RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1994

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission
One Ashburton Place, Room 619
Boston, Massachusetts 02108
(617) 727-0060

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Included in this publication are:

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1994.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1994 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 1994.** Cite Conflict of Interest Advisory Opinions as follows: *EC-COI-94-(number)*. Cite Financial Disclosure Advisory Opinions as follows: *EC-FD-94-(number)*.

  Note: all 1994 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 W. Mann - Rep. Charles W. Mann was fined $500 for his involvement in a certification dispute between the Banking Commissioner and the ousted board of directors of the Bridgewater Credit Union, while Rep. Mann was in litigation against the credit union and while he and a business partner had a credit union mortgage loan which was delinquent. Rep. Mann admitted in a Disposition Agreement that he violated G.L. c. 268A, §6 by participating as a public official in matters which could affect his own financial interests and the financial interests of his business partner, who was a former Director of the Bridgewater Credit Union. Section 6 of the conflict law prohibits a state employee from participating as such in any particular matter in which, to his knowledge, he or his partner has a financial interest. Under §6, a state official may not participate in matters that determine the personnel who will make decisions regarding that official's financial interests. If the ousted directors had been reinstated through a reversal of the Banking Commissioner's certification, they would have been responsible for making litigation and loan workout decisions regarding Rep. Mann's loans.

In the Matter of John Hancock Mutual Life Insurance Company - John Hancock Mutual Life Insurance Company ("Hancock") was fined $110,000 for illegally entertaining Massachusetts legislators during a six-year period. In a Disposition Agreement, the company admitted violating §3(a) of the conflict of interest law by providing more than $30,000 in illegal gratuities to state legislators between August 1, 1987 and May 30, 1993. G.L. c. 268A, §3(a) prohibits the giving of gifts worth more than $50 to a public employee "for or because of any official act performed or to be performed by such an employee."

In the Matter of Wayne Newton - Royalston Fire Chief Wayne Newton was fined $250 for awarding a town contract to town Selectman John Kirkman, who annually votes on Newton's reappointment as Fire Chief, and with whom Newton had an ongoing business relationship. Newton admitted in a Disposition Agreement that he violated G.L. c. 268A, §23(b)(3) by: awarding Kirkman the contract despite Kirkman's use of materials that were below the bid specifications; allowing Kirkman to charge materials to the Fire Department account; and allowing Kirkman to use his (Newton's) personal equipment to perform the work. Section 23(b)(3) prohibits a public official from acting in a manner which would cause a reasonable person to conclude that anyone could enjoy his favor in the performance of his official duties.

In the Matter of Tilcon Massachusetts, Inc. - Tilcon Massachusetts, Inc. ("Tilcon") was fined $1,000 for violating §3(a) of the conflict of interest law in 1987, when Tilcon paved the private driveway of Former Pembroke Highway Surveyor Arthur Hermenau and charged him a discounted "town rate" for the work. At the time of the paving, Tilcon was a vendor to the Pembroke Highway Department, subject to Hermenau's official authority to award town paving contracts and oversee vendors' performance. G.L. c. 268A, §3(a) prohibits the giving of gifts worth more than $50 to a public employee "for or because of any official act performed or to be performed by such an employee."

In the Matter of Suzanne M. Bump - Former Rep. Suzanne M. Bump was fined $600 in May for accepting $195 worth of gratuities from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer. Rep. Bump admitted in a Disposition Agreement that she violated §3(b) of the conflict law in March 1992 by accepting dinner and theater tickets for herself and her husband. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Frank A. Emilio - Former Rep. Frank A. Emilio was fined $4,200 for accepting gratuities totalling $1,384 from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer, Life Insurance Association of Massachusetts lobbyist William Carroll, Massachusetts Life Insurance Company lobbyist Edward Dever, New England Mutual Life Insurance Company lobbyist Alvaro Sousa, Paul Revere Insurance Company lobbyist John Spillane and American Insurance Association lobbyist James T. Harrington. Rep. Emilio admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Robert Howarth - Former Rep. Robert Howarth was fined $2,850 for accepting gratuities worth $956 from John Hancock Mutual Life

Insurance Company lobbyist F. William Sawyer. Rep. Howarth admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Peter B. Morin - Former Rep. Peter B. Morin was fined $700 for accepting $233 worth of gratuities from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer. Rep. Morin admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of William F. Cass - In May, Rep. William F. Cass was fined $550 for accepting $184 worth of gratuities from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer. Rep. Cass admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Kevin Poirier - Rep. Kevin Poirier was fined $2,250 for accepting $749 worth of gratuities from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer. Rep. Poirier admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Thomas P. Walsh - Rep. Thomas P. Walsh was fined $2,500 for accepting gratuities totalling $843 from John Hancock Mutual Life Insurance Company lobbyists F. William Sawyer and Ralph Scott, Life Insurance Association of Massachusetts lobbyist William Carroll and Massachusetts Medical Society lobbyist Andrew Hunt. Rep. Walsh admitted in a Disposition Agreement that he violated §3(b) of the conflict law by gratuities totalling $693 from Scott, Sawyer and Hunt, and that he violated §23(b)(3) by accepting a dinner for himself and his wife worth $150 from Carroll. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees. Section 23(b)(3) prohibits public employees, including legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

In the Matter of Francis G. Mara - Rep. Francis G. Mara was fined $1,700 for accepting gratuities totalling $574 from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer, Medical Malpractice Joint Underwriting Association of Massachusetts lobbyist George Traylor and Life Insurance Association of Massachusetts lobbyist William Carroll. Rep. Mara admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting gratuities totalling $299 from Sawyer and Traylor, and that he violated §23(b)(3) by accepting gratuities totalling $275 from Sawyer and Carroll. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees. Section 23(b)(3) prohibits public employees, including legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

In the Matter of John F. Cox - Rep. John F. Cox was fined $1,750 for accepting gratuities totalling $587 from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer, Medical Malpractice Joint Underwriting Association of Massachusetts lobbyist George Traylor, and Life Insurance Association of Massachusetts lobbyist William Carroll. Rep. Cox admitted in a Disposition Agreement that he violated §23(b)(3) of the conflict law by accepting gratuities totalling $459 from insurance lobbyists, and that he violated §3(b) by accepting a fishing boat excursion for himself and his wife worth $128 from Traylor. G.L. c. 268A, §23(b)(3) prohibits public employees, including legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties. Section 3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees.

In the Matter of Kevin G. Honan - Rep. Kevin G. Honan was fined $1,050 for accepting gratuities totalling $350 from John Hancock Mutual Life Insurance Company lobbyists F. William Sawyer and Ralph Scott and Life Insurance Association of Massachusetts lobbyist William Carroll. Rep. Honan admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting gratuities totalling $200 from Scott and Sawyer, and that he violated §23(b)(3) by accepting a dinner for himself and a guest worth $150 from Carroll. G.L. c. 268A, §3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by such employees. Section 23(b)(3) prohibits public employees, including legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

In the Matter of Arthur Hermenau - Former Pembroke Highway Surveyor Arthur Hermenau was fined $1,000 for violating the conflict of interest law in 1987, when Tilcon Massachusetts, Inc. ("Tilcon") paved Hermenau's private driveway and charged him a discounted "town rate" for the work. Hermenau also forfeited to the Commonwealth the $500 difference between the "town rate" charged by Tilcon and the then-customary market rate for paving. At the time of the paving, Tilcon was a vendor to the Pembroke Highway Department, subject to Hermenau's official authority to award town paving contracts and oversee vendors' performance. In a Disposition Agreement, Hermenau admitted he violated G.L. c. 268A, §3(b) by approaching Tilcon employees to request that the company perform the work, and receiving Tilcon's paving services, and by paying the discounted "town rate" for the paving. Section 3(b) of the conflict law prohibits public employees from accepting anything of substantial value for or because of their official duties.

In the Matter of John Bartley - Former Rep. John Bartley was fined $250 for accepting gratuities worth $665.64 from John Hancock Mutual Life Insurance Company lobbyist Ralph Scott, a personal friend. Rep. Bartley admitted in a Disposition Agreement that he violated G.L. c. 268A, §23(b)(3) by accepting the gratuities. Section 23(b)(3) of the conflict law prohibits public employees, including state legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

In the Matter of Joan M. Menard - Rep. Joan M. Menard was fined $525 for accepting gratuities worth $179.63 from John Hancock Mutual Life Insurance Company lobbyist F. William Sawyer. Rep. Menard admitted in a Disposition Agreement that she violated G.L. c. 268A §3(b) by accepting the gratuities. Section 3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Paul Cellucci - Former Sen. Paul Cellucci was fined $275 for accepting meals from John Hancock Mutual life Insurance Company lobbyist F. William Sawyer, a personal friend and campaign supporter. According to a Disposition Agreement released today, Lt. Governor Cellucci admitted he violated G.L. c. 268B §6 in 1989 by accepting meals worth a total of $273.06 from Sawyer. Section 6 prohibits public officials from accepting gifts from legislative agents totalling more than $100 in a calendar year.

Public Enforcement Letter 95 - 1 (In the Matter of W. Paul White) - Sen. W. Paul White was cited in a Public Enforcement Letter for accepting meals from Edward Baud, a John Hancock Mutual Life Insurance Company lobbyist whose responsibility was to deal with state legislation outside of Massachusetts. Sen. White served as a member of the Council of State Governments' Eastern Regional Conference Executive Committee during the 1980's, as Chair of the national Council during 1991, and has since served on the national Council's Executive Committee and Governing Board. Hancock was a corporate sponsor of the Council, and Baud was Hancock's liaison to the Council. According to the Letter, Sen. White appeared to have violated G.L. c. 268A §23(b)(3) by accepting about $3,000 in meals and beverages from Baud, mostly during Council meetings, while Hancock had an interest in legislation pending before the state legislature. The Letter states that, although Sen. White was never lobbied by Baud, and although there is no evidence that Sen. White's official actions were influenced in any way, the receipt of meals for which Baud was eventually reimbursed by Hancock created the type of "appearance problem" prohibited by §23(b)(3) of the conflict law. The Letter added, however, that the Commission chose to resolve the matter without a fine because the entertainment Sen. White received came from a non-Massachusetts lobbyist, and appeared to have been motivated by Sen. White's role with the Council, rather than his legislative duties. Section 23(b)(3) of the conflict law

prohibits public employees, including state legislators, from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

In the Matter of The New England Mutual Life Insurance Company - The New England Mutual Life Insurance Company ("The New England") was fined $20,000 for illegally entertaining Massachusetts legislators between June 1988 and November 1989. In a Disposition Agreement signed by The New England and the Ethics Commission, the company admitted violating G.L. c. 268A, §3(a) on about 48 occasions, by providing illegal gratuities totalling approximately $6,500 to state legislators and legislative aides. Section 3(a) of the conflict of interest law prohibits the giving of gifts worth more than $50 to a public employee "for or because of any official act performed or to be performed by such an employee."

In the Matter of Middlesex Paving Company - Middlesex Paving Company was fined $6,000 for illegally entertaining eight state employees at annual corporate Christmas parties between 1990 and 1992. In a Disposition Agreement, Middlesex Paving Company admitted violating §3(a) of the conflict law through its entertainment of the state employees, whose official responsibilities included overseeing the company's state contracts. G.L. c. 268A, §3(a) prohibits the giving of gifts worth more than $50 to a public employee "for or because of any official act performed or to be performed by such an employee."

In the Matter of Edward O'Toole - Edward O'Toole, a civil engineer at the Massachusetts Highway Department, was fined $1,000 for accepting approximately $420 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in 1991 and 1992. O'Toole admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Stephen Berlucchi - Stephen Berlucchi, a former highway maintenance engineer for the Massachusetts Highway Department, was fined $950 for accepting approximately $340 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in 1990, 1991 and 1992. Berlucchi admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Anthony Salamanca - Anthony Salamanca, a district highway director at the Massachusetts Highway Department, was fined $850 for accepting approximately $340 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in 1991 and 1992. Salamanca admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Robert Calo - Robert Calo, a civil engineer at the Massachusetts Highway Department, was fined $340 for accepting $170 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in December 1992. Calo admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Ronald Iannaco - Ronald Iannaco, a civil engineer at the Massachusetts Highway Department, was fined $340 for accepting approximately $170 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in December 1992. Iannaco admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Francis Sandonato - Francis Sandonato, a civil engineer at the Massachusetts Highway Department, was fined $340 for accepting approximately $170 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in December 1992. Sandonato admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the

gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of George Ward - George Ward, a manager of operations at the Massachusetts Highway Department, was fined $340 for accepting approximately $170 worth of food, drinks, entertainment and overnight hotel accommodations from Middlesex Paving Company in December 1992. Ward admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. G.L. c. 268A, §3(b) prohibits public employees from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Benjamin Nutter - Topsfield Historic Commission member Benjamin Nutter was fined $1,000 for representing a private client before his own board. In a Disposition Agreement, Nutter admitted violating G.L. c. 268A, §17(c) by representing private clients before the Historic Commission on two occasions during the fall of 1992. Section 17(c) generally prohibits municipal officials and employees from acting as agent for private parties in connection with any matter pending before the municipality.

In the Matter of Michael P. Walsh - Rep. Michael P. Walsh was fined $2,100 for accepting gratuities totalling $700 from John Hancock Mutual Life Insurance Company lobbyists F. William Sawyer and Ralph Scott, Massachusetts Medical Society lobbyist Andrew Hunt, and Life Insurance Association of Massachusetts lobbyist William Carroll. Rep. Walsh admitted in a Disposition Agreement that he violated §3(b) of the conflict law by accepting the gratuities. Section 3(b) prohibits public employees, including state legislators, from accepting anything worth more than $50 which is given to them "for or because of any official act ... performed or to be performed" by them.

In the Matter of Frank Green - Former part-time Richmond Building Inspector Frank Green was fined $500 for issuing permits to himself. In a Disposition Agreement, Green, who was also a self-employed building contractor, admitted he violated §19 of the conflict law by issuing nine building permits for projects where he had been hired to perform the construction work. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting their own financial interests. In the Agreement, Green also admitted he violated §23(b)(3) of the conflict law by issuing a permit for the reconstruction of a burned lakeside cottage, which apparently allowed the owner to build a house approximately 80 square feet larger than the cottage it replaced; Green attributes the difference in size to a lack of care on his part when, as Building Inspector, he checked the owner's measurements of the "footprint" of the burned cottage. At the time he issued the permit, Green had been hired by the owner to build the replacement house. Section 23(b)(3) of the conflict law generally prohibits public officials from taking any action which would cause a reasonable person to conclude that any person could unduly enjoy his favor in the performance of his official duties.

In the Matter of Joanne Koval - Former Holbrook Selectman Joanne Koval was fined $250 for demanding that a local bar take down political campaign signs promoting her opponent in the 1992 primary election for state Senate. In a Disposition Agreement, Koval admitted she violated G.L. c. 268A, §23(b)(3) by implicitly threatening the owner of the Union Street Pub, a business she regulated in her official capacity as a member of the Board of Selectmen, which also serves as the town's licensing authority. Section 23(b)(3) of the conflict of interest law prohibits public employees from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 481

IN THE MATTER
OF
CHARLES W. MANN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Charles W. Mann ("Rep. Mann"), 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 April 27, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of conflict of interest law, G.L. c. 268A, by Rep. Mann. The Commission has concluded its inquiry and, on August 9, 1993, found reasonable cause to believe that Rep. Mann violated G.L. c. 268A.

The Commission and Rep. Mann now agree to the following findings of fact and conclusions of law:

1. Rep. Mann has served in the House of Representatives from 1966-1970, and from 1980 to the present. Rep. Mann also served as the Assistant Legislative Secretary to Governor Sargent from 1970-1974. Beginning in 1991, he has sat on the Joint Committee on Banks and Banking. As a legislator, Rep. Mann is a state employee as that term is defined in G.L. c. 268A, §1(q).

2. Rep. Mann owned a lakefront cottage in Pembroke. On July 19, 1989, he refinanced a $105,000 mortgage on the cottage with the Bridgewater Credit Union ("BCU"). In June 1990, Rep. Mann's mortgage became delinquent with an unpaid principal balance of $104,362.48. Following an unsuccessful workout period, BCU purchased the property for $96,500. The credit union then sued Rep. Mann on July 19, 1991 for an alleged deficiency. Rep. Mann brought a counter claim against BCU asserting that the Credit Union failed to use due diligence in giving notice of its foreclosure sale. On December 21, 1992, BCU and Rep. Mann settled the suit for $10,000.

3. Rep. Mann and former BCU Director John Peck have been partners in real estate ventures since the early 1980s. In connection with one of their development projects, Rep. Mann and Peck borrowed $120,000 from BCU on September 25, 1986, to purchase two lots of land on Elm Street in Hanson. Beginning in spring 1990, the partners routinely fell behind in their payments, and stopped making payments altogether in March 1991 leaving an unpaid principal balance of $115,178.74. On November 21, 1991, BCU notified Peck and Rep. Mann that it would foreclose on the Elm Street properties on December 9, 1991. Ultimately, BCU conducted a foreclosure sale on August 12, 1992 at which it sold the lots for $78,000. The credit union later brought suit against the partners for an alleged deficiency.[1/]

4. BCU is a corporation organized under G.L. c. 171 for the purpose of accumulating and investing the savings of its members and making loans to them. Each credit union must have a board of directors to provide the general direction for its affairs. The credit union's membership elects the board of directors. As part of their duties, BCU directors determine whether and when to foreclose on delinquent loans, whether to write off mortgage deficiencies as losses or to pursue them with collection actions, whether to settle collection actions for less than the full deficiency, and whether to enter into other loan workout agreements.

5. Under G.L. c. 167, §22, the state Commissioner of Banks may take possession of a banking institution if he certifies that it is in an unsound and unsafe condition to transact the business for which it was organized. Acting under this authority, Banking Commissioner Michael Hanson certified BCU on October 18, 1991, and placed it under the control of the Massachusetts Credit Union Share Insurance Corporation. The Commissioner based his certification decision on the findings of successive annual bank examination reports dated February 28, 1990, and February 1, 1991. The certification effectively removed the sitting eleven member board of directors.[2/]

6. The ousted directors disputed the certification. They met on a number of occasions at the Halifax Country Club to devise a strategy to secure their reinstatement. Rep. Mann and Rep. Jacqueline Lewis were invited to and attended one of these meetings in November 1991. They agreed to meet with Banking Commissioner Hanson to determine why he took the certification action.

7. On November 29, 1991, Rep. Mann and Rep. Lewis met with First Deputy Banking Commissioner Thomas Curry and Chief Examiner of Credit Union Examinations John McWhirter. (Hanson did not attend the meeting.) During the meeting, Rep. Mann questioned the Commissioner's aides as to the basis of the certification decision. Upon being informed of some of the banking violations[3/] underlying the certification, Rep. Mann characterized them as minor, stating that "there are violations, and then there are violations." Although Rep. Mann did not request that the Commissioner change his certification decision, he expressed his strong disagreement with the Commissioner's decision.

8. Following the November 29, 1991 meeting, the ousted directors desired a hearing or appeal before the Governor and asked Rep. Mann to set up a meeting. Rep. Mann declined, but agreed to arrange a meeting with then Special Assistant to the Governor Stephen Tocco. Rep. Mann briefed Tocco on the increasingly public dispute[4/] and requested that he "hear the directors' side of the story." Tocco met with three of the ousted directors, but took no action on their concerns.

9. The ousted directors also collected the signatures of 385 BCU shareholders in connection with a petition that made 16 demands on the Banking Commissioner. The petition demanded the Commissioner fully disclose the details of the administration of BCU since its certification. The directors addressed the petition to Rep. Mann and Rep. Lewis, with the request that they present it to the Commissioner. Rep. Lewis delivered the petition and signatures to the Commissioner.

10. The Commission discovered no evidence that in return for the legislative efforts, the ousted directors promised favorable loan treatment to Rep. Mann, or his partner Peck. Nor did the Commission unearth any evidence that Rep. Mann threatened the Banking Commissioner with adverse political consequences if he did not change the certification decision.[5/]

11. General laws c. 268A, §6 prohibits a state employee from participating as such in any particular matter in which, to his knowledge, he or his partner has a financial interest.

12. The controversy as to Commissioner Hanson's certification of BCU was a particular matter.[6/] In addition, Rep. Mann's asking the Governor's Special Assistant to hear the former directors' grievances was tantamount to a request for a determination whether the certification decision was proper. That request was also a particular matter.

13. Rep. Mann and his partner Peck had a reasonably foreseeable financial interest in these particular matters because the ousted directors, if reinstated through a reversal of the certification, would have been in the position to make litigation and loan workout decisions affecting Rep. Mann's and Peck's financial interests in the delinquent and foreclosed upon loans.[7/]

14. By meeting with the Commissioner's staff and arranging the Tocco meeting, Rep. Mann participated in the controversy surrounding the public dispute between the Banking Commissioner and the former BCU directors. Moreover, by arranging the meeting with the Governor's Special Assistant, Rep. Mann participated in what was effectively a request for a determination.

15. By involving himself in the BCU certification controversy, as described above, Rep. Mann officially participated in particular matters in which to his knowledge he and his partner possessed a financial interest. By doing so, Rep. Mann violated G.L. c. 268A, §6.

16. The Commission is unaware of any evidence to indicate Rep. Mann knew he was participating in "particular matters" and therefore violating §6 when he acted as described above.[8/]

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

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

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

Date: March 1, 1994

1/ The terms of the mortgage note provided for joint and several liability. Therefore, Rep. Mann was potentially liable for the entire deficiency.

[2/] Since December 1992, the credit union has been released from the control of the Massachusetts Credit Union Share Insurance Corporation and is now operating on its own.

[3/] Citing confidentiality concerns, the staffers refused to disclose all of the banking violations uncovered in the 1990 and 1991 examination reports.

[4/] The local print media and cable television station provided considerable news coverage of the directors' removal.

[5/] The Commission based its decision to impose a modest sanction in this case on its finding that Rep. Mann did not attempt to place undue pressure on Administration officials to act in a manner that would benefit himself or his partner Peck. Compare *In re Craven*, 1980 §17 (maximum fine allowed by law imposed on legislator serving on House Ways and Means Committee who pressured Department of Community Affairs to fund the Jamaica Plain Community Development Foundation [which had entered into a lease agreement with the legislator's family real estate trust] or risk adverse budget action).

[6/] General laws c. 268A, §1(k) defines "particular matter" in part as "any judicial or other proceeding, application, submission, *request for a ruling or other determination*, contract, claim, *controversy*, charge, accusation, arrest, decision, determination [or] finding..." (emphasis added).

[7/] Under §6, a government official may not participate in matters that determine the personnel who will make decisions regarding that official's financial interests. See *EC-COI-93-17* (selectman, who was employed as local teacher, could not participate in reappointment of Town Manager, an appointee who would be a voting member of the school department's collective bargaining team); *EC-COI-86-25* (city councillor, who was employed as local teacher, would not participate in selection of new school committee member, an appointee who could negotiate teacher's collective bargaining agreement).

[8/] 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, 17 (1945).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 482

IN THE MATTER
OF
JOHN HANCOCK MUTUAL
LIFE INSURANCE COMPANY, INC.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John Hancock Mutual Life Insurance Company, Inc. ("Hancock") pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On June 16, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Hancock had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded the inquiry and, on January 11, 1994, voted to find reasonable cause to believe that Hancock violated G.L. c. 268A, §3.

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

1. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. It has over 10,000 employees nationwide. Its 1992 Statement of Financial Position shows total assets of approximately $41 billion, and revenue of approximately $7.75 billion.

2. Hancock is a Massachusetts domiciled life insurer. As such, its activities are more comprehensively regulated by Massachusetts than any other state.

3. Hancock has a Government Relations Department whose responsibilities include monitoring Massachusetts legislation of interest to Hancock and presenting Hancock's position on such legislation to legislators.

4. From 1982 through May 1993, Raeburn B. Hathaway, Jr. directed the Government Relations Department.[1/] Throughout this time, Hathaway was a Hancock vice-president, and from 1985 through 1993,

he was corporate secretary. As head of the Government Relations Department and the Office of the Secretary, Hathaway answered directly to Hancock's president.

5. Between 1982 and May 1993, the Government Relations Department had one senior registered Massachusetts lobbyist who was responsible for Massachusetts legislation, F. William Sawyer.[2] At various times, Sawyer had an assistant who was also a registered Massachusetts lobbyist to help him with his responsibilities for dealing with Massachusetts legislation. Those assistants included the following: from approximately 1982 to 1986, Barbara Burgess; and from 1990 through early 1992, Ralph Scott.

6. According to the Government Relations Department's yearly internal reports, between 1985 and 1993 it identified, on average, approximately 125 bills filed with the Massachusetts Legislature deemed to be of interest to Hancock. In those same years, on average, approximately 10 such bills were enacted into law. Examples of bills of interest to Hancock, and other life insurers doing business in Massachusetts, included legislation mandating various kinds of insurance coverage, including coverage of AIDS without prior testing; bills placing restrictions on insurance companies investing in foreign countries; bills requiring gender neutral premium rates; bills imposing a new sales tax on Massachusetts service providers, including insurance companies and their subsidiaries; bills that would potentially subject life insurance companies to the higher bank tax excise rate; bills allowing the Savings Bank Life Insurance industry to convert to a stock company and thereby compete more directly with insurance companies; bills allowing the conversion of domestic mutual life insurance companies (such as Hancock) to stock companies; bills dealing with universal health care; bills dealing with long term care; and bills dealing with community reinvestment obligations. Many of these bills had a potential significant economic impact on Hancock and other life insurers doing business in Massachusetts.[3]

7. As stated in a 1992 Hancock legislative consultant job description, in order to present Hancock's position on legislation to legislators, Government Relations Department legislative consultants were "to establish and maintain relationships with legislators." That same job description further states,

> In Massachusetts, the lobbying effort involves frequent personal presentations of testimony before legislative committees as well as daily appearances at the State House while the legislature is in session in order to develop contacts with legislators, staff personnel, and others in state government.

8. Consistent with the above-cited job description for a Hancock legislative consultant, Sawyer did develop many strong, effective, personal relationships with Massachusetts legislators.[4]

9. The reason the Hancock lobbyists created these relationships was to give Hancock access to these legislators so that Hancock's position could be effectively communicated.

10. Hancock's lobbyists believed that they used this access effectively. Government Relations Department reports prepared by Sawyer make clear that in his view many of the above described bills were either enacted or defeated due, at least in part, to the efforts of Hancock's lobbyists.

For example, in the above-mentioned 7/30/87 report, Sawyer stated, as to a bill (S. 1629) which would have banned AIDS testing,

> Fortunately, lobbyists from Hancock and other insurers were able to educate legislators on the implications of Senate 1629. [The Health Care Committee] voted the bill into a study. In the Massachusetts legislature, this means it's unlikely there will be further action on the bill this session.

According to a 10/14/88 report regarding Hancock's retaining a substantial portion of the state employees benefit contract previously awarded competitively to Hancock by an independent state agency, and an effort by the employees' union to rescind that award and give it back to Blue Cross/Blue Shield through the filing of legislation, Sawyer stated,

> Hancock's Government Relations lobbyists, ably assisted by many employees in the home office and the Andover field office, were able to stem the tide to take the contract away from Hancock. Lobbying efforts resulted in a 32 to 118 House defeat of the potentially damaging proposal.

In the 1/16/90 report identified above, Sawyer stated as to S.2087, "We were successful in adding an amendment in the Senate that would have excluded the life company's operations from the breadth of this legislation."

In a 1/10/92 memo as to the Community Reinvestment Act (H.3248), Sawyer commented, "We vigorously opposed this legislation citing our present

community efforts. As a result, this bill was placed in a study order by the Insurance Committee where it died."

11. One way Hancock's lobbyists created strong relationships with Massachusetts legislators was by entertaining them through meals and drinks, golf, and sporting and theatrical events. In other words, the entertainment created and/or furthered goodwill and personal relationships which, in turn, helped achieve access to the legislators.[5/]

12. Between August 1, 1987, and May 30, 1993, almost six years, Hancock's lobbyists entertained individual Massachusetts legislators with meals and golf worth $50 or more on approximately 240 instances.[6/,7/]

On occasion, these meals were quite expensive, costing in the vicinity of $100 per person. Frequently, the expenses of the legislator's spouse or guest were also covered. Many of these meals took place at out-of-state resort settings, including, for example, St. Thomas, Virgin Islands; Amelia Island, Florida; Disney World, Florida; and Las Palmas, Puerto Rico.

Hancock lobbyists, primarily Sawyer, also provided a significant amount of free golf. There are approximately a dozen instances where Hancock lobbyists treated legislators to rounds of golf at expensive courses, such as Sawgrass in Florida which costs approximately $140 per round per person.[8/]

13. In addition, on numerous occasions during the same time period, Hancock entertained Massachusetts legislators at the corporate boxes it maintains at Fenway Park and Boston Garden, or through its tickets for events at Foxboro Stadium and the Wang Center. For the period August 1, 1987 through June 30, 1993, these corporate box seats and these tickets, with the exception of Foxboro Stadium, cost Hancock between $60 and $80 each, excluding any food and beverages. For the most part, Hancock's records do not indicate which legislators were entertained by its lobbyists in these corporate boxes or via Foxboro or Wang tickets. Hancock records do indicate the dollar value of the tickets that were charged to Government Relations each year.[9/] Those numbers, assuming an average ticket price of $70, indicate that the Government Relations Department received on average approximately 100 tickets per year. While some of those tickets were apparently used by department employees, the bulk were used for business entertainment. Hancock has stipulated that its lobbyists used these corporate box seats and/or tickets on at least 10 instances a year in entertaining Massachusetts legislators (and at times their guests) where the value of the seats or tickets was $50 or more. Therefore, Hancock has stipulated that there were at least 60 such instances of entertainment during the relevant time period.

14. In summary, when tickets (60 instances) are added to food and golf expenditures (240 instances), there were at least 300 instances of Hancock, through its lobbyist employees, providing individual Massachusetts legislators with $50 or more of entertainment value during the relevant time period. Those 300 instances include entertainment of more than one legislator at an event. The number of events encompassed in this figure is approximately 150, or approximately 25 per year.

15. The following are examples of the entertainment Sawyer provided to Massachusetts legislators:[10/]

a. Las Palmas del Mar, Puerto Rico

Between December 8, 1992, and December 14, 1992, Sawyer, according to his records, stayed at Las Palmas del Mar, an oceanfront resort located on the southern side of Puerto Rico, approximately 40 miles from downtown San Juan. Sawyer's records indicate that his stay was in connection with a Council of State Government's Conference. (The conference ran between December 9 and December 12, 1992, at the El Condado Hotel in San Juan.)[11/]

According to his records, Sawyer provided entertainment of $50 or more in value to each of five legislators at Las Palmas at a total cost of approximately $1700. This entertainment included golf, meals and drinks.

In addition, on Friday night, December 11, 1992, Sawyer hosted a $2,632.50 dinner in San Juan at the La Picola Fontana. That dinner was attended, according to Sawyer's records, by nine Massachusetts legislators, six of their guests, eight Massachusetts lobbyists and their guests, plus Sawyer. Sawyer had arranged for this dinner several weeks in advance. It cost Hancock a predetermined flat rate of $87.50 per person.

b. Amelia Island, Florida

From March 10 through March 14, 1993, Sawyer was present for a Conference of Insurance Legislators conference held at the Amelia Island Plantation Resort in Florida. Several other Massachusetts lobbyists and 10 Massachusetts legislators were present as well.[12/]

According to his records, Sawyer provided entertainment of $50 or more in value to each of nine legislators at a total cost of approximately $1,600. This entertainment included golf, meals and drinks at the Amelia Island Plantation resort. It also included golf at the nearby Sawgrass course where fees and cart costs per person ranged from $138 to $148 each.

c. Cape Cod

Each July between 1988 and 1991, Sawyer arranged for himself and several legislators to play golf at the Hyannisport Club. Sawyer paid for the fees. In addition, in each of those years he paid for an expensive dinner the same or the next day after the golf outing for the members of his foursome, their guests, and certain other legislators who were on the Cape. In 1988, this dinner was at the Regatta in Cotuit. In 1989 through 1991, the dinner was at the Cranberry Moose Restaurant in Yarmouthport. The cost of the dinner per person was approximately $80. The total cost of the dinner each year was as follows: 1988 ($736), 1989 ($1,045), 1990 ($1,132), and 1991 ($879).

16. Section 3(a) of G.L. c. 268A, prohibits anyone from directly or indirectly giving a state employee anything of substantial value for or because of any official act performed or to be performed by the state employee.

17. Massachusetts legislators are state employees.

18. Anything with a value of $50 or more is of substantial value for §3 purposes.[13/]

19. By giving individual Massachusetts legislators entertainment worth $50 or more while each such legislator was in a position to take official action concerning proposed legislation which could affect Hancock's financial interests, Hancock's lobbyists gave those legislators a gift of substantial value for or because of acts within their official responsibility performed or to be performed by them. In so doing, Hancock's lobbyists violated G.L. c. 268A, §3(a).[14/]

20. As a corporation, Hancock acts through and is responsible for the conduct of its employees. This is so even if the conduct is unauthorized.[15/] Therefore, in that Hancock's lobbyists violated §3 by providing certain legislators with free meals, golf, tickets, and so forth, Hancock also violated G.L. c. 268A, §3(a).

21. The Commission is aware of no evidence that any of the foregoing gifts were given to legislators with the intent to influence any specific official act by them as legislators. The Commission is also aware of no evidence that the legislators in return for gifts took any official action concerning any proposed legislation which would have affected Hancock. In other words, the Commission is aware of no evidence that there was a quid pro quo. However, even if the conduct of Hancock's legislative agents were only intended to create goodwill, it was still impermissible.

22. There are certain exacerbating factors here. As of May 30, 1985, Sawyer had read and placed in Hancock's files a copy of *Commission Advisory No. 8.* Nevertheless, Sawyer continued to illegally entertain Massachusetts legislators as described above long after he had read *Advisory No. 8.*[16/]

Moreover, Government Relations Department lobbyists paid particularly close attention to the Commission's *In re Flaherty* decision issued on December 10, 1990, as discussed above. Notwithstanding this decision, and an internal January 21, 1991 Hancock memo by Hancock's Legal Department warning the Government Relations Department of that decision, Government Relations Department employees continued to illegally wine and dine Massachusetts legislators. Indeed, they did not seriously curtail the frequency of their use of tickets until 1992.

23. There are also, however, certain mitigating factors. Hancock has cooperated with the Commission throughout this investigation. Moreover, it has taken prompt, aggressive, and thorough steps to correct its unlawful practices.[17/]

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

(1) that Hancock pay to the Commission the sum of one hundred ten thousand dollars ($110,000.00) as a civil fine for violating G.L. c. 268A, §3(a);[18/]

(2) that from January 1, 1994, through December 31, 1998, Hancock, on a semi-annual basis, will file a written report with the Division of Public Records of the Office of the Secretary of State, with a copy to the State Ethics Commission, of all expenditures made by Hancock or its employees, and by any independent consultants on behalf of Hancock, involving any Massachusetts state, county or municipal employee; such reports will identify the date, amount, and nature of the

expenditure; the identity of the public employee involved; and, if a Hancock employee or independent consultant incurred the expenditure, the identity of that employee or consultant; and

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

Date: March 21, 1994

1/ After Hancock conducted an internal investigation in April and early May 1993 of the Government Relations Department's entertaining Massachusetts officials, it transferred the supervisory responsibilities for the department from Hathaway to its General Counsel's office, and accepted Hathaway's early retirement.

2/ After completing the investigation cited in the preceding footnote, Hancock, in late May 1993, transferred Sawyer to a department called the Retail Sector.

3/ For example, in a 7/30/87 Government Relations Report, Sawyer wrote as to H.573, which would have affected the manner in which domestic insurance companies reinsured credit risks,

> House 573 eliminates a serious competitive problem for Hancock and other domestic life companies competing with foreign insurers. ... This will significantly improve Hancock's market place position [emphasis in the original].

A 12/13/88 Government Relations Report states as to S. 1790, a bill restructuring the regulation of group credit life and group credit accident and health insurance, "This [bill] significantly increases John Hancock's marketing opportunities."

In a 1/16/90 Government Relations Report, Sawyer wrote,

> This proposal [S.2087] sought to tax entities providing "bank-like" services under the bank tax rate, but because of the broad and sweeping language used could have included John Hancock Life Insurance Company and its subsidiaries. This would have amounted to a double tax...

4/ In the manager's comments section of Sawyer's 1984 employee evaluation, Hathaway stated, "Bill has established many strong relationships with public officials - particularly in the Massachusetts Legislature where he is a most effective representative of John Hancock's interests."

5/ Hancock lobbyist Burgess testified, "Certainly if somebody knows who you are--if you've had dinner together, if you've enjoyed each other's company--and if you call them, they're likely to return your call."

6/ The value of this entertainment was approximately $26,000. In arriving at the $50 or more expense figure, the Commission has included all expenses on a single day or at a single conference attributable to a specific legislator. For example, a lunch and dinner on a given day for a legislator might have each cost less than $50, but if totalled they equaled or exceeded $50, they have been included in the $26,000 figure. In addition, where Hancock paid for a legislator's spouse's expenses, those expenses have been attributed to the legislator.

According to Hancock's records, a substantial portion of this entertainment went to legislators who served on the Insurance or Health Care Committees.

7/ Sawyer's expense records indicate that he spent $50 or more in the aggregate on individual legislators on 207 instances for a total expenditure of approximately $24,000. Those same records indicate that he spent $100 or more on individual legislators in the aggregate in a calendar year on 70 instances.

Burgess' expense records indicate that she spent $50 or more in the aggregate on individual legislators on five instances for a total expenditure of approximately $291. Those same records indicate that she spent $100 or more on individual legislators in the aggregate in a calendar year on three instances.

Scott's expense records indicate that he spent $50 or more in the aggregate on individual legislators on 27 instances for a total expenditure of approximately $1,792.56. Those same records indicate that he spent $100 or more on individual legislators in the aggregate in a calendar year on 16 instances.

8/ The most expensive gratuity documented by Hancock's records was a $3,200 trip to the Super Bowl in January 1986 for a legislator and his wife. This is beyond the Commission's statute of limitations. In any event, this expense is atypical. There is no other expense remotely similar to it in size. The next most expensive single expense would be an expensive dinner or round of golf.

Sawyer's expense records indicate that in January 1991, Hancock jointly paid, with five other insurance companies, the cost of a going away dinner for a legislator. Hancock and these companies also gave that legislator a set of golf clubs valued at $404.25, of which Hancock's contribution was $67.38, at that dinner.

9/ Those dollar values are as follows: 1988 ($999.99), 1989 ($8,159), 1990 ($12,869), 1991 ($11,822), 1992 ($4,418), and 1993 ($6,350).

10/ Because Sawyer invoked his Constitutional rights against self-incrimination and refused to testify before the

Commission, because certain legislators have contested the accuracy of his records, and because of the confidentiality requirements contained in c. 268B, §4 concerning ongoing Commission investigations, legislators who allegedly received gratuities are not named in this disposition agreement.

[11/] The Commission has determined that eight lobbyists, including Sawyer, and eight legislators stayed at Las Palmas at this time. Several of the lobbyists paid for numerous expenses of the legislators. Most of the legislators staying at Las Palmas did not attend any of the conference sessions. (Several explained that the combination of the distance from Las Palmas to San Juan and the traffic made it impractical to try to get to the conference.) Basically, they appear to have spent their time enjoying the facilities at or near Las Palmas.

[12/] Information received by the Commission during its investigation indicates that several of these legislators did not attend any of the conference sessions. As was the case at Las Palmas, several lobbyists paid for numerous entertainment expenses of the legislators.

[13/] See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

[14/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in Advisory No. 8, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing (a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner), worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356.

Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone and Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to entertainment of legislators by Hancock's lobbyists where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[15/] At all relevant times, Hancock had a written policy which provided in part, "No officer or an employee may receive or give any gift or other favor of $50 or more in value from or to anyone with whom the company has or is likely to have any business dealings."

[16/] In addition, the Government Relations Department's lobbyists had been repeatedly warned, through memos from Hancock's Legal Department beginning in 1979, that as lobbyists they were subject to a rule that prohibited them from giving gifts to a public official with an aggregate value of $100 in any calendar year regardless of whether in giving such gifts they were merely socializing or in fact attempting to influence specific legislation. [See G.L. c. 268B, §6 and c. 3, §43, last ¶.] These memos made clear that the $100 restriction applied to meals as well as other forms of entertainment. Nevertheless, as indicated above, Hancock's lobbyists frequently provided individual legislators with entertainment worth $100 or more in a single calendar year. (Hancock has agreed to refer its records evidencing violations of c.3, §43, last ¶ to the Secretary of State's office.)

[17/] Within approximately one month of having first been contacted by the *Boston Globe* regarding its lobbyists entertaining Massachusetts legislators, Hancock conducted an internal inquiry of its practices, accepted Hathaway's early retirement, reassigned Sawyer to a non-Government Relations position, transferred responsibility for the Government Relations Department to the Legal Department, began cooperating with the Ethics Commission, and adopted new written operating procedures for entertainment expenses. In the fall of 1993, Hancock disseminated to all of its Government Relations employees a memorandum summarizing the company's policy on expenditures for public officials. The policy reflects the Ethics Commission's position regarding gratuities. At the same time, Hancock conducted training sessions for all of its Government Relations employees regarding Massachusetts conflict of interest and lobbying laws.

[18/] As described above in footnote 7, Hancock's lobbyists also violated c. 268B, §6 by giving individual legislators more than $100 in entertainment in the aggregate in a calendar year on numerous occasions. Most of the c. 268B, §6 violations are also c. 268A, §3 violations, however. Therefore, the Commission has not imposed a

separate fine for those c. 268B, §6 violations. That the fine is not larger recognizes Hancock's cooperation and prompt corrective measures.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 483

IN THE MATTER
OF
WAYNE NEWTON

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Wayne Newton ("Newton") 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 August 9, 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 Newton. The Commission has concluded its inquiry and, on March 30, 1994, found reasonable cause to believe that Newton violated G.L. c. 268A.

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

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

2. The selectmen annually appoint the fire chief.

3. In early 1992, the Board of Health ("BOH") condemned an apartment building at 1 School Street. In early April 1992, a fire occurred at the property. Newton, as fire chief, sought bids from local contractors to board-up the building to prevent further acts of arson.

4. Newton told contractors to submit bids to board-up the School Street building using at least 1/2" plywood. One contractor submitted an April 16, 1992 written bid of $1,800 using the specified 1/2" plywood.

5. Newton also solicited a bid from Selectman John Kirkman. Kirkman worked for Newton between 1986 and 1991. [Newton subcontracts carpentry work to Kirkman.] Kirkman submitted an April 17, 1992 written bid of $1,700 using 3/8" plywood.

6. There was approximately a $350 price difference between the 1/2" ($875) and the 3/8" ($519) plywood sheets. Although Kirkman's bid was based on thinner and less expensive plywood than specified, Kirkman was awarded the contract. Newton, with the concurrence of the BOH, awarded the job to Kirkman.

7. Newton allowed Kirkman to charge the plywood at the local lumber yard on the fire department account. Additionally, Newton allowed Kirkman to use his (Newton's) personal equipment (a generator and compressor) to perform the job.

8. After the job was completed, Kirkman billed the town for the entire contract amount of $1,700, although the plywood had been charged to the fire department. The BOH withheld payment because they wanted an explanation as to why Kirkman had used the 3/8" plywood and charged the materials to the fire department account. In response to the BOH's concern, Kirkman adjusted the bill to reflect the price difference in the thickness of the plywood.

9. The BOH eventually approved paying Kirkman $1,450 for the School Street job (i.e., it reduced his bill by an amount equal to the price difference between the 3/8" and 1/2" plywood).

10. Newton contends that he did not realize that Kirkman's written bid used 3/8" rather than 1/2" plywood. Additionally, Newton states that he did not provide any preferential treatment to Kirkman and that he would have let any other contractor charge the building materials on the fire department account.

11. 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.[1/]

12. Newton, by participating in the award of the School Street contract to Kirkman, whose bid used 3/8" plywood while other contractors were required to use 1/2" plywood, and subsequently allowing Kirkman to charge building materials on the fire department account and use his (Newton's) personal tools on the job, created the appearance that Kirkman received the

contract in part because Kirkman, as a selectman, annually appoints Newton to his fire chief position. This appearance is further exacerbated by the fact that Kirkman and Newton had a past and ongoing business relationship. Therefore, Newton's actions under these circumstances would cause a reasonable person knowing all of the relevant factors to conclude that Kirkman could unduly enjoy Newton's favor in the performance of his official duties. Consequently, Newton violated §23(b)(3).

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

(1) that Newton pay to the Commission the sum of two hundred and fifty dollars ($250.00) as a civil penalty for the violation of G.L. c. 268A, §23(b)(3); and

(2) that Newton 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 5, 1994

1/ 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."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 410

IN THE MATTER
OF
TILCON MASSACHUSETTS, INC.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and the Tilcon Massachusetts, Inc. ("Tilcon") 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 20, 1989, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Tilcon. The Commission has concluded its inquiry and, on April 18, 1990, found reasonable cause to believe that Tilcon violated G.L. c. 268A, §3(a).

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

1. Tilcon is a corporation doing business in Massachusetts as a paving materials manufacturer and paving contractor. During the time here relevant, a substantial portion of Tilcon's business consisted of municipal paving contracts. Tilcon's contract with the Town of Pembroke was one of at least twenty contracts Tilcon had with Massachusetts municipalities in 1987. The balance of Tilcon's business was commercial, with virtually no individual residential jobs such as driveways. On the rare occasions when Tilcon paved residential driveways, such paving was usually done for private customers with whom Tilcon had an ongoing business relationship or a prior long-standing business relationship.

2. In the Town of Pembroke, the town paving contract1/ is put out to bid and awarded annually by the Town Highway Surveyor. At all times here relevant, the Pembroke Highway Surveyor was Arthur Hermenau ("Hermenau"). As Pembroke Highway Surveyor, Hermenau was a municipal employee as defined in G.L. c. 268A, §1(g).

3. As Highway Surveyor, Hermenau was responsible for the maintenance and reconstruction of the town roads in Pembroke and for the operation of the Pembroke Highway Department. As Highway Surveyor, Hermenau was responsible for overseeing the bidding and award process by which the town paving contract was awarded annually. Hermenau annually advertised the availability of the contract in area newspapers and sent out by mail invitations to bid to several area paving contractors, including Tilcon. When bids were received, Hermenau held a public bid opening and awarded the contracts.2/ After the town paving contract was awarded, Hermenau was responsible as Highway Surveyor for determining town paving needs covered by the contract (i.e., for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

4. In 1986, in bidding for the Pembroke paving contract for the period of September 1, 1986 through August 31, 1987, Tilcon submitted the low bid of $27.14 per ton for Class I Bituminous Concrete in place and was awarded by Hermenau that portion of the town paving contract. Hermenau awarded the remainder of the contract to another vendor which had submitted the low bids on the other two portions of the contract. In 1987, in bidding for the Pembroke paving contract for the period of September 1, 1987 through August 31, 1988, Tilcon submitted the lowest bid on two out of three of the contract categories and tied for lowest bid on the third.[3/] Hermenau awarded and split the third portion between Tilcon and the other low bidding vendor. In 1988, in bidding for the Pembroke paving contract for the period of September 1, 1988 through August 31, 1989, Tilcon submitted the lowest bid on one portion of the contract and tied with another vendor for the lowest bid on the other two contract categories. Hermenau awarded the contract for the first category to Tilcon and split the contract award for the other two categories between Tilcon and the other low bidder.

5. In 1987, Hermenau owned a house in Pembroke with an unpaved driveway. As of July 1987, Hermenau had personally graded and prepared the driveway for paving and was anxious to have the paving done prior to the onset of winter. In July 1987, Hermenau approached John D'Allesandro ("D'Allesandro"), an employee of Tilcon with whom he had had dealings as Highway Surveyor in connection with Tilcon's work for the town, and asked him if Tilcon could pave his driveway. Hermenau informed D'Allesandro of the general dimensions of the driveway and told him that he wanted the work done before winter. D'Allesandro then went to Hermenau's property, viewed the site and agreed to do the work. According to Tilcon, D'Allesandro agreed to do the work only after speaking to and receiving authorization from Tilcon Vice-President and Brockton Branch Manager Joseph P. McMenimen ("McMenimen"). Before authorizing the work, McMenimen asked D'Allesandro if Hermenau agreed to pay for the work and D'Allesandro responded that Hermenau had agreed to pay for the work, according to Tilcon. Hermenau and D'Allesandro did not discuss what Hermenau would be charged by Tilcon for paving his driveway. Hermenau did not ask D'Allesandro for or receive in advance of the work an oral or written estimate of the price Tilcon would charge for paving the driveway.[4/]

6. According to Hermenau, he sought to have Tilcon pave his driveway because he wanted his driveway done with a paving machine and roller, he wanted the job done before winter and because he was familiar with Tilcon as the town contractor and he had been satisfied with Tilcon's work for the town. At the time in question, the reputable smaller paving companies in the Pembroke area that did residential driveway paving did not possess paving machines and spread materials by hand and, further, were booked up to a year in advance with other projects and would not have been able to pave Hermenau's driveway prior to winter.

7. In July 1987, Tilcon placed 80.21 tons of Class I Bituminous Concrete on Hermenau's driveway as a base or "binder" course. The July 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and two laborers. In November 1987, Tilcon finished paving Hermenau's driveway by installing a second layer of 55.18 tons of Class I Bituminous Concrete. The November 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and three laborers. Tilcon's use of a paving machine to install Hermenau's driveway resulted in a smoother, more aesthetically attractive and durable driveway than would have been possible by means of handraking and a roller alone, which would have been the method employed by a smaller local residential paving contractor.

8. In August 1987, Tilcon submitted a lump sum invoice to Hermenau and Hermenau paid Tilcon $2,265.53 for Tilcon's July 1987 paving work on his driveway.[5/] In November 1987, Tilcon charged Hermenau and Hermenau paid $1,510.03 for the paving work completing his driveway. Tilcon's November 1987 bill recited that it was for "Class I Bit. Concrete in place as directed, 55.18 tons at $27.09 a ton," and contained an "asphalt adjustment" charge of $15.20.[6/]

9. In both August and November 1987, Tilcon charged Hermenau and Hermenau paid the same rate as Tilcon then charged the Town of Pembroke for paving under the town paving contract that Hermenau awarded to Tilcon ("the town rate"). During the period here relevant, Hermenau was the only Pembroke homeowner whose driveway was paved by Tilcon as an independent project and the only private customer in Pembroke charged the town rate by Tilcon for paving work. Tilcon agreed to pave Hermenau's driveway and charged Hermenau the Pembroke town rate[7/] because Hermenau was the Pembroke Highway Surveyor and also, according to Tilcon, in part because the company made a profit on the work.[8/]

10. The rate for paving charged by Tilcon under the Town of Pembroke paving contract ("the town rate") was in part determined by the total quantity of

paving purchased by the town, i.e., the town paid less per ton for paving than it would have paid had it contracted with Tilcon for significantly less paving. In charging Hermenau the town rate for the paving of his driveway, Tilcon conferred upon Hermenau the benefit of the reduced per ton cost charged to the town based upon the relatively large quantity of paving the town purchased from Tilcon.[9/] In addition to and apart from the benefit represented by being charged the town rate, Hermenau's access to Tilcon's paving services was itself a benefit to Hermenau. Not only was Tilcon able to work before winter as Hermenau wanted, at a time when other contractors were not available, but Tilcon was able to do the work at a higher standard of quality than a small local driveway contractor would have been able to achieve.

11. Section 3(a) of G.L. c. 268A prohibits anyone from giving a municipal employee anything of substantial value for or because of any official acts performed or to be performed by the municipal official.

12. By agreeing to provide Hermenau with residential paving services that it did not normally perform, by performing those paving services for Hermenau, and by charging for those services at the town rate, all while Tilcon was a bidder on the town paving contract and a town vendor subject to Hermenau's official authority as Highway Surveyor to award the town paving contract and to oversee its performance, Tilcon provided Hermenau with benefits which were of substantial value[10/] for or because of acts within Hermenau's official responsibility performed or to be performed by Hermenau as Highway Surveyor. In doing so, Tilcon violated G.L. c. 268A, §3(a).

13. The Commission is aware of no evidence that Tilcon's employees knew at the time they paved Hermenau's driveway that their actions violated G.L. c. 268A, §3.[11/] The Commission is also aware of no evidence that Tilcon sought from Hermenau as Highway Surveyor any specific official action concerning any matter which would affect Tilcon in return for its provision to him of the above-described benefits.[12/] However, even if the provision of the benefits was only intended to create official goodwill, it was still impermissible.[13/]

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

(1) that Tilcon pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for the violations of G.L. c. 268A, §3(a)[14/]; and

(2) that Tilcon 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 21, 1994

[1/] The town paving contract covers Pembroke's paving needs for the twelve month period, September 1st through August 31st. During the time here relevant, the contract had three components, each of which could be separately awarded to a different vendor with the lowest bid as to that component or divided between vendors with tying bids as to a component: (1) 6000 tons of class I Bituminous Concrete in place; (2) 1500 tons of Bituminous Concrete Type I; and (3) 1500 tons of Asphalt Stockpile Mix to be picked up at the vendor's plant.

[2/] Hermenau's primary criterion for awarding the contract was the price bid, i.e., the contract was generally awarded to the lowest bidder. When the prices bid were close, however, Hermenau had discretion to consider other factors in awarding the bid, such as the distance from the town of the bidders' manufacturing plants, the reputation of the bidders and his own knowledge of any prior problems with the bidders. During the time here relevant, except for a single instance not here material, the contract was always awarded to the low bidder or split between bidders who had submitted the same low bid.

[3/] Tilcon bid a price of $27.09 per ton for Class I Bituminous Concrete in place.

[4/] The price charged Hermenau by Tilcon for its work in paving the driveway was determined by McMenimen. The agreement pursuant to which Tilcon paved Mr. Hermenau's driveway was oral and was not reduced to writing.

[5/] Tilcon's records show that this invoice was for 80.21 tons of binder, tax included.

[6/] Hermenau was not charged and did not pay any tax when he paid Tilcon for the November 1987 work.

[7/] The Commission is aware of no evidence that Tilcon and Hermenau actually negotiated the application of the town rate to Tilcon's charges for paving Hermenau's driveway. After the July 1987 paving work was completed, Tilcon unilaterally decided to charge Hermenau the town rate for the paving of his driveway in part because, according to Tilcon, the company believed that it was a fair way to price

the work on the driveway (which was similar to a small street).

[8/] The Commission is aware of no evidence that Tilcon provided these benefits to Hermenau in return for his being influenced in his performance of any specific official act as Highway Surveyor or any particular act within his official responsibility as Highway Surveyor.

[9/] Hermenau would have paid approximately $500 more than he was charged by Tilcon for the paving of his driveway if he had dealt with a private contractor at the then customary market rate.

[10/] Anything which has a value of $50 or more is of substantial value for the purposes of the conflict of interest law. See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976).

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

[12/] The Commission is further aware of no evidence that Tilcon's above-described private dealings with Hermenau had any effect on Tilcon's performance of its paving contract with the Town of Pembroke.

[13/] As the Commission made clear in its decision *In re Michael*, 1981 Ethics Commission 59, 68, and in *Advisory No. 8*, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise G.L. c. 268A, §2 issues. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Tilcon and Hermenau.

[14/] While the Commission is empowered to impose fines of up to $2,000 for each violation of G.L. c. 268A, §3, the Commission has determined that it is in the public interest to resolve this matter with a $1,000 fine because the prohibited conduct in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 485

IN THE MATTER
OF
SUZANNE M. BUMP

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Suzanne M. Bump ("Rep. Bump") 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 allegations that Rep. Bump had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry, and on January 27, 1994, voted to find reasonable cause to believe that Rep. Bump violated G.L. c. 268A, §3.

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

14. Rep. Bump served in the legislature for four terms from January 1985 to January 1993.

15. During her eight years in the House of Representatives, Rep. Bump served on the Joint Committee on Commerce and Labor where she served as that committee's chairperson during the 1991-92 legislative session. Each year, a number of bills affecting insurance companies (as they are Massachusetts employers) are assigned to the Commerce and Labor Committee. Rep. Bump has presided over hearings on these bills and participated in votes on whether the bills should be reported out of committee. In addition, Rep. Bump has voted on bills of interest to the insurance industry when they reach the House floor.

16. While chairperson of the Commerce & Labor Committee, Rep. Bump also sponsored or co-sponsored four bills of interest to the insurance industry.

17. In 1992, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for

Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, Hancock is more subject to Massachusetts laws and regulations than to those of any other state.

18. In 1992, Rep. Bump knew that Sawyer was a Massachusetts registered lobbyist for Hancock.

19. Lobbyists are employed to promote, oppose, or influence legislation.

20. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through dinners, drinks and event tickets as a means to develop the desired goodwill and personal relationships.

21. On March 8, 1992, Sawyer hosted Rep. Bump and her spouse at a dinner at the Four Seasons Hotel in Boston. The Bumps' share of the dinner expense was $136.32. Prior to the dinner, Sawyer provided Bump and her spouse with tickets to the David Copperfield Magic Show at the Wang Center. The value of these tickets was $59.50. Thus, the total value of the entertainment Rep. Bump and her spouse received was $195.82.

22. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official acts or acts within her official responsibility performed or to be performed by her.

23. Massachusetts legislators are state employees.

24. Anything worth $50 or more is of substantial value.[1/]

25. By accepting a total of $195.82 in food and theater ticket entertainment from Sawyer, while she was in a position to take official action which could benefit that lobbyist, Rep. Bump accepted items of substantial value for or because of official acts or acts within her official responsibility performed or to be performed by her. In doing so, Rep. Bump violated §3.[2/]

26. The Commission is aware of no evidence that the above referenced gratuities were provided to Rep. Bump with the intent to influence any specific official act by her as a legislator or any particular act within her official responsibility. The Commission is also aware of no evidence that Rep. Bump took any official action concerning any proposed legislation which would affect Hancock in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[3/]

27. Rep. Bump has fully cooperated with the Commission throughout this investigation.

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

(1) that Rep. Bump pay to the Commission the sum of six hundred dollars ($600.00)[4/] for violating G.L. c. 268A, §3(b); and

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

Date: May 12, 1994

[1/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[2/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. In prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them, the Commission explained in *Advisory No. 8* (issued May 14, 1985) that:

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498 (issued December 10, 1990) (majority leader violates §3 by accepting six Celtic tickets from billboard company's lobbyists); *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner] worth over $100 per person to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the legislature and where the legislators were in a position to benefit the distributors). Section 3 also applies to meals, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. On the present facts, §3 applies to the entertainment of Rep. Bump where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

Rep. Bump has argued that §3 does not apply to meals given to legislators. There is nothing in the legislative history regarding §3 or the language of §3 to support that argument. In the Commission's view, §3 applies to any form of entertainment, including meals, given to any public official.

[3/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely seriously concerns under the bribery section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, as there was no such *quid pro quo* agreement between Sawyer and Rep. Bump.

[4/] This amount is approximately three times the value of the $195 in prohibited gratuities received by Rep. Bump in violation of c. 268A, §3. It represents a disgorgement of the improperly received gratuity plus a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 486

IN THE MATTER
OF
FRANK A. EMILIO

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and former Representative Frank A. Emilio ("Rep. Emilio") 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 allegations that Rep. Emilio had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Emilio violated G.L. c. 268A, §3.

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

1. Rep. Emilio served in the state legislature for five terms from January 1981 to January 1991.

2. During his ten years in the House of Representatives, Rep. Emilio served on the Joint Committee on Insurance. The majority of bills dealing with the regulation of the insurance industry are assigned to the Joint Committee on Insurance. As an Insurance Committee member, Rep. Emilio participated in the hearings and committee votes on hundreds of insurance bills. He also voted on such bills if they reached the House floor.

3. Rep. Emilio sponsored or co-sponsored dozens of bills affecting the insurance industry.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Co., Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. He was also a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of

life, health and investment products. As a Massachusetts domiciliary, it is more subject to Massachusetts laws and regulations than to those of any other state.

5. During the period relevant here, William Carroll ("Carroll") was a registered legislative agent for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of life insurance companies doing business in Massachusetts.

6. During the period relevant here, Edward Dever ("Dever") was a Massachusetts registered legislative agent for the Massachusetts Life Insurance Company.

7. During the period relevant here, Alvaro Sousa ("Sousa") was a Massachusetts registered legislative agent for the New England Mutual Life Insurance Company.

8. During the period relevant here, John Spillane ("Spillane") was a Massachusetts registered legislative agent for the Paul Revere Insurance Companies.

9. During the period relevant here, James T. Harrington ("Harrington") served as the vice-president for the American Insurance Association, a nationwide trade association of 250 property and casualty insurance companies. Harrington was also a Massachusetts registered legislative agent.

10. Rep. Emilio knew Sawyer, Carroll, Sousa, Dever, Spillane, Harrington and Joseph McEvoy ("McEvoy") were lobbyists representing the insurance industry. On occasion, these individuals testified before the Insurance Committee and lobbied Rep. Emilio regarding various pieces of legislation. Additionally, Rep. Emilio sponsored a number of bills at the request of Sawyer, Spillane and McEvoy.[1/]

11. Lobbyists are employed to promote, oppose or influence legislation.

12. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and tickets to sporting events in order to develop the desired goodwill and personal relationships.

13. During August 20 - 23, 1988, Rep. Emilio and his family attended a Council of State Governments conference in Burlington, Vermont. On Sunday August 21, 1988, Rep. Emilio played golf with Sawyer. Sawyer paid $80 for their golf and entertainment expenses. On Monday evening, August 22, 1988, Sawyer hosted Rep. Emilio and his wife and a Vermont legislator and his guest to a dinner at the Ice House restaurant. The cost of the dinner was $142.46. Rep. Emilio's pro rata share of the golf and dinner expenses was approximately $96.98.

14. From November 28 to November 30, 1988, Rep. Emilio and his spouse attended a Council of Insurance Legislators conference in Atlanta, Georgia. On the evening of November 29, 1988, Sawyer hosted Rep. Emilio and his wife and four other legislators and their guests to a dinner at Pano & Paul's Restaurant. The cost of the dinner was $997.97. The Emilios' pro rata share of the cost of the dinner was approximately $181.41.

15. Hancock maintains a corporate box at the Boston Red Sox 600 Club. Sawyer invited Rep. Emilio to be his guest in the 600 Club for three Red Sox games on June 13, 1989, April 9, 1990 and August 21, 1990. The cost of the box to Hancock was $75 a game, per seat. At the ball games, Sawyer provided Rep. Emilio with drinks and meals. Rep. Emilio's share of the dinner and drink bills was $3.93 for the June 13, 1989 game, $25.71 for the April 9, 1990 game, and $29.04 for the August 21, 1990 game. The total value of the tickets, drinks and meals provided to Rep. Emilio at the ball games was $283.68.

16. During November 24-28, 1990, Rep. Emilio and his spouse were in Walt Disney World, Florida. Rep. Emilio had registered to attend an educational conference sponsored by the Conference of Insurance Legislators.[2/] On the evening of November 24, 1990, Rep. Emilio and his spouse, along with approximately eighteen other lobbyists, legislators (from a number of states) and their guests ate at the Stouffer Hotel in Orlando. The cost of the meal was $2,243.97. The Emilios' pro rata share of the dinner expenses was approximately $117.00. Carroll hosted the dinner, and LIAM paid for the meals. On that same day, Sawyer entertained Rep. Emilio and two other legislators at the Grand Cypress Golf Club. The cost of this golf and entertainment was $468.89. Rep. Emilio's pro rata share of the golf and entertainment was $117.12.

17. On November 28, 1990, Sawyer provided Epcot Center tickets and lunch to the Emilios and two other legislators and their spouses. According to Sawyer's expense records, the combined cost of the tickets and lunches was $246.06. The Emilios' pro rata share of the tickets and lunches was approximately $61.00. On the evening of November 28, 1990, Rep. and Mrs. Emilio, along with approximately ten other

legislators, lobbyists and their guests ate at the Buena Vista Palace at Walt Disney World. The cost of the dinner was $342.48. The Emilios' pro rata share of the dinner was approximately $63.00. Sawyer paid for the dinner.

18. On January 8, 1991, Sawyer, Dever, Carroll, Spillane, Harrington and Sousa hosted a private testimonial dinner for Rep. Emilio at Joe Tecce's Restaurant in Boston. Several days earlier, Rep. Emilio had left the legislature. According to an internal Hancock memorandum written by Sawyer, Rep. Emilio's departure from the State House was "notable" as he had been "very helpful to John Hancock." The lobbyists gave Rep. Emilio a $404.25 set of golf clubs. Rep. Emilio's share of the dinner expenses was $60.11. Thus, Rep. Emilio received a total of $464.36 in gratuities.

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

20. Massachusetts legislators are state employees.

21. Anything worth $50 or more is of substantial value for §3 purposes.[3/]

22. By accepting a total of $1,384.00 in meals, golf, gifts and sports tickets from lobbyists all while Rep. Emilio was in a position, or had recently been in a position, to take official actions which could benefit, and in some instances did benefit, those lobbyists, Rep. Emilio received items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, he violated G.L. c. 268A, §3(b).[4/]

23. The Commission is aware of no evidence that the gratuities or gifts referenced above were provided to Rep. Emilio with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Emilio took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities or gifts. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[5/]

24. Rep. Emilio has fully cooperated with the Commission throughout its investigation.

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

(1) that Rep. Emilio pay to the Commission the sum of four thousand, two hundred dollars ($4,200.00)[6/] as a civil fine for violating G.L. c. 268A, §3(b); and

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

Date: May 12, 1994

[1/] For example, in 1990 Rep. Emilio sponsored H. 553 on McEvoy's behalf. This bill sought to enhance privacy for insurance consumers. The Commissioner of Insurance and the Civil Liberties Union had filed competing bills that were disfavored by the insurance companies. Also in 1990, Rep. Emilio sponsored H. 734 on Sawyer's behalf. House Bill 734 sought to permit insurers to value real estate ownership interests at their assessed value. House Bill 734 was approved by the legislature and signed into law on September 18, 1990.

[2/] Rep. Emilio registered for each of the three conferences mentioned in this agreement. Rep. Emilio's practice was to attend approximately one-half of the workshops and presentations scheduled at each conference.

[3/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[4/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8* (issued May 14, 1985) prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

the gratuity is given for his yet unidentifiable "acts to be performed."

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Section 3 also applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

Rep. Emilio has argued that since he received the golf clubs and dinner when he was several days out of office and no longer in a position to officially benefit the lobbyists, his conduct could not violate §3. Section 3, however, explicitly applies to former public officials. The Commission has ruled that gratuities accepted as tokens of appreciation or gratitude for past performance of public functions violate §3. *In re Michael*, 1981 SEC 59, 67-8.

[5/] As discussed above in footnote 3, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuities being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribery section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, as there was no such *quid pro quo* understanding between the lobbyists and Representative Emilio.

[6/] This amount is approximately three times the value of the $1,384 in prohibited gratuities received by Representative Emilio. The fine reflects a disgorgement of the improperly received gratuities plus a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 487

IN THE MATTER
OF
ROBERT HOWARTH

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Robert Howarth ("Howarth") 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 allegations that Howarth had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on February 25, 1994, voted to find reasonable cause to believe that Howarth violated G.L. c. 268A, §3.

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

1. Howarth served in the state legislature from January 1981 to January 1993. During that time, he served on various committees including the Insurance Committee and the Health Care Committee.

2. Howarth sponsored or co-sponsored three bills affecting the insurance industry.

3. In addition, Howarth, as a member of various legislative committees, participated in many hearings on bills of interest to the insurance industry. Such participation included voting on whether such bills should be reported out of committee. Howarth also voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a

Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. At all relevant times, Howarth knew that Sawyer was a Massachusetts registered lobbyist for Hancock. Sawyer lobbied Howarth regarding various pieces of legislation.

6. Lobbyists are employed to promote, oppose or influence legislation.

7. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

8. Sawyer paid for Howarth to stay in a room at the Copley Plaza Hotel on November 14, 1988. The cost of this lodging was $131.64.

9. Annually from 1988 to 1991, Sawyer took a group of legislators and their guests out for dinner and drinks at a Cape Cod restaurant. In 1988, the dinner was held at The Regatta Restaurant in Cotuit. In 1989 through 1991, the dinner was held at the Cranberry Moose Restaurant in Yarmouthport. The cost of these dinners was between $736.10 and $1,131.89 annually. On the evenings of July 1, 1988, July 2, 1989, July 2, 1990, and July 4, 1991, Howarth and his wife attended these dinners. The Howarths' pro rata share of the cost of the dinners and drinks was $81.79, $174.19, $150.91 and $125.54, respectively.

On the weekend of these Cape Cod dinners, Sawyer also paid Howarth's expenses to golf at the Hyannisport Country Club. Howarth's expenses for 1988 through 1991 were $28.24, $47.74, $52.19 and $56.19, respectively. The total cost of Howarth's dining and golf expenses from 1988 through 1991 were $110.03, $221.93, $203.10 and $181.73, respectively.

10. On January 3, 1991, Howarth and his wife were Sawyer's guests for dinner at the Copley Plaza Hotel. The Howarths' pro rata share of the cost of the dinner was $107.75.

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

12. Massachusetts legislators are state employees.

13. Anything worth $50 or more is of substantial value for §3 purposes.[1/]

14. By accepting a total of $956.18 in drinks, meals and entertainment from Sawyer, all while Howarth was in a position to take official actions which could benefit the lobbyist, Howarth accepted items of substantial value for or because of official acts performed or to be performed. In doing so he violated §3(b).[2/]

15. The Commission is aware of no evidence that the gratuities or gifts referenced above were provided to Howarth with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Howarth took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities or gifts. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[3/]

16. Howarth fully cooperated with the Commission throughout this investigation.

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

(1) that Howarth pay to the Commission the sum of two thousand, eight hundred and fifty dollars ($2,850.00) for violating G.L. c. 268A, §3;[4/] and

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

Date: May 12, 1994

[1/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[2/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific

identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to the lobbyist entertaining Howarth where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[3/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyist and Howarth.

[4/] This amount is approximately three times the value of the $956.18 in prohibited gratuities received by Howarth in violation of §3. It represents both a disgorgment of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 488

IN THE MATTER
OF
PETER B. MORIN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission (Commission) and Peter B. Morin ("Morin") 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 August 9, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Morin had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Morin violated G.L. c. 268A, §3.

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

1. Morin served in the state legislature from January 1985 to January 1991. During that time, Morin served on various committees, including the Committee on Commerce and Labor and the Committee on Banks and Banking.

2. Morin, as a member of legislative committees, participated in hearings on bills of interest to the insurance industry. Such participation included voting on whether such bills should be reported out of committee. Morin also voted on bills of interest to the insurance industry when they reached the House floor.[1/]

3. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock")

lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. At all relevant times, Morin knew that Sawyer was a Massachusetts registered lobbyist for Hancock. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. Hancock offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, Hancock's activities are more comprehensively regulated by Massachusetts than by any other state.

4. Lobbyists are employed to promote, oppose or influence legislation.

5. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

6. Annually from 1988 to 1991, Sawyer took a group of legislators and their guests out for dinner and drinks at a Cape Cod restaurant. In 1988, the dinner was held at The Regatta Restaurant in Cotuit. In 1989 through 1991, the annual dinner was held at the Cranberry Moose Restaurant in Yarmouthport. The cost of these dinners was between $736.10 and $1,131.89 annually. Morin and his wife attended two of these dinners while he was a legislator, on July 1, 1988 and July 2, 1990. The Morins' pro rata share of the cost of the 1988 and 1990 dinners and drinks was $81.79 and $150.91 respectively.

7. Prior to and in conjunction with the July dinners Morin attended, Morin hosted Sawyer and two legislators for golf at the Hyannisport Club, a private seaside golf club on Cape Cod where Morin was a member. In connection with these golf outings, Morin initially incurred the member's charge for guest greens fees, golf cart fees, range ball fees and snack, refreshment and/or lunch charges for Sawyer and the other legislators. Subsequently, Sawyer reimbursed Morin for the cost of all such fees and charges with checks drawn on Sawyer's and his wife's joint checking account.[2/] The cost charged to Morin for guest greens fees at the Hyannisport Club was $25 per golfer.[3/]

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

9. Massachusetts legislators are state employees.

10. Anything worth $50 or more is of substantial value for §3 purposes.[4/]

11. By accepting a total of $232.70 in drinks and meals from Sawyer, while Morin was in a position to take official action which could benefit that lobbyist or his employer, Morin accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Morin violated §3(b).[5/]

12. The Commission is aware of no evidence that the gratuities or gifts referenced above were provided to Morin with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Morin took any official action concerning any proposed legislation which would affect the registered Massachusetts lobbyist in return for the gratuities or gifts. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[6/]

13. Morin cooperated with the Commission's investigation.

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

(1) that Morin pay to the Commission the sum of seven hundred dollars ($700.00) for violating G.L. c. 268A, §3(b);[7/] and

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

Date: May 12, 1994

[1/] According to Morin, he participated in hearings and votes on legislation of interest to the insurance industry only occasionally during his service in the legislature.

[2/] Hancock subsequently reimbursed Sawyer for these expenditures.

3/ According to Morin, the dinners he and his wife were treated to by Sawyer were in part in return for the access he provided to the Hyannisport Club for Sawyer and his guests. The evidence does not, however, establish that Morin's provision of such access was the predominant motivating factor for Sawyer's inclusion of Morin in the annual July Fourth weekend dinners rather than that Morin, as state representative, was in a position to take official action on legislative matters of interest to Hancock and was thus someone whose goodwill Sawyer sought to develop and maintain.

4/ See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

5/ For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to Sawyer entertaining Morin where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed. The fact that part of the motive for the entertainment may have been legitimate -- i.e., reciprocation for Morin having provided Sawyer's golf group with access to the Hyannisport Club, according to Morin -- is not a defense to §3. To the extent that a private relationship is a motivating factor for a gratuity it must be the motive for the gratuity or §3 is violated. *In re Flaherty*, 1990 SEC 498, 500. That was not the case here.

6/ As discussed above in footnote 5, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribery section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there is no evidence of any such *quid pro quo* between the lobbyist and Morin.

7/ This amount is approximately three times the value of the $232.70 in prohibited gratuities received by Morin in violation of §3. It represents both a disgorgment of the value of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 489

IN THE MATTER
OF
WILLIAM F. CASS

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and William F. Cass ("Rep. Cass") 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 allegations that Rep. Cass had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Cass violated G.L. c. 268A, §3.

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

1. Rep. Cass has served in the state legislature from January 1991 to the present. During that time, he has served on the Health Care Committee (1991 to the present; vice-chair in 1993); the Personnel Administration Committee (1991 to the present); and the Joint Committee on Insurance (six months in 1992).

2. Rep. Cass has sponsored three bills affecting the insurance industry.

3. In addition, Rep. Cass, as a member of various legislative committees, has participated in many hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Cass also voted on such bills if they reached the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, Hancock's activities are more comprehensively regulated by Massachusetts than by any other state.

5. At all relevant times, Rep. Cass knew that Sawyer was a Massachusetts registered lobbyist for Hancock.

6. Lobbyists are employed to promote, oppose or influence legislation.

7. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

8. Between March 10, 1993, and March 14, 1993, Rep. Cass stayed at the Plantation Resort at Amelia Island, Florida, where he had registered to attend an educational conference sponsored by the Conference of Insurance Legislators. Rep. Cass stayed at the Plantation Resort with several other legislators and a number of Massachusetts lobbyists. On March 11, 1993, the first day of the conference, Cass played golf at the Amelia Plantation course. He played with a foursome consisting of himself, Sawyer, and two others. He shared a cart with Sawyer for the 18 holes. Sawyer paid for the golf. The value of the golf was $80.[1/] Rep. Cass did not attend any conference events that day.

On March 12, 1993, Rep. Cass played golf at the Valley Course at Sawgrass, a golf course located at Ponte Verde, Florida. Rep. Cass thought that a certain Massachusetts lobbyist other than Sawyer paid for the golf. Sawyer's records, however, show that Sawyer paid for this golf. The cost of the golf was $104 per person. Rep. Cass did not attend any conference sessions that day either.

On Saturday, March 13, 1993, Rep. Cass attended some conference events. He returned to Boston on Sunday, March 14th.

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

10. Massachusetts legislators are state employees.

11. Anything worth $50 or more is of substantial value for §3 purposes.[2/]

12. By accepting $80 in entertainment from Sawyer on March 11, 1993, while Rep. Cass was in a position to take official actions which could benefit Sawyer and/or his employer, Hancock, Rep. Cass accepted an item of substantial value for or because of official acts or acts within his official responsibility performed or to be performed. In doing so he violated §3(b).[3/]

13. By accepting $104 in golf entertainment under the belief it was from a certain Massachusetts lobbyist, while Rep. Cass was in the position to take official actions which could benefit that lobbyist and/or his employer, Rep. Cass accepted an item of substantial value for or because of official acts or acts within his official responsibility performed or to be performed. In doing so he violated §3(b).

14. The Commission is aware of no evidence that the gratuities referenced above were provided to Rep. Cass with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware

of no evidence the Rep. Cass took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[4/]

15. Rep. Cass cooperated with the Commission's investigation.

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

(1) that Rep. Cass pay to the Commission the sum of five hundred and fifty dollars ($550.00)[5/] and;

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

Date: May 12, 1994

[1/] This figure represents the fee for eighteen holes and Rep. Cass' share of a cart.

[2/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[3/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498 issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to entertainment of Rep. Cass by lobbyists where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[4/] As discussed above in footnote 3, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyists and Rep. Cass.

[5/] This amount is approximately three times the value of the prohibited $184 in gratuities received by Rep. Cass, representing both a disgorgment of the gratuity and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 490

IN THE MATTER
OF
KEVIN POIRIER

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Kevin Poirier ("Rep. Poirier")

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 allegations that Rep. Poirier had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Poirier violated G.L. c. 268A, §3.

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

1. Rep. Poirier has served in the state legislature from January 1977 to the present. During that time, he has served on various committees including Ways & Means from 1991 to the present. Rep. Poirier also served as the assistant minority leader (1987 to 1990).

2. Rep. Poirier has co-sponsored two bills affecting the insurance industry.

3. In addition, Rep. Poirier, as a member of various legislative committees, has participated in hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Poirier also has voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, he was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. At all relevant times, Rep. Poirier knew that Sawyer was a Massachusetts registered lobbyist for Hancock. On occasion, Sawyer lobbied Rep. Poirier regarding various pieces of legislation.

6. Lobbyists are employed to promote, oppose or influence legislation.

7. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

8. Each summer from 1988 to 1991, Sawyer took a group of legislators and their guests out for dinner and drinks at a Cape Cod restaurant. In 1988 the dinner was held at The Regatta Restaurant in Cotuit. In 1989 through 1991 the dinner was held at the Cranberry Moose Restaurant in Yarmouthport. The cost of each of these dinners was between $736.10 and $1,131.89. On the evenings of July 1, 1988, July 2, 1989, July 2, 1990, and July 4, 1991, Poirier and his wife attended these dinners. The Poiriers' pro rata share of the cost of the dinners was $81.79, $160.79, $150.91 and $125.54, respectively.

9. Between November 24, 1990, and November 29, 1990, Rep. Poirier, his spouse and eight year old son were in Walt Disney World, Florida where Rep. Poirier had registered and attended an educational conference sponsored by the Conference of Insurance Legislators. On the evening of November 25, 1990, Rep. Poirier, his spouse, and son, along with approximately 25 other legislators, lobbyists and their guests, ate at the Pomp Grill Lounge in Walt Disney World. The cost of the meal was approximately $2,000.00. The Poiriers' pro rata share of the cost of the dinner was approximately $165.00. Similarly, on November 28, 1990, Rep. Poirier and his family, along with approximately 10 other legislators, lobbyists and their guests, ate at the Buena Vista Palace at Walt Disney World. The cost of the dinner was $342.48. The Poiriers' pro rata share of the cost of the dinner was approximately $65.00. Sawyer paid for both of these meals.

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

11. Massachusetts legislators are state employees.

12. Anything worth $50 or more is of substantial value for §3 purposes.[1/]

13. By accepting a total of $749.03 in drinks and meals from Sawyer, all while Rep. Poirier was in a position to take official action which could benefit that lobbyist and/or his employer, Hancock, Rep. Poirier accepted items of substantial value for or because of official acts or acts within his official responsibility

performed or to be performed by him. In doing so he violated §3(b).[2/]

14. The Commission is aware of no evidence that the gratuities or gifts referenced above were provided to Rep. Poirier with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Poirier took any official action concerning any proposed legislation which would affect the registered Massachusetts lobbyist in return for the gratuities or gifts. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[3/]

15. Rep. Poirier cooperated with the Commission's investigation.

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

(1) that Rep. Poirier pay to the Commission the sum of two thousand, two hundred and fifty dollars ($2,250.00) for violating G.L. c. 268A, §3(b);[4/] and

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

Date: May 12, 1994

[1/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[2/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

Rep. Poirier has argued that §3 does not apply to meals given to legislators. There is nothing in the legislative history regarding §3 or the language of §3 to support that argument. In the Commission's view, §3 applies to any form of entertainment, including meals, given to any public official.

On the present facts, §3 applies to the lobbyists entertaining Rep. Poirier where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[3/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyist and Rep. Poirier.

[4/] This amount is approximately three times the value of the $749.03 in prohibited gratuities received by Rep. Poirier in violation of §3. It represents both a disgorgement of the value of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 491

IN THE MATTER
OF
THOMAS P. WALSH

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Thomas P. Walsh ("Rep. Walsh") 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 allegations that Rep. Walsh had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Walsh violated G.L. c. 268A, §§3 and 23.

The Commission and Rep. Walsh now agree to the following findings of fact and conclusions of law:

1. Rep. Walsh has served in the state legislature from January 1987 to the present. During that time, Rep. Walsh has served on various committees, including the Joint Committee on Insurance where he has served as vice chairman since 1992.

2. Rep. Walsh has sponsored several bills affecting the insurance industry.

3. In addition, Rep. Walsh, as a member of various committees, has participated in many hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Walsh also has voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period here relevant, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. During the period here relevant, Ralph Scott ("Scott") was a Hancock lobbyist. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. Hancock offers an array of life, health and investment products. As a Massachusetts· domiciled life insurer, Hancock's activities are more comprehensively regulated by Massachusetts than by any other state. At all relevant times, Sawyer and Scott were registered legislative agents (for Hancock) in Massachusetts.

5. During the period here relevant, Andrew Hunt ("Hunt") was a registered legislative agent for the Massachusetts Medical Society.

6. During the period here relevant, William Carroll ("Carroll") was a registered legislative agent for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of life insurance companies doing business in Massachusetts.

7. At all relevant times, Rep. Walsh knew that Sawyer and Scott were lobbyists for Hancock. Rep. Walsh also knew that Hunt was a lobbyist for the Massachusetts Medical Society and that Carroll was a lobbyist for LIAM. On occasion, these individuals lobbied Rep. Walsh regarding various pieces of legislation.

8. Lobbyists are employed to promote, oppose or influence legislation.

9. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

10. Sometime in 1989, Scott provided Rep. Walsh and a guest of the representative with dinner and admission to Hancock's private box at the Boston Garden to watch a Bruins game. Admission to Hancock's box was alone valued at $128 for Rep. Walsh and his guest. The cost of the dinner is not known.[1/]

11. In January 1990, Sawyer provided Rep. Walsh and his wife with dinner and admission to Hancock's private box at the Boston Garden to watch a Celtics game. Admission to Hancock's box was alone valued at $141 for Rep. Walsh and his wife. The cost of the dinner is not known.[2/]

12. In November 1991, Sawyer provided Rep. Walsh with two Hancock tickets to a Harry Connick, Jr. concert at the Wang Center. These two tickets were worth $68[3/].

13. In December 1992, Sawyer provided Rep. Walsh with two Hancock tickets for the *Nutcracker* at the Wang Center. These two tickets were worth $92.[4/]

14. Between March 10, 1993 and March 15, 1993, Rep. Walsh and his spouse stayed at the Plantation Resort at Amelia Island, Florida, where he attended an educational conference sponsored by the Conference of Insurance Legislators which ran from March 11th to March 14th. Rep. Walsh stayed at the Plantation Resort with a number of other legislators and Massachusetts lobbyists.

On the evening of March 11, 1993, Rep. Walsh and his wife ate dinner at the Plantation Resort with Sawyer and a group of Massachusetts legislators. Sawyer paid for the dinner. The Walshes' pro rata share of the cost of the dinner was $104.

On the evening of March 12, 1993, Rep. Walsh and his wife ate dinner at the Ritz Carlton with a group of Massachusetts legislators and lobbyists. Rep. Walsh did not pay for his or his wife's meal. Rep. Walsh testified that, although he knew that several Massachusetts lobbyists were at the meal, he did not know who paid for the meal. Carroll, the lobbyist representing LIAM, paid for this dinner.[5/] The total cost of the dinner was approximately $3,000. The Walshes' pro rata share of the cost of the dinner was approximately $150.

While at Amelia Island, Rep. Walsh golfed twice. On March 11, 1993, Rep. Walsh golfed with Sawyer and two other Massachusetts legislators. Rep. Walsh's golf fees were paid for by Sawyer at a cost of $80. On March 15, 1993, Rep. Walsh golfed with Hunt and two other Massachusetts legislators. Rep. Walsh's golf fees were paid for by Hunt at a cost of $80.

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

16. Massachusetts legislators are state employees.

17. Anything worth $50 or more is of substantial value for §3 purposes.[6/]

18. By accepting a total of approximately $693 in drinks, meals, golf and theater entertainment from Sawyer, Scott and Hunt[7/], all while Rep. Walsh was in a position to take official actions which could benefit those legislative agents and/or their principals, Rep. Walsh accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Rep. Walsh violated §3(b).[8/]

19. As the facts above indicate, Rep. Walsh received, in addition to the $693 in gratuities from Sawyer, Scott and Hunt, a total of $150 in gratuities of $50 or more, where he did not know the specific identity of the source of the gratuities.[9/]

20. Section 23(b)(3) prohibits a public employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the circumstances to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties.

21. By accepting gratuities of $50 or more in value where he did not know the specific identity of the donor, but had reason to know that the donors were Massachusetts lobbyists, Rep. Walsh acted in a manner which would cause a reasonable person knowing all these facts to conclude that the lobbyists present could improperly influence him in the performance of his official duties.[10/] In other words, Rep. Walsh knew or had reason to know that his actions would create an appearance of favoritism. In so doing, Rep. Walsh violated §23(b)(3).[11/]

22. The Commission is aware of no evidence that the gratuities referenced above were provided to Rep. Walsh with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. Also, the Commission is aware of no evidence that Rep. Walsh took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[12/]

23. Rep. Walsh cooperated with the Commission's investigation.

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

(1) that Rep. Walsh pay to the Commission the sum of two thousand, five hundred dollars ($2,500.00) for violating G.L. c. 268A, §3(b) and §23(b)(3);[13/] and

(2) that Rep. Walsh waive all rights to contest the findings of fact, conclusions of law, and terms and conditions contained in this

agreement in this or any related administrative or judicial proceedings to which the Commission is or may be a party.

Date: May 12, 1994

[1/] This dinner is not identified in Scott's records. Rep. Walsh voluntarily disclosed the dinner in his testimony before the Commission. He had no recollection as to its cost, but believed it did not equal or exceed $50.

[2/] This dinner is not identified in Sawyer's records. Rep. Walsh voluntarily disclosed the dinner in his testimony before the Commission. He had no recollection as to its cost, but believed it did not equal or exceed $50.

[3/] Rep. Walsh testified that Sawyer informed him that the tickets were provided to Hancock free-of-charge in return for Hancock's support of the Wang Center's restoration and that, thus, Rep. Walsh believed that the value of the tickets was zero. Because Sawyer has refused to testify in this matter, the Commission has been unable to confirm Rep. Walsh's testimony on this point. However, regardless of whether Hancock paid for the tickets and regardless of what Sawyer may have told Rep. Walsh, the value of the tickets for G.L. c. 268A purposes was the price at which such tickets were available for purchase by the general public.

[4/] See footnote 3.

[5/] The Commission has evidence Carroll subsequently received contributions of $500 and $600 from two of the Massachusetts lobbyists who were at this meal.

[6/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[7/] $128, Scott, 1989; $141, Sawyer, 1990; $68, Sawyer, 1991; $92, Sawyer, 1992; $184, Sawyer, 1993; and $80, Hunt, 1993.

[8/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

Rep. Walsh has argued that §3 does not apply to meals given to legislators. There is nothing in the legislative history regarding §3 or the language of §3 to support that argument. In the Commission's view, §3 applies to any form of entertainment, including meals, given to any public official.

On the present facts, §3 applies to the lobbyists entertaining Rep. Walsh where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[9/] The Walshes' $150 share of the March 12, 1993 dinner paid for by Carroll.

[10/] Moreover, no matter how carefully this matter is investigated, the possibility can never be eliminated that Rep. Walsh would later be told of the specific sources of the various gratuities described above. This only adds to the appearance concern created by such conduct.

[11/] This conduct also raises issues under §3, discussed above. Nothing in §3 requires that the public official know the source of the gift. All that is required is that the public official know that he is receiving the gift for or because of his position. On the foregoing facts, that could be inferred even though Rep. Walsh did not know the specific identity of the donor. In any event, because this is a matter of first impression, the Commission has decided to resolve this conduct pursuant to §23.

[12/] As discussed above in footnote 8, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, and such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest of law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyists and Rep. Walsh.

[13/] This amount is approximately three times the value of the $843 in prohibited gratuities received by Rep. Walsh in violation of §3 and §23(b)(3). It represents both a disgorgment of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 492

IN THE MATTER
OF
FRANCIS G. MARA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Francis G. Mara ("Rep. Mara") 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 allegations that Rep. Mara had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Mara violated G.L. c. 268A, §§3 and 23(b)(3).

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

1. Rep. Mara has served in the state legislature from January 1982 to the present. During that time, he has served on various committees including the Joint Committee on Insurance from 1983 to the present (chairman 1991 to the present).

2. Rep. Mara has sponsored or co-sponsored numerous bills affecting the insurance industry.

3. In addition, Rep. Mara, as a member of various legislative committees, has participated in many hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. As chairman of the Joint Committee on Insurance, Rep. Mara has presided at that committee's hearings. Rep. Mara also has voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. During the period relevant here, George Traylor ("Traylor") was a registered legislative agent in Massachusetts for various clients, including the Medical Malpractice Joint Underwriting Association of Massachusetts. The association provides malpractice and incidental insurance coverage for physicians, dentists and hospitals.

6. During the period relevant here, William Carroll ("Carroll") was a registered legislative agent for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of life insurance companies doing business in Massachusetts.

7. At all relevant times, Rep. Mara knew that Sawyer and Carroll were Massachusetts registered lobbyists for Hancock and LIAM, respectively. Rep. Mara also knew that Traylor was a Massachusetts registered lobbyist representing a number of different clients. On occasion these individuals lobbied Rep. Mara regarding various pieces of legislation.

8. Lobbyists are employed to promote, oppose or influence legislation.

9. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

10. On the evening of September 19, 1992, Sawyer provided Rep. Mara and Rep. Mara's spouse with tickets to the *Phantom of the Opera* at the Wang Center ($120);[1/] drinks at the Wang Center ($20) and after-dinner drinks at the Four Seasons ($31). The total cost of the entertainment for Rep. Mara and his spouse was $171.

11. From December 8, 1992 to December 14, 1992, Rep. Mara and his spouse were in Puerto Rico. Rep. Mara had registered to attend a Council of State Governments ("CSG") conference in San Juan. However, he and his spouse stayed at the Las Palmas del Mar Resort on the southern coast of Puerto Rico. The resort is approximately 40 miles from San Juan. Rep. Mara stayed at Las Palmas with several other legislators and a number of Massachusetts lobbyists. Rep. Mara maintains he chose not to stay at the conference hotel in San Juan because of safety concerns. According to Rep. Mara, because of the distance from San Juan, he did not attend any of the CSG conference functions.

On the evening of December 8, 1992, Rep. Mara and his spouse ate at the Las Palmas Terrace, a restaurant at Las Palmas del Mar. Rep. Mara did not pay for this meal. Sawyer's records indicate that Sawyer paid and that Rep. Mara and his spouse's pro rata share of the cost of the meal was $55.

Rep. Mara and his spouse ate at the Casa Verde restaurant at Las Palmas del Mar on the evening of December 10, 1992. Again, Rep. Mara did not pay for the meal. Sawyer's records indicate that Sawyer paid and the Maras' pro rata share of the cost of the meal was $70. As to each of the foregoing circumstances, Rep. Mara testified that although he knew that several Massachusetts lobbyists were staying at Las Palmas, he did not know who paid for the meal.

On December 13, 1992, Rep. Mara and his spouse, along with Rep. John Cox and his spouse, went on a fishing excursion with George Traylor and another Massachusetts lobbyist. Rep. Mara testified that when he and his spouse went on the excursion, he was under the impression that they were taking the place of certain other guests who had cancelled at the last moment. The boat was a 40 foot fishing vessel with a captain and one member crew. The cost of chartering the boat was $383. The boat trip lasted several hours and included deep sea fishing and a stop for snorkeling. A box lunch was provided. Rep. Mara did not know what, if any, arrangements had been made between Traylor and the other lobbyist to pay for this excursion, although he assumed that one or both of them were paying for it. In fact, Traylor paid for the charter. The Maras' pro rata share of the cost of the charter was $128.

12. Between March 10, 1993 and March 14, 1993, Rep. Mara and his spouse stayed at the Plantation Resort at Amelia Island, Florida where he had registered for an educational conference sponsored by the Conference of Insurance Legislators.[2/] Rep. Mara stayed at the Plantation Resort with a number of other legislators and Massachusetts lobbyists.

On the evening of March 12, 1993, Rep. Mara and his wife ate dinner at the Ritz Carlton with a group of Massachusetts legislators and lobbyists. Rep. Mara understood that one or more lobbyists paid for the dinner, although he did not know who. Carroll, the lobbyist representing LIAM, paid for this dinner.[3/] The total cost of the dinner was approximately $3,000. The Maras' pro rata share of the cost of the dinner was approximately $150.

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

14. Massachusetts legislators are state employees.

15. Anything worth $50 or more is of substantial value for §3 purposes.[4/]

16. By accepting a total of $171 in drinks and theater ticket entertainment from Sawyer on September 19, 1992, and a $128 fishing boat excursion from Traylor on December 13, 1992, all while Rep. Mara was in a position to take official actions which could benefit those lobbyists, Rep. Mara accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed. In doing so he violated §3(b).[5/,6/]

17. As the facts above indicate, Rep. Mara received, in addition to the $171 and $128 in gratuities, a total of $275 in gratuities of $50 or more[7/] where he did not know the specific identity of the source of the entertainment.

18. Section 23(b)(3) prohibits a public employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the circumstances to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties.

19. By accepting entertainment of $50 or more in value where he did not know the specific identity of the donor, but had reason to know that the donors were Massachusetts lobbyists, Rep. Mara acted in a manner which would cause a reasonable person knowing all these facts to conclude that the lobbyists present could improperly influence him in the performance of his official duties.[8/] In other words, Rep. Mara knew or had reason to know that his

actions would create an appearance of favoritism. In so doing, he violated §23(b)(3).[9/]

20. The Commission is aware of no evidence that the gratuities referenced above were provided to Rep. Mara with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Mara took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[10/]

21. Rep. Mara cooperated with the Commission's investigation.

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

(1) that Rep. Mara pay to the Commission the sum of one thousand, seven hundred dollars ($1,700.00) for violating G.L. c. 268A, §§ 3(b) and 23(b)(3);[11/] and

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

Date: May 12, 1994

[1/] These numbers in parentheses reflect the cost of the entertainment for Rep. Mara and his spouse.

[2/] According to his testimony, Rep. Mara attended conference sessions on March 12 and 13.

[3/] The Commission has evidence Carroll subsequently received contributions of $500 and $600 from two of the Massachusetts lobbyists who were at this meal.

[4/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14.*

[5/] See ¶20.

[6/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

Rep. Mara has argued that §3 does not apply to meals given to legislators. There is nothing in the legislative history regarding §3 or the language of §3 to support that argument. In the Commission's view, §3 applies to any form of entertainment, including meals, given to any public official.

On the present facts, §3 applies to the lobbyists entertaining Rep. Mara where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[7/] 12/8/92 ($55); 12/10/92 ($70) and 3/12/93 ($150).

[8/] Moreover, the possibility can never be eliminated that Rep. Mara would later be told of the specific sources of the various gratuities described above. This only adds to the appearance concern created by such conduct.

[9/] This conduct also raises issues under §3, discussed above. Nothing in §3 requires that the public official know the source of the gift. All that is required is that the public

official know that he is receiving the gift for or because of official acts or acts within his official responsibility. On the foregoing facts, that could be inferred even though Rep. Mara did not know the specific identity of the donor. In any event, because this is a matter of first impression, the Commission has decided to resolve this conduct pursuant to §23.

10/ As discussed above in footnote 6, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyists and Rep. Mara.

11/ This amount is approximately three times the value of the $574 in prohibited gratuities received by Rep. Mara in violation of §3 and §23(b)(3). It represents both a disgorgment of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 493

IN THE MATTER
OF
JOHN F. COX

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John F. Cox ("Rep. Cox") 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 allegations that Rep. Cox had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Cox violated G.L. c. 268A, §§3 and 23(b)(3).

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

1. Rep. Cox has served in the state legislature from January 1983 to the present. During that time, he has served on a number of committees including the Joint Committee on Insurance (1983-1990), Banks and Banking (1982-1990), and the Committee on Bills in the Third Reading (1990-1993, chair).

2. Rep. Cox has sponsored many bills affecting the insurance industry.

3. In addition, Rep. Cox, as a member of various legislative committees, has participated in many hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Cox also voted on such bills on the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, he was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. During the period relevant here, George Traylor ("Traylor") was a registered legislative agent in Massachusetts for various clients, including the Medical Malpractice Joint Underwriting Association of Massachusetts. The association provides malpractice and incidental insurance coverage for physicians, dentists, and hospitals.

6. During the period relevant here, William Carroll ("Carroll") was a registered legislative agent for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of life insurance companies doing business in Massachusetts.

7. At all relevant times, Rep. Cox knew that Sawyer and Carroll were Massachusetts registered lobbyists for Hancock and LIAM, respectively. Rep. Cox also knew that Traylor was a Massachusetts registered lobbyist representing a number of different clients. On occasion these individuals lobbied Rep. Cox regarding various pieces of legislation.

8. Lobbyists are employed to promote, oppose or influence legislation.

9. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

10. From December 8, 1992 to December 14, 1992, Rep. Cox and his spouse were in Puerto Rico. Rep. Cox had registered to attend a Council of State Government's ("CSG") conference in San Juan. However, he and his spouse stayed at the Las Palmas del Mar Resort on the southern coast of Puerto Rico. The resort is approximately 40 miles from San Juan. Rep. Cox stayed at Las Palmas with several other legislators and a number of Massachusetts lobbyists. Rep. Cox maintains he chose not to stay at the conference hotel in San Juan because of safety concerns. According to Rep. Cox, because of the distance from San Juan, he did not attend any of the CSG conference functions.

On the evening of December 8, 1992, Rep. Cox and his spouse ate at the Las Palmas Terrace, a restaurant at Las Palmas del Mar. Rep. Cox did not pay for this meal. Sawyer's records indicate that Sawyer paid, and that the Coxes' pro rata share of the cost of the meal was $55.

Rep. Cox and his spouse ate at the Casa Verde restaurant at Las Palmas del Mar on the evening of December 10, 1992. Again, Rep. Cox did not pay for the meal. Sawyer's records indicate that Sawyer paid, and the Coxes' pro rata share of the cost of the meal was $70.

As to each of the foregoing instances, Rep. Cox testified that, although he knew there were several Massachusetts lobbyists staying at Las Palmas, he did not know who paid for these meals.

On December 13, 1992, Rep. Cox and his spouse, along with Rep. Mara and his spouse, went on a fishing excursion with George Traylor and another Massachusetts lobbyist. The boat was a 40 foot fishing vessel with a captain and one member crew. The cost of chartering the boat was $383. The boat trip lasted several hours and included deep sea fishing and a stop for snorkeling. A box lunch was provided. Rep. Cox did not know what, if any, arrangements had been made between Traylor and the other lobbyist to pay for this excursion, although he assumed that one or both of them were paying for it. In fact, Traylor paid for the charter. The Coxes' pro rata share of the cost of the charter was $128.

11. Between March 10, 1993 and March 14, 1993, Rep. Cox and his spouse, along with several other legislators and lobbyists, stayed at the Plantation Resort at Amelia Island, Florida. Most of the legislators and lobbyists had registered to attend an educational conference sponsored by the Conference of Insurance Legislators. According to Rep. Cox, he planned to register for the conference upon his arrival at Amelia Island but, due to inclement weather and other circumstances, Rep. Cox neither registered for nor attended conference events.

On the evening of March 12, 1993, Rep. Cox and his wife ate dinner at the Ritz Carlton along with a group of Massachusetts legislators and lobbyists. Again, Rep. Cox understood that one or more private lobbyists paid for the dinner, although he did not know which lobbyist paid. Carroll, the lobbyist representing LIAM, paid for this dinner.[1/] The total cost of the dinner was approximately $3,000. The Coxes' pro rata share of the cost of the meal was approximately $150.

Finally, Rep. Cox played two rounds of golf while at Amelia Island. One was at an Amelia Island Plantation course, the other at the Valley Course at Sawgrass, a golf course located at Ponte Verde, Florida. Rep. Cox did not pay for his golfing expenses at either course. He understood that one or more Massachusetts lobbyists paid for these expenses. It is unclear which lobbyist paid for these expenses. Greens fees and cart expenses per person were $80 and $104[2/] at Amelia Island and Sawgrass, respectively.

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

13. Massachusetts legislators are state employees.

14. Anything worth $50 or more is of substantial value for §3 purposes.[3/]

15. By accepting a $128 fishing boat excursion from Traylor, while Rep. Cox was in a position to take official actions which could benefit Traylor, Rep. Cox accepted items of substantial value for or because of official acts or act within his official responsibility performed or to be performed by him. In doing so he violated §3(b).[4/,5/]

16. As the facts above indicate, Rep. Cox received, in addition to the $128 fishing excursion gratuities, a total of $459 in gratuities of $50 or

more,[6/] where he states he did not know the specific identity of the source of the entertainment.

17. Section 23(b)(3) prohibits a public employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the circumstances to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties.[7/]

18. By accepting a total of $459 in entertainment of $50 or more in value where he did not know the specific identity of the donor, but did know that the donors were Massachusetts lobbyists, Rep. Cox acted in a manner which would cause a reasonable person knowing all these facts to conclude that the lobbyists present could improperly influence Rep. Cox in the performance of his official duties.[8/] In so acting, he violated §23(b)(3). In other words, Rep. Cox knew or had reason to know that his actions would create an appearance of favoritism.

19. The Commission is aware of no evidence that the gratuities referenced above were provided to Rep. Cox with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Cox took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[9/]

20. Rep. Cox cooperated with the Commission's investigation.

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

(1) that Rep. Cox pay to the Commission the sum of one thousand, seven hundred and fifty dollars ($1,750.00) for violating G.L. c. 268A, §3(b) and §23(b)(3);[10/] and

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

Date: May 12, 1994

[1/] The Commission has evidence Carroll subsequently received contributions of $500 and $600 from two of the Massachusetts lobbyists who were at this meal.

[2/] This $104 included the following: $80 greens fees, $18 for one-half a cart, and $6 tax.

[3/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[4/] See ¶19.

[5/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

Rep. Cox has argued that §3 does not apply to meals given to legislators. There is nothing in the legislative history regarding §3 or the language of §3 to support that argument. In the Commission's view, §3 applies to any form of entertainment, including meals, given to any public official.

On the present facts, §3 applies to the lobbyists entertaining Rep. Cox where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

6/ 12/8/92 ($55); 12/10/92 ($70); 3/12/93 ($150); and 3/10/93 to 3/13/93 ($184).

7/ This conduct also raises issues under §3 discussed above. Nothing in §3 requires that the public official know the source of the gift. All that is required is that the public official know that he is receiving the gift for or because of official acts or acts within his official responsibility. On the foregoing facts, that could be inferred even though Rep. Cox did not know the specific identity of the donor. In any event, because this is a matter of first impression, the Commission has decided to resolve this conduct pursuant to §23.

8/ Moreover, no matter how carefully this matter is investigated, the possibility can never be eliminated that Rep. Cox would later be told of the specific sources of the various gratuities described above. This only adds to the appearance concern created by such conduct.

9/ As discussed above in footnote 5, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyists and Rep. Cox.

10/ This amount is approximately three times the value of the $587 in prohibited gratuities received by Rep. Cox. The fine reflects the disgorgement of the improperly received gratuities plus a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 494

IN THE MATTER
OF
KEVIN HONAN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Kevin Honan ("Rep. Honan") 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 allegations that Rep. Honan had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 25, 1994, voted to find reasonable cause to believe that Rep. Honan violated G.L. c. 268A, §§3 and 23(b)(3).

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

1. Rep. Honan has served in the state legislature from January 1987 to the present. During that time, he has served on various committees including the Government Regulations Committee (vice chairman) and the Health Care Committee (vice chairman).

2. In addition, Rep. Honan, as a member of various legislative committees, has participated in many hearings on bills which impact on the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Honan has also voted on bills which impact the insurance industry when they reached the House floor.

3. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

4. During the period relevant here, Ralph Scott ("Scott") was also a lobbyist for Hancock.

5. During the period relevant here, William Carroll ("Carroll") was a registered legislative agent for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of the largest life insurance companies doing business in Massachusetts.

6. At all relevant times, Rep. Honan knew that Sawyer and Scott were Massachusetts registered lobbyists for Hancock. Rep. Honan testified that he was never lobbied by Sawyer, Scott or Carroll.

7. Lobbyists are employed to promote, oppose or influence legislation.

8. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

9. In 1991, Honan attended a Boston Celtics game as Scott's guest and sat in Hancock's private skybox at the Boston Garden. The ticket value was approximately $70.00.[1/]

10. Between March 10, 1993 and March 14, 1993, Rep. Honan and his guest stayed at the Plantation Resort at Amelia Island, Florida, where an educational conference sponsored by the Conference of Insurance Legislators was being held. Rep. Honan neither registered for nor attended the conference.

On March 12, 1993, Sawyer paid for Rep. Honan's golf expenses at the Valley Course at Sawgrass, a golf course located at Ponte Verde, Florida. The cost of Rep. Honan's golf expenses was $130.00.[2/]

On the evening of March 12, 1993, Rep. Honan and his guest ate dinner at the Ritz Carlton with a group of Massachusetts legislators and lobbyists. Rep. Honan did not pay for this dinner. Rep. Honan testified that although he knew that Massachusetts lobbyists were in attendance, he did not know who paid for the meal. Carroll, the lobbyist representing LIAM, paid for this dinner.[3/] The total cost of the dinner was approximately $3,000. Honan and his guest's pro rata share of the cost of the dinner was approximately $150.

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

12. Massachusetts legislators are state employees.

13. Anything worth $50 or more is of substantial value for §3 purposes.[4/]

14. By accepting the basketball game ticket from Scott and the golf entertainment from Sawyer, all while Rep. Honan was in a position to take official actions which could benefit those lobbyists, Rep. Honan accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so he violated §3(b).[5/]

15. As the facts above indicate, Rep. Honan received, in addition to the $200.00 in gratuities, a $150 meal where he did not know the specific identity of the source of the entertainment.

16. Section 23(b)(3) prohibits a public employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the circumstances to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties.

17. By accepting entertainment of $50 or more in value where he did not know the specific identity of the donor, but had reason to know that the donors were Massachusetts lobbyists, Rep. Honan acted in a manner which would cause a reasonable person knowing all these facts to conclude that the lobbyists present could improperly influence him in the performance of his official duties.[6/] In other words, Rep. Honan knew or had reason to know that his actions would create an appearance of favoritism. In so doing, he violated §23(b)(3).[7/]

18. The Commission is aware of no evidence that the gratuities or gifts referenced above were provided to Rep. Honan with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Rep. Honan took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities or gifts. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[8/]

19. Rep. Honan fully cooperated with the Commission throughout its investigation.

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

(1) that Rep. Honan pay to the Commission the sum of one thousand and fifty dollars ($1,050.00) for violating G.L. c. 268A, §§3(b) and 23(b)(3);[9/] and

(2) that Rep. Honan waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this

agreement and in any related administrative or judicial proceedings to which the Commission is or may be a party.

Date: May 12, 1994

[1/] Rep. Honan has no specific recollection and Hancock has no records indicating the exact date the basketball game occurred. Rep. Honan testified that he believed the ticket value was approximately $30.00.

[2/] Rep. Honan testified that he was unaware of the value of the golf.

[3/] The Commission has evidence Carroll subsequently received contributions of $500 and $600 from two of the Massachusetts lobbyists who were at this meal.

[4/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14.*

[5/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to the lobbyists entertaining Rep. Honan where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

[6/] Moreover, the possibility can never be eliminated that Rep. Honan would later be told of the specific sources of the various gratuities described above. This only adds to the appearance concern created by such conduct.

[7/]This conduct also raises issues under §3 discussed above. Nothing in §3 requires that the public official know the source of the gift. All that is required is that the public official know that he is receiving the gift for or because of official acts or acts within his official responsibility. On the foregoing facts, that could be inferred even though Rep. Honan did not know the specific identity of the donor. In any event, because this is a matter of first impression, the Commission has decided to resolve this conduct pursuant to §23.

[8/]As discussed above in footnote 5, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed.

[9/] This amount is three times the value of the $350.00 in prohibited gratuities received by Rep. Honan in violation of §3. It represents both a disgorgement of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 409

IN THE MATTER OF ARTHUR HERMENAU

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Arthur Hermenau ("Hermenau") 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 8, 1989, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Hermenau as Highway Surveyor for the Town of Pembroke. The Commission concluded its inquiry and, on April 18, 1990, found reasonable cause to believe that Hermenau violated G.L. c. 268A, §3(b).

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

1. At all times here relevant, Hermenau was employed as the Pembroke Highway Surveyor, an elected and salaried position to which Hermenau was first elected in 1977. As Pembroke Highway Surveyor, Hermenau was a municipal employee as defined in G.L. c. 268A, §1(g).

2. Tilcon Massachusetts, Inc. ("Tilcon") is a corporation doing business in Massachusetts as a paving materials manufacturer and paving contractor. During the time here relevant, a substantial portion of Tilcon's business consisted of municipal paving contracts. Tilcon's contract with the Town of Pembroke was one of at least twenty contracts Tilcon had with Massachusetts municipalities in 1987. The balance of Tilcon's business was commercial, with virtually no individual residential jobs such as driveways. On the rare occasions when Tilcon paved residential driveways, such paving was usually done for private customers with whom Tilcon had an ongoing business relationship or a prior long-standing business relationship.

3. As Highway Surveyor, Hermenau was responsible for the maintenance and reconstruction of the town roads in Pembroke and for the operation of the Pembroke Highway Department. As Highway Surveyor, Hermenau was responsible for overseeing the bidding and award process by which the town paving contract was awarded annually.[1/] Hermenau annually advertised the availability of the contract in area newspapers and sent out by mail invitations to bid to several area paving contractors, including Tilcon. When bids were received, Hermenau held a public bid opening and awarded the contracts.[2/] After the town paving contract was awarded, Hermenau was responsible as Highway Surveyor for determining town paving needs covered by the contract (i.e., for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

4. In 1986, in bidding for the Pembroke paving contract for the period of September 1, 1986 through August 31, 1987, Tilcon submitted the low bid of $27.14 per ton for Class I Bituminous Concrete in place and was awarded that portion of the town paving contract by Hermenau. Hermenau awarded the remainder of the contract to another vendor which had submitted the low bids on the other two portions of the contract. In 1987, in bidding for the Pembroke paving contract for the period of September 1, 1987 through August 31, 1988, Tilcon submitted the lowest bid on two out of three of the contract categories and tied for lowest bid on the third.[3/] Hermenau awarded and split the third portion between Tilcon and the other low bidding vendor. In 1988, in bidding for the Pembroke paving contract for the period of September 1, 1988 through August 31, 1989, Tilcon submitted the lowest bid on one portion of the contract and tied with another vendor for the lowest bid on the other two contract categories. Hermenau awarded the contract for the first category to Tilcon and split the contract award for the other two categories between Tilcon and the other low bidder.

5. In 1987, Hermenau owned a house in Pembroke with an unpaved driveway. As of July 1987, Hermenau had personally graded and prepared the driveway for paving and was anxious to have the paving done prior to the onset of winter. In July 1987, Hermenau approached John D'Allesandro ("D'Allesandro"), an employee of Tilcon with whom he had had dealings as Highway Surveyor in connection with Tilcon's work for the town, and asked him if Tilcon could pave his driveway. Hermenau informed D'Allesandro of the general dimensions of the driveway and told him that he wanted the work done before winter. D'Allesandro then went to Hermenau's property, viewed the site and agreed to do the work. According to Tilcon, D'Allesandro agreed to do the work only after speaking to and receiving authorization from Tilcon Vice-President and Brockton Branch Manager Joseph P. McMenimen ("McMenimen"). Before authorizing the work, McMenimen asked D'Allesandro if Hermenau agreed to pay for the work and D'Allesandro responded that Hermenau had agreed to pay for the work, according to Tilcon. Hermenau and D'Allesandro did not discuss what Hermenau would be charged by Tilcon for paving his driveway. Hermenau did not ask D'Allesandro for or receive in advance of the work an oral or written estimate of the price Tilcon would charge for paving the driveway.[4/]

6. According to Hermenau, he sought to have Tilcon pave his driveway because he wanted his driveway done with a paving machine and roller, he wanted the job done before winter, he was familiar with Tilcon as the town contractor and he had been satisfied with Tilcon's work for the town. At the time in question, the reputable smaller paving companies in

the Pembroke area that did residential driveway paving did not possess paving machines and spread materials by hand and, further, were booked up to a year in advance with other projects and would not have been able to pave Hermenau's driveway prior to winter.

7. In July 1987, Tilcon placed 80.21 tons of Class I Bituminous Concrete on Hermenau's driveway as a base or "binder" course. The July 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and two laborers. In November 1987, Tilcon finished paving Hermenau's driveway by installing a second layer of 55.18 tons of Class I Bituminous Concrete. The November 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and three laborers. Tilcon's use of a paving machine to install Hermenau's driveway resulted in a smoother, more aesthetically attractive and durable driveway than would have been possible by means of handraking and a roller alone, which would have been the method employed by a smaller local residential paving contractor.

8. In August 1987, Tilcon submitted a lump sum invoice to Hermenau and Hermenau paid Tilcon $2,265.53 for Tilcon's July 1987 paving work on his driveway.[5/] In November 1987, Tilcon charged Hermenau and Hermenau paid $1,510.03 for the paving work completing his driveway. Tilcon's November 1987 bill recited that it was for "Class I Bit. Concrete in place as directed, 55.18 tons at $27.09 a ton," and contained an "asphalt adjustment" charge of $15.20.[6/]

9. In both August and November 1987, Tilcon charged Hermenau and Hermenau paid the same rate as Tilcon then charged the Town of Pembroke for paving under the town paving contract that Hermenau awarded to Tilcon ("the town rate"). During the period here relevant, Hermenau was the only Pembroke homeowner whose driveway was paved by Tilcon as an independent project and the only private customer in Pembroke charged the town rate by Tilcon for paving work. Tilcon agreed to pave Hermenau's driveway and charged Hermenau the Pembroke town rate[7/] because Hermenau was the Pembroke Highway Surveyor and also, according to Tilcon, in part because the company made a profit on the work.[8/]

10. The rate for paving charged by Tilcon under the Town of Pembroke paving contract ("the town rate") was in part determined by the total quantity of paving purchased by the town, i.e., the town paid less per ton for paving than it would have paid had it contracted with Tilcon for significantly less paving. In charging Hermenau the town rate for the paving of his driveway, Tilcon conferred upon Hermenau the benefit of the reduced per ton cost charged to the town based upon the relatively large quantity of paving the town purchased from Tilcon.[9/] In addition to and apart from the benefit represented by being charged the town rate, Hermenau's access to Tilcon's paving services was itself a benefit to Hermenau. Not only was Tilcon able to work before winter as Hermenau wanted, at a time when other contractors were not available, but Tilcon was able to do the work at a higher standard of quality than a small local driveway contractor would have been able to achieve.

11. Section 3(b) of G.L. c. 268A prohibits a municipal employee from seeking or receiving anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by the municipal official.

12. By approaching Tilcon's employees in order to obtain Tilcon's services to pave his driveway, by receiving Tilcon's paving services, and by paying for those services at the town rate, all while Tilcon was a bidder on the town paving contract and a town vendor subject to his official authority as Highway Surveyor to award the town paving contract and to oversee its performance, Hermenau sought and received from Tilcon benefits for himself which were of substantial value[10/] for or because of official acts or acts within his official responsibility performed or to be performed by him as Highway Surveyor. In doing so, Hermenau violated G.L. c. 268A, §3(b).

13. The Commission is aware of no evidence that Hermenau knew at the time he sought and received Tilcon's services to pave his driveway that his actions violated G.L. c. 268A, §3.[11/] The Commission is also aware of no evidence that as Highway Surveyor Hermenau offered to Tilcon or Tilcon sought from Hermenau any specific official action concerning any matter which would affect Tilcon in return for its provision to him of the above-described benefits.[12/] However, even if the provision of the benefits was only intended to create official goodwill, Hermenau's receipt of those benefits was still impermissible.[13/]

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

(1) that Hermenau pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §3(b)[14]/;

(2) that Hermenau forfeit the sum of five hundred dollars ($500.00) for the approximate economic benefit he unlawfully derived from his violating §3(b); and

(3) that Hermenau 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 17, 1994

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[1]/ In the Town of Pembroke, the town paving contract is put out to bid and awarded annually by the Town Highway Surveyor. The town paving contract covers Pembroke's paving needs for the twelve month period, September 1st through August 31st. During the time here relevant, the contract had three components, each of which could be separately awarded to a different vendor with the lowest bid as to that component, or divided between vendors with tying bids as to a component: (1) 6000 tons of Class I Bituminous Concrete in place; (2) 1500 tons of Bituminous Concrete Type I; and (3) 1500 tons of Asphalt Stockpile Mix to be picked up at the vendor's plant.

[2]/ Hermenau's primary criterion for awarding the contract was the price bid, i.e., the contract was generally awarded to the lowest bidder. When the prices bid were close, however, Hermenau had discretion to consider other factors in awarding the bid, such as the distance from the town of the bidders' manufacturing plants, the reputation of the bidders and his own knowledge of any prior problems with the bidders. During the time here relevant, except for a single instance not here material, the contract was always awarded to the low bidder or split between bidders who had submitted the same low bid.

[3]/ Tilcon bid a price of $27.09 per ton for Class I Bituminous Concrete in place.

[4]/ The price charged Hermenau by Tilcon for its work in paving the driveway was determined by McMenimen. The agreement pursuant to which Tilcon paved Hermenau's driveway was oral and was not reduced to writing.

[5]/ Tilcon's records show that this invoice was for 80.21 tons of binder, tax included.

[6]/ Hermenau was not charged and did not pay any tax when he paid Tilcon for the November 1987 work.

[7]/ The Commission is aware of no evidence that Tilcon and Hermenau actually negotiated the application of the town rate to Tilcon's charges for paving Hermenau's driveway. After the July 1987 paving work was completed, Tilcon unilaterally decided to charge Hermenau the town rate for the paving of his driveway in part because, according to Tilcon, the company believed that it was a fair way to price the work on the driveway (which was similar to a small street).

[8]/ The Commission is aware of no evidence that Hermenau sought and received or Tilcon provided these benefits to Hermenau in return for his being influenced in his performance of any specific official act as Highway Surveyor or any particular act within his official responsibility as Highway Surveyor.

[9]/ Hermenau would have paid approximately $500 more than he was charged by Tilcon for the paving of his driveway if he had dealt with a private contractor at the then customary market rate.

[10]/ Anything which has a value of $50 or more is of substantial value for the purposes of the conflict of interest law. See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976).

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

[12]/ The Commission is further aware of no evidence that Hermenau's above-described private dealings with Tilcon had any effect on Tilcon's performance of its paving contract with the Town of Pembroke or on Hermenau's performance of his duties as Highway Surveyor.

[13]/ As the Commission made clear in its decision *In re Michael*, 1981 Ethics Commission 59, 68, and in *Advisory No. 8*, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise G.L. c. 268A, §2 issues. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Tilcon and Hermenau.

[14]/ While the Commission is empowered to impose fines of up to $2,000 for each violation of G.L. c. 268A, §3, the Commission has determined that it is in the public interest to resolve this matter with a $1,000 fine because the prohibited conduct in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 495

IN THE MATTER
OF
JOHN BARTLEY

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John Bartley ("Bartley") 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 allegations that Bartley had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on February 25, 1994, voted to find reasonable cause to believe that Bartley violated G.L. c. 268A, §23(b)(3).

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

1. Bartley served in the state legislature from January 1987 until January 1991. During that time, he served on various committees, including the Health Care Committee.

2. Bartley, as a member of various legislative committees, participated in many hearings on bills of interest to the insurance industry. Such participation included voting on whether such bills should be reported out of committee. Bartley also voted on bills of interest to the insurance industry when they reached the House floor.

3. During the period relevant here, Ralph Scott ("Scott") was a Massachusetts registered legislative agent for the John Hancock Mutual Life Insurance Company, Inc. ("Hancock"). Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

4. At all relevant times, Bartley knew that Scott was a Massachusetts registered legislative agent for Hancock.

5. Scott and Bartley met sometime around 1979, when both were working as legislative staffers at the State House. According to Bartley, they developed a close personal friendship, which continued after Bartley became a legislator and Scott became a lobbyist, and which involved frequent socializing between Bartley and Scott, and occasional socializing with their wives and children. Such socializing did not involve any legislative business or have any legislative purpose.

6. In September 1990 Bartley was defeated in his primary campaign for re-election, and was thus scheduled to complete his legislative tenure in the first week of January 1991.

7. Between December 5 and December 8, 1990, Bartley and Scott stayed in St. Thomas, Virgin Islands. A Council of State Government (CSG) conference was being held on St. Thomas at that time. Hancock's records pertaining to Scott indicate he was there on Hancock business; he entertained a number of Massachusetts legislators. Bartley knew Scott was there on Hancock business and was entertaining other Massachusetts legislators on behalf of Hancock. Bartley, however, went to St. Thomas on vacation.

8. Scott allowed Bartley to take advantage of an airline promotion which enabled Bartley to purchase a round trip ticket for $108.31 once Scott purchased a round trip ticket at the full price of $580.81. The total cost of both tickets was $689.12. Therefore, dividing the total cost by two and subtracting the $108.31 that Bartley paid, Bartley received from Scott a benefit of $236.25 in reduced airfare costs.

9. Bartley and Scott traveled together to St. Thomas and Scott allowed him to share the hotel room which Scott had previously reserved for himself. The total lodging expenses for the three nights were $666.52. Scott paid for these expenses; therefore, Bartley received from Scott a $333.26 benefit in lodgings.

10. On the evening of December 7, 1990, Bartley and Scott had dinner at the Chart House restaurant in St. Thomas. Scott paid for this meal. Bartley's pro rata share of the cost of the dinner was $45.13. On December 8, 1990, Scott paid for Bartley's golf expenses at the Mahogany Run Golf Club in St. Thomas. The cost was $51.

11. In total, Scott provided Bartley with $665.64 in benefits in connection with the St. Thomas trip. Hancock reimbursed Scott for the expenses related to these benefits. Consequently, it was Hancock that provided these benefits.[1/]

12. General Laws, c. 268A, §23(b)(3) prohibits a public employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties.

13. By accepting benefits of $665.64 in meals, discounted airfare, shared lodging and golf expenses from Hancock through its lobbyist Scott, all while Bartley was in a position to take official action which could benefit Hancock, Bartley knowingly or with reason to know acted in a manner which would cause a reasonable person knowing all of the facts to conclude that the lobbyist could improperly influence him in the performance of his official duties. In so doing, he violated §23(b)(3).[2/]

14. Scott never lobbied or attempted to lobby Bartley in connection with any matter in which Hancock had an interest. Additionally, the Commission found no evidence that Bartley was, in fact, improperly influenced by Hancock or Scott.

15. Bartley cooperated with the Commission's investigation.

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

(1) that Bartley pay to the Commission the sum of two hundred fifty dollars ($250.00) for violating G.L. c. 268A, §23(b)(3); and

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

Date: July 19, 1994

[1/] Bartley contends that he did not know Hancock paid for the benefits he received in St. Thomas from Scott. Bartley knew, however, that Scott traveled to St. Thomas on Hancock business and entertained legislators while there. Under these circumstances, Bartley had reason to know who paid his expenses.

[2/] Bartley asserts that Scott was motivated by friendship to provide the gratuities to him. The Commission accepts that assertion. In addition to the evidence Bartley provided concerning his friendship with Scott, the fact that they traveled, shared a hotel room and dined together while in St. Thomas is persuasive that friendship was the predominant motivation for the gratuities.

Had the Commission determined that Bartley believed Scott's gifts were motivated in part for or because of an official act performed or to be performed by Bartley, the Commission would have found that Bartley had violated G.L. c. 268A, §3, a more serious violation. However, the Commission found credible Bartley's testimony that he believed that Scott was motivated by friendship to pay for Bartley's expenses. In the Commission's view, however, friendship and personal ties only serve to enhance the appearance of favoritism that arises when a legislator accepts items of substantial value from a lobbyist.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 496

IN THE MATTER
OF
JOAN MENARD

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Joan Menard ("Rep. Menard") 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 allegations that Rep. Menard had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on February 25, 1994, voted to find reasonable cause to believe that Rep. Menard violated G.L. c. 268A, §3.

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

1. Rep. Menard has served in the state legislature from January 1979 to the present. During that time, she has served on various committees, including Ways & Means from 1988 to 1990. Rep. Menard also served as assistant majority whip from 1990 until 1992, when she became majority whip.

2. Rep. Menard has co-sponsored three bills affecting the insurance industry.[1/]

3. In addition, Rep. Menard, as a member of various legislative committees, has participated in many hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. Rep. Menard has also voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was a second vice-president for John Hancock Mutual Life Insurance Company, Inc. ("Hancock"). As such he acted as Hancock's senior lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. At all relevant times, Rep. Menard knew that Sawyer was a Massachusetts registered lobbyist for Hancock. On occasion, Sawyer lobbied Rep. Menard regarding various pieces of legislation.

6. Lobbyists are employed to promote, oppose or influence legislation.

7. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

8. On the evening of June 17, 1992, Rep. Menard and Sawyer and their spouses ate dinner at Jasper's Restaurant in Boston. Sawyer paid for the meal. The Menards' pro rata share of the cost of the dinner was $179.63.[2/]

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

10. Massachusetts legislators are state employees.

11. Anything worth $50 or more is of substantial value for §3 purposes.[3/]

12. By accepting a total of $179.63 in drinks and food from Sawyer while Rep. Menard was in a position to take official actions which could benefit that lobbyist, Rep. Menard accepted items of substantial value for or because of official acts and/or acts within her official responsibility performed or to be performed by her. In doing so she violated §3(b).[4/]

13. The Commission is aware of no evidence that the gratuity referenced above was provided to Rep. Menard with the intent to influence any specific official act by her as a legislator or any particular act within her official responsibility. Also, the Commission is aware of no evidence that Rep. Menard took any official action concerning any proposed legislation which would affect Hancock in return for the gratuity. However, even though the gratuity was only intended to foster official goodwill and access, it was still impermissible.[5/]

14. Rep. Menard has fully cooperated with the Commission throughout this investigation.

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

(1) that Rep. Menard pay to the Commission the sum of five hundred and twenty five dollars ($525.00) for violating G.L. c. 268A, §3(b);[6/] and

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

Date: July 19, 1994

[1/] According to Rep. Menard, the bills were consumer oriented and adverse to the insurance industry. The bills are as follows: Co-sponsor: 1986, H. 2034 (authorizing

joint life coverage); Co-sponsor: 1989, H. 4374 (increasing existing mandated mental illness benefit); Co-sponsor: 1989, H. 4376 (requiring health insurance policies to cover services of rehabilitation counselor); Co-sponsor: 1992, H. 1918 (same as 1989 H. 4376).

2/ Rep. Menard testified that she had a casual friendship with Sawyer; however, she acknowledges that this was not the motivating factor in Sawyer paying for the cost of the dinner.

3/ See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

4/ For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists). *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to the lobbyist entertaining Rep. Menard where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

5/ As discussed above in footnote 4, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyist and Rep. Menard.

6/ This amount is approximately three times the value of the $179.63 prohibited gratuity received by Rep. Menard in violation of §3. It represents both a disgorgement of the gratuity and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 497

IN THE MATTER
OF
ARGEO PAUL CELLUCCI

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Lt. Governor Argeo Paul Cellucci ("Cellucci") 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 14, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Cellucci had violated G.L. c. 268B, §6. The Commission has concluded its inquiry and, on July 12, 1994, voted to find reasonable cause to believe that Cellucci violated G.L. c. 268B, §6.

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

1. Cellucci served in the state legislature from 1976 until 1990. (He served as a representative from 1976 until 1983, and as a senator from 1984 until 1990.) As a senator, he served on the Health Care Committee from 1984 to 1988, and the Government Relations and Leadership Rules Committees from 1988 to 1989.

2. As a senator, Cellucci sponsored or co-sponsored several bills affecting the insurance industry.[1/]

3. Cellucci, as a member of the Health Care Committee, participated in many hearings on bills of interest to the insurance industry. Such participation included voting on whether such bills should be reported out of committee. He also voted on bills of interest to the insurance industry when they reached the Senate floor.

4. During the period relevant here, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. At all relevant times, Sawyer was a registered legislative agent (for Hancock) in Massachusetts. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. It offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, its activities are more comprehensively regulated by Massachusetts than by any other state.

5. At all relevant times, Cellucci knew that Sawyer was a Massachusetts registered legislative agent for Hancock. Moreover, Sawyer lobbied Cellucci regarding both specific legislation and general legislative issues approximately a half dozen times per year.

6. Cellucci testified as follows: He met Sawyer in 1984, while campaigning for the state Senate. Sawyer lived within Cellucci's senatorial district. Sawyer contacted Cellucci and offered to support his candidacy. Sawyer attended Cellucci's fundraisers, posted a campaign sign on his home and otherwise helped in Cellucci's 1984 re-election campaign. In the years that followed Cellucci became friendly with Sawyer. Sawyer supported Cellucci in later campaigns as well.

In 1987, Sawyer approached Cellucci to suggest that his daughter, Karen, a college student, might be a good candidate to work for Cellucci as an intern. After the usual interviewing process, Cellucci hired Karen, and she worked in his office in the summer of 1987. Sawyer stopped by frequently to see Karen in Cellucci's office, since Sawyer worked at the State House as well. These visits numbered about one a week on average. While there, Sawyer also frequently saw Cellucci, and the two spoke on many occasions about sports, politics and other such matters. In the summer of 1989, after Karen graduated from college, she joined Cellucci's staff full-time. In 1991, the Celluccis attended Karen's wedding. She continued to work for Cellucci until 1993.

7. In January 1989, Cellucci and his wife attended the President Bush Inaugural. Sawyer and his wife also attended the Inaugural events. On January 19, 1989, Sawyer hosted a dinner at Petito's restaurant in Washington, D.C. A number of people from Massachusetts who were in Washington for the Inaugural, including the Celluccis, attended this dinner. The Celluccis' pro rata share was $76.96.

8. On March 3, 1989, after a fundraiser, Sawyer, his wife and two children, plus Cellucci and his two children, got together at a nearby restaurant, Past Times Bar & Grill, in Marlboro. Sawyer paid for the dinner. The Cellucci's pro rata share was $42.

9. On April 15, 1989, Sawyer and his wife hosted a dinner at the Copley Plaza attended by Cellucci and his wife. The Celluccis' pro rata share was $154.10.

10. According to Cellucci, he understood that the only reason Sawyer provided the foregoing meals was out of friendship.

11. Section 6 of G.L. c. 268B prohibits a public official or public employee from knowingly or willfully soliciting or accepting from any legislative agent, gifts[2/] with an aggregate value of $100 or more in a calendar year.

12. By receiving meals from Sawyer in 1989, Cellucci received from a legislative agent "gifts" within the meaning of c. 268B, §1(g). Where they equalled or exceeded $100 in value in a calendar year, they were prohibited by G.L. c. 268B, §6. Therefore, by accepting these gifts, Cellucci violated G.L. c. 268B, §6.[3/]

13. Cellucci fully cooperated with the Commission's investigation.

In view of the foregoing violation of G.L. c. 268B by Cellucci, 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 Cellucci:

(1) that Cellucci pay to the Commission the sum of two hundred and seventy-five dollars ($275.00) for violating G.L. c. 268B, §6; and

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

[1/] It appears that the bills were consumer oriented and adverse to the insurance industry. The bills are as follows:

Sole sponsor (all of the following in the Health Care Committee): 1986, S. 467 (group policies to provide benefits for costs of professional nursing services); 1987, S. 465 (establish catastrophic illness expense program funded by state); 1987, S. 510 (same as S. 467);

Co-sponsor: 1986, S. 488, Health Care Committee (Blue Cross/Blue Shield to cover diagnosis and treatment of infertility); 1986, S. 496, Health Care Committee (add psychiatric and mental health nursing specialists to list of those qualified to provide and be reimbursed for out-patient treatment); 1986, S. 509, Health Care Committee (same as S. 467); 1989, S. 720, Insurance Committee (health insurance policies and Blue Cross/Blue Shield contracts to reimburse for services of a registered nurse anesthetist); 1989, S. 723, Insurance Committee (a policy which provides for payment of acupuncturist services must reimburse whether services provided by medical physician or acupuncturist); 1989, S. 726, Insurance Committee (same as S. 465).

[2/] According to G.L. c. 268B, §1(g) gift means "a payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received ... ."

[3/] Cellucci's acceptance of these meals from a Massachusetts lobbyist also raises issues under G.L. c. 268A, §3, which prohibits a public official from accepting an item of substantial value for or because of an official act or act within his official responsibility performed or to be performed. Here, however, there is substantial evidence that the motive for the gratuities was friendship. If friendship is the motive for a gratuity, then the requisite nexus -- "for or because of an official act performed or to be performed" -- is absent and there is no §3 violation. Whether or not the motivation for the gift was friendship, §6 of 268B prohibits the giving of such gifts by a legislative agent and the receipt of the gifts by a legislator.

Senator W. Paul White
c/o Thomas Dwyer, Esquire
400 Atlantic Avenue
Boston, MA 02110

PUBLIC ENFORCEMENT LETTER 95-1

Dear Senator White:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that as a state senator you violated G.L. c. 268A by accepting items of substantial value from John Hancock Mutual Life Insurance Company ("Hancock") and others. Based on the staff's investigation (discussed below), the Commission voted on January 27, 1994 that there is reasonable cause to believe that you violated G.L. c. 268A, §23(b)(3). In view of certain mitigating circumstances (also discussed below), the Commission, however, has determined that further proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed during our inquiry and explaining applicable provisions of the law, with the expectation that this will insure both your and other legislators' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and laws discussed below. The Commission and you have agreed that there will be no formal action against you, and that you have chosen not to exercise your right to a hearing before the Commission.

I. <u>Facts</u>

1. You were a state representative between 1973 and 1988. In November 1988, you were elected to the State Senate. You have served in the Senate from January 1989 to the present.

2. As a state senator, you have served on the following committees: Banks and Banking, 1989 to the present (chair, 1991 to the present); Public Service, 1989 to the present; Ethics, 1989 to the present; Criminal Justice, 1989 to the present; Post Audit and Oversight, 1989 to the present (vice-chair, 1989 to the present).

3. In addition, as a member of various committees, you have participated in hearings on bills of interest to the insurance industry. Such participation has included voting on whether such bills should be reported out of committee. You have also voted on bills of interest to the insurance industry when they reached the Senate floor.

4. As a state senator, you have co-sponsored several bills affecting the insurance industry.

5. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all 50 states. Hancock offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, Hancock's activities are more comprehensively regulated by Massachusetts than by any other state.

6. Hancock has a Government Relations Department whose responsibilities include monitoring

Massachusetts legislation of interest to Hancock and presenting Hancock's position on such legislation to legislators.

7. According to the Government Relations Department's yearly internal reports, between 1985 and 1993, it identified, on average, approximately 125 bills filed each year with the Massachusetts legislature deemed to be of interest to Hancock. During those same years, on average, approximately 10 such bills were enacted into law each year.

8. Edward Baud ("Baud") has worked in Hancock's Government Relations Department since 1967. Basically, his job has been to act as a Hancock lobbyist regarding state legislation outside of Massachusetts in which Hancock has an interest. He is not a registered lobbyist in Massachusetts. According to his testimony, he has not attempted to promote, oppose or otherwise influence legislation in Massachusetts with anyone.

9. As a part of his duties, Baud, for many years, has regularly attended Council of State Governments ("CSG") meetings in various parts of the United States. The CSG is a private, non-profit organization consisting of representatives from both the legislative and executive branches of the 50 state governments. It is supported primarily from dues paid by each of the 50 states. However, it also receives some corporate sponsor dues as well. For several years, Hancock has been a CSG private sector associate, paying $3,000 in annual dues. Baud is Hancock's primary representative to the CSG.

The CSG holds national and regional meetings. The CSG occasionally deals with issues of interest to Hancock. Baud has found speakers from the insurance industry to address insurance issues of interest to the CSG. According to Baud, it serves Hancock's interests to maintain awareness of what issues are of importance to the CSG membership, and to try to have some input regarding those issues which are of importance to Hancock. However, the CSG does not deal with any specific Massachusetts legislation.

10. You became involved in the CSG in the late 1970s. In the 1980s, you became an officer of the CSG Eastern Regional Conference Executive Committee. As such you attended most of the Eastern Regional Conference Executive Committee meetings.[1/] Because of your being on the Executive Committee, you also attended many national CSG events. You were elected national chair in 1990, and served through 1991. As chair, you went to many regional CSG meetings. Since 1991, you have served on the CSG Executive Committee and the CSG Governing Board.

11. Between January 1, 1988, and May 30, 1993, Baud paid for approximately $3,000 in meals and/or beverage expenses for you and/or your spouse. Approximately $2,600 of those expenses involved meals and/or beverages that occurred at or near the site of various CSG meetings or conferences. Although this entertainment was not part of the formal CSG conference agenda, it involved socializing with numerous other CSG participants from various states which took place separate from and in addition to the CSG functions.[2/]

In addition, near Christmas time in 1989, 1990 and 1992, the Bauds hosted you and your spouse at a dinner or brunch at the Ritz-Carlton in Boston. You and your spouse's pro rata share of the cost of that entertainment was approximately $150 in 1989, $120 in 1990, and $160 in 1992.

12. According to your testimony, you met Baud in the early 1980's. You saw each other frequently at various CSG events throughout the 1980's. On occasion, each of you would bring your spouse. Over the years, as a result of your frequent CSG interactions, the four of you gradually came to be close friends. You exchanged Christmas cards and ornaments. You frequently spoke to Baud on the phone about personal matters. Your spouses talked to each other about private matters as well. In March 1992, you and your wife entertained the Bauds at the Harvard Club at your expense. Otherwise, you did not pay for any significant entertainment expenses for the Bauds. (During the relevant time period, neither of you had been to the other's home.)

You assumed that when Baud paid for your and your spouse's meals and drinks at CSG conferences, Hancock was the ultimate source of the payment. Nevertheless, you did not view these expenses as motivated by business reasons, but rather motivated by friendship. As to the Ritz-Carlton meals, you assumed that Baud paid for those meals personally, although you never inquired as to the source of the payment. You believed that the reason Baud paid for these Ritz-Carlton meals was purely friendship.[3/]

13. According to Baud's testimony, he described his relationship with you as a "good business, friendly relationship." While at CSG conferences, he would socialize with you and other legislators. As he became more actively involved with the CSG, he began to build close relations with certain key CSG people such as you, and certain senators from Ohio and New York.

According to Baud, he entertained you because you were an active and important participant in CSG events, and not because you were a Massachusetts legislator.

He also began socializing with you outside of CSG activities. Once a year he and his wife got together with you and your wife at the Ritz-Carlton. Hancock paid for these dinners because they advanced Baud's association with you as an active participant in the CSG. The dinners at the Ritz-Carlton were motivated, however, as much by friendship as business, according to Baud.

II. Discussion

As a state senator, you are a state employee. As such, you are subject to the conflict of interest law, G.L. c. 268A.

Your receiving approximately $3,000 in entertainment from Baud raises an appearance issue under G.L. c. 268A, §23(b)(3). Section 23(b)(3) prohibits a state employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the facts to conclude that anyone can unduly enjoy his favor in the performance of his official duties.[4/]

We begin our discussion by focusing on the approximately $2,600 of that entertainment you received from Baud at or near CSG conferences. In the Commission's view, your acceptance of the $2,600 in entertainment from Baud, knowing: (1) he was a Hancock lobbyist (even though not registered in Massachusetts); (2) that Hancock as a Massachusetts domiciled life insurer is particularly sensitive to regulation by Massachusetts; and (3) that there are numerous bills of interest to the life insurance industry filed each year; constitutes acting in a manner which would cause a reasonable person knowing these facts to conclude that Hancock can unduly enjoy your favor in the performance of your official duties.[5/] This is so even though you were not lobbied by Baud, and even though there is no evidence to indicate that you were ever unduly influenced in the performance of your official duties to favor Hancock's interest. Ultimately, accepting such entertainment creates an appearance problem of undue influence. Therefore, it appears that you violated §23(b)(3).[6/]

The $430 in total Ritz-Carlton entertainment provided to you by Hancock through Baud is more troublesome. At first blush, it would not seem to be connected with CSG activities. Baud testified, however, that he saw these meals as part of his continuing effort to create a strong close personal relationship with you as a CSG official, and that he was also motivated by his friendship with you. In addition, you stated that your understanding was that the meals were provided out of friendship, and that, in fact, you were unaware that Hancock was paying for these meals; you thought Baud paid for them personally.

Although the issue is not free from doubt, the Commission concludes that the CSG connection and friendship do appear to be the motivating factors for the Ritz-Carlton meals.[7/] These Ritz-Carlton meals, however, create even more of an appearance problem under §23(b)(3) than do the $2,600 in CSG-connected meals in that they did not take place at or near CSG conferences involving conference participants. Therefore, it appears that you violated §23(b)(3) by accepting this Ritz-Carlton entertainment.[8/]

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) the entertainment expenses were from a non-Massachusetts lobbyist; and (2) both you and Baud were legitimate participants in CSG functions and most, if not all, of the expenses appear to have been motivated by your CSG role, rather than your legislative duties. We also note that you fully cooperated with the Commission throughout its investigation.

This matter is now closed.

DATE: July 19, 1994

1/ On at least three occasions, Baud met with you and other CSG people to help plan Eastern Regional Conference sessions that were to be held in Boston.

2/ You testified that you considered this entertainment as an extension of the conference and that the gatherings provided an opportunity for you and other conference participants from across the nation to discuss conference topics as well as exchange information on other issues of common interest among the CSG participants.

3/ There is no evidence that the Bauds ever paid personally for any entertaining of you and/or your wife.

4/ Section 23(b)(3) goes on to provide, "it shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no

appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such conclusion."

5/ You could have avoided the appearance problem by making a written disclosure pursuant to §23(b)(3).

6/ It appears that the motive for this entertainment was some mixture of friendship and a desire on Baud's part to deal with you as a CSG official. Had the Commission determined that you understood that Baud's gifts were motivated in part for or because of an official act performed or to be performed by you as a state senator, the Commission would have found that you violated G.L. c. 268A, §3, a more serious violation. (Section 3 prohibits a state employee from accepting an item of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him.)

7/ Again, that Baud was not a registered Massachusetts lobbyist and did not apparently seek to influence you regarding any specific Massachusetts legislation are important in so concluding.

8/ Your argument that you were under the impression that Baud was paying for these meals privately is not a defense. Section 23(b)(3) has a "know or reason to know" standard. In the Commission's view, you should have known that Hancock was paying, since (1) these were expensive meals at the Ritz-Carlton; (2) you knew Baud was a Hancock employee, and more particularly a Hancock lobbyist; and (3) you knew it would be relatively easy for Baud to justify such a dinner as a business expense. Indeed, you knew that on many prior occasions Hancock, through Baud, had paid for your and your wife's meals when he and his wife socialized with you and your wife at or near CSG functions.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 498

IN THE MATTER
OF
THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, INC.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and The New England Mutual Life Insurance Company, Inc. ("The New England") 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 August 9, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that The New England had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on June 7, 1994, voted to find reasonable cause to believe that The New England violated G.L. c. 268A, §3.

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

1. The New England, a Massachusetts corporation, is the state's third largest life insurer. It employs 2,300 employees in its Boston office, and has approximately 3,000 agents nationwide at 85 general agencies.

2. The New England is a Massachusetts domiciled life insurer. As such, its activities are more comprehensively regulated by Massachusetts than by any other state.

3. The New England has a Government Relations Department whose responsibilities include monitoring Massachusetts legislation of interest to the company and presenting its position on such proposed laws to members of the legislature.

4. Between June 1988 and January 1991, Alvaro Sousa was the company vice president who served as the Massachusetts Government Relations officer. Within the Government Relations Department, Sousa reported to Vice President James Gallaher and Senior Vice President Gordon MacKay. The Government Relations Department also retained Joseph McEvoy as an outside legislative consultant for Massachusetts legislation. Gallaher, Sousa and McEvoy were all registered as legislative agents in Massachusetts.

5. In concert with the Life Insurance Association of Massachusetts ("LIAM"), The New England tracks, monitors, and lobbies on several hundred pieces of legislation per year that affects the insurance industry. On average, approximately ten bills are enacted each year into law. Among the proposed laws The New England was interested in between 1988 and 1991 were bills mandating various kinds of insurance coverage; bills requiring gender neutral premium rates; bills mandating premium discounts for non-smokers; bills seeking to provide greater privacy to insurance consumers; bills that would subject life insurance companies to the higher bank tax excise

rate; bills allowing the Savings Bank Life Insurance industry to convert to stock companies and thereby compete more directly with insurance companies; and bills dealing with long term care.

6. Sousa's annual performance plans required him to lobby for the enactment of legislation beneficial to The New England, and for the defeat or modification of bills unfavorable to The New England. As part of his lobbying responsibilities, Sousa's performance plans directed him to enhance existing favorable relations with government officials, and to establish new contacts with other government officials.

7. Consistent with his annual performance plans, Sousa developed strong, effective personal relationships with Massachusetts legislators.[1/] The reason The New England lobbyists maintained or created these relationships was to give The New England effective access to legislators.

8. The New England's lobbyists believed that they used this access successfully. Department reports prepared by MacKay make clear that, in his view, many of the above described bills were either enacted or defeated due in part to the efforts of The New England's lobbyists. For example, in a November 1, 1989 memorandum entitled, "1989 Major Public Affairs Accomplishments", MacKay wrote:

> Among other issues in Massachusetts we successfully lobbied AIDS; a possible tax increase; unisex; and two troublesome privacy bills, avoiding potential negative impact on the industry.
>
> TNE also successfully lobbied the Massachusetts "fraudulent signature" bill, avoiding potential costly and duplicative problems. The bill would have required certification of a signature to change a beneficiary in all life policies.
>
> TNE successfully led the LIAM industry effort to defeat the non-smoker rating bill by 98-46 roll-call vote in the House.

9. One way The New England's lobbyists created strong relationships with Massachusetts legislators was by entertaining them through meals, drinks, golf, sporting and theatrical events. This entertainment created or enhanced goodwill and personal relationships which, in turn, translated into effective access to the legislators.[2/]

10. Between June 24, 1988 and November 14, 1989, The New England lobbyists and Government Relations personnel entertained individual Massachusetts legislators and aides with meals, drinks, golf and tickets worth $50 or more on approximately 47 occasions.[3/] In addition, on January 8, 1991, New England lobbyists helped host a testimonial dinner for a recently retired state legislator who had been regarded as "very helpful" to the insurance industry. Along with a number of other insurance companies, The New England presented the legislator with a $404 set of golf clubs.[4/] The total value of these gratuities and entertainment was approximately $6,500.

11. On occasion, these meals were quite expensive, costing in the vicinity of $100 per person. Frequently, the expenses of a legislator's spouse or guest were also covered. Many of these meals took place at out-of-state resort settings, including: Amelia Island, Florida; Newport, Rhode Island; Scottsdale, Arizona; and Stowe, Vermont. On at least 17 occasions, The New England provided free rounds of golf to Massachusetts legislators and legislative aides.

12. The following are examples of the entertainment The New England lobbyists provided to Massachusetts legislators:

(a) Cape Cod "Massachusetts Nights"

On June 30, 1988 and 1989, The New England Government Relations Department sponsored a "Massachusetts Night" for current and former Massachusetts state legislators at the Wequasset Inn, in Chatham, MA. The events consisted of a cocktail reception and dinner, including a clambake, $45 bottles of wine, shrimp and oyster hors d'oeuvres and an open bar. The New England spent $4,008 on this event in 1989, and $2,558 in 1988. The cost per couple was approximately $360 in 1989 and $200 in 1988. The dinners were attended by New England lobbyists, Government Relations personnel, former legislators and current legislators and their guests. Based on records and testimony it appears four legislators attended in 1988 and seven legislators attended in 1989. Limousine transportation was provided to and from the event to some legislators in 1988 and 1989.

(b) Newport, Rhode Island

In late July 1989, the Council of State Governments held a meeting in Newport, Rhode Island. Numerous Massachusetts legislators attended the meeting. During this time, The New England sponsored and organized an event at the Belcourt Castle for attending legislators and lobbyists.[5/] The event included a tour and mystery game through the castle, a cocktail reception in the Gothic Ballroom, and

dinner in the Italian banquet hall. Piano and violin music was provided throughout the evening. The total cost of the event was $5,742.52, with a per couple cost of approximately $152.00. At least five Massachusetts legislators and their guests attended this event.

(c) Amelia Island

During March 15, 1989 to March 21, 1989, Gallaher and Sousa attended a National Conference of Insurance Legislators conference at Amelia Island, Florida. According to their expense records, Sousa and Gallaher provided entertainment of $50 or more in value to nine Massachusetts legislators at Amelia Island at a total cost of approximately $741.71.[6/] This entertainment included golf, meals, and drinks. Specifically, Sousa and Gallaher hosted three golf outings on two days, and a dinner at the Steak House in Fernandina Beach, FL.

13. General Laws c. 268A, §3(a) prohibits anyone from giving a state employee anything of substantial value for or because of any official act performed or to be performed by the state employee.

14. Massachusetts legislators and legislative aides are state employees.

15. Anything with a value of $50 or more is of substantial value for §3 purposes.[7/]

16. By giving individual Massachusetts legislators and legislative aides entertainment worth $50 or more while each such legislator or aide was in a position to take official action on proposed legislation that affected The New England's financial interests (or had taken past official action), The New England's lobbyists and Government Relations officials gave those legislators and aides gifts of substantial value for or because of acts within their official responsibility performed or to be performed by them. In doing so, The New England's lobbyists and Government Relations officials violated G.L. c. 268A, §3(a).[8/]

17. As a corporation, The New England acts through and is responsible for the conduct of its employees and agents. Therefore, The New England violated G.L. c. 268A, §3(a) by providing certain legislators and aides with free meals, golf, tickets and other entertainment.

18. The Commission is not aware of evidence that any of the foregoing gifts were given to legislators with the intent to influence any specific official act by them as legislators. The Commission is also unaware of evidence that the legislators, in return for gifts, took any official action concerning any proposed legislation which would have affected The New England. In other words, the Commission is aware of no evidence that there was a *quid pro quo*. However, even if the conduct of The New England's agents was only intended to create goodwill, it was still impermissible.

19. There are substantial mitigating factors. In early 1990, well before the Commission initiated its investigation, The New England promulgated new Public Affairs guidelines and established strict reporting procedures which prohibited its employees from offering anything valued at $50 or more to a public official. These internal guidelines succeeded in bringing The New England's lobbying activities into compliance with the Massachusetts conflict of interest law. With the single exception noted above, The New England's lobbyists have not provided any Massachusetts legislator or aide with $50 in entertainment on any occasion during the past 4 1/2 years. In addition, as a result of information developed during this investigation, the New England has voluntarily revised its guidelines to better ensure continued compliance with the conflict of interest law. The New England cooperated with the Commission throughout this investigation.

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

(1) that The New England pay to the Commission the sum of twenty thousand dollars ($20,000.00) as a civil fine for violating G.L. c. 268A, §3(a);

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

DATE: September 22, 1994

[1/] According to Sousa's 1987 annual performance appraisal, "Mr. Sousa has shown an uncanny knack and ability to gain the respect and trust of a host of legislators and key staff persons."

[2/] MacKay analogized lobbying legislators to the selling of insurance. He testified that it was very difficult to sell insurance to someone that you did not know. The likelihood of a successful sale, however, was greatly

increased if the potential buyer was a relative, friend, or a referral. Likewise, the chance for successful lobbying efforts were improved by the existence of personal relationships with legislators.

3/ In arriving at the $50 or more expense figure, the Commission included all expenses on a single day or a single conference attributable to a specific legislator. For example, dinner, a golf outing and drinks given to a single legislator during a three day conference might have each cost less than $50, but if aggregated they equaled or exceeded $50. In addition, where The New England paid for the expenses of a legislator's spouse, those expenses have been attributed to the legislator.

4/ As discussed in detail in paragraph 19, in early 1990, The New England adopted guidelines prohibiting gifts to public officials and halted its practice of providing public officials with entertainment valued at $50 or more. These guidelines did not address gifts to former legislators, and thus did not prevent the unlawful gift of the golf clubs. The New England has since revised its entertainment guidelines to prohibit similar conduct in the future.

5/ At least one other insurance company contributed to the cost of this event.

6/ None of these gratuities individually exceeded $50, but when aggregated over the course of the conference they exceeded $50 for each of the nine legislators. Although the Commission first made specific mention that multiple gratuities given to an official during the course of a single conference would be aggregated in *In re John Hancock Mutual Life Insurance Company*, 1994 SEC ___ (issued March 24, 1994), the Commission announced in *Advisory No. 8* (published May 15, 1985) that a course of conduct of giving gratuities to a public official would be evaluated as to value.

7/ See *Commonwealth v. Famigletti*, 4 Mass. App. 584, 587 (1976); *EC-COI-93-14*.

8/ For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8* (issued May 14, 1985):

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re John Hancock Mutual Life Insurance Company*, 1994 SEC _ (Hancock violated §3(a) by providing meals, golf and event tickets to legislators); *In re Flaherty*, 1991 SEC 498 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists); *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (distributors' association violates §3 by providing free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner] worth over $100 per person to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with legislators who were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356.

Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone and Webster*, 1991 SEC 522; *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to entertainment of legislators by The New England lobbyists where the intent was generally to create goodwill and the opportunity for access, even though specific legislation was not discussed.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 500

IN THE MATTER
OF
MIDDLESEX PAVING CORPORATION

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Middlesex Paving Corporation ("Middlesex") 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 January 25, 1994, 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 Middlesex. The Commission concluded that inquiry, and, on September 27, 1994, found reasonable cause to believe that Middlesex violated G.L. c. 268A, §3.

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

1. Middlesex is a group of affiliated companies incorporated to do business in Massachusetts. Middlesex performs a variety of construction services including paving, bridge construction and repair, landscaping, roadside development and road surfacing. Seventy-five percent of Middlesex's Massachusetts contracts consists of publicly bid and funded projects.

2. During 1990, Middlesex successfully bid for Massachusetts Highway Department ("MHD") contracts valued at over $5 million. These contracts involved construction, paving and maintenance services and were awarded to Middlesex as the lowest qualified bidder.

3. At all times relevant, Stephen Berlucchi ("Berlucchi") was the MHD highway maintenance engineer. As such, he was responsible for supervising and inspecting all maintenance work on state highways performed by state contractors, including Middlesex.

4. On December 22, 1990, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests. More than 400 Middlesex employees and their families attended the party.

5. Berlucchi attended Middlesex's party and received hotel accommodations as Middlesex's guest. The cost to Middlesex was approximately $116.

6. During 1991, Middlesex successfully bid for MHD contracts valued at over $4 million. These contracts involved construction, paving and maintenance services and were awarded to Middlesex as the lowest qualified bidder.

7. At all times relevant, Anthony Salamanca ("Salamanca") was a MHD district highway director and Edward O'Toole ("O'Toole") was a MHD civil engineer. As such, each was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

8. On December 21, 1991, Middlesex again hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests. More than 400 Middlesex employees and their families attended the party.

9. Berlucchi attended the party and stayed overnight at the hotel as Middlesex's guest. The cost to Middlesex was $116. Salamanca, O'Toole and their spouses also attended Middlesex's party and received hotel accommodations as Middlesex's guests. The cost to Middlesex was approximately $170 per couple.

10. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. In 1992, Middlesex also had existing contracts with the Massachusetts Turnpike Authority ("MTA") valued at over $400,000.

11. At all times relevant, Robert Calo ("Calo"), Ronald Iannaco ("Iannaco") and Francis Sandonato ("Sandonato") were MHD civil engineers. George Ward ("Ward") was the MHD Manager of Operations for Essex County. As such, each was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

12. At all times relevant, a certain MTA assistant division engineer was responsible for supervising and inspecting work performed by state contractors, including Middlesex.[1/]

13. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests. More than 400 Middlesex employees and their families attended the party.

14. Calo, Iannaco, Salamanca, Sandonato, Ward and their spouses attended Middlesex's party and received hotel accommodations as Middlesex's guests. The cost to Middlesex was approximately $170 per couple.

15. Berlucchi and his spouse also attended the dinner but did not stay overnight at the hotel. The cost to Middlesex was $108.

16. The MTA assistant division engineer, O'Toole and their spouses attended the December 19, 1992 Middlesex party and received hotel accommodations at the Boston Harbor Hotel. The cost to Middlesex was approximately $250 per couple.

17. Section 3(a) of G.L. c. 268A prohibits, otherwise than as provided by law, the giving or offering of anything of substantial value to any public official for or because of any official act performed or to be performed by such employee.[2/] The Commission has found that private parties violate §3 when they entertain government officials (who are in a position to benefit them) in an effort to generate goodwill. See e.g., *In re John Hancock*, 1994 SEC ___; *In re EUA Cogenex*, 1992 SEC 607; *In re State Street Bank*, 1992 SEC 582; *In re Stone & Webster*, 1991 SEC 552; *In re Rockland Trust*, 1989 SEC 416.

18. By providing dinner, entertainment and overnight accommodations to public officials with the intent to generate and maintain goodwill with these public employees who had official responsibilities concerning Middlesex contracts, Middlesex gave each of these state employees something of substantial value for or because of an official act performed or to be performed by each of them, thereby violating G.L. c. 268A, §3.[3/]

19. The Commission is aware of no evidence that any public official took any official action concerning Middlesex's public contracts in return for attending the party(s). However, even though the public officials were invited only with the intent to foster official goodwill, the invitation was nevertheless impermissible.[4/]

20. Middlesex fully cooperated with the Commission's investigation.

21. Middlesex has taken prompt action to prevent this activity from reoccurring.[5/]

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

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

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

Date: October 12, 1994

[1/] Because of an ongoing Commission investigation, the MTA employee is not identified in this Disposition Agreement.

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

[3/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8*. See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and the public employees.

[5/] Middlesex created a position within their company to monitor expenditures and educate its employees concerning conflict of interest matters.

[6/] This amount is approximately three times the value of the $2,030 in prohibited gratuities Middlesex provided to public employees.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 501

IN THE MATTER
OF
EDWARD O'TOOLE

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Edward O'Toole ("O'Toole")

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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that O'Toole had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that O'Toole violated G.L. c. 268A, §3.

The Commission and O'Toole now agree to the following facts and conclusions of law:

1. At all times here relevant, O'Toole was employed by the Massachusetts Highway Department ("MHD") as a civil engineer. As such, O'Toole was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD civil engineer, O'Toole was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

4. During 1991, Middlesex had successfully bid for MHD contracts valued at over $4 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 21, 1991, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. O'Toole and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. During 1992, Middlesex had successfully bid for MHD contracts valued at $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

8. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

9. O'Toole and his wife attended the Middlesex party and stayed overnight at the Boston Harbor Hotel as Middlesex's guests. The cost to Middlesex was approximately $250.

10. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

11. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD civil engineer, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, O'Toole received gifts of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, O'Toole violated G.L. c. 268A, §3(b).[3/]

12. The Commission is aware of no evidence that the entertainment referenced above was provided to O'Toole with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that O'Toole took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

13. O'Toole fully cooperated with the Commission's investigation.

In view of the foregoing violations of G.L. c. 268A by O'Toole, 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 O'Toole:

(1) that O'Toole pay to the Commission the sum of one thousand dollars ($1,000.00) for violating G.L. c. 268A, §3(b);[6/]

(2) that O'Toole will act in conformance with the requirements of G.L. c. 268A in his future conduct as a state employee; and

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8.* See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

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

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and O'Toole.

[5/] In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to O'Toole, who as a MHD civil engineer had performed and would perform official acts regarding Middlesex's state contracts.

[6/] O'Toole reimbursed Middlesex the $250 cost of the 1992 gratuity after being informed that his actions probably violated the conflict of interest law. He did not reimburse Middlesex for the 1991 gratuity. The $1,000 fine is three times the approximate value of $420 in prohibited gratuities (minus the $250 reimbursement) received by O'Toole in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 502

IN THE MATTER
OF
STEPHEN BERLUCCHI

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Stephen Berlucchi ("Berlucchi") 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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Berlucchi had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Berlucchi violated G.L. c. 268A, §3.

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

1. At all times here relevant, Berlucchi was employed by the Massachusetts Highway Department ("MHD") as the highway maintenance engineer.[1/] As such, Berlucchi was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As the MHD highway maintenance engineer, Berlucchi was responsible for supervising and inspecting all maintenance work on state highways performed by state contractors, including Middlesex.

4. During 1990, Middlesex successfully bid for MHD contracts valued at over $5 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 22, 1990, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Berlucchi attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guest. The cost to Middlesex was approximately $116.

7. During 1991, Middlesex successfully bid for MHD contracts valued at over $4 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

8. On December 21, 1991, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

9. Berlucchi attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guest. The cost to Middlesex was approximately $116.

10. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

11. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

12. Berlucchi and his wife attended the 1992 Middlesex party. The cost to Middlesex was approximately $108.

13. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[2/]

14. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as the MHD highway maintenance engineer, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Berlucchi received gifts of substantial value for or because of acts within his official responsibility performed or to be performed by him.[3/] In so doing, Berlucchi violated G.L. c. 268A, §3(b).[4/]

15. The Commission is aware of no evidence that the entertainment referenced above was provided to Berlucchi with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that Berlucchi took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[5/6/]

16. Berlucchi fully cooperated with the Commission's investigation.

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

(1) that Berlucchi pay to the Commission the sum of nine hundred and fifty dollars ($950.00) for violating G.L. c. 268A, §3(b);[7/] and

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

Date: October 12, 1994

[1/] Berlucchi left state employment in 1993.

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

3/ 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8.* See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

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

5/ As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Berlucchi.

6/ In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Berlucchi, who as the MHD highway maintenance engineer had and would perform official acts regarding Middlesex's state contracts.

7/ Berlucchi reimbursed Middlesex $54 for the cost of his dinner at the 1992 party after being informed that his actions probably violated the conflict of interest law. He did not reimburse Middlesex for the cost of his wife's dinner at the 1992 party, nor did he reimburse Middlesex for the 1990 or 1991 gratuities. The $950 fine is three times the approximate value of $340 in prohibited gratuities (minus the $54 reimbursement) received by Berlucchi in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 503

IN THE MATTER
OF
ANTHONY SALAMANCA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Anthony Salamanca ("Salamanca") 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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Salamanca had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Salamanca violated G.L. c. 268A, §3.

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

1. At all times here relevant, Salamanca was employed by the Massachusetts Highway Department ("MHD") as a district highway director. As such, Salamanca was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD district highway director, Salamanca was responsible for all construction and maintenance work performed in the district by state contractors, including Middlesex.

4. During 1991, Middlesex successfully bid for MHD contracts valued at over $4 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 21, 1991, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to

foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Salamanca and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

8. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

9. Salamanca and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

10. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

11. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD district highway director, he was responsible for all construction and maintenance work performed in the district by state contractors, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Salamanca received gifts of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, Salamanca violated G.L. c. 268A, §3(b).[3/]

12. The Commission is aware of no evidence that the entertainment referenced above was provided to Salamanca with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that Salamanca took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

13. Salamanca fully cooperated with the Commission's investigation.

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

(1) that Salamanca pay to the Commission the sum of eight hundred and fifty dollars ($850.00) for violating G.L. c. 268A, §3(b);[6/]

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

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8.* See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise

would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obligated to do -- a good job.

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Salamanca.

[5/] In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Salamanca, who as a MHD district highway director had and would perform official acts regarding Middlesex's state contracts.

[6/] Salamanca reimbursed Middlesex the cost of the 1992 gratuity after being informed that his actions probably violated the conflict of interest law. He did not reimburse Middlesex for the 1991 gratuity. The $850 fine is three times the approximate value of the $340 in prohibited gratuities (minus the $170 reimbursement) received by Salamanca in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 504

IN THE MATTER
OF
ROBERT CALO

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Robert Calo ("Calo") 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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Calo had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Calo violated G.L. c. 268A, §3.

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

1. At all times here relevant, Calo was employed by the Massachusetts Highway Department ("MHD") as a civil engineer. As such, Calo was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD civil engineer, Calo was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

4. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Calo and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

8. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD civil engineer, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Calo received a gift of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, Calo violated G.L. c. 268A, §3(b).[3/]

9. The Commission is aware of no evidence that the entertainment referenced above was provided to Calo with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that Calo took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

10. Calo fully cooperated with the Commission's investigation.

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

(1) that Calo pay to the Commission the sum of three hundred and forty dollars ($340.00) for violating G.L. c. 268A, §3(b);[6/]

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

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8*. See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

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

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Calo.

[5/] In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Calo, who as a MHD civil engineer had and would perform official acts regarding Middlesex's state contracts.

[6/] Calo reimbursed Middlesex the cost of the gratuity after being informed that his actions probably violated the conflict of interest law. The $340 fine is two times the approximate value of $170.00 in prohibited gratuities received by Calo in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 505

IN THE MATTER
OF
RONALD IANNACO

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Ronald Iannaco ("Iannaco")

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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Iannaco had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Iannaco violated G.L. c. 268A, §3.

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

1. At all times here relevant, Iannaco was employed by the Massachusetts Highway Department ("MHD") as a civil engineer. As such, Iannaco was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD civil engineer, Iannaco was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

4. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Iannaco and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

8. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD civil engineer, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Iannaco received a gift of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, Iannaco violated G.L. c. 268A, §3(b).[3/]

9. The Commission is aware of no evidence that the entertainment referenced above was provided to Iannaco with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that Iannaco took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

10. Iannaco fully cooperated with the Commission's investigation.

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

(1) that Iannaco pay to the Commission the sum of three hundred and forty dollars ($340.00) for violating G.L. c. 268A, §3(b);[6/]

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

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8.* See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

3/ As the Commission stated in *In re Michael*, 1981 SEC 59, 68,

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

4/ As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Iannaco.

5/ In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Iannaco, who as a MHD civil engineer had and would perform official acts regarding Middlesex's state contracts.

6/ Iannaco reimbursed Middlesex the cost of the gratuity after being informed that his actions probably violated the conflict of interest law. The $340 fine is two times the approximate value of $170.00 in prohibited gratuities received by Iannaco in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 506

IN THE MATTER
OF
FRANCIS SANDONATO

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Francis Sandonato ("Sandonato") 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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Sandonato had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Sandonato violated G.L. c. 268A, §3.

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

1. At all times here relevant, Sandonato was employed by the Massachusetts Highway Department ("MHD") as a civil engineer. As such, Sandonato was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD civil engineer, Sandonato was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

4. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing

business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Sandonato and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

8. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD civil engineer, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Sandonato received a gift of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, Sandonato violated G.L. c. 268A, §3(b).[3/]

9. The Commission is aware of no evidence that the entertainment referenced above was provided to Sandonato with the intent to influence any specific act by him as a MHD civil engineer or any particular act within his official responsibility. The Commission is also aware of no evidence that Sandonato took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

10. Sandonato fully cooperated with the Commission's investigation.

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

(1) that Sandonato pay to the Commission the sum of three hundred and forty dollars ($340.00) for violating G.L. c. 268A, §3(b);[6/]

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

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8*. See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

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

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Sandonato.

[5/] In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Sandonato, who as a MHD civil engineer had and would perform official acts regarding Middlesex's state contracts.

[6/] Sandonato reimbursed Middlesex the cost of the gratuity after being informed that his actions probably violated the conflict of interest law. The $340 fine is two times the approximate value of .$170.00 in prohibited gratuities received by Sandonato in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 507

IN THE MATTER
OF
GEORGE WARD

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and George Ward ("Ward") 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 12, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Ward had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on September 27, 1994, voted to find reasonable cause to believe that Ward violated G.L. c. 268A, §3.

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

1. At all times here relevant, Ward was employed by the Massachusetts Highway Department ("MHD") as a manager of operations. As such, Ward was a state employee as that term is defined in G.L. c. 268A, §1.

2. Middlesex Paving Corporation ("Middlesex") is a group of affiliated companies doing business in Massachusetts. Middlesex performs a variety of construction services including maintenance and street paving. A substantial portion of Middlesex's business consists of state contracts.

3. As a MHD manager of operations, Ward was responsible for supervising and inspecting work performed by state contractors, including Middlesex.

4. During 1992, Middlesex successfully bid for MHD contracts valued at over $28 million. These contracts were awarded to Middlesex as the lowest qualified bidder.

5. On December 19, 1992, Middlesex hosted a Christmas party at the Marriott Long Wharf Hotel in Boston. The explicit purpose of the party was to foster goodwill with employees and individuals doing business with Middlesex. The party included cocktails, dinner, entertainment and overnight hotel accommodations for certain guests.

6. Ward and his wife attended the Middlesex party and stayed overnight at the Marriott as Middlesex's guests. The cost to Middlesex was approximately $170.

7. Section 3(b) of G.L. c. 268A prohibits a state employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[1/]

8. By receiving $50 or more in entertainment and hotel accommodations from Middlesex while, as a MHD manager of operations, he was supervising Middlesex's contracts, and where he had been involved in prior Middlesex contracts and was likely to be involved in future Middlesex contracts, Ward received a gift of substantial value for or because of acts within his official responsibility performed or to be performed by him.[2/] In so doing, Ward violated G.L. c. 268A, §3(b).[3/]

9. The Commission is aware of no evidence that the entertainment referenced above was provided to Ward with the intent to influence any specific act by him as a MHD manager of operations or any particular act within his official responsibility. The Commission is also aware of no evidence that Ward took any official action concerning any Middlesex contracts in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[4/5/]

10. Ward fully cooperated with the Commission's investigation.

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

(1) that Ward pay to the Commission the sum of three hundred and forty dollars ($340.00) for violating G.L. c. 268A, §3(b);[6/]

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

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

Date: October 12, 1994

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

[2/] 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* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8*. See also *United States v. Standerfer*, 452 F. Supp. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

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

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

[4/] As discussed above in footnote 2, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Middlesex and Ward.

[5/] In a similar disposition agreement, Middlesex acknowledged violating §3(a) by providing the above entertainment to Ward, who as a MHD manager of operations had and would perform official acts regarding Middlesex's state contracts.

[6/] Ward reimbursed Middlesex the cost of the gratuity after being informed that his actions probably violated the conflict of interest law. The $340 fine is two times the approximate value of $170.00 in prohibited gratuities received by Ward in violation of §3.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 508

IN THE MATTER
OF
BENJAMIN NUTTER

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Benjamin Nutter ("Nutter") 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 12, 1994, 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 Nutter. The Commission has concluded its inquiry and, on October 11, 1994, found reasonable cause to believe that Nutter violated G.L. c. 268A.

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

1. Nutter was, during the time relevant, a member of the Topsfield Historic Commission ("Historic Commission"). As such, Nutter was a

municipal employee as that term is defined in G.L. c. 268A, §1.

2. At all times relevant hereto, Nutter was a licensed architect in the state of Massachusetts and had an office in Topsfield. During 1992, Nutter provided architectural services to Tim and Susan Ward in connection with an addition for their home located on Main Street in Topsfield ("Addition"). Those services included preparing drawings for the Addition.

3. On October 14, 1992, at the Historic Commission meeting, the Wards submitted an application for a Certificate of Appropriateness ("Certificate") for the Addition. The application included the drawings prepared by Nutter mentioned above. Nutter appeared with the Wards, as their architect, in connection with the Certificate and discussed the project.

4. On November 4, 1992, Nutter appeared with the Wards, as their architect, in connection with a public hearing before the Historic Commission relating to the Addition. Nutter participated in the discussion of the Certificate, but abstained on the vote. The Historic Commission voted to approve the Certificate.

5. G.L c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which his town has a direct and substantial interest.

6. The decision whether to approve the Certificate was a particular matter. The town had an obvious direct and substantial interest in that particular matter. By acting as the Wards' agent before the Historic Commission concerning their Certificate as set out in the foregoing paragraphs, Nutter violated G.L. c. 268A, §17(c).

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

(1) that he, in the future, refrain from acting as agent for private parties in connection with particular matters in which the town of Topsfield has a direct and substantial interest, as prohibited by G.L. c. 268A, §17(c);

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

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

Date: October 24, 1994

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 509

IN THE MATTER
OF
MICHAEL P. WALSH

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Michael P. Walsh ("Walsh") 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 August 9, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Walsh had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on July 12, 1994, voted to find reasonable cause to believe that Walsh violated G.L. c. 268A, §3.

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

1. Walsh has served in the state legislature from January 1983 to the present. During that time, Walsh has served on various committees, including the Joint Committee on Insurance (until February 1988) where he served as vice chairman. Walsh is currently the chairman of the Government Regulations Committee.

2. As a state representative, Walsh has sponsored and co-sponsored bills affecting the interests of the insurance industry.

3. In addition, Walsh, as a member of various committees, has participated in many hearings on bills of interest to the insurance industry. Such

participation has included voting on whether such bills should be reported out of committee. Walsh has also voted on bills of interest to the insurance industry when they reached the House floor.

4. During the period here relevant, F. William Sawyer ("Sawyer") was the senior John Hancock Mutual Life Insurance Company, Inc. ("Hancock") lobbyist responsible for Massachusetts legislation. During the period here relevant, Ralph Scott ("Scott") was a Hancock lobbyist. Hancock, a Massachusetts corporation, is the nation's sixth largest life insurer doing business in all fifty states. Hancock offers an array of life, health and investment products. As a Massachusetts domiciled life insurer, Hancock's activities are more comprehensively regulated by Massachusetts than by any other state. At all relevant times, Sawyer and Scott were registered legislative agents (for Hancock) in Massachusetts.

5. During the period here relevant, Andrew Hunt ("Hunt") was a registered legislative agent and lobbyist for the Massachusetts Medical Society, which represents the interests of medical professionals in Massachusetts.

6. During the period here relevant, William Carroll ("Carroll") was a registered legislative agent and lobbyist for the Life Insurance Association of Massachusetts ("LIAM"). LIAM is a trade association of insurance companies doing business in Massachusetts.

7. At all relevant times, Walsh knew that Sawyer and Scott were lobbyists for Hancock. At all relevant times, Walsh also knew that Carroll was a lobbyist for LIAM and that Hunt was a lobbyist for the Massachusetts Medical Society. From time to time, these four individuals lobbied Walsh regarding various pieces of legislation.

8. Lobbyists are employed to promote, oppose or influence legislation.

9. One way in which some lobbyists further their legislative goals is to develop or maintain goodwill and personal relationships with legislators to ensure effective access to them. Some lobbyists entertain legislators through meals, drinks, golf and sporting events in order to develop the desired goodwill and personal relationships.

10. On December 8, 1990, Scott paid $68 for Walsh to golf at the Mahogany Run Golf Course in St. Thomas in the Virgin Islands, where Walsh was attending a Council of State Governments conference.

11. In March 1991, while Walsh was attending a National Conference of Insurance Legislators ("NCOIL") conference in Savannah, Georgia, Sawyer paid for Walsh's golf and related expenses at Sea Pines Plantation, at a cost of $163, and provided Walsh and his guest with at least one free meal costing in excess of $50. Thus, in March 1991, Walsh received gratuities from Sawyer totalling more than $213.

12. During the fall of 1992, Sawyer provided Walsh with two Hancock tickets for *Phantom of the Opera* at the Wang Center. Walsh attended the show with his wife. These two tickets were worth $120.

13. Between March 10, 1993 and March 15, 1993, Walsh and his wife stayed at the Plantation Resort at Amelia Island, Florida, where he attended a conference sponsored by NCOIL which ran from March 11th to March 14th. Walsh stayed at the Plantation Resort with a number of other legislators and Massachusetts lobbyists.

On the evening of March 11, 1993, Walsh and his wife ate dinner at the Plantation Resort with Sawyer and a group of Massachusetts legislators. Sawyer paid for the dinner. The value of this gratuity was at least $50.

On the evening of March 12, 1993, Walsh and his wife ate dinner at the Ritz Carlton with a group of Massachusetts legislators and lobbyists. Carroll, the lobbyist representing LIAM, paid for this dinner.[1/] The total cost of the dinner was approximately $3,000. The Walshes' pro rata share of the cost of the dinner was approximately $150.

On March 15, 1993, Walsh golfed with Hunt and two other Massachusetts legislators. Walsh's golf fees were paid for by Hunt at a cost of $80.

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

15. Massachusetts legislators are state employees.

16. Anything worth $50 or more is of substantial value for §3 purposes.[2/]

17. By accepting a total of approximately $700 in drinks, meals, lodging, golf and theater entertainment from Scott, Sawyer, Carroll and Hunt, all while Walsh was in a position to take official actions which could benefit those legislative agents and/or their principals, Walsh accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Walsh violated §3(b).[3/]

18. The Commission is aware of no evidence that the gratuities referenced above were provided to Walsh with the intent to influence any specific act by him as a legislator or any particular act within his official responsibility. The Commission is also aware of no evidence that Walsh took any official action concerning any proposed legislation which would affect any of the registered Massachusetts lobbyists in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill and access, they were still impermissible.[4/]

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

(1) that Walsh pay to the Commission the sum of two thousand, one hundred dollars ($2,100.00)[5/]; and

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

Date: November 16, 1994

[1/] The Commission has evidence that Carroll subsequently received contributions of $500 and $600 from two of the Massachusetts lobbyists who were at this meal.

[2/] See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *EC-COI-93-14*.

[3/] For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8*, issued May 14, 1985, prohibiting private parties from giving free tickets worth $50 or more to public employees who regulate them,

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

Specifically, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re John Hancock Life Insurance Company*, 1994 SEC ____ (Hancock violated §3(a) by providing meals, golf and event tickets to legislators); *In re Flaherty*, 1991 SEC 498, issued December 10, 1990 (majority leader violates §3 by accepting six Celtics tickets from billboard company's lobbyists); *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free day's outing [a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner], worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

Section 3 applies to meals and golf, including those occasions motivated by business reasons, for example, the so-called "business lunch". *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. *In re Stone & Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

On the present facts, §3 applies to the lobbyists entertaining Walsh where the intent was generally to create goodwill and the opportunity for access, even if specific legislation was not discussed.

[4/] As discussed above in footnote 3, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between the lobbyists and Walsh.

[5/] This amount is three times the $700 approximate total value of the prohibited gratuities received by Walsh and represents both a disgorgement of the gratuities and a civil sanction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 510

IN THE MATTER
OF
FRANK GREEN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Frank Green ("Green") 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 August 9, 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 Green. The Commission has concluded its inquiry and, on October 19, 1994, found reasonable cause to believe that Green violated G.L. c. 268A.

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

1. At all relevant times, Green was employed as the building inspector for the Town of Richmond. This was a part-time position to which Green was appointed by the Richmond Board of Selectmen and for which he was paid $100 per month. As the Richmond building inspector, Green was a municipal employee as that term is defined in G.L. c. 268A, §1(g).[1/]

2. Green's official duties as the Richmond building inspector included issuing building permits for construction done in the town and performing inspections to ensure that all work performed pursuant to such permits complied with the state building code.

3. At all relevant times, Green was also self-employed as a carpenter and building contractor.

4. In 1992, Harold Dupee ("Dupee") owned a lakefront cottage at Richmond Shores which had been heavily damaged by fire and which Dupee wished to replace with a new house. Because of the cottage's lakefront location, Dupee was required to build his new house on the cottage's existing floor dimensions or "footprint". In November 1992, Green was present in his capacity as building inspector when Dupee measured the floor dimensions of the burned cottage. These measurements were used to determine the dimensions of Dupee's new house and were apparently somewhat greater than the dimensions of the existing cottage shown on the Richmond Town Assessor's card for the property.

Soon after the measurements of the burned Dupee cottage were made, Green was hired by Dupee to build a house to replace the burned cottage. After he was hired by Dupee, Green filled out an application for a building permit to build Dupee's new house and signed the permit as the applicant. On December 23, 1992, Green again signed the permit application, this time in his capacity as the Richmond building inspector, and obtained the required signatures of the Richmond zoning enforcement officer and the Richmond Board of Health. Green then issued the permit, allowing Green to proceed with the construction of Dupee's new house.

In the course of Green's construction of Dupee's new house, an issue was raised as to whether the new house was larger than the cottage it replaced.[2/] While the evidence on this point is contradictory, Green concedes that the floor area of the new house is approximately 80 square feet larger than the footprint of the old cottage. Green attributes this difference to a lack of care on his part in checking Dupee's measurements of the footprint of the burned cottage, rather than deliberate action on Green's part. In April 1993, the Richmond Zoning Board of Appeals approved a special permit and variance for the new house without deciding the size issue.

Green was paid almost $20,000 for his labor in building Dupee's house; Dupee provided the materials.[3/]

5. Green, in his capacity as the Richmond building inspector, issued the following additional building permits where Green had personally applied for the permit and where Green was the contractor hired by the owner to perform the permitted work:

a. on January 10, 1990, a permit to raise a house and install a new foundation at a Richmond Shores property;

b. on August 22, 1990, a permit to construct dormers at a Whitewood Cottages property;

c. on August 29, 1990, a permit to rebuild a bathroom, replace windows and other work at a Branch Farm property;

d. on September 26, 1990, a permit to expand the kitchen and construct a screened porch at a Whitewood Cottages property;

e. on May 11, 1991, a permit to add a bedroom to a Richmond Shores property;[4/]

f. on July 10, 1991, a permit to add sunshades at a Richmond Shores property;

g. on September 9, 1992, a permit to construct a shed at an East Street property;[5/] and

h. on November 18, 1992, a permit to construct an addition and a garage at a Richmond Shores property.

6. Section 19 of G.L. c. 268A, except as permitted by paragraph (b) of that section, 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. None of the exceptions of §19(b) apply in this case.

7. The decisions to issue the building permits listed in paragraphs 4 and 5 above were particular matters.

8. As set forth in paragraphs 4 and 5 above, Green participated as the Richmond building inspector in those particular matters by issuing the building permits.[6/]

9. Green, as the contractor performing the permitted work, had a financial interest in the issuance of each of the above-listed building permits. Green knew of his financial interest at the time he issued each of the building permits.

10. Accordingly, by issuing the building permits listed above in paragraphs 4 and 5, Green participated in his official capacity as the Richmond building inspector in particular matters in which he knew he had a financial interest. In so doing, Green violated G.L. c. 268A, §19.

11. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can 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.

12. By issuing building permits for work he would perform and by accepting construction contracts from property owners requiring building permits which he would issue, Green knowingly, or with reason to know, acted in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that persons hiring Green as their contractor could unduly enjoy his favor in the performance of his official duties as building inspector. This was particularly the case with respect to Green's official and private dealings with Dupee. Under the above-described circumstances, a reasonable person would conclude that Green was, as building inspector, less strict with Dupee concerning conforming the dimensions of Dupee's new house with the footprint of the burned cottage than Green would otherwise have been, had Dupee not hired Green to build the new house. Accordingly, Green violated §23(b)(3).

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

(1) that Green pay to the Commission the sum of five hundred dollars ($500.00)[7/] as a civil penalty for violating G.L. c. 268A as stated above; and

(2) that Green 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: November 22, 1994

[1/] Green resigned as the Richmond building inspector in 1993.

[2/] In the course of this controversy, Green was advised that he might have a conflict of interest and Green self-reported his activities to the Commission. As soon as Green became aware of the conflict of interest, Green ceased issuing building permits for his own work.

[3/] Green was not the only contractor who worked on the construction of Dupee's house. Other contractors did the site work, installed the foundation, painted the house and did the landscaping.

[4/] In this case the building permit application was signed by the property owner rather than by Green.

[5/] In this case the building permit application was signed by both Green and the property owner.

[6/] Green did not, however, inspect the work he performed pursuant to the building permits he issued. All inspections of Green's work ere performed by Richmond's alternate

building inspector. In applying for and issuing these building permits for work he performed, Green was apparently following an established practice in Richmond which was apparently known to Green's appointing authority, the Board of Selectmen. Following an established practice which violates the conflict of interest law does not, however, obviate or excuse the violation. Nevertheless, it may be a mitigating circumstance to be considered in assessing the civil penalty imposed for the violation, as set forth above.

[7] That Green's penalty is not higher reflects the fact that Green self-reported this matter to the Commission and ceased issuing building permits for his own work as soon as he was made aware of the conflict of interest. In addition, Green's violations are mitigated by the fact that Green was following an established, albeit unlawful, practice in issuing the building permits for his own work which was known to his appointing authority, the Board of Selectmen, and by the fact that Green did not inspect his own work (which was inspected by the alternate building inspector).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 511

IN THE MATTER OF JOANNE KOVAL

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Joanne Koval ("Koval") enter into this Disposition Agreement ("Agreement") 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 by Koval. The Commission concluded that inquiry, and on September 13, 1994, found reasonable cause to believe that Koval violated G.L. c. 268A, §23(b)(3).

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

1. From April 1991 until April 1994, Koval served on the Board of Selectmen in the Town of Holbrook. As such, she was a municipal employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. The Board serves as the licensing authority in Holbrook. As such, it regulates alcohol establishments through its power to issue, suspend and terminate alcohol, amusement and pool table licenses.

3. The Union Street Pub is an alcohol establishment in Holbrook, located at 70-73 Union Street. In 1990, Union Street Inc. took over the operation of the Pub and applied for the transfer of the Pub's existing licenses. These licenses included a liquor license, a pool table license and an amusement license for video games. The Board of Selectmen approved the transfer of the liquor and amusement licenses to Union Street Inc. Steve Faber holds the controlling interest in Union Street Inc. The Board declined to approve the transfer of the pool table license, and conditioned their future approval of such a transfer on Faber's performing extensive renovations to the Pub. At the time of the transfer approvals, Koval was not a member of the Board of Selectmen.

4. Union Street Inc.'s licenses are subject to annual renewal by the Board of Selectmen.

5. On behalf of Union Street Inc., Faber appeared before the Board of Selectmen in March 1991 to secure approval of the transfer of the pool table license. At this time, Koval was a candidate for a position on the Board of Selectmen in an upcoming election, and opposed the issuance of the license. The Board of Selectmen voted 4 to 1 in favor of the license application.

6. Koval was elected to the Board of Selectmen in April 1991. On December 16, 1991, the Board of Selectmen renewed the Union Street Pub's alcohol and amusement licenses. Koval was present for the meeting and voted for the renewals.

7. In 1992, Koval became a candidate for the state senate seat encompassing the Town of Holbrook. Her opponent in the primary election was Michael Morrissey. In September 1992, before the primary election, the Union Street Pub displayed two campaign signs for Michael Morrissey on the exterior of its premises.

8. One evening in September, Koval entered the Pub and introduced herself to the bartender as a candidate for state senate and as a Holbrook selectwoman. Koval asked the bartender if she had done anything to offend the bar to cause the owners to put up the Morrissey signs. Koval stated she had been helpful as a selectwoman to the Pub in its receipt of its

pool table license. Koval then demanded that the bartender take down the signs.

9. The bartender telephoned Faber and related Koval's demand. Faber instructed the bartender to remove the signs. She did so.

10. Faber feared retaliation from Koval if he did not remove the signs.

11. General Laws c. 268A, §23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy her favor in the performance of her official duties.

12. By introducing herself as a selectwoman, and noting that as such she had been helpful to the bar in the past, and by then demanding that the Union Street Pub remove campaign signs promoting her political opponent, Koval implicitly threatened a party she regulated in her official capacity as a selectwoman. This conduct would cause a reasonable person knowing these facts to conclude that Koval could base her future vote on Union Street Pub license renewals, not on the Pub's record of complying with alcohol laws and regulations, but on its level of campaign support. Such votes would be based on improper influence and undue favor. Therefore, Koval violated G.L. c. 268A, §23(b)(3).

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

(1) that Koval pay to the Commission the sum of two hundred and fifty dollars ($250.00) as a civil penalty for the violations of G.L. c. 268A, §23(b)(3);

(2) that Koval 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: December 15, 1994

TABLE OF CASES

(By Subject or Respondent from 1979 through 1995)

State Ethics Commission

Advisory Opinions

1994

Summaries of Advisory Opinions
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EC-COI-94-1 - A staff member of the State Board of Retirement ("Board") may seek election to the Board and may continue to hold his full-time staff position if he is elected to the Board. If he is elected, he will not need a §7(e) exemption, as the Board's enabling statute requires that the elected member be a current or retirement member of the state retirement system. Thus, he would serve on the Board by virtue of his state position, which is analogous to an *ex officio* post. Additionally, the enabling statute requires that the Board member be an active participant in the retirement system, and contemplates that he will participate in particular matters that affect all retirement system participants, including himself. Therefore, §6 will not prohibit such participation.

EC-COI-94-2 -- Section 3 does not apply to items of substantial value which are given to a public employee as the result of an official act of the Commonwealth or a political subdivision thereof. However, §23(b)(2) will prohibit public employees from using such passes for non-job-related travel, where that usage exceeds $50 in a calendar year.

EC-COI-94-3 -- A municipal building inspector can not display his status as a "Massachusetts Certified Inspector of Buildings" on business cards to be used in his private business activities. Where such certification is derived from his municipal position, §23(b)(2) will prohibit the municipal building inspector's private use of the certification. In addition, under §23(b)(1), the municipal inspector may not privately inspect buildings within the municipality by which he is employed. Due to the statutory obligation that the municipal building inspector take action upon encountering certain situations, the inspector's independent judgement might be impaired by a private business relationship with a paying client.

EC-COI-94-4 -- A court officer can also serve as a constable. Under §4(a), she may receive compensation as a constable from non-state parties, even where the state is a party to the particular matter, as such compensation is "provided by law." However, she must obtain a §7(b) exemption to provide constable services on behalf of a state agency, and an exemption to §20 to provide paid constable services on behalf of a municipal agency. She may not act as a constable for the Trial Court, as court officers are employees of the entire Trial Court, rather than the department to which they have been assigned pursuant to the Court Reform Act. Finally, §23 imposes restrictions on solicitation for her constable business.

EC-COI-94-5 -- A mayor is advised that he/she may invoke the rule of necessity to designate an alternate to serve as the city's collective bargaining representative with an immediate family member's union.

EC-COI-94-6 -- A former state employee is advised that §5 applies to him in his federal position, and that certain activities in that post are barred by §5(a). (The text of this opinion was not available as of the date of publication. The opinion will be included in the 1995 Rulings.)

EC-COI-94-7 -- Non-profit corporations known as Home Care Corporations which contract with the Executive Office of Elder Affairs are not public instrumentalities for the purposes of the conflict of interest law. The Commission's conclusion is based on the application of its traditional four-part jurisdictional test; moreover, the Commission took into consideration, for the first time, whether the Commonwealth functioned as an "owner" of the entities, or whether the Corporations involved private interests.

EC-COI-94-08 - Municipal police officers cannot be employed as private security guards in their own town, outside of the official municipal "paid detail" system. Under the Police Department's policies, officers are required take appropriate police action when necessary, even when off duty. The Commission found that the private security work might impair the officers' independence of judgment in the performance of their official duties. For instance, if a private employer wished a situation settled without the involvement of the Police Department, the officer would be forced to choose between his "24-hour on-duty" status and his loyalty to the private employer. Therefore, the private employment is "inherently incompatible" with the police officers' official duties.

EC-COI-94-09 - An elected member of a regional board, who is also an attorney in private practice, may represent private clients before municipal boards and commissions (other than the one he serves on) in the municipality where selectmen have voted to designate regional board members as "special municipal employees". He may <u>not</u> represent private parties before municipal boards in the municipality which has <u>not</u> granted the regional board members "special" status.

EC-COI-94-10 - Using a five-factor jurisdictional test, a Governor's advisory commission is determined to be a public instrumentality for purposes of G.L. c. 268A. Members of the commission who are not otherwise employed by the Commonwealth will be subject to the conflict of interest law as special state employees. (The text of this opinion was not available as of the date of publication. The opinion will be included in the 1995 Rulings.)

EC-COI-94-11 - A state board member, who is also a member of the board of directors of a private corporation, is generally prohibited by G.L. c. 268A, §6 from participating in certain activities of the state board which would affect the financial interests of the private corporation. However, because his official duties do not "require" him to participate in any matter pending before the state board, the member may simply abstain from participating in those activities affecting the corporation's financial interests, and need not publicly disclose the corporation's financial interest in the matters. (The text of this opinion was not available as of the date of publication. The opinion will be included in the 1995 Rulings.)

EC-FD-94-1 - In a review of *EC-FD-93-1*, the Commission found that two deputy sheriffs did not meet the salary requirement which would mandate financial disclosure under G.L. c. 268B. Nevertheless, the deputy sheriffs are required to file disclosure statements, as they are persons who hold "major policy making positions" by virtue of the fact that they are "persons exercising similar authority" to other public officials who are required to file.

EC-FD-94-2 - A public employee designated to file a Statement of Financial Interest is not required to report information concerning the financial holdings of a spouse who does not reside in the public employee's household.

CONFLICT OF INTEREST OPINION
EC-COI-94-1*

FACTS:

You are currently a full-time employee of the State Treasury as a staff employee of the State Board of Retirement ("Board"). The Board was created by statute, as a division of the Department of the State Treasurer. G.L. c. 10, §18. The Board has three members. The first member is the State Treasurer, who is a member *ex officio* and who serves as chairman. The second member is a current or retired member of the retirement system, elected by that group. The third member is chosen by the first two members. You have taken out nomination papers for election as the second member of the Board.

Pursuant to G.L. c. 10, §19, Board members serve without compensation, but are reimbursed for any expense or loss of salary which they may incur through service on the Board. Board members are not involved in staff employees' promotions, reclassifications, demotions, firings, salary recommendations, personnel evaluations or other like recommendations.

QUESTIONS:

1. Pursuant to the conflict of interest law, may you retain your staff position while running for the Board post?

2. Would the conflict of interest law prohibit you from retaining your staff position if you are elected to the Board?

ANSWERS:

1. Yes.

2. No.

DISCUSSION:

Nothing in the conflict of interest law prevents a government employee from running for any elected position. *Commission Advisory No. 2.* The more difficult issue presented in your request is whether you may retain your current full-time position as a staff member if you are elected to the second Board post. Normally, the propriety of holding multiple positions is addressed by §7 of the conflict of interest law, which 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. Thus, as a Board member, you would normally be prohibited from holding a paid position as a staff member at the Board, absent a gubernatorial exemption. G.L.c. 268A, §7(e). However, G.L. c. 10, §18 specifically requires the second Board member to be either a current or retired member of the state retirement system. This means that a state employee would serve on the Board by virtue of his state employment. "Such a situation is analogous to a state employee serving *ex officio* on a Board." *EC-COI-84-148.* Because service in both capacities is "tied to one state contract, i.e. the original state employment contract, such an individual would not have a §7 prohibited financial interest in another state contract." *Id.* Therefore, §7 is not implicated for you if you are elected to the second Board position.[1/]

Section 6 prohibits a state employee from participating[2/] as such an employee in a particular matter[3/] in which to his knowledge he has a financial interest. The financial interest must be "direct and immediate, or at least reasonably foreseeable." *EC-COI-84-123; 84-98; 86-25; 84-96.* You indicate that Board members are not involved in staff employees' promotions, reclassifications, demotions, firings, salary recommendations, setting of salaries, personnel evaluations or other like recommendations. Pursuant to G.L. c. 10, §20, the State Treasurer has the ability to appoint and remove such clerical and other assistants as may be required to carry on the work of the Board. Thus, if you are elected to the Board, it is unlikely that you will be required to participate in any particular matters in which you have a financial interest.[4/] However, if you find that you do have a prohibited financial interest in a particular matter that comes before you as a Board member (for example, a dispute concerning your own retirement benefits) you must abstain from that matter.

DATE AUTHORIZED: January 11, 1994

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

[1/] Section 8A of G.L. c. 268A states that no member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board. The §8A restriction is not triggered "until a board appoints one of 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 [§8A] if no additional appointment is necessary." *EC-COI-93-19* (discussing §21A, the municipal counterpart to §8A). Thus, since you were first employed in your current full-time position, §8A will not be implicated if you subsequently become a member of the Board.

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/ Since the second Board member must be an active participant in the retirement system, the statute contemplates that this Board member will participate in particular matters that affect all retirement system participants, including himself. G.L. c. 10, §18. Therefore, as a Board member, you may participate in particular matters which affect generally the financial interests of members of the retirement system.

CONFLICT OF INTEREST OPINION
EC-COI-94-2

FACTS:

A state agency proposes to make certain passes available to certain state officials, specifically members of the General Court, constitutional officers and cabinet secretaries. The agency has not yet determined what amount, if any, to charge for these passes. When a charge is established, in all likelihood, the value of the pass will exceed $50 when the price of the pass is compared to the fees which otherwise would be incurred.

The proposed granting of passes is a goodwill gesture in recognition of the status and position of these officials, and their need to engage in frequent scheduled and unscheduled travel. The Agency has always provided free passes to the Governor and Lieutenant Governor. The Governor's office is currently assigned four such passes; the Lieutenant Governor's office one.

QUESTIONS:

1. Does G.L. c. 268A, §3 prohibit the Agency from providing, and the state officials from receiving, passes for free or at a reduced fee?

2. Does G.L. c. 268A otherwise permit receipt of free or reduced fee passes?

ANSWERS:

1. No.

2. Yes, provided that the passes are used only in connection with official state business.

DISCUSSION:

Section 3

This opinion presents an opportunity for the Commission to re-evaluate a question raised in a prior opinion, *EC-COI-92-37,* within the context of a factual record that more squarely presents the issue. In *92-37,* the Commission considered, among other things, whether a legislator may accept free or discounted office space for a district office from a donor who may be a political subdivision of the Commonwealth. That decision, which held that G.L. c. 268A, §3 was applicable, focused primarily on the gift from a private donor, such as a business associate or constituent, with little or no discussion of the distinction between such a donor and a *public entity* donor. We now conclude that where an item of substantial value is given to a public employee as the result of an official act of the Commonwealth or a political subdivision thereof, no issue is raised under §3.

General Laws c. 268A, §3(a) provides: "Whoever otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value1/ to any present or former state, county or municipal employee or to any member of the judiciary, or to any person selected to be such an employee or member of the judiciary, for or because of any official act performed or to be performed by such an employee or member of the judiciary or person selected to be such an employee or member of the judiciary" violates that section of the conflict law. A corresponding provision under §3(b) prohibits receipt of items of substantial value for or because of a state employee's official duties. Read literally, the word "whoever" in §3(a) would appear to prohibit the Agency's furnishing of these passes. Thus, we must first consider whether §3(a) is intended to apply where the Commonwealth, a state agency, or a political subdivision of the Commonwealth is the giver.

Under G.L. c. 4, §7(23), the word "whoever" has the same statutory definition as "person" and includes "corporations, societies, associations, and partnerships". "[I]t is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Hansen v. Commonwealth,* 344 Mass. 214, 219 (1962); *Howard v. Chicopee,* 299 Mass. 115, 121 (1937); *New Bedford v. New Bedford, Woods Hole, Martha's Vineyard Nantucket S.S. Authy.*, 329 Mass. 243, 250 (1952). While some jurisdictions have adopted an exception to this general rule of statutory construction where the statute at issue is "intended to prevent injury and wrong", *Nardone v. United States,* 302 U.S. 379, 383-384 (1937), this exception has not been adopted in Massachusetts. See *Kilbane v. Secretary of Human Services,* 14 Mass. App. Ct. 286 (1982) (holding that the Commonwealth is not a "person" within the meaning of G.L. c. 266, §91 concerning false advertising); see also *Commonwealth v. Elm Medical Laboratories, Inc.*, 33 Mass. App. Ct. 71, 76-77 (1992) (Commonwealth not a "person" for purposes of the State Civil Rights Act). Applying this general rule of statutory construction, we conclude that the state agency's official proposal to furnish free or reduced fee passes to certain state officials does not raise issues under §3(a), because, by its terms, §3 does not contemplate the situation where the Commonwealth is the giver.

This conclusion is supported by our observation that §3 is not designed to prevent lawful acts of the Commonwealth or its political subdivisions. Compare *Attorney General v. Woburn,* 322 Mass. 634, 637 (1948) (where "whoever" construed to include municipalities because the legislative objective -- preventing discharge of sewage into rivers -- would not be possible if cities and towns were exempted). Rather, we have previously recognized that "[t]he preventative purpose of §3 is to preclude public employees from 'temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do -- a good job.'" *EC-COI-89-25* (quoting *In re Michael,* 1981 SEC 59, 68). Such potential for preferential treatment of the donor is clearly present when the donor is a private person or entity with business before the Commonwealth, and our decisions recognize as much. See, e.g., *EC-COI-84-14,* (car purchase discount); *85-42* (state employee prohibited by §3 from accepting offer of discount mortgage from individual). Here, however, it is the Government who gives the pass, not for the purpose of securing favorable treatment for itself, but in recognition of Government employees' work for and travel on behalf of the Government. In such a case, we believe that the financial temptation or pressure to influence public officials that §3 is designed to prevent is not present. *Accord Muschany v. United States,* 324 U.S. 49, 64-68 (1944) (challenged contract was not against public policy as articulated in conflict of interest laws, because there is a lack of financial temptation or political pressure to influence public officials where payments under the contract come from the government and not a third party).[2/]

With regard to the state official's receipt of the pass, we note that the conflict of interest law must be given a workable meaning. *Graham v. McGrail,* 370 Mass. 133, 140 (1976). In light of the fact that we have concluded that §3(a) should not apply to free or reduced fee passes given officially by a state agency, we must also conclude that the state officials in question do not violate §3(b) by receiving these passes.

Section 23

The state officials are nonetheless subject to G.L. c. 268A, §23(b)(2), which prohibits the knowing use or attempted use of their official positions to secure for themselves or others unwarranted privileges or exemptions of substantial value, which are not properly available to similarly situated individuals. The Commission concludes that the officials would violate §23(b)(2) by receiving free or reduced fee passes, unless the passes were restricted to use for government purposes.

Our decision is guided by the principles expressed in *EC-COI-86-17,* where we reviewed an automobile discount policy offered to selected law enforcement officers. We concluded that acceptance of the discount violated §23(b)(2). We said:

> In the case of a selective discount to a public employee, the employee is able to realize a benefit from which the public is excluded. Receipt of such a benefit negates the trust that the public is entitled to place in public employees: that public, not private, interests are furthered when the public 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. As the Commission stated in *EC-COI-83-4,* §23 prohibits as an unwarranted privilege a favoritism policy under which "those who serve the people are treated better than the people themselves."
> *EC-COI-86-17.*

Therefore, the proposed free or reduced fee annual pass policy violates §23 if the pass can be used for personal, non-government purposes. On the other hand, as we pointed out in *EC-COI-86-17,* §23 does not preclude the use of such passes in connection with the performance of official duties. This is because the state officials "are entitled to reimbursement from the commonwealth for any travel expenses incurred in the performance of their official duties. Inasmuch as they would be entitled to free passage from the commonwealth in any event, the fact that the state agency, rather than [their respective state agencies or] the General Court, bears the burden of the expense does not grant an unwarranted privilege to them, within the meaning of §23(b)(2)." *Id.* Thus, we conclude that no issue is raised under §23(b)(2), where the state official is otherwise entitled to reimbursement of business related travel, and uses the pass in lieu thereof.

In summary, we conclude that the giving or receipt of these passes does not violate G.L. c. 268A, §3. In order to comply with §23(b)(2), however, free or reduced fee passes may only be distributed to state officials for use in connection with the exercise of their official duties. Passes which are used for other purposes will violate §23 if the value of that usage exceeds $50 in any calendar year.

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

[2/] We caution, however, that this opinion is limited to situations where the state agency acts as such officially to supply the public employee with an item of substantial value. Therefore, nothing in this opinion should be construed as holding that §§3(a) and 3(b) are inapplicable to gifts made by one or more state employees to another state employee. Where the appropriate nexus is established, i.e., where the item of substantial value is given for any "official act performed or to be performed", the donor in such a case violates §3(a), and the recipient violates §3(b). This is because the gift comes not from the Commonwealth through its official action, but from the state employee, who is clearly subject to §3(a). The potential for preferential treatment or improper pressure on official acts addressed by §3 is present in such a case, where, in this case, it is not present.

CONFLICT OF INTEREST OPINION
EC-COI-94-3

FACTS:

You serve as the Building Commissioner/Inspector of Buildings in a Town ("Town"). You are certified by the State Board of Building Regulations and Standards ("BBRS") as a "building inspector/building commissioner". This certification is now required for all municipal inspectors/building commissioners and is only available to individuals serving in such municipal positions.

You intend to start a private business in which you would conduct private inspections in connection with the purchase and sale of real estate. You state that your business would not involve construction, remodeling or other work subject to inspection by you as the Town's Building Inspector. Rather, you will inspect houses prior to their sale, relative to conditions such as wear and tear, pest infestation, leaks, etc. You tell us that your private inspection services will not relate to compliance with the Massachusetts State Building Code or any other code. You have provided us with a sample contract which you intend to use that specifically states that "[t]his report is not a compliance inspection or certification for past or present governmental codes or regulations of any kind." You believe that, in general, you are under no obligation to take any action in your municipal position, should you inadvertently come across a minor building or other code violation during the course of a private inspection, nor will you do so. There may, however, be certain more serious situations where you are legally required to act as the local inspector.

QUESTIONS:

1. May you use your status as a "Massachusetts Certified Inspector of Buildings" on business cards for your contemplated private business?

2. May you perform the proposed private inspectional services in connection with home sales in Town?

ANSWERS:

1. No.

2. No.

DISCUSSION:

In your position as the Town's Building Commissioner/Inspector, you are a municipal

employee for purposes of the conflict of interest law.[1] Section 23 of G.L. c. 268A is relevant to your request.

1. Use of State Certification on Business Cards

You ask if you may use your status as a "Massachusetts Certified Inspector of Buildings" on your private business cards. The use of your certification will raise an issue under §23, which provides standards of conduct which are applicable to all public employees. Specifically, §23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges of substantial value for himself or others.

Although you are not proposing to explicitly use your title as the Town's Building Commissioner/Inspector, we find that by virtue of your proposed business cards, you would nevertheless be using your public position to secure an unwarranted privilege of substantial value in violation of §23(b)(2). This is because, as you have explained, state certification as a building inspector/commissioner is only available to those individuals who serve as inspectors for municipalities. We therefore conclude that implicit in your use of the certification on your business cards is the use of your public position to assist you in a private business endeavor which has no relation to your public position or state certification. In other words, the use of your certification will likely provide you with unfair advantage over other providers of private inspectional services. Where such an advantage is derived from your public position and available solely to those who hold municipal inspectional positions (a fact which may or may not be known by your prospective private clients), we find that your use of the certification for private purposes would constitute use of your public position to obtain an unwarranted privilege in violation of §23(b)(2). See *EC-COI-92-28* (§23(b)(2) generally prohibits public employees from using official resources, including their titles, to promote a private interest); *84-127* (member of the judiciary may not lend the prestige of his judicial office to a corporate advertising campaign).

We also note that, pursuant to §23(b)(2), you may not use any Town resources or equipment to which you may have access for your private inspection work, nor may you engage in these private business activities during your Town work hours.

2. Performing Inspections in Town

You also ask whether you may perform the proposed private inspectional services in connection with home sales in Town. Section 23(b)(1) prohibits a municipal employee from accepting other employment involving compensation of substantial value,[2] the responsibilities of which are inherently incompatible with the responsibilities of his public office. This provision seeks to prevent the impairment of a public official's independence of judgment in the performance of his official duties which may result from certain types of simultaneous private employment. In 1985, the Commission found a violation of the conflict of interest law where a municipal police lieutenant simultaneously held a private job which overlapped with his official duties. In particular, where the police officer was privately employed as an assistant racetrack security chief and where the racetrack utilized municipal police services, the Commission found that the officer's private duties "necessarily impair[ed] the independence of his judgment in the performance of his official duties". See *In re DiPasquale*, 85 SEC 239;[3] see also *EC-COI-84-93* (attorney engaged in consulting work would be inherently impaired in the performance of his official duties); *91-14* (current member of the General Court could not conduct private seminars providing information on how to obtain advantages before or otherwise lobby the Legislature); *81-151* (state employee must be free to exercise independence of judgment and remain loyal solely to the Commonwealth).

You explain that your proposed inspectional services will be provided as part of a private real estate transaction and not in relation to the Massachusetts State Building Code or any other municipal code. Furthermore, you believe that, in general, you are under no obligation to take action in your municipal position, should you inadvertently come across a building code violation. You have acknowledged, however, that there may be certain situations where you are legally required to act as the local inspector. In particular, §6 of G.L. c. 143 requires that a local inspector, "upon being informed by report or otherwise that a building or other structure ... is dangerous to life or limb ... shall inspect same; and he shall forthwith in writing notify the owner ... to remove it or make it safe if it appears to him to be dangerous ... "

If, therefore, in the course of a private inspection, you were to become aware of a situation which would obligate you to take action as the Town's inspector pursuant to G.L. c. 143, §6, your loyalties would be divided, creating a situation where your private business activities would be inherently incompatible with your public duties as the Town's building inspector. In other words, under such a scenario, your independent judgment would be impaired by your

private business relationship with a paying client. Because you cannot anticipate when you may come across a problem of the type covered by G.L. c. 143, §6, in order to avoid the potential for a violation of §23(b)(1), you must refrain from providing private inspectional services in connection with home sales in Town. See *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (Legislature's concern about conflicts between public duties and private interests "may reasonably have motivated it to prohibit involvements that might present potential for such conflicts"). We note that you are not, however, restricted from engaging in your private inspectional services in other municipalities.

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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/] The Commission has determined that anything valued at $50 or more is "of substantial value". *EC-COI-93-14.*

[3/] We note that this case was decided pursuant to §23(¶2)(1), a prior version of §23(b)(1). The principals embodied in, and the Commission's interpretation of, the predecessor to §23(b)(1) are nevertheless relevant to our analysis here.

CONFLICT OF INTEREST OPINION
EC-COI-94-4

FACTS:

You are a full-time court officer assigned to a department of the Trial Court, providing security in a courthouse. You are interested in simultaneously serving as an appointed constable in order to serve civil and/or criminal process. You do not intend to serve process during your normal working hours as a court officer.

QUESTION:

May you work as a constable while serving as a court officer?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

While constables have a wide range of statutory power, their chief function is the service and execution of legal process. G.L. c. 41, §92.[1/] Constables who are bonded in the maximum amount have the authority to serve the following types of documents: summonses and complaints where the amount of damages is $2,500 or less; executions and real estate attachments not exceeding $2,500; supplementary process in any amount; summary process; notices of all kinds; demands; restraining orders; orders of notice; injunctions; civil and criminal capias; treasurers warrants and proclamations; certain probate and family court process; subpoenas and other writs and papers from district courts, superior courts, the supreme judicial court and federal courts; and mittimus or other required precept posting notices of town meetings and other notices. G.L. c. 41, §§ 92-5. A constable's return of service is *prima facie* evidence of service. Thus, a constable's primary duty is to properly serve all lawful processes issued by a court, judge, or judicial officer that are legally directed to her. G.L. c. 220, §6.[2/]

Nothing in the conflict of interest law would prevent a state employee from serving process as a constable on behalf of a private party or a non-state party. This is true even where the state is a party to the litigation or has a direct and substantial interest in the case.[3/] However, you need an exemption to §7 of G.L. c. 268A in order to serve as a constable on behalf of a state agency.

1. Section 7

Section 7 is implicated where you wish to provide compensated constable services for the Commonwealth or a state agency. Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency[4/], in which the Commonwealth or any state agency is an interested party, unless an exemption applies. This section would prevent you, in some cases, from performing paid services as a constable for the Commonwealth or any state agency. *EC-COI-85-41.*

Section 7 is intended to prevent state employees from using their positions to obtain contractual benefits from the state and to avoid any public perception that state employees have an "inside track" on such opportunities. "Because it is impossible to always

distinguish employees who are in a position to influence the awarding of a contract from those who are not . . . the law treats all state employees as though they have influence." *EC-COI-85-3.* See also Buss, *The Massachusetts Conflict of Interest Statute*, 45 Law R. 299, 374 (1965).

As a full-time state employee in your court officer position, the only exemption potentially available to you is §7(b). This section would permit a court officer to receive compensation from a state agency if *all* of the following conditions are met:

(1) you are not employed by the contracting agency or an agency which regulates the activities of the contracting agency;

(2) you do not participate in or have official responsibility for any of the activities of the contracting agency;

(3) the contract is made after public notice, or, where applicable, competitive bidding;

(4) your constable services will be provided outside of your normal working hours as a court officer;

(5) you are not compensated as a constable for more than 500 hours during a calendar year;

(6) the services are not required as part of your regular duties as a court officer;

(7) the head of the contracting agency files a written certification with the State Ethics Commission that no employee of that agency is able to perform the services as a part of his regular duties; and

(8) you file a full disclosure of your financial interest in the arrangement with this Commission.

Thus, the first issue under §7(b) is: what is the state agency by which you are employed -- the entire Trial Court, or merely the Department of the Trial Court to which you have been assigned. In 1978, the Legislature enacted the Court Reorganization Act, which first effected an administrative consolidation of all of the courts in the Commonwealth with trial jurisdiction. Chapter 478 of the Acts of 1978.[5/] Subsequently, on January 13, 1993, the Governor signed into law the Act Improving the Administration and Management of the Judicial System of the Commonwealth, c. 379 of the Acts of 1992 (commonly referred to as The Court Reform Act). The Court Reform Act further modifies certain aspects of the Trial Court system, including jurisdictional features specifically referencing court officers. Because of the significant legal change to the court system pertaining to court officers, we can no longer conclude that court officers are employees of the Department to which they are assigned. Rather, court officers are employees of the entire Trial Court, as described below.

While the earlier version of the court system provided for a Chief Administrative Justice, the Court Reform Act establishes the position of a Chief Justice for Administration and Management ("CJAM"), whose duties are broadened. G.L. c. 211B, §1. Under the Court Reform Act, the CJAM is responsible for the overall administration of the entire Trial Court. A significant change under the Court Reform Act is that all court officers appointed to any department of the Trial Court are specifically designated as employees of the CJAM, rather than of an individual court. G.L. c. 211B, §9A. The CJAM explicitly has the power to appoint, discipline, transfer[6/] and define the duties of court officers, including those court officers who were appointed prior to the adoption of the Court Reform Act. It is clear that court officers are *not* employees of the chief justice of each department. Instead, the Court Reform Act specifically excludes court officers from the category of personnel of the chief justice of a particular department, and instead explicitly identifies court officers as employees of the CJAM.[7/]

Since the CJAM is the administrative head of the entire Trial Court and court officers are employees of the CJAM, court officers are employed by the Trial Court rather than the department to which they have been assigned. G.L. c. 211B, §9. *Cf. EC-COI-85-41* (based upon the 1978 Act). Thus, you are an employee of the entire Trial Court, not of the Department to which you are currently assigned.[8/] Therefore, you may not receive compensation from the Trial Court or any Department of the Trial Court as a constable, because you will not be able to obtain a §7(b) exemption under G.L. c. 268A.[9/]

Another important condition for a §7(b) exemption is the "public notice" requirement. If you wish to provide constable services for compensation from a state agency, the agency must "publicly advertise" for a constable. The Commission has recognized that, in certain specialized personal service contract areas, the requirements of public notice are not practical. *EC-COI-85-27.* At a minimum, the Commission has required a "good faith effort to notify all qualified individuals in the geographic area." *Id.* This is necessary to provide equal access to the position. In certain circumstances, the comparison of fees charged for a service was sufficient. *EC-COI-83-56.* Here,

where the fees that constables may charge are set by statute, and the only variables are for the portion of fees based upon travel or photocopying, it is not logical to require a state agency to contact several constables to compare terms. There are several publications, such as Massachusetts Lawyer's Diary and the Massachusetts Constable Association Directory, that contain complete lists of eligible constables. Since all qualified individuals would be listed, if you are contacted by a state agency which obtained your name from such a list, the public notice requirement will be fulfilled by this method of selection.

If you were able to comply with all of the §7(b) provisions, you may provide paid constable services for a state agency. Thus: you may not provide constable services for the Trial Court; the state agency must contact you after using a complete list of eligible constables; your constable services must be provided outside of your normal working hours as a court officer; you may not be compensated as a constable for more than 500 hours per year; the head of the contracting state agency must file a written certification with the State Ethics Commission that no employee of that agency is able to perform such constable services; and you must file a full disclosure of your financial interest with this Commission.

2. Section 23

Section 23, the standards of conduct provision, also applies to you. Section 23(b)(2) prohibits a state employee from using or attempting to use his official position to secure an unwarranted privilege or exemption of substantial value[10/] for himself or another. For example, you may not use state time, resources, or personnel to benefit yourself or another. See *P.E.L. 89-4.* Nor may you use your state title or the state seal to promote or endorse your constable services. See, e.g., *EC-COI-84-127; 86-11; 92-5* (seal); *92-39; 85-41* (a court officer may not perform constable duties during court sessions, may not serve capiases in cases where the constable must appear in the court with the person arrested pursuant to the capias to collect her fee). Additionally, you are prohibited from "soliciting potential clients for your constable services by referring to your qualifications as a state employee" and you may not solicit individuals who have business in the court house where you are working as a court officer. *EC-COI-85-41.* Solicitation includes oral representations, passing out business cards, and mailings directed to specific individuals.

Finally, §23(e) permits a head of a state agency to establish and enforce additional standards of conduct beyond those contained in the conflict law. G.L. c. 268A, §23(e). While an agency's own standards of conduct may not be any less restrictive than those found in G.L. c. 268A, the Commission will defer to rulings or standards established by the agency itself which give guidance to its employees in the area of conflict of interest and which are consistent with the principles and aims of §23. *EC-COI-93-23; 84-55.*

In conclusion, you may provide constable services for non-state parties whether or not the state is a party or has a direct and substantial interest in the particular matter. However, you must obtain a §7(b) exemption if you wish to receive compensation as a constable from *state agencies.* Finally, you may not use state time or resources to effectuate your constable duties, you may not use your qualifications as a court officer to solicit potential clients, and you may not solicit individuals who have business in the court house where you are working as a court officer.

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1/ We note that §78 of the Court Reform Act amends G.L. c. 211B, §9 by adding §9A, which states in pertinent part, "[c]ourt officers . . . may serve warrants, mittimuses, precepts, and orders and processes of the court, and shall perform such other duties as chief administrative justices for administration and management may assign." The language in G.L. c. 211B, §9A does not specifically authorize a court officer to accept a post as a constable, but rather appears to permit a court officer, as part of her official duties, to serve certain types of court documents *only* at the direction of the Chief Administrative Justices for Administration and Management. This section does not address the issue of whether a court officer may serve as a constable. We advise you to seek further guidance concerning the interpretation of G.L. c. 211B, §9A from the CJAM and/or the Director of Security of the Trial Court.

2/ A process server must determine that the process which he is called upon to execute is in due form and issues from the court which has jurisdiction of the subject. *Morrill v. Hamel,* 148 N.E.2d 283 (1958). Additionally, service must be served in the manner prescribed by law.

3/ Section 4(a) of G.L. c. 268A prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from receiving compensation from anyone other than the Commonwealth or a state agency in connection with a particular matter 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 other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

The Commission stated in *EC-COI-84-143* that §4(a) would prevent a state employee from receiving compensation from private individuals as a Bail Commissioner in connection with criminal cases. However, we subsequently determined that since such fees were provided for by law, no issues would be raised under §4(a). See *Quinn v. State Ethics Commission*, 401 Mass. 210 (1985). Since fees for constable services are provided for by statute, §4(a) of the conflict of interest law will not be implicated for a state employee who receives compensation as a constable from non-state parties in connection with a matter in which the state is a party or has a direct and substantial interest. Thus, you may provide constable services for private individuals whether or not the state is a party or has a direct and substantial interest in the particular matter. However, issues will arise under §7 if you wish to receive compensation as a constable from state agencies, as described below.

Additionally, §4(c) is not implicated, as constable services do not rise to the level of acting as an "agent". 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, *Zora v. State Ethics Commission,* 415 Mass. 640 (1993); *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).*

4/ "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).

5/ After reviewing this consolidation, we held that each department of the Trial Court was a separate state agency for purposes of G.L. c. 268A. *EC-COI-84-86.* Based upon the 1978 Court Reorganization Act (the 1978 Act), we held that a court officer of the Probate Court was not an employee of the entire Trial Court. *EC-COI-85-41.*

6/ The CJAM has the power to transfer a court officer to any court which needs the services of a court officer. Thus a court officer in one department could be transferred to another department in any county. G.L. c. 211B, §9.

7/ In *EC-COI-84-86,* we held that the Brockton District Court was not the "same agency" as the Boston Juvenile Court for purposes of §7. The new Court Reform Act does not disturb our conclusion that those two entities are different state agencies. Here, however, we address whether a court officer is an employee of the department that she is assigned to, where court officers are explicitly designated as employees of the CJAM.

8/ However, a court stenographer in a particular department of the Trial Court, for example, is an employee of the chief justice of that department, and is not an employee of the CJAM. Thus, a stenographer would be an employee of that department, rather than an employee of the entire Trial Court.

9/ Even though constables are qualified to file subpoenas and other writs and papers, among other documents, from district courts, superior courts, and the supreme judicial court, you may not do so as a *paid constable* because you are employed by the entire Trial Court, and would not be able to fulfill the first requirement under §7(b). Additionally, since court officers may be directed to file such documents by the CJAM under the Court Reform Act, you would not be able to fulfill the sixth and seventh requirements, as such service may be required as a part of your regular duties as a court officer. However, if as a *court officer*, you are directed to file such documents by the CJAM, §7 will not be implicated, as those tasks would be a part of your official duties as a court officer, and will not constitute paid constable services.

10/ Anything valued at $50.00 or more is "of substantial value". *EC-COI-93-14; Commonwealth v. Famigletti,* 4 Mass.App.Ct. 584, 587 (1976); *Commission Advisory No. 8.*

CONFLICT OF INTEREST OPINION
EC-COI-94-5

FACTS:

You are an attorney seeking an opinion on behalf of a Mayor of a City. The spouse of the Mayor is a firefighter employed by the City's Fire Department, and is a member of the City Firefighters Union ("Union"). The Mayor is the sole collective bargaining authority for the City, pursuant to G.L. c. 150E, and therefore has the responsibility to participate in contract negotiations and other decisions in which the Mayor's spouse has a financial interest. The Mayor is also the City's "appointing authority" for purposes of the civil service law, G.L. c. 31, which is incorporated by reference in the collective bargaining agreement between the City and the Union ("Agreement").

The Mayor's spouse is the subject of a grievance filed by the Union, in which the Union alleges that the *prior* Mayor's appointment of the Mayor's spouse to the position of Lieutenant violated the Agreement.

Under the Agreement, grievances that are not resolved at Step I, before the Chief of the Fire Department, or at Step II, before the City's Director of Personnel, shall be submitted to arbitration or, where appropriate, to the Massachusetts Civil Service Commission. You state that the grievance has now progressed past Step II and that, as appointing authority, the Mayor may be called upon to participate in decisions relative to the disposition of the grievance. This matter is currently being handled by the City's labor counsel.

The only provision of the City Charter which deals with substitution for the Mayor is §4.10, thereof, entitled "Temporary Absence of the Mayor". That section provides:

> (a) Acting Mayor - Whenever by reason of illness or absence from the city, the mayor shall be unable to perform the duties of his office for a period of three successive working days, or more, the president of the city council shall become the acting mayor.
>
> (b) Powers of Acting Mayor - The acting mayor shall have all of the powers of the mayor except that he shall not make any permanent appointment nor removal to or from any office unless the disability of the mayor shall have continued for sixty days or more, nor shall he approve or disapprove any measure passed by the city council unless the time within which the mayor must act would expire before the return of the mayor. During any period in which the council president is serving as acting mayor he shall not be eligible to vote on any measure as a member of the city council.

QUESTION:

May the Mayor participate in the negotiation of the collective bargaining agreement between the City and the Union, even though the Mayor's spouse has a financial interest in that contract?

ANSWER:

No. However, the Mayor may invoke the rule of necessity to select a "designated representative" to carry out this function.

DISCUSSION:

The Mayor is a municipal employee[1/] for purposes of the conflict of interest law. Section 19 of G.L.c. 268A prohibits the Mayor's official participation[2/] in any contract, decision or other "particular matter"[3/] in which the Mayor or the Mayor's immediate family[4/] member has a financial interest. Section 19 encompasses financial interests of any size, whether positive or negative, but the financial interest must be direct and immediate or reasonably foreseeable. See *EC-COI-92-18; 89-19; 86-26.* Consequently, §19 would normally prohibit the Mayor's participation in those matters affecting the spouse's direct or reasonably foreseeable financial interest. For example, §19 would prohibit the Mayor from participating in any discussions or votes concerning the collective bargaining agreement between the spouse's union and the City. Other matters affecting the spouse's financial interest include grievances or disciplinary matters affecting the spouse, health benefits affecting all firefighters, matters affecting seniority rights which will impact upon the spouse, or matters involving lay-offs or retirement which affect the spouse. *EC-COI-92-21;* see also, *Commission Advisory No. 11 (Nepotism); EC-COI-90-1; In re DeOliveira,* 1989 SEC 430. Section 19 also prohibits the Mayor from delegating to another those functions which §19 bars the Mayor from performing. See *Commission Advisory No. 11 (Nepotism)*, footnote 8. Thus, we must consider whether applicable statutes or the City Charter provide a substitute official to perform these duties in place of the Mayor.

Mayor Acting As "Employer" Under G.L. c. 150E

Under G.L. c. 150E, §1, the "employer" for purposes of collective bargaining is the city itself, acting through its "chief executive officer" or a designated representative. In *Labor Relations Commission v. Natick,* 369 Mass. 431, 438-441 (1976), the Court held that a city has but one chief executive officer, and that it is that official who must make a "designation of a bargaining representative" to act in his place. Here, however, the chief executive officer is the Mayor, who is prohibited by §19 from designating a bargaining representative to negotiate the firefighter's contract in the Mayor's stead. Thus, Chapter 150E does not provide for a substitute in this case.

The City Charter also does not make any provision for another official to act where the Mayor is disqualified by conflict of interest. Rather, by its terms, the provision calling for an acting mayor is operative only in the case of the Mayor's illness or absence from the City.

Likewise inapplicable here are G.L. c. 43, §26, which provides that the president of the city council shall perform the duties of mayor "[i]f the mayor is absent or unable from any cause temporarily to perform his duties", and G.L. c. 39, §5, which provides that the president of the board of aldermen,

"upon the death, resignation, absence of the mayor, or his inability to perform the duties of his office", shall perform the duties of mayor. It is well settled that these statutes are applicable "only in matters not admitting of delay." *Dimick v. Barry*, 211 Mass. 165, 166-167 (1912). At a minimum, therefore, there must be a "necessity so importunate that it cannot be resisted with reason." *Id.* (examples cited by the court include "impending disaster, threatened disorder, public pestilence, devastation by flood or fire", or matters where time is of the essence, such as in the case of an impending election); see also 5 Op. Att'y Gen. 537, 538 (1920) (statute providing for an acting mayor in matters "not admitting of delay" is "merely a designation of an employee to discharge the duties of the office in the case of emergency"; there must be "an exigency requiring action by the acting mayor"). There is no evidence of exigent circumstances in the present case.[5/] Finally, these statutes provide that the acting mayor shall have the power to perform *all* of the duties of the office, not merely those which the mayor is disqualified to perform by reason of conflict, as would be the case if these statutes were applied here. See, *Ryan, supra.* Thus, lacking a substitute official to perform these particular duties of the Mayor, we must consider whether this is an appropriate case to invoke the rule of necessity.

As we recognized in *EC-COI-93-13*, "[t]he 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. 133, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to G.L. c. 268A). The facts of this case are analogous to those presented in *Mayor of Everett v. Superior Court*, 324 Mass. 144 (1949). In that case, license commissioners challenged the mayor's order removing them from office, citing certain personal remarks of the mayor said to indicate his bias or prejudice against them. The lower court found that the mayor was indeed biased and overturned the mayor's order. The Supreme Judicial Court, however, noted that the legislature conferred upon the mayor the power to remove the city's license commissioners, and that it made no provision that any other officer could act in case the mayor was disqualified by reason of bias or prejudice. As a result, that court, citing *Moran*, held that the mayor could invoke the rule of necessity to participate in the removal of the license commissioners. See also *Graham, supra* (recognizing *Mayor of Everett* as a case in which the rule of necessity has been applied).

Here, similarly, the legislature has conferred upon the Mayor the sole power to act as the city's bargaining representative with regard to the firefighter's contract. Since neither G.L. c. 150E, the City Charter, nor any other statute provides that another official may act if the Mayor is disqualified by conflict of interest, the rule of necessity may be invoked in this case. However, we believe that the rule of necessity ought to be invoked solely to permit the Mayor to select another as the Mayor's "designated representative". G.L. c. 150E, §1. In this way, the City may carry out its obligation to bargain collectively with the Union "free of suspicion or suggestion of action motivated in part by private interest." *Albano v. Selectmen of South Hadley*, 341 Mass. 494, 496 (1960).[6/]

DATE AUTHORIZED: May 10, 1994

[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/] "Official participation includes ... action to approve, disapprove, recommend or decide a particular matter, for example, by voting on it or through discussion of it." *EC-COI-87-25.*

[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/] Moreover, G.L. c. 39, §5 is applicable only where the city charter does not provide otherwise. *Ryan v. Boston*, 204 Mass. 456, 459 (1910). In this case, the City Charter does contain a provision which expressly addresses the mayor's absence or inability to perform the duties of her office. Thus, G.L. c. 39, §5 appears to be inapplicable here in any event.

[6/] You also ask us to consider whether the rule of necessity would apply to actions of the Mayor as the City's "appointing authority", under G.L. c. 31, with regard to

the pending grievance. However, you are unable to tell us what role the Mayor may play in the matter. This Commission renders opinions "only when presented with specific questions relating to potential conflict situations which exist or are imminent. It does not rule on abstract, hypothetical questions." *EC-COI-79-56.* Since we lack specific facts concerning actions the Mayor may be called upon to take as appointing authority, any answer we may give as to whether invocation of the rule is required so that "an important public decision would [not] be frustrated", *EC-COI-93-3*, would be completely hypothetical. Thus, we decline to decide this question at this time. You may contact this Commission for further advice when you have specific facts.

The text of **EC-COI-94-6** was not available as of the date of publication. The opinion will be included in the 1995 *Rulings*.

CONFLICT OF INTEREST OPINION
EC-COI-94-7*

FACTS:

The Executive Office of Elder Affairs ("EOEA"), a state agency established pursuant to G.L. c. 19A, serves "to mobilize the human, physical and financial resources available to plan, develop and implement innovative programs to insure the dignity and independence of elderly persons, including the planning, development and implementation of a home care program for the elderly in the communities of the Commonwealth." Additionally, the EOEA must encourage and assist communities to develop and plan home care programs, which must be operated either by a state agency or any political subdivision of the Commonwealth or by nonprofit corporations organized under G.L. c. 180 and designated by the EOEA. Although c. 19A was passed in 1973, the statutory language which authorized home care programs to be operated by non-profit corporations was not added until 1985.

Councils on Aging ("COAs") are established by cities and towns pursuant to G.L. c. 40, §8B. COAs coordinate and carry out programs designed to meet the problems of the aging. COAs also receive grants from the EOEA to provide programs and services (such as congregate meals and transportation). Additionally, COAs utilize municipal funds and receive other grants to fund their programs and services.

In 1974, the EOEA decided to fulfill its statutory mandate through contracts with non-profit corporations (notwithstanding, as noted above, that explicit statutory authorization for designating non-profit corporations as home care corporations did not come about until 1985). Subsequent thereto, the EOEA developed extensive policies and procedures for managing a "Home Care Program" in the Commonwealth. The program was and continues to be funded with state appropriations (currently approximately $145 million), federal retained revenues and client copayments. The Home Care Program includes community services (home care, home health care and respite care) and protective services. The primary goal of the program is to maintain elder independence and dignity in a home setting. In 1974, the state was divided into 27 service regions. The EOEA established regulations concerning client eligibility as well as the manner in which services would be provided. The EOEA determined that it would contract with a non-profit corporation in each region and known as a Home Care Corporation ("HCC") to provide the services of the Home Care Program. The EOEA sought proposals from prospective service providers in each region. Contracts between the EOEA and 27 non-profit corporations were awarded. Some of the HCCs which were eventually awarded contracts had been in existence and were providing elder services prior to 1974. Other organizations were formed in response to the EOEA's requests for proposals.

Since 1974, the Home Care Program contracts have been the subject of a request for proposals on a periodic basis (now every 5 years). HCCs, as non-profit corporations, are managed by a board of directors and an executive director. Pursuant to G.L. c. 19A, §4(c), the majority of the governing board (board of directors) of any home care provider must be appointed by the COAs of the cities and towns serviced by the home care provider. In addition, a majority of the governing body of designated home care providers must be persons of sixty years of age or older who reside in the cities or towns served. In general, HCCs subcontract with other private organizations as well as with COAs for the majority of the services provided under the Home Care Program. There are, however, instances where a HCC, with the approval of the EOEA, will provide certain services through its own employees. Nevertheless, in most cases the HCCs serve to manage/monitor the delivery of services by their subcontractors. Finally, some HCCs provide a variety of elderly services in addition

to those they provide pursuant to the Home Care Program. Such other programs are funded by various federal, municipal or private sources.

QUESTION:

May compensated employees of COAs serve as unpaid members of the board of directors for a HCC?

ANSWER:

Yes, subject to the limitations discussed herein.

DISCUSSION:

1. Jurisdiction

The Commission must first decide whether the non-profit HCCs should be considered public, as opposed to private, entities for purposes of applying the conflict of interest law.[1/] We conclude that HCCs are not public instrumentalities within the meaning of G.L. c. 268A.

We start by noting that an entity organized in a corporate form will not automatically be considered a private entity. Rather, the Commission has traditionally applied a four factor jurisdictional test to determine whether a particular entity should be considered public for purposes of applying the conflict of interest law to that entity's employees. Those factors are:

(1) the means by which the entity was created (e.g., legislative or administrative action);

(2) the entity's performance of some essentially governmental function;

(3) the extent of control and supervision of the entity exercised by government officials or agencies; and

(4) whether the entity receives or expends public funds. See *EC-COI-91-12; 89-24; 89-1.*

The Commission has on several occasions applied these factors to conclude that private non-profit corporations should be considered public instrumentalities. See *EC-COI-92-26; 91-12; 89-1; 88-24.*

Recently, the Massachusetts Supreme Judicial Court affirmed the Commission's jurisdictional test, stating:

> we believe that the test provides an appropriate starting point for determining whether an entity is an instrumentality [of the Commonwealth] for purposes of G.L. c. 268A. The test focuses on the method of formation, operation, and purpose of the entity, all factors which the Appeals Court recently noted to be central to the question of an entity's status as an "instrumentality" under the conflict of interest law. See *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992). *Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission*, 414 Mass. 582, 588 (1993). ("*MBTA*")

The Court went on to discuss an additional consideration utilized by the Internal Revenue Service ("IRS") when it decides whether an entity is a public instrumentality under the federal tax code: "whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner." See, Rev. Rul. 57-128, 1957-1 C.B. 311; *MBTA,* 414 Mass. at 589. With this opinion, we will for the first time take into account whether there are private interests involved in the entity being examined.

The application of our jurisdictional analysis to HCCs leads to the conclusion that HCCs are not public instrumentalities. First, after examining the history of HCCs and the means by which they were created, we do not find a statute, rule, regulation, or other direct EOEA action. We note that, in 1974, the EOEA made a determination that it would seek to provide home care services through contracts with non-profit corporations ("HCCs"). Pursuant thereto, the EOEA established qualifications and other criteria for serving as a HCC. However, it appears that the EOEA was not statutorily required or otherwise directed to establish HCCs, nor did the EOEA take affirmative steps to specifically create the non-profit corporations which were eventually awarded the contracts. See *EC-COI-88-19* (where there was no law, rule or direct agency action resulting in corporation's creation, mayor's involvement in selection of board of directors and executive director went to the composition of the non-profit organization rather than the impetus for its creation). In fact, until 1985, there was no explicit statutory authorization for the EOEA's use of non-profit corporations to assist in providing home care services. Moreover, as we have noted, some HCCs existed prior to 1974. While it is clear that governmental action has in effect enhanced the market for these services, thereby causing HCCs to proliferate, it would not be accurate to say that HCCs were <u>created</u> by governmental action.

Turning to the second factor, we conclude that the HCCs do perform an essentially governmental

function. While we recognize that the provision of home care services to the elderly can be either publicly or privately performed, we have previously concluded that an entity performs a governmental function where the function is contemplated by state or federal legislation. See *EC-COI-88-19*. Here, the EOEA is statutorily obligated to implement home care programs in the Commonwealth. The EOEA's enabling statute permits the provision of such home care services by non-profit corporations designated by the EOEA. Absent implementation by HCCs, a state agency or other political subdivision of the Commonwealth must operate home care programs for the elderly. The fact that the Home Care Program is currently being carried out by a non-profit corporation does not change the nature of the function from public to private. See *EC-COI-84-147* (private, non-profit corporation performing a portion of duties which public entity is statutorily required to perform is serving a governmental function); *89-24* (non-profit corporation which furthers UMass' legislatively mandated function of education and research performs governmental function). We therefore conclude that the HCCs carry out an obligation statutorily imposed on the EOEA and therefore perform an essentially governmental function.

Considering the third factor, we do not find governmental control of the HCCs in a manner contemplated by our jurisdictional test. We note that the EOEA exercises substantial control and supervision (in the common sense meaning) over the functioning of the HCCs. For example, by regulation, 651 CMR 2.00 et seq., the EOEA sets policy, issues program regulations and guidelines, approves HCC budgets, conducts audits, sets out reporting requirements and training and generally manages many aspects of the day-to-day operations of the Home Care Program. In addition, pursuant to 651 CMR 3.02, the EOEA is required, among other things, to provide ongoing monitoring, assessment and evaluation of the activities and operation of HCCs. However, the Commission has not traditionally looked at governmental regulation of an entity as evidence of governmental control. Rather, we have previously considered governmental participation in the selection of a corporation's board of directors or the presence of a majority of board members appointed by a governmental agency as an indicator of governmental control for purposes of our jurisdictional test. See *EC-COI-91-12; 90-3*. In each of these cases, however, the entity under consideration was created by the actions of government officials, who then controlled the selection process and composition of the entity's governing body. See, e.g., *EC-COI-84-147; 89-1, 91-12* (each involving holding companies created by resolution of the Board of Trustees of a state institution); *89-24* (non-profit corporation created by actions of state officials); *90-3* (same). Here, by contrast, HCCs were not first created and then controlled by the government.

Additionally, we note that the Court in *MBTA* looked beyond the mere appointment of each board member and considered to whom the board members owe their loyalty. Where the Retirement Board members owed their primary loyalty to the members and beneficiaries of the retirement fund and not to the MBTA, the Court did not find that the MBTA exercised the requisite control or supervision over that board, notwithstanding the MBTA's appointment of a portion of the Board members.

In the case before us, we note that, pursuant to statute, a majority of the board members of a HCC must be appointed by the local COAs served by the HCC. In addition, a majority of the board members must be 60 years or older and must reside in the communities served by that HCC. As a result of these two statutory requirements, it appears that the principal legislative goal was to provide HCCs with directors who could advise on behalf of, and otherwise represent, the population most directly affected by the services provided by the HCCs. In any event, because the EOEA does not have appointing authority over any of a HCC's board members, and because it does not appear to us that the HCC board members owe their primary loyalty to the EOEA, we do not find that the EOEA exercises the requisite control for purposes of our jurisdictional test. See, e.g., *EC-COI-84-65* (finding a lack of municipal government control over public charitable trust whose trustees were city officials, because "the three city officials acting in their trustee capacities owe a duty of loyalty to the Fund").

As for the fourth factor, HCCs receive considerable funding from the state by virtue of their Home Care Program contracts with the EOEA. We have previously held that state funds paid pursuant to a vendor contract would not alone indicate state agency status where an entity received the majority of its funding from the federal government. See *EC-COI-85-78*. See also *MBTA* at 582 (funds paid by state agency in which Commonwealth has no continuing proprietary interest become private in nature once they are paid out by the Commonwealth).[2/] Here, by contrast, where the Home Care Program services being provided by the HCCs are statutorily mandated and where the state continues to have an interest in how its program funding is expended, we find that the HCCs receive and expend public funds in the manner contemplated by our jurisdictional test.

As suggested by the Court in *MBTA*, we will also take into consideration, when relevant, "whether there

are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner" in examining entities, such as the HCCs, for jurisdictional purposes. *MBTA*, 414 Mass at 589. As noted above, this jurisdictional consideration is derived from the test used by the IRS when it considers whether an entity is an instrumentality or political subdivision of the state for federal taxation purposes, specifically the Federal Insurance Contributions Act, 26 U.S.C. 3121(b)(7) and the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7). The IRS examines whether there are any non-public proprietary interests involved in the particular entity being examined. For example, in Rev. Rul. 57-128, 1957-1 C.B. 311, 312, the IRS determined that a voluntary unincorporated organization formed by state insurance officials to promote uniformity in legislation affecting insurance, to encourage departmental rulings under the insurance laws of several states, to disseminate information to insurance supervisory officials, and to protect the interests of insurance policyholders in various states, was a part of the "state government machinery for the administration of the insurance laws of the respective states." The IRS decided that the association was a state instrumentality, in part, because

> No proprietary interest in the association exists other than those of the states themselves, which through the membership of their officers have the powers and interests of an owner. The states, through their officers, have the right collectively to dispose of the assets of the association. Therefore it follows that the association is an instrumentality wholly owned by the states. Rev. Rul. 57-128 1957-1 C.B. 31.2

Similarly, in Rev. Rul. 65-196 1965-2 C.B. 389, the IRS examined the existence (or lack of) private interests in a "Sports Area Commission" organized by a city and two villages. The IRS concluded that because all physical properties and other assets of the commission were held and owned by the participating municipalities, and because one of the municipalities was responsible for the project's finances (as opposed to private financing), there were no private interests involved and the commission was "an instrumentality wholly owned by one or more political subdivisions of the state." See also, *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 918 (1987) (finding that Long Island Railroad satisfies the IRS criterion concerning public ownership interest as opposed to private interests where governmental entity, the Metropolitan Transit Authority, wholly owns the entity in question).

In contrast, the IRS determined that a soil and water conservation district was not an instrumentality of the state or any of its political subdivisions. Rev. Rul. 69-453 1969-2 C.B. 183. There, the district began as an unincorporated association of landowners. Later, it was incorporated with the stated purposes of making surveys and investigations and doing research concerning problems of soil erosion, to cooperate with or enter into agreements with landowners, to develop conservation practices and to assist community conservation commissions and provide soil maps for planning and zoning boards. The district's relationship to the government was by virtue of a memorandum of understanding between the district and the state Commissioner of Agriculture in which both agreed to undertake various tasks in cooperation with each other. In examining the district in light of its test, the IRS based its decision that the district was not a public instrumentality, in part on the fact that the district, a private non-stock corporation, primarily acted on behalf of private individuals in accordance with the purposes stated in its certificate of incorporation. The IRS found that any benefits conferred upon the public were incidental to the district's primary purpose.

Considering the facts before us, we find that HCCs, which are privately created, involve significant private proprietary interests in addition to any interests of the Commonwealth or its subdivisions. For example, it appears that neither the EOEA nor the Commonwealth has the right of ownership with regard to the entire inventory of a HCC's physical property. The EOEA, while having the ability to approve of the budget of a HCC and to conduct audits with regard to the services provided to the EOEA pursuant to its contract, does not have the ability generally to control and dispose of the assets of HCCs. Thus, we conclude that the Commonwealth does not act as an owner of the HCCs, where a key element of ownership is the unfettered ability to control and dispose of that which is owned.

In summary, we recognize (a) that the HCCs' provision of home care services to the elderly has been an essentially governmental function since 1974, (b) that HCCs do receive considerable state funding pursuant to the Home Care Program, and (c) that the Commonwealth has a continuing interest in the expenditure of those funds. Nevertheless, we believe that these factors are outweighed by the fact that HCCs were not created pursuant to statute, regulation or other direct action by the EOEA, and that the EOEA does not exercise the requisite control over HCCs, where HCC board members do not owe their primary loyalty to the EOEA. These latter considerations best support a finding that, notwithstanding extensive regulation of HCCs, HCCs should not be deemed to be instrumentalities of the Commonwealth. Rather, we conclude that HCCs are private entities due to the significant private interests at play in the creation and functioning of the HCCs as

non-profit corporations. As a result of the foregoing conclusion, a member of the board of directors of a HCC is not a public employee by virtue of that position.

We will now apply G.L. c. 268A to those employees of the local COAs, municipal agencies for purposes of the conflict of interest law, who seek to be appointed to positions on the board of directors of a HCC.

2. Application of the Conflict of Interest Law.

Section 17 prohibits a municipal employee from acting as an attorney or agent or from receiving compensation from 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. Under §17(c) therefore, a municipal employee (by virtue of his employment with a COA), will be prohibited from acting as an agent[3/] for the HCC which he serves as a director in connection with matters in which his municipality has a direct and substantial interest.[4/] For example, such a COA employee could not serve as the agent of a HCC in negotiating a subcontract for the provision of certain home care services by the COA. We note that acting as an agent includes appearing before the COA or other municipal agencies in a representational capacity, as well as signing off on documents which will be submitted to the COA or another municipal agency. See *EC-COI-92-18, 85-58; 84-6; 83-78.*

Section 19, in relevant part, prohibits a municipal employee from participating in a particular matter in which a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest. For purposes of §19, the financial interest may be of any magnitude and may be of a positive or negative fashion. Under this section, a COA employee who also serves as a director of a HCC will be prohibited from participating as a COA employee in a matter in which the HCC with which he is affiliated has a financial interest. See e.g., *EC-COI-92-1* (municipal employee cannot vote or otherwise participate in municipal funding decisions affecting non-profit corporation/"community action agency" by which he is employed). We note that participation includes not only final decisions on matters, but discussion, debate, recommendations, advice, etc., which lead to a final decision.[5/]

Finally, §23(c) prohibits a public employee from disclosing confidential information to which he may have access as a public employee. For purposes of the prohibition, confidential information is information which is not available through a public records request. For example, under this section, a COA employee could not disclose to the board of the HCC which he is serving any confidential information to which he may have access as a result of his COA position.

DATE AUTHORIZED: June 7, 1994

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

1/ In G.L. c. 268A, §1(p), "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.

2/ The Court in *MBTA* gives as an example public funds paid to a private health care provider to provide services to public employees. Such payments of public funds are a contractually determined form of employee compensation. Therefore, unlike the case at hand, upon payment, the Commonwealth arguably exercises no continuing interest in the health care provider's expenditure of those funds.

3/ HCC board members do not receive compensation and therefore §17(a) is not relevant based on the facts presented.

4/ We note that §17 will apply somewhat less restrictively if the municipal employment position in the COA has been designated by the municipality's board of selectmen or city council as a special municipal employee position. See G.L. c. 268A, §1(n).

5/ We note that §19 provides that a municipal employee may participate in a matter, notwithstanding the prohibition of that section, if the employee has first made a written disclosure to his appointing authority of the financial interest of the business organization with which he is affiliated, and if the appointing authority makes a written determination that the financial interest involved is not so substantial as to be likely to affect the integrity of the services being provided by the employee to the municipality.

CONFLICT OF INTEREST OPINION
EC-COI-94-8*

FACTS:

You are the Chief of Police in the Town of Falmouth ("Town"). Three police officers would like to provide private security services to two hotels and a private beach association located in the Town. The private work in question will be provided by the officers outside of the Town's established detail system.[1/] The officers would be employed at a rate of between $15 and $22 per hour. Under the Town's detail system, private parties request services from the Police Department and officers are assigned by a rotation system so that all officers have an equal opportunity to work details. You state that some private employers have chosen to hire officers outside of the detail system because they are assured of getting the services of the same officer each time and they need not pay the Town's established detail rate. We note that these officers would not wear police uniforms while engaging in this private work. The officers would assume positions with titles such as "desk clerk" and "security guard".

You have provided us with relevant portions of the Falmouth Police Department Manual which provides the following:

> Duty Status - Although officers of the force are assigned specific hours of regular duty, they shall be considered "on duty" at all times for the preservation of the public peace and the protection of life and property, and shall be prepared to take all reasonable police action to accomplish this purpose. All serious matters of public concern shall receive appropriate attention, even though an officer is not on duty at the time.

QUESTION:

Can officers in the Falmouth Police Department be hired privately for security related detail work outside of the detail system established by the Town?[2/]

ANSWER:

Section 23(b)(1) of G.L. c. 268A will prohibit police officers from providing private security services (in Town) outside of the Town's detail system.

DISCUSSION:

The Town's police officers are "municipal employees" for purposes of the conflict of interest law. As such, they are subject to §23(b)(1), which prohibits a municipal employee from accepting other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office. We have previously held that this provision of G.L. c. 268A seeks to prevent the impairment of a public official's independence of judgment in the performance of his official duties which may result from certain types of private employment. See *EC-COI-94-2* (local building inspector may not provide private home inspection services in town by which he is employed because he may encounter situations in the course of his private work where he is legally required to take action as a public official). In 1985, the Commission found a violation of the conflict of interest law where a municipal police lieutenant simultaneously held a private job as an assistant racetrack security chief. The Commission found that where the racetrack relied on municipal police services, the officer's private duties "necessarily impair[ed] the independence of his judgment in the performance of his official duties". *In re DiPasquale*, 1985 SEC 239; see *In re DeLeire*, 1985 SEC 236.[3/]

In the case of the Town's police officers, pursuant to Department policy, officers are required to take reasonable police action when necessary, even during their off duty hours. It follows that private security employment may impair the independence of an officer's judgment in the performance of his police duties. For example, a situation may arise where a private party employing a police officer to perform private security services desires that the Falmouth police not be involved (because of adverse publicity or otherwise). However, under the Police Department policy concerning preservation of the public peace and protection of property, such a situation may require police action by the officer in question, notwithstanding his off duty status. At that point, the officer would be forced to choose between his public position obligations and the wishes of his private employer. Because an officer cannot anticipate when a situation raising the possibility of divided loyalties may arise, we find that the officers would violate §23(b)(1) by accepting private security-related employment in the town in which they are serving as police officers,[4/] which is not pursuant to the Town's detail system. See *EC-COI-94-2*.[5/]

DATE AUTHORIZED: September 13, 1994

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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/] General Laws c. 44, §53(c) requires that all money received by a municipality for work performed by one of its employees for an off-duty work detail related to an officer's regular employment or for special detail work be deposited into the municipal treasury and be paid out without further appropriation to compensate employees for such services. That statutory provision does not appear, however, to prohibit or otherwise limit private security-related employment arrangements between a police officer and a private party where compensation is paid directly to the officer. At most, it evidences legislative recognition of municipality-sanctioned detail systems.

[2/] Recognizing that the question involves public policy concerns, we sought public comment on this issue. We acknowledge helpful submissions by the Massachusetts Municipal Association, the Wellesley Chamber of Commerce, Inc., the mayor of the City of Everett, John R. McCarthy, and the Massachusetts Chiefs of Police Association. In reviewing the submissions, we found persuasive several public policy arguments against permitting police officers to engage in private security work outside of a municipality's detail system. For example, the Massachusetts Municipal Association raised concern about the lack of guidelines or policies governing an officer's duties in the context of private security work. According to the Municipal Association, under a municipality's established detail system, police chiefs retain some authority to determine whether certain detail work is acceptable. In its submission, the Municipal Association also noted that in engaging in private security work, the officers would likely carry weapons issued by the municipality and would be relying on police training provided by or through the municipality. In light of the foregoing, the Municipal Association was concerned about a municipality's potential liability in the event of an error or other unfortunate incident during the course of an officer's private security services.

[3/] We note that in *EC-COI-89-30*, we found that a municipal police chief would not violate §23(b)(1) by engaging in private security consulting work. In that opinion we acknowledged that the prospective conduct was similar to that discussed in *In re DiPasquale; In re DeLeire, id.* Nevertheless, because the board of selectmen had approved of the police chief's outside employment and provided that there were no material changes in the conditions of the private employment, we found no violation of §23(b)(1). We find the case at hand to be factually dissimilar to *EC-COI-89-30* as the officers here would be providing actual security services for their private employers rather than serving in a consulting role (evaluating the performance of other security providers).

[4/] In its submission, the Massachusetts Chiefs of Police Association notes that private security work in another municipality will not result in an inherently incompatible employment situation. We concur. Nothing in the conflict of interest law will prohibit a police officer from engaging in private security work in a municipality other than the one by which the officer is employed.

[5/] The Massachusetts Chiefs of Police Association suggests that potential problems concerning outside employment by police officers can best be addressed and resolved through departmental rules and regulations. In the case of private security work in a community where existing departmental rules require officers to be "on duty" at all times (such as the rule we have before us today), we find the likelihood of inherent incompatibility to be significant. We therefore conclude that such private security work presents the very type of situation contemplated by the §23(b)(1) restriction. We do not mean, however, to suggest that all types of outside employment (other than security work) would be inherently incompatible, nor do we mean to suggest that municipalities are precluded from establishing standards more restrictive than the conflict of interest law concerning outside employment by their police officers. See *EC-COI-93-23.*

CONFLICT OF INTEREST OPINION
EC-COI-94-9*

FACTS:

You are an elected, uncompensated member of the Hampden-Wilbraham Regional School Committee ("Committee") as a result of Wilbraham town elections. The Committee consists of seven members, five members elected by Wilbraham voters and two members elected by Hampden voters.

You are also an attorney in private practice. You wish to represent private parties, for compensation, before boards and municipal agencies in Wilbraham. The Wilbraham Board of Selectmen is willing to designate members of the Committee as "special municipal employees", but the Hampden Board of Selectmen is not.

QUESTION:

If the Wilbraham Board of Selectmen alone designates you a "special municipal employee", may you represent private parties, for compensation, before Wilbraham boards and municipal agencies?

ANSWER:

Yes, provided that the representation does not involve a matter in which Hampden or the Committee is a party or has a direct and substantial interest.

DISCUSSION:

"Municipal employee" is defined in G.L. c. 268A, §1(g) 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..." (emphasis supplied). For purposes of G.L. c. 268A, "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)(emphasis supplied).

In *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992), the Appeals Court held that a regional school committee was an "instrumentality" of its member municipalities, in that it is a "means" by which the municipalities fulfill "their statutory obligation to provide education". Since *McMann*, it is now clear that a regional school board, like the Committee, is a municipal agency of each of its member towns, here Hampden and Wilbraham. See, e.g., *EC-COI-92-26; 92-27; 92-40.* Thus, by virtue of your membership on the Committee, you are, for purposes of the conflict law, a municipal employee of Hampden and Wilbraham. See *id.*

Section 17(a) of G.L. c. 268A provides that no municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation[1/] from anyone other than the city or town or municipal agency in relation to any particular matter[2/] in which the same city or town is a party or has a direct and substantial interest.

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

These sections of c. 268A, "are designed to prohibit divided loyalties", *EC-COI-92-10*, and reflect "the old maxim that a 'man cannot serve two masters'". *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (Liacos, J. dissenting); *EC-COI-90-15* ("The purpose of §17, prohibiting assistance to others, is 'the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to also be a private employee is a contradiction in terms: it suggests that he is serving two masters.'" [quoting *Buss, The Massachusetts Conflict of Interest Statute: An Analysis*, 45 Boston Univ. Law Rev. 299, 322 (1965)]). Section 17 is applicable whenever an economic benefit is received by the employee for services rendered or to be rendered to a private party "when his sole loyalty should be to the public interest". *Id.* Thus, we have consistently interpreted §17 to prohibit municipal employees from receiving compensation or from representing private parties in matters in which their own town is a party or has a direct and substantial interest, whether or not the interests of the town and the private party are adverse to one another. See, e.g., *EC-COI-88-7* (an assistant city solicitor may not represent criminal defendant in a motion to suppress hearing for compensation because of city's direct and substantial interest in the proceeding); *88-1* (part-time city solicitor may not represent private applicant for zoning variance); *84-117* (selectman may not act as legal representative of trust before municipal board); *84-97* (attorney for city public housing tenants' council may not represent private clients in proceeding before municipal board or in lawsuit challenging board's regulations); see also *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83, 90 (1984) (§17 precludes Edgartown attorney from "acting as attorney for other parties, for compensation, relative to a particular matter in which Edgartown is interested," whether or not parties' interests are adverse).

A "special municipal employee" is a municipal employee "whose position has been expressly classified ... as that of a special employee" by the board of selectmen, board of aldermen, or city council, whichever is applicable, using "standards reasonably related to the stated purposes and terms" of the conflict law. G.L. c. 268A, §1(n). As we have recently observed, the special municipal employee designation "is intended to be reserved for those who in fact have limited contact with their level of government." *EC-COI-93-18* quoting *Buss, supra*, at 314. Among the considerations relevant to the special employee determination are whether or not the municipal employee receives compensation and/or is permitted personal or private work during normal working hours. *Braucher, Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 12 (1964). Special designation is given to ensure that the restrictions contained in the conflict law with regard to regular (typically full-time, compensated) employees will not disable the government from securing the services of capable people for intermittent, often uncompensated work. See *Final Report of the Special Commission*, House Doc. No. 3650 (1962), at p. 12.

A special municipal employee is subject to §17(a) and (c) "only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been the subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves no more than sixty days during any period of three hundred and sixty-five consecutive days." Thus, if you were designated as a special municipal employee in your Committee position, §17 would not prohibit you from representing private parties before municipal boards or agencies with regard to matters others than those in which you participated, or with which the Committee is concerned.[3/]

Here, the proposed private work will involve representation of private parties before Wilbraham municipal boards and agencies other than the Committee. As a regular employee of that town by virtue or your membership on the Committee, §17 would prohibit such representation because you would be "receiving . . . compensation from [some]one other than [Wilbraham] or [the Hampden-Wilbraham Regional School Committee] in relation to [a] particular matter in which the same . . . town [Wilbraham] is a party or has a direct and substantial interest." You tell us, however, that the Wilbraham Board of Selectmen is willing to grant you and the other Committee members special municipal employee status in Wilbraham. That is, the Wilbraham Selectmen have indicated their willingness to invoke the mechanism provided by c. 268A, §1(n), that will secure your uncompensated service on the Committee without overly burdening your ability to practice law in that (your own) community. If you are so designated, we conclude that §17 should apply less restrictively to you with regard to your representation of private parties in Wilbraham.

While the question presented in this case has never been squarely addressed by this Commission, our prior precedent would appear to suggest that in order for §17 to apply less restrictively to you in Wilbraham, each of the Committee's member towns would have to designate you as a special municipal employee. See, e.g., *EC-COI-92-27; 92-40.* (That is not possible here because the Hampden Board of Selectmen has indicated its unwillingness to do so.) In each of these prior cases, however, the municipal employee sought to be compensated in connection with a matter in which the *regional entity* was a party or had a direct and substantial interest. Specifically, in *EC-COI-92-27*, we considered whether a member of a three-town regional high school committee would have a conflict of interest if a private company, in which he was a 50% owner, had a contract with the committee to provide goods and services to the regional high school. We concluded that §20, which 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", prohibited the employee's interest in such a contract, unless an exemption applied. We observed that an exemption would only be available if the employee could be designated a special municipal employee, and that the board of selectmen of each such town would have to grant the special employee designation.

Similarly, in *EC-COI-92-40*, we considered whether Commissioners of the Martha's Vineyard Land Bank Commission, which is composed of a member from each of the towns of Martha's Vineyard and the state Secretary of Environmental Affairs or her designee, could act as real estate brokers in land transactions in which the Land Bank was seeking to purchase or sell property. We also addressed the same question with regard to members of town advisory boards, which, by statute, assist the Land Bank Commission in administering the Land Bank, and which are composed of a representative appointed by the local conservation commission, planning board, board of assessors, board of health, park and recreation committee, board of selectmen and water commission. We concluded that, under §17, a Land Bank Commissioner, whether or not designated as a special municipal employee, would be prohibited from acting as a broker for a private party in such a transaction. Further, where the broker is compensated for services rendered on behalf of the Land Bank, we concluded that receipt of such compensation is prohibited by §20 unless an exemption applied. Noting that "each municipality would ... be an interested party to the transaction as the Land Bank is an instrumentality of each of its member[] [towns]," we concluded that Land Bank Commissioners would have to seek special employee designation and the §20(d) exemption from the boards of selectmen of all of the member towns, and file a disclosure with the Town Clerk in all of the member towns.

We believe the facts you present are distinguishable from *92-27* and *92-40* in that you seek to represent private parties before Wilbraham boards and agencies other than the Committee. In analyzing your situation, we note that the restrictions of §17 apply to particular matters in which the "*same city or town*" by which the municipal employee is employed is a party or has a direct and substantial interest. Thus, by its express terms, §17 ought to apply to a Hampden employee *only* with regard to matters in

which Hampden is a party or has a direct and substantial interest, and we can discern no legitimate policy in c. 268A for ruling otherwise. See *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977) (the language used is the principal source of insight into legislative purpose). However, such will rarely, if ever, be the case where the matter is one pending before a Wilbraham board or agency. Accordingly, we find that a member of a regional school committee (or similar regional body), who has been designated as a special municipal employee in that position by a member city or town, may represent private parties before other municipal boards and agencies of that same city or town (to the extent permitted by §17 as it relates to special employees), as long as neither the regional entity nor any other member municipality is a party to that matter or has a direct and substantial interest in it. If (but only if) such other member city or town is also a party or has a direct and substantial interest in the matter, then the member or employee of the regional body must also receive special municipal employee status in that *other* town to have §17 apply less restrictively to him.[4/] See *EC-COI-92-27; 92-40.*

DATE AUTHORIZED: September 13, 1994

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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/ "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).

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/ A member of a board or committee has official responsibility for matters which are pending in the board or committee "whether or not they have actually worked on the matter and whether or not they actually sat on the Board [or Committee] on a given day." *EC-COI-92-36* (Board member); *93-24; 89-7* (matters pending in an agency or Commission).

4/ However, we point out that even if you are designated as a special municipal employee by both of the member towns, §17 would prohibit you from representing a private party before the Committee, because such a matter would be within your official responsibility as a Committee member. See, *EC-COI-92-40 n. 6;* see also *EC-COI-92-36.*

The text of **EC-COI-94-10** was not available as of the date of publication. The opinion will be included in the 1995 *Rulings*.

The text of **EC-COI-94-11** was not available as of the date of publication. The opinion will be included in the 1995 *Rulings*.

CONFLICT OF INTEREST OPINION
EC-FD-94-1

FACTS:[1/]

You represent two county deputy sheriffs who were the subject of an Ethics Commission opinion, *EC-FD-93-1*. In *EC-FD-93-1*, the Commission found that these deputy sheriffs were appointed by a county sheriff to conduct service of process within the county. Under G.L. c. 37, §3, a sheriff must appoint all deputy sheriffs, who serve at the pleasure of the sheriff. A deputy sheriff is unable to serve process without this appointment by the sheriff and without taking an oath of office.[2/]

In some counties, the process serving function is organized as a separate division in the sheriff's office. The responsibilities of the chief deputy in one such county include: the responsibility for the service and execution of all lawfully issued precepts and other process in that county; responsibility for instituting policies and procedures relative to the service of process in that county; responsibility for the implementation and maintenance of records regarding service of process in that county; responsibility for the day to day management of all deputy sheriffs and administrative staff assigned to the division; and responsibility for the preparation of reports and financial data relative to service of civil process, including the annual financial accounting to the county treasurer, pursuant to G.L. c. 262, §8A. According to the sheriff in that county, the Chief Deputy Sheriff of the Civil Process Division has been designated as a public employee who must file a Statement of Financial Interests ("SFI").

The sheriff of the county in which your clients are deputy sheriffs has stated to us that he expressly authorized the two deputies to perform the civil service of process duties of his sheriff's 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 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.

Your clients formed a private corporation ("Corporation"), pursuant to G.L. c. 156B, and serve as President and Treasurer. They manage the civil processing duties for their county through the Corporation. The division of work between the two deputy sheriffs is close to a 50-50 split and they manage the Corporation 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. The Corporation's employees do not participate in any county benefits system, such as life insurance, retirement, or deferred compensation. The Corporation does not receive money from the county treasury and does not use county office space.

The Chairman of their County Commissioners, pursuant to G.L. c. 268B, §3(j)(11), designated one of these deputy sheriffs as an individual in a major policy making position who is required to file a SFI with the Commission. In *EC-FD-93-1*, the Commission concluded that these deputy sheriffs were properly designated to file SFIs, as they occupy major policy making positions under G.L. c. 268B, §1(l). The Commission concluded that the deputy sheriffs fit within two of the classifications in the definition of "major policy making position": 1) they earned a salary in excess of that earned by a state employee classified in step one of job group XXV of the general salary schedule contained in G.L. c. 30, §46 and they report directly to the sheriff, as the executive or administrative head; and 2) they are also persons who fall within the definition of "persons exercising similar authority".

You have requested reconsideration of *EC-FD-93-1*, on behalf of these deputy sheriffs, on the issue of whether these deputy sheriffs earn a salary within the meaning of G.L. c. 268B, §1(l). During the previous opinion process these deputy sheriffs were represented by different counsel. Their prior counsel, when providing the facts for the prior opinion, informed the Commission that each deputy sheriff received a salary. Consequently, the Commission, in *EC-FD-93-1*, was not presented with the salary issue and did not decide the issue as the Commission accepted the facts which were given to it by the prior legal representative.

You state that the deputy sheriffs' prior legal representative was mistaken when he indicated that the deputy sheriffs received a salary. You have presented us with new facts concerning their compensation arrangement, which you would like this Commission to consider. You state that all of the fees for serving process are paid into the Corporation. The Corporation, in turn, remits a portion of the fee to the individual deputy who served the civil process. However, you state that, from 1991 to 1993, neither deputy received a substantial portion of their income from fees received from process which they personally served. As owners of the Corporation, the vast majority of their income is derived from draws against the profits of the Corporation.

At the beginning of the year, both deputies determine a figure for their draws. This decision is the result of informal discussions between the deputies, and is based upon their business judgment, experience, and personal financial situations. In each of the relevant years, this initial figure was lower than the income which they received from the Corporation at the end of the prior calendar year.

Generally, they try to take a weekly draw in an amount that remains stable for a period of months and may also take lump sum payments during the year. However, their total income decreased from 1991 to 1992 and decreased an additional amount from 1992 to 1993. In 1991, the amount of the draws was increased twice. Both deputy sheriffs withdrew substantial lump sum payments twice, as well as smaller distributions. In 1991, one deputy took a check for 40 of the 52 weeks in the year, and the other deputy took a check for 44 of the 52 weeks.

In 1992, the amount of the draw was increased twice, but the increase was less than the preceding year. Both deputies each took one large lump sum payment in January and each received a weekly pay check for 43 of the 52 weeks in the year. In 1993, they increased the amount of their draws once. There were no lump sum payments. One deputy took a draw for 28 of the 52 weeks and the other deputy took a draw for 27 of the 52 weeks. You indicate that, in all three years, the timing of the payments was established

and adjusted according to both deputies' business judgment about cash flow and profitability.

QUESTION:

Given the additional facts presented, were these deputy sheriffs properly designated as public employees, within the meaning of G.L. c. 268B, §1(o), who are required to file SFIs?

ANSWER:

The deputy sheriffs do not earn a salary within the meaning of G. L. c. 268B, §1(l). The deputy sheriffs do hold a major policy making position however, as they are "persons exercising similar authority", and thus are required to file SFIs.

DISCUSSION:

G.L. c. 268B requires that a public employee, defined as "any person who holds a major policy making position in a governmental body", file a Statement of Financial Interest. G.L. c. 268B, §5; §1(o). The Legislature has defined "major policy making position" as

> the executive or administrative head or heads of a governmental body; all members of the judiciary; any 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 section forty-six of chapter thirty and who reports directly to said executive or administrative head; the head of each division, bureau, or other major administrative unit within such governmental body; and persons exercising similar authority. G.L. c. 268B, §1(l).

In *EC-FD-93-1*, one of our conclusions was that the deputy sheriffs were public employees as they were "persons whose salary[3] equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in G.L. c. 30, §46 and who report directly to said executive or administrative head". In your request for reconsideration you question whether the income earned by these deputy sheriffs is considered salary within the meaning of G.L. c. 268B, §1(l).[4] We are mindful that the Legislature, in G.L. c. 4, §7, has defined the word "salary" for use in the General Laws as "annual salary". We find this definition to be inherently ambiguous as it uses the term to be defined as part of the definition.

Accordingly, we turn to other meanings of the term "salary" and to the legislative history of G.L. c. 268B. See generally, *Commonwealth v. Collett*, 387 Mass. 424, 433 (1982) ("when phraseology of statute is ambiguous, court may look to various steps in its enactment to resolve ambiguity"). When construing statutory language, we begin with the premise that the

> intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous.

Int'l. Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984).

The common dictionary definition of "salary" from Webster's Third New International Dictionary is "fixed compensation paid regularly (as by year, quarter, month or week) for services: stipend; esp. such compensation paid to holders of official, executive, or clerical positions ...." While some courts have applied this dictionary definition in cases where the term "salary" was in dispute, other courts have declined to be bound by a dictionary definition. Compare *Crandon v. United States*, 494 U.S. 152, 171 (1989) (Scalia, J. concurring); *Oregon Education Association v. Eugene School District No. 4J*, 633 P.2d 28, 31 (1981) with *Harlan v. Sweet*, 564 N.E.2d 1192, 1193 (1990); *Bell v. Roberts*, 28 A.2d 715, 717-718 (1942). These latter courts have given a more expansive interpretation to the term "salary" in order to effectuate the purpose and legislative intent of the particular statute in question. See *Harlan*, 564 N.E.2d at 1194 (in statute prohibiting certain public employees from receiving compensation in addition to paid salaries, court held that word salary "encompasses all forms of compensation paid to the public official for performing duties of office" whether called a salary or not); *Bell*, 28 A.2d at 718 (attorney fee payable by client not subject to garnishment by attorney's creditor as the fee is considered salary which is protected from garnishment by statute); *Reynolds v. Reynolds*, 58 P.2d 660, 661-62 (1936) (in divorce action, fee for services received from referee in condemnation suit considered to be salary in statute which prohibits assignment of earnings without consent of spouse).

In order to determine whether the Legislature intended that the term "salary" in G.L. c. 268B be

accorded such an expansive reading, we have examined the evolution of the definition of "public employee" within the legislative history of G.L. c. 268B. In 1978, a citizens' initiative petition, House No. 5151, was filed. The subject of this petition was the creation of a State Ethics Commission and a requirement that certain elected and appointed public employees be required to file financial disclosure statements on a yearly basis. The initiative petition defined "Public employee" as

> any individual who receives compensation at an annual rate of $20,000 or more from the state or county or who exercises official responsibility with regard to : (1) contracting or procuring; (2) administering or monitoring grants or subsidies; (3) planning or personnel; (4) inspecting, licensing, regulating, or auditing any person; (5) any other activity where the official action has an economic impact of greater than a de minimus nature on the interests of any person (emphasis added).

At the same time as House No. 5151 was assigned to a legislative committee, other pieces of legislation concerning the creation of an Ethics Commission and financial disclosure were introduced by legislators. See House No. 1452 (creating an Ethics Commission); House No. 4119; House No. 2088; Senate No. 1089. Each of the bills which defined "public employee" used a different definition. The emphasis in House No. 2088 was upon elected officials and appointed officials at the state, county, and municipal level who had administrative or discretionary authority for the receipt or expenditure of public funds. Senate Doc. No. 1089, in pertinent part, required the following individuals to file financial disclosure statements:

> (a) any elected official of the judicial or executive branch of state government (b) any person appointed under state law to an office where, in the conduct of such office, such person: (1) has administrative and discretionary authority for the receipt or expenditure of public funds; or (2) is charged with the administration of any of the laws of this state; or (3) is engaged in a supervisory, policy-making or policy-enforcing work. (c) any employee of the judicial or executive branch of state government and any employee of the county or municipal levels of government who is paid a salary in excess of $20,000 per year or where, in the conduct of such position, such person: (1) has administrative and discretionary authority for the receipt or expenditure of public funds; or (2) is charged with the administration of any of the laws of this state; or (3) is engaged in a supervisory, policy-making or policy-enforcing work ... (emphasis added).

All of these bills were assigned to the same committee. Subsequently, the Senate amended House No. 1452 by substituting Senate No. 1540. In Senate No. 1540 the definition of "public employee" changed again, and deleted any reference to a salary. In Senate No. 1540, a public employee subject to financial disclosure was "any person who exercises official responsibility on behalf of a governmental body, provided that any person who receives only reimbursement for expenses or who serves only on an advisory board where such board has no authority to expend public funds other than reimbursements for expenses shall not be considered a public employee for purposes of this chapter."

Senate No. 1540 was passed and sent to the House, which substituted another bill, House No. 5715. This House substitution provided a definition of public official and public employee. "Public employee", in relevant part, was defined as "any individual who received compensation from the state or county at an annual rate that is in excess of that of a state employee classified in step 1 of Job Group XXV of the general salary schedule in section forty-six of chapter 30 of the General laws ... ."

"Public official" was defined as "any elected state or county official, any member of any governmental body appointed by the governor or the executive head of any governmental body...." The House and the Senate were unable to agree upon House No. 5715, so a joint conference committee was formed, which produced Senate No. 1626. Senate No. 1626 contains the current definitions of "public employee" and "major policy making position" and was enacted into law as G.L. c. 268B.

A common theme throughout these various bills is an intention by the Legislature that public officials who have responsibility, not only to make policy, but also to implement policy, or who are involved in managerial decision making which affects the interests of the public, or who are responsible for receiving or expending public funds, should disclose certain financial interests to dispel any appearance of a conflict of interest and to instill public confidence in government. See e.g., *Opinion of the Justices*, 375 Mass. 795, 807 (1978). In the legislative history of G.L. c. 268B, the use of a salary requirement in determining who would be required to make a financial disclosure appears to have been a subject of debate and continual change within the two Houses of the Legislature. By the use of the word "salary", as

measured by a certain salary range in the General Laws, the Legislature intended that certain state or county employees who fell within a certain salary level were presumed to have the requisite managerial responsibility necessary in order to require making financial disclosure.

After studying the evolution of the definition of "public employee", we conclude that the change from the word "compensation" to "salary" in the final bill indicates that the legislature specifically chose the more restrictive term over the broader term of compensation, intending the word "salary" to mean a specific form of compensation. See e.g., *Elwood v. State Tax Commission*, 369 Mass. 193, 195 (1975). Our conclusion is buttressed by the fact that, although the Legislature used the terms compensation and salary elsewhere in G.L. c. 268B, §1, it did not use these terms synonymously. For example, in G.L. c. 268B, §1(j), the Legislature listed salary and recompense as separate enumerated terms within the definition of income.[5/] Similarly, in G.L. c. 268B, §1(l) the Legislature contemplated that compensation would include more than salary. We are compelled to define terms consistently, within the same section of a statute. See, e.g., *Attorney General v. School Committee of Essex*, 387 Mass. 326, 337 (1982) ("in construing statute, words or phrases used in one part of statute should be related and considered in light of their context").

In light of our conclusions regarding the legislative intent underlying the definition of public employee in G.L. c. 268B, we conclude that neither deputy earned a salary (as construed in common usage) within the meaning of G.L. c. 268B, §1(l). Their compensation, as you describe it, is not fixed and is not given for personal services. Rather, their income is based upon corporate profits. See *Bell v. Roberts*, 28 A.2d 715, 717-718 (1942) (distinguishing fees and other salary due for personal services from profits based on the labor of others).

Therefore, we conclude that, although both deputies report directly to the sheriff, who is the administrative head of the sheriff's department, they do not meet the requisite salary requirement which would mandate financial disclosure as "persons whose salary equals or exceeds that of a state employee ... and who reports directly to said executive or administrative head."

This revised conclusion however, does not alter our additional conclusion in *EC-FD-93-1*, to wit, that both deputies are persons who hold major policy making positions and are required to file SFIs because they are "persons exercising similar authority". In considering the meaning of "persons exercising similar authority", we are guided by the statutory maxim that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *2A C. Sands, Sutherland Statutory Construction*, §47.17; *Haas v. Breton*, 377 Mass. 591, 595 (1979); *Chwaliszewski v. Board of Appeals of Lynnfield*, 29 Mass. App. Ct. 247, 250 (1990). As we indicated above, although the definition of public employee was in a state of flux throughout the evolutionary process of G.L. c. 268B, a clear legislative intent, that certain high level managerial public employees who exercise powers concerning public policy and public funds or who administer the laws of the Commonwealth should file annual financial disclosures, remained constant throughout the process. We conclude that the Legislature intended to include persons who exercise similar[6/] powers to the persons in positions which are listed in the preceding enumerations.

In the category of "persons exercising similar authority", the Legislature emphasized the authority or powers of the person, not their position within a formal institution. See also, *EC-FD-85-2*. Further, by separating the clause "persons exercising similar authority" from the preceding clauses by a semicolon, the Legislature meant that this clause stand as a separate independent category. See *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 434 (1983); *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 231 (1982). Thus, "persons exercising similar authority" are not required to be serving as judges, or as cabinet-level secretaries or as agency managers. What is necessary is that the person possess the power to exercise authority similar to the other enumerated public employees.

As we concluded in *EC-FD-93-1*, both deputies exercise similar authority to the head of a division, department or other major administrative unit within a governmental body, and, consequently, hold a major policy making position in a governmental body. For purposes of G.L. c. 268B, §1(h), the sheriff's department is a governmental body. The position of deputy sheriff is a governmental appointment which requires the appointee to take an oath of office. G.L. c. 37, §3. The sheriff is 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 and 3. Thus, both of your clients are holding positions as deputy sheriffs within that sheriff's department.

Moreover, neither deputy merely serves process as functionaries. The sheriff has expressly delegated to them a major responsibility of his Office. See G.L. c. 37, §11. Both deputies are responsible for all service and execution of writs and process in their county. The statutory powers given to deputy sheriffs are substantial and affect the economic, personal, and liberty rights of all of the residents in the county. For example, deputy sheriffs are able to seize and sell property, make capias arrests, execute evictions, make attachments, and serve all legal judicial process. See generally, G.L. c. 262, §8; *Commonwealth v. Howe*, 405 Mass. 332, 334 (1989) ("deputy sheriff has authority to act that a private person would not have" in upholding authority of deputy sheriff to make a warrantless stop and arrest). Both deputies have the authority to make and implement the policies and procedures governing how these legal actions will be conducted in Essex County. Administratively, they collect, manage and account for hundreds of thousands of dollars in yearly fees and make the process serving assignments to the sixteen deputy sheriffs who serve under them. Clearly they are functioning at a managerial level similar to a department or division head. The County Commissioners, given the nature of the authority exercised by these deputy sheriffs, were justified in designating them to file SFIs.[7/]

Additionally, in *EC-FD-93-1*, we analogized the deputies' situation to that of the chief deputy sheriff of the civil process division of another county sheriff, where the sheriff has organized the process serving function as a separate division within his office. That chief deputy has been designated as a public employee who must file a SFI. According to the job description filed with his appointing authority, the responsibilities of that chief deputy include: the responsibility for the service and execution of all lawfully issued precepts and other process in that county; responsibility for instituting policies and procedures relative to the service of process in that county; responsibility for the implementation and maintenance of records regarding service of process in that county; responsibility for the day to day management of all deputy sheriffs and administrative staff assigned to the Division; and responsibility for the preparation of reports and financial data relative to service of civil process, including the annual financial accounting to the county treasurer, pursuant to G.L. c. 262, §8A. Both deputies are exercising similar authority to that chief deputy, who is the head of a division within a governmental body.

For the foregoing reasons, we continue to conclude that both deputies are properly designated "public employees" who are required to file SFIs. They fall within the category of "persons exercising similar authority", and therefore occupy a major policy making position within the meaning of G.L. c. 268B, §1(l).

DATE AUTHORIZED: June 10, 1994

[1/] You have provided us with additional facts concerning their compensation arrangement. The remaining facts in this opinion were taken from the facts previously given to the Commission by prior legal counsel, and two other sheriffs.

[2/] Under G.L. c. 37, §3, "A sheriff may appoint deputies, who shall be sworn before performing any official act." Service of process is included within the deputy sheriffs' official acts. Under G.L. c. 37, §11 "Sheriffs and their deputies shall serve and execute, within their counties, all precepts lawfully issued to them and all other process required by law to be served by an officer." See also, G.L. c. 220, §7.

[3/] According to their 1991 and 1992 SFIs, in each year each deputy sheriff reported personal income earned from the Corporation in excess of $100,000.

[4/] In this opinion request you urge us not to rely upon 930 CMR 2.02 (17). We did not rely on 930 CMR 2.02 (17) in reaching our decision in *EC-FD-93-1*. We do not rely upon this regulation in the present opinion, but rather upon an analysis of the statutory language.

[5/] We note that the Legislature did not attach a salary requirement to each of the enumerated phrases in G.L. c. 268B, §1(l). The Legislature specifically placed a salary requirement in only one enumerated phrase: "any 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 section forty-six of chapter thirty and who reports directly to said executive or administrative head." Each of the clauses is separated by a semicolon, which, in grammatical and statutory construction, "usually indicates that each clause is intended to be independent." *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 432 (1983); *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 231 (1982). We also note that the salary provision is the third such clause, indicating that it does not attach to the two preceding clauses and the two clauses which follow it. In addition, the proviso in G.L. c. 268B, §1(o), that the definition of public employee does not include individuals who receive no compensation except for reimbursement, recognizes the possibility that an individual may occupy a major policy making position, as defined by one of the other clauses, but not be compensated in such a position.

[6/] By use of the word "similar" to modify authority, we believe that the legislature recognized that the authority

need not be identical to the authority of other members in the preceding enumerations.

2/ The County Commissioners, not the Ethics Commission, originally designated one deputy to file a SFI. The Commission, in *EC-FD-93-1*, indicated that its conclusions applied equally to the other deputy as he shares responsibility on an equal basis.

CONFLICT OF INTEREST OPINION
EC-FD-94-2

FACTS:

You are a public employee who has been designated to file a Statement of Financial Interest ("SFI") pursuant to G.L. c. 268B, §1(l) and §5(c). G.L. c. 268B, §5 requires that you disclose certain financial information concerning members of your immediate family.

QUESTION:

Does the term "immediate family" as used in G.L. c. 268B, §1(i) include a spouse who does not reside in the reporting person's household?

ANSWER:

No.

DISCUSSION:

G.L. c. 268B requires that a reporting person disclose the identity of immediate family members and certain financial information regarding said family members, such as securities, investments, ownership of real property and certain debts, although amounts or value are not required to be given. G.L. c. 268B, §5(g). The statutory definition of "immediate family" is "a spouse and any dependent children residing in the reporting person's household". G.L. c. 268B, §1(i).

As you have observed, this definition is susceptible to two different meanings, depending on which noun or nouns the clause "residing in the reporting person's household" modifies. Under one interpretation, immediate family would include one's spouse, whether or not the spouse resides with the reporting person and any dependent children who reside in the household. Under the second interpretation, "immediate family" would include a spouse who resides in the household and dependent children who reside in the household. How one defines the members of the immediate family will directly affect the reporting requirements in G.L. c. 268B, §5.

In attempting to ascertain the meaning of this definition, the Commission is mindful of the general canon of statutory and grammatical construction which states that "a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation." *Young's Court, Inc. v. Outdoor Advertising Board*, 4 Mass. App. Ct. 130,133 (1976); *Selectmen of Topsfield v. State Racing Commission*, 324 Mass. 309, 312 (1949); *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 133 (1949); *EC-FD-84-1*. Applying the rule of last antecedent in this case is difficult because it is unclear whether the clause to be modified is "spouse and dependent children" or "dependent children". If the clause only modifies "dependent children", a reporting person would have to include information regarding his or her spouse, whether or not the spouse resided in the reporting person's household. While recognizing that, frequently, legislative history in Massachusetts is scant, we nevertheless turn to a review of the legislative history of G.L. c. 268B for whatever guidance it may provide. In this instance, a review of how the definition of "immediate family" evolved provides insight into the meaning of the definition, and persuades us that the general canon of statutory construction should not be applied because the Legislature intended that the clause "residing in the reporting person's household" modify both spouse and dependent children.

In 1978, a citizen's Initiative Petition, House No. 5151, was filed. The purpose of the petition was to establish an Ethics Commission and to require that certain elected and appointed public employees file financial disclosures on a yearly basis. The Initiative Petition defined immediate family as "a spouse residing in the person's household and dependent children".

At the same time as House No. 5151 was assigned to a legislative committee, other pieces of legislation concerning the creation of an Ethics Commission and financial disclosure were introduced by legislators. House No. 1452 (creating an Ethics Commission); House No. 4119; House No. 2088; Senate No. 1089. The Senate bill (Senate No. 1089) and one House bill (House No. 2088) contained definitions of immediate family. The House bill defined immediate family generally as " the employee's spouse and dependents". Senate No. 1089 did not provide a definition of the term, but required that "the disclosure statement shall also include the same information with respect to (1) the mother and father of the reporting person if their

domicile is the same as that of the reporting person, and (2) with respect to the spouse and dependent children, if any, of the reporting person, if enhancement of the economic interest of the spouse or dependent children would benefit the reporting person ... Said statement shall not apply to a spouse separated from the reporting person" (emphasis added).

Subsequently, a new single draft bill, Senate No. 1540 was passed by the Senate and sent to the House. This bill defined "immediate family" as "a spouse residing in the reporting person's household and dependent children, if any". This language was essentially identical to the language in the Initiative Petition.

In the House, Senate No. 1540 was amended by substituting a new bill, House No. 5715. The House provided an expanded definition of immediate family, which was "a spouse residing in the person's household and dependent children and shall also include the mother and father of the reporting member if their domicile is the same as the reporting member." This House bill did not change the requirement specified in Senate No. 1540, that the spouse reside in the household.

The Senate non-concurred with House No. 5715 and a conference committee was formed to resolve the differences in the House and Senate bills. A final bill, Senate No. 1626, was introduced by the conference committee, and passed by each branch of the Legislature. Senate No. 1626 contained the present definition of "immediate family". During the conference committee stage, the inclusion of one's mother and father was deleted from the definition of immediate family and the clause "residing in the reporting person's household" was moved to the end of the definition.

We believe that, by moving the "residing clause" to the end of the sentence, the Legislature intended that the clause modify both spouse and dependent children. Each of the Senate bills contained the referenced language or language indicating that a spouse who did not reside with the reporting person was not included in the filing requirements. The House, in House No. 5715, also included the referenced language. Each branch of the Legislature, in approving its respective bills, had approved of the language "spouse residing in the reporting person's household". Additionally, the language mirrored the definition in the citizen Initiative Petition. In light of each branch's action, there is no indication that the conference committee, whose role was to reconcile differences in the bills, was inclined to eliminate the proviso that the spouse reside in the household. Rather, it appears that the conference committee intended to keep the previously agreed upon language that the spouse reside in the household, but narrow the definition of "immediate family" by eliminating a reporting person's parents and by limiting disclosure of a child's financial interests to the interests of those dependent children who reside with the reporting person. This is consistent with the general intent manifested in G.L. c. 268B, §5, limiting the nature of the financial interests that are required to be disclosed by immediate family and by not requiring any amount or value to be disclosed regarding those financial interests.

In conclusion, for purposes of the reporting requirements in G.L. c. 268B, "immediate family" includes a spouse who resides in the reporting person's household and any dependent children residing in the reporting person's household.

DATE AUTHORIZED: September 13, 1994

COMMISSION ADVISORY NO. 13

AGENCY

PART A: MUNICIPAL EMPLOYEES ACTING AS AGENT*

INTRODUCTION

Massachusetts General Laws Chapter 268A, §17(c) prohibits municipal employees, including elected officials, from acting as agent (or attorney) for anyone other than their municipality in connection with any matter in which their municipality is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if local employees attempted to "serve two masters" -- i.e., their municipality and a second party -- with different or conflicting interests. Section 17 is based on the principle that public employees should be loyal to their public employer, and where their loyalty to the municipality conflicts with their loyalty to a private party or employer, the municipality's interest must win out.

For instance, on matters involving their city or town, local employees are prohibited from acting as agents for other individuals, corporations, the state or federal government, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §17 include: submitting applications or supporting documentation; preparing documents that

require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §17 not only prohibits municipal employees from representing private parties before their *own* board or agency, but also prohibits them from representing anyone

- before *other* municipal boards and agencies
- before state, county or federal agencies
- to private business or charitable organizations, or
- to private individuals

in any instance where their municipality is a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist local employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for purposes of illustration only. Whether or not §17 is triggered will depend on the specific facts of the situation.

MATTERS IN WHICH THE MUNICIPALITY HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter, local employees should first determine if their municipality is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a municipal agency, board, commission, authority or other body;
- any effort to change municipal regulations, policies or procedures;
- any contract, court case or other legal matter in which the city or town is a party, or otherwise has a direct and substantial interest; or
- any ruling or other action by a federal, county, regional or state agency involving matters which are subject to regulation by the municipality.

If their municipality is *not* a party and does *not* have a "direct and substantial interest" in the matter, the restrictions of §17 will not be triggered, and the local employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the city or town *does* have a "direct and substantial interest" in the matter, the municipal employee must also determine whether an activity would constitute "acting as agent". Section 17(c) prohibits a local employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the municipal employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party

can be considered "acting as agent".

Note that the restrictions of §17(c) are not triggered if the municipal employee is not *representing* someone before a third party. A municipal employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the municipal employee *may* violate §17(a) if he or she accepts pay or other compensation for such activities.)

For example, a municipal employee may *not* submit a grant application to a local agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee *may* advise his neighbor on the application procedures and the content of the application.

A municipal employee may *not* sign and send letters on behalf of a grassroots organization advocating a change in local government regulations, even if the letters are addressed to private individuals. The employee *may* participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A municipal employee may *not* attend a community meeting and speak on behalf of a private company, if the city or town is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee *may* help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that municipal employees may not act as an agent in matters of concern to their municipalities.

PERMITTED CONSTITUENCY WORK

Municipal employees may generally act as agents for others if their municipal jobs authorize it. This

applies to both appointed and elected officials performing constituency work.

Certain government jobs authorize employees to act as the agents for private parties concerning matters of interest to the municipality. For example, a Housing Authority employee's responsibility may include advocating on behalf of low-income citizens to increase the number of local affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a prohibited act of agency. Generally, a municipal employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the municipal employee's job responsibilities;
- the municipal employee receives no compensation beyond his or her regular salary;
- the municipal employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the municipal employee is associated;
- the municipal employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the city or town.

On the other hand, if a municipal employee represents a relative, his or her employer or a business associate before local agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will *not* be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes *only* those activities "within the proper discharge of official duties". An economic development specialist would *not* be performing permissible constituency work if she called the Tax Assessor's Office to discuss her friend's tax assessment, since the tax assessment has nothing to do with the development specialist's official duties. Alternatively, if a Council on Aging employee pursues a citizen's complaint against a service provider, this *is* a permissible constituency service since the provider is contracted with and supervised by the Council on Aging.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " *EC-COI-83-137.* Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties", the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " *Id.*

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties", the employee should seek legal advice from his or her city or town counsel or the Legal Division of the State Ethics Commission.

SPECIAL MUNICIPAL EMPLOYEES

"Special municipal employees" may generally act as agents before municipal agencies other than their own.

Municipal employees are considered "special municipal employees" if:

a. their municipal position is uncompensated, or they work for the municipality for less than 800 hours a year, or they hold a contract or position which allows for private employment during "normal working hours";
b. they hold a position which the city council, board of selectmen, or board of aldermen have designated to be a "special municipal employee" position; *and*
c. they are not the Mayor, nor a member of the city council, board of selectmen or board of aldermen.

Note that in municipalities with a population of 10,000 or less, selectmen are automatically designated as "special municipal employees".

If a municipal employee holds a job that has been designated a "special municipal employee" position, the employee may represent private parties on matters of direct and substantial interest to their city or town *if*:

a. the employee has not participated at any time as a municipal employee or special municipal employee in the matter;
b. the matter is not and has not been the subject of the employee's official responsibility; and

c. the matter is not pending in the municipal agency or board for which the employee works.

There is one narrow instance where a special municipal employee may represent a private party before the board he or she works for – the special municipal employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special municipal employees" may generally assist with work under a contract with the municipality, if their appointing authority certifies in writing that the interest of the municipality requires such aid or assistance (a copy of this certification must be filed with the city or town clerk, and is a public record).

Also note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations; drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be considered under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your city or town counsel or the Legal Division of the State Ethics Commission.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 17 also allows municipal employees to assist anyone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, municipal employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is *not* available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The conflict of interest law recognizes that municipal employees may be asked to assist members of their immediate families in dealing with local government matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed municipal employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A municipal employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

a. the municipal employee must be appointed (not elected);
b. the municipal employee must be representing a family member or a person for whom the employee is a fiduciary on a matter in which the employee did not participate (as a local official), and for which the employee did not have official responsibility; and
c. the municipal employee must receive written permission from the official who appointed the employee to his or her position *before* the action occurs.

TESTIMONY UNDER OATH

Municipal employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a *paid* witness.

MATTERS OF GENERAL LEGISLATION

Municipal employees may represent others on matters of general legislation, and home-rule petitions. For example, municipal employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation, or legislation related to their municipalities' governmental organization, powers, duties, finances or property. Note that matters involving *other* types of "special legislation", municipal regulations or administrative policies are *not* eligible for this exemption.

For more information about this exemption, or for a determination as to whether a bill is "general

legislation" or "special legislation", contact your city or town counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's *own* behalf is not considered acting as agent, a municipal employee may always represent his or her own interests or points of view. For instance, a local employee may file her own grant application, or represent himself before the Zoning Appeals Board.

Note, however, that in matters involving the city or town, a municipal employee may *not* act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

Municipal employees may represent themselves before their own agencies, although they may *not* take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

Municipal employees may also express their personal points of view concerning a matter pending before local government agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, municipal employees must *also* observe §19 of the conflict law, which prohibits municipal employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their city or town counsel or the Legal Division of the State Ethics Commission at (617) 727-0060.

AUTHORIZED: January 6, 1988
REVISED: July 12, 1994

* Part B of Advisory 13 covers State employees; Part C covers County employees.

COMMISSION ADVISORY NO. 13

AGENCY

PART B: STATE EMPLOYEES ACTING AS AGENT*

INTRODUCTION

Massachusetts General Laws Chapter 268A, §4(c) prohibits state employees, including elected officials, from acting as agent (or attorney) for anyone other than the Commonwealth on any matter in which the Commonwealth is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if state employees attempted to "serve two masters" – i.e., the state and a second party -- with different or conflicting interests. Section 4 is based on the principle that "public employees should be loyal to the state, and where their loyalty to the state conflicts with their loyalty to a private party or employer, the state's interest must win out." *EC-COI-82-176.*

For instance, on matters involving the Commonwealth, state employees are prohibited from acting as agents for other individuals, corporations, municipal governments, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §4 include: submitting applications or supporting documentation; preparing documents that require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §4 not only prohibits state officials from representing private parties before their *own* board or agency, but also prohibits them from representing anyone

- before *other* state boards and agencies
- before municipal or federal agencies
- to private business or charitable organizations, or
- to private individuals

in any instance where the Commonwealth is a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist state employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for the purposes of illustration only. Whether or not §4 is triggered will depend on the specific facts of the situation.

MATTERS IN WHICH THE STATE HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter, state employees should first determine if the Commonwealth is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a state agency, board, commission, authority or other body;
- any effort to change state regulations, policies or procedures;
- any contract, court case or other legal matter to which the Commonwealth is a party, or otherwise has a direct and substantial interest; or
- any ruling or other action by a federal, county, regional or municipal agency involving matters which are subject to regulation by the Commonwealth.

If the Commonwealth is *not* a party to and does *not* have a "direct and substantial interest" in the matter, the restrictions of §4 will not be triggered, and the state employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the Commonwealth *does* have a "direct and substantial interest" in the matter, the state employee must also determine whether an activity would constitute "acting as agent". Section 4(c) prohibits a state employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the state employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party

can be considered "acting as agent".

Note that the restrictions of §4(c) are not triggered if the state employee is not *representing* someone before a third party. A state employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the state employee may violate §4(a) if he or she accepts pay or other compensation for such activities.)

For example, a state employee may *not* submit a grant application to a state agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee *may* advise his neighbor on the application procedures and the content of the application.

A state employee may *not* sign and send letters on behalf of a grassroots organization advocating a change in state regulations, even if the letters are addressed to private individuals. The employee *may* participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A state employee may *not* attend a community meeting and speak on behalf of a private company, if the Commonwealth is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee *may* help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that state employees may not act as agent in matters of concern to the Commonwealth.

PERMITTED CONSTITUENCY WORK

State employees may generally act as agents for others if their state jobs authorize it. This applies to both appointed and elected officials performing constituency work.

Certain state jobs authorize employees to act as the agent for private parties concerning matters of interest to the state. For example, an Executive Office of

Communities and Development employee's responsibility may include advocating on behalf of low-income citizens to increase the number of local affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a prohibited act of agency. Generally, a state employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the state employee's job responsibilities;
- the state employee receives no compensation beyond his or her regular salary;
- the state employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the state employee is associated;
- the state employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the geographic region under the state employee's official jurisdiction (e.g., a legislative district or a service district).

On the other hand, if a state employee represents a relative, his or her employer or a business associate before state agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will *not* be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes *only* those activities "within the proper discharge of official duties". An economic development specialist would *not* be performing permissible constituency work if she called the Appellate Tax Board to lobby for her neighbor's tax abatement, since the tax abatement has nothing to do with the development specialist's official duties. Alternatively, if a Rate Setting Commissioner pursues a provider's complaint against a regulator, this *is* a permissible constituency service since the regulator is hired and ultimately supervised by the Rate Setting Commission.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " *EC-COI-83-137.* Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties", the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " *Id.*

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties", the employee should seek legal advice from his or her agency's legal counsel or the Legal Division of the State Ethics Commission.

SPECIAL STATE EMPLOYEES

"Special state employees" may generally act as agents before state agencies other than their own. A state employee is considered a "special state employee" if:

a. he is not paid or otherwise compensated for his state position; or
b. he holds an appointed position which, by terms of the employment contract or the position classification, permits personal or private employment during normal working hours (a disclosure of this permission or classification must be filed with the Ethics Commission before the employee begins such "outside" employment); or
c. he holds an appointed position and has not been compensated by the state for more than 800 hours of work during the previous 365 days.

If a state employee holds a job that qualifies as a "special state employee" position, the employee may represent private parties on matters of direct and substantial interest to the state if:

a. the employee has not participated at any time as a state employee or special state employee in the matter;
b. the matter is not and has not been the subject of the employee's official responsibility; and
c. the matter is not pending in the state agency or board for which the employee works.

There is one narrow instance where a special state employee may represent a private party before the board he or she works for -- the special state employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special state employees" may generally assist with work under a contract with the

Commonwealth, if their appointing authority certifies in writing that the interest of the Commonwealth requires such aid or assistance (a copy of this certification must be filed with the Ethics Commission).

Note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations; drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be considered under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your agency's legal counsel or the Legal Division of the State Ethics Commission.

STATE LEGISLATORS

State legislators are generally allowed to act as agents before state boards, provided that they are not paid for the representation.

Legislators *are* allowed to be paid to represent others in court proceedings, quasi-judicial proceedings, and any instance where the particular matter before the state agency is "ministerial" in nature.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 4 also allows state employees to assist anyone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, appointed state employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is *not* available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The conflict of interest law recognizes that Commonwealth employees may be asked to assist members of their immediate families in dealing with state matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed state employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A state employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

a. the state employee must be appointed (not elected);
b. the state employee must be representing a family member or one for whom the employee is a fiduciary on a matter in which the employee did not participate (as a state official), and for which the employee did not have official responsibility; and
c. the state employee must receive written permission from the official who appointed the employee to his or her position *before* the action occurs.

TESTIMONY UNDER OATH

State employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a *paid* witness.

HOLDING MUNICIPAL POSITIONS

State employees may also hold elected and appointed municipal positions, but are prohibited from acting (in their municipal positions) on any matter within the official jurisdiction of their own state agency.

STATE INCOME TAX RETURNS

State employees -- except for employees of the Department of Revenue -- may be paid for assisting in the preparation, filing or amendment of state income tax returns.

MATTERS OF GENERAL LEGISLATION

State employees may represent others on matters of general legislation and certain home-rule petitions. For example, state employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation. Note that matters

involving "special legislation", state regulations or administrative policies are *not* eligible for this exemption.

For more information about this exemption, or for a determination as to whether a bill is "general legislation" or "special legislation", contact your agency's legal counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's *own* behalf is not considered acting as agent, a state employee may always represent his or her own interests or points of view. For instance, a state employee may file her own grant application, or represent himself before the Appellate Tax Board.

Note, however, that in matters involving the Commonwealth, a state employee may *not* act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

State employees may represent themselves before their own agencies, although they may *not* take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

State employees may also express their personal points of view concerning a matter pending before state agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, state employees must *also* observe §6 of the conflict law, which prohibits state employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 727-0060.

AUTHORIZED: July 12, 1994

* Part A of Advisory 13 covers Municipal employees; Part C covers County employees.

COMMISSION ADVISORY NO. 13

AGENCY

PART C: COUNTY EMPLOYEES ACTING AS AGENT*

INTRODUCTION

Massachusetts General Laws Chapter 268A, §11 prohibits county employees, including elected officials, from acting as agent (or attorney) for anyone other than the County on any matter in which the County is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if county employees attempted to "serve two masters" -- i.e., the County and a second party -- with different or conflicting interests. Section 11 is based on the principle that public employees should be loyal to the government, and where their loyalty to the government conflicts with their loyalty to a private party or employer, the government's interest must win out.

For instance, on matters involving their County, county employees are prohibited from acting as agents for other individuals, corporations, municipal governments, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §11 include: submitting applications or supporting documentation; preparing documents that require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §11 not only prohibits county officials from representing private parties before their *own* board or agency, but also prohibits them from representing anyone

- before *other* County boards and agencies
- before municipal or federal agencies
- to private business or charitable organizations, or
- to private individuals

in any instance where the County a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist county employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for the purposes of illustration only. Whether or not §4 is triggered will depend on the specific facts of the situation.

MATTERS IN WHICH THE COUNTY HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter, county employees should first determine if the County is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a county agency, board, commission, authority or other body;
- any effort to change county regulations, policies or procedures;
- any contract, court case or other legal matter to which the County is a party, or otherwise has a direct and substantial interest; or
- any ruling or other action by a federal, county, regional or municipal agency involving matters which are subject to regulation by the County.

If the County is *not* a party to and does *not* have a "direct and substantial interest" in the matter, the restrictions of §11 will not be triggered, and the county employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the County *does* have a "direct and substantial interest" in the matter, the county employee must also determine whether an activity would constitute "acting as agent". Section 11(c) prohibits a county employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the county employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party

can be considered "acting as agent".

Note that the restrictions of §11(c) are not triggered if the county employee is not *representing* someone before a third party. A county employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the County employee may violate §11(a) if he or she accepts pay or other compensation for such activities.)

For example, a county employee may *not* submit a grant application to a county agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee *may* advise his neighbor on the application procedures and the content of the application.

A county employee may *not* sign and send letters on behalf of a grassroots organization advocating a change in county regulations, even if the letters are addressed to private individuals. The employee *may* participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A employee may *not* attend a community meeting and speak on behalf of a private company, if the County is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee *may* help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that county employees may not act as an agent in matters of concern to their County.

PERMITTED CONSTITUENCY WORK

County employees may generally act as agents for others if their county jobs authorize it. This applies to both appointed and elected officials performing constituency work.

Certain county jobs authorize employees to act as the agent for private parties concerning matters of

interest to the County. For example, a County Housing Authority employee's responsibility may include advocating on behalf of low-income citizens to increase the number of affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a prohibited act of agency. Generally, a county employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the county employee's job responsibilities;
- the county employee receives no compensation beyond his or her regular salary;
- the county employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the county employee is associated;
- the county employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the County.

On the other hand, if a county employee represents a relative, his or her employer or a business associate before county agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will *not* be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes *only* those activities "within the proper discharge of official duties". An economic development specialist would *not* be performing permissible constituency work if she called the County Sheriff's Office regarding a criminal investigation, since the investigation has nothing to do with the development specialist's official duties. Alternatively, if a county Housing Authority pursues a resident's complaint against a maintenance contractor, his *is* a permissible constituency service since the contractor is hired and ultimately supervised by the Housing Authority.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " *EC-COI-83-137.* Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties", the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " *Id.*

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties", the employee should seek legal advice from his or her agency's legal counsel or the Legal Division of the State Ethics Commission.

SPECIAL COUNTY EMPLOYEES

"Special county employees" may generally act as agents before county agencies other than their own. A county employee is considered a "special county employee" if:

a. he is not paid or otherwise compensated for his county position; or
b. he holds an appointed position which, by terms of the employment contract or the position classification, permits personal or private employment during normal working hours (a disclosure of this permission or classification must be filed with the Ethics Commission and the appropriate Office of the County Commissioners before the employee begins such "outside" employment); or
c. he holds an appointed position and has not been compensated by the County for more than 800 hours of work during the previous 365 days.

If a county employee holds a job that qualifies as a "special county employee" position, the employee may represent private parties on matters of direct and substantial interest to the County if:

a. the employee has not participated at any time as a county employee or special county employee in the matter;
b. the matter is not and has not been the subject of the employee's official responsibility; and
c. the matter is not pending in the county agency or board for which the employee works.

There is one narrow instance where a special county employee may represent a private party before the board he or she works for -- the special county employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special county employees" may generally assist with work under a contract with the County, if their appointing authority certifies in writing that the interest of the County requires such aid or assistance (a copy of this certification must be filed with the State Ethics Commission).

Note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations; drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your agency's legal counsel or the Legal Division of the State Ethics Commission.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 11 also allows county employees to assist someone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, appointed county employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is not available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The conflict of interest law recognizes that county employees may be asked to assist members of their immediate families in dealing with county matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed county employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A county employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

a. the county employee must be appointed (not elected);
b. the county employee must be representing a family member or one for whom the employee is a fiduciary on a matter in which the employee did not participate (as a county official), and for which the employee did not have official responsibility; and
c. the county employee must receive written permission from the official who appointed the employee to his or her position *before* the action occurs.

TESTIMONY UNDER OATH

County employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a *paid* witness.

HOLDING MUNICIPAL POSITIONS

County employees may also hold elected and appointed municipal positions, but are prohibited from acting (in their municipal positions) on any matter within the official jurisdiction of their own county agency.

MATTERS OF GENERAL LEGISLATION

County employees may represent others on matters of general legislation and certain home-rule petitions. For example, county employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation, or legislation related to a municipality's governmental organization, powers, duties, finances or property. Note that matters involving *other* types of "special legislation", regulations or administrative policies are *not* eligible for this exemption.

For more information about this exemption, of for a determination as to whether a bill is "general legislation" or "special legislation", contact your agency's legal counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's *own* behalf is not considered acting as agent, a county employee may always represent his or her own interests or points of view. For instance, a county employee may file her own grant application, or represent himself before the County Commissioners.

Note, however, that in matters involving their County, a county employee may *not* act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

County employees may represent themselves before their own agencies, although they may *not* take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

County employees may also express their personal points of view concerning a matter pending before county agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, county employees must *also* observe §13 of the conflict law, which prohibits county employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 727-0060.

AUTHORIZED: July 12, 1994

* Part A of Advisory 13 covers Municipal employees; Part B covers State employees.

State Ethics Commission
Room 619
One Ashburton Place
Boston, MA 02108
(617) 727-0060

State Ethics Commission
One Ashburton Place
Room 619
Boston, MA 02108

(617) 727-0060