RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1995

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission
One Ashburton Place, Room 619
Boston, Massachusetts 02108
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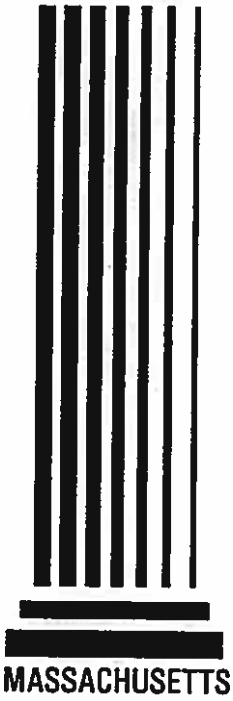

MASSACHUSETTS

The Massachusetts State Ethics Commission

Included in this publication are:

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1995.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1995 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 1995.** 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 1995 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 John Ruffo - Former Worcester Senior Plumbing Inspector John Ruffo was fined $2,500 for violating the state's conflict of interest law. Ruffo admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by issuing 16 plumbing permits for work performed by his son, Mark Ruffo, and by officially inspecting his son's work on nine occasions. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an immediate family member.

Public Enforcement Letter 95 - 2 (In the Matter of Clifford H. Marshall) - Norfolk County Sheriff Clifford H. Marshall was cited for combining official swearing-in ceremonies for deputy sheriffs with political campaign fundraising events on three occasions. According to a Public Enforcement Letter, evidence developed during the Commission's investigation indicated that Marshall "made the ceremonial swearing-in of deputies the ostensible official purpose of three campaign fundraising events." G.L. c. 268A, §23(b)(2) prohibits public officials from using their official positions to obtain unwarranted privileges of substantial value not properly available to similarly situated individuals. "The combining of the swearing-in ceremony with the fundraiser imbued the fundraiser with a sense of credibility (as an official event) and fostered an obligation to attend on the part of solicitees that otherwise would have been lacking if it had been merely a bare bones political fundraiser. Accordingly, [Marshall's] use of the swearing-in ceremony as an attraction for [his] fundraisers was an unwarranted privilege of substantial value," according to the Letter. G.L. c. 268A, §23(b)(3) 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. Marshall's "solicitation of political contributions from current deputies in conjunction with the swearing-in of new deputies, especially given the extraordinarily large number of deputies appointed ... and the apparent lack of public utility of many of those deputies, would cause a reasonable person to conclude that [Marshall] appoint[s] political supporters as deputy sheriffs and expect[s] those deputies to continue to contribute to [Marshall's] campaign fund after their appointment."

Public Enforcement Letter 95 - 3 (In the Matter of Linda Marinelli) - Former Chair of the Oak Bluffs Board of Selectmen Linda Marinelli was cited for participating in her daughter's application for a taxi license. According to a Public Enforcement Letter, when Marinelli abstained from participating in the matter, the license application was denied by a split vote of the other two selectmen. One or two days later, Marinelli encountered Selectman Steven Kenney and objected to his vote to deny the license; the following week, with Marinelli again abstaining, the Board reconsidered its action and granted the license, according to the Letter. Section 23(b)(2) of the Massachusetts conflict of interest law prohibits public officials from using their official positions to obtain unwarranted privileges of substantial value not properly available to similarly situated individuals. According to the Letter, the Commission found reasonable cause to believe that Marinelli used her official position to obtain an unwarranted privilege, i.e., the opportunity to discuss the license application with the selectman who had voted against it. G.L. c. 268A, §23(b)(3) generally 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. The Commission found reasonable cause to believe that Marinelli's actions in approaching Kenney would cause a reasonable person to believe that Marinelli would be improperly influenced by her relationship with her daughter, the Letter said.

In the Matter of Geoffrey Newton - Royalston Building Inspector Geoffrey Newton was fined $500 for violating the state's conflict of interest law. Newton admitted in a Disposition Agreement that he violated the law by issuing nine building permits to his brother, Wayne Newton. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an immediate family member.

In the Matter of Katherine Doughty - Former state Insurance Commissioner Katherine Doughty was fined $2,000 for routinely accepting meals and entertainment from insurance company lobbyists and others who had an interest in matters under her jurisdiction. According to a Disposition Agreement signed by Doughty and the Commission, Doughty violated the conflict law by "accepting benefits in meals and entertainment on a regular basis from individuals who had an interest in matters before the Division of Insurance, all while Doughty was in a position to take official action which could benefit the givers, and without notifying her appointing authority." Doughty accepted meals or other entertainment from insurance company representatives about three times a week while she was Insurance Commissioner, the

Agreement said. "A reasonable person would conclude that such interested parties can unduly enjoy the Insurance Commissioner's favor in the performance of her official duties when matters concerning the interested parties come before the Division of Insurance," the Agreement stated. Section 23(b)(3) of the conflict law generally prohibits public officials from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy her favor in the performance of her official duties.

In the Matter of Edward J. Kennedy, Jr. - Middlesex County Commissioner Edward J. Kennedy, Jr. was fined $500 for borrowing a county copying machine for political campaign purposes. Kennedy admitted in a Disposition Agreement that he violated G.L. c. 268A, §23(b)(2) in July 1994, when he borrowed the copying machine to duplicate voter lists in the City of Lowell. According to the Agreement, Kennedy asked two county employees to move the copier from a county office in Cambridge to Lowell City Hall. When they got the machine to the Lowell Elections Office, the employees were not able to get the copier to work, and it was returned to the county office unused. Kennedy then paid $115 to have the voter list copied at a commercial copier. Section 23(b)(2) of the Massachusetts conflict of interest law prohibits a public official from using his official position to obtain an unwarranted privilege of substantial value, such as the use of public resources for private or political purposes.

In the Matter of Joseph Duggan - Former Hull Lighting Plant Acting Manager Joseph Duggan was fined $500 for violating the state's conflict of interest law by acting, in his official capacity, in matters affecting his sons' and his brother's employment by the Plant. Duggan admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by: recommending that his son Steven be promoted to the position of lead lineman; approving $3,177 worth of overtime for his son Steven, and $661.74 worth of overtime for his son Matthew; and hiring his brother Robert to act as lead lineman after a severe storm in March 1993. "Robert earned $1,316.56 for 36 hours of work at that time. Duggan hired Robert for these duties even though two other linemen had recently been laid off for lack of work," the Agreement said. Section 19 generally prohibits municipal officials from participating in any matter affecting the financial interests of an immediate family member. According to the Agreement, Duggan was advised by town counsel in January 1993 that he could not participate in any Plant personnel matters involving his sons' employment.

In the Matter of Elaine Bush - Millbury Athletic Director Elaine Bush admitted that she violated G.L. c. 268A, §19 in 1994, when she participated in the hiring process by which her daughter was selected as the Millbury High School girls' basketball coach. In a Disposition Agreement with the Ethics Commission, Bush was fined $250 for the violation. According to the Agreement, prior to 1994, the annual posting of the coaching position was "usually *pro forma*, since most coaches are reappointed. The incumbent basketball coach had held the position for the previous 12 years." When the position was posted in 1994, Bush and the Millbury High School principal interviewed the four candidates who applied for the job. Bush was present for her daughter's interview but did not ask any questions. Bush and the principal then decided to forward the names of all four candidates to the Millbury school superintendent for consideration; they did not rank the candidates, and the superintendent selected Bush's daughter for the coaching job. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an immediate family member.

In the Matter of John Beukema - Former Douglas Zoning Board of Appeals member and self-employed architect John Beukema was fined $1,000 for acting as the architect on a project that required Zoning Board approval. Beukema admitted in a Disposition Agreement that he violated G.L. c. 268A, §§ 17(a) and 17(c) in 1991 and 1992, when he was hired by Douglas Environmental Associates, Inc., through Browning-Ferris Industries, to design a recycling facility as part of a landfill the company proposed to build in the town of Douglas. According to the Agreement, Beukema mistakenly believed that the arrangement would not violate the conflict law because members of the Douglas Zoning Board were designated "special municipal employees", and he believed that the "special" status allowed him to act as an architect before the Zoning Board. However, §17(a) of the conflict law generally prohibits "special municipal employees" from accepting compensation from private parties in connection with matters under their official jurisdiction. Section 17(c) of the conflict law generally prohibits "special municipal employees" from representing private parties in connection with matters under their official jurisdiction.

Public Enforcement Letter 96-1 (In the Matter of Vincent D. Barletta) - The Ethics Commission cited Vincent D. Barletta, President of Douglas Environmental Associates, Inc., for paying former Douglas Zoning Board of Appeals member John Beukema a total of about $3,000 to design a recycling

facility that required Zoning Board approval. Section 17(b) prohibits anyone from offering compensation to a "special municipal employee" in connection with matters under the municipal employee's official jurisdiction.

In the Matter of James Gibney - Fall River Superintendent of Schools James Gibney was fined $1,000 for violating the state's conflict of interest law between 1990 and 1994. Gibney admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 when, as Assistant Superintendent of Schools, he participated in his daughter's hiring as a substitute teacher. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an immediate family member.

In the Matter of William P. Pearson - Byfield Water Commission member William P. Pearson was fined $2,000 and required to disgorge an additional $1,700 worth of economic benefit he had received in violation of the conflict law. Pearson admitted in a Disposition Agreement that he repeatedly violated G.L. c. 268A, §19 by acting as Water Commissioner on matters affecting Pearson Landscaping, Pearson Hardware and Highfields Realty, while he owned 50% of each business. Section 19 generally prohibits a municipal official from acting in his official capacity on matters in which he has a financial interest. Pearson also admitted that he violated G.L. c. 268A, §§ 17(a) and 17(c) by representing Pearson Landscaping in discussions with the Water District Superintendent in connection with Byfield Water District contracts. Section 17(a) generally prohibits a municipal official from accepting compensation in connection with any matter pending before the municipality. Section 17(c) generally prohibits a municipal official from acting as agent for a private party in connection with any matter pending before the municipality.

In the Matter of George Traylor - Lobbyist George Traylor was fined $2,000 for illegally entertaining two Massachusetts legislators during a December 1992 trip to Puerto Rico. Traylor admitted in a Disposition Agreement that he violated §3(a) of the conflict law when he treated then-state representatives John Cox and Francis Mara and their spouses to a fishing excursion on December 13, 1992. According to the Agreement, Traylor and another lobbyist chartered a 40-foot fishing vessel for $766, splitting the cost between them. Section 3(a) of the Massachusetts conflict of interest law, General Laws Chapter 268A, prohibits the giving of gifts worth $50 or more to a public employee -- including state legislators -- "for or because of any official act performed or to be performed by such an employee."

In the Matter of Ralph Parisella - Former Beverly Licensing Board member Ralph Parisella was fined $1,000 for using his official position to further his own private business interests. Parisella admitted in a Disposition Agreement that he violated G.L. c. 268A, §§ 23(b)(2) and 23(b)(3) in 1992, when he used his position as a Licensing Board member to retain customers of Ralph's Ice, a company owned by Parisella and his son. According to the Agreement, at the time of the violations, another member of the Licensing Board had a history of opposing the use of outside signs on liquor stores, which local retailers considered important to their business. Parisella approached the owners of four Beverly stores, who were customers of Ralph's Ice but had decided to change ice suppliers, and threatened to not intercede with his colleague on the sign issue if they did not remain clients of Ralph's Ice; the owners decided to remain customers of Ralph's Ice as a result of their conversations with Parisella, the Agreement said. Section 23(b)(2) of the conflict law prohibits municipal officials and employees from using their positions to obtain unwarranted privileges of substantial value for themselves or for others. According to the Agreement, "Parisella used his position as a Board member to retain the business ... for himself and his son as owners of Ralph's Ice. ... In so using his official position, Parisella violated §23(b)(2)." Section 23(b)(3) of the conflict 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. By implying to his customers that "their failure to continue doing business with Ralph's Ice would affect his actions as a Board member," Parisella acted in a manner which would cause a reasonable person "to conclude that Parisella, as a Board member, would officially favor people doing business with Ralph's Ice," the Agreement said.

In the Matter of Jerold Gnazzo- Registrar of Motor Vehicles Jerold Gnazzo was fined $500 for asking a state law enforcement official to provide him with information about an Environmental Strike Force investigation involving a company headed by Gnazzo's wife. In a Disposition Agreement, Gnazzo admitted that he violated G.L. c. 268A, §4(c) by making "inquiries to the [Division of Environmental Law Enforcement] director in relation to the investigation on behalf of his wife and the Krisco Corporation." Section 4(c) of the Massachusetts conflict of interest law, G.L. c. 268A, prohibits a state employee from acting as agent for a private party in connection with a particular matter in which the Commonwealth has a direct and substantial interest. "Section 4 reflects the

maxim that a person cannot serve two masters. Whenever a state employee acts on behalf of private interests in matters in which the state also has an interest, there is a potential for divided loyalties, the use of insider information and favoritism, all at the expense of the state," the Agreement states. "An inquiry into an ongoing sensitive criminal investigation raises such concerns, especially when made by a high ranking public official" like the Registrar.

In the Matter of Lee Robinson - Former Provincetown Selectman Lee Robinson was cited for invoking the selectmen's "*ex officio*" status on municipal boards in order to participate in the consideration of his own application for a parking lot permit. Robinson admitted in a Disposition Agreement that his actions violated G.L. c. 268A, §23(b)(2), which prohibits a municipal official from using or attempting to use his position to obtain an unwarranted privilege of substantial value. "The ability to speak during ZBA and Licensing Board deliberations on his own application when others could not was a privilege of substantial value because it could enhance Robinson's chances of obtaining the potentially valuable permit and license he was seeking. The opportunity for further advocacy was not properly available to other permit/ license applicants," according to the Agreement. The Agreement resolved charges brought against Robinson in May 1995 by the Commission's Enforcement Division. The Commission did not impose a fine in the case because "Robinson's comments were spontaneous and of limited duration. Furthermore, Robinson is no longer a selectman nor does he now have any financial interest in the parking lot," according to the Agreement.

In the Matter of Massachusetts Medical Society - The Massachusetts Medical Society was fined $45,000 for illegally entertaining Massachusetts legislators between July 1989 and April 1993. The corporation admitted, in a Disposition Agreement, that it violated G.L. c. 268A, §3(a) by providing approximately $15,000 in illegal gratuities to state legislators through its lobbyist, Andrew Hunt. Section 3(a) of the conflict of interest law prohibits the giving of gifts worth $50 or more to a public employee "for or because of any official act performed or to be performed by such an employee."

Public Enforcement Letter 96-2 (In the Matter of David R. Nelson) - Bristol County Sheriff David R. Nelson was cited for allowing several of his senior correction officers to solicit their subordinates for contributions to Nelson's political campaign committee. "Some of these solicitations took place during Sheriff Department work hours and in Sheriff Department workplaces," according to a Public Enforcement Letter issued by the Ethics Commission. "Some senior ranking officers selling the fundraiser tickets encouraged their subordinates' sense of obligation to buy the tickets and fostered their belief that you took notice of who purchased tickets and who did not. ...[Y]ou had reason to know how the fundraiser tickets were being sold and to whom. Your failure to take effective affirmative action to prevent these solicitations was in effect passive encouragement and approval of the solicitations. Sound public policy dictates that the elected official has an obligation to prevent such improper conduct once the official knows or has reason to know that his subordinates are engaging in such solicitations," the Letter said. According to the Ethics Commission, Nelson's inaction violated G.L. c. 268A, §§ 23(b)(2) and 23(b)(3). Section 23(b)(2) prohibits a public official from using his official position to obtain an unwarranted privilege of substantial value. It is "a violation of §23(b)(2) for an elected public official to allow appointed public employees in his agency to solicit subordinate agency employees to make political contributions (or otherwise provide assistance) to the elected public official's campaign committee," the Letter said. Section 23(b)(3) generally prohibits a public official from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of his official duties. Nelson's "failure to effectively prevent" the solicitations would cause a reasonable person to conclude that he "could be unduly influenced in the performance of [his] official duties as sheriff by whether or not correction officers purchased tickets" to political fundraisers, according to the Letter.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 512

IN THE MATTER
OF
JOHN RUFFO

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and John Ruffo ("Ruffo") 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 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 Ruffo. The Commission has concluded its inquiry and, on December 14, 1994, found reasonable cause to believe that Ruffo violated G.L. c. 268A.

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

1. At all relevant times, Ruffo was employed as a senior plumbing inspector for the City of Worcester.[1/] As such, Ruffo was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Ruffo's official duties as a Worcester plumbing inspector included the issuing of plumbing and gas permits for construction being done in the city and ensuring all work performed pursuant to such permits complied with local building codes.

3. Ruffo's son, Mark Ruffo, is a local plumbing contractor doing business through K&N Plumbing & Supply.

4. Ruffo, in his capacity as a Worcester plumbing inspector, issued the following plumbing permits and inspected the work done in connection with nine of those permits.[2/]

Address	Permit No.	Date of Permit
119 Lovell Street	0171	1/17/90
30 Dolly Drive	0172	1/17/90
325 Pleasant Street	0170	1/17/90
64 Sandra Drive	0166	1/17/90
31 Dolly Drive	0548	3/21/90
33 Dolly Drive	0818	5/3/90
12 Edlin Street	0819	5/3/90
18 Dolly Drive	0900	5/21/90
28 Dolly Drive	1415	8/14/90
17 Dolly Drive	1609	9/14/90
27 Dolly Drive	1954	11/3/90
29 Dolly Drive	1955	11/13/90
64 Gold Star Blvd.	2099	12/7/90
25 Dolly Drive	0062	1/8/91
21 Dolly Drive	0179	1/31/91
23 Dolly Drive	0309	2/25/91

5. Each of the above permits involved work done by Ruffo's son through K&N Plumbing & Supply.

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

7. The decisions to issue the plumbing permits described in paragraph three above and the determinations as to code compliance (which occurred when the work was inspected) were particular matters.[4/]

8. As set forth in paragraph 3 above, Ruffo participated[5/] as a plumbing inspector in those particular matters by issuing the permits and inspecting the work.

9. Ruffo's son had a financial interest in each of the foregoing particular matters.

10. By issuing the plumbing permits to his son and by inspecting his son's work, as set forth in paragraph 3, Ruffo participated in his official capacity in particular matters in which he knew an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.

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

(1) that Ruffo pay to the Commission the sum of two thousand five hundred dollars ($2,500)

as a civil penalty for violating G.L. c. 268A, §19 as stated above; and

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

DATE: January 4, 1995

[1/] Ruffo was so employed from January 1, 1987, to May 13, 1992, when he retired.

[2/] Numbers 0166, 0179, 0309, 0548, 0818, 1415, 1954, 1955, 2099.

[3/] None of the exemptions applies here.

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

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

Norfolk County Sheriff
Clifford H. Marshall
c/o John S. Mariani, Esq.
John S. Mariani, P.C.
21 Franklin Street
Quincy, MA 02169

PUBLIC ENFORCEMENT LETTER 95-2

Dear Sheriff Marshall:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry concerning whether you, as Norfolk County Sheriff, violated the state conflict of interest law, G.L. c. 268A, by using your power to appoint deputy sheriffs as a means of raising funds for your political campaign committee. Based on the staff's investigation (discussed below), the Commission voted on November 8, 1994 that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §§13 and 23. The Commission, however, does not feel that further proceedings are warranted and has, rather, determined that the public interest would be better served by bringing to your attention, and to the attention of your colleagues throughout the Commonwealth, the facts revealed by our investigation and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. At all relevant times, you were the sheriff of Norfolk County, a paid elected position. You were first elected as Norfolk County Sheriff in 1974 and were subsequently reelected as sheriff in 1980, 1986 and 1992.

2. As Norfolk County Sheriff, you have the statutory power to appoint deputy sheriffs, who serve at your pleasure.[1/] As Norfolk County Sheriff, you have appointed 795 deputy sheriffs since 1986. As of late 1992, there were approximately 1166 Norfolk County deputy sheriffs.[2/]

3. Each person you appoint as a deputy sheriff signs a written oath of allegiance, which is also signed by you. This form is then filed with the Office of the Secretary of State.[3/]

4. Deputy sheriffs have certain statutory powers, including the power to serve process, to transport prisoners and other persons in custody, and to arrest, as set forth in G.L. c. 37.[4/]

5. In 1986, 1989 and ending in January 1992, you, as sheriff, held three swearing-in ceremonies for deputy sheriffs, which each occurred in connection with a meal for which a donation payable to your political campaign committee, the Clifford Marshall Sheriff Committee ("Marshall Committee"), was charged. Participation in the meal (and payment of the donation) was not required for participation in the swearing-in ceremony, nor were your deputy sheriffs required to attend the swearing-in ceremony.

6. In a "Dear Deputy Sheriff" letter dated December 16, 1991, you informed the addressees of the following,

> The annual "Swearing-In" Ceremony of the Norfolk County Civil and Criminal Deputy Sheriffs will take place Sunday, January 12, 1992, at Mosley's On-the-Charles ... a breakfast will precede the Swearing-In ceremony beginning at 10:00 a.m. If you are joining us for breakfast the donation is $50 per person.[5/]

The letter was printed on letterhead stationery ("Sheriff Clifford H. Marshall, High Sheriff to Norfolk County, P.O. Box 266, Dedham, MA 02026") and was signed by you above "Clifford H. Marshall, Sheriff." The stationery states at the bottom, "This stationery & postage privately paid for." Included with the letter was a printed reply card captioned, "Deputy Sheriff's Swearing-In Ceremony, January 12, 1992." The reply card provided three responses to check in the following order: "Enclosed is my $50.00 check to attend the breakfast;" "I plan to attend only the Swearing-In"; and "I plan to attend the tour." The reply card instructed the recipient to respond by January 8, 1992, and further instructed, "No corporate checks accepted. Please make checks payable to: Clifford H. Marshall Sheriff Committee. P.O. Box 266, Dedham, MA 02026."[6/]

7. In several statutorily-required reports filed with the state Office of Campaign and Political Finance ("OCPF"), the Marshall Committee reported the receipt in December 1991 and January 1992 of 220 contributions, totaling $13,245. Two hundred and fifteen of the contributions were from individuals and the vast majority were in the amount of $50. Of the 215 individual contributors, 188 were Norfolk County deputy sheriffs.

8. You have, through counsel, informed the Commission that you have ceased the practice of holding political fundraisers in connection with the swearing-in of deputy sheriffs and will hold no such events in the future.

II. Discussion

As Norfolk County Sheriff, you are a county employee. As such, you are subject to the conflict of interest law, G.L. c. 268A.

The evidence developed in this investigation indicates that you previously made the ceremonial swearing-in of deputies the ostensible official purpose of three campaign fundraising events. Thus, you used your official position to turn an official swearing-in ceremony into a valuable fundraising tool for your campaign committee. The question is whether, in so doing, you secured for your campaign committee and yourself an unwarranted privilege of substantial value which was not properly available to you and similarly situated persons, in violation of G.L. c 268A, §23(b)(2).[7/]

The Commission concludes that your use of the swearing-in of deputies as a political fundraising attraction benefitted a personal rather than a public interest and thus exceeded the proper use of your office as sheriff. (Compare the situation if, for example, you had used the swearing-in ceremony as an attraction for a fundraiser for a Jail inmate literacy program.) Furthermore, the combining of the swearing-in ceremony with the fundraiser imbued the fundraiser with a sense of credibility (as an official event) and fostered an obligation to attend on the part of solicitees that otherwise would have been lacking if it had been merely a bare bones political fundraiser. Accordingly, your use of the swearing-in ceremony as an attraction for your fundraisers was an unwarranted privilege of substantial value[8/] in violation of §23(b)(2).[9/]

This same conduct also violated G.L.c. 268A, §23(b)(3)'s prohibition against a public official knowingly, or with reason to know, acting in a manner which would cause a reasonable person, with 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 party or person. Your solicitation of political contributions from current deputies in conjunction with the swearing-in of new deputies, especially given the extraordinary large number of deputies appointed by you and the apparent lack of any public utility of many of those deputies, would cause a reasonable person to conclude that you appoint political supporters as deputy sheriffs and expect those deputies to continue to contribute to your campaign fund after their appointment. The reasonable inference from these circumstances and the appearance created by your conduct is that your appointment of deputy sheriffs is unduly influenced by the fact that the appointees are contributors to your political campaign fund or are likely to be contributors following their appointment. This violates §23(b)(3).

III. Disposition

Based upon its review of this matter, the Commission has determined that this letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.[10/]

This matter is now closed.

DATE: January 9, 1995

1/ The principal powers of county sheriffs are set forth in G.L. c. 37. Pursuant to G.L. c. 37, §3, sheriffs are empowered to appoint deputies "who shall be sworn before performing any official act."

2/ Some current deputy sheriffs were appointed by your predecessors in office prior to your first election as sheriff.

3/ We reviewed all of the allegiance forms of deputy sheriffs appointed by you since January 1986 which have been filed with the Secretary of State's Office. The allegiance form used in each appointment is the same and each form gives "Deputy Sheriff" as the title of the appointee's office. None of the forms refers to the "Deputy Sheriff" title or appointment as "honorary" or otherwise distinguishes among the appointments.

4/ While many of the deputy sheriffs appointed by you exercise at least some of their statutory powers, e.g., in the course of their employment as correction officers at the Norfolk County Jail and House of Correction or as civil deputies, many others have never exercised any of their official powers or received any compensation for any official acts as deputy sheriffs.

5/ In addition, the letter invited the invitee "to attend an exclusive preview of the Norfolk County Sheriff's Office and Correctional Center," i.e., a tour of the new Norfolk County Jail.

6/ Given that the Marshall Committee paid $320 to have 1,250 reply cards and envelopes printed, it appears that that many persons were invited to the January 1992 event. A far fewer number of people, however, apparently attended the breakfast, as on January 12, 1992, the Marshall Committee paid Mosley's $2,300 for the function, at a rate of $8 per person, indicating that breakfast was served to approximately 275 people.

7/ Section 23(b)(2) of G.L. c. 268A prohibits a county employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

8/ As the Commission noted in *EC-COI-92-5*, for the purposes of §23(b)(2), the raising of $50 or more would constitute substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*

9/ The use of an official swearing-in ceremony for political fundraising purposes is analogous to the use of the Great Seal of the Commonwealth on private stationery for fundraising and other campaign purposes, which was dealt with by the Commission in its March 1992 legal opinion *EC-COI-92-5*. The reasoning by which the Commission in *EC-COI-92-5* determined that "the Seal may not be displayed by public officials seeking reelection or higher office on private stationery for fundraising or other campaign purposes" appears readily applicable to the facts of this case.

In *EC-COI-92-5*, the Commission prohibited the use of the Seal based upon the following reasoning:

> ...We find that the use by a public official of the Seal for political fundraising or other campaign purposes exceeds the proper use of a public employee's office. (footnote omitted). Such campaign activity benefits a personal rather than a public interest. The recipients of such solicitation could reasonably infer that the solicitation was supported or endorsed by the Commonwealth, when in fact it is intended to benefit a personal purpose (an individual's political campaign). (footnote omitted) Because displaying the state Seal may foster a sense of credibility or obligation which the solicitation might not otherwise have had, the use of the state Seal is an unwarranted privilege in violation of §23. (footnote omitted)

10/ 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 because the Commission believes that it may not have been readily apparent that this intermingling of political and official activity would raise issues under G.L. c. 268A.

Linda Marinelli
Oak Bluffs, MA 02557

PUBLIC ENFORCEMENT LETTER 95-3

Dear Ms. Marinelli:

As you know, the Commission has been investigating allegations that you, as an Oak Bluffs selectman, violated the conflict of interest law, G.L. c. 268A, by your involvement in the 1993 award of a taxi license to your daughter. The results of our investigation (discussed below) indicate that the

conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not believe that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. Briefly stated, the relevant chronology is as follows:

You were elected to the Oak Bluffs Board of Selectmen ("Board") in April 1984 and served until April 1993. While so serving, you were the chairman of the Board. You have a daughter, Diane Habekost ("Habekost").

As of January 1993, there were only four taxi cab company licenses in Oak Bluffs. The Board had turned down the previous several requests for additional licenses.

In January 1993, your daughter filed an application with the Board for a taxi license.

On March 9, 1993, the Board considered your daughter's license application. You chaired the meeting. You read a letter from Habekost into the record. You stated you would abstain from comments because Habekost was your daughter, but you remained in the room. Various cab owners opposed the license. You chaired the discussion, and responded to certain comments made from the audience. Consideration of the license was tabled until the board could investigate further.

On March 16, 1993, the Board conducted another public meeting to consider your daughter's application. You abstained and left the room. Again, various owners opposed the license. The application apparently failed on a one to one vote with Selectman Jane Votta voting in favor and Selectman Steven Kenney ("Kenney") voting against.[1/]

On March 23, 1993, the Board held another public meeting on the application; you abstained and left the room. No opposing owners were present. (Apparently, they were not notified that the issue would be reconsidered.) The Board voted two to nothing in favor of the application.

Your term as a Board member ended on April 14, 1993. You were unsuccessful in your reelection bid.

2. Kenney provided the following information:

From October 1991 to April 15, 1994, Kenney was a selectman.

The first hearing on Habekost's license was on March 9, 1993. Habekost argued that the community was not being serviced properly by taxi companies and that the town could use another company. Several taxi owners argued that there was not enough business and to grant another taxi license would create unfair competition. The taxi owners argued that in the recent past all new additional taxi license applications had been denied. After hearing the concerns of taxi owners, Kenney was confused and did not want to issue another license, nor deny one, without further study. Kenney wanted to study the taxi regulations in Oak Bluffs and to look at why other taxi licenses had been denied in the past. Kenney moved that the matter be tabled until the following meeting and that was the action taken.

At the March 16, 1993 meeting, taxi owners again reiterated that an additional taxi license would create undue competition. Habekost argued that the people in the town needed better taxi service. Kenney felt that there were not enough regulations in place to regulate the taxi business in the town, and there seemed to be no established procedures to direct the selectmen on whether or not to approve taxi licenses. A vote was taken and Kenney voted to deny the issuance of the license, with Votta voting to issue the license. Since the vote was split 1-1, and you had abstained, the license was denied.

One or two days after the March 16, 1993 meeting, Kenney happened to meet you at the Board of Selectmen's office. This was not a planned meeting and it was simply a coincidence that you and he met. There was no one else present in the office. You asked Kenney as to why he had voted not to issue the taxi license to Habekost. Kenney again expressed his concerns over taxi regulations. You became very upset. You stated that Habekost had every right to apply for a taxi license. Kenney emphasized to you that there was nothing political in the denial of Habekost's license, and again stated his concerns over taxi regulations. As the discussion went on, and you

continued to be agitated, Kenney mentioned to you that the discussion was not appropriate and you should be concerned about the appearance of conflict of interest in having such discussions. You felt that your daughter was being picked on by the town. Not wanting to discuss the matter further, Kenney abruptly left the room. Kenney became upset because it seemed as if you were insinuating that Habekost had been wronged in some way. The discussion was a short one, three or four minutes. Although you were visibly upset during the discussion, you did not make any threats to Kenney. You did not ask Kenney to make any special accommodations for Habekost, nor did you ask Kenney to change his mind in voting for the license.

After the March 16, 1993 hearing, the press reported about the license and the opposition by taxi owners. Kenney began to receive a number of calls on both sides of the issue. Due to the number of phone calls he received, Kenney continued to look at taxi regulations and other taxi issues in Oak Bluffs. Kenney felt pressured by the community to reconsider whether or not a license should be issued to Habekost. At the March 23, 1993 meeting, Kenney reconsidered the license issue because (1) he felt that Habekost was certainly deserving of the right to have a license, as long as some regulatory issues could be worked out, and (2) because of the number of phone calls that he received complaining about other taxi companies.

Kenney cannot recall whether the Habekost license issue was on the agenda for the March 23, 1993 meeting. If the matter was on the agenda, the clerk may have put it there because there was some confusion as to whether or not a formal vote had taken place at the March 16, 1993 hearing. He believes, but could not specifically recall, that he probably brought the issue up at the third meeting because he had been doing his research and had changed his mind.[2/]

3. You provided the following information:

You had no part in assisting Habekost prepare her taxi license application. Habekost did all the paperwork and all the representation for her taxi license herself.

You did not help Habekost in preparing for the March 9, 1993 hearing. After the meeting on March 9, 1993, you may have had discussions with Habekost regarding your conflict of interest issues and the fact that you would refrain from any participation in Habekost's license request. Aside from this possible conflict of interest related discussion, you had no discussions with Habekost regarding the taxi license. You never gave Habekost any advice on how to proceed in requesting her license, or how she should go about persuading the selectmen to approve the license.

You had no recollection of meeting privately with Kenney prior to the March 23, 1993 meeting. It is possible that you did meet with Kenney and asked him as to his reasons for having denied the license, and Kenney informed you that he wanted to look into past license denials and taxi regulations. You did not do anything to persuade Kenney to change his vote and grant the license to Habekost, or in any way ask Kenney to change his vote.

II. Conflict Law

As a member of the Oak Bluffs Board of Selectmen, you were a "municipal employee" as that term is defined in G.L. c. 268A, §1. As such, you were subject to the conflict of interest law, G.L. c. 268A, generally, and in particular to §23, the so-called "code of conduct" section of the conflict of interest law. The sub-parts of that section which apply to your situation are §23(b)(2) and §23(b)(3). Section 23(b)(2) prohibits any municipal employee from using or attempting to use his position to secure an unwarranted privilege of substantial value for anyone. Its purpose is self-explanatory. Section 23(b)(3) prohibits a municipal employee from causing a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This latter subsection's purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority (or if he does not have an appointing authority, files a written disclosure with the town clerk) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record. (If the public employee is elected, his public disclosure to the town clerk must also be maintained as a public record.)

There is reasonable cause to believe that you violated §23(b)(2). Thus, in the Commission's view, your status of being a selectman gave you entree to your fellow selectmen, especially Kenney, who had the deciding vote. You made use of this entree by having a three to four minute discussion with Kenney as described above. The discussion took place at a critical point in time, i.e., between the apparent one to

one vote not to approve and the reconsideration vote which resulted in the approval. The entree was of substantial value because it could influence the ultimate decision. See, *Burke*, 1985 SEC 246, 251 (access to CEOs for the purpose of having an opportunity to make an insurance pitch was of "substantial value"). Using your position in this manner was unwarranted because the matter in question involved your daughter.[3/] Such entree would not be available to other similarly situated license applicants or their advocates. Therefore, it appears that you violated §23(b)(2) by this conduct.

There is also reasonable cause to believe that your conduct violated §23(b)(3). Thus, your discussing the license matter with Selectman Kenney between the second and third hearings created an appearance of impropriety. It would seem that your conduct as a selectman could be unduly influenced by kinship. The appearance of impropriety is underscored by the fact that the license in question was very valuable, the meeting took place shortly before Selectman Kenney voted to reconsider, the opponents were apparently not given notice that the matter would be reconsidered, and for a number of years all applications for new taxi licenses had been denied.

The Commission could have directed the staff to commence adjudicatory proceedings in which, if you were found to have violated G.L. c. 268A, §23, fines of up to $2,000 for each violation could have been imposed. The Commission chose to resolve this matter with this letter, however, because the violations appear to have involved a spontaneous and abbreviated outburst on your part which, according to Selectman Kenney, did not influence his decision. We also note that you fully cooperated with the Commission in its investigation.

III. Disposition

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

DATE: January 17, 1995

[1/] It is not entirely clear whether Kenney voted against the application or simply indicated he was not prepared to vote in favor of it. In any event, the application failed to obtain the necessary two affirmative votes.

[2/] Board of Selectmen Clerk Janice Wright had no recollection as to how the license matter was brought up again at the third hearing.

[3/] Your involvement in a matter in which your daughter had a financial interest raises an issue under §19 of the conflict of interest law, which prohibits a municipal employee from participating as such in a particular matter in which to her knowledge an immediate family member (among others) has a financial interest. It is not clear whether in meeting with Selectman Kenney you were "participating" in the license matter within the meaning of §19; in any event, the conduct seems more appropriately analyzed under §23.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 516

IN THE MATTER
OF
GEOFFREY NEWTON

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Geoffrey 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 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 Newton. The Commission has concluded its inquiry and, on October 19, 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. At all relevant times, Newton was employed as the Building Inspector for the Town of Royalston. This was a part-time position to which Newton was appointed by the Royalston Board of Selectmen and for which he was paid an annual salary of $5,000. As the Royalston building inspector, Newton was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Newton's official duties as the Royalston 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, Newton's brother, Wayne Newton ("Wayne") was self-employed as a carpenter and building contractor.

4. On the following dates, and at the places indicated, Newton, in his capacity as the Royalston Building Inspector, issued the following building permits to his brother Wayne:

(a) on February 23, 1989, a permit to build an entryway and mud room at a North Fitzwilliam Road property;

(b) on September 19, 1990, a permit for re-roofing at a South Royalston Road property;

(c) on September 26, 1990, a permit for a garage addition to a Frye Hill Road property;

(d) on May 27, 1991, a permit for a temporary ramp at an Athol Road property;

(e) on May 18, 1992, a permit for the re-silling of a barn at a Main Street property;

(f) on May 12, 1993, a permit for bathroom renovations at an Athol Road property;

(g) on June 30, 1993, a permit for interior renovations at an Athol Road property;

(h) on June 30, 1993, a permit for a home built on Athol Richmond Road; and

(i) on September 19, 1993, a permit to build a barn at an Athol Richmond Road property.

5. 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 contained in §19(b) apply in this case.

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

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

8. Wayne, as the contractor performing the permitted work, had a financial interest in the issuance of each of the above-listed building permits. Newton knew of his brother's financial interest at the time he issued each of the building permits.

9. Accordingly, by issuing the building permits to Wayne, as set forth in paragraph 4, Newton participated in his official capacity in particular matters in which he knew an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.

10. Newton cooperated with the Commission's investigation.

11. Newton testified that it was common knowledge in his town that he was issuing permits to Wayne and that his appointing authority, if asked, would have been inclined to grant him an exemption pursuant to §19(b)(1) of G.L. c. 268A.[1/] While there is some evidence supporting Newton's contention, the exemption in fact was never sought and cannot be granted retroactively.

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 five hundred dollars ($500.00)[2/] as a civil penalty for violating G.L. c. 268A as stated above; 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: February 6, 1995

[1/] Section 19(b)(1) provides that it is not a violation of §19 if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.

[2/] That Newton's penalty is not higher reflects the fact that his appointing authority was generally aware of his actions.

Nevertheless, strict compliance with the written disclosure and authorization provisions of §19(b)(1) is necessary to ensure that all due consideration is given to issues with potential controversy and the potential for abuse. Had Newton followed the proper exemption procedure, the selectmen may have concluded at that time that an alternate building inspector should issue the permits.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 517

IN THE MATTER
OF
KATHERINE DOUGHTY

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Katherine Doughty ("Doughty") 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 Doughty had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded its inquiry and, on January 18, 1995, voted to find reasonable cause to believe that Doughty violated G.L. c. 268A.

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

1. Doughty served as Insurance Commissioner from July 1991 until June 1993. The Insurance Commissioner is appointed by the Governor.

2. The Insurance Commissioner has overall responsibility and authority concerning regulation, recommendations and enforcement of all applicable statutes pertaining to entities engaged in insurance or insurance-related enterprises.[1/] The Insurance Commissioner is the appointing authority for the Division of Insurance, the agency responsible for regulating every facet of insurance business transacted within the Commonwealth of Massachusetts.

The Division of Insurance is contained within the Consumer Affairs Secretariat. This Secretariat has as its primary function the protection of the consumer and the regulation of certain industries doing business within the Commonwealth. The objective of the Secretariat is to strike a fair balance between consumer protection and the fostering of a beneficial business climate.

3. As the Insurance Commissioner, Doughty regularly participated in meetings with insurance company lobbyists and other representatives and employees of insurance companies having an interest in matters before the Division of Insurance ("interested parties").[2/]

4. In addition to meetings held at the Division of Insurance office, Doughty regularly met with interested parties outside of the office at restaurants and at entertainment events ("entertainment activities"). Such entertainment activities included meals at restaurants such as the Parker House, The Bay Tower Room, The Four Seasons and Biba. In addition, Doughty attended with interested parties performances of The Phantom of the Opera, Les Miserables, a Boston Red Sox game and a concert at Tanglewood.

5. Doughty attended entertainment activities with interested parties, on average, approximately three times a week.[3/] The interested parties routinely paid for Doughty's expenses.[4/]

6. According to Doughty, who relocated to Massachusetts from Texas in order to take the position of Insurance Commissioner, the entertainment activities listed above had both a social and business purpose.

7. At all relevant times, Doughty knew that the interested parties paying her expenses had interests in matters before the Division of Insurance.

8. Doughty did not disclose in writing to her appointing authority that interested parties were paying, on a regular basis, for her expenses associated with the entertainment activities.

9. 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 her favor in the performance of her official duties. The subsection further provides that it shall be unreasonable to so conclude if the

public employee has disclosed in writing to her appointing authority the facts which would otherwise lead to such a conclusion.

10. By engaging in a practice of accepting benefits in meals and entertainment on a regular basis from individuals who had an interest in matters before the Division of Insurance, all while Doughty was in a position to take official action which could benefit the givers, and without notifying her appointing authority, Doughty acted in a manner which would cause a reasonable person knowing all of the facts to conclude that the interested parties can improperly influence her in the performance of her official duties.[5/] In so doing, she violated §23(b)(3).[6/] In other words, where interested parties who have business pending before the Division of Insurance invite the Insurance Commissioner to attend entertainment events with them on a regular basis and where the interested parties pay for the Insurance Commissioner to attend such events, a reasonable person would conclude that such interested parties can unduly enjoy the Insurance Commissioner's favor in the performance of her official duties when matters concerning the interested parties come before the Division of Insurance. Therefore, a written public disclosure of these facts to Doughty's appointing authority pursuant to §23(b)(3) was required.[7/]

11. Doughty cooperated with the Commission's investigation.

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

(1) that Doughty pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for her course of conduct in violation of G.L. c. 268A, §23(b)(3) by attending entertainment activities as the guest of interested parties under the circumstances described above, without disclosing in writing such activity to her appointing authority; and

(2) that Doughty 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: February 9, 1995

[1/] Legal authority for these actions is contained in G.L. c. 175, and in other statutes and regulations.

[2/] The interested parties were from a variety of sources who may or may not have had common interests depending upon the specific matter before the Division of Insurance.

[3/] The exact frequency that Doughty attended entertainment activities as interested parties' guest is unclear due to lack of recordkeeping and the number of sources.

[4/] Virtually all of Doughty's expenses for each of the above occasions were less than fifty dollars.

[5/] Section 23(b)(3) allows a public official to dispel the appearance of improper influence or undue favor by making a written disclosure to her appointing authority. Doughty, however, failed to make such a disclosure. See *EC-COI-92-12* (public employee should disclose relationship if ties to person under regulatory jurisdiction creates a reasonable basis that the regulatee could enjoy preferential treatment from the public official); *EC-COI-92-7* (public employees should disclose private business relationships with those under their jurisdiction); *EC-COI-89-16* (public official should publicly disclose to appointing authority relevant facts surrounding relationship with regulatee in order to dispel any possible appearance of undue favoritism).

[6/] The above conduct also raises concerns under G.L. c 268A, §3(b). Section 3(b) 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. The Commission has ruled that anything worth $50 or more is of substantial value for §3 purposes. See *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. 584, 587 (1976). In addition, the Commission stated in *In re United States Trust Co.*, 1988 SEC 356, that for §3 purposes, gifts of less than $50 will be aggregated under certain circumstances. Here, however, the Commission has chosen to resolve this matter under §23(b)(3) in order to emphasize that a public official's practice of regularly accepting gratuities of less than $50 in value from individuals who are subject to that official's regulatory authority violates §23(b)(3), even if such individuals have no common interest in any pending matter before that official.

The above conduct also raises concerns under G.L. c 268A, §23(b)(2). Section 23(b)(2) prohibits a public employee from using or attempting to use her official position to secure for herself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. Although the Commission has decided not to resolve the matter under §23(b)(2), it may do so if faced with similar facts in the future.

[7/] As the Commission stated in *Advisory #8* in addressing the receipt of free passes:

> Public employees are already compensated for the performance of their duties. To request or accept any item of more than nominal value -- and in

most cases these tickets are clearly of more than nominal value -- from private entities which have been, are, or may be subject to the public official's responsibilities and duties, is to use one's public position to secure an unwarranted privilege and, in addition, necessarily creates the impression that the private entity may be improperly influencing or unduly enjoying the favor of the public official in the performance of their official duties. Such a practice undermines the public's confidence in the credibility and impartiality of the governmental process.

Compare 57 Fed. Reg. 153, §2635.202 (federal employees prohibited from accepting gifts of less than $50 from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 520

IN THE MATTER
OF
EDWARD J. KENNEDY, JR.

DISPOSITION AGREEMENT

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

On November 8, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Kennedy. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Kennedy violated G.L. c. 268A, §23.

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

1. Kennedy was, during the time relevant, a Middlesex County Commissioner. As such, Kennedy was a county employee as that term is defined in G.L. c. 268A, §1.

2. As of July 1994, Kennedy had filed nomination papers for the Democratic primary for Middlesex North District Register of Deeds. The North District is comprised of the City of Lowell and nine towns.

3. By mid-to-late July 1994, Kennedy had obtained voter registration lists as "checked" (indicating who had voted at the prior elections) for all of the nine towns in the North District, but not for the City of Lowell.[1/]

4. On the evening of July 28, 1994, at Kennedy's request, two county employees[2/] moved a Middlesex County copier from the county's office in Cambridge to the Election Office in Lowell.

5. At approximately 8:45 a.m. the next morning, at Kennedy's request, the same two county employees tried to use the above-described copy machine to copy the City of Lowell voter list. The copy machine would not work. (It was apparently out of toner.) One of the county employees so informed Kennedy. At approximately 11:00 a.m., Kennedy arrived at the Election Office. They still could not get the machine to work. Kennedy instructed the county employees to return the machine to Cambridge. They did so.[3/] Meanwhile, Kennedy paid $115 to have the voter list copied at a commercial copier.

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

7. A public employee's use of public resources of substantial value ($50 or more) for private purposes (not otherwise authorized by law) amounts to the use of one's official position to secure an unwarranted privilege of substantial value. These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment, office space, or other facilities.[4/] Also included is the use of time on the public payroll.

8. By borrowing and attempting to use a county copy machine for campaign purposes (as described above), Kennedy used and/or attempted to use his official position to secure an unwarranted privilege of substantial value, thereby violating §23(b)(2).[5/]

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

(1) that Kennedy pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §23(b)(2);

(2) that Kennedy 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 24, 1995

[1/] In the City of Lowell, the Election Commission would permit examination of the voting lists as "checked" at its office during normal business hours, but would not provide a copy of the list nor provide means for copying.

[2/] According to these county employees, they both were already volunteers in Kennedy's campaign.

[3/] One county employee was on personal compensatory time. The other's supervisor charged him with two hours compensatory time when she found out what he had done that Friday morning.

[4/] In May 1990, the County Commissioners issued a memo warning all county employees about various restrictions on their political activity, including that they could not use county copy machines for campaign purposes.

[5/] It is unclear to what extent Kennedy knew or had reason to know that one county employee was on county time when he helped with the copier on Friday morning. If Kennedy so knew or had reason to know, this use of public employee time would also be unwarranted.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 527

IN THE MATTER
OF
JOSEPH DUGGAN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Joseph Duggan ("Duggan") 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 May 10, 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 Duggan. The Commission has concluded its inquiry and, on September 13, 1994, found reasonable cause to believe that Duggan violated G.L. c. 268A, §19.

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

1. Duggan has worked for the Hull Lighting Plant ("department") for approximately the last 30 years as a general foreman, with the exception that between January 1993 and May 1993 he served as the acting manager. As either general foreman or acting manager Duggan was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As general foreman, Duggan supervises electrical line construction and maintenance. This a 40-hour a week job, and there is often overtime involved, in particular when there are storms.

3. Duggan has two sons that work for the Department, Steven and Matthew. Steven is a lineman. He began working for the Department in the early 1980s, and left after several years. He returned in either 1985 or 1986 and has remained there since. He is currently a lineman, but sometimes has worked as a lead lineman. Whether he is a lead lineman or not is determined by management based on seniority and experience.

Matthew is also a lineman. He has been with the department for eight or nine years, the last year on disability.

Duggan also has a brother, Robert, who worked as a lead lineman for the department until he retired eight or 10 years ago. In times of emergencies, when experienced lead linemen are needed, sometimes Robert will be called by management to work.

4. In September 1991, Duggan pointed out to Lighting Plant management that they had made a mistake in passing over Steven in filling the lead lineman position, where, according to Duggan, Steven had superior qualifications, including several years more experience, than the person being appointed. Duggan recommended to the Lighting Plant manager that Steven be promoted to the position of lead lineman. The manager did not accept that recommendation.

5. By letter dated January 19, 1993, town counsel advised Duggan that he could not participate in any department personnel matters involving his two sons' employment, and that the Lighting Plant Board of Commissioners ("Board") should either make those decisions or delegate them to another employee. Duggan gave this letter to the Board. According to then Board Chairman Thomas J. Sullivan, the Board instructed Duggan to continue to serve as acting manager but to refer any discrete personnel issues involving his sons to the Board.

6. While acting plant manager between January 1993 and May 1993, Duggan did the following:

(a) He approved overtime for his son Steven (164 hours, $3,177) and for his son Matthew (41 hours, $661.74)[1/]; and

(b) after a severe storm in March 1993, he hired his brother Robert to act as a lead lineman. Robert earned $1,316.56 for 36 hours of work at that time. Duggan hired Robert for these duties even though two other linemen had been recently laid off for lack of work.[2/]

7. Except as otherwise permitted by that section[3/], G.L. c. 268A, §19, in relevant part, prohibits a municipal employee from participating as such in a particular matter in which, to his knowledge, he or a member of his immediate family has a financial interest.[4/]

8. The personnel decisions described above (recommending his son Steven for a promotion, approving overtime, hiring his brother) were particular matters.[5/]

9. Duggan participated[6/] in those particular matters by either making the decision himself or recommending action.

10. At the time he so acted, he knew that either a son and/or a brother, as the case may be, had a financial interest in the particular matter.

11. Therefore, by so acting, Duggan participated as a municipal employee in particular matters in which to his knowledge an immediate family[7/] member had a financial interest, thereby violating §19.[8/]

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

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

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

DATE: June 14, 1995

[1/] According to Chairman Sullivan, the Board approved the payrolls and, therefore, was aware of and, in effect, approved the overtime Duggan awarded to his sons.

[2/] There is a dispute as to whether these other two linemen were qualified. Sullivan and Duggan assert they were not. The present Board chairman and manager say they were. In addition, although this was an emergency, Duggan had the time to pass on the decision as to who would be hired to the Board chairman. He did not do so.

[3/] None of those exceptions applies.

[4/] Section 19(b)(1) provides that it is not a violation of §19 if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to

affect the integrity of the services which the municipality may expect from the employee. Pursuant to c. 268A, §24, such disclosures and authorizations are public records.

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

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

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

8/ The fact that the Board knew of and was, in effect, approving Duggan's granting overtime to his sons is a mitigating factor, although not a defense. The Commission has repeatedly observed that the §19(b)(1) disclosure and written authorization procedure is not a technicality. "The steps of the disclosure and exemption prodcedure ... are designed to prevent an appointing authority from making an uninformed ill-advised or badly motivated decision." *In re Hanlon*, 1986 SEC 253, at 255. In any event, here, the Board did not even verbally approve of Duggan hiring his brother in March 1993.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 530

IN THE MATTER
OF
ELAINE BUSH

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Elaine Bush ("Bush") 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 6, 1995, 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 Bush. The Commission has concluded its inquiry and, on July 11, 1995, found reasonable cause to believe that Bush violated G.L. c. 268A.

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

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

2. In early fall 1994, the Millbury School Department posted the Millbury High School girls basketball coach position. The position is annually posted, although the posting is usually *pro forma* since most coaches are reappointed. The incumbent basketball coach had held the position for the previous 12 years.

3. The coaching position pays a stipend of $3,375 for the season.

4. Four candidates applied for the coaching position, including Bush's daughter Jodi Bush ("Jodi") and the incumbent.

5. Bush and the Millbury High School principal interviewed the four candidates. Although Bush was present during her daughter's interview, she did not ask any questions.

6. After finishing the interview process, Bush and the high school principal decided to forward the names of all the candidates to the Millbury School superintendent for consideration. They did not rank the candidates.

7. The superintendent, as the appointing authority for the position, selected Jodi for the coaching job.

8. The Commission has no evidence to suggest that Bush was aware that her actions violated G.L. c. 268A when she participated in the hiring process for the high school girls basketball coach.1/

9. 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 her knowledge she or an immediate family member has a

financial interest. None of the exceptions contained in §19(b) apply in this case.

10. The determination as to whom to hire as the high school girls basketball coach was a particular matter.[2/]

11. As set forth above, Bush participated[3/] as athletic director in that hiring determination by interviewing the candidates and forwarding their names, including her daughter's, to the superintendent for appointment consideration.

12. Jodi, as an applicant for the girls high school basketball coaching position, had a financial interest in the appointment of that position. Bush knew of her daughter's financial interest at the time she participated in the hiring process.

13. Accordingly, by participating in the girls high school basketball coach hiring process, as set forth above, Bush participated in her official capacity in a particular matter in which she knew an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.[4/]

14. Bush cooperated with the Commission's investigation.

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

(1) that Bush pay to the Commission the sum of two hundred and fifty dollars ($250.00) as a civil penalty for violating G.L. c. 268A as stated above;

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

(3) that Bush 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: July 13, 1995

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

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

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

[4/] A troubling fact is that the hiring process resulted in the replacement of an incumbent coach who had held the position for numerous years.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 531

IN THE MATTER
OF
JOHN BEUKEMA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John Beukema ("Beukema") 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 26, 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 Beukema. The Commission has concluded its inquiry and, on May 9, 1995, voted to find reasonable cause to believe that Beukema violated G.L. c. 268A, §§17(a) and 17(c).

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

1. Beukema was, during the times here relevant, a member of the Douglas Zoning Board of Appeals ("ZBA").[1/] Beukema was appointed to the ZBA by the Douglas Board of Selectmen and, after serving as

a ZBA associate member, became a full or regular ZBA member in October 1989. As such, Beukema was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. At all times here relevant, Beukema was self-employed as an architect, with an office in Douglas.

3. In January 1990, Beukema asked the Douglas selectmen to designate him a G.L. c. 268A "special municipal employee."[2/] The selectmen did not act on this request because it was not from the ZBA itself.[3/] The ZBA then asked that all its members be so designated. On February 28, 1990, selectmen voted to make all ZBA members "special municipal employees."

4. In 1991, a proposed landfill and a recycling facility (to be located on nearly 290 acres on the north side of Route 16 in Douglas) was under development by Douglas Environmental Associates, Inc. ("DEA"). The landfill and the recycling facility, once developed, were to be operated by Browning-Ferris Industries, Inc. ("BFI").

5. In September 1991, Beukema, d/b/a JN Albert Associates, entered into an Architectural Service Agreement ("Service Agreement") with BFI to design the buildings for the landfill's recycling facility. Pursuant to the Service Agreement, Beukema was to receive a fee of $2,920 for the design of the recycling facility buildings.[4/] The Service Agreement further provided, "When requested, the architect shall assist the owner in acquiring necessary permits."[5/]

6. After entering into the Service Agreement, Beukema proceeded to draw up plans for the recycling facility buildings and site layout.

7. Pursuant to the Service Agreement, in 1992 Beukema prepared an application to the ZBA for a special permit ("Site Plan Review") for the proposed recycling facility under Section VI 6:02 of the Douglas Zoning Bylaw. The special permit application named DEA president Vincent Barletta ("Barletta") as the applicant. Beukema signed the application for Barletta on July 13, 1992, and filed it with the ZBA. The application was received by the ZBA on July 16, 1992. The ZBA then scheduled a public hearing on the matter for August 12, 1992, and gave public notice of the meeting by posting and newspaper advertisement between July 22, 1992, and August 5, 1992.

8. On August 12, 1992, Beukema appeared with Barletta at the ZBA public hearing relating to the recycling facility. Beukema, as Barletta's architect, made a presentation to the ZBA describing the recycling facility and responded to questions from the ZBA and members of the public.

9. Near the end of the August 12, 1992 ZBA public hearing, a member of the public questioned whether Beukema had a conflict of interest in being a ZBA member and Barletta's (the special permit applicant's) architect. In response, ZBA Chairman Lawrence "Guy" Bacon ("Bacon") stated that Beukema would not vote on the matter and that, because ZBA members had been designated as special municipal employees, Beukema's being the special permit applicant's architect did not create a conflict of interest. Bacon was then asked if the Commission had been consulted on the issue and Bacon responded "no."[6/]

10. Beukema abstained from any participation in the recycling facility matter as a ZBA member. On September 22, 1992, the ZBA, without Beukema participating, unanimously approved the special permit subject to several conditions.

11. Beukema was paid approximately $3,000 by DEA as compensation for his services under the Service Agreement.[7/]

12. Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation[8/] from anyone other than the municipality or an agency of the municipality in relation to a particular matter[9/] in which the municipality is a part or has a direct and substantial interest.

13. Section 17(c) of G.L c. 268A prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent[10/] for anyone other than the municipality or an agency of the municipality in connection with any particular matter in which his town has a direct and substantial interest.

14. Section 17 further provides that a special municipal employee, such as Beukema, is subject to §17(a) and §17(c) only in relation to a particular matter (a) in which he has participated as a municipal employee, or (b) which is, or within one year has been, a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving (provided he has served more than 60 days during any 365 consecutive day period).[11/]

15. The ZBA's special permit site plan review of the proposed recycling facility was a particular matter, in which the town was a party and had a direct and substantial interest, and was a subject of Beukema's official responsibility as a ZBA member, within the meaning of §17,[12/] at the time when Beukema acted on Barletta's behalf in connection with it and within one year of Beukema's receiving compensation from DEA in relation to it.[13/] Thus, condition (b) of the special municipal employee provisions in §17 was met, and Beukema was subject to §17(a) and §17(c) despite his status as a special municipal employee.

16. By receiving compensation from DEA for his services in connection with the special permit site plan review application, Beukema received compensation from someone other than the Town of Douglas in relation to a particular matter (then or within one year a subject of his official responsibility) in which the town was a party and had a direct and substantial interest. In so doing, Beukema violated G.L. c. 268A, §17(a).

17. By preparing Barletta's special permit site plan review application and filing it with the ZBA, and by speaking on behalf of Barletta at the ZBA hearing, Beukema acted as agent for someone other than the Town of Douglas in connection with a particular matter (then a subject of his official responsibility as a ZBA member) in which the town was a party and had a direct and substantial interest. In so doing, Beukema violated G.L. c. 268A, §17(c).

18. According to Beukema, at the time of his above-described actions he believed that his conduct was lawful because he was a special municipal employee. As set forth above, Beukema was mistaken about the effect of his special municipal employee status. In addition, according to Beukema, he relied on ZBA Chairman Bacon's concurrence with this misunderstanding of the law. Neither of these circumstances, however, excuses Beukema's violations of G.L. c. 268A, §17.[14/]

19. Beukema cooperated fully in the Commission's investigation of this matter.

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

(1) that Beukema pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating G.L. c. 268A, §§17(a) and 17(c); and

(2) that Beukema waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Disposition Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.[15/]

DATE: August 3, 1995

[1/] Beukema is no longer a ZBA member.

[2/] A "special municipal employee" is a municipal employee whose position has been expressly classified by the board of selectmen as that of a special employee under the terms and provisions of G.L. c. 268A. G.L. c. 268A, §1(n).

[3/] According to Beukema, he decided to make this request after attending a Commission seminar given to Town of Douglas officials and employees (including ZBA members) in December 1989, at which, among other topics, special municipal employee status was generally discussed; in particular, Beukema sought "special" status in order to be able to seek the contract for the design of the new town police station which was advertised for bid in late 1989. According to Beukema, it was his understanding from the seminar that if he had "special" status he would be able, as an architect, to enter into contracts with the town and appear as an architect before town boards, including the ZBA. Thus, Beukema apparently misunderstood what was said at the seminar concerning the effect of special municipal employee status. To the degree that Beukema believed that special municipal employee status would permit him to appear before his own board, the ZBA, and receive compensation for work subject to review by that board, Beukema was mistaken, as set forth herein below.

[4/] The Service Agreement also provided that Beukema would be paid by the hour for additional work.

[5/] According to Beukema, at the time he entered into the Service Agreement, he believed that the proposed recycling facility buildings would require only approval by the town building inspector and would not require the approval of the ZBA. Subsequently, however, Beukema learned that the proposed recycling facility buildings would require a special permit from the ZBA.

[6/] Neither Bacon (who had also attended the December 1989 Commission seminar) nor Beukema sought or received advice from the Commission or Douglas' town counsel regarding whether Beukema, as a ZBA member and special municipal employee, could be the architect for a private client on a project requiring a permit from the ZBA or could appear for a client before the ZBA. Instead, both Beukema and Bacon apparently relied on their shared

misunderstanding of the general discussion of "special municipal employee" status at the December 1989 Commission seminar in concluding that Beukema could act as Barletta's architect on the special permit application.

7/ Although the Service Agreement was between Beukema, d/b/a JN Albert Associates, and BFI, and Beukema sent invoices for his work to BFI, DEA paid for Beukema's services under the Service Agreement. Among the payments to Beukema by DEA were a $1,000.00 payment on October 6, 1991 and a $1,280.00 payment on November 19, 1992. Additional payments (bringing the total to about $3,000) were received by Beukema on undetermined dates contemporaneous with his services under the Service Agreement.

8/ "Compensation" means 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).

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

10/ A municipal employee acts as agent within the meaning of the conflict of interest law where he acts on behalf of some other person or entity. *In re Dias* 1992 SEC 574, 575. The mere speaking or writing on behalf of another party satisfies the agency element of §17(c). *Id.*; *EC-COI-84-6*; see *Commission Advisory No. 13 (Agency)*.

11/ The 60 day requirement applies only to condition (c) and is not here relevant. Condition (b) of §17 is met as set forth *infra*.

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

13/ The Commission has held that the "keynote of official responsibility is the 'potentiality' of directing agency action and not the actual exercise of power." *EC-COI-87-17*; i.e., that "official responsibility" turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36*. Thus, the test to determine whether a public employee has "official responsibility" for a particular matter is whether the matter falls within the employee's authority, regardless of whether that authority is exercised. *Id.* Accordingly, regular members of a municipal board, such as Beukema was, retain official responsibility for all matters which are pending before the board, whether or not they have actually worked on the matters as a board member and whether or not they sat on the board on a given day. *Id.*; see, e.g., *EC-COI-89-7; 84-48*. Thus, a regular municipal board member may not avoid "official responsibility" for a matter simply by abstaining from participation in the matter as board member, and abstention from official participation in the particular matter in question is not a defense to a G.L. c. 268A, §17 violation. *In re Dias*, 1992 SEC 574, 575; *In re Townsend*, 1986 SEC 276, 278; *In re Bingham*, 1984 SEC 174, 175.

14/ It is well-established that ignorance of the law is no defense to a violation of G.L. c. 268A. *In re Zerendow*, 1988 SEC 352, 354-355. *In re Brewer*, 1987 DEC 300, 301, *In re Doyle*, 1980 SEC 11, 13, see also *Scola v. Scola*, 318 Mass. 1, 7 (1945). In addition, reliance upon incorrect legal advice is not a defense to a violation of G.L. c. 268A, in the absence of compliance with G.L. c. 268A, §22 and 930 CMR 1.03(3). See *In re Lavoie*, 1987 SEC 286, 287 ("... if a public employee involved in a potentially serious conflict of interest situation seeks to rely on a legal opinion as a shield against action by this Commission, the important substantive provisions controlling the issuance of such opinions must be followed. The opinion must be from town counsel, in writing and made a matter of public record ... such opinion must also be filed with the Commission ..." (citations deleted)). See also *Zerendow*, at 354. Such mistaken understanding of the law and/or reliance on incorrect legal advice may, however, be considered by the Commission as a mitigating circumstance in determining the sanction to be imposed for the violation. *Id.* See *infra*.

15/ Although the Commission is authorized to impose a civil fine of up to $2,000 for each violation of G.L. c. 268A, and to bring a civil action against the violator to recover damages in the amount of up to three times the economic advantage obtained through the violation, the Commission here is imposing only a $1,000 fine and is not requiring that Beukema give up any of the compensation he received in violation of G.L. c. 268A. This is because the Commission is convinced that Beukema, based upon his misunderstanding of G.L. c. 268A (which was erroneously confirmed by his board chairman), made a good faith, although insufficient and ineffective, attempt to comply with the conflict of interest law by seeking and obtaining "special municipal employee" status for ZBA members and by not participating as a ZBA member in the Barletta special permit matter. That a $1,000 fine is being imposed, notwithstanding these mitigating circumstances, reflects the fact that the Commission has made clear in a number of cases that public officials cannot engage in the type of conduct engaged in by Beukema, as described above, without violating G.L. c. 268A. See, e.g., *In re Nutter*, 1994 SEC 710, *In re Dias*, 1992 SEC 574, and *In re King*, 1990 SEC 449. Thus, Beukema's mistake concerned well-established principles of the conflict of interest law and does not relieve him of responsibility for his §17 violations, especially where he failed to seek the advice of town counsel or the Commission concerning the legality of his above-described activities for Barletta (and DEA).

Vincent D. Barletta, President
Douglas Environmental Associates, Inc.
c/o David E. Lurie, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111

PUBLIC ENFORCEMENT LETTER 96-1

Dear Mr. Barletta:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry concerning whether you violated the state conflict of interest law, G.L. c. 268A, by providing compensation to Douglas Zoning Board of Appeals ("ZBA") member John Beukema ("Beukema") in relation to a particular matter in which the Town of Douglas was a party or had a direct and substantial interest, and which was a subject of Beukema's official responsibility as a ZBA member. Based upon the preliminary inquiry, the Commission voted on May 9, 1995 that there is reasonable cause to believe that you violated §17(b) of G.L. c. 268A. The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are the president of Douglas Environmental Associates, Inc. ("DEA"). At the time here relevant, DEA was developing a proposed landfill and recycling facility to be located on nearly 290 acres on the north side of Route 16 in Douglas. Browning-Ferris Industries, Inc. ("BFI") was the proposed operator of the landfill and recycling facility.

2. John Beukema ("Beukema") was, during the time here relevant, a member of the Douglas Zoning Board of Appeals ("ZBA").[1/] At the time here relevant, ZBA members were designated special municipal employees as defined in G.L. c. 268A, §1(n).[2/] Beukema was also self-employed as an architect, with an office in Douglas, and did business as JN Albert Associates.

3. At the time here relevant, Mark Conley ("Conley") was a BFI employee who managed BFI's involvement in the Douglas project. Conley was primarily responsible for the development of the recycling portion of the Douglas project.

4. Sometime in mid-1991, Conley recommended to you that Beukema be hired to design the recycling buildings, in part because Beukema was a Douglas resident and it would be good public relations to utilize "local talent."[3/] You approved Conley's recommendation.[4/]

5. In September 1991, Beukema, d/b/a JN Albert Associates, entered into an Architectural Service Agreement ("Service Agreement") with BFI to design the buildings for the recycling facility. Pursuant to the Service Agreement, Beukema was to be paid a fee of $2,920 for the design of the recycling buildings.[5/] The Service Agreement further provided, "When requested, the architect shall assist the owner in acquiring necessary permits."[6/]

6. After entering into the Service Agreement, Beukema proceeded to draw up plans for the recycling buildings and site layout.[7/]

7. Pursuant to the Service Agreement, in 1992, Beukema prepared an application to the ZBA for a special permit (Site Plan Review) for the proposed recycling center under Section VI 6:02 of the Douglas Zoning Bylaw.[8/] The special permit application named you as the applicant. Beukema signed the application on your behalf on July 13, 1992, and filed it with the ZBA. The application was received by the ZBA on July 16, 1992. The ZBA then scheduled a public hearing on the matter for August 12, 1992, and gave public notice of the meeting by posting and newspaper advertisement between July 22, 1992, and August 5, 1992.

8. On August 12, 1992, you, Beukema, Conley and DEA Project Manager Sean O'Hearn ("O'Hearn") attended the ZBA public hearing relating to the recycling center.[9/] Beukema, as your architect, made a presentation to the ZBA describing the recycling center and responded to questions from the ZBA and members of the public.

9. Near the end of the August 12, 1992 ZBA public hearing, a member of the public questioned

whether Beukema was "going to sit" as a ZBA member on the special permit application matter and whether that would be a conflict of interest. In a response, ZBA Chairman Bacon stated that Beukema would not vote on the matter and that, because ZBA members had been designated as special municipal employees, Beukema's being the special permit applicant's architect did not create a conflict of interest. Bacon was then asked if the ZBA had consulted the Commission on the issue and Bacon responded "no".[10/]

10. Beukema abstained from any participation in the recycling center matter as a ZBA member. On September 22, 1992, the ZBA, without Beukema participating, unanimously approved the special permit subject to several conditions.

11. Although the Service Agreement was between Beukema, d/b/a JN Albert Associates, and BFI (rather than you or DEA), you, in your capacity as DEA's president, caused DEA to make at least two payments to Beukema pursuant to the Service Agreement. In October 1991, you signed a DEA check paying JN Albert Associates $1,000. In November 1992, you signed a DEA check paying JN Albert Associates $1,280. Both payments by DEA were made in response to JN Albert Associates' invoices to BFI, which were forwarded to DEA.

12. You cooperated fully with the Commission's investigation of this matter.

II. Discussion

As a ZBA member, Beukema was a special municipal employee. As such, Beukema and, under some circumstances, private parties doing business with him (such as yourself), were and are subject to the conflict of interest law, G.L. c. 268A.

Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation[11/] from anyone other than the municipality or a municipal agency in relation to any particular matter[12/] in which the municipality is a party or has a direct and substantial interest. Section 17(b) of G.L. c. 268A prohibits anyone from knowingly giving, offering or promising compensation to a municipal employee which the employee is prohibited from receiving under §17(a).[13/] Section 17 further provides that a "special municipal employee", such as Beukema, is only subject to §17(a) in relation to a particular matter (a) in which he has participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving (provided he has served more than 60 days during any 365 consecutive day period).[14/]

The special permit site plan review for the landfill recycling facility, for which Beukema applied on your behalf with the ZBA in July 1992, was a particular matter in which the Town of Douglas was a party and had a direct and substantial interest. That particular matter, at the time Beukema represented you before the ZBA (on August 12, 1992) and at the time he received compensation from DEA (in November 1992), was (or within one year had been) a subject of Beukema's official responsibility as a ZBA member.[15/] This was the case even though Beukema abstained from participating in the particular matter as a ZBA member. Therefore, condition (b) of the special municipal employee provisions in §17 was satisfied and §17(b) prohibited you from knowingly,[17/] directly or indirectly, providing compensation to Beukema in relation to the special permit site plan review application. Accordingly, there is reasonable cause to believe you violated G.L. c. 268A, §17(b) by, as DEA's president, causing DEA to compensate Beukema.[18/]

III. Disposition

Based upon its review of this matter, the Commission has determined that this public letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.[19/]

This matter is now closed.

DATE: August 3, 1995

[1/] Beukema served as an associate member of the ZBA until October 1989, when he became a full member. Beukema no longer serves on the ZBA.

[2/] The Douglas selectmen designated ZBA members as special municipal employees in February 1990 in response to a request that month for such designation from ZBA Chairman Lawrence Bacon ("Bacon"), which followed Beukema's individual request for special municipal employee status. According to Beukema, he decided to make this request after attending a Commission seminar given to Town of Douglas officials and employees (including ZBA members) in December 1989, at which, among other topics, special municipal employees status was generally discussed; in particular, Beukema sought special municipal employee status in order to be able to seek the

contract for the design of the new town police station which was advertised for bid in late 1989. According to Beukema, it was his understanding from the seminar that if he had special municipal employee status he would be able, as an architect, to enter into contracts with the town and appear as an architect before town boards, including the ZBA. Thus, Beukema apparently misunderstood what was said at the seminar concerning the effect of special municipal employee status. To the degree that Beukema believed that special municipal employee status would permit him to appear before his own board, the ZBA, and to receive compensation for work subject to review by that board, Beukema was mistaken.

3/ According to Beukema and Conley, the two had first met in 1990 when Beukema submitted a bid for the design of a home Conley was having built. Conley was favorably impressed by Beukema's work, although he selected another architect. Thus, in 1991, when Conley solicited bids from architects for the design of the recycling buildings, he asked Beukema to submit a bid. According to Conley, Beukema submitted the lowest bid.

4/ According to Beukema and Conley, prior to Beukema's hiring they discussed whether there would be any problem with Beukema designing the recycling buildings and being a ZBA member. Beukema told Conley that there would be no ethical problem because he was a special municipal employee. In addition, Beukema told Conley that he thought that the recycling buildings' design plans would require only approval by the town building inspector, and not the ZBA. This discussion between Conley and Beukema was not, however, related to you at the time of Beukema's hiring. According to you, at the time you approved Beukema's hiring, you did not know that he was a ZBA member or that the recycling buildings' plans would require ZBA approval.

5/ The Service Agreement also provided that Beukema was to be paid by the hour for additional work.

6/ This was apparently standard language in the contract form used by Beukema for the Service Agreement.

7/ According to Beukema, it was at this time that he first learned that the proposed recycling buildings would require a special permit site plan review by the ZBA. According to Beukema and Conley, when Beukema learned that special permit site plan review by the ZBA would be required in order to obtain a building permit for the recycling buildings, Beukema discussed with Conley whether or not there would be an ethical problem if Beukema presented the special permit site plan review application to the ZBA. Beukema told Conley that there would not be an ethical problem because Beukema was a special municipal employee and would abstain from participating as a ZBA member in the ZBA's review of the application.

8/ By this time, you were aware that Beukema was a ZBA member and that a special permit from the ZBA was required. According to you and Conley, however, Conley advised you, in turn based upon what he had been told by Beukema, that there was no ethical problem in Beukema applying for the special permit and appearing before the ZBA because Beukema was a special municipal employee and would not participate in the special permit matter as a ZBA member.

9/ According to you, at a meeting on the morning of August 12, 1992, in preparation for the ZBA meeting, Beukema personally told you and O'Hearn that his appearing on your behalf before the ZBA would not create an ethical problem because he was a special municipal employee and he would not participate in the special permit matter as a ZBA member.

10/ Neither Bacon (who had also attended the December 1989 Commission seminar) nor Beukema had sought or received advice from the Commission or Douglas' town counsel regarding whether Beukema, as a ZBA member and special municipal employee, could be the architect for a private client on a project requiring a permit from the ZBA or could appear for a client before the ZBA. Instead, both Beukema and Bacon apparently relied on their shared understanding of the general discussion of "special municipal employee" status at the December 1989 Commission seminar in concluding that Beukema could act as Barletta's architect on the special permit application. You, in turn, relied on what was said by Beukema, Bacon and Conley concerning the conflict of interest issue and did not seek further advice on the issue.

11/ "Compensation" means 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).

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

13/ Section 17(b) states "No person shall knowingly, otherwise than as provided for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation."

14/ The 60-day requirement applies only to condition (c) and is not here relevant. Condition (b) of the special municipal employee provisions in §17 was met as described *infra*.

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

[16] The Commission has held that "the keynote of official responsibility is the 'potentiality' of directing agency action and not the actual exercise of power," *EC-COI-87-17;* i.e, that "official responsibility" turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36.* Thus, the test to determine whether an employee has "official responsibility" for a matter is whether the particular matter falls within the public employee's authority, regardless of whether that authority is exercised. *Id.* Accordingly, regular members of a municipal board, such as Beukema, retain "official responsibility" for matters which are pending before the board, whether or not they have actually worked on the matter as a board member and whether or not they actually sat on the board on a given day. *Id.*; see, e.g., *EC-COI-89-7; 84-48.* Thus, such a regular municipal board member may not avoid "official responsibility" for a matter by abstaining from participation in the matter as a board member. *Id.*

[17] The Commission has not previously decided the question of what "knowingly" means in §17(b). (It should be noted that the word "knowingly" does not appear in §§17(a) or §17(c).) It is, however, well-established in the law that the use of the word "knowingly" does not require that a person know that his actions violate the law or that the person intends to violate the law. "Knowingly" when used in a statute "imports a perception of the facts requisite to make up the crime ... but contains no element of purpose to violate the law." *Commonwealth v. McKnight*, 283 Mass. 35, 39 (1933) (citations omitted); *Commonwealth v. Altenhaus*, 317 Mass 270, 273 (1940).

[18] By the time DEA made the November 1992 payment to Beukema, you knew that Beukema was a ZBA member, that the recycling center matter involved the interests of the town, and that the matter had been before Beukema's board for special permit site plan review. Thus, you had the requisite knowledge about the relevant facts to be said to have knowingly provided Beukema with compensation that he was prohibited from receiving under §17(a). What you were mistaken about (along with Beukema, Conley and Bacon) was how the law (G.L. c. 268A, §17) applied to the facts of Beukema's situation. As set forth above, based on what you were told by the others, you mistakenly believed that, because Beukema was a "special municipal employee" and was going to abstain from the matter as a ZBA member, Beukema did not have a conflict of interest law problem in representing you before the ZBA. This mistake of law does not, however, alter the conclusion that there is reasonable cause to believe that you knowingly caused DEA to give to a Douglas town employee (Beukema) compensation in relation to a particular matter in which the town of Douglas was a party, in violation of §17(b). It is, however, a mitigating circumstance which the Commission has considered in determining how this matter should be resolved. See *infra*.

[19] The Commission is authorized to impose a civil 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 due to the unusual circumstances here presented. Thus, you are a private person who hired a public employee, at first not knowing he was a public employee or that the matter as to which you had hired him would come before his municipal board, and then continued to deal with the public employee (and caused that employee to be compensated) in reliance, in part, upon the employee's mistaken representations (and those of the employee's board's chairman) that there was no conflict of interest problem in the employee representing you before his own board because he was a special municipal employee and would not officially participate in the matter as to which you privately employed him. Furthermore, the Commission has had very few public cases concerning the meaning of §17(b) (in contrast to its many §17(a) and §17(c)-related cases) and it may have been unclear to the general public that your conduct as a private business person dealing with a public official, as described in this letter, was prohibited. The Commission also notes your full cooperation with the Commission's investigation of this matter.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 532

IN THE MATTER
OF
JAMES GIBNEY

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and James Gibney ("Gibney") 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 18, 1995, 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 Gibney. The Commission has concluded its inquiry and, on July 11, 1995, found reasonable cause to believe that Gibney violated G.L. c. 268A, §19.

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

1. Gibney was the Fall River assistant superintendent of schools from 1989 to 1993. In

January 1994, Gibney was appointed superintendent of schools by the Fall River School Committee ("School Committee"), after serving as the acting superintendent of schools for a number of months. As such, Gibney was a municipal employee, as that term is defined in G.L. c. 268A, §1, at all times here relevant.

2. As assistant superintendent, Gibney was responsible for maintaining the list of substitute teachers for the Fall River school system. According to Gibney, during the time he was responsible for the substitute list, every applicant who applied for a substitute teaching position was put on the substitute list, as long as he or she met the minimum education requirement of two years of college.

3. The Fall River school system uses an average of 50 to 60 substitutes daily. Substitutes replace teacher assistants[1/] as well as teachers. At the times here relevant, Fall River substitute teachers were paid a minimum of $44 per day. If a substitute replaced a teacher and remained in the same assignment for more than five days, the pay increased to $58; if a substitute replaced a teacher assistant, the pay remained at $44 per day, regardless of the number of days in the same assignment.[2/]

4. In December 1990, Gibney's daughter, Christine Gibney ("Christine"), applied for a substitute teacher position. At the time, Christine was in her third year of college.

5. Gibney, as assistant superintendent, reviewed Christine's application, determined that Christine met the minimum educational requirements to be a substitute and instructed his secretary to place Christine's name on the substitute list.[3/]

6. Between December 1990 and June 1992, when she graduated from college, Christine worked a total of 50 days as a substitute in the Fall River school system.[4/]

7. In September 1992, a year-long substitute teacher assistant position became available at the Lincoln School in Fall River. The Lincoln School principal contacted Gibney and requested someone to fill the position. In response, Gibney gave the Lincoln School principal the names of three people (including Christine) from which to choose to fill the position.

8. The Lincoln School principal chose Christine and, in September 1992, Christine was assigned to fill the substitute teacher assistant position for the 1992-1993 school year. Christine received the same assignment for the 1993-1994 school year and thus worked two full 180-day school years in the same substitute teacher assistant position. Christine was paid $44 per day for her substitute teacher assistant work at the Lincoln School.

9. At no time, prior to or contemporaneous with his above-described actions, did Gibney disclose to his appointing authority, the School Committee, that he was adding his daughter's name to the substitute list, that he was recommending her to fill a long-term substitute teacher assistant position, or that he was otherwise officially participating in his daughter's hiring as a substitute.[5/]

10. Section 19 of G.L. c. 268A, except as otherwise permitted in that section,[6/] provides, in relevant part, that a municipal employee is prohibited from participating as such an employee in a particular matter in which he knows a member of his immediate family[7/] has a financial interest.

11. The adding of Christine's name to the substitute list and the offering of her name to the Lincoln School principal to fill a long-term substitute teacher assistant position were particular matters.[8/] Both of these actions involved decisions or determinations by Gibney in his official capacity as assistant superintendent.

12. By, in his official capacity as assistant superintendent, deciding to add Christine's name to the substitute list and offering her name to the Lincoln School principal to fill a long-term teacher assistant position, Gibney participated[9/] in these particular matters.

13. Christine had a financial interest, known to Gibney, in her employment as a substitute. Therefore, by participating officially in his daughter Christine's employment as a substitute teacher assistant in Fall River, as described above, Gibney participated as a municipal employee in particular matters in which to his knowledge a member of his immediate family had a financial interest. In so doing, Gibney violated G.L. c. 268A, §19.

14. Gibney fully cooperated with the Commission's investigation.[10/]

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

(1) that Gibney pay to the Commission the sum of one thousand dollars ($1,000) as a

civil penalty for violating G.L. c. 268A, §19; and

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

DATE: August 9, 1995

1/ Teacher assistants are required to have a high school diploma or its equivalent. At the time here relevant, assistants were paid on an hourly basis, between $6 and $7 per hour for six hours, thus earning $38 to $42 daily.

2/ Thus, a substitute teacher replacing a teacher assistant was always paid more than the teacher assistant, during the period here relevant.

3/ Prior to Christine's name being placed on the substitute list, her educational credentials were verified by Gibney's secretary in the same manner as was done with all applicants being placed on the list.

4/ Christine's assignments, as with all substitute assignments, were made by Gibney's secretary in response to calls for substitutes from school principals. The Commission is aware of no evidence that Gibney interfered on Christine's behalf in these assignments.

5/ Gibney did not make a disclosure concerning his daughter working as a substitute in the Fall River school system until February 7, 1994. According to Gibney, he first became aware of an obligation under the Education Reform Act (which took effect on June 18, 1993) to formally notify the School Committee of his daughter's employment in January 1994, when it was pointed out to him during a public meeting at which he was interviewed for the position of superintendent. According to Gibney, however, it was common knowledge in the Fall River school system that Christine was his daughter. General knowledge of Christine's relationship to Gibney was not the equivalent, however, of Gibney's disclosure to his appointing authority of the actions he was taking as assistant superintendent concerning Christine. Furthermore, as set forth *infra*, advanced disclosure to one's appointing authority is required to avoid a violation of G.L. c. 268A, §19.

6/ Section 19(b)(1) permits a municipal employee to participate in a particular matter in which his immediate family member has a financial interest if the employee *first* advises his appointing authority of the nature and circumstances of the particular matter and makes full disclosure of the financial interest, and the employee receives *in advance* a written determination from the appointing authority that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee. Here, Gibney did not make such a disclosure to his appointing authority (the School Committee) and did not receive such a determination from the School Committee. Thus, §19(b)(1) is not applicable here.

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

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

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

10/ Gibney aided the Commission throughout its investigation into this matter by providing information and documents. In addition to agreeing to resolve his violations of §19 with this Agreement, Gibney has made a commitment to assisting others to avoid violating the law by offering to help provide inservice training concerning the conflict of interest law to other public school administrators.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 533

IN THE MATTER
OF
WILLIAM P. PEARSON

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and William P. Pearson ("Pearson") 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 June 22, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Pearson. The Commission has concluded its inquiry and, on July 12, 1994, by a majority vote, found reasonable cause to believe that Pearson violated G.L. c. 268A.

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

1. Pearson was, during the time relevant, a member of the Byfield Water Commission ("BWC"). As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Pearson has served on the BWC since 1990.

2. The BWC is an elected, five member board which oversees the operation of the Byfield Water District ("District"). The BWC meets once a month to review and approve bills and to authorize significant expenditures.

3. The Byfield Water District is an independent entity formed in 1947, pursuant to a special act of the Legislature, to provide water to a specified geographical area in the town of Newbury. The District serves approximately 600 customers[1/] and has an annual budget of about $225,000. (The budget is set at the District Annual Meeting. The commissioners do not have the authority to exceed that budget. All major projects are subject to approval at special or annual District meetings.) The District superintendent oversees the day-to-day operation of the District Water Department.

4. Pearson has private interests in three corporations: Pearson Landscaping, Inc.; Pearson Hardware, Inc.; and Highfields Realty, Inc. All three businesses are located at 2 Fruit Street, Byfield. Pearson jointly owns all three businesses with his brother (each owning 50%). Pearson receives a salary from Pearson Landscaping of approximately $15,000 to $20,000 per year. He does not receive a salary from Pearson Hardware or Highfields Realty. Pearson shares in any profits from each of the three corporations.

5. The District purchases miscellaneous hardware items from Pearson Hardware. The District has, at least until recently, used Pearson Landscaping for all of its emergency waterline repairs, and for the installation of major watermain projects. Finally, beginning on or about March 1, 1991, the District has rented its office space from Highfields Realty, Inc., paying $180 a month.[2/]

6. Between January 1, 1991, and December 31, 1992, Pearson, as a BWC commissioner, signed warrants approving a total of $30,530.30 in payments for bills from Pearson Landscaping, Pearson Hardware and Highfields Realty.

7. On January 8, 1992, the BWC discussed a Wayside Avenue homeowner's request that water be run to his home. As a result of that discussion, the BWC agreed that it would be best to install the water main the full 2,000 feet length of the street at a cost of $20,000. The BWC further agreed that the homeowner should prepare a ten taxpayer petition requesting a District special meeting to consider this project. On Pearson's motion, the BWC voted to schedule a special district meeting to vote on the project once the required petition was received. In or about spring of 1992, the BWC placed an article in the warrant before the District annual meeting which would authorize approximately $6,000 for the installation of a watermain on Hickory Lane. In each of the foregoing cases, Pearson involved himself in the discussion concerning, and the ultimate decision to take, the described action. In each case, Pearson acted in favor of the action. At the time Pearson so acted, he knew it was reasonably likely that Pearson Landscaping would do the watermain work, or submit a bid for the work.

8. Pearson Landscaping did do the watermain work on the Wayside Avenue and the Hickory Lane projects, receiving a total of approximately $14,000 for the two projects.

9. Part of Pearson's Pearson Landscaping salary in 1992 was derived from the District's payments to Pearson Landscaping for the work on the Wayside Avenue and Hickory Lane projects.

10. Pearson acted as Pearson Landscaping's agent regarding both the Wayside Avenue and Hickory Lane projects by, as a Pearson Landscaping employee, discussing various issues regarding the projects with the District superintendent.

11. Except as otherwise permitted in that section,[3/] G.L. c 268A, §19 in relevant part prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he or a business organization by which he is employed has a financial interest.

12. The various decisions and determinations by the BWC to approve bills from Pearson Hardware, Pearson Landscaping and Highfields Realty were all particular matters.[4/] The decisions by the BWC in

January and Spring 1992 to place the Wayside Avenue and Hickory Lane projects before the District Meetings were also particular matters.

13. Because Pearson was substantially and personally involved in making the foregoing decisions, he participated[5/] in those particular matters.

14. Because each such decision involved a company 50% owned by Pearson, Pearson had a financial interest in those particular matters. Pearson was, of course, aware of those financial interests at the time he so participated.

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

16. Section 17 prohibits a municipal employee from receiving compensation from or acting as agent for anyone other than his municipality in relation to a particular matter in which the municipality has a direct and substantial interest.

17. The District had a direct and substantial interest in each of the large scale watermain projects (Wayside Avenue in Hickory Lane) described above.

18. As already discussed above, the decisions by the BWC to place the Wayside Avenue and Hickory Lane watermain projects before the District meetings were particular matters.

19. Pearson acted in relation to those particular matters by discussing with the District superintendent the work in progress.

20. Pearson acted as Pearson Landscaping's agent in doing so. Part of his compensation for 1992, as described above, was derived from this work.

21. Therefore, Pearson violated §17 by receiving compensation from Pearson Landscaping and acting as Pearson Landscaping's agent in relation to particular matters in which the District had a direct and substantial interest, all as described above.

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

(1) that Pearson pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for the violations of G.L. c. 268A, §19;

(2) that Pearson pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for the violations of G.L. c. 268A, §17;

(3) that Pearson disgorge the economic benefit he received by violating G.L. c. 268A, §§ 17 and 19, which was $1,700[6/]; and

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

DATE: August 17, 1995

1/ All but seven or eight of these are located in Newbury.

2/ Evelyn Noyes, chairperson of the BWC and a realtor, observed that the only other space available was for $525 per month. She said the Highfields Realty space was the best deal.

3/ None of the exceptions applies here.

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

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

6/ This represents an approximation of Pearson's share of profits from the $30,530.30 in bills he approved, and his salary attributable to the Wayside Avenue and Hickory Lane projects.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 534

IN THE MATTER
OF
GEORGE TRAYLOR

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and George Traylor ("Traylor") 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 February 25, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Traylor. The Commission has concluded its inquiry and, on December 14, 1994, found reasonable cause to believe that Traylor violated G.L. c. 268A, §3.

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

1. During the period relevant here, Traylor was a registered legislative agent in Massachusetts for various clients. Those clients, through their legislative agents and otherwise, track, monitor and lobby on many pieces of legislation that affect their interests.

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

3. 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 in order to develop the desired goodwill and personal relationships.

4. From December 8, 1992 to December 14, 1992, Traylor stayed at the Las Palmas Del Mar Resort on the southern coast of Puerto Rico. Traylor stayed there with a number of other Massachusetts lobbyists and several legislators.

5. On December 13, 1992, Traylor and another Massachusetts lobbyist went on a fishing excursion with two Massachusetts legislators, former state representatives John Cox and Francis Mara, and their spouses. For that purpose, Traylor and the other lobbyist chartered a 40-foot fishing vessel with a captain and one-member crew. The boat trip lasted several hours and included deep sea fishing and a stop for snorkeling. A box lunch was provided. The cost of charting the boat was $766, split equally between Traylor and the other lobbyist. Thus, Traylor provided each legislator and his spouse with entertainment at a cost of $128 per couple.[1/]

6. 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.

7. Massachusetts legislators are state employees.

8. Anything with a value of $50 or more is of substantial value for §3 purposes.[2/]

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

10. 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 Traylor's clients. In other words, the Commission is aware of no evidence that there was a *quid pro quo*. However, even if Traylor's conduct was only intended to create goodwill, it was still impermissible.

11. Traylor refused to cooperate with the Commission in its 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 Traylor:

(1) that Traylor pay to the Commission the sum of two thousand dollars ($2,000) as a civil fine for violating G.L. c. 268A, §3(a); and

(2) that Traylor 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: October 23, 1995

1/ In earlier deposition agreements with these legislators, the entire cost of the charter was stated as being $383. At that time, the Commission believed the full cost of the charter had been charged to Traylor's hotel bill. The Commission has since learned that the $383 charge on Traylor's bill represented only one half of the total cost of the charter.

2/ See *Commonwealth v. Famigletti*, 4 Mass. App. 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):

> [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 646 (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 Traylor 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. 535

IN THE MATTER
OF
RALPH PARISELLA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Ralph Parisella ("Parisella") 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 May 25, 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 Parisella. The Commission has concluded its inquiry and, on July 11, 1995, found reasonable cause to believe that Parisella violated G.L. c. 268A.

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

1. At the times here relevant, Parisella was a member of the Beverly Licensing Board ("Board"), an appointed position Parisella has held since 1988. As such, Parisella was, at all times here relevant, a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As a Board member, Parisella's duties included issuing, overseeing and enforcing alcoholic beverages licenses in accordance with state and local laws.

3. Parisella owned Ralph's Market in Beverly for 35 years, until he sold it in 1988. While Parisella owned Ralph's Market, he developed an ice business, Ralph's Ice. When Parisella sold Ralph's Market, he retained ownership of Ralph's Ice.

4. In 1992, Parisella was semi-retired and Parisella's son, Jason Parisella ("Jason"), was running Ralph's Ice, the ownership of which Parisella and his wife were then in the process of transferring to Jason. In 1992, Parisella still continued to help out with Ralph's Ice when the business was especially busy, was still involved in the management of Ralph's Ice and continued to receive a salary from Ralph's Ice.

5. In 1992, Ralph's Ice was the only ice company located in Beverly. There were, however, other ice companies located outside of Beverly which supplied ice to businesses in Beverly. Patten Co. Ice ("Patten Ice") of Peabody and Salem Ice of Salem were Ralph's Ice's two main competitors in 1992.

6. In 1992, Ralph's Ice had approximately 75 customer accounts, including gas stations, convenience and grocery stores, package stores, restaurants and other retail outlets. Among Ralph's Ice's customers were Cornerstone Liquor Store ("Cornerstone") and Cabot Liquor Store ("Cabot"), both owned by Jerry Dubrow and his son Robert Dubrow (together "the Dubrows"); and Simpson's Package Store ("Simpson's") and Ryalside Liquors ("Ryalside"), both owned by George Finn ("Finn"). Each store did approximately $200 per year in business with Ralph's Ice. Cornerstone, Cabot, Simpson's and Ryalside were Beverly package stores licensed by the Board to sell alcoholic beverages.

7. In early 1992, the new owner of Ralph's Market applied to the Board for a license to sell beer and wine. Parisella was not involved in Ralph's Market's license application, either privately or as a member of the Board. Ralph's Market's license application was opposed by Finn and the Dubrows. In October 1992, the Board granted a beer and wine license to Ralph's Market. Parisella did not participate as a Board member in the granting of the license to Ralph's Market.

8. The Board's granting of the beer and wine license to Ralph's Market upset Finn and the Dubrows. Finn and the Dubrows blamed Parisella for the granting of the license to Ralph's Market.

9. On October 26, 1992, Finn told Parisella he was changing ice suppliers for his two stores because of the Board's issuance of the license to Ralph's Market. Parisella tried to convince Finn not to change ice suppliers. During their conversation, Parisella told Finn that he had nothing to do with the issuance of the license to Ralph's Market. In an effort to convince Finn to continue doing business with Ralph's Ice, Parisella reminded Finn that Parisella was pro-business and referred to another Board member, Russ Kiernan ("Kiernan"), who had a history of opposition to outside signs on liquor stores (which Beverly retailers considered important to their business). Exactly what Parisella said to Finn is uncertain; however, Parisella's statements were such as would cause a reasonable person hearing them and knowing the relevant circumstances to conclude that Parisella, as a Board member, would intercede with Kiernan on the sign issue if Finn continued to buy ice from Ralph's Ice, but would not do so if Finn changed ice suppliers. As a result of this conversation with Parisella, Finn decided to remain a customer of Ralph's Ice.

10. On October 29, 1992, Cornerstone was in the process of changing ice suppliers from Ralph's Ice to Patten Ice. While Patten Ice employees were in Cornerstone to install their ice cooler, Parisella saw the company's truck parked in front of the store, entered the store, observed what was occurring and confronted Robert Dubrow. In the ensuing conversation with Robert Dubrow, Parisella referred to Kiernan and Kiernan's opposition to outdoor signage. Exactly what Parisella said to Robert Dubrow is uncertain; however, Parisella's statements were such as would cause a reasonable person hearing them and knowing the relevant circumstances to conclude that Parisella, as a Board member, had in the past prevented Kiernan from acting on the signage issue, and would cease doing so if Robert Dubrow changed ice suppliers.

11. After this discussion with Robert Dubrow, Parisella left Cornerstone, went to Cabot and asked Jerry Dubrow why Cornerstone was "throwing out [Ralph's Ice] ice." Jerry Dubrow told Parisella that Cornerstone and Cabot were changing ice suppliers because Ralph's Market had been given a beer and wine license. Parisella responded that he did not vote on the license and did not have anything to do with it. Parisella, in this conversation with Jerry Dubrow, also referred to Kiernan and Kiernan's opposition to outdoor signage. Again, exactly what Parisella said to Jerry Dubrow is uncertain; however, Parisella's statements were such as would cause a reasonable person hearing them and knowing the relevant circumstances to conclude that Parisella, as a Board member, had in the past prevented Kiernan from acting on the sign issue and would cease doing so if Jerry Dubrow changed ice suppliers.

12. As a result of their October 29, 1992 conversations with Parisella, the Dubrows decided to remain customers of Ralph's Ice.[1/]

13. Kiernan was a Board member for ten years until he resigned in late 1992. According to Parisella and Kiernan, the following statements are true: Other

than their Board service, Kiernan and Parisella had no relationship. Parisella had no influence over Kiernan while Kiernan served on the Board. As a Board member, Kiernan opposed signs for mostly aesthetic reasons. Kiernan was not aware that Parisella discussed Kiernan's position on signs with liquor store owners. Kiernan never discussed the sign issue with Parisella outside of Board meetings. Parisella never attempted to convince Kiernan to "back off" of the sign issue. (The Commission is aware of no evidence contradicting these statements.)

14. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using or attempting to use his official position to obtain for himself or others unwarranted privileges of substantial value which are not properly available to similarly situated persons.

15. The Dubrows' and Finn's annual ice purchases from Ralph's Ice were of substantial value.[2/]

16. As set forth above, Parisella used his position as a Board member to retain the business of Finn and the Dubrows for himself and his son as owners of Ralph's Ice. Parisella's use of his official position to retain the business of Finn and the Dubrows was, thus, the use of Parisella's official position to obtain an unwarranted privilege of substantial value. In so using his official position, Parisella violated §23(b)(2).

17. 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.

18. Parisella, by making statements to the Dubrows and Finn implying that their failure to continue doing business with Ralph's Ice would affect his actions as a Board member, 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 Parisella, as a Board member, would officially favor people doing business with Ralph's Ice and, thus, that those persons could improperly influence or unduly enjoy Parisella's favor in the performance of his official duties as a Board member. Thus, Parisella violated G.L. c. 268A, §23(b)(3).[3/]

19. Parisella fully cooperated with the Commission's investigation.

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

(1) that Parisella pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating G.L. c. 268A, §23; and

(2) that Parisella 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 16, 1995

[1/] Parisella stopped doing business with Finn and the Dubrows in 1993, after Parisella learned of the Commission's investigation into this matter.

[2/] Anything worth $50 or more is of substantial value for G.L. c. 268A purposes. See *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587; EC-COI-93-14.

[3/] Although an appointed official, such as Parisella was as a Board member, may avoid a violation of §23(b)(3) by a written disclosure to his appointing authority, Parisella made no such disclosure.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 536

IN THE MATTER
OF
JEROLD GNAZZO

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Jerold Gnazzo ("Gnazzo") 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 September 14, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Gnazzo. The Commission has concluded its inquiry and, on May 9, 1995, found reasonable cause to believe that Gnazzo violated G.L. c. 268A.

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

1. At all times material to this matter, Gnazzo was the Massachusetts Registry of Motor Vehicles ("RMV") Registrar. As such, he was a state employee within the meaning of G.L. c. 268A, §1.

2. At all times material to this matter, Gnazzo's wife, Jane S. Gnazzo ("Jane"), was the president of Krisco Corporation. Krisco Corporation owned and operated a MAACO Autobody shop located at 444 Somerville Avenue in Somerville, Massachusetts. According to Gnazzo, neither Jane nor Gnazzo had an ownership interest in Krisco Corporation.[1/]

3. In the fall of 1992, the Massachusetts Attorney General's ("AG") Environmental Strike Force ("Strike Force"), working closely with the Division of Environmental Law Enforcement ("DELE") of the Executive Office of Environmental Affairs,[2/] commenced a criminal investigation into alleged illegal hazardous waste transfers at the above Somerville MAACO shop.

4. On or about April 28, 1993, in furtherance of this investigation, the Strike Force issued a subpoena *duces tecum* to the "Keeper of the Records, Krisco Inc." at 444 Somerville Avenue, Somerville, Massachusetts.

5. Jane was furnished with a copy of the subpoena either by mail or by facsimile at her usual place of business.

6. Gnazzo obtained a copy of the above subpoena from his wife.

7. The subpoena did not identify the Strike Force. The names of an assistant attorney general and an environmental police officer were identified on the subpoena.

8. Having assumed the subpoena had been authorized by DELE, on or about May 5, 1993, Gnazzo telephoned the DELE director and asked him to come to his office.[3/] When the DELE director arrived at Gnazzo's office, Gnazzo showed him the Strike Force subpoena. The DELE director informed Gnazzo of the relationship between DELE and the Strike Force.

9. Gnazzo explained to the DELE director that he, Gnazzo, knew that there had been an ongoing investigation into matters related to the disposal of paints and other hazardous substances at the Somerville MAACO shop, but that he, Gnazzo, understood that the situation had been investigated and that he, Gnazzo, believed the matter was being resolved administratively. Gnazzo further explained that he was concerned that the subpoena had targeted his wife, and through her Gnazzo himself, solely for political reasons.

10. Gnazzo asked the DELE director to find out whether the case had substance or if it was politically motivated. The DELE director agreed to do this.

11. Gnazzo did all of the foregoing on behalf of his wife and the Krisco Corporation (his wife was still named Krisco Corporation's president).

12. Later that same day, the DELE director telephoned a DELE State Police lieutenant assigned to the Strike Force and asked to see her at his office. The DELE director was the DELE lieutenant's supervisor. When the DELE lieutenant arrived at the DELE director's office, the DELE director handed her a copy of the MAACO subpoena he had received from Gnazzo. The DELE director related to the DELE lieutenant the information Gnazzo had told him, and expressed Gnazzo's concern that the DELE case against Krisco Corporation and Jane was politically motivated.

13. The DELE lieutenant told the DELE director that the investigation was substantive and was not motivated by politics.

14. The DELE director thereafter returned to Gnazzo's office, where the DELE director told Gnazzo what the DELE lieutenant had said. The DELE director and Gnazzo both testified that Gnazzo did not ask the DELE director to take any additional action.

15. On August 11, 1993, the AG's office announced an indictment against the Somerville MAACO shop, arising out of the alleged illegal disposal of paints and other hazardous substances used in the day-to-day operation of the auto body shop.

16. Jane was not named in the indictment.

17. Section 4(c) of G.L. c. 268A prohibits a state employee from acting as agent for anyone other than the Commonwealth or a state agency in connection

with any particular matter in which the Commonwealth or state agency is a party or has a direct and substantial interest.

18. The Strike Force's determination to conduct a criminal investigation into alleged illegal hazardous waste transfers at the Somerville MAACO shop was a particular matter[4/] in which the Commonwealth was a party or had a direct and substantial interest. When Gnazzo made inquiries to the DELE director in relation to the investigation on behalf of his wife and the Krisco Corporation, he acted as agent for someone other than the Commonwealth in connection with a particular matter in which the Commonwealth was a party. Therefore, Gnazzo violated G.L. c. 268A, 4(c).

19. Section 4 reflects the maxim that a person cannot serve two masters. Whenever a state employee acts on behalf of private interests in matters in which the state also has an interest, there is a potential for divided loyalties, the use of insider information and favoritism, all at the expense of the state. See generally *EC-COI-92-4; 82-176.* An inquiry into an ongoing sensitive criminal investigation raises such concerns, especially when made by a high-ranking public official like the RMV Registrar.[5/]

20. Gnazzo cooperated with the Commission's investigation.

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

(1) that Gnazzo pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §4(c);

(2) that Gnazzo 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 14, 1995

[1/] At all times materials to this matter, Jane maintained a usual place of business at 450 Albany Street, Boston, Massachusetts. According to Gnazzo, Jane had no knowledge of or responsibility for the day-to-day operations of the auto body repair business at the Somerville MAACO shop.

[2/] DELE officers are assigned to the AG Strike Force. The Strike Force investigates environmental violations allegations and works with the AG through prosecution. The Strike Force officers report to AG personnel but continue to be subject to a certain amount of control and supervision by DELE.

[3/] Gnazzo and the DELE director had their offices in the same building on Nashua Street in Boston.

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

[5/] A state employee, however, is not prevented from acting as agent for or otherwise aiding or assisting members of his immediate family, provided the state employee receives the prior approval of the state official responsible for having made the appointment to the position held by the state employee in question. See *G.L. c. 268A, §4(c).* The Registrar is appointed by the Governor. This was not done by Gnazzo.

Even if Gnazzo had obtained the Governor's approval before acting, he would have nevertheless violated §4 because the exemption would not apply to inquiries made on behalf of Krisco Corporation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 525

IN THE MATTER
OF
LEE ROBINSON

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Lee Robinson ("Robinson") 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 March 30, 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 Robinson. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Robinson violated G.L. c. 268A.

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

1. Robinson was, during the time relevant, a Selectman of the Town of Provincetown. As such, Robinson was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. On July 23, 1990, the Selectmen voted to designate themselves as non-voting "*ex-officio*" members of town boards.

3. On April 7, 1992, Robinson submitted an application for a special permit in the name of the A&P to the Provincetown Zoning Board of Appeals ("ZBA") and the Provincetown Licensing Board, based upon his intentions to lease and operate the A&P's unused parking lot for the purpose of providing parking to summer tourists.

4. On June 4, 1992, the ZBA voted to draft a decision to grant Robinson's special permit.

5. On June 18, 1992, the ZBA considered Robinson's application at a public hearing. Robinson was asked to attend and to submit certain documentation concerning the permit. With the chairperson's consent, Robinson spoke in support of his application. After the public hearing session ended, debate among the ZBA members over the permit application continued. In response to a comment made during the debate, Robinson stated that he could speak. He stated that as a Selectman, he is an *ex-officio* member of the ZBA and could participate in its deliberations[1/], even those that are closed to the public. The chairperson allowed Robinson to provide input into the debate.

6. On July 3, 1992, the Provincetown Licensing Board considered Robinson's application for license to operate the parking lot. With the chairperson's consent, Robinson spoke in support of his application. After the public hearing session ended, Robinson requested to speak. He stated that as a Selectman, he is an *ex-officio* member of the Licensing Board and could participate in its deliberations, even those that are closed to the public. The chairperson denied Robinson's request to speak.

7. Robinson operated the parking lot from approximately late July of 1992 until early summer of 1993, and no longer operates or has any interest in the parking lot. During the brief period of operation, he made no profit and incurred an after-expense loss on the venture.

8. Robinson is no longer a Selectman, nor does he hold any other municipal position in Provincetown or elsewhere.

9. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from using or attempting to use his position to obtain an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

10. The ability to speak during ZBA and Licensing Board deliberations on his own application, when others could not, was a privilege of substantial value because it could enhance Robinson's chances of obtaining the potentially valuable permit and license he was seeking. The opportunity for further advocacy was not properly available to other permit/license applicants.

11. By invoking his *ex-officio* member status in order to speak or attempt to speak during ZBA and Licensing Board deliberations on his own application where others could not, Robinson used or attempted to use his Selectman's position to obtain an unwarranted privilege of substantial value, not properly available to other similarly situated individuals, in violation of §23(b)(2).[2/]

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

> that Robinson 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.[3/]

DATE: November 17, 1995

[1/] Mr. Robinson asserts that in both instances he intended to address the procedures used in the handling of the application, which he saw as a matter of public concern.

[2/] See footnote 1.

[3/] The Commission is authorized to impose a fine of up to $2,000 for each violation of G.L. c. 268A. The Commission, however, believes that no fine is appropriate here. Robinson's comments were spontaneous and of limited duration. Furthermore, Robinson is no longer a Selectman nor does he now have any financial interest in the parking lot.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 537

IN THE MATTER
OF
MASSACHUSETTS MEDICAL SOCIETY

DISPOSITION AGREEMENT

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

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

The Commission and Mass. Medical now agree to the following findings of fact and conclusions of law:

1. Mass. Medical is the oldest continuously operating medical society in the country, having been incorporated by the Massachusetts Legislature in 1781. The purpose of the Society is to advance medical knowledge, to support professional and ethical medical standards and to promote the health and well being of the citizens of the Commonwealth.

2. Mass. Medical is a non-profit corporation whose membership is made up of physicians, residents and medical students who primarily reside or have professional activity in Massachusetts. Mass. Medical is governed by a 524 member House of Delegates and a 32 member Board of Trustees. Mass. Medical has an elected president who serves a one-year term. Mass. Medical currently has 15,251 members, most of whom pay annual dues.

3. The medical profession in Massachusetts is subject to many state laws. Numerous bills are filed in the Massachusetts Legislature each year potentially affecting the medical profession and the public health.[1/] Mass. Medical monitors proposed laws potentially affecting the medical profession and the public health, and frequently seeks to promote, oppose or otherwise influence such legislation.

4. Mass. Medical has many committees and departments through which it advances the practice of medicine. During the period here relevant, Mass. Medical had a Government Relations Department which was responsible for monitoring Massachusetts legislation of interest to Mass. Medical's members and presenting Mass. Medical's position on such proposed laws to members of the Legislature.

5. Mass. Medical employed lobbyists, including Andrew Hunt ("Hunt"), who was, at all times here relevant, a Massachusetts registered legislative agent for Mass. Medical. He was assigned to the Government Relations Department and functioned as a full-time lobbyist for Mass. Medical in dealing with the Massachusetts Legislature. In this role, he tracked health care legislation of interest to Mass. Medical, coordinated testimony and presentations to legislative committees, and met with various legislators and their staff.

6. In order to effectively present Mass. Medical's position on legislation to state legislators, Hunt developed and maintained personal relationships with legislators and their staff people. These personal relationships ensured that Hunt would have access to these government officials so that Mass. Medical's position on proposed laws could be presented.

7. During the period here relevant, one way in which Hunt created strong, personal relationships with Massachusetts legislators was by providing them with free meals and drinks, golf, and other gratuities. These gratuities created and/or fostered goodwill and personal relationships between the public officials and Hunt which, in turn, enhanced Hunt's access to the public officials.

8. During the period here relevant, Hunt submitted a monthly expense report to Mass. Medical listing each of his expenses by amount, date and by

reference to a general description of the nature of the expense, such as "medical malpractice" or "medicare." The reports, however, failed to identify who was entertained. In any event, Mass. Medical paid for all of these expenses.

9. Hunt has refused to now identify who was entertained.

10. Between July 1989 and April 1993, Hunt provided individual Massachusetts legislators with meals, golf and other entertainment worth $50 or more on numerous occasions. The value of this entertainment was approximately $15,000.[2/] Examples of such entertainment are as follows.

a. From December 8 to December 14, 1992, Hunt was in Puerto Rico. There was a Council of State Governments ("CSG") conference being held in San Juan at the time. Hunt stayed at the Las Palmas del Mar Resort on the southern coast of Puerto Rico with several legislators and a number of Massachusetts lobbyists. On December 13, 1992, Hunt and another Massachusetts lobbyist went on a fishing excursion with two representatives and their spouses. For that purpose, Hunt and the other lobbyist chartered a 40-foot fishing vessel with a captain and one-member crew. The boat trip lasted several hours and included deep sea fishing, a stop for snorkeling, and a box lunch. The cost of chartering the boat was $766, split equally between Hunt and the other lobbyist. Thus, Hunt provided each legislator and his spouse with entertainment at a cost to him of $128 per couple.

b. Between March 10 and March 15, 1993, Hunt stayed at the Plantation Resort at Amelia Island, Florida, where an educational conference sponsored by the Conference of Insurance Legislators ("COIL") ran from March 11th to March 14th. Hunt stayed at the Plantation Resort with a number of Massachusetts legislators and lobbyists. During his stay, Hunt paid a total of $240 in greens fees for three Massachusetts legislators. (The cost of each greens fee was approximately $80.)

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

12. Massachusetts legislators and their staff are state employees.

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

14. By giving individual Massachusetts legislators or their staff gratuities worth $50 or more while each such legislator or staff member was, recently had been, or soon would be in a position to take official action concerning proposed legislative matters which could affect the financial or other interests of Mass. Medical's members, Mass. Medical's legislative agent gave those legislators and their staff members gifts of substantial value for or because of acts within their official responsibility performed or to be performed by them. As a corporation, Mass. Medical acts through and is responsible for the conduct of its employees. Because it is responsible for the conduct of its legislative agent, Mass. Medical violated G.L. c. 268A, §3(a).[4/]

15. The Commission is not aware of any evidence that (a) Mass. Medical gave any of the foregoing gratuities to legislators with the intent to influence any specific official act by them as legislators; or (b) that the legislators in return for the gratuities took any official action concerning any proposed legislation which would have affected Mass. Medical. In other words, the Commission is not aware of a *quid pro quo*. Even if the conduct of Mass. Medical was only intended to create goodwill, it was still impermissible.

16. Mass. Medical, through its current officers, has cooperated with the Commission in its investigation.[5/]

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

(1) that Mass. Medical pay to the Commission the sum of forty-five thousand dollars ($45,000) as a civil fine for violating G.L. c. 268A, §3(a); and

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

DATE: December 14, 1995

[1/] Many of these bills have a potential economic impact on Mass. Medical's members.

[2] As discussed, Hunt's records do not identify who he entertained. The Commission, however, has based the $15,000 figure on the following: (1) certain legislators have identified themselves as having been entertained by Hunt; (2) a significant portion of the expenses were incurred at conferences attended by Massachusetts legislators; (3) the amount of expenses was far in excess of any amount Hunt could have incurred for his own expense and expenses in connection with that portion of his job that did not involve him in dealing with legislators or their staff; and (4) Hunt's refusal to testify precluded the Commission from obtaining direct evidence of the amount of the gratuities and accordingly, because of the unavailability of such direct evidence, the Commission has drawn an adverse inference that on numerous occasions during this time period he did provide (as a Mass. Medical lobbyist) $50 or more in entertainment value to Massachusetts legislators.

As noted, neither the Commission nor Mass. Medical had sufficient information to determine the actual amount of gratuities Hunt provided to Massachusetts legislators between July 1989 and April 1993. However, in order to bring closure to this matter by the Disposition Agreement, Mass. Medical has stipulated to the figure set by the Commission.

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

> [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. See *In re John Hancock Mutual Life Insurance Company*, 1994 SEC 646 (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 a $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." See *In re U.S. Trust*, 1988 SEC 356. Finally, §3 applies to entertainment gratuities of $50 or more even in connection with educational conferences. See *In re Stone and Webster*, 1991 SEC 522, and *In re State Street Bank*, 1992 SEC 582.

In arriving at the $50 or more expense figure, the Commission would include 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 cost less than $50, but if totalled they equaled or exceeded $50, they would be included. In addition, where the lobbyist paid for a legislator's spouse's expenses, those expenses would be attributed to the legislator.

On the present facts, §3 applies to entertainment of legislators and their staff by Mass. Medical's lobbyist where the intent was generally to create goodwill and the opportunity for access, even if specific legislation was not discussed.

[5] The Commission also notes that within days of the Disposition Agreement entered into by John Hancock (1994 SEC 646, dated March 21, 1994), Mass. Medical implemented a written policy to bring all expenditures in line with the standards outlined in that Disposition Agreement. This was before the Commission notified Mass. Medical that it was the subject of a Preliminary Inquiry. The policy memorandum, dated March 29, 1994, provides that no legislative agent, government relations staffer or consultant should expend $100 or more cumulatively over the course of any year on gifts, entertainment of any kind, including meals and drinks, on any one legislator and his or her family members, and further that on any given occasion, gifts and entertainment of any kind, including meals and drinks, totaling $50 to any one legislator and his or her family are prohibited.

Bristol County Sheriff David R. Nelson
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Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110-2600

PUBLIC ENFORCEMENT LETTER 96-2

Dear Sheriff Nelson:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry concerning whether you, as Bristol County Sheriff, violated the state conflict of interest law, G.L. c. 268A, when several Bristol County Sheriff Department ("Sheriff Department") employees raised funds for your political campaign committee by selling tickets to political fundraisers, sponsored by your campaign committee, to fellow Sheriff Department employees. Based on the staff's inquiry (discussed below), the Commission voted, on July 11, 1995, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23. The Commission, however, does not believe that further proceedings are warranted due to the fact that this is a case of first impression, and has, rather, determined that the public interest would be better served by bringing to your attention, and to the attention of all elected officials throughout the Commonwealth, the facts revealed by our inquiry and by setting forth the Commission's position concerning the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are the Sheriff of Bristol County, a paid elected position. You first became Bristol County Sheriff in 1983 and have since served continuously as Sheriff.

2. In 1991 and 1992, your political campaign committee held fundraising events. Tickets were sold to these events at a price of $50 each.

3. In 1991 and 1992, several Sheriff Department correction officers of the rank of lieutenant and above solicited subordinate correction officers to purchase tickets to your campaign committee's political fundraisers. Some of these solicitations took place during Sheriff Department work hours and in Sheriff Department workplaces, including the Ashe Street Jail and the Dartmouth House of Correction. An undetermined number of tickets to your fundraisers were sold to rank and file correction officers by their superiors in this manner.

4. Some correction officers who purchased tickets to your campaign committee's fundraisers apparently felt pressured to do so. Thus, there is evidence that some senior ranking officers selling the fundraiser tickets encouraged their subordinates' sense of obligation to buy the tickets and fostered their belief that you took notice of who purchased tickets and who did not. The Commission is, however, aware of no evidence of any adverse consequences in fact suffered by anyone for refusing to buy tickets to your campaign committee's fundraisers.

5. In 1991 and 1992, persons selling tickets to your campaign committee's fundraisers were apparently advised about the applicable campaign finance laws. Some of these ticket sellers were senior ranking officers under your direct command as Sheriff. Although you apparently did not personally participate in the sale of fundraiser tickets, due to the systematic and organized manner and the location of certain of the fundraiser ticket sales solicitations, you had reason to know that solicitations of Sheriff Department subordinates by their superiors were taking place in Sheriff Department workplaces.[1/]

II. Discussion

As Bristol County Sheriff, you are a county employee. As such, you are subject to the conflict of interest law, G.L. c. 268A, generally, and in particular, for the purposes of this discussion, to §§23(b)(2) and 23(b)(3) of the statute.[2/]

There is evidence indicating that, in 1991 and 1992, many Bristol County correction officers were solicited to buy tickets to your campaign committee's political fundraising events. Some of these solicitations occurred on the job, in Sheriff Department workplaces, and were made by superior correction officers of their subordinates. These solicitations were to some degree inherently coercive of the employees solicited. Regardless of whether anything was said or implied by the ticket sellers about the consequences on the job of buying or not buying tickets, it is difficult in this context to view the purchase of tickets for one's boss' political fundraiser as a free choice.

Since the authorization of *Commission Advisory No. 4 (Political Activity)* in 1984, the Commission has

made clear that solicitations of this kind are prohibited by G.L. c. 268A, §23(b)(2), when engaged in by *appointed* public employees. As the Commission stated in *Advisory No. 4*,

> The Commission has repeatedly held that the conflict of interest law §23(b)(2) forbids public employees from soliciting anything of substantial value from those they oversee, because of the "inherently coercive" nature of such solicitations. The Commission has applied this principle to political campaigns. Thus, *appointed* public employees may not solicit campaign assistance from persons they regulate or who are under their supervision (emphasis in original). For example, they may not use their official title or authority, or their presence at a meeting under coercive circumstances, to solicit campaign assistance. ...The same principle applies to campaign fundraising. Thus, appointed public employees (whether compensated or not) may not solicit political contributions from other public employees whom they supervise, vendors that they oversee, or anyone over whom they may have regulatory power.

Thus, there is clearly reasonable cause to believe that the senior ranking correction officers, who are *appointed* employees, who solicited subordinates to buy your campaign committee's fundraiser tickets violated §23(b)(2).

Although you apparently did not directly participate in the sale of your campaign committee's fundraiser tickets, you had reason to know how the fundraiser tickets were being sold and to whom. Although Sheriff Department employees on your political committee were apparently cautioned about fundraising restrictions, that action did not deter or prevent some of your officers from soliciting their subordinates on the job. Your failure to take effective affirmative action to prevent these solicitations was in effect passive encouragement and approval of the solicitations.

The Commission has not previously had occasion to address the issue of whether and under what circumstances an *elected* official whose senior ranking subordinates solicit lower ranking employees for political assistance or contributions to the elected official's campaign committee violates §23(b)(2). Because the elected official has the authority to halt this type of prohibited solicitation, the elected official's failure to effectively do so and his acceptance of political contributions raised by the solicitation when he knows or has reason to know of the nature of the solicitation is, in effect, a use of his position to permit a prohibited activity. Sound public policy dictates that the elected official has an obligation to prevent such improper conduct once the official knows or has reason to know that his subordinates are engaging in such solicitations.

In a March 9, 1982 public letter to then Boston Mayor Kevin H. White (*Compliance Letter 82-2*), the Commission held that §23 prohibits a "public official who controls the jobs of large numbers of employees and the awarding of important contracts with vendors" from permitting "a [birthday party] to be planned that will raise money for him or any members of his family without making every reasonable effort to insure that there is neither direct solicitation of these employees or vendors nor pressure, either implicit or explicit, on such employees or vendors to attend or contribute."[3/] Similarly, it is an unwarranted privilege of substantial value and a violation of §23(b)(2) for an elected public official to allow appointed public employees in his agency to solicit subordinate agency employees to make political contributions (or otherwise provide assistance) to the elected public official's campaign committee.

The 1991 and 1992 solicitations of Sheriff Department employees by their superiors to purchase tickets to your political fundraisers (and the monies thereby obtained) amounted to unwarranted privileges of substantial value. By not taking effective affirmative action to prevent these solicitations, you appear to have used your position as sheriff to obtain unwarranted privileges of substantial value not properly available to similarly situated persons.[4/] Accordingly, there is reasonable cause to believe that you violated §23(b)(2).

This same conduct and/or failure to act on your part also appears to have violated G.L.c. 268A, §23(b)(3)'s prohibition against a public official knowingly, or with reason to know, acting in a manner which would cause a reasonable person, with 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. Your failure to effectively prevent the above-described actions of senior ranking correction officers directly under your command would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that you approved of the solicitation of Sheriff's Department employees by their superiors to buy tickets to your political fundraisers and, given the sales methods apparently employed by some of your senior ranking officers (as described above in paragraph 4), that you could be unduly influenced in the performance of your official

responsibilities as Sheriff by whether or not correction officers purchased tickets to your political fundraisers. Thus, there is reasonable cause to believe that you violated §23(b)(3).

III. Disposition

Based upon its review of this matter, the Commission has determined that this letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.[5/]

This matter is now closed.

DATE: December 21, 1995

[1/] Although on one occasion you apparently reprimanded a senior ranking correction officer for such solicitations, you did not inform your staff generally about the reprimand. You, instead, apparently informed your campaign committee of the reprimand and advised the committee to comply with all pertinent campaign laws. You, however, did not take any further action to ensure that your advice to your campaign committee was followed.

[2/] Section 23(b)(2) prohibits a public employee from knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated persons. 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, with knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. Section 23(b)(3) further provides 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.

[3/] Although, the Commission in *White* stated that its ruling did not relate to legitimate political fundraisers, as discussed above, the solicitation by appointed superiors of their subordinates is not legitimate political fundraising.

[4/] It is clear that the solicitations were of substantial value to you and your campaign fund. As the Commission noted in *EC-COI-92-5*, for the purposes of §23(b)(2), the raising of $50 or more would constitute substantial value. See also *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8.*

[5/] 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 because the Commission has not previously indicated that it will view elected officials as being responsible for ensuring that appointed superior officers or employees do not solicit subordinates for campaign contributions. In addition, it appears that you took some, albeit ineffective, action to control the above-described solicitations.

State Ethics Commission

Advisory Opinions

1995

Summaries of Advisory Opinions
Calendar Year 1995

EC-COI-94-10 - Using a four-factor "advisory board" test, the Commission finds that the Governor's Advisory Commission on Domestic Violence is a state instrumentality. Its members who are not otherwise state employees are, as a result of their service on the Governor's Advisory Commission, considered "special state employees" subject to the restrictions of G.L. c. 268A, §§ 4, 6 and 7. Other members' service on the Governor's Advisory Commission is by virtue of their primary state employment, and does not trigger the multiple office holding restrictions of §7.

EC-COI-94-11 - A member of a college Board of Trustees is advised that, because he is a member of the board of directors of a private corporation, G.L. c. 268A, §6 will prohibit his participation in the Board's consideration of a matter affecting the financial interests of the private corporation. However, the official duties of a Board member do not "require" each member's participation in every matter pending before the Board: a member may be absent from a meeting or may recuse himself on a specific matter. Therefore, the Board member may simply abstain from participating in the §6-prohibited matter, and is *not* required to also disclose the corporation's financial interest to his appointing authority and the Commission.

EC-COI-95-01 - Using a five-part jurisdictional test, a local "cable access" corporation is determined not to be a municipal agency for purposes of the conflict of interest law.

EC-COI-95-02 - Because it serves a state function, separate and distinct from the planning services provided by agencies of its member municipalities, the Metropolitan Area Planning Council is a state agency (rather than a municipal agency) for purposes of the conflict law, and its 133 members, who are uncompensated, are special state employees.

EC-COI-95-03 - Using a four-factor "advisory board" test, the Commission finds that private-sector members of the City of Boston Mayor's Special Commission on Health Care are *not* municipal employees for purposes of the conflict law.

EC-COI-95-04 - An elected municipal official, who also serves as a savings bank "corporator", is *not* required to abstain from official actions affecting the financial interests of the savings bank. G.L. c. 268A §19 generally prohibits a municipal employee from taking any official action affecting the financial interests of an organization for which the municipal employee serves as a director or officer. However, the duties and powers of a bank "corporator" are not analogous to those of an officer or director, and therefore the general prohibition is not triggered.

EC-COI-95-05 - A Mayor is advised that City employees may receive "government rate" discounts on their private cellular phone service from the City's cellular telephone carrier, because such discounts are given as a "common industry-wide practice" to other large groups of employees, rather than because of the city employees' official positions. However, the employees may not use City resources to implement or receive bills for their private usage.

EC-COI-95-06 - Absent specific statutory or regulatory authority, G.L. c. 268A, §4 prohibits state employees from receiving compensation from a private school to conduct Saturday tests of applicants for a state license.

EC-COI-95-07 - A compensated member of a city housing authority board is advised that, if he is elected as a city councillor, G.L. c. 268A, §20 will prohibit him from accepting the stipend paid to housing authority members. Because the board position was not publicly advertised, he would not qualify for a §20(b) exemption, and, by its terms, the "housing authority exemption" to §20 applies only to housing authority *employees*, and not to board members.

EC-COI-95-08 - A high-ranking state employee is advised that, under the provisions of G.L. c. 268A, §7(a), he may dispose of his financial interest in a state contract by placing all of the stock in the affected company in an irrevocable trust for the benefit of his wife.

EC-COI-95-09 - A member of the General Court, privately employed as a residential loan officer, is advised that he may not accept commissions for initiating loans which involve state financial assistance programs. Also, his private work is subject to the restrictions of G.L. c. 268A, §§ 4, 6 and 23.

EC-COI-95-10 - Using a four-factor jurisdictional test, the Commission finds that a Downtown Association, initially funded by an Executive Office of Communities and Development Downtown Partnership Program grant awarded to the city, is a private entity – not a municipal agency – for purposes of the

conflict law. A member of the city's Historic Commission, who serves *ex officio* as a member of the Downtown Association's board, will be subject to the restrictions of G.L. c. 268A, §§ 19 and 23 in the performance of her official duties. Also, her actions as a Downtown Association board member will be subject to the restrictions of G.L. c. 268A, §17, unless the City Council determines that her municipal duties include representation of the Downtown Association.

EC-COI-95-11- A former Chairman of a town Zoning By-Law Study Committee, who is a lawyer in private practice, may serve as paid counsel to the Committee. However, his private law practice will be subject to the restrictions of G.L. c. 268A, §§ 17, 18, and 23, and his official actions subject to the restrictions of G.L. c. 268A, §§19 and 23.

EC-FD-95-1 - A public employee, designated to file a Statement of Financial Interest, is required to report securities held in three family trusts. The Commission finds that, under G.L. c. 268B, §5(g), the securities are "beneficially owned" by the public employee because he receives income from them, although he has no control over the trusts' investment decisions and has no rights to the trust res.

CONFLICT OF INTEREST OPINION
EC-COI-94-10*

FACTS:

The Governor's Advisory Commission on Domestic Violence ("Advisory Commission") was established in July, 1993, pursuant to Executive Order No. 357. It succeeded the Domestic Violence Policy Group ("DVPG") created in 1992 by Executive Order No. 334. The Advisory Commission's work was broadened from that of DVPG to include the response of the health, human services, educational and business communities, as well as law enforcement and the judiciary, to the problem of domestic violence. The Advisory Commission is charged with preparing recommendations regarding domestic violence, evaluating the success of state agencies and other public entities in responding to domestic violence victims, and recommending policy initiatives to improve services for victims and batterers. The Executive Order does not specify a formal work product to be prepared or completed by the Advisory Commission. The Governor and executive branch agencies are not required to adopt or implement any of the Advisory Commission's recommendations.

Under the Executive Order, the Advisory Commission is comprised of the Lieutenant Governor or his designee, the Secretary of Public Safety or her designee, the Secretary of Health and Human Services or his designee, and at least one representative from each of the following: the Attorney General's Office, the district attorneys, victims' assistance agencies, police departments, certified batterers' treatment programs, the Trial Court and such other members as the Governor may appoint. At this time, the Advisory Commission includes the Commissioner of the Department of Probation, the Commissioner of Public Health, the Secretary of Education, several legislators, advocates for the victims of domestic violence and several service providers. The inclusion of "private members" (i.e., victim advocates and service providers) is designed to give the Advisory Commission a fuller understanding of and appreciation for the unique issues facing providers of services to both batterers and their victims. These private members provide the Governor with opinions and expertise which is not otherwise available within the Executive Branch.

The Executive Order designates the Lieutenant Governor as Chairman of the Advisory Commission. There is no fixed number of members, term of service, or required number of meetings per year. Members serve at the discretion of the Governor. The order specifies no voting protocol. In practice, the Commission has made recommendations based on a simple majority of those present, and has no established quorum. Several subcommittees have been established, and a number of interested parties who have not been officially appointed are participating in the work of the subcommittees. Parties who have previously worked with the subcommittees include executive branch employees who have been called upon to lend their expertise to the subcommittees, other interested public employees such as district attorneys and state and local police, and private individuals such as advocates and victims. The Executive Director of the Advisory Commission, which is not a formal position, is a state employee. None of the "private members" of the Commission are compensated for their work or reimbursed for their expenses, nor do they expend or control public funds as members of the Advisory Commission.

Recently, the Advisory Commission has become increasingly active in providing recommendations to a wide range of governmental bodies on issues involving domestic violence. These recommendations have focused on developing legislation, policies and programs to coordinate better the work between the criminal justice system and the social service programs. The following is a summary of these recent activities:

(1) Batterers' Treatment Subcommittee: This subcommittee, co-chaired by the Commissioner of the Department of Public Health ("DPH"), has been reviewing the guidelines for the certification of batterers' treatment programs by DPH. Pursuant to the Abuse Prevention Act, 1990 Mass. Acts c. 403, a special judicial commission was created to develop batterers' treatment program certification standards and guidelines. The initial set of guidelines provided that DPH could develop additional guidelines and could amend the current ones. Under c. 403 of the Acts of 1990, DPH has ongoing responsibility for certification and monitoring of batterers' treatment programs. Working with the Women's Health Division of DPH and with the Advisory Commission Subcommittee, DPH has developed a set of proposed amendments to the current guidelines and DPH will be holding public hearings before finalizing the guidelines.

(2) Transition Subcommittee: This subcommittee has developed draft guidelines for visitation centers. The guidelines, which are general in nature, include recommendations for the training of personnel and standard procedures for dealing with victims and batterers. In addition, the Subcommittee will review a needs assessment study conducted by Abt Associates on behalf of the Department of Social Services ("DSS").[1/] That study identifies the most pressing

needs in shelters and related service programs. The Subcommittee will evaluate, research and develop programmatic recommendations concerning gaps in services, which, pursuant to outside section 51 of Chapter 126 of the Acts of 1994 (the final supplementary appropriations bill for fiscal year 1994),[2] will be forwarded to the House and Senate Committees on Ways and Means.

(3) Uniform Enforcement Subcommittee: This subcommittee has drafted and circulated suggested guidelines for district attorneys in handling domestic violence cases. The Subcommittee has incorporated into its draft guidelines comments it has received from the district attorneys. In addition, the Subcommittee has prepared guidelines for police in responding to domestic violence incidents, including standardized report forms and investigation checklists.[3] This work has involved the Domestic Violence Unit of the State Police. Both sets of guidelines have been approved by the Advisory Committee and are being forwarded to district attorneys and local police departments to use at their own discretion.

(4) Legislation Subcommittee: This subcommittee has reviewed all legislation relative to domestic violence, and has presented an overview to the Advisory Commission. Based on the Subcommittee's recommendations, the Advisory Commission has endorsed a number of legislative initiatives. The Advisory Commission's endorsement was cited by the Administration in an effort to gain passage of legislation. Subcommittee members have also worked on draft legislation regarding long-term housing assistance for victims of domestic abuse.

(5) Community Education Subcommittee: This subcommittee is preparing recommendations on violence in teen dating. These recommendations will likely focus on the role of the Executive Office of Education ("EOE") in assisting schools to prevent dating violence. For example, the Advisory Commission may recommend that the EOE provide schools with information concerning programs and services on teen dating violence.

(6) Other Advisory Commission Projects: The Advisory Commission is involved in serving as a clearinghouse for "best practices" and new initiatives to combat domestic violence. Using funding from the Massachusetts Commission on Criminal Justice ("MCCJ"), the Advisory Commission and the MCCJ have produced and distributed a domestic violence newsletter.[4] Finally, the Advisory Commission has made recommendations to the Governor concerning Administration budget requests.

QUESTIONS:

1. Will Advisory Commission members, who are not otherwise state employees (so-called "private members"), be considered special state employees for purposes of the conflict of interest law?

2. If yes, what limitations will G.L. c. 268A place on the activities of those Advisory Commission members?

ANSWERS:

1. Yes, private members will be considered special state employees.

2. As special state employees, the private activities of private members will be restricted by the conflict of interest law in a limited manner as detailed below.

DISCUSSION:

1. Jurisdiction

For purposes of the conflict of interest law, a state employee is defined as "a person performing services for or holding an office, position, employment, or membership in a state agency,[5] whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council." G.L. c. 268A, §1(q).

As we recently stated in *EC-COI-93-22*, we examine four factors in determining whether an advisory committee will be considered a state agency or instrumentality thereof. Those factors are:

1) the impetus for the creation of the committee (whether required by statute, rule, regulation or otherwise);

2) the degree of formality associated with the committee and its procedures;

3) whether members of the committee perform functions or tasks expected of government employees, or will they be expected to represent outside viewpoints; and

4) the formality of the committee's work product, if any. *EC-COI-86-4; 86-5.*

Examining the Advisory Commission in light of these four factors, we begin by noting that the

Advisory Commission was created by the Governor by executive order as opposed to by statute, rule, or regulation. See *EC-COI-83-21* (task force set up by governor on his own initiative, as opposed to statutory requirement, was not a public entity); contrast *EC-COI-82-157* (advisory council established by G.L. c. 7, §40M on a permanent basis, rather than a temporary or *ad hoc* basis, resulted in finding of state employee status for members). We have previously been more inclined to find a public instrumentality where a committee is a permanent and mandatory component to the implementation of a state statute. See *EC-COI-87-17* (Water Resources Management Advisory Committee of the Department of Environmental Quality Management established as a mandatory committee under St. 1985, c. 592); *86-4* (Administrative Penalties Advisory Committee mandatory and permanent committee pursuant to state statute). Here, in contrast, the Advisory Commission exists solely at the pleasure of the Governor and exists only so long as he deems it necessary and useful. Thus, it is neither mandatory nor permanent. However, this factor alone is not dispositive.

Our examination of the Advisory Commission in light of the remaining factors leads us to conclude that its structure, and more importantly, the tasks it performs, distinguishes it from the council analyzed in *EC-COI-93-22*, which we determined to be advisory in nature. We find that the Advisory Commission functions with a higher degree of formality than traditional advisory committees. Here, the Lieutenant Governor is designated by Executive Order as the chairman. The Advisory Commission is organized into various subcommittees, each of which functions to carry out specific tasks. Although the Governor's Executive Order does not specify the total number of members, it does require the appointment of specific members, many of whom are public employees who are statutorily required to devise and administer programs regarding domestic violence. The Executive Order therefore contemplates a committee with a particular structure. Finally, we find significant that the Advisory Commission functions with the assistance of an executive director, who is a state employee. In contrast, the council in *EC-COI-93-22* did not have members who were otherwise employed by the Commonwealth. Moreover, that council did not have a chair designated by the Governor, nor did it utilize the services of a state employee as executive director.

We also find that the Advisory Commission members perform tasks ordinarily expected of public employees, rather than serving to represent outside viewpoints. See *EC-COI-87-17; EC-COI-86-5* (advisory committee, set up to ensure that agency receives the informed opinions of a broad spectrum of the local population concerning the impact of an agency program, would not be public instrumentality); contrast *86-4* (finding state agency status where permanent committee's principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees). In *EC-COI-93-22*, we found that members of an advisory council principally served to provide the Governor with outside viewpoints concerning the Massachusetts economy and the status of industry in the Commonwealth. Here, not only are a significant portion of the Advisory Commission members, as it is currently constituted, otherwise employed by the Commonwealth,[6/] but also, in examining the functions of the Advisory Commission, we find that, through subcommittees, the Commission performs tasks ordinarily expected of public employees. Rather than merely serving as a "sounding board" to provide the Governor with a variety of outside viewpoints, the Advisory Commission was created to address "a need to coordinate and integrate policy on all aspects of domestic violence at the highest levels of state government and to broaden the scope of the Commission's inquiry to include the response of the health, human services, educational and business communities."[7/] Pursuant to the Executive Order, the Advisory Commission is required to consider the need for further legislation concerning domestic violence, evaluate on a continuing basis the governmental (law enforcement, judicial, health and human service systems) response to victims, consider further policy initiatives to enhance interagency communication and cooperation, and consider measures to prevent and reduce the incidence of domestic violence through public education. These goals are similar to those imposed on government agencies within the Commonwealth. See St. 1990 c. 403, §14-16. For example, the Batterers' Treatment Subcommittee, which is chaired by the Commissioner of DPH, is reviewing current guidelines for the certification of batterers' treatment programs by DPH. DPH, working with this Subcommittee, has prepared a set of proposed amendments to the current guidelines. DPH is planning to hold a public hearing on the guidelines before finalizing them. We note that, pursuant to statute, DPH is charged with amending current, and promulgating additional, guidelines. The work of the Subcommittee on this issue amounts to working with the DPH on a statutorily mandated task.

Similarly, the Transition Subcommittee planned to review a needs assessment, conducted privately on behalf of DSS, which identified the most pressing needs in shelters and related services. Pursuant to §51 of Chapter 126 of the Acts of 1994, the Subcommittee would then evaluate the research, and develop programmatic recommendations identifying gaps in

service. These recommendations were required to be forwarded to the House and Senate Committees on Ways and Means by October 1, 1994. We find that this statutory requirement constitutes legislative recognition that the Advisory Commission (through its subcommittees) performs tasks ordinarily expected of government employees. Here, the Legislature has directed the Subcommittee to perform a specific service and to report its results to the Legislature by a particular date. Such a statutorily mandated evaluation of state programs might otherwise be the responsibility of DSS or other executive branch employees. Likewise, the Uniform Enforcement Subcommittee, in creating law enforcement guidelines, appears to be performing a task ordinarily expected of government employees. This is because, pursuant to statute, the development of domestic violence response guidelines would be the responsibility of local law enforcement agencies themselves. See St. 1990 c. 403, §15. We find that the services expected of the subcommittees go well beyond merely providing a variety of private viewpoints.

Finally, with regard to the work product of the Advisory Commission and its subcommittees, we find significant formality. For example, several subcommittees have drafted extensive guidelines for use and implementation by various public agencies, including DPH, the Commonwealth's district attorneys and state and local police. In contrast, in *EC-COI-93-22*, the advisory council analyzed various industries and crafted reports, but such reports and the recommendations contained therein did not amount to polices or programs which were readily adopted and implemented by executive branch agencies. Here, the Advisory Commission's work product in the nature of guidelines is specifically created with input from, and for adoption by, public agencies.

Applying all of the foregoing factors, we conclude that the Advisory Commission is an instrumentality of the Governor's Office. With the exception of the Advisory Commission's discretionary creation by Executive Order, we find that the Advisory Commission functions in a manner resembling a governmental agency rather than a mere "sounding board" to provide a variety of private viewpoints. We therefore conclude that Advisory Commission members who are not already state employees will be considered state employees for purposes of G.L. c. 268A. However, because Advisory Commission members are not compensated for their services, the "private members" will be considered special state employees.[8/]

2. Limitations Imposed by G.L. c. 268A

As special state employees, private members of the Advisory Commission will be impacted by the conflict of interest law in a less significant manner than those members who are otherwise employed by the Commonwealth. Sections 4, 6 and 7 of G.L. c. 268A are relevant in this case.

Section 4

Section 4(a) of G.L. c. 268A prohibits a state employee from directly or indirectly receiving or requesting compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

A special state employee is subject to the prohibitions of §4(a) and (c) only in relation to a particular matter (1) in which he has at any time participated[9/] as a state employee, or (2) which is or within one year has been a subject of his official responsibility,[10/] or (3) which is pending in the state agency in which he is serving. Clause (c) is applicable only to a special state employee who serves on more than sixty days during a period of three hundred and sixty-five consecutive days.

Under §4(c), for example, a private member would be prohibited from representing a private party before the Advisory Commission, as such representation would be in connection with a particular matter for which the Advisory Commission members have official responsibility. However, private members will not be precluded from appearing before state agencies other than the Advisory Commission with regard to matters unrelated to the work of the Advisory Commission. As for §4(a), a private member could not be privately compensated to prepare a report or other documents for submission to the Commission or any of its subcommittees. See *EC-COI-93-5* (state employee may not receive private compensation for making submissions to state agency). Again, we emphasize that the §4(a) restriction on compensation would apply only with regard to matters before the Advisory Commission. A private member would not therefore be prohibited from preparing documents for submission to other state agencies. Other than the limited situation described above,

however, it is unlikely that a private member will receive private compensation in relation to any particular matters in which he has participated or which are under his official responsibility as an Advisory Commission member, thereby avoiding issues under §4(a). Rather, we think that the Advisory Commission's tasks are more likely to raise issues under §6 of the conflict of interest law.

Section 6

Section 6 of G.L. c. 268A prohibits a state employee from participating in a particular matter in which the employee, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. Under this section, for example, a private member who is employed by a "business organization" (even if a non-profit organization) would be subject to the §6 restriction to the extent that the Advisory Commission takes up matters in which his employer has a direct and immediate, or a reasonably foreseeable, financial interest.[11/] We note that §6 requires a state employee to notify his appointing authority in writing of the financial interest. The appointing authority must then (a) assign the matter to another employee, (b) assume responsibility for the matter, or (c) make a written determination to be filed with the State Ethics Commission that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the state employee. Copies of both the notification to the appointing authority and the appointing authority's determination must be forwarded to the State Ethics Commission.

Therefore, if a matter affecting the financial interests of a private member, or the private organization by which he is employed, is taken up by the Advisory Commission, that private member must abstain, make a disclosure to the Governor and await further instruction from the Governor concerning his participation. For example, if the Batterers' Treatment Subcommittee is considering whether or not to require a certain number of licensed professional staff members for state certification of a treatment program, a private member who is employed by an organization providing such a treatment program will be subject to the §6 restriction. Similarly, a §6 issue may be raised if the Transition Subcommittee is considering a plan to supplement current shelter services through DSS contracts with private providers. Under such a scenario, a private member who is employed by an agency which is likely to seek such a state contract will need to comply with the §6 requirements. To the extent that a private member is aware of matters likely to be taken up by the Advisory Commission or one of its subcommittees, and in which his private employer will have a reasonably foreseeable financial interest, that member may desire to seek a determination in advance from the Governor permitting his participation in those matters when they arise.

Section 7

Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the Commonwealth or any state agency is an interested party, unless an exemption applies. Section 7 is implicated if a private member is to receive compensation that derives from a contract with a state agency. As a special state employee, however, such a private member may have an interest in a state contract as long as the contract is with a state agency in whose activities he neither participates nor has official responsibility for as an Advisory Commission member. Where a private member has a financial interest in a contract with a state agency with which he has no dealings as a Commission member, the §7 prohibition may be overcome by filing with the Ethics Commission a disclosure of the financial interest, in compliance with an exemption contained in §7(d). For example, §7(d) would be applicable where an Advisory Commission member employed by a private university has a financial interest in a teacher training contract between the university and the Department of Education ("DOE"). As long as the Advisory Commission does not participate in or have official responsibility for the activities of DOE, a disclosure pursuant to §7(d) will overcome the §7 prohibition. In contrast, where a private member has a direct or indirect financial interest in a contract with a state agency with which the Commission closely works, such as DPH, the exemption provided by §7(e) must be utilized. In addition to a disclosure to the State Ethics Commission, that exemption requires approval by the Governor.[12/]

DATE AUTHORIZED: November 8, 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/ Pursuant to G.L. c. 18B, §2, DSS is required to provide and administer temporary residential programs providing counseling and supportive assistance for women in transition and their children who, because of domestic violence, homelessness, or other situations, require temporary shelter and assistance.

2/ The outside section reads as follows:

> The governor's domestic violence policy commission transition subcommittee shall evaluate research regarding the effectiveness of existing programs and their ability to meet required standards, and gaps and services to special needs populations such as cultural and linguistic minorities, mentally ill and substance abusing battered women, as well as teens in violent relationships and develop program recommendations to address these needs. Such evaluations shall be provided to the house and senate committees on ways and means not later than October first, nineteen hundred and ninety-four. St. 1994, c. 126, §51.

3/ Pursuant to 1990 Mass. Acts. c. 403, §15, each law enforcement agency is required to adopt local guidelines for law enforcement response to domestic violence. In addition, under G.L. c. 209A, §6, as amended by St. 1990, c. 403, §7, upon investigating an incident of domestic violence, police are required to file a written incident report in accordance with local law enforcement agency standards.

4/ Pursuant to G.L. c. 6, §156, the MCCJ, among other functions, is charged with encouraging and disseminating law enforcement and criminal justice information.

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

6/ Approximately 60% of the current Advisory Commission members are state employees.

7/ Executive Order No. 357, July 8, 1993.

8/ "Special state employee," a state employee:

> (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or
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> (2) who is not an elected official and
>
> (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or
>
> (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

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

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

11/ We have previously decided that regulations themselves are not particular matters, but that the decisions and determinations made during the process of promulgation are particular matters. See *EC-COI-87-34*. Here, decisions and determinations during the process of creating statutorily required guidelines would be particular matters even if the guidelines themselves are not. To the extent that a private member's employer will have a financial interest in those decisions and determinations, §6 is relevant.

12/ Ordinarily, when a full-time state employee holds an additional state position, an issue under §7 arises. Here, however, because state employee members of the Advisory Commission serve on the Commission by virtue of their primary state employment, we do not find that they hold more than one state position. See *EC-COI-84-147; 84-148*. In other words, those members of the Advisory Commission who are otherwise employed by the Commonwealth have only one state contract, thereby avoiding a §7 issue.

CONFLICT OF INTEREST OPINION
EC-COI-94-11

FACTS:

You are seeking an opinion on behalf of a member of the board of trustees ("Board") of a state college ("College").

The College is a state agency of higher education, created and placed under the control of its Board by statute. The statute gives broad authority to the Board

by granting to it "all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing board of institutions of higher learning." *Id.* This section further provides that "[i]n exercising such authority, responsibility, powers and duties said board shall not in the management of the affairs of the university be subject to, or superseded by, any other state agency, board, bureau, commission, department or officer, except as provided" by law (cites omitted). Two members of the Board shall be full-time students elected by the student body, and 17 members shall be appointed by the Governor. At least five such gubernatorial appointees shall be alumni, and one shall be a representative of organized labor. Members of the Board serve without compensation and are special state employees. If any member is absent for four regular meetings in any calendar year, exclusive of July and August, his office as member of the Board shall be deemed vacant. Upon notification by the chairperson to the Governor that a vacancy exists, the Governor shall appoint a new member from a list of names provided by the public education nominating council established by statute.

The Board has oversight responsibilities for all programs within the College. Board members will be involved in discussions and meetings and will ultimately vote on the future of one campus facility ("the Facility"). Preliminary discussions have begun regarding the possible merger of the Facility with one or more area private corporate entities ("private entities").

One member of the Board is also an uncompensated member of the board of directors of a private corporation ("the Corporation"). The Corporation is also considering possible affiliations with the same private entities. If the Corporation affiliates with one private entity, it could be considered a competitor of the Facility. Discussions at Board meetings and at the Corporation's board meetings may involve information regarding possible mergers and affiliations by these respective boards with private entities.

QUESTIONS:

1. Does §6 of the conflict law prohibit the Board member from participating in Board meetings, discussions or votes concerning the possible merger or affiliation of the Facility with the private entities described above?

2. If so, does §6 require that the Board member abstain and notify the Governor, his appointing authority, and this Commission of the nature and circumstances of the particular matter and the financial interest that requires the Board member's abstention?

ANSWERS:

1. Yes.

2. No, because the Board member is not "otherwise required to participate" in any matter pending before the Board.

DISCUSSION:

Section 6 of the conflict law prohibits a state employee from participating[1/] in a particular matter[2/] in which he, an immediate family member, or a business organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or reasonably foreseeable financial interest. The financial interest implicated by §6 may be of any size, and may be positive or negative, so long as the financial interest is "either direct, or, if indirect, reasonably foreseeable." *EC-COI-89-33.* Financial interests that are remote, speculative, or not sufficiently identifiable do not require abstention. *EC-COI-89-19; 87-16; 84-98.* We have said that we will decide on a case-by-case basis whether a financial interest is reasonably foreseeable. *EC-COI-89-33.*

Unquestionably the Corporation has a financial interest in its own directors' decision whether or not to affiliate with another private entity. However, §6 concerns the Board member's official participation, not actions which he may or may not take in his private dealings. Consequently, we must determine whether the Corporation also has a financial interest in the *Board's* decision whether or not to cause the Facility to merge or affiliate with a private entity. We conclude that the Corporation does have a reasonably foreseeable financial interest in such decisions of the Board.

In previous opinions, we have said that the prohibition on one's official activities in §6 extends to include voting on matters affecting a competitor's financial interests. Thus, for example, we have said that §6 prohibits a state employee, who is also an officer, director, trustee, partner or employee of an organization, from participating officially with regard to applications for funding submitted by competitor organizations, because such participation gives the state employee "the opportunity to advance the financial interests of [his] own organization at the expense of [his] organization's competitors." *EC-COI-*

81-118. We found that §6 is particularly applicable where the competition is over a limited pool of resources. Here, the Facility and the Corporation are or are likely to be competitors for the same opportunity to affiliate with a finite number of similarly situated private entities. Accordingly, the Corporation, as a competitor of the Facility, has or is likely to have a financial interest in the Board's consideration of the Facility's options in this regard. Therefore, as an officer of the Corporation, §6 prohibits the Board member from participating officially in matters in which the Corporation has a financial interest. Although we recognize that the precise nature of the Corporation's financial interest in such matters cannot now be identified, we think that the existence of such financial interest is obvious, and that when coupled with the potential for conflicting allegiances presented by these facts, amply supports the conclusion that the Board member ought to abstain.[3/]

Having concluded that §6 requires the Board member's abstention, we go on to consider whether, in addition, the Board member must notify his appointing authority, the Governor, and this Commission "of the nature and circumstances of the particular matter and make full disclosure of such financial interest ... " G.L. c. 268A, §6. We conclude that disclosure is not required.

Section 6 provides, in relevant part: "Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest..." Upon receiving such disclosure, the appointing official may assign the particular matter to another employee, or assume responsibility himself, or make a written determination that the state employee may participate because the employee's interest is not so substantial as to affect the integrity of his services to the Commonwealth. You have asked us to determine whether the Board member's duties are such that they "otherwise require him to participate in" Board matters of the kind here at issue. In making this determination, we look first to the language of the statute.

The disclosure requirements in §6 are triggered if the public employee's "*duties* would . . . require him to participate." G.L. c. 268A, § (emphasis supplied). Thus, it is apparent that the word "required" must be read in conjunction with the word "duties." "Duty" is defined as: "Obligatory conduct or service" or "Mandatory obligation to perform." *Black's Law Dictionary 453* (5th ed. 1979). We conclude that "duties which would require" a public employee's participation are those actions which are within such employee's "mandatory obligation to perform". Such a situation is presented, for example, where a matter is specifically assigned to a state employee such that she must either perform the work herself or delegate the task to another to be performed. See, e.g., *EC-COI-90-5* In either case, the employee's duties "require" her participation, i.e., participation is mandatory, since she may not simply do nothing, but must elect to either perform the task herself or reassign it to another. See, e.g., *EC-COI-86-13* (assignment of a matter is participation within meaning of §19, the municipal counterpart to §6).

By contrast, a member of a Board or Commission may abstain from participating in a particular matter for reasons other than an actual or potential conflict of interest, e.g., where a Board member abstains from participation because legitimately undecided on the issue or for reasons of conscience. Such Board member, we think, cannot be compelled to participate notwithstanding his desire to abstain, as *his* participation in the matter is discretionary. That is, while participation by all Board members present and capable of voting may be the expected or preferred course of action, each Board member is nevertheless free to abstain. Therefore, we conclude that since an individual Board member's duties do not "require" that member to participate in any particular matter, such Board member may simply abstain from all participation in the matter without giving notice to his appointing authority and this Commission.

The conclusion we reach here is also consistent with the policy behind §6. By its terms, the vice which §6 is designed to guard against is "participation" in a matter affecting financial interest, i.e., self-dealing. Where there is no self-dealing (i.e., no participation), §6 is not triggered. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B. U. Law Rev. 299, 354 (1965) ("it is the act of public participation alone which constitutes the violation.") Early opinions of the Attorney General and the Commission are in accord. For example, in *Conflict Opinion No. 613*, the Attorney General concluded that §6 would not be applicable if the Board member did not participate, but that an exemption was required "should [the Board member] nevertheless wish to participate in the Board's activities." Similarly, in *EC-COI-79-61*, the Commission concluded that a Board member should not participate unless and until he complied with the disclosure requirements and obtained the written determination required by §6. However, the disclosure requirements in §6 were not triggered if the Board member simply

abstained. We think that these opinions correctly reflect the policy of §6 particularly where, as in the case of a Board member, the public employee may effectively isolate himself from all participation in the matter.

We also note that where a Board member intends to abstain, resort to the disclosure requirements presents the appointing authority with two choices: he may assign the matter to another employee, or he may perform the task himself. You argue that each of these options is inappropriate here. We agree.

If disclosure were made here, the particular matter which the Governor would be asked to reassign or undertake himself is the Board member's decision-making functions, e.g., his vote. However, nothing in the applicable statute permits the Governor to replace a Board member except in the case of a vacancy. Thus, the Board member's decision-making functions cannot lawfully be assigned to another employee. Nor can the Governor assume responsibility for the matter himself as to do so would improperly subject the Facility's management to an officer (other than a Board member) in violation of that same statute. We have previously concluded that where disclosure is inappropriate or futile under the circumstances, §6 requires mere abstention. See *EC-COI-93-24* (member of the State Ethics Commission who performs a quasi-judicial function involving confidential information should simply abstain).

Finally, we are persuaded that nothing in the legislative history of §6 requires a different result. Our examination of that legislative history reveals that the "otherwise required" language in §6 is the result of a 1978 amendment to 268A, which arose out of the Common Cause initiative petition to create the Commission in c. 268B, and to amend certain sections of c. 268A. Prior to the 1978 amendment, the second paragraph of §6 provided an exemption to the employee who made a disclosure to his appointing authority and was given a written determination in advance that he could participate. Participation was also permitted if the financial interest was of a type exempted from §6 by "general rule or regulations approved by the attorney general."

In 1978, Common Cause inserted the following language into its initiative petition (House No. 5151):

> Any public official or public employee, who in the discharge of his official duties, would be required to take an action that would affect directly or indirectly a financial interest of himself, a member of his immediate family, or a business with which he is associated, shall take the following actions:
>
> (a) Prepare a written statement signed under penalty of perjury describing the matter requiring action and the nature of the particular conflict; and
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> (b) Deliver a copy of the statement to the commission; and
>
> (2) if he is not a member of a legislative or quasi-legislative body or an elected official, he shall deliver a copy of the statement to his immediate superior, if any, who shall assign the matter to another employee, or if he has no immediate superior, he shall take such steps as the commission shall prescribe or advise to remove himself from influence over actions and decisions on the matter.

House No. 5151 was assigned to a legislative committee together with related house and senate bills. What emerged was a new draft bill, Senate No. 1540, which provided:

> Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either
>
> (1) assign the particular matter to another employee; or
>
> (2) assume responsibility for the particular matter; or
>
> (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case the employee would not violate the first paragraph of this section by his participation in the particular matter. A copy of such written determination shall be retained by the employee for a period of six years after the termination of his involvement in the particular matter.

As currently enacted, §6 provides the same options as in Senate No. 1540, but requires disclosure to both the appointing authority and this Commission.

In our view, the primary purpose of the legislative change proposed in the Common Cause initiative petition was to expressly permit reassignment where a "public official or public employee, ... in the discharge of his official duties, would be required to take an action" affecting particular financial interests.

This option was not available under the prior §6. In committee, the Legislature adopted this change, retained the option from the prior version allowing participation after disclosure to and a written determination from the appointing authority, and added a third option – the appointing authority could assume responsibility himself. However, the various bills are in accord that resort to these options is necessary only where the discharge of the public employee's official duties requires him to take action. In other words, §6 applies only where some form of participation is unavoidable because the public official's duties make his participation mandatory. Where, as in the case of the Board member, participation is not mandatory, the disclosure requirements in §6 are not triggered. Therefore, the Board member may simply abstain.

DATE AUTHORIZED: December 14, 1994

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

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

[3/] Moreover, as you note, the Corporation is a provider of insurance to consumers throughout the state including, presumably, users of the Facility and users of other similar facilities located in the area. Given this fact, we recognize the likelihood that the Corporation also has a financial interest in the Facility's plans because of the effect such plans may have on costs borne by the Corporation as a result of expanded (or contracted) services in that area. Additionally, we note that §6 may also be implicated by other Board decisions regarding the Facility that have a direct or reasonably foreseeable impact on the Corporation's financial interest. However, we have no facts at this time on which to base such a determination.

CONFLICT OF INTEREST OPINION
EC-COI-95-1*

FACTS:

You are the Executive Director of the Waltham Community Access Corporation, a non-profit corporation ("Corporation"), organized in accordance with §501(c)(3) of the Internal Revenue Code. The Corporation was not established by vote of the City Council or by ordinance, but rather was incorporated in response to the cable license agreement executed between the City and the local cable company. According to the Waltham Cable License Agreement, the Corporation has responsibility to manage the local access channels and ensure that all Waltham residents, businesses and organizations have a reasonable opportunity to utilize the access facilities of the cable television system. The Corporation is responsible for all community programming, including program production and allocating capacity and time on the channels.

Under the License Agreement, the cable company agreed to designate 10% of its channel capacity on the subscriber system for public, educational and municipal access. Each channel is to be activated at the discretion of the Corporation, according to rules and regulations established jointly by the Corporation and the cable company. At least one of the channels is dedicated to municipal uses, and the City determines such uses. The cable company maintains the local access channels free of charge to local residents, city departments and organizations. Operating rules for these channels are established by the Corporation in conjunction with the cable company and the City. The Corporation is responsible for staffing and supervision at the studio, community education, training of local citizens in the use of the system, local ordinance programming, and program generation.

Under the License Agreement, the cable company agreed to provide monies to the Corporation and the schools to defray operating expenses and to assist in capital expenditures. The present agreement requires the cable company to give 4% of its gross revenues to the Corporation in each year of operation. Additionally, the cable company agreed to pay a maximum of $572,000 for capital equipment purchases over the term of the license. The cable company also purchased a mobile van, which is capable of remote programming, and established a complete studio centrally located in downtown Waltham. The City provides no funding or municipal resources to the Corporation. The Corporation raises additional revenue through fundraising events, such as auctions, and fees which it charges. The Corporation rents

space, pays for its utilities, compensates its employees, and retains legal counsel. You state that, should the Corporation dissolve, the City does not have a reversionary interest in any of the assets of the Corporation.

The Corporation is governed by a Board of Directors ("Board") which is appointed by the Mayor. The Board also includes one *ex officio* member selected by the cable company. Other than the power to appoint Board members, the Mayor has no other decision-making role in the Corporation.[1/] Under the Corporation bylaws, the Board may, by majority vote, with or without cause, remove a member from the Board. The Board has full power to manage and control the property and affairs of the Corporation, including full authority with respect to the distribution and payment of money received by the Corporation. The Board is not required to report its actions to the Mayor, nor does the Mayor play a role in reviewing the Board's actions, except that the cable company files with the City an annual report which describes the state of the local programming.

You indicate that, in 1988, at the recommendation of the City Solicitor's Office, the City Council designated the Board to be special municipal employees under the conflict of interest statute.[2/] The Board questions whether you, as a Corporation employee, are a municipal employee under the conflict of interest law. You were hired by the Board. You have never received any compensation or benefits from the City. Corporation employees are not eligible for a municipal pension, municipal union membership, or authorized to use municipal vehicles.

QUESTION:

Are you, as Executive Director of the Waltham Cable Access Corporation, a "municipal employee" as defined by Chapter 268A, §1(g)?

ANSWER:

No, because the Waltham Cable Access Corporation is not a "municipal agency" as defined by chapter 268A, §1(f).

DISCUSSION:

G.L. c. 268A, §1(g) defines a municipal employee as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, 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).

In order to determine whether you are a municipal employee within the statutory definition, we must consider whether the Corporation is a "municipal agency" under the conflict of interest law.

Municipal agency is defined in G.L. c. 268A, §1(f) 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."

Prior opinions of the Commission have identified several criteria useful to an analysis of whether a particular entity is a public instrumentality for the purposes of G.L. c. 268A. These factors are:

(a) the impetus for the creation of the entity (e.g., legislative or administrative action);

(b) the entity's performance of some essentially governmental function;

(c) whether the entity receives or expends public funds; and

(d) the extent of control and supervision exercised by governmental officials or agencies over the entity.

See *EC-COI-94-7; 89-24; 89-1*. The Commission also considers whether, in light of the preceding factors, "there are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner." See *MBTA Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993) (quoting Rev. Rul. 57-128, 1957-1 C.B. 311, 312). For the following reasons, we conclude that the Corporation is not a municipal agency whose members and employees are subject to the conflict of interest statute.

In 1988, the Ethics Commission addressed the question of whether a similar local access cable corporation was a municipal agency under the conflict law, and concluded that the particular cable access corporation was not a municipal agency. *EC-COI-88-19*. In *EC-COI-88-19*, the Commission concluded that the local access corporation was not governmentally created, as the impetus for the creation was the License Agreement between the city and the cable company, as opposed to a rule, regulation, statute, or ordinance. Further, the Commission found that the

local access corporation's management of the local access channels, while a public service, was not an essentially governmental function. According to the Commission, "public television scheduling and production are neither traditional nor exclusive roles of government." *EC-COI-88-19.*

We reaffirm our conclusions that the management of local access channels by a non-profit organization is not an essentially governmental function, and that, absent a rule, regulation, statute, or ordinance, an organization established as a result of a contract between a City and a private company is not governmentally created. See, e.g., *MBTA Retirement Board v. State Ethics Commission*, 414 Mass at 589-590 (no governmental creation where there is no statute, regulation or executive order addressing establishment of fund and board which arose from trust instrument); *EC-COI-94-7; 93-2* (non-profit created in response to lease; no governmental creation); *84-65* (no governmental creation where entity created by terms of will).

Turning to the third factor, concerning the amount of public funding, we do not find, under our jurisdictional test, that the Corporation receives significant public funding. The City provides no City funding or municipal resources to the Corporation. See *EC-COI-93-2* (corporation privately financed and will not expend or receive county funds). Further, considering the private interests involved, we find that these private interests outweigh any interest of the City. See *MBTA Retirement Board*, 414 Mass. at 591 ("analysis of [public funding] factor ... should focus on the use of the public funds received by the entity in question, taking into consideration the private interests involved"). The Corporation has full authority to manage and expend its funds, within the parameters of its contractual obligations, bylaws and articles of organization, without oversight by the City. The City has no proprietary interest in the assets of the Corporation and has no right to receive any of the assets upon dissolution of the Corporation. See *Id* at 591. Compare, *EC-COI-94-7* (public funding found where state provided non-profit with substantial funding, audited non-profit organization's financial records, and maintained an interest in how funds were expended).

The final consideration in our analysis is the degree of control and supervision exercised by governmental officials over the Corporation. In *EC-COI-88-19*, the Commission found no government control of the local access corporation because, although the Mayor appointed the initial Board of Directors, all subsequent Directors were selected by the Board of Directors, not by the Mayor. In your situation, the Mayor is the appointing authority under the License Agreement and the Corporation Bylaws. We must consider whether the Mayor's appointment power provides a sufficient indication of control to constitute governmental control.

In previous Commission opinions, one of the significant measures of control has been the presence of a majority voting block appointed by a government official on the board of directors of a non-profit corporation. See, e.g., *EC-COI-91-12; 89-24; 89-1.* However, the Supreme Judicial Court, in its interpretation of our jurisdictional test, has indicated that, in addition to voting power, "the issue of control must be considered in the context of each board member's role as a fiduciary..." *MBTA Retirement Board*, 414 Mass. at 592.

Other than his appointment power, the Mayor has not been given any decision-making role in the Corporation, and the Board is not required to report its actions to the Mayor. See *EC-COI-93-2* (no control or supervision over Board decisions); compare *EC-COI-88-24* (members of Board take action upon instruction from government personnel). We note that, under its bylaws, although the Board may not appoint subsequent members, it may, by majority vote, remove a member (a mayoral appointee), with or without cause. This provision provides some evidence of the Board's independence from the Mayor's Office. Under the Corporation bylaws, the Corporation has full authority to manage its affairs. Given the Board's autonomy in managing its affairs and the limited participation by the Mayor, we conclude that the Board's primary loyalty lies with the Corporation and with the cable subscribers, and that the Board members owe a fiduciary duty to the Corporation. See *MBTA Retirement Board*, 414 Mass. at 592 (board members, as trustees, owe primary loyalty to beneficiaries of retirement fund, not to MBTA).

In conclusion, we do not find that the level of control exercised by the Mayor in appointing the Board is sufficient to outweigh our conclusions under the other jurisdictional factors. Because the Corporation was not created by statute or regulation, does not perform an essentially governmental function, does not receive or expend governmental funds, and has authority to manage its own affairs without direction from a City agency, we conclude that the Corporation is not a "municipal agency" for purposes of the conflict of interest statute, and that Corporation employees are not municipal employees subject to the conflict law.

DATE AUTHORIZED: January 18, 1995

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

1/ The city has established a separate cable oversight board, which is a municipal agency. This board serves as the city's liaison with the cable company and addresses issues of concern to cable consumers.

2/ The City Solicitor's Office now informs us that it believes that the Corporation is a private corporation, not subject to the conflict law.

CONFLICT OF INTEREST OPINION EC-COI-95-2*

FACTS:

You are counsel to the Metropolitan Area Planning Council. You seek an opinion concerning whether the council is a state, county, municipal or regional municipal agency for purposes of the conflict law.

The Metropolitan Area Planning Council ("MAPC") was established by Chapter 668 of the Acts of 1963 to conduct research and prepare and compile data, maps, charts, tables and plans for the physical, social and economic improvement of the metropolitan area planning district. Under the 1963 Act, the metropolitan area planning district consisted of "each city or town which is a member of the metropolitan sewage district, the metropolitan water district or the metropolitan parks district" ("Member Municipality"), each city or town which is contiguous to a Member Municipality and which applies to the MAPC to be included, and any other city or town whose application to the MAPC is approved by a majority vote of the representatives on the MAPC. The MAPC was funded by an appropriation of the General Court, "charged as assessments upon the various cities and towns comprising the district," such assessment to be certified by and paid to the state treasurer. Chapter 668 amended G.L. c. 6, §17 so as to place the MAPC under the supervision of the Governor.

In 1970, the powers and duties of the MAPC were further defined by Chapter 849 of the Acts of 1970, now codified under G.L. c. 40B, §§ 24 - 29. Under G.L. c. 40B, §26, the metropolitan area planning district, is "a public body politic and corporate," which consists of 98 cities and towns, and any city or town which, in accordance with the statute, applies to and is approved by a majority vote of the council. Such municipalities may leave the MAPC only by legislative act. Three towns have joined the MAPC voluntarily.

The MAPC "shall maintain the fullest cooperation with cities and towns in the district and shall render them all possible assistance in their planning activities, especially where two or more of the municipalities have common problems." G. L. c. 40B, §25. It "shall have and exercise the same powers and duties of the" Southeastern Massachusetts Regional Planning District, which is established by the Executive Director of the Massachusetts Office of Business Development pursuant to G.L. c. 40B, §9. *Id.* Thus, among other things, the MAPC is empowered to conduct research and/or studies and to compile information necessary for identifying problems and needs of the district, and for the formulation of goals, objectives, policies, plans and programs in relation to the development and redevelopment of the district's resources and facilities. G.L. c. 40B, §14. While the MAPC is empowered to approve or disapprove plans for the development or redevelopment of the district or portions thereof, such powers are largely advisory. *Id.*

Pursuant to state statutes, e.g., the Subdivision Control Law (G.L. c. 41, §§ 81K - 81GG) and the Zoning Act (G.L. c. 40A), Massachusetts cities and towns regulate planning locally. For example, subdivision control is regulated exclusively on a town-by-town basis by local planning boards. Decisions to grant or deny zoning special permits and variances are likewise made at the local level by such bodies as planning boards, zoning boards, boards of aldermen, etc. The MAPC's planning activities do not replace or in any way regulate the activities of these local boards. Neither does the MAPC take over or assume the zoning authority of local legislative bodies. Each MAPC Member Municipality continues to exercise autonomous planning powers which are neither subject to MAPC control nor controlled by MAPC. The MAPC performs only a state-mandated regional planning function, which, as noted above, is generally advisory in nature. It conducts its affairs autonomously. G.L. c. 40B, §26. For example, the MAPC is no longer under the Governor or his supervision. See St. 1970, c. 849, §1. However, the MAPC is required to make annual reports both to member municipalities and to the General Court.

MAPC members, who are uncompensated, include one representative from each city and town of the district[1/], 21 gubernatorial appointees, a sufficient number of whom shall represent the viewpoints of minority and low-income groups, and the following officers or their designees, who shall be members *ex officiis*: the Chairman of the Massachusetts Bay

Massachusetts Port Authority, the Chairman of the Massachusetts Turnpike Authority, the Commissioner of Public Safety, the Commissioner of the Metropolitan District Commission, the Chairman of the Board of Directors of the Massachusetts Water Resources Authority, the Commissioner of Highways, the Executive Director of the Massachusetts Office of Business Development, the Secretary of Communities and Development, the Commissioner of Environmental Management, the Commissioner of Environmental Protection, the Chairman of the Boston Redevelopment Authority, the Commissioner of Public Works of the City of Boston and the Executive Director of the Boston Water and Sewer Commission.

The MAPC Executive Committee is composed of individuals elected from among the representatives of the cities and towns, the gubernatorial appointees and the *ex officio* members. Pursuant to G.L. c. 40B, §28, this Committee takes action in the name of, and on behalf of, the MAPC and is generally responsible for the conduct of MAPC's affairs. The member municipalities have no veto power in the affairs of the MAPC or its Executive Committee.

Local funding of MAPC is made via an assessment voted by MAPC, with no review by the individual municipalities. The MAPC's budgetary decisions are not subject to local control. Significantly, the General Laws give the MAPC direct taxing authority, and the per capita assessments voted by MAPC are collected by the state Treasurer through the "cherry sheet" issued annually to each city and town under G.L. c. 59, §20. Municipal payments are made to the state Treasurer and credited to the MAPC fund. G.L. c. 40B, §29. The MAPC may also accept funding "by gift, grant or contract from any source including grants, bequests, gifts, or contributions made by any individual, corporation, association, public authority, or agency or subdivision of the federal or state governments." *Id.*; see also G.L. c. 40B, §14.[2/] It may sue and be sued "upon the same conditions that a town may sue or be sued." G.L. c. 40B, §14.

The MAPC has spent the last seven years developing MetroPlan 2000, which is a regional plan for the development of the infrastructure of eastern Massachusetts. The MAPC has also conducted regional studies concerning the impact of the Central Artery/Third Harbor Tunnel project. Currently, pursuant to its Work Program for 1994 - 1995, the MAPC is, among other things, coordinating with state and other agencies in the development of the Regional Transportation Plan and the State Implementation Plan, and with state water resource policy forums, including the MWRA Wastewater Advisory Committee, the Water Resources Commission, and the Massachusetts Bays Program, regarding regional water systems planning.

QUESTION:

Is the MAPC a state, county, municipal or regional municipal entity for purposes of the conflict law?

ANSWER:

The MAPC is a state agency and its members, who are uncompensated, are "special state employees."

DISCUSSION:

Clearly, the MAPC is a government instrumentality. It is created by statute as "a public body politic and corporate." G.L. c. 40B, §26. Its members are chosen by government officials and perform essentially governmental functions, and it receives and expends public funds. See *EC-COI-94-7; 89-24; 89-1*. Thus, we are left to consider whether the MAPC is a state, county, municipal or regional municipal entity. The focus of such analysis is on "the level of government to be served by the agency in question." *EC-COI-90-2*, quoting Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U. Law Rev. 299, 310 (1965). Previously, we have considered which level of government funds and oversees the entity, and whether the entity carries out functions similar to those of a particular level of government. See, e.g., *EC-COI-90-2; 83-74; 82-25*. For example, in *EC-COI-83-74*, we concluded that a local private industry council ("PIC") is a municipal agency because municipal elected officials played a role in the selection of PIC members and, together with the PIC, in the implementation of the federal job training act. In *EC-COI-82-25*, we concluded that a school district was a municipal agency because it carried out the municipal function of providing public education.

Having reviewed the enabling legislation for the MAPC, we conclude that, although the MAPC has certain local characteristics, it is a state agency for purposes of the conflict law. This conclusion rests on the fact that the MAPC performs a state regional planning function that is separate and distinct from each of its member municipalities' local planning bodies. The MAPC, and not the member municipalities, exercises exclusive control over the MAPC's affairs. With regard to funding, member municipalities make their contributions to the MAPC through the state Treasurer, but play no role in the formulation or implementation of the MAPC's budget.

Member municipalities are not the MAPC's sole funding source, however. Rather, the MAPC is empowered to accept funds from other levels of government (e.g., federal and state agencies or authorities) and from private individuals, corporations and associations. Further, although each Member Municipality elects a representative to the MAPC, approximately one-quarter of MAPC members and *ex officio* members are selected by the Governor or are employees of state agencies and authorities. Lastly, our review of the history of the MAPC's enabling statute persuades us that this entity originally existed as a state agency. St. 1963, c. 668. Although the MAPC's structure was changed as a result of St. 1970, c. 849, §3, nothing in that Act evinces a legislative intent to make the MAPC an agency of a county, city or town.

To the extent that *EC-FD-79-2* and *EC-COI-81-48* reach a different result, we decline to follow these opinions.

In *EC-FD-79-2*, we were asked to consider whether the MAPC is a "governmental body" subject to the financial disclosure requirements of General Laws Chapter 268B. Section 1(h) of Chapter 268B defines a governmental body as "any *state* or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the commonwealth."[3/] The Commission concluded that "the MAPC is a hybrid agency, having both state and local characteristics. However, its membership, control, responsibilities and objectives are primarily local, rather than state-wide or county-wide, in nature. For these reasons, MAPC is not a 'governmental body' as that term is defined in Chapter 268B. The 'multi-municipal' character of the MAPC renders it a 'special district' under Section 21 of that Chapter."[4/] In *EC-FD-79-2*, however, we declined to express an opinion "as to the appropriate characterization of the MAPC under any other statute."

In *EC-COI-81-48*, we ruled that the municipal exemption contained in §4 of Chapter 268A prevented a state employee, who was also a municipal representative to a planning council, from voting on matters within the purview of his state agency. The municipal exemption was applicable, we reasoned, because as a city's representative to the planning council, the state employee held "an appointive office in a district within the meaning of Section 4."

Our thinking regarding the character of "districts" has evolved since 1981, particularly in light of the Appeals Court's decision in *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421 (1992). Prior to *McMann*, this Commission had been of the view that a regional district is an independent municipal agency and is not a "municipal agency" within the meaning of G.L. c. 268A, §1(f).[5/] This view was rejected by the Appeals Court, which in *McMann* concluded that a regional school committee is an "instrumentality" of each of its member municipalities. "In reaching this conclusion the Court considered the ordinary and approved use of the word 'instrumentality' in the statute; the formation, operation and purpose of a regional school district; and the purpose of G.L. c. 268A. *Id.* at 425-428. The Court found that the municipalities use the school district as a means to fulfill their statutory obligation to provide education and that the municipalities played a substantial role in the creation of the district and the district's financial matters. *Id.* at 427." *EC-COI-92-26.*

Applying these considerations to the MAPC, we do not find that the MAPC is an "instrumentality" of its member municipalities. The MAPC was created by the state Legislature, not by the Member Municipalities in their discretion, to perform a state-mandated regional planning function. The MAPC's enabling legislation designates which municipalities shall be members of the MAPC. Member municipalities may leave the MAPC only by act of the Legislature. Moreover, membership on the MAPC is not limited to the cities and towns, but includes 21 gubernatorial appointees, and eleven *ex officio* members from state agencies or authorities.

The MAPC does not act as the means by which the member municipalities perform mandated local planning functions. Rather, each MAPC Member Municipality continues to exercise autonomous planning powers which are neither subject to MAPC control nor controlled by MAPC.

The local funds contributed to the MAPC are determined by vote of the MAPC; such assessments are not subject to local review. Once transferred out of the Member Municipalities' custody, the contributed funds are not subject to local control through oversight of the MAPC's budget or otherwise.

Finally, the individual Member Municipalities exercise no control over the activities of the MAPC, which is an autonomous body.

In short, to the extent that the MAPC operates as a means to carry out a governmental function, that function is a state rather than a municipal one. Thus, we conclude that the MAPC is a "state agency" as it is an instrumentality thereof. G.L. c. 268A, §1(p).

Accordingly, members of the MAPC, who are uncompensated, are "special state employees."[6/]

DATE AUTHORIZED: April 11, 1995

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

1/ The city and town representatives "shall be appointed by the mayor or, if the city has a manager, by the city manager and in the case of a town, by the board of selectmen or, if the town has a manager, by the town manager...." G.L. c. 40B, §24.

2/ According to its 1994 - 1995 Work Program and Budget: "Almost two-thirds of the [MAPC's] budget each year is drawn from outside resources that the [MAPC] receives under contract with other agencies."

3/ "State agency" is not a defined term in Chapter 268B. Chapter 268A, §1(p) defines "state agency," 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."

4/ The reference to "Section 21 of that Chapter" in fact refers to §21 of St. 1978, c. 210 which inserted G.L. c. 268B. Section 21 of Chapter 210 provides, in relevant part: "The state ethics commission established by chapter 268B of the General Laws, inserted by section 20 of this act, is hereby authorized and directed to prepare legislation establishing financial disclosure requirements for officials and employees of cities, towns, and *special districts* of the commonwealth."

5/ "Municipal agency," 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).

6/ "Special state employee," a state employee:

> (1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or
>
> (2) who is not an elected official and
>
> (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or
>
> (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation. G.L. c. 268A, §1(o).

CONFLICT OF INTEREST OPINION EC-COI-95-3*

FACTS:

The Mayor's Special Commission on Health Care ("Commission") was organized in June 1994. Its purpose is to advise the Mayor of the City of Boston ("City") regarding the development of a proposal to merge Boston City Hospital and Boston University Medical Center Hospital. The Commission is structured to obtain input from interested constituencies, including the affected hospitals, organized labor, community health centers, and the business community, among others. As outlined in the Mayor's June 6, 1994 press release, the Commission's scope of work is as follows:

> (1) Work to create a model for a new and streamlined organization for the Department of Health and Hospitals;
>
> (2) Review Boston's health care delivery systems and make recommendations to the Mayor to create a closer affiliation or consolidation of services between the Department of Health and Hospitals and the Boston University Medical Center Hospital;
>
> (3) Monitor and assist in the implementation of approved recommendations in a timely fashion;
>
> (4) Make recommendations to the Mayor which would consolidate and make more efficient the management of both health care institutions;
>
> (5) Advise the Mayor on the future financial relationship between the City of Boston, the

Department of Health and Hospitals and Boston University Medical Center Hospital;

(6) Draft any local or state legislation necessary to accomplish the recommendations accepted by the Mayor.

During February 1995, the Commission held three public hearings "designed to provide a voice in the merger to anyone who is concerned."[1/] The public hearings were "part of an ongoing process that has sought to solicit input from a wide variety of groups and individuals." The Commission has also held more than 15 community meetings and forums throughout the City.

The Commission is headed by Patricia McGovern, former Chair of the Massachusetts Senate Ways and Means Committee. The other members of the Commission are: Robert Ciolek, Chief Operating Officer of the City of Boston; Thomas Trailor, Acting Commissioner of the Department of Health and Hospitals;[2/] Elaine Ullian, Chief Executive Officer of Boston University Medical Center Hospital; John Cradcock, Director of the East Boston Neighborhood Health Center; Dr. Rev. Roy Hammond, Pastor of the Bethel A.M.E. Church; Jeanne Blake, former medical reporter for WBZ-TV, author and businesswoman; Celia Woislo, Executive Director of Local 285, Service Employees International Union (SEIU); Dr. Judy Ann Bigby, Assistant Professor of Medicine at Harvard Medical School; Dr. Deborah Scott, M.D., private practitioner; Dr. Alyce Adams, Harvard St. Health Center; and Dr. Hortensia Amaro, Boston University School of Public Health.

The Commission was created in the Mayor's discretion. There is no legislation, statute, ordinance, or executive order providing authority to create this body. The Commission is expected to meet and complete its recommendations to the Mayor by May 1, 1995.

According to the City's Corporation Counsel, the Commission's recommendations could be quite detailed (e.g., which hospital buildings or departments to retain, which debt to assume or not, etc.). Its work product is expected to include proposed draft legislation to implement these recommendations. Further, although the Commission lacks authority to bind the City, its recommendations are likely to embody those concepts on which the interested parties have reached consensus. It is the Mayor, however, who will decide whether to adopt the recommendations and present them to the City Council and the State Legislature for consideration.

QUESTION:

Are the non-City employee members of the Commission municipal employees within the meaning of G.L. c. 268A, §1(g)?

ANSWER:

No.

DISCUSSION:

In relevant part, the conflict of interest law defines "municipal employee" as a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis. G.L. c. 268A, §1(g). A "municipal agency" is 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). Thus, the question is whether Commission members are persons "performing services for" a "municipal agency".

We have previously weighed the following four factors in determining what constitutes "performing services" for a municipal agency:

(1) the impetus for creation of the position (whether by statute, rule, regulation or otherwise);

(2) the degree of formality associated with the job and its procedures:

(3) whether the holder of the position will perform functions or tasks ordinarily expected of employees, or will he be expected to represent outside private viewpoints;

(4) the formality of the person's work product, if any. See *EC-COI-87-28; 86-5; 82-81.*

In general, where an advisory council has been created by statute, we have found that it is a government agency and its members are government employees. See, e.g., *EC-COI-86-4; 82-157; 82-139.* The Commission, on the other hand, is created in the Mayor's discretion, a factor previously found to weigh against a finding that the body so created is a government agency. See *EC-COI-93-22* (council created in the Governor's discretion is advisory in nature.). However, because no one factor is

dispositive, we examine the Commission in light of the remaining three factors. *EC-COI-86-4.*

With regard to the degree of formality associated with the job, we have typically examined the body's organizational formality (often dictated by statute) and the formality of its work product. For example, in *EC-COI-86-5*, we found that an advisory committee to the Office of Real Property within the Division of Capital Planning and Operations was not a state agency in part because membership on the committee "[could] be fluid and [was] generally open." By comparison, we found that school advisory councils whose members are selected according to a statutory formula, whose meetings are subject to the Open Meeting Laws, and who must observe certain statutorily-mandated records retention procedure are municipal agencies. *EC-COI-93-21.*

In examining the Commission, we note that, except for the Chairperson and the two City employee members, Commission membership appears to be from a pool of citizens, chosen by the Mayor in his discretion, who represent various constituencies potentially affected by the merger.[3/] There is no set procedure for their selection, or for the preparation and retention of the Commission's work product. The Commission is of limited duration. *EC-COI-79-12.* Any formality in its procedures is imposed by the Commission members (not by the Mayor or by statute), apparently for the purpose of permitting the Commission to operate in an efficient and timely manner. See *EC-COI-86-5.*

We also conclude that the Commission does not perform tasks ordinarily expected of government employees, nor is its work product that ordinarily or uniquely expected of government employees. Crucial to our analysis in this area is whether the entity performs an advisory function (i.e., by providing outside viewpoints of use to government) or whether it performs an essentially governmental function by assisting in the work product of a government agency. Recently, for example, we concluded that a Council organized principally to provide the Governor with outside viewpoints concerning the Massachusetts economy and the status of industry in the Commonwealth is not a governmental body. *EC-COI-93-22.* We noted that, through the Council, "the Governor will have access to opinions and expertise which is not otherwise available within the executive branch." On the other hand, we have said that an entity is a governmental agency where it assists government in carrying out a mandated function. See, e.g., *EC-COI-94-10; 86-4* (finding state agency status where permanent committee's principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees.) .

The tasks performed by the non-municipal employee members of the Commission (other than the Chairperson) generally are: (1) articulating a merger structure which addresses the private interests they represent, (2) holding public hearings and meetings to solicit outside and community viewpoints, and (3) assisting in drafting proposed legislation to implement the Commission's recommendation. Clearly, these functions are not "essentially governmental." The mere fact that these tasks are performed collectively by members of a special commission does not transform the nature of the tasks to governmental functions. In the course of their Commission work, it is the private interests of the non-municipal employees, their employers and their constituencies that are being addressed. We would not say, for example, that an individual's expression of these very same interests in the context of a business meeting is the performance of a governmental function. Furthermore, the public hearings, community meetings and forums conducted by the Commission elicit the type of outside viewpoints which we have traditionally found to advise and inform government in a manner not generally available through its employees. See, e.g., *EC-COI-93-22.* Moreover, the drafting of proposed legislation (as contemplated here) is not, in our view, "ordinarily or uniquely expected of government employees." *Id.* Thus, none of the tasks performed by the non-municipal employee members of the Commission are essentially governmental in nature.

We note that the Commission's Chairperson plays a slightly different role as she is neither a municipal employee nor a representative of an interested party or constituent group. However, the Chairperson, like the other Commission members, lacks authority to bind the City. Her role, to the extent that it differs from the roles played by the other non-municipal employees, appears to be that of a facilitator and a spokesperson for the Commission. These functions, however, are not essentially governmental in nature. Most importantly, the Chairperson does not appear to be discharging a duty imposed on any government official or agency. Compare *EC-COI-94-10.*

In summary, we conclude that where, as here, the Commission is formed in the Mayor's discretion, is composed of members of constituencies likely to be affected by the proposed merger, and is designed to surface the private interests involved and to provide the Mayor with non-binding outside viewpoints not otherwise readily available to him, the Commission is not a "municipal agency" and its members are not

"municipal employees" within the meaning of the conflict law.

DATE AUTHORIZED: April 11, 1995

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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/ Comments of the Commission Chairperson, press release, Office of the Mayor, February 3, 1995.

2/ Mr. Trailor replaced former Commissioner of Health and Hospital Lawrence Dwyer, who resigned on March 30, 1995.

3/ Public employee membership on an advisory group is not dispositive of its status as a government agency. See, e.g., *EC-COI-93-22.*

CONFLICT OF INTEREST OPINION
EC-COI-95-4*

FACTS:

You are an elected member of the Housing Authority ("Authority") of the Town of Marblehead ("Town"). You are currently serving a 10-year term as one of the approximately 80 corporators of the Marblehead Savings Bank ("Bank"). The Authority keeps a significant portion of its monies in accounts at the Bank.

Savings Banks - Historical Context

Savings banks flourished in the mid-nineteenth century; they are concentrated in the northeastern United States. The first Massachusetts savings bank was organized in 1816 and the last in 1955. Until the early 1980's, all Massachusetts savings banks were mutual, in that they were not-for-profit organizations, like most hospitals and colleges, operated solely on behalf of their depositors. Corporators of such traditional mutual savings banks are intended to represent a cross-section of a bank's depositors.

In 1982, savings banks were permitted to convert to stockholder owned institutions. St. 1982, c. 155, §29, as amended. Today, of the approximately 100 Massachusetts savings banks, approximately two-thirds are traditional mutual banks, rather than stockholder owned banks. The principal procedural, organizational, governance and managerial functions and operations of Savings Banks are set forth in G.L. c. 168 ("Savings Bank Statute").1/

Savings Bank Statute

A savings bank is required to have at least 25 corporators, who serve for 10-year staggered terms and must be or become depositors. At least 75% of the corporators must be citizens and residents of the Commonwealth. The principal legal responsibility of corporators is to attend annual meetings2/ to elect (i) their bank's trustees (from among the corporators) and (ii) their bank's president, vice president(s) and clerk.3/ G.L. c. 168, §§9, 9A, 10, 13, 14.

A savings bank's corporators are also authorized to amend their bank's by-laws and are among those who are required to approve certain major changes in their bank's corporate structure, e.g., the merger and/ or consolidation of their bank with other savings or cooperative banks, the conversion of their bank into a stockholder owned form of corporation, the formation of a mutual holding company and the dissolution of their bank. G.L. c. 167H and c. 168, §§33, 34, 34A, 34C and 34E; 209 CMR 33.00.

A savings bank's board of trustees is specifically charged with managing the business of the bank. There are required to be at least 11 trustees who meet at least quarterly. The board of trustees elects the bank's treasurer, vice treasurer and assistant treasurer and such other officers as it deems necessary. It also elects, from among the trustees, a board of investment having not less than five members who meet at least monthly. Among other responsibilities, the board of investment is specifically charged with approving the following bank activities: (i) all loans and changes in loan terms and security pledged therefor; (ii) the purchase and sale of any securities; (iii) all foreclosures and sales of foreclosed property; and (iv) interest rates for various deposit accounts. G.L. c. 168, §§10, 11, 12, 14.

Bank's By-Laws and Practice

The Bank was created in 1871 by legislative act of the General Court. St. 1871, c. 99. The Bank's by-laws ("By-Laws") are consistent with provisions of the Savings Bank Statute. The By-Laws specify that the Bank is required to have (i) from 25 to 85 corporators ("Corporators"); (ii) a 20-member board of trustees ("Trustees"); (iii) a president, four vice presidents and a clerk (all elected by the Corporators); (iii) a Treasurer (elected by the Trustees); and (iv) a board of investment ("Board of Investment") consisting of the president and four trustees elected by the Trustees. In addition, the By-Laws require that there be an

auditing committee, distinct from the Board of Investment, composed of at least three trustees and that salaried bank employees may not be Corporators.

Practically speaking and, again consistent with the Savings Bank Statute, the essential responsibility of the Bank's 80 Corporators is to attend the annual meeting to elect Corporators, Trustees and certain of the officers to fill vacant and/or term-expired positions. At such meetings, they also listen to report(s) about the affairs of the Bank. Corporators are unpaid; virtually all of the Corporators are either residents of or have businesses in the Town or both. As such, individual Corporators may, but are not required to, help the Bank to maintain an awareness of community needs and problems with Bank products, services or activities and promote the use of the Bank's products and services.

By contrast, the Trustees (who meet quarterly) are charged with exercising "general supervision of the management of the Bank," and the members of the Board of Investment (who meet weekly) are charged with exercising "general supervision and control in all matters pertaining to the interest of the Bank." The Trustees and the members of the Board of Investment are paid for each meeting they attend.

The Bank's president and vice presidents work part-time. They receive no compensation for serving as such officers. The Bank's treasurer (elected by the Board of Trustees) works full-time and receives a salary; it is the treasurer who is the day-to-day "boss" of the Bank.

QUESTION:

Does G.L. c. 268A (the conflict of interest law) permit you to serve as a member of the Authority and a Corporator of the Bank?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

As a member of the Authority, you are a special municipal employee[4/] for purposes of the conflict of interest law. G.L. c. 121B, §7.

1. Applicability of Section 19

Section 19 of the conflict of interest law, in relevant part, prohibits a municipal employee from participating in any particular matter[5/] in which (i) he, his immediate family or his partner, (ii) a business organization in which he serves as an officer, director, trustee, partner or employee or (iii) a person or organization with whom he is negotiating or has an arrangement for prospective employment has a financial interest.

The purpose of this section (and its county and state counterparts) is to require the public employee to avoid situations in which he or certain persons or entities with whom he has a close family or business relationship have a "private stake." See Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. Law Rev. 299, 353 (1965).

> An employee may have a close cousin or grandparent (or friend or enemy) and be influenced by his or her interest in a particular matter; but the statute must draw a line somewhere, and the interests of such persons, who are less likely to have an identity of interest with the employee, are not attributed to him.

Id. at 356.

A similar rationale applies to business relationships addressed in this section. The statutory prohibition extends only to the specified business relationships, not to all possible business relationships. For example, the prohibition is not triggered if a municipal employee's private business employee or consultant were to have a financial interest in a particular matter before such municipal employee.

The threshold question here is whether or not, as a Corporator, you are a "director of a business organization" within the meaning of §19 of the conflict of interest law.[6/] If you are, then §19 applies to you in these circumstances; if you are not, then §19 does not apply.

In light of the information provided by you and by others;[7/] our review of the Savings Bank Statute and certain associated regulations, and the By-Laws and certain practices of the Bank; our comparison of the roles and functions of Corporators and Trustees with those of stockholders and directors of business and other banking corporations; and our holdings in *EC-COI-89-15* and *89-12*, all discussed below, we take this occasion to revisit our determinations in *EC-COI-87-10* and *83-40*.[8/] We conclude that, as a Corporator, you serve neither by title nor in substance as a director of the Bank. Accordingly, we further conclude that you will not be required by §19 to abstain from participating as an Authority member in matters in which the Bank has a financial interest.

The term "corporator" is not expressly included among those relationships, titles or positions that

automatically trigger §19's abstention requirements. That, however, is not dispositive. As we have indicated in previous opinions, in determining whether §19's abstention requirements apply in a particular case, we will not necessarily be bound solely by the formal name or title given to a position; rather, we will examine the substance of the relationship or the "substance of the position." See *EC-COI-89-15* (state employee/member of private institution's board of overseers not subject to §6, state counterpart to §19); *EC-COI-89-12* (state employee/member of private hospital board of advisers not subject to §6); *80-43* (partnership relationship imputed to a group of lawyers who create a public image that they are partners).

Therefore, we will examine and compare the "substance of the positions" of the Corporators and the Trustees in the operations and management of the Bank. We will then compare those positions to those of stockholders and directors in business corporations.

The Bank's Corporators are unpaid, have no ownership interest[9/] in the Bank and reflect various interests in the Town. They attend annual meetings to elect their fellow-Corporators and those of the Bank's Trustees and the Bank's president, vice presidents and clerk who are up for election. The Corporators are also authorized to amend the Bank's By-Laws and required to approve major changes in the Bank's structure or existence, such as mergers, conversions, consolidations and dissolutions.

By contrast, it is the Bank's 20 Trustees and, in particular, the sub-group of Trustees and president constituting the Bank's five-member Board of Investment who manage the business of the Bank at quarterly and weekly meetings, respectively. The Trustees elect the members of the Board of Investment and the Treasurer, who is the Bank's day-to-day "boss". The Board of Investment reviews and decides upon the ongoing business decisions of the Bank relating to such matters as loan terms, interest rates, foreclosures and investments.

Most current Massachusetts business corporations are governed by the Business Corporation Law, G.L. c. 156B.

Stockholders of business corporations have ownership interests in their corporations. They attend annual meetings or vote by proxy to elect those of the directors, the treasurer and the clerk who are up for election. They are also authorized to amend the corporation's articles of organization and by-laws and required to approve major changes in the corporation's structure or existence, such as the disposition of all or substantially all of its corporation's assets, mergers, consolidations and dissolutions.

By contrast, directors manage the business of the corporation. Directors elect the president, and typically they elect officers other than the treasurer and the clerk unless the by-laws provide otherwise. Directors may delegate certain of their powers to an executive committee elected by and composed of directors.

On the basis of the foregoing analysis and comparison, it appears to us that the functions and responsibilities of the Bank's Corporators are in all material respects analogous to those of stockholders of a business corporation and, correspondingly, that the functions and responsibilities of the Bank's Trustees are analogous to those of the directors of a business corporation.[10/] The court's finding in *Cosmopolitan Trust Co. v. Mitchell*, 242 Mass. 95 (1922) that directors of a trust company, who manage it on behalf of stockholders, are analogous to the trustees of a savings bank, who are its managing officers, supports this conclusion.

The Corporators perform the same roles for the Bank as do stockholders: both choose management, have authority to amend the governing documents and are required to approve major changes in the Bank's structure and existence.[11/] By contrast, it is the Bank's Trustees, Board of Investment and/or officers (not the Corporators) who perform the functions of directors of a business corporation, to wit, managing the business and affairs of the Bank.[12/]

In *EC-COI-89-12*, we wrote about a state employee who was also a member of a private hospital's board of advisers:

> [W]e conclude that your board of advisor responsibilities are not comparable to those of a corporate officer or director. This conclusion is based on the fact that those corporate officer and director functions are already performed by other individuals, and on the Hospital's intent to establish the board of advisors as a community-based sounding board, rather than as a decision-making management board. *Id.*

We followed that opinion in *EC-COI-89-15*, involving a state employee who was also a member of a board of overseers of a private institution. We concluded that the board of overseers was primarily a community-based sounding board and did not perform the institution's "corporate officer and director functions." *Id.* at 250. The principles expressed in both opinions are equally applicable here. The Bank's Corporators are not comparable to corporate officers or directors, whose functions are already performed by

other individuals, namely, the Bank's Trustees, Board of Investment and/or officers.

In sum, our conclusion is that the "substance of the position" of Corporator is not that of a director.[13/] Accordingly, §19 does not apply to your situation. Compare *EC-COI-87-5* (under §6, the state counterpart to §19, a state employee who is also a bank director may not participate in state matters in which the bank has a financial interest).

2. Limitations on Your Activities

Section 17

Section 17 of the conflict of interest law, in relevant part, prohibits a municipal employee from acting as agent for anyone other than the municipality in connection with any particular matter in which the *same* municipality is a party or has a direct and substantial interest. The rationale behind this is that public employees should be loyal to their public employers, and, where their loyalty to such public employers conflicts with their loyalty to a private party or employer, their public employers' interests must win out. See *EC-COI-82-176* (involving a state employee under §4, the state counterpart to §17).

That prohibition applies less restrictively to special municipal employees. A special municipal employee may not act as agent in connection with a particular matter (i) in which he at any time participated as a municipal employee, (ii) which is or has been the subject of his official responsibility[14/] within one year or (iii) which is pending in the municipal agency in which he serves. This last restriction applies only to special municipal employees who serve on more than 60 days[15/] during any 365-day period.

As applied to your circumstances, you should refrain from representing the Bank's interests or acting on its behalf, formally or informally, to or before the Authority. For example, during any audit of the Authority's books, records and accounts, you should not act as the Bank's representative. See *EC-COI-87-5* (state employee who is also a bank director).

Section 23

Section 23 of the conflict of interest law imposes standards of conduct that are applicable to all public employees.

Section 23(b)(2) prohibits a public employee from using his official position to secure for himself or others an unwarranted privilege of substantial value[16/] that is not properly available to similarly situated individuals. Under the precepts of this section, you may not, for example, use your Authority title or position in a newspaper advertisement or a letter to promote the Bank to Town residents. That would or could give the impression that the Authority or the Town endorses the Bank.

Section 23(b)(3), the so-called "appearances" section, is most pertinent to your situation. It prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties. The section requires the employee to dispel any such "appearance of conflict" by making a written disclosure of the relevant facts.

Thus, even though §19 would not require you to abstain from participating in the Authority's decisions regarding matters involving or affecting the interests of the Bank or, for that matter, the interests of the Bank's business competitors (e.g., where, in what amounts and in what types of accounts to deposit the Authority's monies), before participating in any such matter, you will be required to file a written disclosure of all relevant facts with the Town Clerk, and we suggest that you also make a similar oral public disclosure for inclusion in the minutes of the Authority's meeting(s) at which such matters are reviewed, discussed, considered or voted upon.

Furthermore, if you do participate in any such matters, then under §23(b)(2), you must take care to follow ordinary and accepted procedures without deviation. In other words, if you feel that you will be so biased in favor of the Bank that you will not be able to act objectively, you should abstain from participating.

DATE AUTHORIZED: April 11, 1995

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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/ Other provisions of the General Laws govern the banking powers and functions of savings banks, cooperative banks, trust companies and other banking institutions in the Commonwealth. G.L. c. 167B through 167G.

2/ A quorum consists of the greater of 13 corporators or 25% of the incorporators, but no more than 50 corporators are necessary to constitute a quorum. A corporator may forfeit his membership by failing to attend two consecutive annual meetings. G.L. c. 268, §§9 and 9A.

3/ The president and at least one vice president must be trustees.

[4/] Certain provisions of the conflict of interest law apply less restrictively to special municipal employees than to other municipal employees.

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

[6/] Because you have no ownership interest in the Bank, you have no personal financial interest within the meaning of §19. Furthermore, while we recognize that, as a Corporator, you are eligible to be elected to serve as a Trustee and that it is theoretically possible that you could be elected to serve as a Bank officer (president, vice president, treasurer or clerk), you have not been so elected and, thus, do not so serve.

[7/] We were provided information by the General Counsel for the Massachusetts Division of Banks, legal counsel for the Bank, personnel from the Massachusetts Bankers Association and the Executive Director of the Authority.

[8/] In *EC-COI-87-10*, our conclusion that a particular savings bank's corporators, in effect, performed the functions of directors was based on our determination that corporators "elect the management of the bank" and "make fundamental decisions concerning the liquidation, dissolution or merger of the Bank." In fact, in those two respects as well as others, corporators are more like stockholders than directors. Stockholders, like corporators, elect much of the management and are involved in approving liquidations, dissolutions and mergers of their corporations. In our earlier opinion, we also noted that, upon a conversion of a savings bank into a stockholder owned corporation, the corporators "would be treated as directors." In actuality, upon any such conversion, it is generally the members of the then-existing board of trustees who, pursuant to a plan of conversion approved by the Commissioner of Banks and the Corporators, among others, become the initial board of directors of the converted bank. See 209 CMR 33.00. Thus, after having undertaken a closer examination and analysis of the law and the facts, we here reach a different conclusion.

Our opinion in *EC-COI-83-40* involved a state employee who was responsible for depositing state patients' private funds into bank accounts and who was also a corporator of a bank into which such funds were deposited. In that case, we implicitly concluded that nothing in the conflict of interest law "would prohibit outright" the state employee's simultaneously serving in her state position and as a bank corporator, but suggested that she nevertheless engage in specifically prescribed disclosure procedures derived from a "merger" of the disclosure procedures contained in the predecessor of §23(b)(3) (the so-called "appearance" of conflict provision) and §6 (state counterpart to §19) to address the concerns raised by her dual positions.

[9/] In *Jefferson v. Cox*, 246 Mass. 495, 497 (1923), the court wrote: "There are and can be no shares of stock in a Massachusetts savings bank. Such a bank is a purely mutual institution without stock."

[10/] For further comparison, we note that co-operative banks (governed by G.L. c. 170), credit unions (governed by G.L. c. 171) and trust companies (governed by G.L. c. 172) have a comparable division of responsibilities between their shareholders, members or stockholders, as the case may be, on the one hand, and their directors, on the other.

[11/] Comparing the roles of corporators and those of stockholders, we do not mean to conclude that the two positions are substantively identical. Indeed, they are not, because, among other reasons, corporators do not have an ownership interest in their savings banks whereas stockholders have ownership interests in their business corporations.

[12/] If you were to be elected to serve as a Trustee or an officer of the Bank, or if the Bank were to convert to a stockholder owned savings bank and you were chosen or elected to serve as a director, then, from and after any such event, you would be subject to the abstention requirements of §19.

[13/] Several provisions of the Savings Bank Statute provide further support for our conclusion. First, the term "officers" is used in §13 of the Savings Bank Statute to refer in the aggregate to trustees, members of the board of investment, president, vice presidents, treasurer and clerk of savings banks. It appears that that designation is used to distinguish that group from the "operating officers," who do not include the trustees. The fact that corporators are not included in either group supports our conclusion.

Second, §22 of the Savings Bank Statute imposes penalties (fines and/or imprisonment) on officers, directors, trustees and employees for their knowing and willful misconduct. It does not mention corporators. That omission evidences the minimal role that the Legislature contemplated for corporators of savings banks.

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

We note that "[o]fficial responsibility turns on the authority to act, and not on whether that authority is exercised." *EC-COI-89-7*. Thus, by abstaining, a public employee will not remove a particular matter from his official responsibility.

[15/] For purposes of calculating the 60-day limit, (i) a day is not counted unless the public employee serves his agency on such day and (ii) any part of a day on which the public

employee so serves will be counted as a whole day. See *EC-COI-85-49.*

[16/] Anything valued having a value of $50 or more is "of substantial value." *EC-COI-93-14; Commonwealth v. Famigletti,* 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes).*

CONFLICT OF INTEREST OPINION
EC-COI-95-5

FACTS:

You are the Mayor of a City. You have been advised that City employees are being offered a discount for cellular telephone service by the City's cellular telephone carrier ABC. The City employees have been contacted by means of a promotional bulletin informing them of the "Government Rate Offer" being made available to all City employees. As you understand it, ABC is offering a government employee group rate that matches the municipal monthly service and air time rates. In comparison, an individual not employed by the City would pay a rate that is $9.00 a month more than the current municipal rate. In addition, you are informed that certain municipal employees propose to be billed for personal cellular telephone service through their municipal agencies.

ABC has provided the following additional information. The discount being offered to City employees is the same as that being offered to various other municipalities in New England.[1/] Moreover, ABC states that the same discount is available to some federal government employees[2/] as well as to the employees of numerous large corporations located throughout New England. ABC notes that its program differs from that of its competition in that there is no corporate liability. In other words, the municipality (or corporation in the case of a corporate client) is not liable for cellular telephone charges incurred by its employees in connection with their personal accounts.[3/]

QUESTIONS:

1. Does the conflict of interest law allow City employees to accept a discounted "government rate" for personal cellular telephone service?

2. May City employees be billed for personal cellular telephone service through a municipal department or agency?

ANSWERS:

1. Yes.

2. No.

DISCUSSION:

Section 23 establishes standards of conduct that are applicable to all public employees in the Commonwealth. In particular, §23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value[4/] which is not properly available to similarly situated individuals.

We begin by noting that the phrases "similarly situated individuals" and "unwarranted privilege" are not defined in G.L. c. 268A. Nevertheless, we have previously concluded that "where the granting of a benefit is expressly authorized either by statute or made available by common industry-wide practice to all employees of participating organizations, we do not believe that the granting of the benefit ordinarily constitutes an unwarranted privilege not properly available to similarly situated individuals." *EC-COI-87-37.* In other words, while we have sought to forbid receipt of those discounts which would tend to undermine public confidence, we have not said that public service, standing alone, should prohibit a public employee's participation in a widely available discount program. For example, in *EC-COI-87-37,* state employees were allowed to participate in a computer equipment discount negotiated by a state agency for all state employees because *similar* discounts were negotiated in the public and private sector. We found compelling that the equipment discount was available not only to at least 60,000 state employees, but that a large number of private sector employers had negotiated similar employee discounts with the same companies. We therefore concluded that the state employee discount was consistent with a common industry-wide practice and was therefore properly available to similarly situated individuals. Moreover, the benefit was warranted because the availability had been communicated to eligible employees and the negotiation of the discount was a commonly accepted business practice.

In contrast, we have held that a benefit selectively provided to an individual public employee, *EC-COI-87-7,* or to a discrete group of employees, which is not made available to members of the general public, will not be permissible pursuant to §23(b)(2). In *EC-COI-86-14,* concerning an automobile discount program offered to selected law enforcement officers, we stated:

> 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.

In addition, we have also cautioned that issues may arise under §23 if the availability of the discount is not widely publicized or known by all eligible employees. In such a case, officials involved in negotiating the discount or those made aware of it may be found to have an unwarranted privilege not available to similarly situated employees. A broad-based and uniform employee discount precludes any appearance that particular employees have been selected for a discount because they may be in a public position where they can benefit the giver. See *EC-COI-87-37* (uniform discount offered to all state employees).

In the case at hand, the cellular telephone plan being offered to City employees is similar in most respects to plans available both nationally and statewide to a large class of public and private employees. We therefore find that the discount in question is being made available pursuant to a common industry-wide practice.[5/] Moreover, the discount is not being offered to an individual or to a discreet group of public employees, but rather is available to all City employees who appear also to have been adequately notified of the opportunity to participate. We conclude that City employees who take advantage of the plan will not be receiving an unwarranted privilege not available to similarly situated individuals. Such employees will not therefore violate §23(b)(2).[6/]

The use of a city department, staff, equipment, or any other municipal resources for purposes of implementing the discount program would, however, raise an issue under §23(b)(2). This is because the use of City resources by City employees for personal purposes constitutes an unwarranted privilege not available to similarly situated individuals. Section 23(b)(2) dictates that the use of public time and resources must be limited to serving public rather than private purposes. See, e.g. *EC-COI-93-6* (police associations may not use public facilities as a mail drop for association solicitations). The City must therefore work with ABC to ensure that City employees may not use City telephone equipment or City cellular telephone accounts in connection with their private cellular telephone service. For example, billing for private cellular telephone accounts may not be issued through any City department or agency. Rather, a City employee must be billed for his private account at his home or other private address. In conclusion, the City must prohibit the use of any public resources to implement private cellular telephone service for City employees.

DATE AUTHORIZED: April 11, 1995

1/ ABC indicates that, based on its past practice with the employees of other corporate clients, City employees would continue to be eligible for the discounted rate, even if, at some time in the future, the City were to choose a different cellular telephone carrier for its corporate accounts.

2/ ABC is currently seeking to expand its discount rate to cover other state and federal government employees where, until recently, tariffs have been less favorable.

3/ ABC believes that this fact distinguishes it from its competition. According to ABC, other cellular telephone companies hold the corporation liable for charges incurred in connection with the first twenty cellular telephone lines personally held by the corporation's employees.

4/ Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8; EC-COI-93-14.*

5/ Through previous opinion requests, we are aware that another cellular phone carrier is offering discounted rates to government employees in Massachusetts. As we understand it, a tariff change for a "Government Plan" filed with, and approved by, the Massachusetts Department of Public Utilities allows discounted cellular telephone rates to be charged to any federal, state or municipal employee for personal cellular telephone service. As in the ABC plan, no government agency has any legal or financial obligation to the cellular telephone company or its agent. Rather, the public employees, as individuals, are responsible for the cost associated with such cellular telephone service. Moreover, the Government Plan is analogous in concept to the carrier's "Associate Plan," a special plan for individuals who are employed by a business organization or government agency which has a contract with that carrier. In addition, there is an "Associate Plan" applicable to employees of associations that are not incorporated under state law. We understand that originally the Government Plan was somewhat more favorable than the Associate Plans because of certain competitive factors, but, at present, the various plans offer substantially the same rates. The above-described plans further demonstrate that discounted cellular telephone rates are widely available to public and private employees in the Commonwealth as part of an industry-wide practice.

[6/] In addition, where the discount in question is being provided to all City employees, we will not find that it is being offered "for or because of" the official acts of any particular City employee. The discount does not therefore raise any issues under G.L. c. 268A, §3.

CONFLICT OF INTEREST OPINION
EC-COI-95-6

FACTS:

Pursuant to state law, certain state employees conduct tests of persons who are applying for a certain state license. The tests are generally conducted on Monday through Friday. These state employees receive no additional compensation beyond their "straight time" salary for these tests.

There is currently a backlog of tests. Additionally, a number of private schools have requested that the state agency conduct tests on Saturday mornings because of the great convenience to their customers and themselves.[1/] You state that the assignment of additional state employees during the week could handle any backlog, but the convenience of Saturday testing will always remain a significant issue. The supervisor of the state employees would like the state employees to conduct Saturday tests on "straight time", however, the current union contract prohibits Saturday work at "straight time" and requires overtime compensation at a rate of time and one-half.[2/] Neither the state agency that conducts the test, nor the state agency that issues the licenses, has the funds to pay for such overtime.

Recently, at the request of several private schools, approximately 20 state employees have been conducting tests on Saturday mornings. Each state employee has been assigned a specific work period. The schools have paid the time and one-half hourly rate by depositing it into an existing state agency fund designated for this purpose. Each state employee is compensated with a Commonwealth of Massachusetts check drawn from that account (less appropriate payroll deductions). Each state employee conducts about 12 tests in the four hour period. The school may not select or request the specific state employee that will be assigned on a particular Saturday. These state employees are assigned by their agency from a list of personnel.

In general, pursuant to an article in the contract between the state employees' union and the Commonwealth, such work periods "shall be in accordance with" the terms of a certain agency memorandum ("Memorandum"). Under the Memorandum, state employees may perform work "involving the construction and/or maintenance or repair of state highways and/or properties owned by the Massachusetts Port and Turnpike Authorities" or "of any type approved by the Executive Officer, or his designee." Such work may be performed on days off; on holiday days off; during vacations; on any day on which the state employee starts days off, holiday day off, or vacation; "and at such other times as may be established by agreement and announced by the [state agency]." The Memorandum further provides that "[a]ll work will be distributed to members fairly and equitably [from lists established in accordance with a procedure set forth in the Memorandum] as to number of work periods, type, hours and compensation thereof, and averaged on a continuing monthly basis."

The method by which each school finances the additional costs associated with this work is not standard. One method is for the school to surcharge each student being tested nine dollars, which is paid directly to the school. This additional cost is not paid by persons taking tests given by the state employees during Monday to Friday.

You and the administrative head of the state agency[3/] have approved Saturday testing period "as a short term measure", provided that such testing periods are consistent with the requirements of the Massachusetts conflict of interest law.[4/] As a long term remedy, the state agency's managers are negotiating with their employees' union to find a way to assign state employees to Saturday tests and to pay for such service on "straight time".

QUESTION:

Does G.L. c. 268A permit state employees to be paid for working at private schools which may or may not charge their students a surcharge in connection with that work?

ANSWER:

No, unless legal authority for such work is established through statute or regulation.

DISCUSSION:

Except as "otherwise provided by law for the proper discharge of official duties," §4 of the conflict law prohibits a state employee from being compensated, directly or indirectly, by anyone other than the Commonwealth in relation to any particular

matter[5/] in which the Commonwealth or a state agency is a party or has a direct and substantial interest. The rationale behind §4 "is 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.*

In deciding the current question, we need not decide the extent to which the proposed work periods, in general, are or are not in relation to particular matters. Rather, it is enough that state licensure of an individual or entity, as we have previously found, is a particular matter of direct and substantial interest to the Commonwealth. See, e.g., *EC-COI-82-105* (description omitted); *80-95* (state has direct and substantial interest in decision to grant a cable television license); see also *EC-COI-79-6* (liquor licensing is a matter of direct and substantial interest to the municipality). Thus, unless such compensation is "otherwise provided by law for the proper discharge of official duties," §4 prohibits a state employee's receipt of compensation from a private school (i.e., a non-state party) in connection with a state agency-sponsored test. Compare *EC-COI-82-176* (state employee, for private compensation, may teach at school because his compensation is not in relation to the test). That is, because there is the potential that a state employee might feel beholden to the private school that pays him at the expense of the state's interest in licensing only qualified persons, express statutory authority for the private payment is required.

Our examination of the facts reveals that nothing in the General Laws or the state agency's enabling act authorizes these work periods. Instead, such work hours are governed by the collective bargaining agreement and a specific agency memorandum. Although the agency's administrative head is authorized to make all necessary rules and regulations for the performance of the duties of the state's employees, including rules and regulations relating to compensation of affected state employees [citation omitted], these provisions do not, of themselves, amount to statutory authority for work periods in connection with particular matters of direct and substantial interest to the Commonwealth. See, e.g., *EC-COI-92-4 n. 9* (the statute or regulation must specifically authorize receipt of compensation from the non-state party); see also *EC-COI-89-5*. Thus, the privately paid work in question violates §4 of the conflict law.

In *EC-COI-92-4*, we recognized that the "as provided by law" language in §4 can be met by "a regulation duly promulgated by a government agency authorized to do so." We also note that, at the municipal level, there exists statutory authority for payment for work similar to that at issue here. [citation omitted]

We think that enactment of a statute or promulgation of a regulation pursuant to the General Laws, similar to the statute governing municipal affairs, would satisfy the §4 requirement. However, because such authorization is presently lacking, a state employee's receipt of compensation from a private school in relation to a state agency-sponsored test violates §4.

DATE AUTHORIZED: May 10, 1995

[1/] Each location of each private school must be licensed to operate by the Commonwealth pursuant to statute. Such licenses must be renewed annually.

[2/] (statutory reference omitted)

[3/] (footnote omitted)

[4/] Saturday examinations have been suspended pending the outcome of this opinion.

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

CONFLICT OF INTEREST OPINION
EC-COI-95-7

FACTS:

You are a member of a municipal Housing Board of Commissioners ("Housing Board"), appointed by the Governor. Your appointment was not subject to confirmation by the City Council. The Governor does not publicize gubernatorial appointee vacancies on local housing authorities in a newspaper or other periodical of general circulation. As a Commissioner, you are paid an annual stipend which does not exceed $1,800.

You are contemplating seeking election to the City Council. If elected, you would receive an annual

salary of approximately $7,500. You state that the City Council does vote to confirm the four Housing Authority Commissioners other than yourself.[1/]

QUESTION:

Does G.L. c. 268A permit you to hold your compensated position as a member of the Housing Authority Board of Commissioners if you are elected to the City Council?

ANSWER:

No, unless you forego the $1,800 stipend for serving on the Housing Board.

DISCUSSION:

As a member of the Housing Board, you are a special municipal employee[2/] for purposes of the conflict law. See G.L. c. 121B, §7. If you are elected as a City Councillor, you will be a regular municipal employee in that position.

Section 20 of the conflict law prohibits a municipal employee from having a direct or indirect financial interest in a contract made by the same municipality. The term "contract" in §20 includes any type or arrangement between two or more parties under which one undertakes certain obligations in consideration of the promises made by the other. Thus, we have previously concluded that the term "contract" includes employment arrangements, *EC-COI-84-91; In Re Doherty* (1982); *Quinn v. State Ethics Commission*, 401 Mass. 210 (1987), and that §20 prohibits multiple office holding in the same city or town, unless an exemption applies. See *EC-COI-90-2; Commission Advisory No. 7: Multiple Office Holding at the Local Level.*

Since our decision in *EC-COI-82-46,* we have recognized that because an elected position is not contractual in nature, an elected official's compensation is not received pursuant to a "contract". Therefore, §20 does not prohibit you from holding your Housing Board position and also receiving compensation as a City Councillor. However, we must examine whether there is an exemption which permits a City Councillor to receive compensation as an appointed Housing Board member.

1. Section 20(b) exemption

As noted above, if you are elected as a City Councillor, you will be a regular municipal employee. You will have a prohibited financial interest in your compensated position as a Housing Board member, unless an exemption from §20 applies. Section 20(b) contains the only exemption generally available to regular municipal employees. In order to qualify for that exemption, you must be able to meet all of the following conditions:

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

2. the position is publicly advertised;

3. you file a statement disclosing the second job with the city or town clerk;

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

5. the services performed in the second job are not part of your duties in the first job;

6. you are not compensated in the second position for more than 500 hours per year;[3/]

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

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

We note that you will not fulfill the second §20(b) requirement, namely, that your position as a Housing Board member was "publicly advertised."[4/]

Section 20(b) requires that the second contract be "made after public notice or where applicable, through competitive bidding." The term "public notice" is not defined in the conflict law. However, we have previously interpreted this term to require advertisement of the position "in a newspaper of general circulation." *EC-COI-87-24.* The public notice requirement is not satisfied where the selection process has been "based primarily on word-of-mouth." *EC-COI-83-95; 85-7* (Governor's word-of-mouth request for candidates to sit on seven member board did not satisfy "public notice" requirement in §7(b), the state counterpart to §20(b)). Moreover, we have declined to waive the public notice requirement "upon a theory that public advertising would be impractical or not effective." *EC-COI-87-24* ("It is not for the

Commission to waive the public notice requirement or broaden its scope by interpretation. Any such change in law or policy must emanate from the General Court."). The vacancy on the Housing Board which you filled was not publicly advertised. Thus, you will not qualify for the §20(b) exemption.

2. The Housing Authority Exemption

Section 20 also contains a so-called housing authority exemption. Specifically, the seventh paragraph of §20 provides in relevant part:

> This section shall not prohibit an employee of a housing authority in a municipality from holding any elective office, other than the office of mayor, in such municipality nor in any way prohibit such employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such elected officer shall not, except as otherwise expressly provided, receive compensation for more than one office or position held in a municipality, but shall have the right to choose which compensation he shall receive; provided further that no such elected official may vote or act on any matter which is within the purview of the housing authority by which he is employed; and provided further that no such elected official shall be eligible for appointment to any such additional position while he is still serving in such elective office or for six months thereafter.

Here, we are asked to consider whether the seventh paragraph, which makes reference to an "employee" of a housing authority, also applies to a "member" of such authority. Based on the express language used and the discernible legislative history of this paragraph, we conclude that it does not.

In determining the scope of the housing authority exemption, we look first to the language used. *Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n*, 402 Mass. 352, 354 (1988). By its express terms, the exemption applies to an "employee" of a housing authority. We note that under Chapter 121B, a housing authority "shall be managed, controlled and governed by five members." G.L. c. 121B, §5. The office of member is created "by a statute enacted by the Legislature in accordance with the broad power entrusted to the General Court to name and settle officers, Constitution, Part II, c. 1, §1, art. 4, and the Legislature can determine qualifications for members of a housing authority, provide for their appointment or election, define their duties, fix their tenure, and designate the causes for and method to be followed in their removal." *Collins v. Selectmen of Brookline,* 325 Mass. 562, 91 N.E. 2d 747, 749 (1950). Under G.L. c. 121B, §6, a member may be removed from office "because of inefficiency, neglect of duty or misconduct in office." A housing authority may employ an executive director and "such other officers, agents and employees as it deems necessary or proper," and may delegate to "one or more of its members, agents or employees such powers and duties as it deems necessary and proper for the carrying out of an action determined upon by it." G.L. c. 121B, §7. Each member of a housing authority, "and any person who performs professional services for such an authority on a part-time, intermittent or consultant basis ... shall be considered a special municipal employee" for purposes of the conflict law. *Id.* Read together, these sections draw a clear distinction between members of a housing authority on the one hand, and housing authority employees on the other. That is, the terms are neither synonymous nor are they readily interchangeable.

Moreover, our examination of the evolution of the housing authority exemption further supports our conclusion that the exemption applies to employees but does not apply to members of a housing authority. The housing authority exemption was inserted by St. 1987, c. 374, §2, approved October 5, 1987. That statute was enacted less than four months after our decision and order in *In re Paul T. Hickson,* 1987 SEC 296 (decided June 25, 1987). There we found that Hickson, an elected city councillor in the City of Westfield, had violated §20 by also serving as a compensated maintenance worker for the Westfield Housing Authority. We imposed a fine for that violation in part because we found the facts of *Hickson* to be nearly identical to those in *In re Kenneth R. Strong,* 1984 SEC 195.

What is now the housing authority exemption was originally proposed in House No. 4294 as an amendment to Chapter 39 of the General Laws. House No. 4294 contained a broad exemption which provided that "any elected municipal employee may serve as a paid employee of a local housing authority." The General Court rejected that language, and in House No. 5896, amended §20 by inserting language taken verbatim from similar provisions in §20 regarding the application of the §20 restriction to town councillors and boards of selectmen. The exemption contained in House No. 5896 applied to "an employee of a housing authority." Based on our review of its evolution, we conclude that the intent of the housing authority exemption was twofold. First, the exemption was crafted to address concerns raised by the *Hickson* and *Strong* decisions which applied to housing

authority *employees*. Second, the exemption was intended to incorporate the restrictions applicable to members of boards of selectmen and town councillors relative to holding additional positions in a municipality. However, we discern no legislative intent to extend the scope of the exemption to include housing authority *members*.

Accordingly, we conclude that because you do not qualify for the §20(b) or the housing authority exemption, §20 of the conflict law will prohibit you from being a City Councillor and also receiving compensation as a member of the Housing Board. However, you may serve in both positions if, within 30 days of your receipt of this opinion, you notify the Housing Authority that you will forego the $1,800 stipend received for serving on the Housing Board.

DATE AUTHORIZED: May 10, 1995

[1/] In a city, four members of a housing authority shall be appointed by the mayor subject to confirmation by the city council. G.L. c. 121B, §5.

[2/] "Special municipal employee", a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

[3/] Approximately 9.5 hours per week.

[4/] Because it is not necessary to our decision, we expressly decline to address whether the City Council's confirmation of four of the Housing Board's members constitutes the City Council's "participat[ion] in or ... official responsibility for ... the activities of the" Housing Board.

CONFLICT OF INTEREST OPINION
EC-COI-95-8

FACTS:

You are counsel to a high-ranking state employee.[1/] Your client has a 5% ownership interest in ABC, Inc. ("ABC"). He is not an officer or a director of ABC and has had no involvement in the management or control of ABC's business since resigning from its Board of Directors several years ago.

In 1989, state agency XYZ awarded a multi-million dollar consultant contract to a corporation ("the Corporation") for services related to a state project. In 1994, your client learned that ABC was one of several subconsultants selected by the Corporation in 1989.[2/] ABC was one of two firms listed in the direct expense budget submitted by the Corporation for testing. The value of ABC's services was estimated at several thousand dollars.

Since the Corporation's contract was first awarded, there have been no changes in ABC's scope of work or budget. Of the funds budgeted, ABC has received most of the fund allotted for that testing. Of that amount, approximately half was received after your client became a management-level official at XYZ.

During his tenure at XYZ, two modifications to the Corporation's contract were voted by its board. The first extended the completion date for approximately two years. The second represented a multi-million dollar increase in funds for extra work completely unrelated to ABC.

After assuming his current state position, your client delegated all XYZ and related agency contract approvals to a subordinate and, since that date, has not seen any documents relating to the Corporation's contract. However, he has been advised by his designee that there have been three additional modifications to the Corporation's contract, none of which affected the scope or budget for ABC's work.

Despite steps taken by your client to separate his private interests from his public responsibilities, and to be aware of and take appropriate action under Chapter 268A with regard to private interests he may have, he did not learn of ABC's subconsultant relationship to the Corporation until a year ago. Therefore, to resolve all questions arising from his 5% interest ownership of ABC, and other financial interests he may be required by Chapter 268A to dispose of, he has created an irrevocable trust ("Trust").

The Trust

The Trust was created with your client as Settlor and First Beneficiary of the Trust. Other parties and his successors in trust are the Trustees. The Trust is irrevocable as he does not reserve the right to amend or revoke the Trust Agreement. Successor Trustees shall be designated in writing by the Policy Committee of a law firm, or the immediate or remote successor to said firm.

From time to time, your client will cause to be delivered to the Trust certain property which the Trustees shall receive and administer according to the terms of the Trust Agreement. Under that Agreement, the Trustees shall pay the net income of the Trust at least annually and shall, from time to time, pay to, or for the benefit of, your client so much of the principal of the Trust as the Trustees, in their sole discretion, shall determine. The Trust Agreement further provides that the "Trustees shall segregate in a separate fund any property transferred to them by [your client] for the purposes of disposing of any financial interest he may have in such property to the extent required by Chapter 268A of the General Laws of Massachusetts." ("Fund Property"). You have confirmed that, pursuant to this provision, your client has placed in trust the stock representing his entire 5% interest in ABC. The net income of the Fund Property (e.g., the ABC stock) shall be paid at least annually to your client's spouse, who is listed as the Second Beneficiary. The Trustees have sole discretion to pay principal to or for the benefit of said spouse. Further, pursuant to G.L. c. 184B, which powers are expressly incorporated by reference in the Trust Agreement, the Trustees have power to "sell, exchange or otherwise dispose of the property at public or private sale on such terms as [they] may determine...." G.L. c. 184B, §2(1)(a). However, "[i]n the event the Trustees dispose of [the Fund Property] by sale, exchange, or otherwise, the proceeds of such disposition shall be deposited in trust for the benefit of [your client]." Additionally, if said spouse shall die before all of the Fund Property is distributed, and while your client occupies a position or office in the government of the Commonwealth that is inconsistent with the acquisition of a financial interest in any specific property in such trust corpus ("Prohibited Position"), such specific property shall be paid to said spouse's estate. If your client does not occupy a Prohibited Position at the time of his wife's death, the Fund Property shall be distributed to the Trust held for the benefit of him. Accordingly, there is the possibility that interests previously "disposed" of during his tenure as a state employee could revert to him.

QUESTION:

Does G.L. c. 268A, §7 permit your client to dispose of financial interests in property to his wife under the circumstances described above?

ANSWER:

No, unless he takes further steps to ensure that the prohibited financial interests do not revert to him.

DISCUSSION:

Your client is a state employee[3/] for purposes of the conflict law. As such, he is subject to the restrictions of G.L. c. 268A, §7 which, with certain exceptions, prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency. As a 5% owner of ABC, which is a subconsultant under the Corporation's contract with state agency XYZ, he has an indirect financial interest in an XYZ contract. See, e.g., *EC-COI-83-5; 82-117.* Because his ownership interest in ABC exceeds one percent,[4/] and as a high-ranking state official, he participates in or has official responsibility for the activities of XYZ, he does not qualify for any of the exemptions to §7.[5/] Thus, §7(a) requires that he dispose of his interest in ABC's contract with the state. To this end, he has established a Trust which, in general, operates to pay and distribute to his spouse those financial interests which §7 prohibits him from retaining. As a result, we must first consider whether §7 permits a state employee to dispose of a prohibited financial interest in a state contract by creation of a trust, and second, whether, as spouses, his spouse's financial interest in the stock placed in trust should be imputed to your client for purposes of §7.

Turning to the first question, we note that this Commission has previously sanctioned disposition of a §7-prohibited financial interest through use of an irrevocable trust. Specifically, in *EC-COI-80-86,* a member of the judiciary was also a part owner of building, a portion of which was to be leased to a state agency. Upon execution of such a lease, the state employee would have a financial interest in a state contract in violation of §7. The question presented

was whether, pursuant to §7(a), the state employee could transfer his interest in the building in trust for the benefit of his adult children and their issue. The state employee proposed two methods: (1) a so-called Clifford Trust whereby his interest in the building would be held in trust for a period of 10 years with all income paid or accumulated for the benefit of his adult children and their issue (i.e., until the state employee reached the state's mandatory retirement age for judges, whereupon his interest in the building would revert to him), or (2) an irrevocable trust for the benefit of his adult children and their issue.

In *80-86*, we concluded that a state employee does not "dispose of" a §7-prohibited financial interest simply by placing that interest out of his control for a term of years. Thus, we opined that, where, under the Clifford Trust, ownership in the building would revert to the state employee, that employee would continue to have an indirect financial interest in the lease in violation of §7. However, we concluded that the irrevocable trust "would not offend §7 so long as the terms of the trust expressly provide that in no event could ownership of the property revert to [the state employee]."

While *80-86* provides some guidance for resolution of your client's situation, it is important to note that that decision involved a trust for the benefit of emancipated *adult children* who presumably did not reside with, and who were not supported by, the state employee. In the instant case, we are asked to decide whether our reasoning in *80-86* is also applicable where the trust is for the benefit of the state employee's spouse. That is, we must ask whether the spouse's financial interest in the property placed in trust should be attributed to the state employee for purposes of §7.

As noted by one commentator, "section 7 does not automatically attribute the financial interest of the employee's wife ... to the employee himself. This should not mean, however, that the interest of a spouse ... must ... never be considered as the basis of an interest by the state employee himself. The test should be whether such an interest can fairly be said to be the employee's." Buss, *The Massachusetts Conflict of Interest Law: An Analysis,* 45 B.U. Law Rev. 299, 375 (1965). Recognizing this fact, we do not attribute to a state employee his spouse's financial interest in a state contract solely because of the marriage relationship. *EC-COI-83-123*; see also *EC-COI-84-13* ("In general, §7 does not prohibit both a husband and wife from serving as state employees, even with the same agency. While the husband obviously benefits from his wife's income (and vice-versa), the husband does not, strictly speaking, have a financial interest in his wife's employment contract with the state.") However, we have closely examined interspousal transfers of interests held by the state employee. See, e.g., *EC-COI-83-37; 83-111; 83-125.* Where there has been a divestiture of the state employee's interest to his spouse, we have looked at a number of factors to determine whether the state employee has truly transferred all right and title to the interest and any benefit that might flow from it, or whether the purported transfer is merely "a contrivance to evade the reach of the conflict of interest laws." *EC-COI-89-14.*

Our precedent regarding interspousal transfers has almost exclusively concerned the transfer of an interest in a going concern, where the state employee prior to the transfer has not only owned, but has played a role in the management and control of the business. In evaluating such transfers, we have looked to find evidence that the transferring spouse has relinquished all right, title and interest in the property and has ceased to deal with it as his own. Among the factors which we have considered in determining whether there has been a relinquishment of the interest are (1) the consideration paid by the transferee, (2) whether the state employee's initial investment has been liquidated, and (3) whether the state employee continues to own the property transferred. Further, we have considered whether the state employee continues to participate in the management and control of the business, such that it can fairly be said that he continues to deal with the property as his own. *EC-COI-89-14.*

In certain cases, we have found that attribution was warranted. For example, in *EC-COI-83-37*, a state employee assigned to his wife his rights, title and interests as a general and limited partner in two limited partnerships, together with an irrevocable power of attorney. The limited partnerships were formed to develop real property using funding secured from a state agency. The wife was not involved in the work of the limited partnerships prior to the assignment and had no background, expertise or interest in real estate development. Further, the transfer to the wife was without consideration and was made in part because she was someone the state employee could rely on to handle the project in the same manner as he. We concluded that the facts of the assignment were such that the state employee could "fairly" be said to still have a financial interest in the project funded by the state. This conclusion was based on our concern that, despite the purported transfer of the interest, the transferring spouse continued to deal with the property as his own, albeit through his wife. In our view, that concern was warranted because the wife lacked the expertise to manage the business interest alone, and

absence of consideration paid by the wife to her husband was at least some evidence of the husband's failure to completely relinquish the interest.

We also found that attribution was warranted in *EC-COI-83-111*, where a state employee transferred his ownership interest in land, formerly held jointly with his wife, to his wife alone. The transfer was made to protect the land from being subject to any liability which the employee might incur in the performance of his state duties. Subsequently, his wife proposed to sell the property to the state agency that employed her husband. In attributing the wife's interest to her state employee husband, we noted that the transfer was not in return for any consideration, nor was its purpose to benefit the wife by giving her sole right and title to the land and all benefits which might come from it. Moreover, there was no independent evidence that the state employee husband had relinquished his financial interest in the proceeds of the wife's proposed sale to the Commonwealth. We said: "Absent evidence that you will not derive any financial benefit, direct or indirect, from the sale of the land, the Commission concludes that you will have a financial interest in the sale by your wife to [the state agency] in violation of §7." See also *EC-COI-83-125* (attribution found where state employee regularly participates in the company's financial decisions); *85-24* (attribution found where employee shares in management and control of spouse's business).

Turning to the issue at hand, we note that the question -- whether transfer of stock into an irrevocable trust for the benefit of one's spouse constitutes "disposal" of that interest for purposes of the conflict law -- is a question of first impression for this Commission. As noted above, our prior precedent (other than *83-111*) has concerned transfers of interests in going concerns where the state employee's management and control of that interest was a central factor in our analysis. In the present situation, your client's ability to manage and control ABC is derived from his stock in that company, which the he has now placed in trust for the benefit of his wife. Although this type of interspousal transfer has never been considered by this Commission, we think that the key question remains the same: can your client fairly be said to have a financial interest in the property transferred. *EC-COI-84-13.*

As noted above, following our earlier precedent, we will not attribute his wife's interest in this property to him solely because of the marital relationship, the extent to which husband and wife may share in common household expenses, or the equitable rights they may have in each other's property. See Kindregan and Inker, *Massachusetts Practice: Family Law and Practice* §406 at pp. 17-18, Vol 2.; *deCastro v. deCastro*, 415 Mass. 787, 795 (1993). Rather, we will examine whether it can fairly be said that, apart from the mere fact of his marriage, your client retains a direct or indirect financial interest in the property held in Trust for the benefit of his wife. We conclude that, in general, the settlor of an irrevocable retains neither a direct nor an indirect financial interest in the property placed in trust. However, because the ABC stock placed in trust for his wife can revert to your client, we conclude that the Trust does not dispose of the indirect financial interest in the state contract held by ABC. Thus, in order to comply with §7, your client must take further steps to ensure that the beneficial ownership of the property cannot revert to him.

By placing the ABC stock in an irrevocable trust, your client no longer holds legal title to that stock, nor is he the beneficial owner of it. *Welch v. Davidson,* 102 F.2d 100, 102 (1st Cir. 1939) ("in equity, the beneficiary of a trust is the owner of the trust res; ... he has an equitable estate in the property constituting the trust and is considered the real owner; ... the trustee, on the other hand, holds the legal title to the property with the right to administer it for the benefit of the beneficiary and in accordance with terms of the trust."); see also *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412 (1980) (the legal effect of an irrevocable voluntary trust is to alienate the settlor's power to control assets placed in trust). Furthermore, because the Trust is irrevocable, the transfer of stock into the Trust "'cannot be revoked or set aside at the will of [the settlor,], *Lovett v. Farnham,* 169 Mass. 1, 2-3 [1897], ' without proof of mental unsoundness, mistake, fraud or undue influence.' *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 577 [1907], and cases cited." *Clune v. Norton,* 306 Mass 324, 326 (1940). Moreover, to the extent that the ABC stock represents his legal right or entitlement to participate in ABC's business decisions, your client has relinquished all such rights and entitlements. The Trustee, not your client, retains control over the administration of the ABC stock and the distribution of income derived therefrom to your client's wife. Moreover, your client does not select successor trustees. Pursuant to G.L. c. 184B, the trustee may even sell the stock. Thus, unlike the case in *EC-COI-83-37* and *83-111*, your client has manifested some intention to give to his wife the financial interests that flow from the ABC stock and, in general, has done so in a manner where he does not retain control over the property transferred. In other words, despite a lack of consideration, the use of a trust vehicle creates a transaction that is different from the assignment for no consideration in *EC-COI-83-37* and the sale without consideration in *EC-COI-83-111.*

However, we are mindful that your client has not completely disposed of all interest in the ABC stock. For example, if the stock is sold, even while your client is a state employee and ABC is under contract with the state, the proceeds of the sale will be placed in trust for *his* benefit. Under another scenario, ownership of the stock could revert to him after a period of years. That is, if, after he leaves state service, his wife should predecease him, the property previously placed in trust for her benefit would not pass to her estate, but would be placed in trust for him. As we concluded in *EC-COI-80-86,* a trust that contains this type of reversionary interest does not obviate the §7 violation. That is, where such reversion is not merely possible but is expressly called for in the Trust Agreement, we think that it can fairly be said that your client retains an indirect financial interest in the property. 2 *Scott on Trusts*, §128.2 (4th ed. 1982) ("if the settlor manifested an intention that the beneficiary should take the principal only if during his lifetime the trustee should elect to give it to him, [the beneficiary] has not the entire beneficial interest under the trust, and unless there is a gift over to a third person, the trustee will hold the property upon a resulting trust for the settlor or his estate.") Accordingly, unless your client takes additional steps to ensure that beneficial ownership of the property cannot revert to him, we conclude that he will continue to have an indirect financial interest in violation of §7.

DATE AUTHORIZED: June 6, 1995

[1/] The subject of this opinion has had other positions in state government, including a management position within the agency that he now oversees.

[2/] This opinion request was submitted shortly after he learned of ABC's subcontract.

[3/] "State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

[4/] Section 7 does not apply "if such financial interest consists of ownership of less than one percent of the stock of a corporation."

[5/] The §7(b) exemption is the only exemption generally available to regular state employees. Among other things, the §7(b) exemption requires that the state employee "not participate in or have official responsibility for any of the activities of the contracting agency."

CONFLICT OF INTEREST OPINION
EC-COI-95-9

FACTS:

You are a member of the General Court. You serve or will serve on one or more legislative committees but do not and will not serve on any Banking or Housing Committees.

You are also employed as a residential loan officer by XYZ, a private lender. In that position, you meet with potential borrowers, explain XYZ's programs to them and assist them in completing their loan applications. Thereafter, you submit the completed loan applications to XYZ's loan processing department and, if XYZ requires additional information, you obtain it from the applicants and provide it to XYZ. You play no role in XYZ's decisions regarding applicants' eligibility or qualifications for loans, their receipt of loans or the amounts or conditions under which any such loans are made. Rather, you inform potential borrowers about the loan process and the availability of loans and perform a clerical and intake role for XYZ.

The potential borrowers whom you serve reach you through various means. Most commonly, acquaintances refer business to you; XYZ and its affiliated entities refer interested parties in your loan territory to you; and you affirmatively promote XYZ's residential loan programs to those in your loan territory who are regularly involved in real estate transactions, namely, realtors, lawyers and financial planners. You have not publicly advertised or disseminated announcements about your business affiliation with XYZ, nor has XYZ done so.

XYZ currently compensates you by commission for each loan that is initiated through you and that "closes"; you receive no compensation if a loan does

not close. Your commission is currently 0.5% of the principal amount of the loan. XYZ pays you from a separate account; your compensation is not derived from the loan closing proceeds. You receive no other compensation in connection with your work as a loan officer.

You sometimes deal with potential borrowers who are likely to not qualify for conventional bank mortgage loans for the homes they wish to purchase. You would like to inform them about and direct them, if and when appropriate, to three Massachusetts loan programs that, in different ways, could assist them in purchasing such homes. Those programs are described below.

1. MHFA's First-Time Home Buyers' Program ("MHFA Program"). Under this Program, the Massachusetts Housing Finance Agency ("MHFA"), using more flexible underwriting standards than are generally applied, makes below-market rate mortgage loans available to income-eligible, first-time home buyers, e.g., through lower interest rates and/or equity requirements. Private lenders, such as XYZ, originate and process such loans to satisfy state and federal Community Reinvestment Act requirements calling for lenders to invest certain amounts of money in disadvantaged areas. MHFA, in effect, funds such loans by purchasing them from such lenders pursuant to loan purchase agreements with such lenders. MHFA derives its monies from its issuance and sale of bonds. In addition, for an annual fee (currently 0.25% of the original principal amount of the loan), virtually all such lenders, including XYZ, agree to service such loans pursuant to loan servicing agreements with MHFA. The borrowers may also be required to pay such lenders up to two points, which may be financed through the loan.

MHFA approves any private lender that (i) applies to originate and service such loans, (ii) satisfies MHFA's financial criteria, and (iii) agrees to operate in accordance with MHFA's programmatic guidelines. There are currently 55 - 60 active private lenders participating in the MHFA Program.[1/]

2. MHPFB's Soft Second Program ("MHPFB Program"). The Massachusetts Housing Partnership Fund Board ("MHPFB")[2/] administers this Program under a contract with the Massachusetts Executive Office of Communities and Development ("EOCD"). This Program has been funded with public monies from a variety of sources.[3/] This Program's objective is to broaden opportunities for first-time home ownership for low- and moderate-income persons by reducing their first mortgage loan amounts and lowering their initial monthly costs. To that end, participating private lenders such as XYZ originate both the first and second mortgage loans, and the second mortgage loan is structured so that repayment of principal is deferred for a period of time, with interest-only payments initially. MHPFB subsidizes a portion of the second mortgage loan interest payments due from borrowers to their private lenders. To effectuate such subsidies, MHPFB, the borrowers and the private lenders enter into tri-party subsidy agreements pursuant to which MHPFB deposits into a lender account amounts to be used to subsidize such loans. In addition, under a separate agreement between MHPFB and the private lenders, a pool of public funds is available to provide a loan loss reserve for the lenders as additional security in case a borrower defaults under such "soft second loan". Among the attractions of this Program for private lenders is that it allows them to structure their first mortgage loans so as to be saleable in the secondary market.

Private lenders are often encouraged and invited to participate in this Program. This Program is open to private lenders who wish to participate, with priority given to lenders offering competitive terms.

3. EOCD's HOME Program. EOCD administers this federally-funded program ("EOCD Program"). Among its offerings, this Program provides to first-time home buyers funding assistance for down payments and closing costs. Municipalities and non-profit organizations, such as community development corporations, (collectively, "Non-State Entities") apply to EOCD for this funding. Pursuant to written agreements ("HOME Agreements"), EOCD provides such funding to those Non-State Entities that it selects. The Non-State Entities then award such funds as no-interest loans to borrowers, thereby assisting borrowers in obtaining financing from private lenders. Such loans are forgiven progressively and, if the borrowers continue to reside in their homes for specified minimum periods of time, they are eventually forgiven entirely. EOCD enters into its HOME Agreements with the Non-State Entities; it does not deal with the borrowers or the private lenders.

The Non-State Entities select the private lenders whose borrowers will receive such assistance based on the lenders' willingness to afford their borrowers more flexible underwriting standards and/or loan terms and conditions.

(We will refer to the MHFA, MHPFB and EOCD Programs collectively as "State Programs" and to loan monies made available through such State Programs as "State Assistance". We will refer to MHFA's loan purchase and servicing agreements, MHPFB's subsidy

and loss reserve agreements and the EOCD's HOME Agreements collectively as "Agreements".)

State Assistance would be attractive and could be available to potential borrowers having low and moderate incomes. You would like to initiate and process loans to such potential borrowers. If you were permitted to do so, you would, in appropriate cases, advise such borrowers about the benefits and requirements of the relevant State Programs, assist such borrowers in completing applications and forms and providing additional materials and information that may be required, and transmit the same to XYZ.[4/] Other XYZ personnel would then engage in any and all communications and dealings with State Program personnel. If more information or materials were required to assure the availability of State Assistance for a particular borrower or to process the loan, you would gather and provide it through XYZ in the same way.

If borrowers for whom you initiated and processed loans were also to receive State Assistance through one or more of the State Programs in connection with their loan closings, the amount of and manner in which XYZ pays your compensation would not vary. Your XYZ compensation would be due you if XYZ transaction closed and would be calculated as it now is, based on the then "going" percentage of the principal amount of the XYZ loan. If the loan did not close, you would receive no compensation.

QUESTIONS:

1. Does G.L. c. 268A permit you, while serving as a member of the General Court, to receive compensation from XYZ for initiating XYZ loans to borrowers who receive State Assistance through any of the State Programs when such compensation is conditional on the closing of the subject loan?

2. Does G.L. c. 268A permit you, while serving as a member of the General Court, to work for XYZ as a loan officer in connection with XYZ loans not involving State Assistance through any of the State Programs?

ANSWERS:

1. No.

2. Yes, subject to the limitations described below.

DISCUSSION:

As a member of the General Court, you are a state employee; and MHFA, MHPFB and EOCD are state agencies[5/] for the purposes of G.L. 268A (conflict of interest law).

A. Section 7

Section 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party, unless the employee is eligible for and obtains an exemption. In *EC-COI-81-93*, we described the prophylactic rationale for §7:

> The purpose of §7's prohibition is to prevent a state employee from influencing the awarding of contracts by any state agency in a way which might be beneficial to the employee. Because it is impossible to distinguish employees who are in a position to influence the awarding of a contract from those who are not in such position, the law treats all state employees as if they have such influence. See W. G. Buss, *The Massachusetts Conflict of Interest Law: An Analysis*, B.U. Law Rev. 299, 368, 374 (1965).

The section seeks to avoid the perception and the actuality of a state employee's enjoying an "inside track" on state contracts or employment.

Each of the Agreements constitutes a contract made by a state agency in which that very state agency is an interested party within the meaning of §7. MHFA is an interested party in both its loan purchase and its servicing Agreements with XYZ; MHPFB is an interested party in its tri-party subsidy Agreements with XYZ and borrowers, and in its loss reserve Agreements with XYZ; and EOCD is an interested party in its HOME Agreements with Non-State Entities.

1. Threshold Question

The threshold question here is whether you, as a loan officer of XYZ, would have a direct or indirect financial interest in such contracts.

The State Programs have been established to subsidize or assist low- and moderate-income home buyers in obtaining mortgage loans. Each Program's State Assistance is effected differently. The MHFA Program provides private lenders like XYZ incentives for making such loans because MHFA agrees to purchase the loans and pay the lender annual loan servicing fees, and, in addition, the lender can, by making such loans, satisfy certain state and federal minimum requirements to lend in disadvantaged areas.

The MHPFB and EOCD Programs also provide private lenders incentives for making such loans by affording them additional security, whether by easing the borrowers' financial burdens through subsidies or junior financing, by providing a loan loss reserve to cover certain loan defaults and/or by allowing lenders to structure certain of such loans for sale in the secondary market. As a result of the State Programs, private lenders are willing and able to apply more flexible underwriting standards for making such loans.

XYZ pays you a commission only for an XYZ loan that is made to borrowers whose loans you initiated and that actually close. In other words, your being compensated by XYZ is conditional on the closing of the relevant loan.

We have never squarely addressed the question presented by this case. The Supreme Judicial Court has observed that the conflict of interest law is "deficient" because it does not contain a definition of "financial interest". *Graham v. McGrail*, 370 Mass. 133, 138 (1976), citing an earlier opinion. We note that neither does the law contain a definition of the even more difficult concept of "indirect financial interest". Through our opinions, we have developed those concepts. Our conclusion in this case that you would have an indirect financial interest in state contracts stems from that precedent and from public policy considerations.

In a line of opinions, we have held that a public employee who is also a real estate broker "on the side" would have a prohibited financial interest in a commission resulting from the consummation of a land sale contract in which the employee's level of government is the seller or the buyer. See *EC-COI-81-63* (n. 2); *81-93; 85-32* (state employee/real estate broker who, directly or through her business, received a commission in connection with the purchase or sale of state property).[6/] In those cases, the broker would not have been compensated by commission, whether from the sale proceeds or not, if the land sale transaction had not been consummated. See also *EC-COI-79-128*, involving a state employee who was to be compensated by private insurance companies for contacting other state employees to encourage them to enroll in deferred compensation plans under the direction and oversight of the state, where we concluded that the subject employee would have an indirect financial interest in the state contract between the subscribing employees and the state.

Although, in your situation, you would be one step further removed from the subject state contract, you, like the real estate broker, would not be compensated for an XYZ loan closing involving State Assistance unless the applicable state contract was consummated.

In *EC-COI-93-10*, we held that a state employee seeking to be employed "on the side" as a Zamboni operator by a private vendor at a state-owned ice rink would have a prohibited indirect financial interest in his employer/state agency's ice rink management contract with that private vendor. In that case, there was no indication that the ice rink employee was to be compensated out of state monies. Our rationale was that the state management contract made it possible for the vendor to operate the ice rink, and "but for" that state contract, the state employee would not have been able to work as a Zamboni driver for compensation at the state ice rink facility. We applied a "but for" test to trace the state employee's indirect financial interest to the subject state contract.

Similarly, in your situation, "but for" the State Assistance to the borrower, the particular loan on which your commission is based would not be made, and you would not be compensated.

In *EC-COI-87-14*, we advised a state employee, who was a developer "on the side" and who did not have a direct contract with EOCD, that he would have a financial interest in EOCD contracts designed to assist low- and moderate-income families to purchase affordable housing. We wrote that, even though a factual determination revealed that the employee/developer's financial interest in the EOCD subsidy program was "not substantial, direct, or quantifiable", we would not "make an exception to application of the literal language of §7."

Comparing your situation to that case, XYZ would have a direct financial interest in the various Agreements to which it was a party, namely the MHFA and the MHPFB Agreements; and XYZ would have an indirect financial interest in EOCD's HOME Agreements, which would assist its borrowers in qualifying for the subject loan. Although your financial interest would be one step removed from XYZ's, you also would have a financial interest in those Agreements. Like the state employee/developer in *EC-COI-87-14*, your financial interest would be indirect and perhaps not substantial as to any specific Agreement, but unlike that person, your interest would be quantifiable.

In certain cases, the Commission has determined that a state employee's interest in a state contract does not implicate §7. Your situation is distinguishable from those cases.

Your insulation from and lack of contact with the state agencies providing the State Assistance does not nullify §7. In several opinions, we have made it clear that the application of §7 does not depend on the state employee's being involved in the state contract. *EC-COI-83-13* (state employee was prohibited from receiving from a private foundation monies derived from a state agency's grant regardless of the fact that the grant was awarded prior to his state employment); *EC-COI-84-133* (under the municipal counterpart to §7, former municipal employee was prohibited from receiving commissions generated from insurance policies covering his municipality during the period when he was a municipal employee, regardless of whether or not he wrote policies for the town).

Our articulation of §7's prophylactic purpose in *EC-COI-87-14, supra*, is apt here:

> The language of §7 is designed to prevent the opportunity to gain financially from contracts made by a state agency as much as it is designed to prevent the reality of financial gain.

One can understand, in light of that purpose, why a member of the General Court or an employee of MHFA, MHPFB or EOCD could be considered to be in a position from which he could influence the awarding of State Assistance in particular instances and why, then, §7 is broadly designed to prevent such a state employee from having the opportunity to benefit or from actually benefiting therefrom. Although we recognize that your financial interest is more remote than XYZ's, §7's prohibition applies to prevent you from having the "opportunity to gain financially from contracts made by" MHFA, MHPFB and EOCD.

For those reasons, we conclude that you would have an indirect financial interest in a state contract if you were to receive a commission from XYZ conditioned upon the closing of a loan made to a borrower who receives State Assistance to facilitate such a loan closing. In so concluding, we recognize that your actual commission would be paid out of a separate XYZ account, not directly from State Loan Assistance monies. However, XYZ's payment of such commission to you would be triggered by the closing of the entire loan transaction, which would presumably not close as structured "but for" the availability of State Assistance. It is because your receipt of compensation in such cases is dependent or conditional upon the consummation of a state contract, namely, one or more of the Agreements, that you would have an indirect financial interest in such a state contract.

We point out that if, rather than compensating you by commission paid only upon the closing of the subject loan, XYZ were to compensate you by salary or at an hourly rate or even by commission for each XYZ loan application that you process (whether the loan closes or not), our analysis would differ. In any of such cases, your receipt of compensation would not be conditional upon or triggered by the consummation of a state contract. See, e.g., *EC-COI-85-40* (a member of the General Court/state employee was prohibited from representing for compensation a private client selling land to a state agency, but his associate could represent such client and, provided the legal fees were based on hourly rate rather than a percentage of the purchase price, the state employee could share in such compensation); see, also, *EC-COI-81-3* (state employee who was also a salaried employee of private firm who did not share in firm's profits and was not paid with state contract monies would not have a financial interest in his firm's state contracts); *81-87* (state college employee who was also employed as president of a bank with which the college deposited funds did not have a financial interest in the contracts between the college and the bank because his bank compensation was by salary that was not conditioned upon the level of college deposits in the bank).

In other words, if XYZ were to pay you *regardless* of whether its loans to borrowers, including those receiving State Assistance, closed, your receipt of the XYZ commission would not implicate §7. See *EC-COI-83-28* (state employee selling land to his town would have a prohibited financial interest in a state grant to town if the town were to vote to purchase the property *on the condition* that the town received state grant money, but he would not have such financial interest if the town were to vote to purchase the property *regardless* of whether it would subsequently receive state grant money reimbursing it for the purchase).

2. Exemption

The next question is whether any exemption is available to you that would permit you to work for XYZ on loans that may be subsidized or assisted through a State Program. The only pertinent exemption is contained in §7(c), which is specifically applicable to members of the General Court and provides that a member of the General Court will be exempt from §7's prohibitions if the subject state contract is not made by either branch of the General Court and "if his direct and indirect interests and those of his immediate family in the corporation or other commercial entity with which the contract is made do

not in the aggregate amount to ten percent of the totalproprietary interests therein, and the *contract is made through competitive bidding*[7] and he files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family." We are assuming for the purposes of this analysis that you would qualify for this exemption under the percentage interest test because you have no proprietary interest in either XYZ or in any Non-State Entities who may be parties to the Agreements for State Program Assistance.

Nevertheless, the §7(c) exemption does not apply to your situation because none of the state agencies providing State Assistance can be said to engage in any competitive bidding process, as defined in §1(b), before entering into Agreements with private lenders such as XYZ or the Non-State Entities.

Were you a state employee, other than a member of the General Court, it appears that you would be eligible for the §7(b) exemption, which is less restrictive. Among its other requirements, §7(b) provides that the subject state contract must be made after *either* "public notice or where applicable, through competitive bidding." The more easily satisfied "public notice" language was added to the §7(b) exemption during the 1982 legislative session, when the General Court considered and enacted various changes designed to reduce the scope of §7's prohibitions. See St. 1982, c. 612, §§5-7. Section 7(c) has not been similarly amended.

In sum, you may not receive a commission from XYZ in connection with the closing of a mortgage loan to borrowers subsidized or assisted with State Assistance so long as your receipt of the commission is conditional upon the consummation of the subject loan transaction.

B. Applicability of Other Sections

1. Section 4

Section 4 regulates what a state employee may do "on the side". It generally prohibits state employees from receiving compensation from or acting as agent for anyone other than the state or a state agency in connection with a particular matter in which the state or a state agency is a party or has a direct and substantial interest.

However, in most instances, those substantive restrictions do not apply to members of the General Court, who are only prohibited by §4 from personally appearing for compensation[8] (other than their legislative salaries) before state agencies for compensation, *unless*:

(1) the particular matter before the state agency is ministerial in nature;[9] or

(2) the appearance is before a court of the commonwealth; or

(3) the appearance is in a quasi-judicial proceeding.[10]

See *EC-COI-89-31* (applying §4 to a member of the General Court having a private law practice). We have construed the "personal appearance" prohibition as including all contacts and communications (whether in person, by telephone or in writing) with a state agency or state agency personnel with intent to influence. *Id.; EC-COI-87-27.*

Your current activities as an XYZ loan officer do not appear to implicate §4 because you do not contact, communicate with or otherwise deal with state agencies. Were your responsibilities for XYZ to change, so as to require you to engage in contacts or communications with or to any state agency or its personnel, this would raise concerns under §4, and you should seek further advice from us.

2. Section 6

Section 6, in relevant part, prohibits a state employee from participating in any particular matter[11] in which to his knowledge he or a business organization in which he serves as an employee has a financial interest. "Participation"[12] includes both formal and informal lobbying of colleagues, giving advice and making recommendations, not just deciding or voting on particular matters. The financial interest may be of any size and may be either positive or negative. It must, however, be direct and immediate or reasonably foreseeable in order to implicate §6.

This section will not prohibit you from participating in connection with general legislation, even if it would foreseeably affect your own or XYZ's financial interests,[13] because "general legislation" is specifically excluded from the conflict law's definition of "particular matter". See *EC-COI-87-11.*

However, special legislation is not so excluded. In *EC-COI-90-17*, describing the attributes of special, as compared to general, legislation, we wrote that "legislation which is temporary, which does not amend the General Laws, and which creates an exception or special rule which does not apply to other similarly situated individuals or organizations will be regarded

as special legislation." Thus, for example you might be required to abstain if there were proposed special legislation to increase MHFA's bonding authority that would have a reasonably foreseeable affect on XYZ's financial interest. See, e.g., *EC-COI-85-69*. In addition, concerns may arise under this section if you were asked to consider such matters as individual agency appropriations or individual budget line items (apart from the entire budget) that would have a reasonably foreseeable financial affect on XYZ's financial interests.

As you do not serve on the Legislature's Banking or Housing Committees, it appears that §6 will impose relatively insignificant restrictions on your activities as a member of the General Court.

3. Section 23

Section 23 imposes standards of conduct that are applicable to all public employees.

First, §23(b)(2) prohibits a public employee from using his official position to obtain unwarranted privileges or exemptions of substantial value[14/] for himself or others that are not available to similarly situated individuals. Under §23(b)(2), we have consistently prohibited public employees from using their titles, state time or public resources, including secretarial services and copying facilities, to promote private interests. See, e.g., *EC-COI-92-28; 92-12; 92-5* (legislator may not use state seal on correspondence to promote political campaign); *89-31* (legislator may not use government resources or letterhead to promote or announce private law practice); *P.E.L. 89-4* (state employee may not use state letterhead, state time, state secretarial resources to promote private trip).

Second, we have generally held that, unless authorized by statute or regulation, a public employee is prohibited by §23(b)(2) from soliciting anything of substantial value from subordinate employees, vendors with whom he has official dealings or persons with a specific interest in a piece of legislation.[15/] That is because of the inherently exploitable nature of such situations. See *EC-COI-84-61* (addressing legislator's marketing of tax shelters); *84-124; 82-64*.

Third, §23(b)(3), the so-called "appearances" section, prohibits a public employee from acting in a manner that would cause a reasonable person to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties. The section requires the employee to dispel any such "appearance" by making a written disclosure of the relevant facts in a manner that is public in nature. A member of the General Court may make such disclosure by filing it with the clerk of his or her legislative branch and, if applicable, by having it recorded with the minutes of the meeting or hearing at which the "appearance" may arise.

As applied to your situation, (i) you may not use state resources or facilities to promote XYZ's or your own private business interests, and (ii) you may not intervene on behalf of XYZ, potential borrowers or any Non-State Entities to promote any of their interests with or to any of the State Program agencies.

Furthermore, you may not solicit loan business for XYZ from subordinate employees or vendors with whom you have official dealings as a member of the General Court, or from "persons at a time when they have a specific interest in a piece of legislation before you." See *EC-COI-84-61*. That is, you may not "target" for such solicitation anyone with such an interest in legislative business. If, to your knowledge, any such employee, vendor or person with such an interest in legislative business seeks a loan through you from XYZ, (i) that person's decision to apply for such loan must be entirely voluntary, (ii) that person (not you) must have initiated the proposed business relationship, and (iii) you must publicly disclose in writing the facts clearly showing that the conditions described in clauses (i) and (ii) have been satisfied. This requirement is derived from §23(b)(2) and §23(b)(3) to overcome the inherently exploitable nature of certain relationships.

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1/ There are also approximately 30 additional lenders that once participated in the MHFA Program and are still servicing the remaining outstanding loans.

2/ MHPFB was created by and funded through Chapter 405, §35 of the Acts of 1985, which was amended by Chapter 102, §§34-37 of the Acts of 1990, which characterizes MHPFB as "a body politic and corporate" and constituted as "a public instrumentality", "placed in" the Massachusetts Executive Office of Communities and Development.

3/ This Program was originally funded with an appropriation from the General Court. Its recent funding has come through EOCD and, through the FY 1995 budget process, its current funding is derived from $1,000,000 of MHFA monies.

4/ The MHPFB Program has one additional requirement, namely, that a request for reservation of funding be sent directly to MHPFB by XYZ's loan officer; however, while the lender's and the loan officer's names must be inserted in blanks on the reservation request form, only the applicant-borrower(s) sign the form.

5/ "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).

6/ In *EC-COI-90-2* and *92-40*, decided under §20, the municipal counterpart to §7, we presented hypothetical cases in which municipal employee/real estate brokers would have prohibited financial interests in commissions "based on the sale price" of the subject real estate. We intended thereby to confirm, not to narrow, our prior holdings.

7/ "Competitive bidding," all bidding, where the same may be prescribed by applicable sections of the General Laws or otherwise, given and tendered to a state, county or municipal agency in response to an open solicitation of bids from the general public by public announcement or public advertising, where the contract is awarded to the lowest responsible bidder. G.L. c. 268A, §1(b).

8/ "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).

9/ "[M]inisterial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents." G.L. c. 268A, §4.

10/ "[A] proceeding shall be considered quasi-judicial if:
(1) the action of the state agency is adjudicatory in nature; and
(2) the action of the state agency is appealable to the courts; and
(3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding." G.L. 268A, §4.

11/ "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).

12/ "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).

13/ For example, general legislation expanding the scope of one or more of the State Programs might foreseeably affect XYZ's, potentials borrowers' and/or your financial interests.

14/ Anything having a value of $50 or more is "of substantial value." *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)*.

15/ Section 3(b) also prohibits a public employee from soliciting or receiving "anything of substantial value for himself for or because of" his official acts.

CONFLICT OF INTEREST OPINION
EC-COI-95-10

FACTS:

You are the Solicitor of a City. You seek an opinion on behalf of Ms. A, Chairperson of the City's Historic District Commission ("Historic Commission"). Ms. A was appointed to this uncompensated position by the City Council ("Council").

In 1993, the City, through the efforts of its Mayor and other City officials, applied for and received from the Executive Office of Communities and Development ("EOCD"), a [amount omitted] start-up grant for use in developing an entity, which has evolved into the [City] Downtown Association, Inc. ("Association"). Ms. A also serves as a member of the Board of Directors of the Association.

EOCD Downtown Partnership Program

EOCD receives from HUD Community Development Block Grant monies, some of which it awards to municipalities having populations of fewer than 50,000.1/ One of those programs is the Downtown Partnership or Downtown Revitalization Program ("Program"). The Program's major objective is the elimination of urban slums and blight. Through the Program, EOCD seeks to involve and assist private enterprises in developing an entity through which they can work in partnership with their municipal governments to improve their urban environment through various activities, initiatives and projects (collectively, "Downtown Projects").

Municipalities can apply to EOCD for initial Program funding to finance the start-up or so-called

"emerging partnership" costs of an entity ("Downtown Entity"), which is generally, if not always, formed as a Massachusetts corporation under G.L. c. 180. EOCD refers to the cooperative working relationship between a municipality and its Downtown Entity as a "Downtown Partnership."[2/]

Downtown Entities include among their governing bodies representatives of a cross-section of the community, such as businesses, institutions, churches, civic organizations, property owners, community residents and municipal governments. EOCD strongly encourages open lines of communication between the municipality and the Downtown Entity constituting a Downtown Partnership. Among various ways of achieving such communication and information flow, EOCD generally recommends (but does not require) that some municipal officials serve as *ex officio* members[3/] of the governing body of the Downtown Entity and, likewise, that representatives of the Downtown Entity regularly attend meetings of the municipality's governing body.

Once the Downtown Entity has been formed, the municipality can apply to EOCD for, and may be awarded, up to three additional Program grants in each of the Entity's first three years of operation. That funding is provided for a variety of Downtown Projects, such as:

> training; goal-setting; planning for downtown economic development; strategies for business retention, recruitment and start-ups; improvement of local regulations (zoning, permits, etc.); parking strategies; cooperative services; loans/grants for building rehabilitation (facades, signs); streetscape improvements; studies and programs in promotions and marketing; tourism development; downtown market analysis; loans for new and expanding business activities; and training and support for new businesses and entrepreneurial ventures.

Typically, as a Downtown Entity gains more experience during the three-year period working in a Downtown Partnership relationship with its municipality, EOCD decreases the amount of funding to be allocated to the Entity's project manager. At the end of the three-year period, EOCD provides no further funding to the municipality to support the Downtown Entity, which is expected to operate self-reliantly thereafter with funds raised through its own efforts, e.g., from members' dues and contributions, fund-raising programs and events, and other government and private loans, grants and contributions (collectively, "Other Funding Sources").

If EOCD approves a municipality's application for Program funding, EOCD enters into a grant agreement with the municipality, which enters into a subgrant agreement with the Downtown Entity. Pursuant to those two agreements, funding flows from EOCD to the municipality and thence to the Downtown Entity, provided that, at each contract level, the conditions for disbursing funds have been satisfied.

Although no statute, rule, regulation, order, ordinance or other law mandates the formation or maintenance of Downtown Entities, through EOCD Program grants, municipalities promote and support the formation, maintenance and operation of such Entities during their early stages. Among their goals in providing such funding, EOCD and the Program-grant-receiving municipalities hope and expect that the Downtown Entities will survive long-term and continue to work in Downtown Partnership relationships.

Twenty-three Downtown Entities have been funded with Program grants and are involved in Downtown Partnership relationships with Massachusetts municipalities.

Downtown Partnership: City and Association

With the help of EOCD's $[amount omitted] start-up grant, the Association was incorporated in [date omitted] to work with the City in a Downtown Partnership relationship. The Association's Articles of Organization set forth its principal purposes, namely:

> (1) To improve, better, market and revitalize the businesses and business community in the City's Downtown area;
>
> (2) To foster and promote the development of business and businesses in the City's Downtown area;
>
> (3) To promote and enhance the visual quality and appearance of the historic sites, businesses and structures within the City's Downtown area;
>
> (4) To preserve and enhance the visual quality and appearance of the historic areas, and public areas situated in the City's Downtown area;
>
> (5) To educate and inform the public, and, in particular, the citizens of the City, of the location and background of historic sites in the City's Downtown area, and to promote and

encourage the study and utilization of these historic sites by the public; and

(6) To seek federal, state and other grants for the purposes of furthering the purposes set forth above.

The Association's by-laws ("By-Laws") provide that its members may be "any person or business entity who has paid in full the dues established by the Board." The annual dues are [amount omitted]. The Association currently has more than 60 members, the vast majority of whom are representatives of local businesses, and others of whom are elected or appointed City officials, representatives of churches and unaffiliated individuals.

The By-Laws require that the Association have a 15-member Board of Directors ("Board"). Five of the Board members serve *ex officio*:[4] the Mayor; a representative of the Historic Commission (currently Ms. A); a representative of the City's public school system; and two private sector representatives, namely, the President of the City's board of trade and an officer of a City bank. The other ten Board members are elected by and from among the Association's members. The *ex officio* Board members (except for the Mayor) serve a one-year term. The other Board members serve three-year terms. The Board currently has 14 members, 11 of whom (including the two *ex officio* business members) represent business interests[5] and three of whom are the *ex officio* City officials.

The Association's president, secretary and treasurer are elected by the Board from among its members. None of the Association's officers is a City official or other City employee.

The Association retains its own legal counsel and its own accountant. The Association's offices are located in a privately owned office building; it has its own furnishings and equipment or uses those of its private sector Board members.

Through a resolution adopted on [date omitted], the Council authorized the Mayor (i) to apply for and "take any action necessary to secure up to [amount omitted]" of Program funds "for the implementation of Ready Resource grant-funded activities for the Downtown Partnership of" the City and the Association; (ii) to execute all grant documents on behalf of the City; and (iii) to expend the grant monies in accordance with the grant application and accompanying documents.[6] The Mayor submitted the Program grant application to EOCD on [date omitted]. Through a Program grant agreement ("Grant Agreement") dated [date omitted] with EOCD, the City received a "Phase II" Program grant (for the first year of EOCD's possible three-year funding period) in the amount of [amount omitted] ("Grant") for the following Downtown Projects: Downtown Manager's Salary/Benefits; Training and Technical Assistance; Market Analysis; Parking and Traffic Study; Design Guidelines; and Association's Administration.

At its [date omitted] meeting, the Council approved the associated Program subgrant agreement (Subgrant Agreement). On [date omitted], the City and the Association entered into the Subgrant Agreement under which the Association was engaged as the City's subgrantee to perform the following Downtown Project services and functions, among others, for a maximum of [amount omitted] ("Subgrant"):[7] (i) to hire a downtown manager ("Manager") to manage the day-to-day operations and finances of the Association, including assisting with the development and implementation of the Association's downtown revitalization program, coordinating work group activities, developing and overseeing promotional events, working with financial/lending institutions and government agencies to develop support programs for downtown businesses, preparing grant proposals, working with businesses and civic groups to organize special events and aesthetic improvements and promote the City's downtown, and coordinating activities with the City's Community Development Office;[8] (ii) to engage consultants to provide planning assistance in architectural design of aesthetic improvements, including commercial signs and facades; in professional fundraising planning and development to sustain the Association on a long-term basis; and in market analysis services to develop a market niche to enhance the long-term economic viability of the City's downtown; and (iii) to maintain and operate an Association office.

The Subgrant Agreement provides that the City's project representative will be its Community Development Chief Planner, specifies the method and schedule for disbursing the Subgrant, and includes dispute resolution provisions, which designate the City's Community Development Director as the first level of review and the Mayor as the second and final (without further recourse) level of review if the Association takes issue with amounts of payments or with nonpayment by the City.

The City does not delegate its duties or powers to the Association. Although the Association is subject to the terms and conditions of the Subgrant Agreement, it does not require City approval before it makes decisions or acts. It can and does act independently of the City. For example, the

Association has hired a Manager, selected an architect and will be hiring other consultants to assist in market analysis and fundraising efforts. It has conducted a "Summerfest" and other events, business training seminars and breakfast gatherings for its members; has purchased and installed flower barrels in the City's downtown area; and has given City officials advice and input about particular design and infrastructure projects affecting the downtown area.

At the end of the EOCD funding period, the Association plans to operate independently with revenues raised from Other Funding Sources.

QUESTIONS:

1. Is the Association a municipal agency or a private entity for purposes of the conflict of interest law?

2. May Ms. A serve as a member of the City's Historic Commission while serving as a member of the Association's Board of Directors?

ANSWERS:

1. The Association is a private entity for purposes of the conflict of interest law.

2. Yes, subject to the limitations discussed below.

DISCUSSION:

A. Threshold Question

The threshold question is whether or not the Association is a municipal agency[2/] or a private entity for purposes of the conflict of interest law.

To determine whether an entity (including a non-profit corporation such as the Association) is a public agency or an instrumentality thereof, the Ethics Commission ("Commission") has developed and will consider the following four factors:

(1) the means by which the entity was created (e.g., legislative, administrative or other governmental action);

(2) the entity's performance of some essentially governmental function;

(3) the extent of the 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-94-7* (factors reviewed in state agency context); *EC-COI-92-26* (non-profit corporation is a municipal agency); *EC-COI-88-19* (non-profit corporation is not a municipal agency).

In addition, following the suggestion of the Supreme Judicial Court, the Commission also takes into consideration, when relevant, whether and to what extent there are significant private interests involved in the entity under review, or whether the state or its political subdivisions have the powers and interests of an owner. See *EC-COI-94-7; MBTA v. State Ethics Commission*, 414 Mass. 582, (1993).

After considering the facts in light of those four factors and the additional consideration, we conclude that the Association is a private entity, not a municipal agency, within the meaning of the conflict of interest law.

1. Impetus for Creation

No statute, rule, regulation, order, ordinance or other law requires the Association to be created or to include municipal officials on its governing body. The Association was formed through the joint efforts of EOCD, municipal employees and agencies, and private parties to become a vehicle that enters into a contract to undertake and implement Downtown Projects through the Downtown Partnership model.

The Commission observed in *EC-COI-94-7*, that, although it was "clear that governmental action has in effect enhanced the market for" the services of the subject home care corporations, thereby causing such corporations to proliferate, those corporations were not *created* by government action. A similar observation can be made here, where governmental action, start-up funding and continued funding through the Subgrant Agreement has encouraged development of the Association, but it would not be accurate to say that the Association was *created* by government action.

In *EC-COI-88-19*, we considered a newly formed, non-profit corporation that was designated by a city pursuant to the city's cable television license agreement to manage and operate public, educational and local municipal access channels in the city and whose board of directors and executive director were selected by the city's mayor. There, we found that the corporation, having been created pursuant only to a contract with the city (rather than by law, rule or regulation), was not "governmentally created" despite the participation of governmental officials in its organizational efforts. Here, similarly, although those who were instrumental in prompting the creation and procuring the funding for formation and initial operation of the Association were municipal

employees, the Association was formed to perform services under a contract -- the Subgrant Agreement -- not by law, rule or regulation.

The Association is distinguishable from the non-profit corporations that we found to have been governmentally created because the impetus for their creation was a governmental agency and they also *performed a legislatively mandated function* of the creating agency. See *EC-COI-90-3; 89-24; 84-147* (confirmed by *89-1); 84-66* (all involving non-profit corporations established by state agencies); and *88-24* (where municipal officials in a municipal agency created a non-profit corporation to further the agency's statutory purpose). In *EC-COI-88-24*, the non-profit corporation was created by municipal officials to further the goals of the municipal agency in which they served; had as its executive director a senior administrator of the municipal agency; had a board of directors, one third of whom were employees of the municipal agency; had no staff or offices of its own, but rather borrowed staff members from and occupied offices of municipal agencies; and took action only upon the direction of municipal agency personnel.

Here, by contrast, although some of the Downtown Projects that may be undertaken by the Association are similar to functions of City agencies, particularly the Community Development Office, on these facts we cannot readily conclude that the Association performs legislatively mandated functions of a City agency or agencies. The Association (having its own Manager, officers and consultants and its own offices, furnishings and equipment, and having City employees constituting only a small minority of its Board and its membership and no City employees as its officers) is not inextricably entwined with the City. We are also mindful of the fact that EOCD's and the City's purpose in fostering the creation of the Association is to have it be a viable, independent entity after three years.

In sum, the Association was not created by statute, rule, regulation, order, ordinance or other law, but rather stems from a contractual arrangement and does not appear to perform the legislatively mandated functions of a City agency. For those reasons, we conclude that the Association was not governmentally created.

2. Essentially Governmental Functions

Depending on the particular Downtown Project, the Association's purposes and functions may or may not be governmental in nature. For example, sign, facade and landscaping improvements; parking and traffic planning and improvements; loans to small businesses; and training could be public, private or mixed initiatives. It appears, however, that none of the Association's purposes, functions or Downtown Projects is so uniquely within the bailiwick of government[10/] that they would be characterized as essentially governmental functions.

3. Whether the Entity Receives or Expends Public Funds

Currently, the Association does indeed receive and expend the Grant monies pursuant to the Subgrant Agreement, a contractual arrangement. For purposes of this analysis, the Grant monies become municipal funds once EOCD awards and pays the Grant to the City. The Association is the City's contractor. The City has the absolute right, without cause, to terminate the Subgrant Agreement upon 15 days notice to the Association, in which case the City is only required to pay for services already provided and accepted. The City also has the right to withhold payment if it considers the Association's performance to be inadequate. The Association expects to develop and receive revenues from Other Funding Sources and, thus, to become financially independent of the City within three years, when additional Program funding is no longer available. Thus, while municipal monies may be expected to constitute the bulk of the Association's current revenues, municipal funding is not expected to be the sole or even the primary source of funding in the long-term.

Therefore, we conclude that the Association does indeed currently receive and expend municipal monies; however, we do not accord significant weight to this factor on the "public side" of the balance, because that governmental funding situation appears to be temporary.

4. Extent of Municipal Control and Supervision

Under the Subgrant Agreement, the City may be said to control and supervise the contractual undertakings of the Association, in that the City can unilaterally terminate the Subgrant Agreement and/or (through its Community Development Director and Mayor) be the final arbiter of the adequacy of Association's contract performance and whether the Association will be paid. However, the control and supervision does not extend to other aspects of the Association's operations, e.g., hiring or engaging the Manager, legal and accounting advisers, architects and other consultants or making other management and operational decisions. Certainly, after the termination of the Subgrant Agreement and other comparable contracts that may be expected during the Program's usual three-year funding period, it could not now be

said that the City will control and supervise any aspect of the Association's activities.

The three City officials who are *ex officio* members of the Board do not and could not, even if they wished or were directed to, control the 15-member Board or the Association. In fact, it does not appear that the City even requires its officials to serve on the Board, which the City presumably would if it sought to control the Association. Furthermore, whatever control the City may exert over the Association's operations through the three *ex officio* city employee/Board members is diluted, because two of those three individuals serve only one-year terms while most of the other Board members serve three-year terms.

We conclude that, although the Association's performance of the Subgrant Agreement obligations may be controlled and supervised to some extent by the City, the Association is an independent corporate entity that is not controlled by the City.

As to the additional consideration suggested by the Court in the *MBTA* case, it appears to us that there are significant private interests involved in the Association, because the vast majority of its members are affiliated with local businesses and the Association's purposes and projects are for their benefit. There is no indication that any property acquired by the Association with Subgrant or other funds will belong to anyone other than the Association or its members. Furthermore, the Downtown Projects are intended to revitalize the City's downtown area, and will at the same time benefit local businesses, for example, in the form of loans and facade, signage and/or streetscape improvements.

After weighing all factors and considerations, we conclude that the Association is a private entity, because it has significantly more attributes of a private entity than of a municipal agency.

B. Application of the Conflict of Interest Law to Ms. A's Situation

1. Section 17

Section 17(c) generally prohibits a municipal employee, "*otherwise than in the proper discharge of official duties*," from acting as agent or attorney for anyone other than the municipality in connection with any particular matter[11/] in which the municipality is a party or has a direct and substantial interest.[12/] The rationale behind this is that public employees should be loyal to their municipal employers, and where their loyalty to their municipal employers conflicts with their loyalty to a private party or employer, the municipality's interest must win out. See *EC-COI-82-176* (involving §4, the state counterpart to §17).

Under §17(c), Ms. A may not, for example, represent or personally appear on behalf of the Association (whether formally or informally, whether through written or oral communications and whether in person or otherwise) to or before *any* City agency[13/] or personnel, EOCD, or anyone else in connection with the Association's performance of its contractual obligations under the Subgrant Agreement, the Subgrant, or any other matters in which the City has a direct and substantial interest, including any future Program subgrant. "Personally appearing" includes any contact with the intent to influence. *EC-COI-92-1; 87-27.*

That prohibition may be tempered if Ms. A's representation of the Association's interests is in the proper discharge of her official duties as a member of the Historic Commission. If the Council were explicitly and specifically to describe or approve Ms. A's municipal duties so as to include her representation of the Association in certain situations and/or before certain bodies or personnel, then she could generally perform those authorized functions in the proper discharge of her official duties. The Council's awareness that Ms. A serves on the Historic Commission and also as a member of the Association's Board does not by itself constitute official affirmation. See *EC-COI-83-20* (involving §4, the state counterpart to §17(c), in which the Commission suggested that a state employee required a written statement from his state agency describing or approving his representation of an individual employee of the agency). If the Council does not so expand Ms. A's municipal duties, then she may not so represent the Association.

2. Section 19

Section 19, in relevant part, prohibits a municipal employee from participating as such an employee in any particular matter[14/] in which (to his knowledge) he or a business organization[15/] in which he serves as an officer, director, trustee, partner or employee has a financial interest unless the employee first receives an exemption. "Participation"[16/] includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30.* The financial interest may be of any size and may be either positive or negative. *EC-COI-84-96.* It must, however, be direct and immediate or reasonably foreseeable in order to implicate §19. *EC-COI-86-25; 84-123; 84-98; 84-96.*

Notwithstanding that general prohibition, an appointed municipal employee may participate in such a matter if he first obtains an exemption under §19(b)(1) by (i) giving his appointing official written notice of the nature and circumstances of the particular matter and making full disclosure of the financial interest, and (ii) receiving a written determination from that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the municipality may expect from the employee.

As applied to this case, if the Historic Commission were asked to consider a particular matter that would reasonably foreseeably affect the Association's financial interest, Ms. A must abstain from participating in any aspect of such matter unless she has first receives an exemption determination, as described above. For example, if the Historic Commission were charged with disbursing historic renovation grant monies and the Association were an applicant or potential recipient, Ms. A would need an exemption in order to participate.

3. Section 23

Section 23 imposes standards of conduct that are applicable to all public employees.

Section 23(b)(3), the so-called "appearances" section, is pertinent to Ms. A's situation. It prohibits a public employee from acting in a manner that would cause a reasonable person to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties. The section requires the employee to dispel any such "appearance" by making a written disclosure of the relevant facts.

Thus, even if §19 would not require Ms. A to abstain from participating in Historic Commission matters because such matters do not affect the Association's *financial* interests, if such matters are likely to affect other Association interests, Ms. A should file a written disclosure of all relevant facts to her appointing authority. She should also make a similar, oral, public disclosure for inclusion in the minutes of the Historic Commission's meeting(s) at which such matters are reviewed, considered, voted or otherwise acted upon.

For example, if the Association were to publicly express its support for or opposition to a construction project being proposed by an Association member (or anyone else, for that matter) and part of the project required Historic Commission review and approval, Ms. A would be required to make such disclosure prior to participating in the matter.

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[1/] HUD awards such CDBG grants directly to larger cities without EOCD involvement.

[2/] EOCD derived its model for Downtown Partnerships from The National Trust for Historic Preservation's National Main Street Center concept, through which public- and private-sector representatives join together to work on various projects.

[3/] According to EOCD and City personnel, there is no federal, state or local requirement that municipal officials so serve.

[4/] It appears from the By-Laws that the *ex officio* Board members have the same rights and obligations (including voting) as all other members.

[5/] One of those business representatives is also a member of the Council; another is also a member of the City's Zoning Board of Appeal. We are informed that they serve on the Board in their private capacities, not as City officials or representatives.

[6/] When the Council adopted its resolution, its members presumably knew that the Board included the three *ex officio* City officials. However, it does not appear that the City requires the three City officials to so serve.

[7/] The $[amount omitted] difference between the Grant and Subgrant amounts was paid under a separate contract for the traffic and parking study done before the Association was in operation.

[8/] The City's Chief Planner in the Community Development Office has acted as a liaison between the Association and the City, but he is not a member of the Association's staff, nor is his City salary funded with Grant or Subgrant monies.

[9/] "Municipal agency," 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).

[10/] For example, responsibility for police and fire services, municipal infrastructure (water, sewer, drainage, streets) and public school education are classic essentially governmental services.

[11/] "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).

[12/] As Ms. A is not compensated for being a member of the Board, the constraints contained in §17(a) are not relevant here.

[13/] "Municipal agency," 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).

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

[15/] A non-profit corporation is a "business organization" within the meaning of the conflict law. *EC-COI-88-4.*

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

CONFLICT OF INTEREST OPINION
EC-COI-95-11

FACTS:

Until last year, you were Chairman of the Zoning By-law Study Committee in a town ("Town"). The Committee, which was established by and reports to the Board of Selectmen, is made up of town residents and has been assigned the project of revising and restructuring the Town's zoning bylaws. The Committee intends to completely revise and rewrite the entire zoning bylaws, rather than recommend amending only certain parts.

Although you no longer reside in the Town, the Board of Selectmen would like to retain you as paid counsel to assist the Committee in preparing the revised zoning bylaws, because current Committee members are not familiar with certain legal requirements of zoning.

Your private law practice occasionally requires you to represent clients before the Town's boards and agencies.

QUESTIONS:

1. May you represent property owners before the Zoning Board of Appeals or other authorities in Town?

2. After the new zoning bylaws are enacted, may you represent clients before the Zoning Board of Appeals or other Town authorities?

ANSWER:

1. Yes, subject to the limitations set forth below.

2. Yes, subject to the limitations set forth below.

DISCUSSION:

If you were to be retained by the Town as legal consultant to the Committee, you would become a municipal employee.[1/] *EC-COI-87-8.* Sections 17, 18, and 23 of the conflict law apply to your questions.

Restrictions as a Current Municipal Employee

Section 17

Section 17(a) prohibits a municipal employee from receiving compensation[2/] from anyone, other than the municipality, in connection with a particular matter[3/] in which the municipality is a party or has a direct and substantial interest. In addition, §17(c) prohibits a municipal employee from acting as an agent or attorney for anyone other than the municipality in any claim against the municipality or in connection with any particular matter in which the municipality has a direct and substantial interest.

The broad sweep of §17 would preclude you as a current municipal employee from representing private parties in any matter in which the Town had a direct and substantial interest, not only matters involving the Zoning Board of Appeals, zoning issues or other permit granting authorities. See, e.g., *EC-COI-89-30; 88-21.*

Section 17 would apply somewhat less restrictively to you, however, if you were designated a special municipal employee.[4/] A special municipal employee is subject to the restrictions of §17(a) and (c) only in relation to a particular matter (a) in which he has at any time participated[5/] as a municipal employee, or (b) which is or within one year has been subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) does not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.[6/]

For example, if you were a special municipal employee as a consultant to the Committee, you would be prohibited from also representing a client seeking

to amend the zoning bylaws, because amending the bylaws would constitute a particular matter in which you participated or which was within your official responsibility.[7/] Section 17 would not, however, preclude you from representing private clients in zoning and permitting issues where you were retained only to interpret and apply the current bylaws or in matters involving other municipal agencies or boards.

If you were to serve for more than 60 days during a 365-day period, however, the §17 prohibition would apply to any particular matter pending before the agency in which you serve. In your case, the consultant position was established by and reports to the Board of Selectmen. Therefore, you could not represent private clients or be compensated by anyone other than the Town in connection with a particular matter before the Board of Selectmen.

Section 23

Section 23 describes standards of conduct that apply to all public employees. Section 23(b)(2) provides that no municipal employee may use his official position to secure unwarranted privileges or exemptions for himself or others. Section 23(b)(3) prohibits a municipal employee from engaging in any conduct which gives a reasonable basis for the impression that any person or entity can improperly influence or unduly enjoy his favor in the performance of his duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. If there is an appearance of a conflict under §23(b)(3), you must file a written disclosure in advance to your appointing authority of all the facts and circumstances about the matter and continue to perform your Committee work using objective criteria. *EC-COI-89-19.* For example, a challenge to the validity of a current zoning bylaw could raise concerns under §23 if the issue were peculiar to your client and the same issue were being contemplated by the Committee.

Finally, §23(c) prohibits a municipal employee from engaging in any business or professional activity that will require him to disclose confidential information which he has gained by reason of his official position or authority, and from improperly disclosing such confidential materials[8/] or using such information to further his private interests.[9/]

Restrictions after Municipal Employment

Section 18

Section 18(a) prohibits a former municipal employee from acting as an agent or attorney for, or receiving compensation from, anyone other than the municipality or a municipal agency in connection with any particular matter in which the municipality or a municipal agency is a party or has a direct and substantial interest *and in which he participated* as a municipal employee.

Section 18(b) prohibits a former municipal employee, for one year, from appearing personally[10/] before any officer or agency of the municipality as an agent or attorney for anyone other than the municipality or a municipal agency in connection with any particular matter in which the municipality is a party or has a direct and substantial interest *and which was under official responsibility*[11/] any time within a period of two years prior to the termination of his municipal employment.

As a former legal consultant to the Committee, you will be barred from working for anyone other than the Town in challenging the validity, or supporting the wisdom,[12/] of the Town's revised zoning bylaws because you participated in their revision. The only particular matter that will be under your official responsibility also will be the only matter in which you participate as a municipal employee — the revision of the zoning bylaws. Therefore, the prohibition under §18(b) will be subsumed under §18(a).[13/]

The Commission has concluded that regulations, once promulgated, are not "particular matters" as defined in §1(k), however, "the process by which they are adopted and the determination that was initially made as to their validity will be considered particular matters." *EC-COI-81-34.* See also, *EC-COI-87-34; 85-11.* Although we concluded in *EC-COI-85-22* that a proposed zoning amendment is a particular matter under §1(k),[14/] we have not heretofore determined whether a comprehensive revision of zoning bylaws should be analyzed, for the purposes of the conflict law, in the same manner as the creation of regulations. Applying our analysis in *EC-COI-87-34*, we conclude that the revision process should receive the same treatment under the conflict law.

In *EC-COI-87-34*, a state employee had reviewed a draft of proposed regulations, suggested changes, and met with industry representatives regarding the draft. As a former state employee, he then wished to represent private clients in discussions with state officials in connection with promulgating the draft. We concluded that because the employee had participated personally and substantially in the promulgation process and made decisions about the public policy of some or all of the regulations, he was permanently prohibited from challenging the wisdom or legality of the draft regulation.

The underlying principle in our reasoning was that former public employees should not be able to attack

regulations they helped create. *EC-COI-87-34*. As in that case, there may be circumstances in which your private clients' challenges to the revised bylaws raise the same issues being addressed in your Committee work. Therefore, your consulting work to rewrite the zoning bylaws and a challenge by your private client to the validity of those bylaws would involve the same determination or particular matter.

Once the revised bylaws have become effective, you may represent private parties in cases related to the interpretation or application of the new bylaws. *EC-COI-87-34*. The goal of §18 is not to bar former public employees from benefitting from the general subject-matter expertise they acquired in government service, but rather from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer. *EC-COI-92-17*.[15] Lawyers who develop an area of expertise should not be prohibited from representing clients in that area, because such a prohibition would unduly restrict their practice and deprive their clients of needed expertise. *EC-COI-87-34*.[16] [17]

DATE AUTHORIZED: October 19, 1995

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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] "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

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

[4] "Special municipal employee", a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, §1(n).

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

[6] The calculation of the sixty-day limit is based upon the following factors. First, a day is not counted unless services are actually performed for the Town on that day. Second, if you serve only part of a day for the Town, you will be considered to have served for a complete day. Third, if you assign one of your firm's associates to perform the work under your supervision, you will be considered as having performed billable services on such days. See *EC-COI-85-49*.

[7] See discussion *infra* under Section 18.

[8] The materials are defined as "materials or data within the exemption to the definition of public records as defined by G. L. c. 4, §7." G. L. c. 268A, §23(c)(2).

[9] As legal consultant to the Committee, you also will be subject to additional restrictions under §19. The pertinent restriction is that a municipal employee may not participate in any particular matter in which he, an immediate family member or partner, a business organization in which he is an officer, director, trustee, partner, or employee has a reasonably foreseeable financial interest. Such a financial interest may be of any size and may be either positive or negative, but it must, however, be direct and immediate or reasonably foreseeable in order to implicate §19. *EC-COI-86-25; 84-123; 84-96*. You could not, for example, continue to revise the zoning bylaws if you or any of the

interested parties under §19 had a reasonably foreseeable financial interest in the outcome of your official work.

If there is such an interest, however, you may qualify for an exemption. Under §19(b)(1), you may participate in a particular matter affecting such a private financial interest if, *prior to participating*, you (1) advise your appointing official of the nature and circumstances of the particular matter; (2) make a full written disclosure to your appointing official of the financial interest; and (3) receive a *written* determination in advance from your appointing official that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town.

For example, §19 issues would be raised if other members of your firm were to represent a client for a fee when the client sought to expand a commercial zoning district to include a site formerly restricted from commercial development. We have presumed that a law firm has a financial interest in all matters in which it represents a client for a fee. *EC-COI-89-5 n. 7.*

[10/] Appearing personally includes the submission of written correspondence, telephone calls, or any contact with the intent to influence. See *EC-COI-87-27.*

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

[12/] See *EC-COI-87-34*, n. 1.

[13/] We do not have sufficient information about the Committee to determine whether it constitutes a municipal agency under the conflict law. See, e.g. *EC-COI-88-2* and *85-22* (for discussions of the criteria required to make such a determination). If the Committee were deemed to be a municipal agency, then, as a former Chairman, you would be considered now to be a former municipal employee. As such, the advice under §18 currently would apply to you. In the event you decide not to accept employment as a legal consultant for the Town and you intend to represent private clients before the Town in matters involving the revised zoning bylaws, you should seek further guidance from the Commission in order to determine whether your prior participation as Chairman of the Committee constituted municipal employment under the conflict law.

[14/] The proposed amendment in that case was needed to allow developing a specific multifamily housing project.

[15/] "[O]nce the regulation is in final form, there exists a permissible scope of representation. . . . [A] former state employee may properly represent a private party in a case related to the interpretation or application of a regulation which he had previously participated in drafting as a state employee. This interpretation is consistent with the policy that lawyers who develop a specialized area of expertise should not be perpetually precluded from representing private clients in that area of expertise. Such a ban would unduly restrict the livelihood of specialized attorneys and deprive clients of needed expertise. . . . [S]uch representation may *not* include an attack on the validity of the regulations." *EC-COI-87-34* (emphasis added).

[16/] You also ask whether §18 would impose a limit on your compensation for your services to the Committee in order to permit you to appear before the Zoning Board of Appeals or other Town boards after you complete municipal employment. This question relates to the following paragraph in §18:

> Notwithstanding the provisions of clause (b), a former town counsel who acted in such capacity on a salary or retainer of less than two thousand dollars per year shall be prohibited from appearing personally before any agency of the city or town as agent or attorney for anyone other than the city or town *only* in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest *and in which he participated* while so employed. (emphasis added)

This paragraph allows the restrictions of §18(b) to be applied less restrictively to counsel whose legal services for a municipality may have had a limited scope. The implication is that such counsel should not be overly restricted in other matters simply because of his rather limited municipal employment. In your circumstances, however, we need not decide whether you would be considered a former "town counsel" under this paragraph because this restriction would apply neither to your compensation from the Town nor to the scope of your private practice before Town agencies. Whether you were to receive more or less than $2,000 per year for your Committee work would not change the effect of §18(b)'s restrictions upon your private practice because you would have had official responsibility over and participated in only the revision of the zoning bylaws.

[17/] You should also note that §§18(c) and (d) may apply to your fellow attorneys in your law practice. Under these provisions, the partners of a former municipal employee are subject to the same restrictions as the municipal employee. The Commission has concluded that the term "partner" is not limited to formal partnership agreements. See, e.g., *EC-COI-93-24; 93-9; 85-62.* Because the letterhead for your law practice includes the designation "P.C.", we call your attention especially to the analysis in *EC-COI-93-24* about whether a law practice set up as a professional corporation is considered a partnership under the conflict law. In that case, we concluded that a professional corporation was not a partnership. Should your law practice's professional corporation not meet the tests of that analysis, you should seek further guidance from the Commission.

FINANCIAL DISCLOSURE OPINION
EC-FD-95-1

FACTS:

You are a state employee who has been designated to file a yearly Statement Of Financial Interests ("SFI") pursuant to G.L. c. 268B, §5(c). General Laws c. 268B, §5(g) delineates the categories of financial information which public employees are required to report regarding property holdings, business associations, securities, investments, gifts, honoraria, reimbursements, and certain creditor information.

You are a beneficiary in three family trusts. In each trust, the trust *res* consists of securities. In each trust, the trustee has the sole discretion to manage the trust *res*. You have no ability to direct or control the trustee's actions or the trusts' investments. You state that you receive a listing of the trusts' holdings on a yearly basis, but you have no knowledge of the trust's holdings at any given time during the year, and you have no power to direct the trustee to buy or sell any particular security. In fact, you state that you have never spoken to the trustee about these trusts.

The first trust was established by a grandparent's will. Upon your mother's death, you and your siblings became beneficiaries of this trust. According to the trust documents, you are entitled to receive the income, measured by a proportional share of the principal of the trust, during your lifetime. You are only entitled to receive the income and will never receive the principal. Upon your death, the principal will be paid to your surviving issue.

The second trust was established by a parent's will. Under this trust, you and your siblings have a right to the trust income, but not to the principal. Upon the death of the last of your siblings, the principal of the trust will be distributed to all of your parent's grandchildren.

The third trust was established by your grandparents. As your mother's issue, you, with your siblings, are entitled to the trust income. At the death of an individual who is unknown to you, but who was selected as a random measuring life, you and your siblings will be entitled to the trust principal.

QUESTION:

Is a public employee, who is an income beneficiary of a family trust, who may or may not be entitled to the principal of the trust, and who has no control over the trust investments, required to report the securities held in the trust, pursuant to G.L. c. 268B, §5?

ANSWER:

Yes.

DISCUSSION:

The Legislature, in G.L. c. 268B, §5(g), specified certain categories of information which public employees are required to include in their yearly SFIs. Section 5(g)(2) requires disclosure of "the identity of all securities and other investments with a fair market value of greater than one thousand dollars which were beneficially owned, not otherwise reportable thereunder..." At issue is the meaning of "beneficially owned".[1/] The term "beneficially owned" is not defined in G.L. c. 268B, and, as the Commission has noted in passing, is not a term which has been commonly defined in the case law. See *EC-FD-87-2* (beneficial ownership not commonly used in law of trusts or used synonymously with term beneficial interest).

In determining the meaning which the Legislature intended to ascribe to the term "beneficially owned," we must analyze the nature of a trust beneficiary's interest in the trust res. Does one who has a right to income from a trust, but who may never receive any principal, have an ownership interest in the trust *res*?

The nature of a beneficiary's interest in the trust *res* has been a matter of dispute among legal theorists and among the courts. The United States Supreme Court has espoused a view, in several cases, that a trust beneficiary's interest is an ownership interest in the trust res. In *Brown v. Fletcher*, 235 U.S. 589 (1915) the Court was required to decide whether an interest in a trust assigned by a beneficiary was a property interest. The Court rejected the argument that the beneficiary's interest in the trust was a personal interest and right based upon the relationship between the trustee and the beneficiary, stating, "[t]he beneficiary here had an interest in and to the property that was more than a bare right and much more than a *chose in action*. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself [at a future date]..." *Id.* at 599. The Court found that the assignment was not a *chose in action* payable to the assignee, but rather, was "evidence of the assignee's right, title, and estate in and to property." *Id.*

In *Blair v. Commissioner*, 300 U.S. 5 (1937) a question arose whether the life income beneficiary of

a trust who had assigned his interests to his children was required to pay the tax on the income. Tax liability attached to ownership, and the Court was required to determine whether the beneficiary had assigned only a right to the income, and not any right, title or interest in the trust itself. *Id.* at 13. The Court, re-affirming *Brown*, concluded that:

> The will creating the trust entitled the petitioner during his life to the net income of the property held in trust. He thus became the owner of an equitable interest in the corpus of the property.... The assignment of the beneficial interest is not the assignment of a *chose in action* but of the "right, title, and estate in and to property."

Id. at 13-14 (citations omitted); see also *Senior v. Braden*, 295 U.S. 422 (1935).

Austin Wakeman Scott, a noted commentator in trust law, shares the view that a beneficiary holds a proprietary interest in the trust *res*, but he also recognizes that the question of whether the beneficiary has as proprietary interest in the subject matter of a trust is a difficult one. A. Scott, *The Law Of Trusts* §130 (3rd ed. 1967 & Supp. 1986). Professor Scott acknowledges that, in the early English law of uses, the use was considered a personal relationship between the trustee and the beneficiary. Scott argues that, as trust law has evolved, the nature of a beneficiary's interest has changed to include not only *in personam* rights, but also *in rem* rights. Scott contends that the fact that a beneficiary may be required to proceed through the trustee in actions against third parties does not mean that the beneficiary does not have a proprietary interest in the property, but only means that in protecting the beneficiary's interests, the trustee serves as the beneficiary's representative.

In comparison, Richard R. Powell, another noted commentator, in his treatise volume on trusts, opines that the preferable modern rule is that a beneficiary of a trust has only a *chose in action* plus other supplementary protection against interference by third parties. R. Powell, *The Law Of Real Property* ¶515 (1988 revision). He argues that, historically, a beneficiary's interest was personal, based on a right to compel the trustee to perform the established trust and rights against other parties who interfere with the trustee's performance of his obligations to the beneficiary. Powell would argue that a beneficiary's interest in a trust of securities is not an ownership interest in the securities, but is a *chose of action* to compel the trustee to administer the trust according to its terms. He does not believe that the evolution of the law justifies a change from the historical concept of a beneficiary's interest as one of rights against the trustee; furthermore, he believes that, considering the numerous types of trusts and beneficial interests today, it is not helpful to consider a beneficiary's interest to be an equitable ownership interest. He notes that numerous states[2/] have, by statute, vested all ownership, whether the interest is considered beneficial or legal, in the trustee.

Massachusetts has not joined other jurisdictions in enacting such a statute. We conclude that the courts in the Commonwealth would find that a beneficiary has a proprietary interest in the trust *res*. See *Ventura v. Ventura*, 407 Mass. 724, 726 (1990) (in express trust separation of legal and equitable control of property); *Baker v. Commissioner of Corporations and Taxation* 253 Mass. 130 (1925). The First Circuit Court of Appeals has stated that

> It must be conceded that in equity the beneficiary of a trust is the owner of the trust res; that he has an equitable estate in the property constituting the trust and is considered the real owner; that the trustee, on the other hand, holds the legal title to the property with the right to administer it for the benefit of the beneficiary and in accordance with the terms of the trust...

Welch v. Davidson, 102 F.2d 100, 102 (1939).

Similarly, in *Baker v. Comr. of Corporations and Taxation*, 253 Mass. 130 (1925), the Supreme Judicial Court was asked to decide the nature of a beneficiary's interest in order to determine whether the beneficiary was subject to an excise tax on real estate. The trust *corpus* contained a piece of real property. The beneficiaries were holders of certificates which entitled the beneficiaries to a right to the dividends from the property, but no rights to the property, or to call for partition or distribution. *Id.* at 132. The Supreme Judicial Court concluded that the interest of the certificate holders constituted an equitable interest in the land that was the trust *res*. *Id.* at 138.

In light of the legal decisions in this jurisdiction regarding the nature of a trust beneficiary's interest, we conclude that, for purposes of G.L. c. 268B, an income beneficiary of a trust has an ownership interest in the trust *res*. An income beneficiary receives a financial benefit garnered directly from the trust *res*. This benefit is an incident of ownership.

You suggest that we conclude that, for purposes of G.L. c. 268B, a beneficiary's ownership interest should constitute more than a right to income from the trust, but must also include a right to control or direct

the trust *res*. We note that the term "beneficial ownership," as commonly used in securities law in relation to insider trading liability and to disclosure provisions, has been interpreted to include control over disposition of the security[3/] and a pecuniary interest in the security.[4/] *Mendell On Behalf of Viacom, Inc. v. Gollust*, 793 F. Supp. 474, 479 (S.D.N.Y. 1992). However, in judicial analysis, which aspect of ownership is considered most significant depends upon the purpose of the particular section of the securities law. *Id.*

We do not believe that the Legislature intended, and we are not inclined, to limit the investment disclosure requirement to those public employees who, as beneficiaries, are able to exercise substantial direction over the trust assets. The nature of the express trust relationship necessarily contemplates that a beneficiary will traditionally have limited control over the trust *res*, as legal title is vested in a trustee who receives such powers as are granted in the trust instrument. See e.g., *EC-FD-87-2.*

Further, from our review of the legislative history underlying G.L. c. 268B, we think that the Legislature, in using the term "beneficial ownership", intended to include not only those securities and investments directly held by a public employee, but also those investments held in trust for a public employee, who, in turn, receives benefits from those investments.

In the Initiative Petition filed in 1978, "the name and amount held, at fair market value, or (sic) stock, commodity options or mineral rights worth $1000 or more" was required to be reported. Early House drafts of the financial disclosure law retained this language. House No. 5715. An early Senate bill, Senate No. 1089, required the disclosure of trust income received and the "identity of all securities, investments (except for bank account balances) and real property (except for one's domicile) valued in excess of $1000, whether held directly or in trust for the reporting person's benefit."

In the following Senate bill, Senate No. 1540, this language was deleted and replaced by language patterned after the Initiative Petition. However, Senate No. 1540 was amended on the Senate floor to state:

> the identity of all securities and investments with a fair market value exceeding one thousand dollars, whether held directly or in trust for the reporting person's benefit. The amount of each such holding shall be reported if:
>
> (a) the reporting person is a public official or public employee of the commonwealth and the entity in which the investment or security is held is regulated by or does business with the commonwealth; or
>
> (b) the reporting person is a public official or public employee of a county and the entity in which the investment or security is held is regulated by or does business with such county.
>
> In addition, the amount of income exceeding one thousand dollars from each such holding shall be reported if paragraph (a) or (b) above is satisfied....

Thus, the legislative conference committee was faced with two proposed disclosure requirements for securities and investments. The House version did not specifically address securities or investments held in trust, whereas the Senate version did. The final bill, Senate No. 1626, contained the present language regarding beneficial ownership of securities. Although it may have been more precise to have retained the language "in trust for the reporting person's benefit", the Legislature may have chosen not to limit disclosure only to investments held directly or in trust, but may have also attempted to include other methods of investment holdings. At a minimum, the term "beneficial ownership" includes the trust relationship, as contemplated by the Senate versions of the law. Additionally, the Legislature is presumed to have knowledge of the judicial interpretations regarding a beneficiary's interest. See e.g., *MacQuarrie v. Balch,* 362 Mass. 151, 152 (1972) (Legislature presumed to have knowledge of decisions of SJC).

Moreover, we are reluctant to apply a technical definition as used in securities regulation to the term "beneficial ownership." The Legislature, in G.L. c. 268B, §5(g)(2), did not limit the term to securities. "Beneficially owned" also modifies "other investments ... not otherwise reportable thereunder".

Finally, our conclusion -- that a trust beneficiary who is receiving income derived from the trust *res* is required to disclose the securities in the trust -- furthers the purposes of G.L. c. 268B. Even if a public employee, who is a beneficiary, cannot control his investment, he may still be in a position to take official actions which would affect the stream of income he receives from the trust. The Financial Disclosure Law was enacted in order to assure the citizens of the Commonwealth of the "impartiality and honesty of public officials". *Opinion of the Justices,*

375 Mass. 795, 807 (1978). The requirement that certain policy-making public officials and public employees disclose personal investment information serves "to assure the people that 'the financial interests ... present neither a conflict nor the appearance of a conflict with the public interest.'" *Id.* at 811.

DATE AUTHORIZED: July 11, 1995

1/ The scope of this opinion does not address the issue of whether individuals who have future or contingent beneficial interests are required to report these interests on their SFIs. See *EC-FD-87-2*. Here, you have a present vested interest in the trusts. In *EC-FD-87-2*, without considering the meaning of "beneficially owned", we stated that one who has a present vested interest in a trust was required to report the trust, but one who had a contingent future interest would not be required to report the interest.

2/ See e.g, New York Real Property Law §100; California Civil Code §863; Michigan Stat. Ann., §26.66.

3/ The Securities and Exchange Commission has, by regulation, defined the term "beneficial ownership" in relation to its disclosure provisions requiring that certain investors notify the stock issuer and the Securities and Exchange Commission of an ownership interest of more than 5% of the issuer's stock. Under 17 CFR §240.13d-3,

> ... a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the disposition of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security.

The purpose of this disclosure requirement is to "alert investors in securities markets to potential changes in corporate control and to provide them with an opportunity to evaluate the effect of these potential changes." *Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 62 (First Circuit, 1991). Thus, the disclosure requirements target those individuals who are in a position to exercise the power to control or alter a corporation. *Id.* at 63.

4/ The *Mendell* Court, in its review of the relevant precedent discussing beneficial ownership for purposes of insider trading liability, stated that "control without direct financial interest does not constitute beneficial ownership, and that even without complete or exclusive control direct financial interest in the issuers shares may itself constitute beneficial ownership." *Id.* at 480.

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