tell us that the restaurant is already operating from its current location without a pouring license, and any resulting relocation of the restaurant upon completion of the current lease term is speculative.

A "pouring license" for beverages to be drunk on the premises may be granted by the local licensing authority pursuant to G.L. c. 138, §12. Section 15A of G.L. c. 138 provides that with regard to license applications under §12, the local licensing authority (the selectmen) must cause a notice to be published within ten days after receipt of a pouring license application. The local licensing authority may take action on an application only after a hearing which may not be held sooner than ten days after the publication of the notice. Pursuant to G.L. c. 138, §16B, applications for licenses shall be granted or dismissed by the local licensing authority not later than 30-days after the filing of the application. Any applicant who is aggrieved by the action of a local licensing authority in refusing to grant an application, or by failure to act within the 30 day period, may appeal to the Alcohol Beverages Control Commission (ABCC). You tell us that the ABCC has jurisdiction only to approve or disapprove of the action of the local licensing authority and must then remand the matter to the local licensing authority for further action. The ABCC may not, in any event, order a license to be issued to any applicant except where the application for the license application has first been approved by the local licensing authority. The ABCC does not have the ability to compel a local licensing authority to grant a license. Rather, if the ABCC disagrees with the denial of a license, it may remand the matter for further action by the local authority.

QUESTIONS:

1. May the Selectman who is himself the landlord of a license applicant participate in discussions or votes in connection with the pouring license application submitted to the Board?

2. May the Selectman whose partner is the landlord of a license applicant participate in discussions or votes in connection with the pouring license application submitted to the Board?

ANSWERS:

1. Yes, because of the rule of necessity.

2. Yes.

DISCUSSION:

1. Selectman/Landlord

Section 19 of G.L. c. 268A provides that a municipal employee may not participate[2/] in any particular matter[3/] 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. Such a financial interest may be of any size, and may be either positive or negative. *EC-COI-89-33; 89-19*. Furthermore, whether the financial interest is direct and immediate, or reasonably foreseeable, the §19 restriction is implicated. *EC-COI-89-19*.

You have informed us that with regard to the Selectman who is himself a landlord, without issuance of a pouring permit, his tenant will withdraw from the contemplated leasing arrangement. In light of these facts, it is reasonable to conclude that the Selectman's financial interest will be affected by the Board's decision on the pouring license application. Consequently, §19 would normally prohibit the selectman's participation in the Board's actions

(including discussions or hearings) concerning that particular license application.

The rule of necessity was established by the courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision. See *Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 1233, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to G.L. c. 268A); see also *Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272 (1990).

The Commission has historically stressed the narrow circumstances in which the rule of necessity may be invoked. Specifically, the Commission has held that the rule of necessity may not be validly applied where another qualified tribunal can be found or where the governmental body's inability to act is due in part to the mere absence or illness of a member. See *EC-COI-92-24*; *82-10*; *80-100*. In other words, only where the municipal body cannot obtain the quorum necessary to take action because of disqualification (because of conflicts of interest) may the rule of necessity provide a mechanism by which all members may act notwithstanding any conflicts of interest.

In a recent opinion concerning the rule of necessity, we held that the rule would apply to a situation where disqualification due to conflicts of interest would deprive the governmental body of the number of members necessary to take a valid affirmative vote. *EC-COI-93-3*. In that particular case, although a majority of the members of a municipal board were qualified to consider the matter at issue, we found that the rule could be applied in a situation where, because of conflicts of interest and the type of matter being considered (requiring a supermajority for an affirmative vote), the body could never approve (or act affirmatively with regard to) the matter.

Here, a novel issue concerning applicability of the rule of necessity is presented. We have not previously considered the rule's applicability where one position on a board is vacant and cannot be filled in time to comply with a time requirement for taking action imposed on the board by a statute. Under these circumstances, the resulting question is whether the rule can be invoked as to the current two-member board where one board member would otherwise be disqualified due to a conflict of interest.

We believe that the rule of necessity should apply in a situation where statutory time restrictions require the Board to act, where a vacancy on the Board cannot be filled in time to meet those time restrictions and where, as a result, the Board cannot obtain a quorum due to the disqualification of one or more of its members.[4/] If the rule is not applied in this situation, the Board will be unable to fulfill its statutorily required responsibilities because of a conflict of interest. Here, the other requirement for the rule's applicability is met because neither the ABCC nor any other entity may carry out the task of issuing a pouring license. We therefore find that under circumstances such as those presented here, the rule of necessity may be applied. To find otherwise, we would frustrate the explicit legislative purpose of having an important public decision, such as the granting of a liquor pouring license, made in a timely manner by a local licensing authority.

2. Selectman Whose Partner is Landlord.

With regard to the other Selectman whose partner is currently leasing property to an applicant for a pouring license, we must first determine whether that Selectman will be prohibited from participating by virtue of §19. As indicated above, §19 will prohibit a municipal employee from participating in a matter in which his partner has a direct and immediate or reasonably foreseeable financial interest. Here, the applicant is already operating his business from the leased premises and is unlikely, in the foreseeable future, to alter his lease arrangement as a result of an unfavorable decision by the Board concerning the pouring license. Based on the facts provided to us, it does not appear that the partner of the Selectman in question would have a direct and immediate or reasonably foreseeable financial interest in the restaurant owner's ability to obtain a pouring license.[5/] Any impact which the pouring license decision might have on future lease arrangements with the applicant is speculative at this time. See *EC-COI-89-19* (financial interests which are remote, speculative, or not sufficiently identifiable do not require disqualification). We caution, however, that were we to have different facts before us, we might be inclined to find that the Selectman's participation is barred under §19. For example, an issue would be raised under §19 if the tenant's restaurant business was likely to fail without the issuance of the license (and therefore the tenant would be unable to fulfill his lease obligations). Similarly, if the lease arrangement contained a term allowing for the Selectman's partner as landlord to share in any of the restaurant's profits, the §19 restriction would be implicated. Should you

discover additional facts indicating an identifiable financial interest on the part of the Selectman's partner, you should seek further advice from this Commission.

Date Authorized: May 25, 1993

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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/ Apparently, a total of 64 days are required for the scheduling and holding of a special election. See G.L. c. 41, §10; c. 53, §§7, 14.

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/ We note that this opinion is not intended to address the applicability of the rule of necessity to situations in which a board position is vacant and cannot be filled for a period of time, but where the board is not compelled by law to take action before the position may be filled. Likewise, we are not commenting here on the appropriateness of invoking the rule of necessity where the board is required by law to act on a matter within a limited time period and where one of its members is unable to participate for reasons other than vacancy before the expiration of the period in which the board must act.

5/ 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. Absent an issue under §19, the Selectman in question would nevertheless need to file a written disclosure with the Town Clerk of the landlord/tenant relationship between his partner and the pouring license applicant. Such a disclosure must be made prior to Selectman's participation in Board proceedings relating to the license application.

CONFLICT OF INTEREST OPINION
EC-COI-93-14

FACTS:

You are a member of the Legislature and, in the course of your duties and committee work, you are frequently invited to business meetings which include a meal. These meals are paid for by individuals with an interest in legislative business.

QUESTION:

Does the $50.00 threshold used by the Ethics Commission in its assessment of whether an item is "of substantial value" for purposes of G.L. c. 268A remain a viable measure of substantial value?1/

ANSWER:

Yes.

DISCUSSION:

The term "substantial value" first appeared as part of the comprehensive 1962 conflict of interest legislation that created c. 268A. In response to the need for a comprehensive law covering all employees and addressing the major kinds of conduct which might create either a conflict of interest or the appearance of conflict, the General Court established a special study commission in 1961 to draft and recommend appropriate legislation. The special commission modeled much of its work on drafts of similar legislative initiatives pending in Congress. The special commission was guided by two objectives: that the proposed legislation address corruption in public office, inequality of treatment of citizens, and the use of public office for private gain; and that the proposed legislation set realistic and precise standards so that the Commonwealth, counties, and municipalities may continue to attract capable individuals who are willing to serve in government. Final Report of the Special Commission on Code of Ethics, H. 3650 at 18 (1962).

The relevant section in the 1962 legislation is §3. G.L. c. 268A, §3(b) prohibits a public employee from directly or indirectly soliciting, accepting, or agreeing to accept 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) places a corresponding prohibition on anyone who offers or gives something of substantial value to a public employee for or because of any official act or act within the employee's official responsibility.2/

The General Court did not establish a statutory dollar amount for substantial value. This approach followed the recommendation of the special commission that the substantial value standard should "be dealt with by judicial interpretation in relation to the facts of a particular case, an approach more desirable than the imposition of a fixed valuation formula." Final Report, 1962 House Doc. No. 3650, p. 11.

Subsequently, in *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976), the Massachusetts Appeals Court opined that it would be "difficult to conceive of circumstances in which $50 ... could not be found "substantial" in the context of §3(b)." The Commission relied upon the *Famigletti* decision when it established a $50 threshold as a guideline for public employees who were offered gifts, meals, or other benefits during the course of their official employment. See *In re Michael*, 1981 SEC 59, 69; *Commission Advisory No. 8 (Free Passes)* (1985). As a matter of prosecutorial discretion, the Commission has declined to sanction gifts valued at less than $50, considering such gifts to be of nominal value.[3/]

The term "substantial value" has not been limited to cash gifts and has been interpreted to include, among other things, tickets *(Advisory No. 8)*, meals, loans (*In re Antonelli, 1986 SEC 101*), transportation (*EC-COI-82-99*), bequests (*Public Enforcement Letter 92-1*), and frequent flyer points (*EC-COI-88-22*), as well as intangible benefits such as a desirable faculty appointment (*EC-COI-81-136*), access to hospital administrators (*In re Burke*, 1985 SEC 248), and use of the state seal to benefit private interests (*EC-COI-92-5*).

This opinion request raises the question whether the Commission should continue to use a $50 threshold in measuring "substantial value." We re-affirm our decision that substantial value is $50 or more.

The $50 standard is part of the long-standing precedent of the Commission and has been relied upon as a guide by thousands of public employees. We have received no public comment urging us to increase the threshold. We are reluctant to change long-standing precedent when we have not been presented with a compelling reason to do so, particularly in light of the important public interest which underlies the substantial value requirement and the provisions of G.L. c. 268A, §3.

In reaching our decision, we are guided by the original preamble to G.L. c. 268A, which states,

> A continuing problem of a free government is the maintenance among its public servants of moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards of the highest order. A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.

One of the fundamental principles upon which the conflict law, in general, and §3, in particular, are based, is public confidence that the judgment of public employees and their decisions are based on the public's interest, and are not made because an official has been influenced, or appears to be influenced, by gratuities. When a public official accepts gratuities from private individuals and organizations with an interest in the official's actions, the public's confidence in the credibility and impartiality of the government process is undermined. See *EC-COI-86-14*; *In re Michael*, 1981 SEC 59, 68; *Commission Advisory No. 8 (Free Passes)*. Questions arise in the public's mind concerning preferential treatment.

The acceptance of gratuities "negates the trust that the public is entitled to place in public employees: that the public, not private interests, are furthered when the employee performs his duties. In such a case the private citizen may reasonably ask why a public official is entitled to compensation or benefits over and above what the taxpayer has authorized and from which he has been excluded," thus creating an environment where "those who serve the people are treated better than the people themselves." *EC-COI-86-14*; see also, *EC-COI-83-4*.

In conclusion, the term "substantial value" is not defined in G.L. c. 268A, and the Commission is charged with interpreting the term in light of the overall remedial purpose and intent of the conflict of interest law. See e.g., *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978); *Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536 (1974). We believe that the $50 threshold serves the public interest in maintaining the integrity of the

government decision-making process, and provides a realistic and workable measure which public officials may use to guide their conduct.

Date Authorized: May 25, 1993

[1/] Because the definition of "substantial value" is an issue of great interest to public employees at all levels of government and to the public, we publicly invited legal arguments from interested parties, including the Office of Governor's Legal Counsel, Counsels for the House of Representatives and the Senate, Common Cause and the Massachusetts Municipal Association. We did not receive any response.

[2/] The term "substantial value" was more recently inserted into 1986 amendments for two of the G.L. c. 268A, §23 standards of conduct. Section 23(b)(1) provides that a public employee may not accept employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office. Section 23(b)(2) provides that a public employee may not use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value.

[3/] In certain instances, the Commission has aggregated repeated gratuities whose cumulative value is greater than $50 to find a violation under §3 and has indicated that it may aggregate donations from organizations or entities which share a common interest in legislative business. See *EC-COI-93-8*; *92-2*; *In re Flaherty*, 1990 SEC 498; *In re United States Trust Company*, 1988 SEC 356. For example, if an organization provides you with free meals or other gratuities on a repeated basis over the course of a year, the Commission will aggregate the total value of all of the meals for purposes of determining substantial value. See *In re United States Trust Company*, 1988 SEC 356, 358; *Commission Advisory No. 8.* This example is not intended to represent the only circumstances in which the Commission will aggregate. The Commission will consider other circumstances on a case by case basis.

CONFLICT OF INTEREST OPINION
EC-COI-93-15

FACTS:

You are a Selectman in a Town (Town). You are also the part owner of an engineering and surveying business (the Corporation). The Corporation is incorporated in New Hampshire with an office in Massachusetts. The Corporation provides technical services to some Massachusetts municipalities, but it predominantly serves private individuals and companies. The Corporation has not previously served as a consultant for the Town.

The Corporation now has the opportunity to work on land development projects for privately held land in the Town. In such situations, the Corporation would provide engineering and surveying services to private parties, but would not have an equity interest in the land or the development. Specifically, you contemplate that the Corporation would prepare drawings on behalf of private parties for submission to the Town's Planning Board for approval as part of a subdivision plan pursuant to G.L. c. 41, §81K *et seq.* In addition, the Corporation may prepare documents for submission to the Town Conservation Commission for approval under the Wetlands Protection Act, G.L. c. 131, §40 or in the context of a septic system approval by the Town's Board of Health.

The other principal of the Corporation is a registered land surveyor. You are a registered professional engineer. It is the Corporation's policy that you and the other principal stamp and seal all plans and other professional documents. You include your professional seal on documents for reasons of quality control and liability exposure. In addition, a professional stamp/seal is sometimes required by the general laws or by a local government to be included on certain documents submitted for municipal approval. Your professional stamp and seal contains your name as well as your designation as a professional engineer.

QUESTIONS:

1. Does G.L. c. 268A permit you to receive compensation for the preparation of documents which will be submitted to a Town agency?

2. Does G.L. c. 268A permit you to place your professional seal on documents which will be submitted to a Town agency?

ANSWERS:

1. No.

2. No.

DISCUSSION:

As a selectman, you are a municipal employee[1/] for purposes of applying the conflict of interest law.[2/]

1. Receipt of Compensation:

Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in connection with a particular matter[3/] in which the municipality is a party or has a direct and substantial interest.

By definition, submissions and applications requiring approval of a municipal agency are particular matters in which the municipality has a direct and substantial interest. See *EC-COI-86-03*. In *EC-COI-93-5*, we stated that the receipt of private compensation by a full-time state employee for making submissions or reporting information to a state agency would violate §4(a) (state employee restriction which parallels §17). In addition, where §17(a) uses the language "in connection with" a particular matter, compensation for work done pursuant to or in relation to a submission or application raises an issue under §17(a). For example, the Commission has previously held that work done pursuant to a building permit (a particular matter) is presumptively in connection with that permit. Absent specific circumstances indicating that a municipal employee is one of a number of privately paid employees on a construction project and has no responsibility for dealing with the municipal government, a public employee's receipt of private compensation for work pursuant to a building permit will violate §17(a). See *EC-COI-88-9*; contrast *87-31*, n.7.

In applying §17(a) to your facts, we find that any private compensation you would receive for preparing plans and other documents which will be submitted to any Town board or agency would be considered in relation to a particular matter in which the Town has a direct and substantial interest, i.e., an application requiring municipal approval. See *EC-COI-92-18* (county employee may not receive compensation from private investment firm for preparing proposal which the firm intends to submit to county agency). Even if you would not be receiving compensation for actually making a submission or filing documents in relation to an application, where the documents which you or other employees of the Corporation prepare are required by a municipal agency, are relied upon by a municipal agency in making its decisions, and are an integral part of an application submitted to the municipal agency, we would find that the preparation of such documents is "in relation to" the application or submission, a particular matter within the meaning of the §17(a) restriction. You could not, therefore, receive compensation paid by a private client for the preparation of documents to be submitted to any Town agency. In addition, you could not receive compensation in your position with the Corporation for supervising or approving the work of other Corporation employees who would be preparing documents which would then be submitted to a Town agency. See *EC-COI-92-1*.

If, however, the firm were to prepare such submissions on an unpaid basis, an issue would not be raised under §17(a). Similarly, if the Corporation were to utilize fees generated from particular matters in which the Town has a direct and substantial interest to pay the salaries of other corporate employees or to otherwise segregate its receivables to avoid your receipt of any such fees, an issue under §17(a) will be avoided. See *EC-COI-85-21*.[4/]

2. Use of Professional Stamp or Seal.

Section 17(c) prohibits a municipal employee from acting as attorney or agent for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest. The Commission has, on numerous occasions, held that, for purposes of the conflict law, acting as an agent includes signing contracts on behalf of an individual or entity, acting as a spokesperson or advocate for another in an application process, presenting supporting information to a public agency or representing another in any way before a public agency. See *EC-COI-92-18*; *85-58*; *84-6*; *83-78*.

In *EC-COI-92-25* we further explained the meaning of agency within the context of the conflict of interest law:

> [i]n 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 issue here is whether professionally stamping or sealing documents, which are then submitted to a

Town board or committee, constitutes representation of, or personally appearing on behalf of, someone other than the Town.

An agency relationship within the context of the conflict of interest law comes into play when "there is a palpable link between the private person doing business with the government and the government employee, whereby the latter is bound -- or appears to be bound -- to speak and act on behalf of the former." *Commonwealth v. Newman, supra.*, at 150. Here, in professionally stamping a document which will be submitted to a Town board, you appear to be acting on behalf of the Corporation's client. At the very least, there is an appearance (if not an obligation) that you are ultimately bound to speak on behalf of the Corporation's client in relation to that document if its contents are questioned by a municipal agency. Moreover, your statement that the seal is affixed for liability reasons further indicates to us an acknowledgment (if not an intention) that you will be bound or potentially bound to take legal responsibility for the contents of the document on behalf of the client.

Additionally, in the case of a professional engineer, pursuant to state regulation, a professional stamp indicates that a registered professional engineer or someone under his direct personal supervision has prepared the document. See 250 CMR 3.05:(3). Presumably, the fact that a document has been prepared by or with the supervision of a professional engineer is meant to communicate, on behalf of the party for whom the document was prepared, a certain level of quality and accuracy such that the document may be relied upon. Indeed, you state that such a stamp is placed on the document, among other reasons, for quality control. In other words, in placing your professional stamp on a document to be submitted to a Town board, you are in fact communicating in a representational capacity (on behalf of the Corporation's client) that the contents of the document are correct and accurate and the substance of the document may be relied upon by the Town board in granting its approval.

We therefore conclude that when you place your professional stamp on a document, you do so in a representational capacity, that is, on behalf of your Corporation's client. Such activity constitutes acting as agent within the meaning of the §17(c) prohibition.

In summary, §17 will prohibit your receipt of income in relation to the preparation of documents which will be submitted to any Town agency. In addition, you may not act as agent for any of the Corporation's clients by submitting documents or applications on behalf of clients, or by otherwise representing clients before any Town agency. Finally, even if you do not receive compensation derived from the fees for preparing documents to be submitted to a Town board or agency, you cannot include your professional stamp or seal on such documents.

DATE AUTHORIZED: June 22, 1993

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/ By definition, selectmen in a town with a population greater than 10,000 inhabitants may not be special municipal employees. G.L. c. 268A, §1(n).

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/ We note that other employees of the Corporation would not be restricted from appearing before (in person or by making submissions to) Town boards or agencies or from being compensated by the Corporation in connection therewith. As explained above, however, you cannot supervise such employees, nor may you receive any compensation derived from those matters.

CONFLICT OF INTEREST OPINION
EC-COI-93-16

FACTS:

You were employed by a state agency from 1980 until 1992. For approximately one year, you were in a managerial position where you supervised over 1000 employees who were directly responsible for delivery of services, and you participated in the development of a Request for Proposal (RFP) for the majority of the

agency's existing contracts. Specifically, you supervised the staff members who wrote the RFP, and you sat on committees in which its content was reviewed and discussed. After the development of the RFP, the contracting process was halted due to a change in administrations. During that time period, the RFP was reviewed but was not substantially altered. You did not participate further in the contracting process.

You have informed us that ABC, a private entity, has offered you a position that will include the supervision of staff who are implementing contracts awarded to ABC by your former state agency. All of the existing contracts were awarded pursuant to the RFP described above, but not until several months after you left the agency. You have also stated that your position with ABC would involve contracts ABC has with other state agencies. You wish to accept the position offered by ABC.

QUESTION:

May you receive compensation from ABC for your work in connection with the contracts awarded to ABC by your former state agency in 1993?

ANSWER:

No, for the reasons stated below.

DISCUSSION:

As a "former state employee" under G.L. c. 268A you will be subject to the restrictions of §§5 and 23 of G.L. c. 268A.

Section 5

Section 5(a) prohibits you from ever receiving compensation from anyone other than the Commonwealth or a state agency in connection with any "particular matter" in which the Commonwealth or a state agency is a party and in which you "participated" as a state employee. We have recently stated that our analysis of §5(a) must be faithful to the purpose behind its enactment. That purpose, we have said, "is to bar ... 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." *EC-COI-92-17* (emphasis added).

Participate, as defined in §1(j), requires that the level of participation be personal and substantial.[1/] Not all participation by a government employee will be deemed to meet this requirement; we have previously stated that participation that is non-determinative and not part of the decision-making process is most likely to be deemed ministerial and insubstantial and, on that basis, will not constitute "participation" under the conflict law. *EC-COI-89-7*; *In the Matter of John Hickey*, 1983 SEC 158, 159. Although in two early Commission opinions we concluded that "participation in the development of an RFP is not, in and of itself, substantial 'participation' ... in the award of the contract," (*EC-COI-79-51*; see also *79-85)*, we have subsequently made it clear that the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs. Compare *EC-COI-81-113* (advice rendered at a preliminary stage not deemed substantial participation); *83-46* (40 hours spent surveying computer companies to gather information necessary to prepare RFP deemed substantial participation).

Upon reviewing the principles articulated in our earlier opinions and applying them to your facts, we conclude that you participated as a state employee in the contracts awarded to ABC in 1993. Our conclusion is based on your substantial role, either directly or indirectly through the supervision of others, in the drafting of the RFP and in the decision making process concerning its content.[2/] See, *Graham v. McGrail*, 370 Mass 133 (1976) (participation in discussions involving a particular matter amount to personal and substantial participation); *EC-COI-87-27* (participation will be found if former employee made any decision, determination or approvals, or if you actively supervised or consulted with others in their determinations, decisions or approvals); *EC-COI-89-7* (oversight and tacit approval of the work of direct subordinates can constitute participation within the meaning of the statute). Here, the level of your involvement, we conclude, amounts to "personal and substantial" participation in the RFP and the resulting contract.

The scope of the work you do for ABC is further restricted by other provisions of the conflict law. Specifically, §5(b) prohibits you from appearing for one year before any state agency on behalf of ABC (or any other individual or entity), in connection with any particular matter which was within your "official responsibility"[3/] as a state employee during the two years prior to the termination of your service. "Official responsibility turns on the authority to act,

and not on whether that authority is exercised." *EC-COI-89-7*; see also, *EC-COI-89-17* (The keynote of official responsibility is the 'potentiality' of directing agency action and not the actual exercise of power.). Thus, §5(b) prohibits you from participating in meetings and negotiating sessions with, or personal appearances before your former state agency or any other state agency in connection with any matter which was within your official responsibility after 1990. *EC-COI-79-73*. We have stated that "personal appearance" would include any telephone calls or correspondence made by you on behalf of ABC in connection with the contracts or other matters which were under your official responsibility during the last two years of your state position. *EC-COI-89-26*; see also, *89-27* (oral or written communications made "with the intent to influence" particular action is a personal appearance; whereas, communications relating "solely to procedure" are probably *de minimis* communications not triggering the prohibitions of §5(b)). We note that your extensive responsibilities for supervising some state employees will bring a significant number of matters within your area of "official responsibility."

Section 23

Lastly, your employment by ABC would be restricted by the standards of conduct contained in §23. Section 23(c) prohibits a state employee from disclosing confidential information which she has acquired in her state position or from using such information to further her personal interest. See, *EC-COI-89-23*.

DATE AUTHORIZED: June 22, 1993

[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/] We note that the RFP you helped to create is substantially the same as the RFP which led to the contracts awarded to ABC.

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

CONFLICT OF INTEREST OPINION
EC-COI-93-17

FACTS:

You are a school teacher and a member of the Board of Selectmen (Board) in the Town of XYZ (Town). You have complied with the provision of the Selectman's exemption to G.L. c. 268A, §20 to hold both posts simultaneously.[1/]

The Town has a Town Manager form of government and the Board is the appointing authority for the Town Manager. As the appointing authority, the Board also negotiates the terms of the Manager's contract, and evaluates his performance.

Recently the education reform bill was enacted into law at the state level. This law established that in towns with a Town Manager form of government, the Town Manager is to act as a voting member of the collective bargaining team for the School Department in the Town. Since your Town Manager is currently involved in determining the wages, hours, and terms and conditions of employment for the School Department employees (including yourself), you wish to know whether as a Selectman you may evaluate the Manager and re-negotiate any aspect of the Manager's contract.

QUESTION:

Can a Selectman, who is also a teacher, evaluate the Town Manager's performance or re-negotiate his contract, where the Manager is negotiating on behalf of the School Department?

ANSWER:

No, unless the re-negotiation of the Manager's contract or the evaluation involves only incidental terms or conditions of employment, such as retirement benefits, overtime compensation and the like.

DISCUSSION:

Section 19

Section 19 prohibits municipal employees from participating[2/] in particular matters[3/] in which they or their immediate family members[4/] have a financial interest. See, e.g. *EC-COI-89-19*. The financial interest must be "direct and immediate, or at least reasonably foreseeable." *EC-COI-84-123*; *84-98*; *86-25*; *84-96*. Participation includes discussion and

informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30*. Under §19, if *any* financial interest is implicated, no matter how small, or whether the affect is positive or negative, participation is impermissible. *EC-COI-84-96*.

A contract is a particular matter for purposes of the conflict of interest law, as is the decision whether or not to re-negotiate a contract. G.L. c. 268A, §1(k). Moreover, evaluating an employee's performance or re-negotiation of a contract constitutes participation in a particular matter. Thus the issue here is whether, as a member of the School Department, you will have a reasonably foreseeable financial interest in the Manager's contract or in a decision to re-negotiate his contract which would prevent you from participating in either a re-negotiation of the Manager's contract or an evaluation of his performance.

In *EC-COI-86-25*, the Commission held that a City Council member who was also an employee of the Massachusetts Teachers Association (MTA) could not appoint a School Committee member, where the School Committee was in negotiation with the MTA's local affiliates, as the MTA had a financial interest in the selection of the School Committee member. Similarly, we conclude here that if the proposed re-negotiation of the Manager's contract contemplates the Manager's re-appointment or conditions upon which he can continue employment, then you may not participate in such re-negotiation since it will determine whether or not the Town Manager continues to participate in the union negotiations, which in turn will affect your own financial interest. See *Advisory No. 11 (Nepotism)*; *EC-COI-86-25*.

Conversely, you will not have a financial interest in the mere evaluation of the Manager's performance (where re-appointment is not at issue), or the re-negotiation of the incidental terms or conditions of the Manager's continuing employment (e.g. retirement benefits, overtime compensation and the like). Thus, you may participate in negotiations contemplating incidental terms or conditions of the Manager's employment under §19.

Section 23

To the extent that §19 allows you to participate in the evaluation of the Town Manager or the re-negotiation of his contract, you will be required to comply with G.L. c. 268A, §23. Section 23 establishes standards of conduct for all public employees.

Section 23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value[5/] which is not properly available to similarly situated individuals. Section 23(b)(2) requires that you apply objective standards to any matters involving the Manager, and that you not allow the fact that he will be negotiating with the School Department to affect your judgment. See *EC-COI-92-32*; *89-23*; *89-3*.

Additionally, §23(b)(3) prohibits a public 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 of the relevant facts to the employee's appointing authority, or if no appointing authority exists, by making a public disclosure. 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." *EC-COI-92-3* (emphasis in original). Thus, to the extent that §19 does not prohibit your participation in the evaluation of the Town Manager or re-negotiation of his contract, you will be required to file a written disclosure with the Town Clerk concerning your interest as an employee of the school department.

DATE AUTHORIZED: August 9, 1993

[1/] Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by *any* municipal agency of the same city or town, in which the city or town is an interested party, unless an exemption applies. The propriety of holding multiple municipal positions is addressed by §20. See *Commission Advisory No. 7*. The Selectmen's exemption allows a municipal employee to simultaneously hold the position of Selectman, and allows the employee to perform the duties of or receive the compensation provided for such office; provided, however, that the Selectman does not receive compensation for more than one office or position held in a town; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such

additional position while he is still a member of the board of selectmen or for six months thereafter.

2/ "Participate", participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

3/ "Particular matter", any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactments 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.

5/ Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*

CONFLICT OF INTEREST OPINION
EC-COI-93-18

FACTS:

You represent a municipal agency (Agency A) in the Town. Mr. X1/ is a full-time employee at Agency A. His normally scheduled hours at Agency A are 7:30 a.m. to 3:30 p.m., Monday through Friday. He is also on call one weekend per month. Mr. X also has a part-time post with the Town, assigned to a second municipal agency (Agency B). His work hours at Agency B are normally scheduled after 4 p.m. on weekdays and during the day on weekends, for an average of 20 hours per week. The position at Agency B is designated as a "special municipal employee" post. When Mr. X is on call for Agency A, he is required to respond, even if he is working at Agency B.

QUESTIONS:

1. Can Mr. X be designated as a "special municipal employee" in his position with Agency A?

2. Can Mr. X hold both municipal positions simultaneously?

ANSWERS:

1. No, as he works full-time in that position.

2. No, unless he reduces the number of hours he works at Agency B to no more than 500 hours per year.

DISCUSSION:

1. Special Municipal Employee Status

The term "employee" at each level of government (state, county and municipal) is defined in G.L. c. 268A very expansively. One is considered an employee of a particular level of government if he performs services for the government or holds any office, position, employment or membership in any of its agencies or instrumentalities.2/ An individual is a government employee whether he is paid or unpaid, or whether he works full-time or part-time. Individuals working on an intermittent basis, or as consultants, are also defined as government employees. However, certain provisions of the conflict of interest law distinguish between regular employees and "special" employees. The distinction is important since those provisions of the conflict law apply in a less restrictive fashion for "special" employees.

A municipal employee3/ can be designated as a "special municipal employee" only if one of the following conditions exists:

1. He is unpaid, or

2. By its classification in the municipal agency involved or by the terms of the contract or conditions of employment, the employee is permitted "personal or private employment" during "normal working hours", or

3. He did not earn compensation for more than 800 hours in the position during the preceding 365 days.4/ G.L. c. 268A, §1(n).

You have urged that we read §1(n) to permit a full-time employee who works on other than a 9 a.m. to 5 p.m. schedule to attain special employee status.5/ To achieve this result, you would have us interpret the phrase "normal working hours" to mean employment from 9 a.m. to 5 p.m. In this way, you argue, Mr. X would be entitled to special employee status because the conditions of his employment with Agency A (specifically, his 7:30 a.m. to 3:30 p.m. schedule)

would "permit ... personal or private employment during normal working hours." We decline to accept your proposed construction, however, for the following reasons.

While the phrase "normal working hours" is neither defined in c. 268A nor discussed in its legislative history, we note that the phrase was adopted by the legislature nearly thirty years ago, when flex-time was not as prevalent as it is today. Then, it was more often the case that in most agencies (other than institutions, and the like, which are run on a 24 hour per day basis) the work day ran from 9 a.m. to 5 p.m., and employees were given little or no flexibility to shift their hours from that norm. With that historical reality in mind, we are not persuaded that the main object to be accomplished in §1(n) was to create a device that would allow a full-time employee to work odd hours so as to facilitate multiple municipal office holding. Indeed, the simplest reason for concluding that §1(n) is inapplicable to Mr. X's situation is that the employment outside of the "normal working hours" of one's public service contemplated by §1(n) is "personal and private employment." That language, according to its usual and accepted usage, cannot reasonably be interpreted to embrace Mr. X's public employment at Agency B. Thus, interpreting that language alone, we conclude that Mr. X may not enjoy special employee status in his position at Agency A.

An additional basis for this conclusion, however, may be found when one examines the words "normal working hours" in light of the legislative history and purpose of §1(n). Our examination of the legislative history and early commentary on the statute leads us to conclude that special employee status was primarily intended for those individuals whose public activities were not a substantial portion of their work day. In this way, the Commonwealth could enjoy the part-time services of these individuals, without penalizing them by unnecessarily restricting their private activity.

In 1962, a special commission completed an extensive study of conflict of interest issues. G.L. c. 268A was the product of that study. In the Final Report of the Special Commission, House Doc. No. 3650, at p. 12, it was noted that the proposed conflict of interest bill "defined special employees . . . as those who serve without compensation or those whose condition of employment permits some personal and private activities on the part of the . . . employee" (emphasis added). The Special Committee pointed out that, without the classification, it would be "impossible for the Commonwealth to have the service of specialists or other capable people for specific assignments in departments or agencies." *Id.* Thus, the critical consideration is whether the employee is permitted outside employment in the course of his municipal employment, and not whether such outside employment is carried on "in the nighttime, or at some other odd hours, [as] 'normal working hours' should be determined...not by an arbitrary notion of which hours of the day are 'normal' for work." Buss, *"The Massachusetts Conflict-of-Interest Statute: An Analysis"* 45 Boston L. Rev. 299, 314, n. 94.

Here, it is plain that Mr. X's full-time position with Agency A does not permit personal or private employment during his workday there. Indeed, so extensive is Mr. X's connection with the Agency A that his on-call status with that agency requires that he respond there, even if at that very moment he is assigned to be at work for Agency B. That the completion of Mr. X's full workday with the Agency A is before 5:00 p.m., or at such a time that there remain hours in the day in which he can work, is not dispositive. Rather, the interpretation of §1(n) that is most consistent with its legislative history is the one which recognizes that "employment 'during normal working hours' means, generally, during all or a predominant part of such hours." *Buss* at 314. On the other hand, "when a substantial portion of the normal working day, or working week, are taken up with the employee's public duties, the relevant test is, under the third alternative, based on total compensated hours."[6/] *Id.* Quite obviously, as a full-time employee, Mr. X is unable to meet that test.

Finally, we note that an examination of prior versions of §1(n) also indicates that special municipal employee status was not contemplated to embrace full-time employment under most circumstances. Specifically, prior to April 27, 1965, §1(n) defined a special municipal employee as "a municipal employee whose position has been expressly classified ... as that of a special employee under the terms and provisions of this chapter." Responding to inquiries from municipal officials concerning the factors to be considered in assigning such classification, the attorney general issued a memorandum outlining the relevant standards.[7/] That memorandum included as one of the six factors to be considered the "amount of compensation [received] in relation to that of a full-time employee." Braucher, *Conflict of Interest in Massachusetts*, in Perspectives of Law, Essays for Austin Wakeman Scott 12 (1964). Clearly, therefore, special employee status was thought to be something other than full-time employment.

In short, viewing the plain language of §1(n) in its entirety and with attention to its main objective, we conclude that the stated prerequisites of §1(n) (i.e. an employee who volunteers his time, or who is paid but works a for a mere fraction of a year -- 800 hours a year or less -- or who is allowed private employment during his normal working hours) all embrace a character of employment that is different from ordinary full-time employment.[8/] Therefore, we believe that, absent special circumstances, full-time employees are regular employees, and cannot be designated as "special."[9/]

Since Mr. X cannot be designated as a "special municipal employee" in his Agency A position, he will be subject to the restrictions on multiple office holding contained in §20(b) of G.L. c. 268A.

2. Multiple office holding at the local level

Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by *any* municipal agency of the same city or town, in which the city or town is an interested party, unless an exemption applies.

As noted above, Mr. X does not qualify for designation as a "special" as employee of Agency A. Thus, he must meet all of the following conditions under §20(b) to also work at Agency B, as §20(b) is the only exemption available to "regular" municipal employees:

1. The second job must be with a completely independent agency, department or board. The individual may not participate in or have official responsibility for any of the activities of the second agency, and the first agency must not regulate activities of the second agency;

2. the position is publicly advertised;

3. the individual files a statement disclosing the second job with the city or town clerk;

4. the second job will be performed outside of the normal working hours of the first position;

5. the services performed in the second job are not part of the employee's duties in the first job;

6. the employee is not compensated in the second position for more than 500 hours per year;[10/]

7. the head of the second agency, department or board, certifies that no employee of that agency is available to do this work as part of their regular duties; and

8. the city or town council, board of aldermen, or board of selectmen give their approval of this exemption from §20.

Mr. X does not currently fulfill all of these §20(b) requirements. Since he works approximately 20 hours per week at Agency B, unless he works less than a full year, he will exceed the yearly time limit. Mr. X may not receive compensation in the Agency B post for more than 500 hours per year in order to qualify for a §20(b) exemption. Thus, as Mr. X does not qualify for a §20(b) exemption, he may not hold the full-time Agency A and part-time Agency B posts simultaneously.

However, if Mr. X were to be paid for 500 hours or less per year in his Agency B post, he may be eligible for a §20(b) exemption if he can fulfill the remainder of the §20(b) conditions. Specifically, Mr. X will need the certification described above by the head of Agency A, and approval of this exemption by the Board of Selectmen.

DATE AUTHORIZED: August 9, 1993

1/ Mr. X has authorized this opinion request.

2/ Agency One is a "municipal agency" for purposes of the conflict of interest law. A "municipal agency," is defined 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).

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/] Approximately 20 weeks at 40 hours/week or 15 hours/week for a full year of employment.

[5/] For convenience, we will refer to this type of work schedule as "flex-time."

[6/] The "third alternative" refers to the portion of §1(n) which allows for "special" designation where the employee does not earn compensation for more than 800 hours in the position during the preceding 365 days.

[7/] Edward W. Brooke, Attorney General, Memorandum re Classification Under Chapter 779 of the Acts of 1962 (March 8, 1963).

[8/] See, e.g., *Buss*, 45 Boston Univ. L. Rev. 299, 314 (1965) ("It is clear that the special classification is intended to be reserved for those who in fact have limited contact with their level of government.")

[9/] Those who are permitted to have private employment during normal working hours may include consultants whose contracts do not include scheduled work hours, attorneys allowed to engage in the private practice of law during normal working hours, or full/part-time teachers at educational institutions who are expressly allowed time to do private research or study. These examples are not meant to be all inclusive.

[10/] Approximately 9.5 hours per week.

CONFLICT OF INTEREST OPINION
EC-COI-93-19

FACTS:

You are the Administrative Assistant (Assistant) to the Board of Selectmen (Board) of a town (Town). The Assistant is appointed on an annual basis to this full-time, paid position. The Assistant's duties have recently been expanded to include the responsibilities of the insurance commissioner (Commissioner), previously a separately appointed, paid part-time position. Additionally, the Assistant's duties now include the responsibilities of Secretary to the Sewer Commissioners (Secretary), previously also a separately appointed, paid part-time position. The Assistant will now be compensated through one paycheck for all of her services in that position. The Assistant is now interested in seeking election to a position on the Board.

You also inform us that the Assistant's spouse is the manager of a Town department (this is a full-time position appointed by the Board).

QUESTIONS:

1. Does G.L. c. 268A permit the Assistant to provide services to multiple municipal agencies, assuming that she will receive only one paycheck?

2. Does G.L. c. 268A permit the Assistant to hold her current Town position and to serve as a Selectman?

3. If she is elected and serves in the position of Selectmen, is Town Meeting approval required under G.L. c. 268A, §21A in order for the Assistant to be reappointed in future years to her current position as Assistant?

ANSWERS:

1. Yes.

2. Yes, provided that she complies with the exemption found in §20(d).

3. Yes.

DISCUSSION:

The Assistant is a municipal employee[1/] for purposes of G.L. c. 268A. Selectmen are also considered municipal employees.

1. The Assistant's Current Position.

Section 20

Section 20 prohibits a municipal employee from having a financial interest in a municipal contract. For purposes of the conflict of interest law, the term "contract" includes any type of 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). See also *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987).

Typically, when an individual receives compensation from the same municipality for more than one appointed municipal position, an issue is raised under §20 by virtue of the separate employment contract which results from each municipal appointment. Here, however, you tell us that the duties of the Assistant have recently been expanded to include the responsibilities of Commissioner and

Secretary, and that the Assistant will be compensated with only one check. In *EC-COI-83-83*, the Commission concluded that a state employee who received one paycheck which reflected duties performed for two state agencies would not violate §7 (the state counterpart to §20) because the duties performed would be considered to stem from one state employment contract. See also *EC-COI-84-12*. Similarly, we conclude here that, because the functions of Assistant, Commissioner and Secretary have been combined into one municipal position, an issue under §20 will not arise.

2. Holding the Positions of Selectman and Assistant.

We must also examine §20 in light of the Assistant's intention to seek the office of Selectman. A selectman who also serves as the selectmen's Assistant will have a financial interest, within the meaning of §20, by virtue of the "employment contract" which results from her appointment to the compensated Assistant's position. Such a financial interest in a municipal contract is prohibited unless one of the exemptions found in §20 applies.

Because the Town has fewer than 10,000 residents, the Town's Selectmen are, by definition, special municipal employees.[2/] As a special municipal employee, the individual in question may avail herself of the exemption found in §20(d)[3/] to overcome the prohibition against the financial interest she has in her employment contract as Assistant.[4/] She must file, with the Town Clerk, a written disclosure of her financial interest in the Assistant's position, and must also receive, from the remaining selectmen, approval of the §20(d) exemption.[5/]

We note that §20 also contains an exemption (the "selectman's exemption") which permits a municipal employee to hold the additional municipal position of selectman, provided that the individual is employed by the municipality prior to becoming a selectman. The selectman's exemption imposes several additional restrictions. For example, the municipal employee may receive only one municipal salary but has the ability to choose which salary he will receive. In addition, as a selectman, he may not vote or act on any matter within the purview of the municipal agency by which he is employed or over which he has official responsibility. Finally, he may not be appointed to any additional municipal position while serving as a selectman or for six months thereafter. While the Assistant is not prohibited from using the Selectman's exemption, rather than §20(d), to overcome the §20 prohibition, use of the Selectman's exemption will render her service as a Selectman of little or no value to the Town because of the restriction that, as a Selectman, the Assistant may not vote or act on any matter within the purview of the municipal agency by which she is employed. See *EC-COI-93-4*. Because the Assistant is employed by the Board, the restriction imposed by the selectman's exemption would prohibit her from acting or voting on any of the Board's business. Thus, we assume that the Assistant will elect to pursue an exemption under §20(d). The Assistant must additionally comply with the standard imposed by §19 of G.L. c. 268A.

Sections 19

Section 19 prohibits a municipal employee from participating[6/] in any particular matter[7/] in which she or her immediate family members,[8/] including her husband, has a financial interest.

Section 19 will prohibit the Assistant as selectman from participating in matters related to her employment or any reappointment as Assistant. For example, the Assistant could not participate as a selectman in the approval of the §20(d) exemption for herself. Moreover, she cannot participate as Assistant or as selectman in any particular matter which will have a financial impact on her husband's employment by the Town. We note that participation includes not only the final, formal vote on a given matter, but also any discussion, recommendations, etc., leading to a formal vote. *EC-COI-87-25*. Whenever such a matter comes before the Board, it would be advisable for her to leave the room. See *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

3. The Assistant's Reappointment.

Assuming that the Assistant receives a §20(d) exemption permitting her to hold the positions of selectman and Assistant, the next issue is whether the Assistant/selectman may be reappointed by the remaining selectmen to the Assistant's position on an annual basis.

Section 21A

Section 21A prohibits a municipal board or commission from appointing any of its members to any office or position under the supervision of that board or commission unless such appointment is first approved by a vote at an annual town meeting or unless the member has resigned from the Board at least thirty days before the appointment. Therefore, even upon compliance with the requirements of §20, an issue will arise under §21A if the board of

selectmen appoints one of its current members (or a former member prior to the expiration of thirty days) to a position under the supervision of the selectmen.[9/]

In *EC-COI-92-30*, we explained that §21A is rooted in the common law doctrine of incompatibility of offices. See *Gaw v. Ashley*, 195 Mass 173 (1907); *Attorney General v. Henry*, 262 Mass. 127, 132 (1928); *Mastrangelo v. Board of Health of Clinton*, 340 Mass. 491, 492 (1960); *Starr v. Board of Health of Clinton*, 356 Mass. 426 (1969). This incompatibility includes the potential danger that a board member will attempt to persuade his fellow colleagues to appoint him or otherwise engage in conduct which might give the appearance of such self-dealing activity, and the danger that, as a result of alliances formed through service together on a board, board members will be persuaded to reappoint one who, under different circumstances, they would conclude should be removed from office. See *Mastrangelo*, 340 Mass. at 492; See also *EC-COI-80-44* (§21A serves to prohibit board member from attempting to persuade fellow colleagues to appoint him and any appearance of self-dealing activity). Our review of this body of common law, and the express language of §21A, persuades us that the Legislature has chosen to resolve the actual or perceived incompatibility of positions by prohibiting the appointment of an individual to a position under the supervision of his fellow board members. We must still consider, however, whether the policy considerations embodied in §21A are also implicated in the case of a reappointment.

We have previously examined the issue of reappointment in the context of §20 and the selectman's exemption. In *EC-COI-82-107*, we considered whether the selectman's exemption and its prohibition against appointment to a second municipal position effectively barred an individual's reappointment to a municipal position which he held prior to becoming a selectman. Noting the statute which created this appointment bar was entitled, "[a]n act providing that a person shall not be prohibited from holding the office of selectman in a town because such person is an employee of the Town," we concluded that the appointment bar was intended to cover only new, post-elective appointments. We went on to note that the reappointment at issue in *EC-COI-82-107* was not the same as an appointment to a new, post-elective position. Rather, we concluded that the reappointment was more properly regarded as an appointment to the very position which the selectman's exemption expressly permits a selectman to hold.[10/]

We decline to reach a similar result, however, with regard to our treatment of reappointment in the context of §21A, because §21A serves a substantially different purpose. In contrast to the selectman's exemption, §21A prohibits a board member from acting to appoint a fellow board member to a position under the supervision of the board, absent a vote of the Town meeting. We find that by erecting this appointment bar the Legislature has once again sought to address the potential for abuse whereby selectmen could acquire or continue to hold a subordinate position by virtue of their incumbency in the office of selectmen. See fn.9, above. We conclude that the application of §21A to the Assistant is appropriate where the potential for using the office of selectman to seek designation by her fellow board members to continue to hold the Assistant's position is present upon her "reappointment".[11/] Therefore, if the Assistant is serving as a selectman when her current appointment as the Board's Assistant expires, she may not be reappointed by the Board as Assistant, without first receiving approval of the appointment at the annual town meeting,[12/] or if she has resigned from her Selectman's position, she may be reappointed only after the expiration of thirty days.

DATE AUTHORIZED: September 14, 1993

[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/] "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).

3/ Under §20(d), the restrictions of §20 do not apply to a special municipal employee who files with the clerk of the city, town or district a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if the city council or board of aldermen, if there is no city council, board of selectmen or the district prudential committee, approves the exemption of his interest.

4/ Section 20 also contains an exemption which is applicable to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency. This exemption is not available here because, as a selectman, the Assistant is employed by the contracting agency (the Board) and, therefore, she participates in the activities of the contracting agency. See G.L. c. 268A, §20(c).

5/ In her Assistant's position, the employee will not have a financial interest in the position of selectman because selectmen are elected and we have previously determined that election to a public office does not create a contract. *EC-COI-82-26.*

6/ "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).

7/ "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).

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

9/ The §21A restriction, however, is not triggered until a board appoints one its own members to a position under that board's supervision. Where a person is first employed under the supervision of a board and then becomes a board member, an issue will not be raised under §21A if no additional appointment is necessary. See *Commission Advisory No. 3.*

10/ As we noted in *EC-COI-82-107*, the Legislature was apparently aware of the potential for abuse in that a selectman could use that position to acquire other municipal positions. The Legislature, however, addressed that concern in the case of regular selectmen (i.e. selectman who are required to use the selectman's exemption to continue to hold a municipal position held prior to becoming a selectman) by prohibiting those selectmen from seeking and holding any additional municipal positions (not held prior to election).

11/ We do not believe our interpretation here of §21A is inconsistent with *EC-COI-82-107* because we believe that the selectman's exemption does not contemplate allowing a municipal employee to seek and hold the additional position of selectman when the original municipal position is a position under the supervision of the selectmen. As we noted above, use of the selectman's exemption where one holds a position under the supervision of the Board renders the selectman's position a nullity. See our discussion at Section 2. To the extent that it is necessary, we are here clarifying our ruling in *EC-COI-82-107* to state that the selectman's exemption will effectively allow reappointment only where such reappointment is to a position which is not under the supervision of the selectmen.

12/ We note that unless the Town restructures the Assistant's position so as to obviate the need for annual reappointment, town meeting approval will be necessary each year in order for the Assistant to continue to hold that position as well as her selectman's position.

CONFLICT OF INTEREST OPINION
EC-COI-93-20

FACTS:

You are an appointed sewer commissioner in a town (Town). Sewer commissioners have been designated special municipal employees.

You are also the president and principal owner of ABC Plumbing & Heating (ABC). In your individual capacity, you have previously developed several multi-unit residential projects. Presently, you own several undeveloped acres of land in the Town on which you expect to erect residential units in the future.

The sewer commission (Commission) is currently reviewing proposed sewer and water regulation revisions that were drafted by their former executive director. These regulations will govern the construction of all new sewer and water pipes, and the repair of all existing pipes within the Town.

You anticipate that the Commission will soon consider whether polyvinyl chloride (PVC) pipe or copper pipe must be used for water connections. You state that PVC pipe is considerably less expensive for a developer to use than copper pipe. Additionally, you indicate that if the Commission allows the use of PVC pipe, it could require that it be laid in a bed of sand rather than in the existing soil, thereby creating added expense for the developer.

QUESTION:

Does G.L. c. 268A permit you to participate as a Commissioner in a decision to adopt these water and sewer regulations?

ANSWER:

No, unless your appointing authority gives you an exemption under G.L. c. 268A, §19(b)(1).

DISCUSSION:

In your position as a sewer commissioner, you are a municipal employee for the purposes of the conflict of interest law.[1/] As a result, you are subject to the restrictions set forth in §19, which provides that a municipal employee (including a special municipal employee) may not participate[2/] as such in any particular matter[3/] in which to his knowledge he or his immediate family has a financial interest.

In *Graham v. McGrail*, 370 Mass. 133, 139 (1976), the term "financial interest" was interpreted to mean an economic interest that is not shared with a substantial segment of the public. While the Court in *Graham* held that the financial interest implicated by §19(a) is to be distinguished from the interest every member of the Town would have in a particular act or expenditure of the Town,[4/] the Court also made it clear that an individual's interest in his own compensation "is unquestionably a 'financial interest'" under §19(a). That 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 direct or reasonably foreseeable financial interest will be affected, the municipal employee must abstain from the matter in question. See, e.g., *EC-COI-89-19;* see also *Graham v. McGrail*, 370 Mass. at 137-138. The question then is whether you have a direct or reasonably foreseeable financial interest in the proposed revisions to the Town's water and sewer regulations.

As a real estate developer whose project would be subject to the regulations, you have an obvious financial interest in the Commission's decision whether or not to require the more costly copper pipe or the more costly method of PVC pipe installation. See, e.g., *EC-COI-84-76* (city council member has obvious financial interest in decisions of council with regard to land he proposes to develop); *EC-COI-87-31* (where Board issued permits and licenses concerning the operation of restaurants, Board member has financial interest in Board determinations regarding his restaurant). Thus, §19 would prohibit your participation in the decision whether or not to promulgate these regulations, unless that decision either is not a "particular matter" or is exempt under §19(b)(3) because the decision involves "a determination of general policy," and your financial interest is "shared with a substantial segment of the [Town's] population."[5/] See *EC-COI-92-34*.

The Commission has long recognized that while "regulations in and of themselves are not particular matters ... the process by which they are adopted and the determination that was initially made as to their validity will be considered particular matters." *EC-COI-81-34*; see also *85-11; 87-34*. Therefore, §19 would require your abstention unless we were to conclude that your financial interest in the decision is shared with a substantial segment of the Town's population.[6/]

In determining whether your financial interest in the promulgation of the proposed regulations is shared by a substantial segment of the Town's population, we look to our most recent application of this statutory language in *EC-COI-92-34*. There we considered whether a Selectman and commercial property owner could participate in a decision to adopt a residential factor that would have the effect of applying a higher tax rate to commercial property than to residential property. In analyzing that question, we first looked to whether the general policy at issue suggested a

classification for the segment of the Town's population we were to examine. We concluded, in that case, that the classification was established by the regulation itself -- whether the Town resident was a commercial, as opposed to a residential, property owner.

We then sought to determine what percentage of the Town's population fit within the classification and found that 10% of the Town's population were commercial property owners. Noting that the "relevant classification must be one of kind rather than degree," however, we did not seek to determine whether there was a difference among commercial property owners in the degree to which they were financially impacted by the policy.[7/]

Applying a like analysis in this case, we believe that although the regulations do not establish the relevant classification, the facts you present suggest what that classification consists of, namely, construction businesses -- real estate developers, contractors, plumbers, and the like -- which will be affected on a regular basis by the regulations. By contrast, homeowners, and businesses unrelated to construction, would be affected only in the rare instance where they install or repair new or existing pipes. Moreover, some homeowners and businesses will never be affected by the regulations.

As in *EC-COI-92-34*, we do not endeavor to determine among construction businesses the difference, if any, in the degree to which the regulations will affect their financial interest. Instead our focus is next directed to determining whether people who own these businesses constitute a substantial segment of the Town's population. Here, we think it safe to assume these business owners represent but a small percentage of the Town's total population.[8/] Because of this, and because such business owners' ability to earn their livelihood is directly affected by construction costs, we must conclude that, as a real estate developer, your financial interest in the adoption of regulations affecting those costs is not shared by a substantial segment of the Town's population. See, e.g., *EC-COI-83-47* (selectman and commercial shellfisherman may not participate in particular matters concerning the shellfishing industry where his shellfishing license was one of only 200 issued by the Town, and because of the "significance to [his] livelihood"); see also *84-96* (owner of land abutting proposed development would, by virtue of the location of his property, have a financial interest that was distinct from other citizens).

Since we conclude that your financial interest is not shared by a substantial segment of the Town's population, the only exemption from §19 that is available to you is that contained in §19(b)(1). To qualify for this exemption, prior to participating, you must (1) inform your appointing official of the nature and circumstances of the particular matter; (2) make a full written disclosure to your appointing authority of the financial interest; and (3) receive a written determination in advance from your appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town. Unless and until you receive this exemption, you must abstain from any participation in the promulgation of water and sewer regulations for the Town.[9/]

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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/] "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/] Examples cited by the Court are every taxpayer's interest in the school budget for his town, every town employee's interest in every town expenditure, and the interest of school children and their parents in school services.

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

[6/] In *EC-COI-92-34*, we noted that certain matters of general policy may not be particular matters for purposes of G.L. c. 268A. That precedent is wholly consistent with

our ruling in *EC-COI-81-34* that regulations themselves are not particular matters. Nothing in *EC-COI-92-34*, however, persuades us that we must now depart from our longstanding precedent that the process leading to the adoption of general policy contained in a regulation is a particular matter.

7/ In *EC-COI-92-34*, our concern was that while the residential factor affected all commercial property owners, the opinion requester owned a significantly higher percentage of the Town's commercial property. Therefore, the degree to which the residential factor affected the requester's interest was greater than the remainder of the class of commercial property owners.

8/ In *92-34*, we held that 10% of a town's population would constitute a "substantial segment." The Town's population, according to the 1990 census, is 33,836. G.L. c. 4, §7(41) ("population" as used in the General Laws, means the number of residents counted in the most recent census). Were we to apply a 10% standard here, we would have to be presented with evidence that the Town has 3,383 or more owners of construction-related businesses in order for us to conclude that the regulations affecting such business owners as a class affect a substantial segment of the Town's population.

9/ Should you obtain an exemption under §19(b)(1), you are advised that you must continue to guide your conduct in accordance with the principles of §23. Specifically, Section 23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Thus, §23(b)(2) requires that you apply objective standards in any decision concerning the proposed regulations, without regard to your personal interest in the matter. See *EC-COI-89-23; 89-3*.

CONFLICT OF INTEREST OPINION
EC-COI-93-21

FACTS:

You are counsel to the Auburn School Committee (Committee). Members of the Committee are elected.

Your question concerns the Education Reform Act of 1993, Chapter 71 of the Acts of 1993, which was signed into law on June 18, 1993 (Act). Specifically, St. 1993, c. 71, §53, amends G.L. c. 71, §59C by requiring that each public, elementary, secondary and independent vocational school in the Commonwealth shall have a school council (Council). You ask whether the Council is subject to G.L. c. 268A and, if so, how G.L. c. 268A will apply to a Council member who also serves on a school committee.

The Act provides that the Council shall consist of the principal, teachers, parents, and community representatives "drawn from such groups or entities as municipal government, business and labor organizations, institutions of higher learning, human services agencies or other interested groups," and, in secondary schools, at least one student representative. The principal shall be a co-chair of the Council with another co-chair selected by the Council members. Parent representatives will be elected by the school's Parent Teacher Organization (PTO). If there is no PTO, the school committee will approve the representative process by which the parent representatives will be chosen. Once elected, "parents shall have parity with professional personnel on the [Council]." Teacher representatives are chosen by the teachers in that school building, and the principal will choose community representatives, subject to a representative process approved by the Superintendent and the School Committee. The Act also provides that non-school members (i.e., persons other than parents, teachers, students and staff of the school), shall not constitute more than fifty (50%) percent of the Council. Council members will not be compensated for their work on the Council.

The Act requires that school councils hold their first meeting not later than forty (40) days after the first day of school. Council meetings will be subject to the Massachusetts Open Meeting Law, G.L. c. 39, §23B. The Act requires that the school council "shall meet regularly with the principal of the school".

A Council will review, and advise the principal on the budget for the school; consult with the principal on the development of a student handbook in a secondary school; assist the principal in the identification of the educational needs of the students attending the school; and consult with the principal on the adoption of educational goals for the schools, consistent with the state Board of Education's goals and standards and the educational policies established by the School Committee.

Under the Act, the principal, with the assistance of the Council, is required to formulate a school improvement plan (Plan). This and other records of the Council are subject to the Public Records Law, G.L. c. 66, §30. The Plan "shall include an assessment of the impact of class size on student performance, and shall consider student to teacher ratios and other factors and supportive adult resources,

and may include a scheduled plan for reducing class size." The Plan also shall address professional development of the school's professional staff, the allocation of professional development funds in the school budget, the enhancement of parental involvement in the school, safety and discipline, extracurricular activities, and the provisions of appropriate educational services to culturally and linguistically diverse student populations. When completed, the Plan shall be submitted to the school committee for review and approval on an annual basis. If the Plan is not reviewed by the school committee within thirty days of receipt, "the plan shall be deemed to have been approved." A school committee may delegate other policy making responsibilities to a school council, although collective bargaining responsibilities under G.L. c. 150E may not be delegated.

The Act also rewrites G.L. c. 71, §37, which concerns the responsibilities and duties of school committees. Under the Act, school committees, among other things, are responsible for reviewing and approving budgets for public education in the school district. School committees also establish educational goals and policies for schools in their district that are consistent with the requirements of law and the statewide goals and standards established by the state board of education. St. 1993, c. 71, §35.

You state that a school committee member might be asked to serve on a Council either as a parent or community representative.

QUESTION:

1. Are Council members "municipal employees" within the meaning of G.L. c. 268A, §1(g)?

2. Does an elected school committee member violate G.L. c. 268A by also serving on a school council?

ANSWER:

1. Yes.

2. No.

DISCUSSION:

Jurisdiction

The threshold question is whether Council members are persons "performing services for" a "municipal agency".[1/]

In previous decisions, the Commission has weighed the following four factors in determining what constitutes "performing services" for a municipal agency:

> (1) the impetus for creation of the position (whether by statute, rule, regulation or otherwise);
>
> (2) the degree of formality associated with the job and its procedures;
>
> (3) whether the holder of the position will perform functions or tasks ordinarily expected of employees, or will he be expected to represent outside private viewpoints; and
>
> (4) the formality of the person's work product, if any. See *EC-COI-87-28; 86-5; 82-81.*

In general, where an advisory council has been created by statute, the Commission has found that it is a government agency and its members government employees. See, e.g., *EC-COI-86-4; 82-157; 82-139.* Here, the Council is created by the Act. However, because no one factor is dispositive, we examine the Council in light of the remaining three factors. *EC-COI-86-4.*

Our examination of the remaining factors leads us to conclude that the Council is a municipal agency. In *EC-COI-86-5*, we found that an advisory committee to the Office of Real Property within the Division of Capital Planning and Operations was not a state agency in part because membership on the committee "[could] be fluid and [was] generally open." Indeed, the facts of that case indicated that the only required membership on the committee was "an invitation" to certain representatives to the general court.

Here, by contrast, the Act delineates who must serve on the Council and the process by which they are to be selected. The Act provides that membership on the council shall include parents, teachers and community representatives. Where there is no representative process for choosing parent and community representatives, the Act requires that such a process be approved by the school committee and, in the case of the community representatives, also by the Superintendent of Schools.

The Act also provides guidelines for the conduct of Council meetings. Most significantly, Council meetings will be subject to the Massachusetts Open Meeting Law, G.L. c. 39, §23B, and its requirements for advance public notice of meetings, public

attendance, and the preparation of accurate records of votes and other actions taken at such meetings. Compare *EC-COI-86-5* (not a state agency where "there [were] no provisions ... for the conduct of committee meetings (e.g., whether the meetings must be open to the public).") We conclude, therefore, that the Council has a high degree of formality both as to its membership and its procedures.

We also conclude that Council members will perform functions or tasks of the type ordinarily expected of municipal employees. We have previously found that members of a committee formed in the discretion of a state agency that had little organizational formality and whose purpose was to provide outside viewpoints to the agency were not state employees for purposes of G.L. c. 268A. See *EC-COI-86-5; 82-81.* In comparison, the members of a committee created pursuant to statute who played a substantive role in the agency's regulation process were found to be state employees. *EC-COI-87-17; 86-4.*

Here, Council members who are parents and/or community representatives do provide outside viewpoints, but are also involved in the formation of school policy. Under the Act, the Council will review and advise the principal on the budget for the school; consult with the principal on the development of a student handbook in a secondary school;[2/] assist the principal in the identification of the educational needs of the students attending the school; consult with the principal on the adoption of educational goals for the schools consistent with the state Board of Education's goals and standards and the educational policies established by the School Committee; and assist the principal in the formulation of a school improvement plan. A school committee may also delegate other policy making responsibilities to a school council. In short, the Act envisions that the Council will play a substantive role in the identification of the educational needs of the students attending the school, and in the formulation of policies and a plan to meet those needs. Thus, we find that the functions to be performed by Council members are of the type ordinarily performed by municipal employees.

Finally, we find that the school improvement plan prepared with the Council's input and assistance is a formal work product, requiring school committee approval. Thus, weighing all of the relevant factors, we conclude that Council members are "performing services for" a "municipal agency," and, therefore, are municipal employees for purposes of G.L. c. 268A.[3/]

Sections 17 and 19

Having concluded that the Council is a municipal agency, we turn to your second question, namely, whether an elected School Committee member violates c. 268A by also serving on the Council. In *EC-COI-92-26*, the Commission addressed the situation where a municipal employee is serving on two boards. There the Commission concluded that this dual status "eliminates certain conflict of interest issues" under §17 and §19 of the conflict law.

Specifically, under §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, prohibits a municipal employee from participating in a matter in which a business organization[4/] in which he is serving an employee has a financial interest. However, these sections will not prohibit a municipal employee from acting as a Committee member, in matters in which the Council has an interest, or vice versa, "because in each capacity the employee is acting on behalf of the municipality." *EC-COI-92-26*; see also *EC-COI-90-2.*[5/]

Section 20

As noted in *EC-COI-92-26, n.4*, however, we must also consider whether the employee's dual status raises issues under §20, dealing with multiple municipal office holding. In general, 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 of the same city or town, unless an exemption applies. In applying §20, we must look at each position held from the prospective of the other position held.

The Commission has held that an elected municipal post does not involve a contract with the municipality. *EC-COI-82-26.* Thus, a Committee member does not need an exemption in his Council position in order to hold his elected School Committee post. Nor does the Committee member need an exemption in such position to hold a position as a Council member, as he will be uncompensated in Council post, and thus will not have a financial interest in that position. Therefore, §20 will not prohibit an elected School Committee member from also serving as an uncompensated member of the Council.[6/]

DATE AUTHORIZED: October 19, 1993

1/ General Laws c. 268A defines a municipal employee as: "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis...G.L. c. 268A, §1(g). (emphasis added)

2/ See, St. 1993 c.71, §36. The student handbook is intended to contain school policies concerning the use of tobacco products, disciplinary proceedings, including procedures assuring due process, standards and procedures for suspension and expulsion of students, procedures pertaining to discipline of students with special needs, and the disciplinary measures to be taken in cases involving the possession or use of illegal substances and weapons.

3/ Our conclusion is buttressed by our observation that in drafting the Act, the Legislature clearly contemplated G.L. c. 268A. See, e.g., St. 1993, c. 71, § 54 (in the Act's anti-nepotism provision, "immediate family" shall have the meaning assigned by c. 268A, §1(e)); St. 1993, c. 71, §32 (it shall not be a violation of c. 268A for a member of the foundation budget review commission to participate in commission deliberations that will or may have a financial impact on his own compensation). Where the Legislature did not want members of an advisory council to be considered public employees by virtue of that membership, it stated so expressly. See St. 1993, c. 71, §3 (members of advisory council to the board of education shall not, by virtue of their membership, be considered state employees).

4/ Municipalities and their agencies are considered to be "business organizations" for purposes of §19. See *EC-COI-89-2; 88-4; 84-7; 81-62.*

5/ We caution that a school committee member must still be guided by the principles in §23, which provides standards of conduct for all public employees. Specifically, §23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Thus, §23(b)(2) requires the application of objective standards when one acts as a school committee member to review the plan one helped to develop as a Council member. See *EC-COI-89-23; 89-3.* We offer no opinion concerning whether such dual service furthers the intent and purpose of the Education Reform Act.

6/ We point out that the result would be different in the case of appointed School Committee members who are regular municipal employees, and who receive compensation in their School Committee position. Section 20(b) is the only exemption generally available to regular municipal employees. See *Commission Advisory No. 7.* Use of that exemption, among other things, requires public advertisement of the second job, here the School Committee position. Alternatively, the city council, board of alderman (if there is no city council), or board of selectmen may designate the Council members "special" municipal employees, in which case they may utilize the less onerous exemption in §20(d). (The §20(c) exemption for "specials" is unavailable to a school Committee member because he participates in or has official responsibility for the municipality's school department.)

By contrast, §20 will not present an obstacle to principals and teachers who serve on the Council by virtue of those municipal positions. See *EC-COI-84-147* (no issue raised under §7, the state counterpart to §20, for members of company board who served by virtue of their state university affiliation); *84-148.*

CONFLICT OF INTEREST OPINION
EC-COI-93-22

FACTS:

A Governor's Advisory Council (Council) was organized to provide the Governor with input and advice on issues related to the Massachusetts economy. Members of the business and academic communities, as well as individuals within the Administration, had reason to believe that the Governor would be receptive to private sector viewpoints on certain economic issues. The Council, however, was never officially formed by the Governor, nor were its members officially appointed.

The Council has submitted various reports to the Governor, all advisory in nature, and has primarily focused on analyzing various industries and making policy recommendations to the Governor. One recommendation resulted in the creation of a particular program within a state agency. That program is funded in part by the private sector. The Council's recommendations contributed to the Administration's decision to support two initiatives which were incorporated into legislation filed by the Governor, which was subsequently enacted by the Legislature. The Council's recommendations, however, do not amount to policies and programs which may be readily adopted and implemented by executive branch agencies.

The Administration views the Council as representative of one particular constituent group in the Commonwealth. The Governor now wishes to publicly acknowledge the importance of the issues on which the Council has been focusing and would like to motivate or encourage the Council to continue the work it has been doing. Accordingly, the Governor

has decided to formally create the Council through Executive Order as he has done with other advisory groups representing various constituent groups.[1/] The Governor's decision to create the Council through an Executive Order is completely discretionary.

In the future, the Council will continue to be made up of members from the private sector and academia. They will be chosen for their expertise in various areas relevant to the work of the Council. As in the past, Council members will not receive any compensation nor will they be reimbursed for expenses. The Council will not receive, nor will it expend or control, public funds. There is no required number of members, nor is there any required number of meetings of the Council. Sub-committees may be designated at the direction of the Council chair. All reports of the Council will be advisory in nature, and the Governor will not be required to adopt or implement them, in whole or in part. Council members will have no authority delegated to them. The Council's purpose will be to continue to serve as an outside resource to the Governor and to provide him with the benefit of members' expertise. No government officials are members of the Council, but the Governor attends the Council meetings, usually with the Lieutenant Governor and the Secretary of Economic Affairs. Although these government officials meet regularly with the Council, the work of the Council is performed by its members.

QUESTION:

Will Council members be considered state employees for purposes of the conflict of interest law?

ANSWER:

No.

DISCUSSION:

For purposes of the conflict of interest law, a state employee is defined as "a person performing services for or holding an office, position, employment, or membership in a state agency,[2/] 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).

The Commission has previously considered four factors in determining whether an advisory committee will be considered a state agency or instrumentality thereof. No single factor is dispositive of this determination. Those factors are:

1) the impetus for the creation of the committee (whether required by statute, rule, regulation or otherwise);

2) the degree of formality associated with the committee and its procedures;

3) whether members of the committee with perform functions or tasks expected of government employees, or will they be expected to represent outside viewpoints;

4) the formality of the committee's work product, if any. *EC-COI-86-4; 86-5.*

We must examine the Council in light of these four factors. First, the Council was not created pursuant to statute, rule, or regulation, but rather by the Governor in his discretion. See *EC-COI-83-21* (task force set up by Governor on his own initiative as opposed to statutory requirement was not a public entity); contrast *EC-COI-82-157* (advisory council established by G.L. c. 7, §40M on a permanent basis rather than a temporary or ad hoc basis resulted in finding of state employee status for members). In prior opinions, we have considered the fact that a committee is a permanent and mandatory component to the implementation of a state statute to be an important factor in finding state agency status. See *EC-COI-87-17* (Water Resources Management Advisory Committee of the Department of Environmental Quality Management established as a mandatory committee under St. 1985, c. 592); *86-4* (Administrative Penalties Advisory Committee mandatory and permanent committee pursuant to state statute). Here, the members of the Council will serve at the pleasure of the Governor and the Council is not required to remain in existence for any definitive period.

Second, the Council is not organized or required to function pursuant to formal guidelines set out by Governor. For example, the number of members, the term of office, the number of meetings, etc., are not specified in the draft Executive Order. Similarly, there are no specified procedures for the conduct of Council meetings or the participation by Council members in those meetings. See e.g., *EC-COI-82-81* (notwithstanding procedural guidelines outlining the scope of work, goals, timetables and anticipated work product, task force member are not public employees where formality of procedures is merely an effort to

have task force function in a timely and organized manner).

Third, the Commission has previously placed considerable emphasis on whether the committee performs tasks ordinarily expected of public employees or whether the committee serves to represent outside viewpoints. In *EC-COI-87-17* we contrasted a committee engaged in regulation formation, an essentially governmental function, with a committee which principally served as a sounding board for constituent groups. The latter committee would not be engaging in tasks ordinarily expected of public employees. See *EC-COI-86-5* (advisory committee set up to ensure that agency receives the informed opinions of a broad spectrum of the local population concerning the impact of an agency program would not be public instrumentality); contrast *86-4* (finding state agency status where permanent committee's principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees). In summary, we have traditionally focused on whether the board is serving in a clearly advisory capacity with regard to a particular project or program as opposed to engaging in traditional governmental functions such as the formulation of regulations or the evaluation of agency budgets.

Here, we find that members of the Council principally serve to provide the Governor with outside viewpoints. It appears that, through the Council, the Governor will have access to opinions and expertise which is not otherwise available within the executive branch. The Council and its subcommittees serve to identify needs and ideas for programs, but do not provide detailed policies and programs that may be readily adopted by executive branch agencies. In other words, the Council does not perform the work of executive branch agencies nor has the Governor delegated any of his statutory authority to the Council. See *Opinion of the Justices*, 368 Mass. 866 (1975) (members of Judicial Nominating Committee established by executive order did not hold public office where function of committee was to advise and make non-binding recommendations to the Governor; the Governor had not delegated his constitutional duty of judicial appointment to the Committee). We note that, in one instance, a subcommittee submitted draft legislation as part of its report. We do not, however, find that the drafting of legislation constitutes performing a function ordinarily or uniquely expected of government employees.[3/] This is especially the case where the Governor has the option of filing his own legislation. See *EC-COI-82-81* (task force engaged in drafting legislation not a public instrumentality where public official has option of filing his own recommended legislation). We caution, however, that were the Council to engage in other activities, such as the drafting of regulations or lobbying the Legislature on behalf of an executive agency, our conclusion as to the Council's principal function, and therefore as to its status as a public instrumentality, could change.[4/] See *EC-COI-86-4*.

Finally, pursuant to the draft Executive Order, the Council's work product may vary from recommendations to more detailed and significant analyses. There does not appear, however, to be any requirement that the work product take any specific form. Moreover, you inform us that the Council's recommendations are considered advisory in nature and the Governor will not be required to adopt or implement them in whole or in part. See *EC-COI-83-21* (task force that created report which contained only recommendations and which had no binding authority over any state agency or employees was not a governmental entity).

Applying all of the foregoing factors which we have traditionally considered in determining whether an entity is an instrumentality of a governmental agency, we conclude that the Council is not an instrumentality of the Governor's Office. Council members will not therefore be considered state employees for purposes of the conflict of interest law.

DATE AUTHORIZED: December 7, 1993

[1/] In a like fashion, the Governor recently recognized the work of the Hispanic American Advisory Commission by Executive Order.

[2/] A state agency 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. G.L. c. 268A, §1(p).

[3/] We do not recognize the drafting of legislation as an exclusive task of government employees where citizens of the Commonwealth may draft and seek to have introduced their proposed legislation. In contrast, the drafting of regulations is a governmental function customarily initiated by government agency staff as recognized by the Administrative Procedures Act, G.L. c. 30A, §§2 et. seq. See *EC-COI-86-4*.

[4/] Similarly, if the Governor delegated particular functions of his office to the Council, or if the Council's

recommendations were binding, our conclusion here concerning the status of Council members could change.

CONFLICT OF INTEREST OPINION
EC-COI-93-23

FACTS:

You are the Director of Maintenance for the Brockton Housing Authority. The Authority owns and manages seventeen public housing developments in Brockton. Most of the developments have a full time maintenance staff assigned for the care and upkeep of the buildings. This staff maintains housing authority property in such areas as heating, plumbing, and grounds. Housing Authority tenants, under their leases, are responsible for the installation and repair of personal property inside of their apartments, such as the installation of air conditioners and fans, interior painting, and washing windows.

You have been informed that Housing Authority tenants have solicited Authority employees to perform private repair and maintenance work on behalf of the tenants. Authority employees may have also solicited such private work from the tenants who live in developments which the employees maintain as part of their official duties. Employees have entered into private business arrangements with tenants, have performed the work outside of normal working hours and have been compensated by the tenants for the services.

Upon the advice of the Housing Authority legal counsel, you have instituted a written policy forbidding Housing Authority employees from accepting anything of value from tenants for maintenance work, and from maintaining or repairing a tenant's personal property. The policy states:

> Employees are prohibited from soliciting or accepting payment of money, gratuities, gifts, or anything of value from residents for work done in the resident's apartment. This is true whether the work is accomplished on your own time or company time. Employees are prohibited from installing, removing, diagnosing, repairing, or maintaining the private personal property of residents, at any time.

In promulgating this policy, you have relied on G.L. c. 268A, §3 and §23. You have articulated several reasons why you have issued this policy. You believe that a unique superior/subordinate relationship exists between Housing Authority maintenance employees and tenants, particularly in elderly housing developments, as the relationship is supervisory in nature. Maintenance employees are usually the only Housing Authority personnel on-site and are called upon by tenants to initially respond to various issues, such as a disruptive tenant. In eviction cases, the housing authority maintenance person may be the initial witness. There are also issues concerning access to tenant's apartments, possible coercion of tenants, and unfair competition. You also indicate that tenants have contacted the Housing Authority office in order to obtain private work from Housing Authority employees or to make complaints regarding dissatisfaction with some private work that was done in an apartment. In your view, this practice involves the use of official resources to facilitate private business dealings.

QUESTION:

May the Housing Authority impose standards governing Housing Authority employees' private business arrangements with Housing Authority tenants which are consistent with the purposes of G.L. c. 268A but which are more stringent than G.L. c. 268A?

ANSWER:

Yes.

DISCUSSION:

Housing Authority maintenance employees are municipal employees for purposes of G.L. c. 268A. G.L. c. 268A, §1(g); see also, G.L. c. 121B, §7 (housing authority shall be considered a municipal agency for purposes of c. 268A). As municipal employees, they are subject to G.L. c. 268A, §23(b)(2), which prohibits a municipal employee from using his official position to obtain unwarranted privileges of substantial value[1/] for himself or others which are not available to similarly situated individuals.

The Commission has consistently interpreted §23(b)(2) to prohibit public employees from soliciting private business relationships from individuals over whom the public employee has authority or a regulatory relationship. See e.g., *EC-COI-93-6* (police officers prohibited from using position to solicit from private citizens); *92-7* (legislator prohibited from soliciting his aide for campaign activities); *84-61; 84-*

56; 83-156; 82-64 (agency employee prohibited from soliciting from clients and their families on behalf of private business); *81-66*. Our concern in each of these opinions has been the "inherently exploitative" or "inherently coercive" nature of the relationship. See *EC-COI-92-7*. Any attempted private solicitation by a public employee from individuals "who may be directly and significantly affected by the authority of a [municipal] employee at a given time ... exploits an inherent pressure on those individuals, resulting from that authority." *EC-COI-84-61; 83-43;* see also *EC-COI-83-156* ("§23 prohibits commercial arrangements involving inherent exploitation by state employee of individual with whom employee has acquired a relationship which turns on trust or reliance in carrying out his state responsibilities"). A public employee, who receives a private gain as a result of a business relationship with one whom he oversees, "capitalizes" upon his public position over the private individual. *EC-COI-82-64;* see also *EC-COI-93-6* (privilege obtained by police officer "special consideration from potential donors that police officers are able to obtain for private purposes by exploiting their official powers"). In these circumstances, one may never know whether the private party is objectively responding to the solicitation or whether his decision is influenced by a pressure to maintain good relationships with the public employee, or whether any official dealings are affected by the private dealing. See *EC-COI-83-156; 82-64.*

Additionally, this Commission has consistently interpreted G.L. c. 268A, §23(b)(2) to forbid the use of official resources, such as municipal telephones, copying machines, secretarial services, or facilities to promote or assist a private business enterprise. See e.g., *EC-COI-93-6; 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"); *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").

The concerns underlying the solicitation of individuals with whom a public employee has an official relationship are not completely alleviated if the private individual, rather than the public employee, is the solicitor. In this situation, an appearance of impropriety exists, as issues are raised concerning whether the public employee's impartiality will be affected in his official dealings with the private individual and whether the private individual feels compelled to request or use a public employee's private business in order to maintain good will. See *EC-COI-92-7; In re Garvey*, 1990 SEC 478, 479-80. 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. The Commission has required that, if a public employee is solicited to enter a private enterprise by a private individual with whom he has official dealings, the public employee must make a full written public disclosure to his appointing authority. See *EC-COI-92-7; In re Garvey*, 1990 SEC 478; *In re Keverian*, 1990 SEC 460. This disclosure must specifically state facts which clearly show that the relationship is entirely voluntary and that it was initiated by the person under the supervisory employee's jurisdiction. *EC-COI-92-7.*

Irrespective of who initiated the solicitation, such relationships also raise issues under G.L. c. 268A, §3, particularly if any payment to a public employee for private services is not proportional to the services rendered. G.L. c. 268A, §3(b) prohibits a public employee from directly or indirectly soliciting, accepting, or agreeing to accept 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) places a corresponding prohibition on anyone who offers or gives something of substantial value to a public employee for or because of any official act or act within the employee's official responsibility.

For purposes of §3 the nexus is met even if a donor gives an item of substantial value to engender good will from a public employee, or to thank a public employee for a "job well done." *EC-COI-93-8; In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609; *In re State Street Bank*, 1992 SEC 582; *In re Stone and Webster Engineering Corporation*, 1991 SEC 522, 523, n.1. Accordingly, in evaluating whether §3 is implicated in a private compensated business relationship between a public employee and an individual with whom the public employee has official dealings, the Commission may consider whether any fee received by the public employee is commensurate with the services rendered and whether the relationship falls within the ordinary and usual course of commercial business dealings.

Housing Authority Conduct Policy

You question whether an agency may promulgate standards of conduct to be followed by its employees which are stricter than c. 268A. The Housing Authority Conduct Policy is stricter than c. 268A as it prohibits private business relationships between

housing authority employees and tenants, regardless of who initiates the relationship. For the following reasons, we conclude that an agency may institute stricter standards than c. 268A imposes.

In G.L. c. 268A, §23(e), the Legislature provided that "where a current employee is found to have violated the provisions of [§23], appropriate administrative action as is warranted may also be taken by the appropriate constitutional officer, or by the head of a state, county, or municipal agency. Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct." Accordingly, the Housing Authority Board may institute and enforce standards of conduct for its employees, in addition to the provisions of G.L. c. 268A.

The Commission, absent special circumstances, will defer to an agency code of conduct which "gives guidance to its employees in the area of conflict of interest and which is consistent with the principles and aims of §23." *EC-COI-85-12; 80-51.* The Housing Authority Conduct policy which you have implemented is consistent with G.L. c. 268A, §23 and is based upon the same concerns which this Commission has articulated in its longstanding precedent under §23. In particular, your policy addresses the problems of the use of official resources to assist private business activities and the "inherent exploitation" when a public employee enters a private business arrangement for compensation with a private individual who relies on and is directly affected by that public employee's performance of his official duties. This Commission will defer to the Housing Authority's policy.

DATE AUTHORIZED: December 7, 1993

[1/] The Commission has defined substantial value to be $50 or more. See *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976). The Commission will also aggregate amounts which are given or solicited for a common purpose in calculating substantial value. See *EC-COI-93-6*, n.4; *92-23; 92-2*.

CONFLICT OF INTEREST OPINION
EC-COI-93-24

FACTS:

You are a member of a law firm (Firm). You have been asked to consider an appointment as a Commissioner of the State Ethics Commission (Commission).

The Firm, which previously functioned as a partnership, has been organized and operated as a professional corporation under G.L. c. 156A. The Firm is identified as a professional corporation on its letterhead. All lawyers are instructed to include the phrase "a Professional Corporation" whenever the firm name is used, for example, on all pleadings in court and on opinion letters. All lawyers have been provided with business cards which identify the Firm as a professional corporation.

There are currently forty-six stockholders of the Firm. Under the by-laws, each stockholder is referred to as a "member of the firm" or "member." Each member holds one share of voting stock and each member has one vote on any matter which is put to a vote. As a member of the Firm, you own one share of voting stock.

The Board of Directors, known as the Management Committee, consists of four people, each of whom must be a member of the Firm. The Management Committee manages the business of the firm, except for those matters reserved to the members by the by-laws, or by the Articles of Incorporation, or to the Compensation or Nomination Committees, as provided in the by-laws. The Management Committee generally meets weekly to consider matters relating to the management of the Firm. You are a director of the Firm and sit on the Management Committee. Your term expires in January, 1994.

Each member is an officer of the Firm. There are three named officers of the Firm: a president, a treasurer and a clerk. You are an officer only by virtue of your status as a member of the Firm. The Chair of the Management Committee is ex officio the president and treasurer, but, according to the by-laws, those titles are not to be used, except as required by law, by the articles of incorporation or as requested by third parties.

The Firm is a going concern which keeps careful account of its income and assets. The Firm is also careful to observe all of the corporate formalities required by law, by the articles of incorporation or the by-laws, and keeps its records in accordance with those formalities. Its financial statements are reviewed annually by Price Waterhouse. It is adequately capitalized, and each member has paid capital into the Firm.

Members, together with associate lawyers and staff, are employees of the Firm. Annual salaries for

members are set by the Compensation Committee. The distribution to the members of net receipts (profits) of the Firm is determined by the Compensation Committee, not the Management Committee. The Compensation Committee is elected by the members. Neither you nor any member of the Management Committee sits on the Compensation Committee.

On occasion, members of the Firm or associate lawyers (who are not members) represent people or entities on matters within the jurisdiction of the Commission. In particular, there is at least one member and one associate whose clients have matters currently pending before the Commission. These lawyers' practices are such that they frequently represent clients who have matters within the jurisdiction of the Commission.

If appointed to the Commission, you personally will not represent any client on matters within the Commission's jurisdiction. If appointed, as soon as you are informed that a matter pending in the Commission involves a client of the Firm, you will recuse yourself from future participation in that matter. In addition, for all such matters, you will make arrangements within the Firm to assure that you receive no compensation related to the representation.

QUESTION:

What limitations will G.L. c. 268A place on your activities and those of the Firm and its members and employees should you accept membership on the Commission?

ANSWER:

You and the Firm will be subject to the following limitations.

DISCUSSION:

1. Jurisdiction

If you accept appointment as a Commissioner you will be a special state employee[1/] for purposes of G.L. c. 268A. See *EC-COI-87-39*. As a result, certain of the provisions of the conflict of interest law will apply less restrictively to your private activities than if you were a full-time state employee.

2. Limitations on Your Private Law Practice

a. Section 4

Section 4(a) of G.L. c. 268A, the conflict of interest law, prohibits a state employee from directly or indirectly receiving or requesting 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. Section 4(c) prohibits a state employee from acting 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 concern addressed by §4 is the potential of influencing pending agency matters." *EC-COI-91-5*.

A special state employee is subject to the prohibitions of §4(a) and (c) only in relation to a particular matter (1) in which she has at any time participated[2/] as a state employee, or (2) which is or within one year has been a subject of her official responsibility,[3/] or (3) which is pending in the state agency in which she is serving. Clause (c) only applies to a special state employee who serves as such for more than sixty days during any period of three hundred and sixty-five consecutive days. The Commission has previously noted that a regular member of a Board or Commission has official responsibility for matters which are pending in the Board or Commission, "whether or not they have actually worked on the matter and whether or not they actually sat on the Board [or Commission] on a given day." *EC-COI-92-36* (Board member); *89-7* (matters pending in an agency or Commission). As a result, Commission matters that are handled by members or associate lawyers of the Firm are matters which will be the subject of your official responsibility as a Commission member. You have stated that you will not represent private persons in matters before the Commission if appointed.

Pursuant to §4(a), you will be precluded from receiving the compensation that derives from representation of a private party by members or associates of your Firm. Your proposal to have the Firm take accounting steps to ensure that you will not indirectly receive compensation in connection with such matters will prevent issues from being raised under §4(a). Section 4(a) will not prevent you from

representing or receiving compensation from your or the Firm's representation of client before state agencies other than the Commission, however.

b. Section 7

This section prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth or any state agency is an interested party, unless an exemption applies. Section 7 is implicated where you will receive compensation that derives from your or the Firm's representation of a state agency client. As a special state employee, however, you may have a financial interest in contracts made by a state agency in whose activities you neither participate nor have official responsibility for as a Commission member, following your submission to the Commission of a disclosure of the financial interest pursuant to §7(d). If appointed, you will need to follow the §7(d) exemption procedure with regard to each such representation of a state agency by you or the Firm.

3. Limitations on Your Official Activities as a Commission Member

a. Section 6

This section prohibits a state employee from participating as a state employee in a particular matter in which she or a business organization in which she is an employee has a direct or reasonably foreseeable financial interest.[4/] *EC-COI-89-5; 84-96.* Thus, §6 will require your abstention from all matters in which the Firm is representing a client before the Commission.[5/] You will also be required to abstain from any decision which may result in additional legal work for the Firm. Such a situation would arise if, for example, a longtime client of the Firm was the subject of a request that the Commission institute a preliminary inquiry under G.L. c. 268B, §4. In such a case, §6 will be triggered because it is reasonably foreseeable that your vote in favor of initiating such an inquiry may result in work for the Firm. As long as you continue to abstain issues under §6 will not arise.[6/]

b. Section 23

As a state employee, you will also be subject to §23 which establishes standards of conduct for all public employees. Specifically, §23(b)(2) prohibits a public official from using her position to secure an unwarranted privilege of substantial value[7/] which is not properly available to similarly situated individuals. Under §23(b)(3) you must avoid creating the appearance of undue favoritism. Issues under these subsections could arise if you were to participate officially in a matter involving the Firm or its clients. Your intention to abstain from such matters, however, will avoid these concerns. You must also bear in mind that §23(c) will prevent you from disclosing to the Firm or its clients any confidential information which you have acquired as a Commission member.

4. Limitations on Other Members of the Firm

A partner of yours would share the restrictions which G.L. c. 268A places on the you in your private law practice. Specifically, §5(d) prohibits a partner of a state employee from acting as agent or attorney for anyone other than the state in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest and in which the state employee participates or has participated as a state employee or which is the subject of his official responsibility.

We have concluded that all matters pending in the Commission, including those handled by members of the Firm, would be the subject of your official responsibility as a Commission member. Thus, we must address whether other "members" of the firm are your "partners" for purposes of G.L. c. 268A, §5(d).

Previously, where business ties have been indeterminate, we have construed the word "partner" broadly to include "a person who joins with another, formally or informally, in a business venture." *EC-COI-84-78; 93-9.* Thus, we have found a partnership arrangement where a group of individuals has given the public appearance of a partnership, for example, by linking their names on a letterhead and answering their telephone using this firm name, whether or not they in fact shared profits. See, e.g., *EC-COI-80-43; 82-68; 84-78.* In our decision in *EC-COI-93-9*, however, we stated that in construing the term "partner" broadly, we did not purport to "revise the terms of statutorily defined business arrangements." Thus, while we reserved the right, in appropriate circumstances, to review the substance of a corporate entity, we nevertheless recognized the distinction drawn in the language and history of G.L. c. 268A between partnerships and other forms of business arrangements. We expressly left open, however, the question whether our analysis in that case would apply to a professional corporation. *EC-COI-93-9*, n. 14.

The question left open in *93-9* is squarely presented here where the firm is organized as a professional corporation under G.L. c. 156A. Subject

to the terms and conditions of Supreme Judicial Court Rule 3:06, G.L. c. 156A permits attorneys-at-law admitted to practice in the courts of the Commonwealth under G.L. c. 221 to perform professional services utilizing the corporate form. G.L. c. 156A, §§2, 3.[8] The most important feature of Rule 3:06 is that is establishes limited liability for lawyers practicing in the corporate form. Additionally, the Rule provides that incorporation shall not diminish the application of the Code of Professional Responsibility to attorneys in the corporation; nor shall incorporation "modify, abrogate or reduce the attorney-client privilege or any comparable privilege or relationship." Although Rule 3:06 establishes requirements for provisions that the articles of organization of each professional corporation must contain, nothing in the Rule prevents such corporations from enjoying the tax benefits and non-tax benefits enjoyed by other professional or business corporations.[9]

In the present case, each member of the firm is a stockholder in the professional corporation and holds one share of voting stock entitling the holder to one vote on matters put to a vote in the corporation. It is well settled that "[t]he ordinary relationship of stockholders [in a corporation] is not that of partners." *Leventhal v. Atlantic Finance Corp.*, 314 Mass. 194, 198 (1944). Accordingly, unless we find a basis for disregarding the corporate form, members of the firm are not "partners" for purposes of G.L. c. 268A, §5(d).

In *EC-COI-93-9*, we expressly reserved the right to review the substance of a corporate entity according to the principles enunciated in *Evans v. Multicon Const. Corp.*, 30 Mass. App. Ct. 728, *further appellate review denied*, 410 Mass. 1104 (1991). In *Evans*, the court outlined the following twelve factors which should be considered in deciding whether to penetrate the corporate form: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at time of litigated transaction; (9) siphoning away of corporate assets by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of corporation for transactions of the dominant shareholders; (12) use of corporation in promoting fraud. We are mindful, however, that the general rule in this Commonwealth is that corporate form will be disregarded only in "rare particular situations to prevent gross inequity." *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 620 (1968).

We find that none of the applicable factors point in favor of piercing the corporate veil in the present case.[10] The facts indicate that the firm is an adequately capitalized, going concern which is managed by a Board of Directors, known as the Management Committee. The Management Committee generally meets on a weekly basis. The firm is careful to observe all of the corporate formalities required by law, or by the articles of incorporation or by-laws of the corporation. Corporate records are kept in accordance with these formalities, and the financial statements of the corporation are reviewed annually by Price Waterhouse. Matched against the *Evans* factors, these facts do not warrant piercing the corporate veil that has been established by the firm's compliance with G.L. c. 156A and Supreme Judicial Court Rule 3:06.

Nor is this a case which warrants the application of the common law doctrine of partnership by estoppel which is codified in G.L. c. 108A, §16. In order to apply that doctrine it must be shown: "(1) that the would-be partner has held himself out as a partner; (2) that such holding out was done by the [would-be partner] directly or with his consent; (3) that the [party seeking to invoke the doctrine] had knowledge of such holding out; and (4) that [that party] relied on the ostensible partnership to his prejudice." *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 571 (1984); *Standard Oil Co. v. Henderson*, 265 Mass. 322, 326 (1928).

Here the firm displays to the public none of the attributes of a partnership. All lawyers in the firm are encouraged to use the designation "member" or "member of the firm" when referring to stockholders, and the words "a professional corporation," when referring to the firm. The latter term appears on the firm's letterhead, business cards, pleadings and opinion letters.[11]

Nor is the firm operated as a *de facto* partnership. Shares in the corporation are issued on the basis of "membership" and not in relation to the percentage of the profits earned or to be earned by any member. Instead, members are employees whose annual salary is set by a Compensation Committee elected by the members. Members each make a capital contribution to the corporation and all records including, presumably, the firm's tax returns reflect the corporate status. Compare *Boyd, Payne, Gates & Farthing, P.C. v. Payne, Gates, Farthing & Radd, P.C.*, 472 S.E.2d 784 (Va. 1992) (law partners who formed a professional corporation for tax purposes but who continued to conduct themselves as partners could have their rights and liabilities determined according to the law of partnership.)[12]

Finally, we recognize that law professional corporations are distinguishable from other business or professional corporations because lawyers are subject to the professional and ethical obligations imposed by Supreme Judicial Court Rule 3:06 and the Code of Professional Responsibility. Standing alone, however, these ethical standards do not provide a basis for disregarding the corporate form.

In essence, Supreme Judicial Court Rule 3:06 operates to remove any distinction between partnerships and professional corporations for purposes of the Code of Professional Responsibility. The Rule, however, is based not upon an interpretation of G.L. c. 156A or the principles applied to pierce the corporate veil, but upon the Supreme Judicial Court's inherent authority to regulate the practice of law. See *Opinion of the Justices*, 289 Mass. 607, 612 (1935); Post, *The Massachusetts Professional Corporation Act*, 10 Boston Bar J. 7 (1963). We conclude that this judicial authority cannot realistically be used by the Commission as a device to ignore the parties' lawful act to organize themselves as a professional corporation. *Cf. Melby v. O'Melia*, 286 N.W.2d 373 (1979) and *We're Associates Company v. Cohen, Stracher & Bloom, P.C.*, 480 N.E.2d 357 (N.Y. 1985) (both holding that the Code of Professional Responsibility applicable to lawyers practicing in the corporate form does not prevent the application for corporate law or principles of limited liability). Thus, we conclude that members of the firm are not "partners" for purposes of G.L. c. 268A, §5.[12/]

DATE AUTHORIZED: December 7, 1993

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

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

[4/] Participation includes discussion and informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30.*

[5/] The Firm has a financial interest in all matters in which it represents a client for a fee. *EC-COI-89-5.*

[6/] In general, §6 requires a state employee in addition to notify her appointing authority in writing of the financial interest. *EC-COI-85-33; 85-47.* The appointing authority shall then either: (a) assign the matter to another employee, (b) assume responsibility for the matter, or (c) make a written determination to be filed with the Commission 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 state employee. Here, however, the quasi-judicial nature of the Commission and the confidentiality of its proceedings, G.L. c. 268B, §4(b), make meaningful notice to your appointing authority impossible. Thus, you are advised to abstain.

[7/] Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes); EC-COI-93-14.*

[8/] Corporations not organized under G.L. c.156A may not practice law. See G.L. c. 221, §46.

[9/] The provisions of the Massachusetts Business Corporation Law, G.L. c. 156B, applicable to ordinary business corporations, are applicable to professional corporations, except as limited by G.L. c. 156A and by professional and ethical obligations. G.L. c. 156A, §4.

[10/] Because occasions to pierce the corporate veil arise where there is (1) a "confused intermingling of the activities of two or more corporations," (e.g., where a parent and subsidiary ignore the independence of their separate corporate identities), (2) fraudulent intent or consequences arising from the acts of the principals, or (3)

substantial injustice absent evasion of the corporate form, *My Bread*, 353 Mass. at 619, many of the factors discussed in *Evans* are inapplicable here.

11/ We find no significance in the fact that aside from the designation, "a professional corporation," there has been no change in the firm name since its conversion from a partnership in 1991. See *MBA Ethics Opinion 77-14*, 62 Mass. L. Q. 193 (finding that a professional corporation may continue to use its former partnership name after incorporation; "this representation would not be misleading, for while the group members are not partners, they are in fact associated together as shareholders and employees of a professional corporation.")

12/ In *Boyd*, attorneys referred to themselves as partners in internal firm manuals and in announcements sent to clients and the legal community; distributed stock in the same percentage as their entitlement to profits; failed to issue stock to a new "member" of the corporation, but allowed him to share in the profits; allowed the non-stockholding "member" to participate in firm meetings; referred to the firm as a partnership on tax returns; and executed an agreement dealing with the possibility of a tax audit in which each agreed that any tax liability shall become the responsibility of "each partner" according to his percentage of the profits.

13/ This conclusion is consistent with Commission opinions which have found that "associates" and those having "Of Counsel" arrangements are not constrained by the requirements of §5. See *EC-COI-85-13* (associate); *89-5* (Of Counsel).

FINANCIAL DISCLOSURE OPINION
EC-FD-93-1

FACTS:

You represent two county deputy sheriffs, appointed to conduct service of process within the county. Under G.L. c.37, §3, a sheriff may appoint deputy sheriffs, who serve at the pleasure of the sheriff. The sheriff has stated to us that he expressly authorized these two deputy sheriffs to perform the civil service of process duties of his department. According to the sheriff, the deputy sheriffs do not report to him on a daily basis, but he retains the power to revoke a deputy sheriff's commission and has oversight and responsibility for service of process by the deputies in his county. See G.L. c.37, §2. The sheriff has stated that the two deputy sheriffs have discretion concerning how to implement these duties, provided that the civil process serving is conducted within the confines of the law. However, if problems arise, such as issues concerning the conduct of a deputy sheriff's official duties or whether service of process is being implemented within the confines of the law, or the appointment of new deputy sheriffs, these two deputy sheriffs are accountable to him.

The two deputy sheriffs whom you represent formed a private corporation (Corporation) to serve process, and serve as president and treasurer. You estimate that the division of work between the two deputy sheriffs is 50-50 and that they manage the business and share responsibility equally. The Corporation is funded entirely by the fees received from serving process and other duties from which deputy sheriffs may receive a fee. You state that these two deputy sheriffs draw a salary from the Corporation.1/ The employees do not participate in any county benefits system, such as life insurance, retirement, and deferred compensation. The corporation does not receive money from the county treasury and does not use county office space.

The chairman of the county commissioners, pursuant to G.L. c. 268B, §3(j)(11),2/ has designated one of these deputy sheriffs as an individual in a major policy making position who is required to file a Statement of Financial Interest (SFI) with the Commission.3/ You argue that these deputy sheriffs are not public employees and should not be required to file SFIs because, although they are appointees of the sheriff, they are not employees, do not occupy policy making positions with the sheriff, and receive no compensation from the sheriff or the county treasury. You state that they "operate a private business corporation funded entirely through the provision of professional services to private individuals and business entities."

QUESTION:

Was this deputy sheriff properly designated to file a Statement of Financial Interests for calendar years 1991 and 1992?

ANSWER:

Yes.

DISCUSSION:

G.L. c. 268B, §5(c) provides that:

> Every public employee shall file a statement of financial interests for the preceding calendar year with the commission within thirty days after becoming a public employee, on or

> before may first of each year thereafter that such person is a public employee and on or before may first of the year after such person ceases to be a public employee...

For purposes of §5(c) the Commission has defined the term "public employee" as

> Any person holding a major policy making position in a governmental body for thirty days or more during a reporting year whether by election, appointment, contract of hire or engagement, and whether on a full, part-time, intermittent, or consultant basis, excluding any person who serves on a board, commission or council which has no authority to expend public funds other than to approve reimbursements for expenses and excluding any person who receives no compensation other than reimbursement for expenses. 930 CMR 2.02 (15), see G.L. c. 268B, §1(o).

The Legislature has determined that, among others, a state or county employee whose salary equals or exceeds that of a state employee classified in step one of job group XXV in the general salary schedule contained in section forty-six of chapter thirty (currently $34,972.08) and who reports directly to the executive or administrative head of a government agency is an individual who holds a major policy making position in a governmental body[4/] and who must file a Statement of Financial Interest. G.L. c. 268B, §1(l). See also *930 CMR 2.02(12)*.

In determining whether the deputy sheriff is required to file an SFI, the Commission considers the relevant question to be whether the deputy sheriff is a public employee under c. 268B, not whether the deputy sheriff is required to file as the President of a private corporation. The Commission finds that, under c. 268B, the deputy sheriff was properly designated to file an SFI.

For purposes of G.L. c. 268B, the sheriff's department is a governmental body and the sheriff is the executive or administrative head. The sheriff is also the appointing authority for the deputy sheriffs and has overall responsibility for service of process by the deputies in his county and for all official acts of the deputies whom he appoints. See, G.L. c. 37, §§2, 3 (sheriff responsible for the official acts of his deputies). By expressly authorizing these two deputy sheriffs to carry out the serving of legal process in the county, including subpoenas and other court documents, the sheriff has delegated a duty of the sheriff's office to his deputy sheriffs. It does not follow, either from the private nature of the Corporation, or from the manner in which power to serve process is delegated, that the principals of the Corporation are not directly reportable to the sheriff. To the contrary, we note that when an issue arises concerning an alleged breach of a deputy sheriff's duty, or whether service of process is being conducted properly, within the confines of the law, the two deputy sheriffs answer directly to and are accountable to the sheriff. There is no intermediate person to whom they would answer in the chain of command. We do not find it dispositive that these deputy sheriffs are not required to report to the sheriff on a daily basis. On the basis of the sheriff's authority and the lack of an intermediary level of management, we conclude that the deputy sheriffs do report to the executive or administrative head of a government body. Accordingly, since he receives a salary[5/] in excess of $34,972.08, the deputy sheriff holds, by appointment[6/], a major policy making position. Thus, he is required to file an SFI during the years in which he was designated to file an SFI.

In reaching this conclusion, we also note that the position of deputy sheriff is a governmental appointment which requires the appointee to take an oath of office (G.L. c. 37, §3); that a deputy sheriff's duties and fees are fixed by statute (G.L. c. 37, §11; G.L. c. 220, §6; G.L. c. 262, §8); and that the deputy sheriff is required to make a yearly accounting to the county treasurer of all fees collected (G.L. c. 262, §8A). See *Finance Commission of Boston v. Basile*, 354 Mass. 188, 192 (1968) ("fees and expenses charged by deputy sheriffs have a reasonable relation to the finances and methods of administration of the city and of the county ... fees for service of process might otherwise be made payable into the city treasury and any excess enure to its benefit"). Therefore, we do not accept the argument that the deputy sheriff is merely functioning as the officer in a private corporation.

We also do not agree with your contention that the deputy sheriff's situation is analogous to that described in a recent court opinion, *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993) (hereinafter *MBTA)*. In *MBTA*, the Supreme Judicial Court concluded that, for purposes of G.L. c. 268A, §1(p), the MBTA Retirement Board was not a state agency because it lacked sufficient indicia of control, governmental function, governmental creation, and public funding in order to have the requisite direct tie with the Commonwealth. *Id.* at pp.588-593. We believe that *MBTA* is inapposite to the situation before us. First, the test for whether an organization is a state

agency for purposes of G.L. c. 268A is not the test for determining whether an employee has been properly designated to file an SFI under c. 268B. Second, unlike *MBTA*, where the Court found no direct tie to government, in the deputy sheriff's situation, the corporation is integrally tied to the government. Public employee status is derived from the deputy sheriff's appointment and statutory obligations and powers.[7/] Unlike the MBTA Board, the corporation cannot function in the absence of the deputy sheriffs' statutory appointment, which gives the individuals the legal power to serve process. Without this appointment and these powers, no one in the corporation may serve process, nor may the corporation conduct the business of serving process. Use of the corporate form by the deputy sheriff in order to carry out civil process serving is merely a tool to implement a governmental function.[8/]

You argue that the deputy sheriffs are exempt from the filing requirements because they do not expend public funds. Pursuant to G.L. c. 268B, §1(o), however, the issue is whether the governmental body which they serve (here, the sheriff's department) expends public funds. Further, 930 CMR 2.02 (15) only exempts from the definition of public employee those persons who serve on a council, commission or board which has no authority to expend public funds. The deputy sheriffs do not serve on such a council, commission or board.

Additionally, you argue that the deputy sheriffs are exempt since they are not paid directly from the county treasury, but the financial disclosure law does not require that one's compensation be paid directly from public monies. See generally, c. 268B, §1(l); 930 CMR 2.02 (17); *EC-FD-85-2*. In *EC-FD-85-2*, we concluded that two individuals who served the county, but who were compensated by a private corporation, were required to file SFIs because of the policy positions they held within the institution and the authority they possessed to expend public funds.

In addition to the analysis above, we note that, pursuant to G.L. c. 268B, §1(l), and 930 CMR 2.2(12), the deputy sheriffs must file SFIs if they are "person[s] exercising similar authority"[9/] to the head of a division, bureau, or other major administrative unit within a governmental body. We find the deputy sheriffs fit within this definition. In essence, the sheriff has delegated his responsibility for service of process to these deputy sheriffs, a function of the sheriff's office which may otherwise be organized as a department of the sheriff's office.[10/] Therefore, the deputy sheriffs are "person[s] exercising similar authority."

The designation of these deputy sheriffs comports with the purpose of c. 268B. The Financial Disclosure law was enacted "to assure the public of the impartiality and honesty of its public officials." *EC-FD-85-2*. Those public employees required to file include those who are presumably in a position to make policy or expend public funds. The deputy sheriffs have a policy making role where the sheriff has delegated a statutory function (service of process) to the deputy sheriffs and has given the deputy sheriffs the discretion to carry out and administer the function.

In conclusion, the deputy sheriff was properly designated as a public employee under G.L. c. 268B, §1(o) for purposes of filing SFIs for calendar years 1991 and 1992. Both deputies must file their SFIs within thirty (30) days of receipt of this opinion.

DATE AUTHORIZED: August 9, 1993

1/ You acknowledge that the salary is in excess of $34,972.08. See discussion, *infra*.

2/ Under c. 268B, §3(j)(11), the chairman of the county commissioners in each county, not the sheriff, is required to submit a list of all major policy making positions.

3/ Although our records do not indicate that your other client has been designated to file an SFI, this opinion will apply equally to him.

4/ "Governmental body" means any state or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the Commonwealth. G.L. c. 268B, §1(h).

5/ The Ethics Commission, in 930 CMR 2.02(17), has defined the term salary to mean "the salary, wages or other compensation authorized for the reporting year equals or exceeds the salary in effect on January 1st of the reporting year for step one of job group XXV...."

6/ For purposes of c. 268B, it is not necessary for an individual to have a traditional employment arrangement with a government body. Under 930 CMR 2.02 (15) an individual may serve by election, appointment, contract of hire or engagement on a full, part-time, intermittent or consultant basis (emphasis added). See *EC-FD-85-2*.

7/ We note that this conclusion is consistent with Commission precedent that elected and appointed constables (who may also legally serve process) are municipal employees under the conflict of interest statute. See *EC-COI-86-10; 86-8; 82-59*.

8/ For purposes of this opinion, we do not find it necessary to decide whether the corporation is an instrumentality of

the County. It is sufficient that the principals of the corporation are performing services for the Sheriff's Department, a county agency. See *EC-FD-85-2.*

[9/] Exercising similar authority means "exercising authority on more than an occasional basis or for more than eight consecutive days which is qualitatively or quantitatively similar to, or the same as, that of the executive or administrative head or heads of a governmental body, a member of the judiciary, a person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in M.G.L. c. 20, §46 and who reports directly to said executive or administrative head, or the head of a division, bureau, or other major administrative unit within a governmental body, except that no person shall be deemed to be exercising authority similar to that of another person merely by virtue of acting in the place of that other person during his or her normal vacation or sick leave periods." 930 CMR 2.02(7).

[10/] We take notice that the sheriff of Suffolk County has organized the process serving function in a separate division within his office. The chief deputy sheriff in charge of process serving in Suffolk County has been designated as a public employee who must file an SFI.

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