RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1996

STATE
ETHICS
COMMISSION

MASSACHUSETTS

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

RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1996

STATE
ETHICS
COMMISSION

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 1996.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1996 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 1996.** Cite Conflict of Interest Advisory Opinions as follows: *EC-COI-96-(number)*. Cite Financial Disclosure Advisory Opinions as follows: *EC-FD-96-(number)*.

  Note: all 1996 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

(By Subject or Respondent from 1979 through 1996)

(CASES WITHOUT PAGE NUMBERS WERE NOT PUBLISHED, BUT ARE AVAILABLE UPON REQUEST.)

State Ethics Commission
Enforcement Actions
1996

Summaries of Enforcement Actions
Calendar Year 1996

In the Matter of James J. Flanagan - In a Decision and Order, former Massachusetts Turnpike Authority employee James J. Flanagan was fined $750 after finding that he violated G.L. c. 268A, §3(b) by accepting about $250 worth of entertainment and hotel accommodations from a Turnpike Authority contractor, Middlesex Paving Company, during and after the company's 1992 Christmas party. Section 3(b) of the Massachusetts conflict of interest law generally prohibits public employees from accepting anything of substantial value given to them for or because of any act performed or to be performed by them The Commission also found that Flanagan violated G.L. c. 268A, §23(b)(3) through his purchase of a used car from Petruzzi & Forrester, an East Brookfield construction company whose Turnpike Authority contracts were under Flanagan's supervision, when he failed to make a written disclosure of the relevant circumstances to his appointing authority. Section 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; however, a public employee may avoid violating §23(b)(3) by making a written disclosure of all relevant facts to his appointing authority. The Commission found that Flanagan did *not* violate G.L. c. 268A, §3(b) by his purchase of the car from Petruzzi and Forrester.

In the Matter of Petruzzi and Forrester - In a Decision and Order, the Commission found that East Brookfield construction company Petruzzi & Forrester did *not* violate G.L. c. 268A, §3(a) by transferring ownership of a used car to Flanagan. Section 3(a) generally prohibits anyone from giving a gift of substantial value to a public employee for or because of any act performed or to be performed by that employee.

In the Matter of Wolfgang Bauer - Franklin Town Administrator Wolfgang Bauer was fined $10,000 for paying below-market rent on an apartment he leased for 31 months from two local developers with whom he had official dealings as Town Administrator. Developers Patrick Marguerite and Francis Molla were separately fined $5,000 each for giving Bauer the reduced rate while they had construction projects pending in the town. According to a Disposition Agreement, Bauer admitted paying $200 rent each month for two-bedroom apartment; the other two-bedroom apartments in the building were rented for at least $500 per month. The arrangement began in February 1992, during Bauer's divorce proceedings, and ended in September 1994 when Marguerite and Molla transferred ownership of the building to a bank in lieu of foreclosure. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of Patrick Marguerite - Franklin developer Patrick Marguerite was fined $5,000 for giving Franklin Town Administrator Wolfgang Bauer reduced rate rent on an apartment Bauer leased from Marguerite and Francis Molla for 31 months beginning in February 1992 while Marguerite and Molla had construction projects pending in the town. According to a Disposition Agreement, Bauer admitted paying $200 rent each month for a two-bedroom apartment; the other two-bedroom apartments in the building were rented for at least $500 per month. The arrangement began in February 1992, during Bauer's divorce proceedings, and ended in September 1994 when Marguerite and Molla transferred ownership of the building to a bank in lieu of foreclosure. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of Francis Molla - Franklin developer Francis Molla was fined $5,000 for giving Franklin Town Administrator Wolfgang Bauer reduced rate rent on an apartment Bauer leased from Molla and Patrick Marguerite for 31 months beginning in February 1992 while Marguerite and Molla had construction projects pending in the town. According to a Disposition Agreement, Bauer admitted paying $200 rent each month for a two-bedroom apartment; the other two-bedroom apartments in the building were rented for at least $500 per month. The arrangement began in February 1992, during Bauer's divorce proceedings, and ended in September 1994 when Marguerite and Molla transferred ownership of the building to a bank in lieu of foreclosure. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of Harley Keeler - Uxbridge Fire Chief Harley Keeler was fined $1,000 for his participation in the January 1995 hiring of his stepdaughter, Melissa Blodgette, as a full-time firefighter. Keeler admitted in a Disposition

Agreement that he violated G.L. c. 268A, §19 first by assigning his deputy chief to interview the two candidates for the position, and then by appointing Blodgette to the position. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an "immediate family" member. As his wife's child, Blodgette is a member of Keeler's "immediate family" for the purposes of the conflict law. Blodgette resigned the $22,000-a-year position on December 31, 1995. The position was re-posted.

In the Matter of Ross W. Smith - Uxbridge Selectman Ross W. Smith was fined $2,000 for his participation as Selectman in the July 1994 awarding of a contract to purchase a used school bus, and for having a concealed financial interest in that contract. Smith admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by participating in the contract awarding process. According to the Agreement, after publicly advertising the sale of the surplus 1985 school bus, the town received two bids for the contract. At the July 18, 1994 selectmen's meeting, Smith both made a motion and then voted on the motion to award the contract to Stratton Electric; Smith had earlier asked Stratton to submit the bid on his behalf, according to the Agreement. Section 19 of the conflict law generally prohibits a municipal official from participating as such in a particular matter which affects his own financial interest. Smith also admitted to violating G.L. c. 268A, §20 through the bus purchase. Section 20 of the conflict law generally prohibits a municipal official from having a financial interest in a contract with his municipality. Smith subsequently sold the bus again, and earned a $72 profit on the transaction.

In the Matter of Paul Enis - Dracut Water Commissioner Paul Enis was fined $1,000 for participating in the hiring and supervision of his son, Tom Enis, as a Water District Employee between 1989 and January 1995. Enis admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by acting as Water Commissioner in matters in which his son had a financial interest. Tom Enis earned a total of about $30,000 working for the District part-time during the school year and occasionally full-time during summer and school breaks, according to the Agreement. Section 19 -- the so-called "nepotism section" of the conflict of interest law -- generally prohibits municipal officials from taking any official action which will affect the financial interests of an immediate family member. Among other actions, the section generally prohibits a municipal official from participating in the decision to hire an immediate family member, and also from participating in the day-to-day supervision of the family member.

In the Matter of Marilyn Mondeau - East Bridgewater Wage and Personnel Board member Marilyn Mondeau was fined $500 for participating in the Board's decisions to recommend to Town Meeting a 3% cost-of-living adjustment and retaining an existing wage "pay grid" for non-union administrative positions. Mondeau admitted in a Disposition Agreement that she violated G.L. c. 268A, §19 by participating in the decisions, which she knew would affect the salary of her daughter, Jeanne Bennett, a Police Department administrative assistant. When Town Meeting approved the Board's recommendations in June 1995, Bennett's annual salary was increased by $1,929. Section 19 of the conflict of interest law generally prohibits municipal officials from taking any official action which will affect the financial interests of an immediate family member. Among other actions, the section generally prohibits a municipal official from participating in discussions and recommendations regarding matters affecting the salary of an immediate family member.

In the Matter of Louis Zwingelstein - Former Sheffield Conservation Commission member Louis Zwingelstein was fined $2,000 for preparing, on behalf of a private client, a design plan for a fire pond which required Conservation Commission approval; for accepting payment for the design work; and for acting as a Commission member on his client's proposal by participating in a site visit, public hearings and Commission discussions, and by signing a determination of applicability. Zwingelstein admitted in a Disposition Agreement that he violated G.L. c. 268A, §§ 17(a), 17(c) and 19 through his actions. Section 17(a) of the conflict of interest law generally prohibits municipal officials from accepting private compensation in connection with matters of direct and substantial interest to their municipality, including matters pending before a municipal agency. Section 17(c) generally prohibits municipal officials from acting as "agent" for private clients in connection with such matters; among other actions, this section prohibits municipal officials from preparing architectural, engineering or other design plans which will be submitted for municipal review. Section 19 generally prohibits municipal officials from participating in matters affecting the financial interests of their private employers; among other actions, this section prohibits participation as a public official in discussions, public hearings or deliberations regarding matters affecting private clients.

In the Matter of Charles F. Flaherty, Jr. - House Speaker Charles F. Flaherty, Jr. was fined $26,000 for violating the state's conflict of interest law on 13 occasions, when he accepted illegal gratuities from lobbyists and others with interests in legislative business. In a Disposition Agreement, Flaherty admitted he violated G.L. c. 268A, §3(b) by accepting the following gratuities:

- On five occasions between April 1991 and July 1992, Flaherty used a Newport, Rhode Island condominium owned by Abraham Gosman, and loaned to Flaherty by Gosman's associate Robert Cataldo, while Gosman had an interest in various legislative matters. Flaherty did not pay for the condominium's use, worth a total of approximately $7,000.
- Between August and September 1990, Flaherty stayed at a Cotuit, Massachusetts vacation home rented by his close friend, registered lobbyist John E. Murphy, and Richard Goldberg, while Goldberg was seeking legislative action to resist an eminent domain land taking. Flaherty did not pay for his use of the vacation home, worth at least $2,775.
- In 1990, 1991 and 1992, Flaherty attended July 4th holiday weekend events in Kennebunkport, Maine. Approximately 18 to 25 people, including Massachusetts legislators and lobbyists, attended each event. Lobbyist Mark Doran, Associated Industries of Massachusetts ("AIM") and the Choate Group paid a substantial portion of the expenses of each event, which included boat rentals, clambakes and other meals, entertainment and hotel rooms for some of the guests. During this time, Doran was employed as a lobbyist for AIM, and both AIM and the Choate Group lobbied the Legislature regarding various matters. Flaherty accepted gratuities totalling about $2,000 during the three events.
- In 1991, Flaherty spent two weekends at a vacation home in Mashpee, Massachusetts, owned by a friend of Doran. Flaherty did not pay for the use of the home, worth a total of approximately $700.
- In 1991, Flaherty used a Martha's Vineyard townhouse, owned by a limited partnership controlled by Jay Cashman and members of Cashman's family. The townhouse was loaned to Flaherty by Cashman's friend, Edward Carroll. At the time, Cashman had interests in state construction contracts; Cashman had also, on behalf of the Construction Industries of Massachusetts, lobbied Flaherty regarding bond authorizations to fund state construction projects. Flaherty did not pay for the use of the townhouse, worth a total of approximately $700. Section 3(b) of the conflict law prohibits public employees, including state legislators, from accepting anything of substantial value which is given to them "for or because of any official act ... performed or to be performed" by them. Gratuities worth $50 or more are considered to be "of substantial value" for purposes of the conflict law. Friendship between the giver and the recipient of a gratuity is not a defense to a G.L. c. 268A, §3 violation unless the friendship is the only motive for the gratuity. In each of the above instances, Flaherty "knew that the givers were in considerable part seeking his official goodwill on behalf of themselves or others who had or would have business interests before the House of Representatives," according to the Agreement. On December 10, 1990, the Ethics Commission fined Flaherty $500 for violating §3(b) of the conflict law by accepting five Celtics skybox tickets from a lobbyist and an officer of Ackerly Communications of Massachusetts, Inc., a billboard company with business interests before the Legislature. Under its enabling statute, G.L. c. 268B, the Ethics Commission is authorized to impose a maximum administrative penalty of $2,000 per violation of the conflict law. The Agreement cited the 1990 Commission action in its imposition of the $26,000 fine for Flaherty's 13 violations of G.L. c. 268A, §3(b).

In the Matter of Associated Industries of Massachusetts - Associated Industries of Massachusetts ("AIM") was fined $2,000 for providing entertainment gratuities to Flaherty, through its lobbyist Mark Doran, on July 4th holiday weekends in 1990 and 1991. AIM admitted in a Disposition Agreement that it violated G.L. c. 268A, §3(a) when Doran provided Flaherty with the gratuities. AIM is an association of over 3,000 Massachusetts businesses; one of its purposes is to lobby the Legislature on behalf of the interests of its members, the business community at large, and for economic growth and jobs. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of The Choate Group - The Choate Group was fined $3,000 for providing entertainment gratuities to Flaherty, through its lobbyist Edward E. O'Sullivan, on July 4th holiday weekends in 1990, 1991 and 1992. The Choate Group admitted in a Disposition Agreement that it violated G.L. c. 268A, §3(a) when O'Sullivan provided Flaherty with the gratuities. The Choate Group is a private business which lobbies the Legislature on behalf of various clients. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of Robert Cataldo - Robert Cataldo admitted in a Disposition Agreement that he violated G.L. c. 268A, §3(a) and was fined $7,500 for providing Flaherty with the use of a Newport condominium, owned by Abraham Gosman, on five occasions between April 1991 and July 1992, while Gosman and Cataldo had an interest in various legislative matters. Section 3(b) of the conflict of interest law, G.L. c. 268A, prohibits public employees from receiving gifts worth $50 or more which are given to them for or because of their official duties. Section 3(a) prohibits anyone from giving such a gift.

In the Matter of James B. Triplett - In a Decision and Order, the Commission dismissed five of the ten charges issued by the Commission's Enforcement Division against Triplett in January 1995 and authorized a Disposition Agreement.

In the Matter of James B. Triplett - Oxford Police Chief James B. Triplett, who is also a lawyer in private practice, was fined $2,000 for participating as Police Chief in matters affecting his private law clients, without disclosing the private relationship to his appointing authority, the Oxford Board of Selectmen. Triplett admitted in a Disposition Agreement that he violated G.L. c. 268A, §23(b)(3), by: (a) participating in a 1992 arson investigation into a fire which destroyed a house owned by Barbara Kiley. Triplett had acted as Kiley's lawyer both in her efforts to sell the house and in a contempt action for failure to make mortgage payments on the house; (b) as Police Chief, directing police department actions regarding the enforcement of liquor and other laws regarding "Manny's", an Oxford bar owned by one of Triplett's private law clients; and (c) testifying, as Police Chief, at a Planning Board hearing on a proposal to expand the Lullman Paradis Funeral Home parking lot, when Triplett had previously provided legal services both to Lullman Paradis, Inc. and to one of the company's owners, Diane Paradis. G.L. c. 268A, §23(b)(3) generally prohibits a public official from acting in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties; however, a public employee may avoid violating §23(b)(3) by making a written disclosure of all relevant facts to his appointing authority. In 1989, Triplett was advised by the State Ethics Commission that, to avoid violating the conflict law, he should disclose to the Oxford Board of Selectmen his legal representation of any town business people who held licenses subject to his jurisdiction; Triplett did not disclose his attorney-client relationships in any of the above instances.

In the Matter of Francis Beaudry - Warren Selectman Francis Beaudry was fined $500 for participating in a Selectmen's discussion of Cemetery Department employee wages, and for joining in the board's consensus to submit a revised wage list to Town Meeting for approval. Beaudry admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by participating in the matter, which he knew would affect the wages of his wife's brother, a Cemetery Department employee. Section 19 of the conflict of interest law generally prohibits municipal officials from taking any official action which will affect the financial interests of an immediate family member. Among other actions, the section generally prohibits a municipal official from participating in discussions and recommendations regarding the salary of an immediate family member.

In the Matter of Raymond Hebert- Former Norton Building Inspector Raymond Hebert was fined $3,000 for violating G.L. c. 268A, §§ 3(b) and 23(b)(3). In a Decision and Order, the Commission: (a) found that Hebert violated §3(b) by accepting at least $320 worth of construction services and a coil of waterline worth $100-$200 from builder James Chabot; (b) found that Hebert did *not* violate §3(b) when he accepted use of a "builder's discount" on major appliances from his friend, builder Thomas Grossi; (c) found that the value of construction plans Hebert accepted from Chabot was not proven to be "of substantial value"; and (d) found that Hebert violated §23(b)(3) by acting -- without appropriate public disclosures -- as Building Inspector in matters involving Chabot, Grossi, and developer Arthur Amaral, a friend of Hebert who was at the time building a house for Hebert. Section 3(b) of the conflict law prohibits a public employee from accepting anything of substantial value which is given to him for or because of official acts performed or to be performed by him. Section 23(b)(3) generally prohibits a public official from acting in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties; however, a public employee may avoid violating §23(b)(3) by making a written disclosure of all relevant facts to his appointing authority.

In the Matter of Frank R. Mazzilli - Former Chairman of the Carver, Marion, Wareham Regional Landfill Committee Frank R. Mazzilli was fined $7,500 for violating the conflict of interest law between May and July 1993 by representing his private tenant, Phillip LaMarca, in matters involving the operators of the regional landfill. Mazzilli admitted in a Disposition Agreement that he violated

G.L. c. 268A, §§ 17(c) and 23(b)(2) when, on LaMarca's behalf, he: (a) asked Energy Answers Corporations Operators to accept shredded tires LaMarca had accumulated on Mazzilli's property, for which the landfill operators initially charged a reduced per-ton dumping fee; (b) assured the landfill operators, on several occasions, that the agreed-upon dumping fees would be paid; and (c) called the company's site supervisor and asked that the landfill operators continue to accept the tires at the lower disposal rate, after being told that the company no longer wanted to do so. Section 17(c) of the conflict law prohibits a municipal official from acting as the agent for anyone other than the municipality in connection with matters of direct and substantial interest to the municipality. Section 23(b)(2) prohibits a municipal official from using his official position to obtain an unwarranted privilege of substantial value for himself or anyone else; among other actions, it prohibits a municipal official from soliciting someone he regulates for a private commercial transaction.

In the Matter of Harold R. Partamian - Former Executive Secretary to the State Board of Registration in Pharmacy Harold R. Partamian was fined $3,250 for acting in his official capacity on matters affecting his private "after-hours" employer, Insta-Care Pharmacy Service Corporation. Partamian admitted in a Disposition Agreement that he repeatedly violated G.L. c. 268A, §6 between July 1993 and February 1994, by participating as Board Executive Secretary on matters involving Insta-Care. According to the Agreement, Partamian: (a) issued notices of informal Board conferences concerning pending allegations against Insta-Care, which warned that failure to attend the hearings could result in disciplinary action by the Board, and also rescheduled such conferences; (b) took part in a Board meeting concerning alleged illegal distribution of controlled substances at an Insta-Care wholesale pharmacy; (c) took part in imminent danger hearings concerning the same Insta-Care wholesale pharmacy; (d) handled a telephone complaint alleging safety problems involving an Insta-Care pharmacy, and advised the complainant how to resolve the matter informally with Insta-Care or, alternatively, how to send a written complaint to the Board; and (e) received a written complaint, with supporting documentation, from the same complainant and failed to turn the documents over to the Investigative Unit of the Division of Registration, to the Division Director, or to the Board. The documents remained in Partamian's desk until after he left his position as Board Executive Secretary in February 1994. Section 6 of the conflict law generally prohibits a state employee from participating in any particular matter which affects the financial interests of his private employer. The section also requires that a state employee file with his appointing authority a written disclosure of his private employer's financial interests in any matter in which the employee would ordinarily be required to participate. The Commission advised Partamian of the requirements of G.L. c. 268A, §6 in a 1982 advisory opinion. Partamian was also advised of the conflict law's restrictions in a 1987 Commission staff letter. In 1992, the Commission fined Partamian $1,000 for participating in three matters involving Insta-Care. In the Agreement, "Partamian's failure to reform his conduct following his 1992 disposition agreement with the Commission" is cited as an exacerbating factor weighed by the Commission in its determination of the fine. "That a higher fine has not been imposed is due in part to the fact that Partamian resigned from his position as Board executive secretary in lieu of facing the prospect of a formal discharge based on essentially the same reasons as those enumerated in this Agreement." Partamian was laid off from his part-time employment at Insta-Care in December 1993.

In the Matter of Richard Penn - Revere City Councilor Richard Penn was fined $500 for participating in his official capacity in a matter affecting the financial interests of his private employer, Wonderland Greyhound Park. Penn admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 in November 1993, when he submitted a letter to the Revere City Planner making recommendations about a special permit to be considered by the City Council; two of Penn's recommendations were eventually incorporated as conditions of the permit. Penn had been advised by the Commission's Legal Division in April 1993 that he could not participate in the special permit application process because Wonderland Greyhound Park, his employer, had a financial interest in the matter, the Agreement says.

Public Enforcement Letter 97-1 (In the Matter of Richard Penn) - Revere City Councilor Richard Penn was cited for a vote to approve a special permit application. Wonderland Greyhound Park, his employer, had a financial interest in the matter. In the Public Enforcement Letter to Penn, the Commission noted that Revere City Solicitor Richard Villiotte had improperly advised the Council that it could invoke the Rule of Necessity to allow Penn and other councilors to participate in the vote. "The Commission has emphasized that the Rule of Necessity should be invoked only as a last resort when a board is unable to act on a matter because it lacks the number of members required to take a valid official vote, solely because members are disqualified from acting" because of conflicts of interest, the Letter said. "[I]nvoking

the Rule of Necessity was not required if all of the conflicted councilors, except for you, cured their conflicts by filing §23(b)(3) disclosures. ... Your §19 conflict could not be cured. Thus, as you were the only councilor truly disqualified from voting, the Rule of Necessity was improperly invoked." In the Letter, the Commission cited three mitigating factors in its decision to resolve this issue by means of a public enforcement letter rather than a fine: (i) Penn's "reliance on the faulty written advice of the city solicitor"; (ii) the fact that the vote had been annulled by a Superior Court judge; and (iii) "the lack of evidence that [Penn] intentionally manipulated the city council's invocation of the Rule of Necessity to enable [himself] to vote." Section 19 of the conflict law generally prohibits a municipal official from participating as such an official in any particular matter in which his private employer has a financial interest. Section 23(b)(3) generally prohibits a public official from acting in a manner that would cause a reasonable person to conclude that he can be improperly influenced, or that any person could unduly enjoy his favor in the performance of his official duties; however, officials may obtain an exemption from this section by making a full, public written disclosure of all the relevant facts which would lead to such a conclusion.

In the Matter of Armand Gagne - Former Chairman of the Dighton Board of Selectmen Armand Gagne was fined $5,000 for arranging to have his Suffolk University course work paid for by the town's tuition reimbursement program. Gagne admitted in a Disposition Agreement that he violated G.L. c. 268A, §19 by acting, in his official capacity, in matters in which he had a financial interest. According to the Agreement, Gagne completed his Suffolk University course work in March 1993, earning a Master of Public Administration degree, at a total cost to the town of $22,260. Gagne approved the tuition invoices for payment as 'Department Head'; signed treasury warrants after personally ensuring that the tuition payments would be included therein; and moved to have funds transferred or explaining such transfers at special Town Meetings. Section 19 of the conflict law prohibits a municipal employee from taking any official action which would affect his own financial interests.

In the Matter of James B. Triplett - In a Decision and Order, the Commission found that Oxford Police Chief James B. Triplett ("Triplett") did *not* violate G.L. c. 268A, §23(b)(2) or §23(b)(3) by, as the Petitioner alleged, directing that Laurie Carlsen, the daughter of a former Oxford Police Officer Robert Carlsen, be released from police arrest without a bail hearing being held, and by allegedly delaying the initiation of a criminal complaint against her. Section 23(b)(2) prohibits a municipal official from using his official position to obtain an unwarranted privilege of substantial value for himself or anyone else. Section 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; however, a public employee may obtain an exemption from this restriction by making a written disclosure of all relevant facts to his appointing authority.

In the Matter of Herbert M. Kuendig - Former Scituate Planning Board Member Herbert M. Kuendig ("Kuendig") was fined $1,000 for representing a private client for whom he designed a house by submitting the design work and appearing before the Planning Board on behalf of his client while Kuendig was a Planning Board member. Kuendig admitted in a Disposition Agreement that his actions violated G.L. c. 268A, §17. Section 17(a) of the conflict of interest law generally prohibits municipal officials from accepting private compensation in connection with matters of direct and substantial interest to their municipality, including matters pending before a municipal agency. Section 17(c) generally prohibits municipal officials from acting as "agent" for private clients in connection with such matters; among other actions, this section prohibits municipal officials from preparing architectural, engineering or other design plans which will be submitted for municipal review.

In the Matter of James Russo - In a Decision and Order, the Commission, having been informed of the death of Mr. Russo, terminated this matter.

In the Matter of Kevin Kinsella - In a Decision and Order, Scituate Selectman Kevin B. Kinsella by finding that Kinsella did *not* violate G.L. c. 268A, §23(b)(2) by, as the Enforcement Division alleged, attempting to use his official position as a Selectman to secure for his son the privilege or exemption from arrest, bail, and prosecution by contacting the Chief of Police to obtain his son's release from custody and to give Kinsella "professional courtesy" in relation to his son's arrest. Section 23(b)(2) prohibits a municipal official from using his official position to obtain an unwarranted privilege of substantial value for himself or anyone else. According to the Decision and Order, a majority of the Commission found that there was not a preponderance of the evidence that Kinsella violated the law in his conversations with the Chief. The Commission stated, "Although we do not conclude that [the Enforcement Division] has proved its case, we do

not condone [Kinsella's] conduct, which can best be described as extremely poor judgment under the circumstances. [Kinsella's] conduct suggested an abuse of power which, at the time, warranted investigation by this Commission."

In the Matter of Fred L. Gilmetti - Former Whitman Planning Board Member Fred L. Gilmetti ("Gilmetti") was fined $1,000 for submitting a letter and appearing before the Planning Board on behalf of F.L.G. Builders, Inc. ("F.L.G.") for which Gilmetti served as president, while Gilmetti was a Planning Board member. Gilmetti admitted in a Disposition Agreement that his actions violated G.L. c. 268A, §17(c), which generally prohibits a municipal official from acting as an agent for anyone other than the town in connection with matters in which the town has a direct and substantial interest.

In the Matter of Angelo M. Scaccia - In a Decision and Order, the Commission found that Representative Angelo M. Scaccia violated G.L. c. 268A, §3(b) by, on five occasions, accepting illegal gratuities from lobbyists with interest in legislative business. The Commission ordered Scaccia to pay a civil penalty of $3,000. Section 3(b) of the conflict law prohibits public employees, including state legislators, from accepting anything of substantial value which is given to them "for or because of any official act ... performed or to be performed" by them and §23(b)(3) of the conflict law 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 that Scaccia violated §3(b) by: (a) in 1991, accepting from Philip Morris lobbyist Theodore Lattanzio dinner for himself, his wife and his son and golf fees for himself and his son while attending a Council of State Governments conference in Hauppauge, New York; (b) in 1993, accepting from John Hancock Insurance Company lobbyist F. William Sawyer two rounds of golf for himself while attending a National Conference of Insurance Legislators ("NCOIL") conference in Amelia Island, Florida; and (c) in 1993, accepting from Life Insurance Association of Massachusetts president William Carroll dinner for himself at the Ritz-Carlton Hotel while attending the NCOIL conference in Amelia Island, Florida. The Commission found each of these gratuities to be worth $50 or more and thus "of substantial value" for purposes of the conflict law. The Commission also found that Scaccia did *not* violate G.L. c. 268A, §3(b), as alleged in the Order to Show Cause, by accepting from lobbyist Richard McDonough dinner for himself and his son at the Amelia Island Inn while attending a NCOIL conference in Amelia Island, Florida in 1993. In addition, the Commission found that Scaccia violated G.L. c. 268B, §6 by accepting from Lattanzio, Sawyer and Carroll gifts aggregating $100 or more in a calendar year and §7 by, on two occasions, filing false Statements on Financial Interest for calendar years 1991 and 1993.

In the Matter of John E. Murphy - Legislative agent John E. Murphy was fined $2,000 for providing entertainment gratuities to former Speaker Charles F. Flaherty, Jr. Murphy admitted in a Disposition Agreement that he violated G.L. c. 268B, §6 when he provided Flaherty the use of a vacation house in Cotuit, Massachusetts in August and September 1990. Flaherty used the Cotuit house a total of approximately 21-25 calendar days between August 1, 1990 and September 4, 1990. Flaherty's use of the house was worth no less than $2,775. During 1990-1992, Murphy lobbied the Legislature on behalf of such clients as racetracks, solid waste facilities, hospitals, a billboard company, an electric utility and an entity seeking compensation for an eminent domain taking. Section 6 of the financial disclosure law prohibits a legislative agent from knowingly and willfully offering or giving to a public official gifts with an aggregate value of $100 or more in a calendar year.

In the Matter of Julie A. DiPasquale - In a Decision and Order, the Commission dismissed all charges and authorized the issuance of a Public Enforcement Letter.

Public Enforcement Letter 97-2 (In the Matter of Julie A. DiPasquale) - Former Somerville School Committee member Julie A. DiPasquale ("DiPasquale") was cited regarding her participation in matters in which her sister and daughter had financial interests. According to a Public Enforcement Letter, in 1992 DiPasquale participated in several votes calling for the use of a 1988 civil service list in appointing a principal clerk-stenographer for the School Department and an investigation into School Department hiring practices. Her sister Eileen Bakey ("Bakey"), who was a clerical employee of the School Department, was effectively ranked number one on the list. In August 1992, Bakey was appointed to the vacant position. The Enforcement letter also states that in 1994 DiPasquale participated in revising the policy for calculating scores on the Teacher Eligibility List, which determines the ranking of applicants for teaching positions. DiPasquale's daughter Julie DiPasquale ("Julie") was ranked seventh on two elementary lists for the 1993-1994 school year. As a result of the revisions, Julie's rank for the 1994-1995 school year changed to fifth. In September 1994, Julie

was recommended for a position as a sixth grade teacher at the Healey School. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an "immediate family" member. The Commission found reasonable cause to believe that DiPasquale's participation in matters affecting the financial interests of her sister and daughter violated §19. 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. The Commission found reasonable cause to believe that DiPasquale's actions in participating in matters affecting the financial interests of her sister and daughter would cause a reasonable person to believe that she would be improperly influenced by her relationship with her sister and her daughter. The Commission cites as one of its major reasons for resolving this matter with a Public Enforcement Letter -- rather than proceeding with the pending adjudicatory proceeding concerning DiPasquale -- the fact that DiPasquale believed in good faith that she could participate in these decisions because they involved determinations of general policy. Although there is an exemption in §19 for general policy matters, the exemption does not apply unless the financial interest is shared with a substantial segment of the town's or city's population (10% or more under Commission precedent). Where DiPasquale's sister's and daughter's financial interests were shared with only a handful of other applicants, the exemption did not apply.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 518

IN THE MATTER
OF
JAMES FLANAGAN

Appearances: Karen Gray, Esq.
Counsel for the Petitioner

William F. Sullivan, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch., Burnes, Gleason, Larkin and McDonough

Presiding Officer: Commissioner Herbert P. Gleason, Esq.

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 6, 1995 by issuing an Order to Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Massachusetts Turnpike Authority ("MTA") employee James Flanagan ("Flanagan"), violated G.L. c. 268A, §3(b) by receiving certain gratuities from MTA contractors Middlesex Paving Corporation ("Middlesex") and Petruzzi & Forrester, Inc. ("Petruzzi & Forrester"). Specifically, the Petitioner alleged that Flanagan violated §3(b) by receiving from Middlesex, for himself and his guest, cocktails, dinner, entertainment and overnight hotel accommodations valued at $250 in connection with a 1992 Christmas party. The Petitioner also alleged that Flanagan violated §3(b) by: receiving from Petruzzi & Forrester a "free car"; and/or, by receiving from Petruzzi & Forrester a seven month $2,000 interest-free loan; and/or by accepting Petruzzi & Forrester's forgiveness of the $2,000 debt (owed by Flanagan for the car); and/or by receiving from Petruzzi & Forrester a discount of $50 or more on the fair market value of the car.

Flanagan filed his answer on May 17, 1995, admitting that he had attended a party and had accepted hotel accommodations paid for by Middlesex. In his answer, Flanagan also admitted that he had received a vehicle from Petruzzi & Forrester and that he had not paid the agreed upon price of $2,000 until November 5, 1993. Pre-hearing conferences were held in this matter on May 8, 1995, August 18, 1995, August 29, 1995, and October 12, 1995, with Commissioner Gleason presiding.[1/] At those conferences, procedural issues were discussed primarily focusing on discovery and scheduling, as well as the possibility of settlement.

An adjudicatory hearing in this matter and In re Petruzzi & Forrester (Docket No. 519) was held on two separate dates, October 30, 1995, and November 8, 1995. At the beginning of the hearing on October 30, 1995, the Petitioner sought to have the Commission recognize the Answers of the Respondents as part of the record of the adjudicatory proceeding. Likewise, the Petitioner requested that the previously filed "Stipulations and Agreements" concerning the Middlesex counts in the OTSC be included in the record for the proceeding. In addition, the Petitioner requested that the Commission take "administrative notice" of a disposition agreement previously entered into by Middlesex. Respondent Flanagan objected on the basis of relevancy. The Presiding Officer took notice of the Disposition Agreement noting Respondent's objection.[2/]

At the conclusion of evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01(9)(k). The Petitioner and Respondent submitted briefs on December 11, 1995.

The parties were also invited to present their closing arguments before the full Commission. 930 CMR 1.01(9)(e)(5). Closing arguments were heard on December 13, 1995. The Petitioner and the Respondent each presented closing arguments at that time. Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on January 17, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.[3/]

II. Findings

A. Jurisdiction

Flanagan does not contest the fact that at times relevant to the allegations of the OTSC, he was a "state employee" within the meaning of G.L. c. 268A, §§3(b) and 23(b)(3).

B. Findings of Fact

The Commission finds the following facts, which have been stipulated to by the parties, in relation to those charges involving Middlesex:

1. At all times here relevant, the MTA employed Flanagan as an assistant division engineer. As such, Flanagan was a state employee as that term is defined in G.L. c. 268A, §1.

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

3. Prior to and throughout 1992, as an MTA assistant division engineer, Flanagan supervised and inspected work performed by state contractors, including Middlesex. Moreover, as of late 1992, it was likely that Flanagan would supervise and inspect Middlesex contracts in the future.

4. In 1992, Middlesex had MTA contracts valued at over $400,000.

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

6. Flanagan and his guest attended the Middlesex party and stayed overnight at the Boston Harbor Hotel as Middlesex's guests. The cost to Middlesex was approximately $250.

The Commission finds the following facts in relation to the charges involving Petruzzi & Forrester:

7. From 1979 until March 29, 1993, the MTA employed Flanagan as an Assistant Division Engineer. From March 29, 1993, until August of 1994, when his employment was terminated, Flanagan was employed by the MTA in the position of Construction Inspector.

8. MTA Assistant Division Engineers direct and participate in the monitoring of contractors and the inspection of construction projects to assure that plans and specifications are being properly implemented. Responsibilities for the position include the preparation of records involving the recording of total quantities, payments and work performed.[4/]

9. MTA Construction Inspectors monitor the activities of construction contractors to assure that plans and specifications are adhered to. Responsibilities for the position include measuring quantities of materials and maintaining a daily record of activities.[5/]

10. MTA Assistant Division Engineers and Construction Inspectors, in carrying out their responsibilities, exercise discretion and make decisions which affect the financial interests of the MTA contractors whom they are overseeing.[6/]

11. Petruzzi & Forrester is a construction company doing business in Massachusetts. Petruzzi & Forrester have previously provided construction services to the MTA.

12. Prior to 1992, Petruzzi & Forrester were awarded two MTA construction contracts. Petruzzi & Forrester also served as a sub-contractor with regard to an MTA paving contract.

13. Flanagan served as the Assistant Division Engineer with regard to a construction project at Turnpike Interchange 11A, which was completed during the early summer of 1990. Subsequently, Flanagan served as the Assistant Division Engineer with regard to a construction project at the Turnpike Interchange 9 toll plaza during the summer and fall of 1990. During 1990, Flanagan also served as the Assistant Division Engineer with regard to a paving project at Turnpike Interchange 9. With regard to each of the foregoing projects, Flanagan admitted that he supervised the work of Petruzzi & Forrester.

14. On December 12, 1992, the MTA awarded Petruzzi & Forrester a rock excavation contract (#851-426) valued at approximately one million dollars.

15. With regard to MTA contract #851-426, during the period of December 12, 1992, through March of 1993, Flanagan held the title of Assistant Division Engineer but performed the functions of an "office engineer".

16. Flanagan's functions with regard to MTA contract #851-426 included assembling shop drawings, using quality control ledger numbers to prepare pay estimates and investigating extra work orders.

17. A document entitled "Preconstruction Conference",[7/] which was prepared in the normal course of an MTA construction project, indicates that Flanagan's role in relation to MTA contract #851-426 would be limited to assembling and reviewing shop drawings. However, in preparing pay estimates for the

contract, Flanagan was in a position to question and verify measurements which were supplied to him by the project inspector, Kevin Moriarty.[8/]

18. With regard to MTA contract #851-426, Flanagan participated in the review of an extra work order, resulting in a payment to Petruzzi & Forrester of an additional $16,000, and in the resolution of a controversy concerning the bid specifications.[9/]

19. In late March of 1993, Flanagan approached Petruzzi and informed him that he was interested in purchasing a car owned by Petruzzi & Forrester. The car, a 1989 Oldsmobile Cutlass Ciera with 119,000 miles, had been previously used by a Petruzzi & Forrester employee who no longer worked for the company.

20. Flanagan approached Petruzzi & Forrester concerning the purchase of the car while he was acting as the Assistant Division Engineer on contract #851-426 and was therefore in a position to take official actions which could affect the interests of Petruzzi & Forrester.[10/]

21. Prior to April 6, 1993, Petruzzi & Forrester contacted Brookfield Motors and received an oral (by telephone) estimate as to the value of the car.[11/] Brookfield Motors did not inspect the car in connection with its oral estimate of the car's value.

22. Although the car was not on the market, Petruzzi & Forrester agreed to sell it to Flanagan for $2,000 after receiving the oral estimate from Brookfield Motors.

23. On April 6, 1993, Flanagan and Petruzzi & Forrester signed a bill of sale which stated that Flanagan had paid and delivered $2,000 to Petruzzi & Forester for the car.

24. On April 22, 1993, Flanagan registered the car in his name. On or about May 7, 1993, Flanagan dropped off to Petruzzi & Forrester the license plates that were left on the car when Flanagan took possession of it. The Massachusetts Registry of Motor Vehicles acknowledged receipt of the Petruzzi & Forrester license plates on May 11, 1993.[12/]

25. Flanagan paid $215 in sales tax to the Massachusetts Registry of Motor Vehicles as a result of his purchase of the vehicle.

26. Between April 6, 1993, and November 5, 1993, Flanagan did not make payment of the agreed upon $2,000 purchase price. During the same period, Petruzzi & Forrester did not pursue payment for the car.

27. Petruzzi & Forrester understood that Flanagan could not and, therefore, would not pay for the vehicle on April 6, 1993. In addition, Forrester understood that Flanagan would pay for the vehicle some time after April 6, 1993, but he did not know when.[13/]

28. Forrester understood that Flanagan had an obligation to pay $2,000 for the car and he always intended for Flanagan to pay that debt.[14/]

29. Subsequent to April 6, 1993, Forrester put a folder containing information on the sale of the car in his "suspense file".[15/] Because the time period following the transfer of the vehicle was Petruzzi & Forrester's "busy season", however, Forrester never looked in that file between April and November of 1993. Moreover, Forrester failed to follow up on the outstanding $2,000 debt owed by Flanagan because of the fact that he alone ran the office for Petruzzi & Forrester without any support staff.[16/]

30. At all times prior to November 5, 1993, Flanagan intended to pay Petruzzi & Forrester $2,000 for the vehicle.[17/]

31. On November 2, 1993, Massachusetts State Police Officer Walter Carlson went to the offices of Petruzzi & Forrester to inquire about Petruzzi & Forrester's sale of the car to Flanagan. Immediately thereafter Petruzzi & Forrester telephoned Flanagan to inform him of the State Police investigation.

32. On November 5, 1993, Flanagan paid Petruzzi & Forrester $2,000 for the car.

33. Between 4/26/93 and 10/5/94, Flanagan paid a total of $3,322.90 for repairs to the vehicle involving the battery, tires, starter, steering, hoses, transmission, ignition and brakes.[18/]

34. Flanagan's relationship with Petruzzi & Forrester was based solely on his official interaction with them as an MTA employee.[19/]

35. Flanagan did not file a written disclosure with his MTA appointing authority of his purchase of an automobile from Petruzzi & Forrester.[20/]

III. Decision

The Petitioner contends that Flanagan violated G.L. c. 268A, §3(b) with regard to his receipt of several gratuities. This section prohibits anyone, being a

present or former state, county or municipal employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly, asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of substantial value for himself for or because of any official act or acts within his official responsibility performed or to be performed by such an employee.

The term "substantial value" is not defined in G.L. c. 268A. In construing this term, both the courts and the Commission have established a $50 threshold at which and above, a gift will be regarded as of substantial value. *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1986) (a gift of $50 would be considered substantial within the context of §3(b)); *Commission Advisory No. 8 (Free Passes) (1985); EC-COI-93-14* (re-affirming Commission's use of $50 threshold in measuring substantial value). The Commission has not limited its application of §3 and the $50 threshold to cash gifts. Rather the Commission has found tickets, meals, loans (*In re Antonelli*, 1982 SEC 101) and transportation valued at $50 or more to be of substantial value. In contrast, gifts, discounts or meals worth less than $50 have been treated as of nominal value. *In re Michael*, 1981 SEC 59.

The Commission has previously found a §3 violation where gifts and other things of substantial value are given "for or because of" the employee's official acts[21/] even where there is no understood "quid pro quo" or intent to influence the employee's acts. The Commission examines the relationship between the gratuity and the employee's official duties. The Commission has previously explained that

> [a] public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple enumeration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. See *Michael*, 1981 SEC 59, 68.

In its *Free Passes* Advisory, the Commission announced that the application of §3 is not limited to instances in which matters are actually pending before a public official, but includes prior or future official acts as well. The Commission created a policy whereby it will infer a "for or because of" relationship between the gift and the recipient where there is no prior social or business relationship between the giver and the receiver, and where the recipient is in a position to use his authority in a manner which could affect the giver.

A. Middlesex

The Petitioner alleges that by accepting gratuities valued at approximately $250 from Middlesex in the form of a party and overnight hotel accommodations, Flanagan violated G.L. c. 268A, §3(b).

Based on the foregoing agreed upon facts, there is no dispute that Flanagan attended the December 19, 1992, Christmas party, which included cocktails, dinner, entertainment and overnight hotel accommodations at the Marriott Long Wharf Hotel in Boston. It was agreed by the parties that the explicit purpose of the party was to foster good will with employees and individuals doing business with Middlesex. Prior to and throughout 1992, Flanagan supervised and inspected work performed by Middlesex. Furthermore, as of late 1992, it was likely that Flanagan would supervise and inspect Middlesex contracts in the future. We therefore conclude that Flanagan was in a position to use his authority in a manner which could affect Middlesex. As a result, the Petitioner has proven by a preponderance of the evidence that Flanagan received something of substantial value from Middlesex for or because of officials acts performed or to be performed. Flanagan thereby violated §3(b) of G.L. c. 268A.

B. Petruzzi & Forrester

1. Section 3(b)

The Petitioner alleges that by not paying Petruzzi & Forrester $2,000 for an automobile after he had taken possession of it, Flanagan received something of substantial value because he:

a) accepted a "free car"; or

b) knew and had accepted the fact that Petruzzi & Forrester had forgiven the $2,000 debt; or

c) had accepted from Petruzzi & Forrester an interest free loan of $2,000 for seven months; or

d) had accepted from Petruzzi & Forrester a discount of $50 or more on the fair market value of the car.

a. *Gift of a Car*

The parties agree that Flanagan received from Petruzzi & Forrester a 1989 Oldsmobile Cutlass Ciera with 119,000 miles on April 6, 1993. It is undisputed that Flanagan paid to Petruzzi & Forrester $2,000, the agreed upon sales price, on November 5, 1993. Thus, the Commission does not find that Flanagan received from Petruzzi & Forrester a "free car".

b. *Forgiveness of Debt*

The Petitioner contends that Flanagan received from Petruzzi & Forrester something of substantial value because he was aware of and had accepted the fact that the debt owed for the vehicle had been forgiven prior to the State Police investigation. In other words, the Petitioner would have us find that had the State Police not investigated the transaction, Petruzzi & Forrester would not have required Flanagan to pay the $2,000 debt.

On this point, the Commission finds that the Petitioner has presented no direct evidence to demonstrate that Petruzzi & Forrester had at any time forgiven the $2,000 debt. Based on the most obvious evidence, the fact that Petruzzi & Forrester eventually notified Flanagan of the outstanding obligation (albeit after the State Police investigation) and the fact that Flanagan eventually paid the previously agreed upon purchase price of $2,000, we conclude that Petruzzi & Forrester did not forgive the debt. Moreover, even if we consider the Petitioner's theory that, but for the State Police investigation, Petruzzi & Forrester had already treated and would continue to treat Flanagan's debt as forgiven, we do not find that the theory is supported by any direct evidence. Flanagan testified that, at all times after receiving the car, he intended to pay the $2,000. Mr. Forrester also testified that there was no doubt in his mind that Flanagan was under an obligation to pay the $2,000 agreed upon price. Thus, the only two parties who could give definitive testimony with regard to the terms of the transaction provided testimony in contradiction to the Petitioner's allegation that the debt had been forgiven.

Further, we find that the circumstantial evidence put forth by the Petitioner does not permit us to draw a reasonable inference that Petruzzi & Forrester had forgiven the $2,000 debt. In particular, the Petitioner has proven by undisputed evidence the passage of a seven-month time period following the receipt of the car and before the payment of $2,000 was made. Moreover, the Petitioner established that the payment occurred only after a state police investigation concerning the car's transfer had commenced.

In response, however, Petruzzi & Forrester argue that they understood that Flanagan would not and could not pay for the vehicle on April 6, 1993. Forrester testified that it was his understanding that Flanagan would be paying for the car some time later. We have credited Forrester's testimony that he put a folder containing information on the sale of the car in his "suspense file", but that because of time of year (their busy season), he never looked in that file between April and November of 1993. Moreover, Forrester explained that his failure to follow up on Flanagan's payment resulted from the small size of their office.

In summary, the Petitioner's allegation that the debt was forgiven by Petruzzi & Forrester is supported, at best, by circumstantial evidence. However, we find Forrester's explanation concerning his failure to collect the debt during the seven month period credible. This explanation rebuts the Petitioner's circumstantial evidence. We, therefore, conclude that the Petitioner has not proven by a preponderance of the evidence that the debt was forgiven.

c. *Interest Free Loan*

The Petitioner alleged that, even if Flanagan intended eventually to pay for the car, Flanagan received from Petruzzi & Forrester an interest free loan of $2,000 for seven months. However, we find that Petitioner failed to meet its evidentiary burden concerning the value of the alleged loan, the type of loan provided, the prevailing interest rate for an automobile loan at the relevant time, etc. Because we cannot make such determinations without evidence before us, we cannot reasonably conclude that Flanagan accepted from Petruzzi & Forrester something of substantial value in the nature of an interest free loan.

d. *Discount*

The Petitioner further alleged that Flanagan accepted from Petruzzi & Forrester a discount of $50 or more on the fair market value of the vehicle. We find that the record is devoid of clear and reliable direct evidence demonstrating that the fair market value of the vehicle was $2,050 or greater.[22/]

The Petitioner relies on circumstantial evidence as to the vehicle's fair market value. In particular, the Petitioner put forth the amount of sales tax ($215) paid by Flanagan to the Registry of Motor Vehicles on his purchase of the vehicle. Petitioner argues that the Commission may draw an inference from this evidence that, assuming a sales tax rate of 5%, the Registry believed the value of the car to be $4,300. However, the Petitioner presented no testimony or documentary evidence as to how the Registry assesses the value of a vehicle for sales tax purposes. Forrester testified that, based on his own inquiry of the Registry, that agency uses a computer generated value which does not take into account the condition or mileage of the vehicle. The owner of the vehicle may file for an abatement if, due to the condition of the car, the actual value is believed to be less than that which is assigned to the vehicle by the Registry.[23/] Because there was no evidence as to how the Registry's values are arrived at, we cannot reasonably draw an inference as to the fair market value of the vehicle based on the Registry's collection a $215 sales tax.

In response to the Petitioner's allegation, Petruzzi & Forrester contends that the $2,000 price paid for the car reasonably reflected the fair market value of the vehicle. In support thereof Petruzzi & Forrester submitted the NADA Official Used Car Guide for May, 1993, to demonstrate that a high mileage deduction of $2,500 would be applicable to a 1989 intermediate or personal luxury car with 115,000 to 130,000 miles.[24/] There was not, however, any testimony or other evidence to demonstrate how this guide could be used to assess the actual or fair market value of the car in question.[25/] Additionally, Flanagan submitted repair bills for the vehicle which he incurred between 4/26/93 and 10/5/94 totalling $3,322.90. Finally, Petruzzi & Forrester presented evidence that the depreciated "value of the car", as shown on Petruzzi & Forrester's 1993 tax return, was $1,818. As a result, the company reported a taxable gain of $182 on the sale. There was no testimony as to how the amount of depreciation was calculated, although the tax return was prepared by a Certified Public Accountant.

We therefore find that the Petitioner has not put forth sufficient direct evidence to prove that the fair market value of the vehicle exceeded $2,000. Moreover, we do not find the circumstantial evidence sufficiently clear or reliable so as to permit us to draw an inference as to the vehicle's fair market value.[26/] As a result, we conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received a discount of $50 or more on the fair market value of the vehicle.

Because we conclude that the substantial value element of a §3(b) has not been proven with regard to any of the Petitioner's allegations concerning the car, we do not reach the question: was Flanagan, immediately prior to the transfer of the vehicle, in a position to use his authority to affect Petruzzi & Forrester so that a gift to him would violate §3(a). We note, however, that we do not find persuasive, Flanagan's argument that because he was not in a position to give final approval to the pay estimates, he was not in a position to take actions which affected Petruzzi & Forrester. Moreover, Dionne testified that there was a likelihood that Flanagan could have been assigned to a Petruzzi & Forrester contract in the future, after the transfer of the vehicle. Finally, Flanagan testified that he had not been instructed by his MTA supervisors that he was never again to work on a Petruzzi & Forrester project.

2. Section 23(b)(3)

Petitioner alleges that by failing to pay the $2,000 for the car to Petruzzi & Forrester, with whom he had dealings in his official capacity as an MTA employee, until the state police made inquiries about the matter seven months after he took possession of the car, Flanagan violated §23(b)(3). The Petitioner argues that Flanagan thereby acted in a manner which would cause a reasonable person knowing the relevant circumstances to conclude that Petruzzi & Forrester could unduly enjoy Flanagan's favor in the performance of his official duties.

Section 23(b)(3) of G.L. c. 268A provides that

> [n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

We have previously recognized the inherently exploitable nature of public employees entering into

private business relationships with those under their jurisdiction. The Commission has emphasized that:

> public officials and employees must avoid entering into private commercial relationships with people they regulate in their public capacities. In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains. *In re Keverian, supra,* 462.

In applying §23(b)(3), the Commission will evaluate whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest.

In the case before us, we could reasonably find that Flanagan "acted in a manner . . . ," within the meaning of §23(b)(3), if he performed his MTA job responsibilities on the Petruzzi & Forrester rock excavation contract while discussing with Petruzzi & Forrester his interest in purchasing their car. Whereas, if Flanagan approached Petruzzi & Forrester concerning the purchase of the vehicle only after his official relationship with them had ended (after having been transferred to a job involving another contractor), then he could not act in a manner which would cause a reasonable person to conclude that he would be unduly influenced in the performance of his duties.

On this point, we find that Flanagan was performing his MTA job responsibilities with regard to a Petruzzi & Forrester project at that same time that he approached Petruzzi & Forrester concerning his interest in purchasing their automobile. Therefore, by a preponderance of the evidence, we find that a reasonable person could conclude that the integrity of any actions taken by Flanagan in his MTA position regarding the rock excavation contract, while simultaneously negotiating the purchase of the car with Petruzzi & Forrester, could be undermined by his private dealings with Petruzzi & Forrester concerning the car.

This analysis of §23(b)(3) is consistent with our prior application of this section. The Commission has previously held that "acting in a manner" refers to the taking of official action as a public employee. See *EC-COI-89-9* (member of General Court advised after conveying interest in company to his wife that prior to his *legislative participation* in matters involving clients of the company, he should publicly disclose the relevant facts); *89-16* (a member of a state Board must disclose his prior friendship with petitioner prior to acting on petition pending before the Board); *89-29* (Steamship Authority employee made 23(b)(3) disclosure prior to participating in Authority decision concerning sale of land that Authority had previously purchased from his private client).

Finally, we note that in order to avoid a violation in circumstances such as those before us, §23(b)(3) requires a public employee to file a written disclosure with his appointing authority describing the public employee's private business relationship with someone whom the employee regulates. See *EC-COI-92-7* citing *In re Keverian*, 1990 SEC 460 (Speaker of the House admitted that private business relationships with office employees and vendors, without disclosure, violate §23(b)(3)); *In re Garvey*, 1990 SEC 478. In this case, Flanagan did not file any written disclosure with his MTA appointing authority concerning his purchase of the car from Petruzzi & Forrester.[7] Flanagan therefore violated §23(b)(3) of G.L. c. 268A.

IV. Conclusion

In conclusion, the Petitioner has proven by a preponderance of the evidence that Flanagan violated §3(b) by receiving from Middlesex something of substantial value for or because of official acts performed or to be performed. We further conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received from Petruzzi & Forrester something of substantial value and therefore he did not violate §3(b) in relation to the motor vehicle transaction. We do, however, conclude that the Petitioner has proven by a preponderance of the evidence that Flanagan violated §23(b)(3) in relation to his purchase of an automobile from Petruzzi & Forrester.

V. Order

The Middlesex Gratuities

Pursuant to the authority granted it by G.L. c. 268B, §4(j),[28] the Commission hereby orders James Flanagan to pay a civil penalty of $750 (seven hundred and fifty dollars) to the Commission within thirty days of his receipt of this Decision and Order for receiving gratuities for himself and his guest from Middlesex in violation of G.L. c. 268A, §3(b). This penalty is consistent with the penalties paid by other public employees who attended the above-described Middlesex event without paying for it. See e.g., *In re O'Toole*, 1994 SEC 698; *In re Berlucchi*, 1994 SEC 700; *In re Salamanca*, 1994 SEC 702.

The Car From Petruzzi & Forrester

Although the Commission has found that Flanagan violated §23(b)(3) in relation to his purchase of a motor vehicle from Petruzzi & Forrester, we choose not to assess a civil penalty for this violation. In reaching this decision, we have considered several factors. We note that, as early as April of 1993, Flanagan's MTA superiors were aware of his private transaction with Petruzzi & Forrester and that Flanagan did not attempt to hide his purchase of the vehicle. Additionally, Flanagan was terminated from his MTA position, at least in part, because of his purchase of the automobile from Petruzzi & Forrester.

Our decision not to impose a penalty with regard to the §23(b)(3) violation in this case is also based on our prior practice of imposing penalties only in those §23(b)(3) cases where there has been a pattern of violative conduct or where the conduct has been considered particularly egregious. See e.g., *In re Doughty*, 1995 SEC 726; *In re Malcolm*, 1991 SEC 535. We find that this matter does not involve that type of §23(b)(3) violation.

DATE: January 17, 1996

---

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

[2] At the conclusion of testimony on November 8, 1995, the presiding officer noted that the previously noticed Disposition Agreement would be recognized as a record of the Commission, but that the findings contained therein would not be considered by the Commission in reaching a decision on this matter. Rather, the Commission would apply its prior precedent to its factual findings in the current case. With regard to the particular allegations involving Middlesex, the parties agreed that they would rest on the previously filed Stipulations and Agreements.

[3] Commissioner Gleason is not a signatory to the Decision because his term ended prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

[4] This finding is derived from a written job description for the position of MTA Assistant Division Engineer which was admitted in evidence.

[5] This finding is derived from a written job description for the position of MTA Construction Inspector which was admitted in evidence. MTA inspector Kevin Moriarty's testimony concerning his job responsibilities further supports this finding. Flanagan's testimony concerning his role as a Construction Inspector also supports this finding.

[6] This finding is supported by the testimony of Ronald Dionne, MTA Division Engineer. Although on cross-examination, Mr. Dionne was challenged as to the extent of Flanagan's responsibility with regard to a particular contract involving Petruzzi & Forrester, we find Dionne credible as to the general job responsibilities for the two MTA positions. Moreover, this finding is supported by written job descriptions for the two positions which were admitted in evidence.

[7] This document was admitted in evidence.

[8] This finding is supported by the testimony of Ronald Dionne. Although Dionne admitted on cross-examination that Flanagan did not give the final approval with regard to pay estimates or extra work orders, we find Dionne credible with regard to the actual role played by Flanagan on contract #851-426. We note that Flanagan admitted preparing the pay estimates.

[9] This finding is supported by Ronald Dionne's testimony which we find credible.

[10] This finding is supported by a letter from Spencer Savings Bank dated March 24, 1993, which was admitted in evidence and which responds to an inquiry by Petruzzi & Forrester concerning its intention to sell the vehicle in question. Furthermore a letter dated March 22, 1993, from MTA Director of Human Resources, James LaBua, notified Flanagan that he would be reclassified to the position of Construction Inspector effective March 29, 1993. Therefore, we can reasonably find that Flanagan had approached Petruzzi & Forrester concerning the car prior to March 23, 1993, and at that time he continued to function as the Assistant Division Engineer with regard to a Petruzzi & Forrester contract. Moreover, there is no evidence to suggest to us that Flanagan worked on any project other than contract #851-426 during the month of March, 1993.

[11] Forrester's testimony as to the value placed on the car by Brookfield Motors was unclear.

[12] This finding is based on Flanagan's testimony and several Registry of Motor Vehicles documents including a Plate Return Receipt.

[13] This finding is supported by the testimony of Forrester. We note that Forrester was challenged on cross-examination concerning his prior understanding of when Flanagan would pay for the car. However, we find Forrester credible in that he understood payment would be made some time after April 6, 1993, and that the exact time for payment was not scheduled.

[14] This finding is based on Forrester's testimony which we find credible.

[15] The "suspense file" apparently was mechanism intended to work as a tickler system to remind Forrester of matters which would require his future attention.

[16] We find Forrester's testimony concerning his failure to pursue payment from Flanagan due to other more pressing concerns credible.

[17] This finding is based on Flanagan's testimony which we find credible. The Petitioner's introduction of evidence concerning Flanagan's financial status in 1993 does not prompt us to draw an inference contrary to this finding.

[18] This finding is supported by the bills for these repairs which were admitted in evidence.

[19] Flanagan testified that his relationship with Petruzzi & Forrester was purely business.

[20] This finding is based on Flanagan's testimony during the adjudicatory hearing.

[21] "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

[22] As to the fair market value of the vehicle, Forrester testified that he received an oral estimate from Brookfield Motors (prior to April 6, 1993), which was based in part on a deduction for high mileage "somewhere in the neighborhood of $2,500." On cross examination, Forrester, claiming a lack of clear memory, put the Brookfield Motors statement of the high mileage deduction at "$2,900 or whatever. . . ." The testimony was unclear as to what value was actually placed on the car by Brookfield Motors. A written estimate from Brookfield Motors was admitted in evidence. The written estimate, prepared by Sales Representative Troy D. Kruzewski, was provided to Forrester in May of 1994 (more than one year after the transaction) and states that the "average loan" using "April's NADA official used card guide" is $2,075 which includes a mileage deduction of $2,200. However, we do not credit the written estimate as reliable where there was no evidence, other than the document itself, as to how it was prepared or what the meaning of the term "average loan" is and how it relates to the fair market value of a used vehicle.

[23] There was no evidence as to whether Flanagan ever attempted to obtain an abatement and if he did not, the reason for that decision.

[24] A review of the record indicates that the document was admitted solely for the purpose of demonstrating a mileage deduction as opposed to the value of the vehicle in question.

[25] Because the car was not sufficiently identified, we are unable to determine which of several values provided by the Guide would be applicable to the car in question.

[26] For example, there was no expert testimony as to the fair market value of a 1989 Oldsmobile Cutlass Ciera with 119,000 miles.

[27] We note that there was testimony that in April of 1993, Dionne (Flanagan's immediate supervisor) was aware that Flanagan had received the car from Petruzzi & Forrester. At some point during April of 1993, Dionne reported the transaction to his superior, Chief Engineer Bruce Grimaldi. Furthermore, Dionne testified that he was instructed by Grimaldi to do nothing further in connection with the car transfer. MTA Director of Operations, John Judge testified that he became aware of the automobile transaction at some time in September of 1993.

[28] The Commission possesses the authority under G.L. c. 268B, §4(j) to assess civil penalties of not more than two thousand dollars for each violation of G.L. c. 268A.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 519

IN THE MATTER OF PETRUZZI & FORRESTER, INC.

Appearances: Karen Gray, Esq.
Counsel for the Petitioner

John Petruzzi and William Forrester
Pro se for the Respondent

Commissioners: Brown, Ch., Burnes, Gleason, Larkin and McDonough

Presiding Officer: Commissioner Herbert P. Gleason, Esq.

DECISION AND ORDER

I. Procedural History

The Petitioner initiated these adjudicatory proceedings on April 6, 1995 by issuing an Order to Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Petruzzi & Forrester, Inc., ("Petruzzi & Forrester") violated G.L. c. 268A, §3(a) by providing certain gratuities to Massachusetts Turnpike Authority ("MTA") employee James Flanagan ("Flanagan"). Specifically, the Petitioner alleged that Petruzzi & Forrester violated §3(a): by giving to Flanagan a "free car"; and/or by giving to Flanagan a seven month $2,000 interest-free loan; and/or by forgiving Flanagan's $2,000 debt (owed for the car); and/or by giving Flanagan a discount of $50 or more on the fair market value of the car.

Petruzzi & Forrester filed its answer on May 30, 1995, admitting that it had transferred a vehicle to Flanagan. Pre-hearing conferences were held in this

matter and in re James Flanagan (Docket No. 518) on May 8, 1995, August 18, 1995, August 29, 1995, and October 12, 1995, with Commissioner Gleason presiding.[1/] At those conferences, procedural issues were discussed primarily focusing on discovery and scheduling, as well as the possibility of settlement.

An adjudicatory hearing was held in this matter and in re James Flanagan on October 30, 1995, and November 8, 1995. At the beginning of the hearing on October 30, 1995, the Petitioner sought to have the Commission recognize the Answers of the Respondents as part of the record of the adjudicatory proceeding.

At the conclusion of evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01(9)(k). The Petitioner submitted its brief on December 11, 1995. Petruzzi & Forrester did not file a brief.

The parties were also invited to present their closing arguments before the full Commission. 930 CMR 1.01(9)(e)(5). Closing arguments were heard on December 13, 1995. Petitioner presented its closing argument at that time as did William Sullivan, Esq., on behalf of Flanagan. Petruzzi & Forrester did not present a closing argument on December 13, 1995. Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on January 17, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.[2/]

II. Findings

A. Jurisdiction

It is undisputed that at times relevant to the allegations of the OTSC, Flanagan was a "state employee" within the meaning of G.L. c. 268A, §3(a).

B. Findings of Fact

1. Petruzzi & Forrester is a construction company doing business in Massachusetts. Petruzzi & Forrester has previously provided construction services to the MTA.

2. From 1979 until March 29, 1993, the MTA employed Flanagan as an Assistant Division Engineer. From March 29, 1993, until August of 1994, when his employment was terminated, Flanagan was employed by the MTA in the position of Construction Inspector.

3. MTA Assistant Division Engineers direct and participate in the monitoring of contractors and the inspection of construction projects to assure that plans and specifications are being properly implemented. Responsibilities for the position include the preparation of records involving the recording of total quantities, payments and work performed.[3/]

4. MTA Construction Inspectors monitor the activities of construction contractors to assure that plans and specifications are adhered to. Responsibilities for the position include measuring quantities of materials and maintaining a daily record of activities.[4/]

5. MTA Assistant Division Engineers and Construction Inspectors, in carrying out their responsibilities, exercise discretion and make decisions which affect the financial interests of the MTA contractors whom they are overseeing.[5/]

6. Prior to 1992, Petruzzi & Forrester was awarded two MTA construction contracts. Petruzzi & Forrester also served as a sub-contractor with regard to an MTA paving contract.

7. Flanagan served as the Assistant Division Engineer with regard to a construction project at Turnpike Interchange 11A, which was completed during the early summer of 1990. Subsequently, Flanagan served as the Assistant Division Engineer with regard to a construction project at the Turnpike Interchange 9 toll plaza during the summer and fall of 1990. During 1990, Flanagan also served as the Assistant Division Engineer with regard to a paving project at Turnpike Interchange 9. With regard to each of the foregoing projects, Flanagan admitted that he supervised the work of Petruzzi & Forrester.

8. On December 12, 1992, the MTA awarded Petruzzi & Forrester a rock excavation contract (#851-426) valued at approximately one million dollars.

9. With regard to MTA contract #851-426, during the period of December 12, 1992, through March of 1993, Flanagan held the title of Assistant Division Engineer but performed the functions of an "office engineer".

10. Flanagan's functions with regard to MTA contract #851-426 included assembling shop drawings, using quality control ledger numbers to prepare pay estimates and investigating extra work orders.

11. A document entitled "Preconstruction Conference" which was prepared in the normal course of an MTA construction project, indicated that

Flanagan's role in relation to MTA contract #851-426 would be limited to assembling and reviewing shop drawings. However, in preparing pay estimates for the contract, Flanagan was in a position to question and verify measurements which were supplied to him by the project inspector, Kevin Moriarty.[6/]

12. With regard to MTA contract #851-426, Flanagan participated in the review of an extra work order, resulting in a payment to Petruzzi & Forrester of an additional $16,000, and in the resolution of a controversy concerning the bid specifications.[7/]

13. In late March of 1993, Flanagan approached Petruzzi and informed him that he was interested in purchasing a car owned by Petruzzi & Forrester. The car, a 1989 Oldsmobile Cutlass Ciera with 119,000 miles, had been previously used by a Petruzzi & Forrester employee who no longer worked for the company.

14. Prior to April 6, 1993, Petruzzi & Forrester contacted Brookfield Motors and received an oral (by telephone) estimate as to the value of the car.[8/] Brookfield Motors did not inspect the car in connection with its oral estimate of the car's value.

15. Although the car was not on the market, Petruzzi & Forrester agreed to sell it to Flanagan for $2,000 after receiving the oral estimate from Brookfield Motors.

16. On April 6, 1993, Flanagan and Petruzzi & Forrester signed a bill of sale which stated that Flanagan had paid and delivered $2,000 to Petruzzi & Forester for the car.

17. On April 22, 1993, Flanagan registered the car in his name. On or about May 7, 1993, Flanagan dropped off to Petruzzi & Forrester the license plates that were left on the car when Flanagan took possession of it. The Massachusetts Registry of Motor Vehicles acknowledged receipt of the Petruzzi & Forrester license plates on May 11, 1993.[9/]

18. Flanagan paid $215 in sales tax to the Massachusetts Registry of Motor Vehicles as a result of his purchase of the vehicle.

19. Between April 6, 1993, and November 5, 1993, Flanagan did not make payment of the agreed upon $2,000 purchase price. During the same period, Petruzzi & Forrester did not pursue payment for the car.

20. Petruzzi & Forrester understood that Flanagan could not and, therefore, would not pay for the vehicle on April 6, 1993. In addition, Forrester understood that Flanagan would pay for the vehicle some time after April 6, 1993, but he did not know when.[10/]

21. Forrester understood that Flanagan had an obligation to pay $2,000 for the car and he always intended for Flanagan to pay that debt.[11/]

22. Subsequent to April 6, 1993, Forrester put a folder containing information on the sale of the car in his "suspense file".[12/] Because the time period following the transfer of the vehicle was Petruzzi & Forrester's "busy season", however, Forrester never looked in that file between April and November of 1993. Moreover, Forrester failed to follow up on the outstanding $2,000 debt owed by Flanagan because of the fact that he alone ran the office for Petruzzi & Forrester without any support staff.[13/]

23. At all times prior to November 5, 1993, Flanagan intended to pay Petruzzi & Forrester $2,000 for the vehicle.[14/]

24. On November 2, 1993, Massachusetts State Police Officer Walter Carlson went to the offices of Petruzzi & Forrester to inquire about Petruzzi & Forrester's sale of the car to Flanagan. Immediately thereafter Petruzzi & Forrester telephoned Flanagan to inform him of the State Police investigation.

25. On November 5, 1993, Flanagan paid Petruzzi & Forrester $2,000 for the car.

26. Between April 26, 1993 and October 5, 1994, Flanagan paid a total of $3,322.90 for repairs to the vehicle involving the battery, tires, starter, steering, hoses, transmission, ignition and brakes.[15/]

27. Flanagan's relationship with Petruzzi & Forrester was based solely on his official interaction with them as an MTA employee.[16/]

III. Decision

The Petitioner contends that Petruzzi & Forrester violated G.L. c. 268A, §3(a). This section prohibits anyone, otherwise than as provided for by law for the proper discharge of official duty, from directly or indirectly, giving, offering or promising anything of substantial value to any present or former public employee for or because of any official act[17/] performed or to be performed by such an employee.

We must therefore determine whether Petruzzi & Forrester gave Flanagan an item of substantial value, and if so, whether the gift was for or because of any official act performed or to be performed by Flanagan.

The term "substantial value" is not defined in G.L. c. 268A. In construing this term, both the courts and the Commission have established a $50 threshold at which and above, a gift will be regarded as of substantial value. See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1986) (a gift of $50 would be considered substantial within the context of §3(b)); *Commission Advisory No. 8 (Free Passes) (1985); EC-COI-93-14* (re-affirming Commission's use of $50 threshold in measuring substantial value). The Commission has not limited its application of §3 and the $50 threshold to cash gifts. Rather the Commission has found tickets, meals, loans (*In re Antonelli*, 1982 SEC 101) and transportation valued at $50 or more to be of substantial value. In contrast, gifts, discounts or meals worth less than $50 have been treated as of nominal value. See *In re Michael,* 1981 SEC 59.

Here, the Petitioner alleges that by not requiring Flanagan to pay $2,000 for the car after he had taken possession of it, Petruzzi & Forrester gave Flanagan something of substantial value because it:

a) gave Flanagan a "free car"; or

b) had forgiven the $2,000 debt; or

c) had given an interest free loan of $2,000 for seven months; or

d) had given a discount of $50 or more on the fair market value of the car.

a. *Gift of a Car*

The parties agree that Petruzzi & Forrester provided to Flanagan a 1989 Oldsmobile Cutlass Ciera with 119,000 miles on April 6, 1993. It is undisputed that Flanagan paid to Petruzzi & Forrester $2,000, the agreed upon sales price, on November 5, 1993. Thus, the Commission does not find that Petruzzi & Forrester provided to Flanagan a "free car".

b. *Forgiveness of Debt*

The Petitioner contends that Petruzzi & Forrester gave to Flanagan something of substantial value because the debt owed for the vehicle had been forgiven prior to the State Police investigation. In other words, the Petitioner would have us find that had the State Police not investigated the transaction, Petruzzi & Forrester would not have required Flanagan to pay the $2,000 debt.

On this point, the Commission finds that the Petitioner has presented no direct evidence to demonstrate that Petruzzi & Forrester had at any time forgiven the $2,000 debt. Based on the most obvious evidence, the fact that Petruzzi & Forrester eventually notified Flanagan of the outstanding obligation (albeit after the State Police investigation) and the fact that Flanagan eventually paid the previously agreed upon purchase price of $2,000, we conclude that Petruzzi & Forrester did not forgive the debt. Moreover, even if we consider the Petitioner's theory that, but for the State Police investigation, Petruzzi & Forrester had already treated and would continue to treat Flanagan's debt as forgiven, we do not find that the theory is supported by any direct evidence. Flanagan testified that, at all times after receiving the car, he intended to pay the $2,000. Mr. Forrester also testified that there was no doubt in his mind that Flanagan was under an obligation to pay the $2,000 agreed upon price. Thus, the only two parties who could give definitive testimony with regard to the terms of the transaction provided testimony in contradiction to the Petitioner's allegation that the debt had been forgiven.

Further, we find that the circumstantial evidence put forth by the Petitioner does not permit us to draw a reasonable inference that Petruzzi & Forrester had forgiven the $2,000 debt. In particular, the Petitioner has proven by undisputed evidence the passage of a seven-month time period following the receipt of the car and before the payment of $2,000 was made. Moreover, the Petitioner established that the aforementioned payment occurred only after a state police investigation concerning the car's transfer had commenced.

In response, however, Petruzzi & Forrester argue that they understood that Flanagan would not and could not pay for the vehicle on April 6, 1993. Forrester testified that it was his understanding that Flanagan would be paying for the car some time later. We have credited Forrester's testimony that he put a folder containing information on the sale of the car in his "suspense file", but that because of time of year (their busy season), he never looked in that file between April and November of 1993. Moreover, Forrester explained that his failure to follow up on Flanagan's payment resulted from the small size of their office.

In summary, the Petitioner's allegation that the debt was forgiven by Petruzzi & Forrester is supported, at best, by circumstantial evidence. However, we find Forrester's explanation concerning his failure to collect

the debt during the seven month period credible. This explanation rebuts the Petitioner's circumstantial evidence. We, therefore, conclude that the Petitioner has not proven by a preponderance of the evidence that the debt was forgiven.

c. *Interest Free Loan*

The Petitioner alleged that, even if Petruzzi & Forrester intended eventually to require Flanagan to pay for the car, Petruzzi & Forrester provided an interest free loan of $2,000 for seven months. However, we find that Petitioner failed to meet its evidentiary burden concerning the value of the alleged loan, the type of loan provided, the prevailing interest rate for an automobile loan at the relevant time, etc. Because we cannot make such determinations without evidence before us, we cannot reasonably conclude that Petruzzi & Forrester provided something of substantial value in the nature of an interest free loan.

d. *Discount*

The Petitioner further alleged that Petruzzi & Forrester provided Flanagan with a discount of $50 or more on the fair market value of the vehicle. We find that the record is devoid of clear and reliable direct evidence demonstrating that the fair market value of the vehicle was $2,050 or greater.[18/]

The Petitioner relies on circumstantial evidence as to the vehicle's fair market value. In particular, the Petitioner put forth the amount of sales tax ($215) paid by Flanagan to the Registry of Motor Vehicles on his purchase of the vehicle. Petitioner argues that the Commission may draw an inference from this evidence that, assuming a sales tax rate of 5%, the Registry believed the value of the car to be $4,300. However, the Petitioner presented no testimony or documentary evidence as to how the Registry assesses the value of a vehicle for sales tax purposes. Forrester testified that, based on his own inquiry of the Registry, that agency uses a computer generated value which does not take into account the condition or mileage of the vehicle. The owner of the vehicle may file for an abatement if, due to the condition of the car, the actual value is believed to be less than that which is assigned to the vehicle by the Registry.[19/] Because there was no evidence as to how the Registry's values are arrived at, we cannot reasonably draw an inference as to the fair market value of the vehicle based on the Registry's collection of $215 in sales tax.

In response to the Petitioner's allegation, the Respondent contends that the $2,000 price paid for the car reasonably reflected the fair market value of the vehicle. In support thereof the Respondent submitted the NADA Official Used Car Guide for May, 1993, to demonstrate that a high mileage deduction of $2,500 would be applicable to a 1989 intermediate or personal luxury car with 115,000 to 130,000 miles.[20/] There was not, however, any testimony or other evidence to demonstrate how this guide could be used to assess the actual or fair market value of the car in question.[21/] Additionally, Flanagan submitted repair bills for the vehicle which he incurred between 4/26/93 and 10/5/94 totalling $3,322.90. Finally, Petruzzi & Forrester presented evidence that the depreciated "value of the car", as shown on Petruzzi & Forrester's 1993 tax return, was $1,818. As a result, the company reported a taxable gain of $182 on the sale. There was no testimony as to how the amount of depreciation was calculated although the tax return was prepared by a Certified Public Accountant.

We therefore find that the Petitioner has not put forth sufficient direct evidence of the fair market value of the vehicle. Moreover, we do not find the circumstantial evidence sufficiently clear or reliable so as to permit us to draw an inference as to the vehicle's fair market value.[22/] As a result, we conclude that the Petitioner has not proven by a preponderance of the evidence that Flanagan received a discount of $50 or more on the fair market value of the vehicle.

Because we conclude that the substantial value element of §3(a) has not been proven with regard to any of the Petitioner's allegations, we do not reach the question: was Flanagan, immediately prior to the transfer of the vehicle, in a position to use his authority to affect Petruzzi & Forrester so that a gift to him would violate §3(a).

The Commission has previously found a §3 violation where gifts and other things of substantial value are given "for or because of" the employee's official acts even where there is no understood "quid pro quo" or intent to influence the employee's acts. The Commission will examine the relationship between the gratuity and the employee's official duties. The Commission has previously explained that

> [a] public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of Section 3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would

subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple enumeration for doing what employees are already obliged to do - a good job. Sound public policy necessitates a flat prohibition since the alternative would present unworkable burdens of proof. It would be nearly impossible to prove the loss of an employee's objectivity or to assign a motivation to his exercise of discretion. *In re Michael*, 1981 SEC 59, 68.

In its *Free Passes* Advisory, the Commission announced that the application of §3 is not limited to instances in which matters are actually pending before a public official, but includes prior or future official acts as well. The Commission created a policy whereby it will infer a "for or because of" relationship between the gift and the recipient where there is no prior social or business relationship between the giver and the receiver, and where the recipient is in a position to use his authority in a manner which could affect the giver.

We note that in this case, we have found that Flanagan took actions in his official capacity which affected the interests of Petruzzi & Forrester. Furthermore, Dionne testified that there was a likelihood that Flanagan could have again been assigned to a Petruzzi & Forrester contract after the transfer of the vehicle.

IV. Conclusion

In conclusion, the Petitioner has not proven by a preponderance of the evidence that Petruzzi & Forrester gave to Flanagan something of substantial value in relation to the vehicle transaction. We therefore find that Petruzzi & Forrester did not violate §3(a) of G.L. c. 268A. Accordingly, this matter is now concluded.

DATE: January 17, 1996

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

[2/] Commissioner Gleason is not a signatory to the Decision because his term ended prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

[3/] This finding is derived from a written job description for the position of MTA Assistant Division Engineer which was admitted in evidence.

[4/] This finding is derived from a written job description for the position of MTA Construction Inspector which was admitted in evidence. MTA inspector Kevin Moriarty's testimony concerning his job responsibilities further supports this finding. Flanagan's testimony concerning his role as a Construction Inspector also supports this finding.

[5/] This finding is supported by the testimony of Ronald Dionne, MTA Division Engineer. Although on cross-examination, Mr. Dionne was challenged as to the extent of Flanagan's responsibility with regard a particular contract involving Petruzzi & Forrester, we find Dionne credible as to the general job responsibilities for the two MTA positions. Moreover, this finding is supported by written job descriptions for the two positions which were admitted in evidence.

[6/] This finding is supported by the testimony of Ronald Dionne. Although Dionne admitted on cross-examination that Flanagan did not give the final approval with regard to pay estimates or extra work orders, we find Dionne credible with regard to the actual role played by Flanagan on contract #851-426. We note that Flanagan admitted preparing the pay estimates.

[7/] This finding is supported by Ronald Dionne's testimony which we find credible.

[8/] Forrester's testimony as to the value placed on the car by Brookfield Motors was unclear.

[9/] This finding is based on Flanagan's testimony and several Registry of Motor Vehicles documents including a Plate Return Receipt.

[10/] This finding is supported by the testimony of Forrester. We note that Forrester was challenged on cross-examination concerning his prior understanding of when Flanagan would pay for the car. However, we find Forrester credible in that he understood payment would be made some time after April 6, 1993, and that the exact time for payment was not scheduled.

[11/] This finding is based on Forrester's testimony which we find credible.

[12/] The "suspense file" apparently was mechanism intended to work as a tickler system to remind Forrester of matters which would require his future attention.

[13/] We find Forrester's testimony concerning his failure to pursue payment from Flanagan due to other more pressing concerns credible.

[14/] This finding is based on Flanagan's testimony which we find credible. The Petitioner's introduction of evidence concerning Flanagan's financial status in 1993 does not prompt us to draw an inference contrary to this finding.

[15/] This finding is supported by the bills for these repairs which were admitted in evidence.

[16/] Flanagan testified that his relationship with Petruzzi & Forrester was purely business.

[17/] "Official act," any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, §1(h).

[18/] As to the fair market value of the vehicle, Forrester testified that he received an oral estimate from Brookfield Motors (prior to April 6, 1993), which was based in part on a deduction for high mileage "somewhere in the neighborhood of $2,500." On cross examination, Forrester, claiming a lack of clear memory, put the Brookfield Motors statement of the high mileage deduction at "$2,900 or whatever. . . ." The testimony was unclear as to what value was actually placed on the car by Brookfield Motors. A written estimate

from Brookfield Motors was admitted in evidence. The written estimate, prepared by Sales Representative Troy D. Kruzewski, was provided to Forrester in May of 1994 (more than one year after the transaction) and states that the "average loan" using "April's NADA official used card guide" is $2,075 which includes a mileage deduction of $2,200. However, we do not credit the written estimate as reliable where there was no evidence, other than the document itself, as to how it was prepared or what the meaning of the term "average loan" is and how it relates to the fair market value of a used vehicle.

[19/] There was no evidence as to whether Flanagan ever attempted to obtain an abatement and if he did not, the reason for that decision.

[20/] A review of the record indicates that the document was admitted solely for the purpose of demonstrating a mileage deduction as opposed to the value of the vehicle in question.

[21/] Because the car was not sufficiently identified, we are unable to determine which of several values provided by the Guide would be applicable to the car in question.

[22/] For example, there was no expert testimony as to the fair market value of a 1989 Oldsmobile Cutlass Ciera with 119,000 miles.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 538

IN THE MATTER
OF
WOLFGANG BAUER

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Wolfgang Bauer ("Bauer") 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 March 30, 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 Bauer. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Bauer violated G.L. c. 268A, §3.

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

1. Bauer is the Franklin town administrator. As town administrator, Bauer is the chief executive officer of the town and is responsible for the effective administration of all town affairs placed in his charge by or under the town charter.[1/]

2. As town administrator, Bauer occasionally participates in matters concerning private construction projects in town. For example, Bauer occasionally attends meetings of and makes recommendations to the zoning board of appeals, the planning board and the conservation commission. He is involved in matters concerning zoning bylaw enforcement, bond posting, the setting of commercial developers fees and establishing development conditions (such as betterments, sidewalks, traffic studies, etc.). Bauer also appoints, subject to the consent of the City Council, and has the ability to terminate the building inspector and other major town officials.

3. During the relevant period, Patrick Marguerite ("Marguerite") and Francis Molla ("Molla") were builders/developers each independently involved in various private construction projects in the Town of Franklin. Marguerite and Molla had completed projects, had pending projects and expected to have additional projects in Franklin. In connection with these projects, they each have had matters before the building department, the planning board and the conservation commission. In furtherance of these projects, both Marguerite and Molla have had dealings with various town officials including Bauer as town administrator.

4. At all times here relevant, Marguerite, Molla and/or their families owned an apartment building in Franklin called the Union Square Apartments.

5. In February 1992, Bauer was looking for an inexpensive apartment to rent until his divorce was resolved, as he was living out of a hotel room. The Union Square Apartments had many vacancies.

6. Bauer, Marguerite and Molla entered into an oral agreement that allowed Bauer to rent one of the vacant Union Square two bedroom apartments at a reduced rent ("the apartment"). Bauer, Marguerite and Molla testified that they agreed that Bauer could rent the apartment at the reduced rate until Molla and Marguerite could rent the apartment at the prevailing market rate, at which time Bauer would either have to leave or pay the full rent.

7. Union Square two bedroom apartments rented for $500 and up per month. There were no set rental values for all two bedroom apartments, as the

apartments were assigned rental values based upon their distance from the end of the building; farthest away from the railroad tracks had a higher rent, and those next to the railroad tracks had a lower rent. Molla, or his agent, selected the apartment that Bauer would occupy based on the existing vacancies. Bauer and Molla testified that Bauer paid $200 rent each month for the apartment he occupied. There were always vacancies during Bauer's occupancy.

8. Bauer rented the apartment under this arrangement from February 1992 until September 1994 (31 months),[2/] when Marguerite and Molla transferred ownership of the apartment building to a bank in lieu of foreclosure.

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

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

11. The above-described reduced rent rate was of substantial value each month.

12. By accepting a reduced rental rate each month while he then was, recently had been and/or soon would be in a position to take official action concerning Marguerite's and Molla's projects in town,[4/] Bauer accepted an item of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so he violated G.L. c. 268A, §3(b) each month.[5/]

13. The Commission is aware of no evidence that the rental arrangement referenced above was provided to Bauer with the intent to influence any specific act by him as town administrator. The Commission is also aware of no evidence that Bauer took any official action concerning any of Marguerite's or Molla's projects in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[6/] [7/] [8/]

14. Bauer fully cooperated with the Commission's investigation.

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

(1) that Bauer pay to the Commission the sum of ten thousand dollars ($10,000) as a civil penalty for his course of conduct in violation G.L. c. 268A, §3[9/]; and

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

DATE: January 24, 1996

[1/] The town administrator administers and implements the directives and policies adopted by the town council. The administrator attends all council meetings and has the right to speak but not vote, makes recommendations to the council, prepares the town budget, serves as ombudsman and performs any duties required by the charter, bylaw or order of the council. The administrator, with the approval of the council, may establish, reorganize or consolidate any department, board, commission or office under his jurisdiction. Additionally, subject to ratification by the council, the administrator's appointments include police and fire chiefs, zoning board of appeals members and redevelopment authority members.

[2/] Bauer's divorce proceedings continued until September 8, 1993.

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

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

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

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obligated to do -- a good job.

[6/] As discussed above in footnote 4, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be

performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Bauer and Marguerite and/or Molla.

[7] In separate disposition agreements, Marguerite and Molla acknowledge violating §3(a) by entering into the above reduced rental arrangement with Bauer.

[8] There may have been a "mixed motive" in Marguerite and Molla giving and Bauer accepting the reduced rate apartment. In other words, Marguerite and Molla may have given Bauer the reduced rate for these reasons: (1) to foster official goodwill with Bauer as town administrator; (2) to generate income from an otherwise vacant apartment, and (3) to assist Bauer while he was going through his divorce.

This "mixed motive" contention is not a defense. Where a public employee was, recently had been, and/or soon would be in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if there were additional reasons for the offer and receipt of the gift, unless the evidence establishes that these other reasons constitute the complete motive for the gift. See *Advisory No. 8.* See also *In re Flaherty*, 1990 SEC 498.

[9] The fine takes into consideration the economic benefit Bauer received by virtue of the reduced rent arrangement.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 539

IN THE MATTER
OF
PATRICK MARGUERITE

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Patrick Marguerite ("Marguerite") 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 March 30, 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 Marguerite. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Marguerite violated G.L. c. 268A, §3.

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

1. During the relevant period, Marguerite was a builder and developer involved in various private construction projects in the Town of Franklin. In connection with these projects, Marguerite had matters before the building department, the planning board and the conservation commission. In furtherance of these construction and development projects, Marguerite had dealings with various town officials including Bauer as town administrator.

2. During the time here relevant, Marguerite had completed projects, had pending projects and expected to have additional projects in Franklin.

3. Wolfgang Bauer ("Bauer") is the Franklin town administrator. As town administrator, Bauer is the chief executive officer of the town and is responsible for the effective administration of all town affairs placed in his charge by or under the town charter.[1]

4. As town administrator, Bauer occasionally participates in matters concerning private construction projects in town. For example, Bauer occasionally attends meetings of and makes recommendations to the zoning board of appeals, the planning board and the conservation commission. He is involved in matters concerning zoning bylaw enforcement, bond posting, the setting of commercial developers fees and establishing development conditions (such as betterments, sidewalks, traffic studies, etc.). Bauer also appoints, subject to the consent of the City Council, and has the ability to terminate the building inspector and other major town officials.

5. At all times here relevant, Marguerite and builder/developer Francis Molla ("Molla") and/or their families owned an apartment building in Franklin called the Union Square Apartments.

6. In February 1992, Bauer was looking for an inexpensive apartment to rent until his divorce was resolved, as he was living out of a hotel room. The Union Square Apartments had many vacancies.

7. Bauer, Marguerite and Molla entered into an oral agreement that allowed Bauer to rent one of the vacant Union Square two bedroom apartments at a reduced rent ("the apartment"). Bauer, Marguerite and Molla testified that they agreed that Bauer could rent the apartment at the reduced rate until Marguerite and

Molla could rent the apartment at the prevailing market rate, at which time Bauer would either have to leave or pay the full rent.

8. Union Square two bedroom apartments rented for $500 and up per month. There were no set rental values for all two bedroom apartments, as the apartments were assigned rental values based upon their distance from the end of the building; farthest away from the railroad tracks had a higher rent, and those next to the railroad tracks had a lower rent. Molla, or his agent, selected the apartment that Bauer would occupy based on the existing vacancies. Bauer and Molla testified that Bauer paid $200 rent each month for the apartment he occupied. There were always vacancies during Bauer's occupancy.

9. Bauer rented the apartment under this arrangement from February 1992 until September 1994 (31 months),[2/] when Marguerite and Molla transferred ownership of the apartment building to a bank in lieu of foreclosure.

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

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

12. The above-described reduced rent rate was of substantial value each month.

13. Marguerite, by giving Bauer a reduced rental rate each month while Bauer then was, recently had been or soon would be in a position to take official action concerning Marguerite's projects in town, gave Bauer a gratuity for or because of official acts or acts within his official responsibility performed or to be performed by Bauer as town administrator. In so doing, Marguerite violated G.L. c. 268A, §3 each month.[4/] [5/]

14. The Commission is aware of no evidence that the rental arrangement referenced above was provided to Bauer with the intent to influence any specific act by him as town administrator. The Commission is also aware of no evidence that Bauer took any official action concerning any of Marguerite's or Molla's projects in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[6/] [7/]

15. Marguerite fully cooperated with the Commission's investigation.

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

(1) that Marguerite pay to the Commission the sum of five thousand dollars ($5,000) as a civil penalty for his course of conduct in violation G.L. c. 268A, §3; and

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

DATE: January 24, 1996

[1/] The town administrator administers and implements the directives and policies adopted by the town council. The administrator attends all council meetings and has the right to speak but not vote, makes recommendations to the council, prepares the town budget, serves as ombudsman and performs any duties required by the charter, bylaw or order of the council. The administrator, with the approval of the council, may establish, reorganize or consolidate any department, board, commission or office under his jurisdiction. Additionally, subject to ratification by the council, the administrator's appointments include police and fire chiefs, zoning board of appeals members and redevelopment authority members.

[2/] Bauer's divorce proceedings continued until September 8, 1993.

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

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

[5/] In separate disposition agreements, Bauer and Molla acknowledge violating §3 by entering into the above reduced rental arrangement.

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

case, however, as there was no such *quid pro quo* between Bauer and Marguerite and/or Molla.

7/ There may have been a "mixed motive" in Marguerite and Molla giving and Bauer accepting the reduced rate apartment. In other words, Marguerite and Molla may have given Bauer the reduced rate for these reasons: (1) to foster official goodwill with Bauer as town administrator; (2) to generate income from an otherwise vacant apartment, and (3) to assist Bauer while he was going through his divorce.

This "mixed motive" contention is not a defense. Where a public employee was, recently had been, and/or soon would be in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if there were additional reasons for the offer and receipt of the gift, unless the evidence establishes that these other reasons constitute the complete motive for the gift. See *Advisory No. 8.* See also *In re Flaherty*, 1990 SEC 498.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 540

IN THE MATTER
OF
FRANCIS MOLLA

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Francis Molla ("Molla") 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 March 30, 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 Molla. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Molla violated G.L. c. 268A, §3.

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

1. During the relevant period, Molla was a builder and developer involved in various private construction projects in the Town of Franklin. In connection with these projects, Molla had matters before the building department, the planning board and the conservation commission. In furtherance of these construction and development projects, Molla had dealings with various town officials including Bauer as town administrator.

2. During the time here relevant, Molla had completed projects, had pending projects and expected to have additional projects in Franklin.

3. Wolfgang Bauer ("Bauer") is the Franklin town administrator. As town administrator, Bauer is the chief executive officer of the town and is responsible for the effective administration of all town affairs placed in his charge by or under the town charter.1/

4. As town administrator, Bauer occasionally participates in matters concerning private construction projects in town. For example, Bauer occasionally attends meetings of and makes recommendations to the zoning board of appeals, the planning board and the conservation commission. He is involved in matters concerning zoning bylaw enforcement, bond posting, the setting of commercial developers fees and establishing development conditions (such as betterments, sidewalks, traffic studies, etc.). Bauer also appoints, subject to the consent of the City Council, and has the ability to terminate the building inspector and other major town officials.

5. At all times here relevant, Molla and builder/developer Patrick Marguerite ("Marguerite") and/or their families owned an apartment building in Franklin called the Union Square Apartments.

6. In February 1992, Bauer was looking for an inexpensive apartment to rent until his divorce was resolved, as he was living out of a hotel room. The Union Square Apartments had many vacancies.

7. Bauer, Marguerite and Molla entered into an oral agreement that allowed Bauer to rent one of the vacant Union Square two bedroom apartments at a reduced rent ("the apartment"). Bauer, Marguerite and Molla testified that they agreed that Bauer could rent the apartment at the reduced rate until Molla and Marguerite could rent the apartment at the prevailing market rate, at which time Bauer would either have to leave or pay the full rent.

8. Union Square two bedroom apartments rented for $500 and up per month. There were no set rental values for all two bedroom apartments, as the apartments were assigned rental values based upon their distance from the end of the building; farthest away from the railroad tracks had a higher rent, and those

next to the railroad tracks had a lower rent. Molla, or his agent, selected the apartment that Bauer would occupy based on the existing vacancies. Bauer and Molla testified that Bauer paid $200 rent each month for the apartment he occupied. There were always vacancies during Bauer's occupancy.

9. Bauer rented the apartment under this arrangement from February 1992 until September 1994 (31 months),[2/] when Marguerite and Molla transferred ownership of the apartment building to a bank in lieu of foreclosure.

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

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

12. The above-described reduced rent rate was of substantial value each month.

13. Molla, by giving Bauer a reduced rental rate each month while Bauer then was, recently had been or soon would be in a position to take official action concerning Molla's projects in town, gave Bauer a gratuity for or because of official acts or acts within his official responsibility performed or to be performed by Bauer as town administrator. In so doing, Molla violated G.L. c. 268A, §3 each month.[4/] [5/]

14. The Commission is aware of no evidence that the rental arrangement referenced above was provided to Bauer with the intent to influence any specific act by him as town administrator. The Commission is also aware of no evidence that Bauer took any official action concerning any of Marguerite's or Molla's projects in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.[6/] [7/]

15. Molla fully cooperated with the Commission's investigation.

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

(1) that Molla pay to the Commission the sum of five thousand dollars ($5,000) as a civil penalty for his course of conduct in violation G.L. c. 268A, §3; and

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

DATE: January 24, 1996

[1/] The town administrator administers and implements the directives and policies adopted by the town council. The administrator attends all council meetings and has the right to speak but not vote, makes recommendations to the council, prepares the town budget, serves as ombudsman and performs any duties required by the charter, bylaw or order of the council. The administrator, with the approval of the council, may establish, reorganize or consolidate any department, board, commission or office under his jurisdiction. Additionally, subject to ratification by the council, the administrator's appointments include police and fire chiefs, zoning board of appeals members and redevelopment authority members.

[2/] Bauer's divorce proceedings continued until September 8, 1993.

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

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

[5/] In separate disposition agreements, Bauer and Marguerite acknowledge violating §3 by entering into the above reduced rental arrangement.

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

[7/] There may have been a "mixed motive" in Marguerite and Molla giving and Bauer accepting the reduced rate apartment. In other words, Marguerite and Molla may have given Bauer the reduced rate for these reasons: (1) to foster official goodwill with Bauer as town administrator; (2) to generate income from an otherwise vacant apartment, and (3) to assist Bauer while he was going through his divorce.

This "mixed motive" contention is not a defense. Where a public employee was, recently had been, and/or soon would be in a position to take official action concerning matters affecting a party's

interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if there were additional reasons for the offer and receipt of the gift, unless the evidence establishes that these other reasons constitute the complete motive for the gift. See *Advisory No. 8.* See also *In re Flaherty*, 1990 SEC 498.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 541

IN THE MATTER
OF
HARLEY KEELER

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Harley Keeler ("Keeler") 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 11, 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 Keeler. The Commission has concluded its inquiry and, on September 13, 1995, found reasonable cause to believe that Keeler violated G.L. c. 268A.

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

1. At all relevant times, Keeler was employed as the fire chief for the town of Uxbridge. As such, Keeler was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. In January 1995, the Uxbridge Fire Department posted a full-time firefighter position.

3. The full-time firefighter position pays an annual salary of approximately $22,000.

4. Keeler selected two individuals to serve on the selection committee: the deputy chief and another fire department officer. Subsequently, Keeler decided to have only the deputy chief interview the candidates.

5. Five applications for the full-time firefighter position were taken out but only two were returned. One of the candidates was Keeler's stepdaughter Melissa Blodgette ("Blodgette").

6. The deputy interviewed the two candidates and recommended to Keeler that Blodgette receive the position.

7. Keeler, after receiving the deputy's recommendation, appointed Blodgette to the full-time firefighter position.

8. 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[1/] has a financial interest. None of the exceptions contained in §19(b) apply in this case.[2/]

9. The determination as to whom to hire for the full-time firefighter position was a particular matter.[3/]

10. As set forth above, Keeler participated[4/] as fire chief in that hiring determination first by selecting the interview committee and then by appointing his stepdaughter to the position.

11. Blodgette, as an applicant for the full-time firefighter position, had a financial interest in the appointment of that position. Keeler knew of his stepdaughter's financial interest at the time he participated in the hiring process.

12. Accordingly, by participating in the full-time firefighter position hiring process, as set forth above, Keeler participated in his official capacity in a particular matter in which he knew an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.[5/]

13. Keeler cooperated with the Commission's investigation.

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

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

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

(3) that Keeler 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 30, 1996

1/ "Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e). Blodgette is an immediate family member to Keeler as Blodgette is his wife's child.

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

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

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

5/ On December 31, 1995, Blodgette resigned from the firefighter position. The position is to be re-posted.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 542

IN THE MATTER
OF
ROSS W. SMITH

DISPOSITION AGREEMENT

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

On November 15, 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 Smith. The Commission has concluded its inquiry and, on December 13, 1995, found reasonable cause to believe that Smith violated G.L. c. 268A.

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

1. Smith was, during the time relevant, an elected selectman in the Town of Uxbridge. As such, Smith was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In June 1994, the town decided to sell a 1985 surplus school bus ("the Bus"). The town publicly advertised the sale and sought sealed bids.

3. John Stratton, Jr. ("Stratton") is an electrician who owns Stratton Electric in Uxbridge.

4. Smith asked Stratton to submit a bid for the Bus for him, and Stratton agreed.

5. On a Stratton Electric invoice dated July 12, 1994, Stratton submitted a signed $553 bid for the Bus on Smith's behalf. The bid did not disclose Smith's financial interest in the matter.

6. The selectmen opened the Bus bids at their July 18, 1994 meeting. They received two bids; one from The Weagle Bus Company for $500 and the other from Stratton Electric for $553.

7. Smith, as a selectman, made a motion and voted to award the contract to Stratton Electric. The motion passed unanimously.

8. Smith did not disclose that Stratton was only a straw or that he (Smith) was the real bidder.

9. Smith subsequently paid for the Bus with a treasurer's check for $553. Smith thereafter took possession of the Bus.

10. On July 29, 1994, Smith sold the Bus at the Concord Auto Auction for $750. After deducting $125 in auction fees, Smith earned $72 profit on the sale of the Bus.

11. By using Stratton Electric to submit the bid for the Bus, Smith concealed the fact that he had a financial interest in the bid.

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

13. The decision to award the bid to Stratton Electric for the surplus Bus was a particular matter.

14. Smith participated in that particular matter by making the motion and voting to award the Bus bid to Stratton Electric. Smith, as the real bidder, had a financial interest in the Bus contract award.

15. Smith, by making the motion and voting to award the contract to Stratton Electric, participated in his official capacity in a particular matter in which he knew he had a financial interest, thereby violating G.L. c. 268A, §19.

16. Section 20 of G.L. c. 268A, in relevant part, prohibits a municipal employee from, knowingly or with reason to know, having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town in which the city or town is an interested party.

17. Upon its acceptance of the bid for $553, the town entered into a contract within the meaning of that term in §20. Smith, the actual (although concealed) buyer, had a financial interest in that contract because he had to pay the $553 and he would obtain title to the Bus. Therefore, Smith had an indirect financial interest in that contract in violation of §20.

18. Smith fully cooperated with the Commission's investigation.

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

(1) that Smith pay the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for his course of conduct in violating G.L. c. 268A, §§19 and 20 as stated above; and

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

DATE: February 21, 1996

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 544

IN THE MATTER
OF
PAUL ENIS

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Paul Enis ("Enis") 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 13, 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 Enis. The Commission has concluded its inquiry and, on November 15, 1995, found reasonable cause to believe that Enis violated G.L. c. 268A.

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

1. The Dracut Water Supply District ("District") provides water service for the Town of Dracut.[1/] Policy and management decisions are made at annual district meetings and are carried out by the Dracut Water Commission, a board consisting of three elected water commissioners, through a superintendent appointed by the Dracut Water Commission.

2. At all relevant times, Enis was an elected member of the Dracut Water Commission. As such, Enis was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

3. Enis has a son named Tom. Between 1989 and January 1995, Tom worked for the District. Tom worked part-time during the school year and occasionally full-time during summer and school breaks. His responsibilities included reading water meters, physical labor and general office help. There was no employment application or job posting for the position filled by Tom.

4. Tom was hired to work for the District and during this time Enis was a member of the board involved with the hiring and supervision of District employees. As such, Enis participated in the hiring and supervision of his son.

5. The District paid Tom between $7.50 and $9.00 an hour. During the five year period, Tom earned approximately $30,000.

6. Tom ceased working for the District in January 1995.

7. 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.

8. Hiring decisions and determinations arising from or relating to day-to-day supervision of workers are particular matters.[2/]

9. Enis participated[3/] as water commissioner by hiring and supervising his son's work for the Water District.

10. Tom, as a potential employee, had a financial interest in being hired and in the subsequent supervision of that position. Enis knew of his son's financial interest at the time he participated as a Dracut Water Commissioner, in the hiring and subsequent supervision, of his son.

11. Accordingly, by participating as a Dracut Water Commission member in the hiring and supervision of his son, Enis participated in his official capacity in a particular matter in which he knew an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.

12. Enis cooperated with the Commission's investigation.

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

(1) that Enis pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for his course of conduct in violation of G.L. c. 268A, §19 as stated above;

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

(3) that Enis 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: March 11, 1996

[1/] The District consists of about 90% of the Town of Dracut (6600 homes).

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 545

IN THE MATTER
OF
MARILYN MONDEAU

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Marilyn Mondeau ("Mondeau") 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 November 15, 1995, 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 Mondeau. The Commission has concluded its inquiry and, on February 14, 1996, found reasonable cause to believe that Mondeau violated G.L. c. 268A, §19.

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

1. Mondeau has been an appointed member of the East Bridgewater Wage & Personnel Board (the "Board") since July 1994. As such, Mondeau is a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Board has jurisdiction over wage and personnel issues affecting non-union town employees.[1/] (Policies affecting unionized positions are determined by the Board of Selectmen.[2/])

3. Jeanne Bennett ("Bennett") is Mondeau's daughter. Bennett has been the Police Department administrative specialist since 1990.

4. During a Board meeting on March 15, 1995, Mondeau seconded a motion to maintain an existing wage pay grid for non-union administrative positions.[3/] The motion carried unanimously. The Board also voted to increase each step in the grid by 3% to reflect a cost of living adjustment. Mondeau participated in the discussion and voting of these matters.

5. The 3% increase would allow anyone below step 6, the highest step on the grid, to receive a step increase and the 3% increase until they reached step 6. Other than the director of Elder Affairs, Bennett was the only employee who had not yet reached step 6.

6. As of March 15, 1995, Bennett was at step 4 in her position. Under the amended wage grid, which first had to be approved by Town Meeting, Bennett's pay would increase between 6% and 7% (from $25,348 to $27,277).

7. When she discussed and voted in favor of maintaining the grid and approving a 3% across-the-board increase, Mondeau was aware that her daughter was one of the employees not yet at the highest step.

8. The grid was approved by town meeting vote in June 1995.

9. General Law c. 268A, §19, in pertinent part, prohibits a municipal employee from participating as such in a particular matter[4/] in which to her knowledge a member of her immediate family[5/] has a financial interest.

10. The decisions to maintain the wage grid and to approve an across-the-board 3% increase for non-union administrative employees were particular matters.

11. Mondeau participated[6/] in those particular matters by discussing both issues, seconding the motion regarding the grid, and voting in favor of maintaining the grid and approving the 3% increase.

12. Mondeau's daughter had a financial interest in those decisions by virtue of the fact that as the Police Department administrative assistant not yet at the top step on the wage grid, she had an interest in the grid being maintained, as well as an obvious interest in any across-the-board increase.

13. Mondeau was aware of her daughter's financial interest in these matters.

14. Therefore, by acting as described above, Mondeau participated as a Wage & Personnel Board member in a particular matter in which to her knowledge a family member had a financial interest, thereby violating §19.[7/]

15. Mondeau cooperated with the Commission's investigation.

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

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

(2) that Mondeau 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: March 11, 1996

[1/] Planning Board clerk, Police Department administrative specialist, Water Department administrative assistant, Elder Affairs director, and selectmen administrative assistant (as of October 1, 1995).

[2/] The three members of the Board of Selectmen also serve as members of the Wage & Personnel Board.

[3/] This grid consists of six grade steps.

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

[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/] In her defense, Mondeau observes that she believed she could participate because these matters involved several people, and not just her daughter. Mondeau was mistaken in her understanding. The Commission has made clear that a municipal employee may not participate in a raise affecting an immediate family member even if it also involves many other municipal employees. *In re Goodreault*, 1987 SEC 280 (disposition agreement in which a Haverhill city councillor paid a $500 fine for violating §19 by participating as a city councillor in approving a two-page schedule of proposed salary increases for city employees, including her brother as mayor).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 546

IN THE MATTER
OF
LOUIS ZWINGELSTEIN

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Louis Zwingelstein ("Zwingelstein") 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 11, 1995, 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 Zwingelstein. The Commission has concluded its inquiry and, on February 14, 1996, found reasonable cause to believe that Zwingelstein violated G.L. c. 268A, §§17 and 19.

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

1. Zwingelstein was, during the time relevant, a Sheffield Conservation Commission member. As such, Zwingelstein was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. During the time relevant, Zwingelstein has owned and is president of Soil Tech, Inc. ("Soil Tech"), a Massachusetts corporation which provides a wide range of engineering consulting services. Zwingelstein receives a weekly salary from Soil Tech.

3. In or about December 1993, William Harris, a Sheffield resident, hired Soil Tech to design a plan for a fire pond that Harris wanted to build on his property in Sheffield.

4. Zwingelstein prepared the design, completing it on or about January 4, 1994. Harris paid Soil Tech for this design. Part of Zwingelstein's Soil Tech salary was attributable to the work he did on this design.[1/]

5. In or about late December 1993, Harris applied to the Sheffield Conservation Commission for a determination of applicability regarding his intention to construct the pond.[2/]

6. On January 28, 1994, the Conservation Commission signed Harris' determination of applicability (for permission to dig monitor wells to verify water levels), finding that although the work was within a buffer zone, it would not alter any wetlands. Zwingelstein participated in this by discussing and signing the determination of applicability.

7. In September 1994 (prior to September 22, 1994), Harris submitted a Notice of Intent to the Conservation Commission regarding his plan to construct the above pond.[3/] The drawing submitted in connection with the Notice of Intent was based on the design prepared by Zwingelstein discussed above.

8. At a September 22, 1994 public hearing, the Conservation Commission reviewed Harris' Notice of Intent. Zwingelstein involved himself in the discussion of the Notice of Intent by, as a Conservation Commission member, making comments in support of the project. At that time, the Commission continued the hearing, and decided to conduct a site visit. Zwingelstein supported those decisions.

9. On October 10, 1994, Zwingelstein (as a Conservation Commission member), along with certain other members of the Commission, viewed the site.[4/]

10. On October 13, 1994, the Conservation Commission resumed the public hearing regarding the Harris Notice of Intent. Zwingelstein, acting as a Conservation Commission member, involved himself in the discussion. After some extensive discussion, the Commission, with Zwingelstein concurring, agreed to continue the hearing.

11. The Conservation Commission next considered the Notice of Intent on October 27, 1994. The Commission approved the Notice of Intent by a 2 to 1 vote. Zwingelstein was not present. According to Zwingelstein, he did not attend this meeting because, as he understood the conflict of interest law, while he could act as a private engineer regarding matters that would come before his board, and while he could discuss those matters as a member of the board, he could not participate in definitive votes on any such matters.[5/]

12. At its October 27, 1994 meeting, the Conservation Commission decided to issue an Order of Conditions with the following conditions for the project: compliance with Fire Department fire pond standards; mulch would be made out of straw or hay from adjacent fields; pesticide, herbicide or any other chemical application would be regulated within the resource area of the project and the buffer zone; and the project would be carried out between July 1 and October 30, 1994.[6/]

13. On January 25, 1995, Zwingelstein resigned as a Conservation Commission member.

14. Section 17(a) of G.L. c. 268A prohibits a municipal employee from directly or indirectly receiving compensation from anyone other than the municipality in relation to a particular matter in which the municipality has a direct and substantial interest.

15. The decisions made by the Conservation Commission regarding the determination of applicability and the notice of intent were particular matters.

16. The town had a direct and substantial interest in those particular matters.

17. Zwingelstein received $1,100 (Harris paid to Soil Tech) for designing a plan which he knew would go before the Conservation Commission in relation to the notice of intent.

18. Therefore, by indirectly receiving compensation from Harris for designing a plan in relation to the Conservation Commission's decision regarding the notice of intent, Zwingelstein received compensation in relation to a particular matter in which the town had a direct and substantial interest, thereby violating §17(a).

19. Section 17(c) of G.L. c. 268A prohibits a municipal employee from acting as agent or attorney for anyone other than the municipality in relation to a particular matter in which the town has a direct and substantial interest.

20. By preparing and placing his initials on the above described plan, where he knew that plan was going to be submitted to the Conservation Commission, Zwingelstein acted as Harris' agent in relation to a particular matter in which the town had a direct and substantial interest, thereby violating §17(c).

21. Except as otherwise permitted by that section,[7/] General Law c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he, a member of his immediate family, or a business organization the employee is involved with has a financial interest.

22. As discussed above, the decisions by the Conservation Commission regarding the determination

of applicability and notice of intent were particular matters.[8/]

23. Zwingelstein participated[9/] in the decision regarding the determination of applicability by discussing it at the January 1994 Conservation Commission meeting, and by signing the determination. He participated in the Notice of Intent by discussing the issue at Conservation Commission meetings on September 22, 1994 and October 27, 1994; and by going on the site visit on October 10, 1994.

24. At the time he so acted, Zwingelstein was aware that Soil Tech would be the clerk of the works for the project if the Conservation Commission approved the project. Consequently, he knew that he and/or a business organization by which he was employed had a financial interest in these particular matters.

25. Therefore, by acting as described above, Zwingelstein participated as a Conservation Commission member in particular matters in which to his knowledge he and/or a business organization by which he was employed had a financial interest, thereby violating §19.

26. Zwingelstein cooperated with the Commission's investigation.

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

(1) that Zwingelstein pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating G.L. c. 268A, §§17 and 19;

(2) that Zwingelstein 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: March 11, 1996

[1/] Harris paid Soil Tech approximately $1,100 for this design work. In addition, Zwingelstein would supervise the construction of the fire pond, discussed infra.

[2/] A determination of applicability is a filing required with the Conservation Commission for projects near wetlands, per G.L. c. 131, §40 (Massachusetts Wetlands Protection Act).

[3/] A Notice of Intent is a filing required when a project takes place within 100 feet of a "buffer zone" (wetlands, river, lakes or other bodies of water). The notice describes the proposed project and how it would affect the buffer zone.

[4/] The purpose of a Conservation Commission site visit in connection with a Notice of Intent is to view the project site and ask questions. Site visits are not required, and are not conducted for all projects.

[5/] As is discussed infra, Zwingelstein's understanding of the law was incorrect.

[6/] Zwingelstein terminated his and his company's involvement with the project in June 1995, after being contacted by the State Ethics Commission. Thus, he did not serve as clerk of the works on the project.

[7/] None of the exceptions applies.

[8/] "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).

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 547

IN THE MATTER
OF
CHARLES F. FLAHERTY, JR.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Charles F. Flaherty, Jr. ("Flaherty") 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 14, 1996, the United States Attorney's Office and Flaherty brought to the Commission's attention information indicating that he had violated the conflict of interest law, G.L. c. 268A, and the financial disclosure law, G.L. c. 268B.[1/] The Commission has reviewed the facts, and on March 22, 1996, voted to find reasonable cause to believe that Flaherty violated G.L. c. 268A, §3(b) and §23 and G. L. c. 268B, §6.

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

I. Introduction

1. Flaherty has served in the House of Representatives ("House") of the Massachusetts State Legislature ("Legislature") from January 1965 to the present. During that time, Flaherty served as the chairman of the Committee on Counties (1971-1982); chairman of the Committee on Taxation (1983); and Majority Leader (1985-1990). In 1991, Flaherty was elected Speaker of the House and he is currently serving his third term in that office.

2. As a state representative and as Speaker, Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. As Speaker, Flaherty presides over the House, manages and administers the business organization of the House and recommends to the Democratic caucus for their ratification all majority party leadership and committee assignments. Thus, as Speaker, Flaherty has and exercises considerable influence and control over the House, both as to legislative and administrative matters.

3. On November 16, 1988, Flaherty violated G.L. c. 268A, §3(b) by accepting five free skybox tickets to a Boston Celtics game from a lobbyist and an officer of Ackerley Communications of Massachusetts, Inc. ("Ackerley"), a billboard company with business interests before the Legislature.

4. On December 10, 1990, Flaherty signed a Disposition Agreement with the Commission admitting that his receipt of the Celtics tickets from Ackerley violated G.L. c. 268A, §3(b).[2/] The 1990 Disposition Agreement included a promise by Flaherty that he would refrain from any further conduct in violation of G.L. c. 268A, §3(b). During the period here relevant, Flaherty was aware that his receipt of gratuities, of the type and under the circumstances described herein below, would violate G.L. c. 268A, §3(b).

5. From July 1990 to August 1992, notwithstanding Flaherty's knowledge of the conflict law and despite the 1990 Disposition Agreement, Flaherty accepted and received gratuities from lobbyists, lobbying groups and individuals with business interests before the Legislature, including the use of vacation homes on 13 separate occasions (totaling more than 62 days) for himself and his guests,[3/] with a total value of approximately $13,175, as described herein below.

II. The Newport Condominium

6. In 1991-1992, Abraham Gosman ("Gosman") was a controlling shareholder, a member of the board of directors and chief executive officer of the Mediplex Group, Inc. ("Mediplex"), a company that operates nursing homes and other medical treatment facilities in Massachusetts and elsewhere. Mediplex's business is regulated by the Commonwealth of Massachusetts, and Mediplex was subject to the acts of the Legislature, at the times here relevant.

7. During the period here relevant, Gosman was also involved in real estate development projects in Massachusetts. During 1992, Gosman attempted to purchase and renovate the former Sears Building in the Fenway area of Boston. Gosman planned to convert the Sears Building into a multi-use medical building and rent space to nearby hospitals. The Sears Building project had an estimated cost of more than $120 million. Gosman withdrew from the Sears Building project in late 1992 and it was not completed.

8. As part of the Sears Building project, Gosman sought a variety of favorable actions from federal, state and municipal agencies. Gosman needed approvals and permits from Boston, state and federal agencies for issues relating to the environment, regulation of health care facilities, transportation, zoning and taxes. Gosman also considered financing the project with bonds issued by the Massachusetts Industrial Finance Agency. In addition, in 1992, legislation pending before the House ("The Rivers Bill") would have regulated development near rivers and streams, and would have potentially affected the Sears Building Project. The Rivers Bill was never enacted.

9. During the period 1991-1992, the Legislature considered a variety of bills that affected Gosman's business interests. On a continuing basis, the Legislature acted on general legislation that affected the rates, taxes, worker's compensation obligations and insurance eligibility of health care facilities in the Commonwealth, including but not limited to Mediplex's facilities.

10. Robert Cataldo ("Cataldo") has been associated with Gosman's business interests from approximately 1985 to the present. Although he was not a registered legislative agent in Massachusetts, Cataldo contacted public officials, including Massachusetts legislators, on behalf of Gosman's business interests. In 1992, Gosman asked Cataldo to participate in the leasing and permitting for the Sears Building project. Beginning in 1993, Cataldo became a member of the board of directors of Mediplex.

11. During the period here relevant, Gosman owned a luxury, top floor, five bedroom condominium in Newport, Rhode Island. Gosman from time to time allowed some of his family members, employees and friends to use the Newport condominium without charge.

12. In or about April, 1991, Cataldo offered Flaherty use of Gosman's Newport condominium. In or about April 1991, Cataldo informed Gosman that he had invited Flaherty to stay at the Newport condominium.

13. Flaherty and his personal guests used the Newport condominium a total of five times, on the following dates:

a. April 12-14, 1991;
b. July 8-9, 1991;
c. December 8-9, 1991;
d. February 22-23, 1992; and
e. July 18-26, 1992.

14. Neither Gosman nor Cataldo was present when Flaherty used the Newport condominium. The only people present at the Newport condominium were Flaherty and his guests.

15. When Flaherty used the Newport condominium, he knew it was owned by Gosman and knew that Cataldo was then involved in promoting Gosman's various business interests, which interests involved state legislation and/or regulatory matters as to which legislators had influence.

16. The value of Flaherty's and his guests' use of the Newport condominium was approximately $7,000. Flaherty did not pay anything for the use of the Newport condominium.

III. **The Cotuit House**

17. During the period here relevant, Richard Goldberg ("Goldberg") was one of four partners in the Bremen Company, Ltd. ("Bremen Ltd."). Bremen Ltd. and a related trust owned and operated a parking lot in East Boston known as Park 'n Fly. Park 'n Fly was an off-airport parking facility used by travelers at Logan who were parking their cars for one or more days. Goldberg also operated the Goldberg Family Limited Partnership d/b/a Logan Communications ("Logan Communications"), which Goldberg and his family owned and controlled. Logan Communications owned billboards on property near Bremen Ltd.'s parking lot and leased the billboards to advertisers. The business activities of both Bremen Ltd. and Logan Communications were subject to state regulation and affected by the acts of the Legislature.

18. During the 1980's, the Commonwealth began planning to construct a traffic tunnel from Boston, under Boston Harbor, to East Boston. This construction project was known as the Central Artery-Third Harbor Tunnel Project. By the late 1980's, the Commonwealth had indicated that it intended to take all or part of Bremen Ltd.'s parking lot and Logan Communication's billboards by eminent domain as part of the construction of the Central Artery-Third Harbor Tunnel. Goldberg organized his partners' opposition to these eminent domain takings, and, by May 1990, they had retained John E. Murphy ("Murphy"),[4/] who was known to have close ties to Flaherty, to lobby the Legislature on behalf of Bremen Ltd. and Logan Communications. Murphy and Goldberg lobbied the Legislature in the Spring of 1990 to amend a revenue bill with a provision that would have prohibited the Commonwealth from taking Logan Communications' and Bremen Ltd.'s property by eminent domain. The Legislature approved the bill with the amendment sought by Goldberg and Murphy as House Bill No. 5858.

19. In July 1990, Governor Dukakis vetoed the amendment to House Bill No. 5858. In his veto message on July 18, 1990, the Governor indicated that another solution to the issue of the taking of Logan Communications' and Bremen Ltd.'s land should be sought.

20. In late July 1990, Murphy signed a lease to rent a large and luxurious vacation house in Cotuit, Massachusetts ("Cotuit house") for the period of August 1, 1990 to September 4, 1990. Murphy and Goldberg shared the $11,645 cost of this vacation home. Murphy paid $2,000 rent plus $645 for the use of the telephone. Goldberg paid $9,000 rent.

21. In August and early September 1990, Murphy and Goldberg made the Cotuit house available for use by Flaherty, Flaherty's guests and others.

22. Flaherty stayed at the Cotuit house four out of the five weekends of the rental period, plus many weekdays. Murphy and Goldberg and their guests also used the house. In all, Flaherty stayed at the Cotuit house a total of approximately 21-25 calendar days,[5/] a benefit worth at least $2,775 for which Flaherty paid nothing.

23. During the time that he was staying at the Cotuit house, Flaherty knew that: (a) Goldberg was seeking legislative action to help Bremen Ltd. and Logan Communications resist the eminent domain takings; (b) Murphy was lobbying the Legislature on behalf of Goldberg and several other clients; and (c) Murphy and Goldberg were paying for the Cotuit house, although, according to Flaherty, he did not know that Goldberg was paying more than Murphy.

24. During 1990-1992, Murphy lobbied the Legislature on behalf of such clients as racetracks, solid waste incinerators, hospitals, a billboard company, an electric utility, and an entity seeking compensation for an eminent domain taking.[6/]

IV. The Kennebunkport Holidays

25. The Associated Industries of Massachusetts ("AIM") is an association of over 3,000 Massachusetts businesses. One of the purposes of AIM is to lobby the Legislature on behalf of the interests of its members and of the business community at large. During 1990-1992, AIM lobbied the Legislature on numerous bills, including environmental/packaging legislation, reform of the Worker's Compensation System, and taxation.

26. During the period here relevant, Mark Doran ("Doran") was an employee of and a lobbyist for AIM. In the years 1991 and 1992, Doran also had private clients for whom he lobbied.

27. The Choate Group is a private business retained by other entities and businesses to lobby the Legislature. During 1990-1992, the Choate Group lobbied the Legislature on behalf of various business clients.

28. During 1990-1992, Edward E. O'Sullivan ("O'Sullivan") was an employee of and a lobbyist for the Choate Group. O'Sullivan was also the Choate Group's vice-president.

29. During 1990, 1991 and 1992, Doran and O'Sullivan organized multiple day July 4th holiday events for Flaherty and others in Kennebunkport, Maine, where Doran's in-laws had a house. AIM and the Choate Group paid a substantial portion of the expenses of these holidays.

30. Approximately 18 to 25 people attended each of these July 4th holiday events at Kennebunkport. The majority of these people knew each other and were close friends of Flaherty, including Massachusetts lobbyists and legislators. Doran had his friends and family members present.

31. The funds from the Choate Group, AIM and Doran were used to pay for boat rentals, clambakes and other meals, entertainment, and hotel rooms for some of the guests.

32. Flaherty was aware that AIM and the Choate Group had interests in legislation. Flaherty was also aware that AIM and the Choate Group, respectively, employed Doran and O'Sullivan as lobbyists and gave them expense accounts which, among other things, were used to entertain legislators. Although neither Doran nor O'Sullivan informed Flaherty that any lobbying entity subsidized the event, Flaherty nevertheless accepted benefits from Doran and O'Sullivan, did not determine the amounts paid by AIM and the Choate Group, and did not pay his proportionate share, thus accepting a benefit of approximately $2,000.[7/]

V. The Mashpee House

33. Doran also arranged for Flaherty to spend two weekends during 1991 at a vacation home in Mashpee, Massachusetts, owned by a friend of Doran's. The first time Flaherty stayed at the Mashpee house was during Memorial Day weekend, from May 23, 1991 to May 27, 1991. Flaherty invited three friends to accompany him on this visit. The second time that Flaherty stayed at the Mashpee house was with Doran and his wife from June 21, 1991 to June 23, 1991. Flaherty invited a guest. The value of these two visits to Mashpee was approximately $700. Flaherty knew on each of these occasions that Doran had made the arrangements. Flaherty did not pay anything for these two weekend stays in Mashpee.

VI. The Martha's Vineyard Townhouse

34. From 1974 to 1994, Jay Cashman ("Cashman") was a 50% owner of a construction business in Massachusetts known as JM Cashman, Inc. From 1985 to 1994, JM Cashman, Inc. had over $100 million in contracts with the Commonwealth. Among such projects, the company repaired bridges and waterfront facilities, and participated in some of the largest construction projects in Massachusetts, including

the Third Harbor Tunnel and Massachusetts Water Resource Authority Treatment Plant at Deer Island.

35. J.M. Cashman, Inc. is also a member of a construction industry group known as the Construction Industries of Massachusetts ("CIM"). Among its activities, CIM lobbies the Massachusetts Legislature on behalf of the interests of the construction industry. Cashman has held various offices in CIM, including serving as its chairman in 1993-1994, its vice-chairman in 1992-1993, and as a board member from 1986-1992.

36. On an annual basis, the Legislature must vote to authorize the Commonwealth to issue bonds to finance construction projects. During the period here relevant, Cashman lobbied Flaherty several times on behalf of CIM to secure passage of bonding authorization for construction projects. Jay Cashman and another CIM member also met with Flaherty to discuss CIM's position on an initiative petition which sought to repeal a constitutional amendment Flaherty had previously sponsored.

37. At the time here relevant, Edward Carroll ("Carroll") was a friend of the Cashman family.

38. Cashman and other members of his family controlled a limited partnership that owned a two-bedroom townhouse condominium on Martha's Vineyard in an area known as Tashmoo Woods.

39. In 1991, Carroll arranged for Flaherty to use the Cashman vacation townhouse on two occasions: March 22-24, 1991 and July 30, 1992 to August 2, 1992. Flaherty brought personal guests to the Cashman townhouse on both occasions and no member of the Cashman family was present during either visit.

40. When Flaherty used the Martha's Vineyard townhouse, he knew it was Cashman's and knew of Cashman's interest in legislation. It was also Flaherty's understanding that Cashman had approved Flaherty's use of the Martha's Vineyard townhouse.

41. The total value of Flaherty's use of the Cashman townhouse was $700. Flaherty did not pay Cashman anything for the use of the Cashman townhouse.

VII. The Conflict of Interest Law

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

43. Massachusetts legislators are state employees.

44. Anything worth $50 or more is of substantial value for G.L. c. 268A, §3 purposes.[8/]

A. The Newport Condominium

45. By, in 1991 and 1992, accepting the use of the Gosman Newport condominium on four occasions, valued at $7,000, while Flaherty was, recently had been, or soon would be in a position to take official actions which could affect Cataldo and/or Gosman, Flaherty accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Flaherty violated §3(b).[9/10/]

B. The Cotuit House

46. By, in 1990, accepting the use of the Cotuit house from Murphy and Goldberg, which use was valued at no less than $2,775, while Flaherty was, recently had been, or soon would be in a position to take official actions which could affect Goldberg and/or other Murphy clients, Flaherty accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Flaherty violated §3(b).[11/]

C. The Kennebunkport Holidays

47. By accepting the 1990, 1991 and 1992 Kennebunkport July 4th holidays, valued at no less than $2,000, while Flaherty was, recently had been, or soon would be in a position to take official actions which could affect Doran, O'Sullivan, AIM and/or The Choate Group, Flaherty accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Flaherty violated §3(b).[12/] [13/]

D. The Mashpee House

48. By, in 1991, accepting the use of the Mashpee house from Doran on two occasions, valued at $700, while Flaherty was, recently had been, or soon would be in a position to take official actions which could affect Doran, Flaherty accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Flaherty violated §3(b).[14/]

E. The Martha's Vineyard Condominium

49. By, in 1991, accepting the use of the Cashman Martha's Vineyard condominium, valued at $700, while Flaherty was, recently had been, or soon would be in a position to take official actions which could affect Cashman, Flaherty accepted items of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Flaherty violated §3(b).[15/]

IX. Conclusion

Friendship is not a defense regarding any of the foregoing gratuities. The existence of a friendship between a public employee and the giver of a gratuity is not a defense to a G.L. c. 268A, §3 violation unless the friendship was the only motive for the gratuity. *In re Flaherty*, 1991 SEC 498. That was not the case here. Flaherty acknowledges that he had no social relationship with Gosman. Although Flaherty was close personal friends with Murphy and Doran and friendly to varying lesser degrees with the other givers, he nevertheless acknowledges that, in each instance described above, he knew that the givers were in considerable part seeking his official goodwill on behalf of themselves or others who had or would have business interests before the House. This conduct violates G.L. c. 268A, §3(b).

The Commission is aware of no evidence that Flaherty took or promised to take any official action concerning any proposed legislation which would affect any of the registered Massachusetts legislative agents or other specific individuals in return for the gratuities as described above.[16/] However, even if the gratuities were intended only to foster official goodwill and access, they were still impermissible.[17/]

In view of the foregoing violations of G.L. c. 268A, as well as the fact that Flaherty was sanctioned by the Commission in 1990 for receiving unlawful gratuities in violation of G.L. c. 268A, §3(b), the Commission has determined that the public interest would best be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Flaherty:

(1) that Flaherty pay to the Commission the total sum of twenty-six thousand dollars ($26,000) as a civil penalty for violating G.L. c. 268A, §3(b),[18/] and

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

DATE: March 27, 1996

[1/] The Commission first became aware that Flaherty may have violated G.L. c. 268A and G.L. c. 268B in 1993; however, the Commission chose to defer any investigation of these matters pending an inquiry by the U.S. Attorney's Office, which inquiry is now concluded.

[2/] *In re Flaherty*, 1991 SEC 498 ($500 fine and $150 disgorgement).

[3/] One of these occasions arises from Flaherty's staying at a vacation home in Cotuit, Massachusetts during a five-week period that a lobbyist and his client rented this home. Although Flaherty made multiple visits to this home, and stayed approximately 21-25 days in August and September, 1990, these visits are here collectively treated as one of the 13 occasions. Although Flaherty and/or his guests stayed at these vacation homes on 62 calendar days, not all such stays involved his remaining overnight.

[4/] Beginning in or about May 1990, Goldberg and Bremen Ltd. paid a $2,000 per month retainer for Murphy's lobbying services.

[5/] As noted above, not all of these days involved overnight stays.

[6/] The Commission is not aware of any evidence that Murphy lobbied Flaherty regarding Goldberg matters between 1990 and 1992. Murphy did, however, lobby Flaherty regarding some of his other clients' matters during 1991 and 1992.

[7/] July, 1990, $500; July, 1991, $800; and July, 1992, $700.

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

[9/] In determining whether the items of substantial value have been given for or because of official acts or acts within one's official responsibility, 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 *Commission Advisory No. 8: Free Passes* (issued May 14, 1985):

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

[10/] This same conduct also violated G.L. c. 268A, §23(b)(3) which prohibits a public employee from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence the public employee or unduly enjoy his favor in the performance of his official duty.

[11/] This conduct also violated G.L. c. 268A, §23(b)(3). In addition, where the gratuities were provided by a legislative agent and exceeded $100 in a calendar year, their receipt also violated G.L. c. 268B, §6, which prohibits a public employee from knowingly and wilfully accepting from a legislative agent gifts with an aggregate value or $100 or more in a calendar year.

[12/] Flaherty has stated that he was unaware that AIM and The Choate Group subsidized the entertainment during the July 4th gatherings. Nothing in §3 requires that the public official know the ultimate source of an illegal gratuity. All that is required is that the public official know that he is receiving the gratuity for or because of official acts or acts within his official responsibility. On the foregoing facts, that could be inferred even if Flaherty did not know the specific identity of the all donors. In any event, here Flaherty knew that the intermediate sources, Doran and O'Sullivan, were prohibited sources, themselves lobbyists.

[13/] This same conduct also violated G.L. c. 268A, 23(b)(3).

[14/] This conduct also violated G.L. c. 268A, §23(b)(3) and G.L. c. 268B, §6.

[15/] This conduct also violated G.L. c. 268A, §§23(b)(3).

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

[17/] Flaherty has stated that no legislation was discussed during any of the events at issue in the instant Agreement. However, §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free days's outing (a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner), worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors). This rule of law was clearly stated in Flaherty's 1990 Disposition Agreement with the Commission.

[18/] Because the c. 268A, §23 and c. 268B, §6 violations are based on the same facts as the §3 violations, no additional fine is imposed for those violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 548

IN THE MATTER OF ASSOCIATED INDUSTRIES OF MASSACHUSETTS

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and the Associated Industries of Massachusetts ("AIM") 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 22, 1996, the Commission voted to find reasonable cause to believe that AIM violated G.L. c. 268A, §3(a). The Commission and AIM now agree to the following findings of fact and conclusions of law:

1. AIM is an association of over 3,000 Massachusetts businesses. One of the purposes of AIM is to lobby the Legislature on behalf of the interests of its members, the business community at large, and for economic growth and jobs. During 1990-1991, AIM lobbied the Legislature on numerous bills, including bills dealing with taxation, labor/employee law, environmental, energy and health care issues.

2. During the period here relevant, Mark Doran ("Doran") was an employee of and registered legislative agent for AIM. As part of his duties, Doran was to track, monitor and oppose, promote or otherwise seek to influence legislation on behalf of AIM. In 1991 and 1992, Doran also had private clients for whom he lobbied in addition to and separate from his work for AIM.

3. Charles F. Flaherty, Jr. ("Flaherty") has served in the House of Representatives ("House") of the Massachusetts State Legislature ("Legislature") from January 1965 to the present. During that time, Flaherty served as the chairman of the Committee on Counties (1971-1982); chairman of the Committee on Taxation (1983); and Majority Leader (1985-1990). In 1991, Flaherty was elected Speaker of the House and he is currently serving his third term in that office.

4. As a state representative and as Speaker, Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. As Speaker, Flaherty presides over the House, manages and administers the business organization of the House and recommends to the Democratic caucus for their ratification all majority party leadership and committee assignments. Thus, as Speaker, Flaherty has and exercises considerable influence and control over the House, both as to legislative and administrative matters.

5. During 1990 and 1991, Doran participated along with others not associated with AIM in organizing multiple day July 4th holiday events for Flaherty and others in Kennebunkport, Maine. AIM paid $500 and $1,123 in 1990 and 1991, respectively, to subsidize the expenses of these holidays.[1/]

6. Approximately 18 to 25 people attended each of these July 4th holidays at Kennebunkport. The majority of these people knew each other and were close friends of Flaherty, including Massachusetts lobbyists and legislators.

7. The funds from AIM were used by Doran to pay a portion of the cost of certain clambakes and other meals and entertainment for some of the guests, including Flaherty and his guests.

8. Flaherty has acknowledged that the total value of his share of the Kennebunkport July 4th expenditures for 1990 and 1991 combined was at least $1,300.[2/]

9. It is unclear as to how much of this $1,300 in gratuities came to Flaherty from AIM through Doran as opposed to from other sources. AIM acknowledges, however, that its employee Doran provided at least $50 of the gratuities that went to Flaherty at each of the 1990 and 1991 Kennebunkport July 4th holidays.

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

11. Massachusetts legislators are state employees.

12. Anything worth $50 or more is of substantial value for G.L. c. 268A, §3 purposes.[3/]

13. As a business organization, AIM acts through and is responsible for, the conduct of its employees and agents.

14. By, in 1990 and in 1991, giving Flaherty gratuities valued at $50 or more, while Flaherty was, recently had been, or soon would be in a position to take official actions on matters affecting the interests of AIM, Doran gave items of substantial value to Flaherty for or because of official acts performed or to be performed by Flaherty.[4/] Because it is responsible for the conduct of its legislative agent Doran, AIM violated G.L. c. 268A, §3(a).[5/]

15. The Commission is aware of no evidence that AIM sought or requested Flaherty to take any official action concerning any proposed legislation in return for the gratuities as described above.[6/] However, even if the gratuities were intended only to foster official goodwill and access, they were still impermissible.[7/]

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

(1) that AIM pay to the Commission the total sum of $2,000 for violating G.L. c. 268A, §3(a), and

(2) that AIM 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: March 28, 1996

[1/] The $500 in 1990 was used to subsidize the costs of various types of entertainment. The $1,123 in 1991 was for one dinner attended by Flaherty, his guests, and numerous other people.

[2/] July, 1990, $500 and July, 1991, $800.

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

[4/] There is evidence to indicate that, in providing gratuities to Flaherty, Doran was motivated in part by personal friendship with Flaherty. The evidence also indicates, however, that Doran gave the gratuities in substantial part for or because of actions Flaherty could take as a legislator or speaker. Therefore, friendship is not a defense to the §3 violations. See *In re Flaherty*, 1991 SEC 498. For friendship to be a defense to a §3 violation, it must be the only motive for the gratuity. That was not the case here.

[5/] In determining whether the items of substantial value have been given for or because of official acts or for acts within one's official responsibility, 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 *Commission Advisory No. 8: Free Passes* (issued May 14, 1985):

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

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

7/ Section §3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free days's outing (a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner), worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 549

IN THE MATTER
OF
THE CHOATE GROUP

DISPOSITION AGREEMENT

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

On March 22, 1996, the Commission voted to find reasonable cause to believe that The Choate Group violated G.L. c. 268A, §3(a). The Commission and The Choate Group now agree to the following findings of fact and conclusions of law:

1. The Choate Group is a private business retained by other entities and businesses to lobby the Legislature. During 1990-1992, The Choate Group lobbied the Legislature on behalf of various business clients.

2. During 1990-1992, Edward E. O'Sullivan ("O'Sullivan") was an employee of and lobbyist for The Choate Group. O'Sullivan was also The Choate Group's vice-president. As part of his duties, O'Sullivan was to track, monitor and oppose, promote or otherwise seek to influence legislation on behalf of The Choate Group.

3. Charles F. Flaherty, Jr. ("Flaherty") has served in the House of Representatives ("House") of the Massachusetts State Legislature ("Legislature") from January 1965 to the present. During that time, Flaherty served as the chairman of the Committee on Counties (1971-1982); chairman of the Committee on Taxation (1983); and Majority Leader (1985-1990). In 1991, Flaherty was elected Speaker of the House and he is currently serving his third term in that office.

4. As a state representative and as Speaker, Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. As Speaker, Flaherty presides over the House, manages and administers the business organization of the House and recommends to the Democratic caucus for their ratification all majority party leadership and committee assignments. Thus, as Speaker, Flaherty has and exercises considerable influence and control over the House, both as to legislative and administrative matters.

5. During 1990, 1991 and 1992, O'Sullivan participated along with others not associated with The Choate Group in organizing multiple day July 4th holiday events for Flaherty and others in Kennebunkport, Maine. The Choate Group paid a portion of the expenses of each of these events.

6. Approximately 18 to 25 people attended each of these July 4th holidays at Kennebunkport. The majority of these people knew each other and were close friends of Flaherty, including Massachusetts lobbyists and legislators.

7. The funds from The Choate Group were used to pay for boat rentals, clambakes and other meals and entertainment for some of the guests.

8. Flaherty has acknowledged the total value of his share of the Kennebunkport July 4th expenditures for 1990, 1991 and 1992 combined was at least $2,000.1/

9. It is unclear as to how much of this $2,000 in gratuities came to Flaherty from The Choate Group through O'Sullivan as opposed to from other sources. The Choate Group acknowledges, however, that its employee O'Sullivan provided at least $50 of the gratuities that went to Flaherty in each of the three years of the Kennebunkport July 4th holidays.

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

11. Massachusetts legislators are state employees.

12. Anything worth $50 or more is of substantial value for G.L. c. 268A, §3 purposes.[2/]

13. As a business organization, The Choate Group acts through and is responsible for the conduct of its employees, officers and agent.

14. There is evidence to indicate that The Choate Group had instructed O'Sullivan to not spend more than $50 in entertaining any Massachusetts public official prior to these Kennebunkport events.

15. By, in 1990, 1991 and 1992, giving Flaherty gratuities valued at $50 or more, while Flaherty was, recently had been, or soon would be in a position to take official actions on matters affecting the interests of The Choate Group or its clients, O'Sullivan gave items of substantial value to Flaherty for or because of official acts performed or to be performed by Flaherty. Because it is responsible for the conduct of its legislative agent O'Sullivan, The Choate Group violated G.L. c. 268A, §3(a).[3/] [4/]

16. The Commission is aware of no evidence that The Choate Group sought or requested Flaherty to take any official action concerning any proposed legislation in return for the gratuities as described above.[5/] However, even if the gratuities were intended only to foster official goodwill and access, they were still impermissible.[6/]

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

(1) that The Choate Group pay to the Commission the total sum of $3,000 for violating G.L. c. 268A, §3(a), and

(2) that The Choate Group 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: March 28, 1996

[1/] July, 1990, $500; July, 1991 $800; and July, 1992, $700.

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

[3/] In determining whether the items of substantial value have been given for or because of official acts or for acts within one's official responsibility, 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 *Commission Advisory No. 8: Free Passes* (issued May 14, 1985):

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

[4/] The Choate Group is responsible for its employee's actions even if they violated company policy. See, e.g., *In re Ackerley Communications, Inc.*, 1991 SEC 518.

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

[6/] Section 3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Massachusetts Candy and Tobacco Distributors, Inc.*, 1992 SEC 609 (company representing distributors violates §3 by providing a free days's outing (a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner), worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors). This rule of law was clearly stated in Flaherty's 1990 Disposition Agreement with the Commission. *In re Flaherty*, 1991 SEC 498.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 550

IN THE MATTER
OF
ROBERT CATALDO

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Robert Cataldo ("Cataldo") 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 27, 1996, the Commission voted to find reasonable cause to believe that Cataldo violated G.L. c. 268A, §3(a).

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

1. During the period here relevant, Cataldo was a Massachusetts business consultant.

2. In 1991-1992, Abraham Gosman ("Gosman") was the controlling shareholder, a member of the board of directors and chief executive officer of the Mediplex Group, Inc. ("Mediplex"), a company that operates nursing homes and other medical treatment facilities in Massachusetts and elsewhere. Mediplex's business is regulated by the Commonwealth of Massachusetts, and Mediplex was subject to the acts of the Massachusetts State Legislature ("Legislature"), at the times here relevant.

3. During the period here relevant, Gosman was also personally involved in real estate development projects in Massachusetts. During 1992, Gosman attempted to purchase and renovate the former Sears Building in the Fenway area of Boston. Gosman planned to convert the Sears Building into a multi-use medical building and rent space to nearby hospitals. The Sears Building project had an estimated cost of more than $120 million. Gosman withdrew from the Sears Building project in late 1992 and it was not completed.

4. To complete the Sears Building project, Gosman required a variety of favorable actions from federal, state and municipal agencies. Gosman needed approvals and permits from Boston, state and federal agencies for issues relating to the environment, regulation of health care facilities, transportation, zoning and taxes. Gosman also considered financing the project with bonds issued by the Massachusetts Industrial Finance Agency.

5. During 1991 and 1992, the Legislature considered a variety of bills that affected Gosman's business interests. On a continuing basis, the Legislature acted on general legislation that affected the rates, taxes, worker's compensation obligations and insurance eligibility of health care facilities in the Commonwealth, including but not limited to Mediplex's facilities. In addition, in 1992, legislation pending before the House ("The Rivers Bill") would have regulated development near rivers and streams, and would have potentially affected the Sears Building Project. The Rivers Bill was never enacted.

6. Beginning in 1993, Cataldo was also a member of the board of directors of Mediplex. From time to time, Cataldo contacted public officials, including Massachusetts legislators, on behalf of his own and Gosman's business interests. In 1992, Gosman asked Cataldo to participate in the leasing and permitting for the Sears Building project. Gosman promised Cataldo some share of the profits if that project were successful.

7. Charles F. Flaherty, Jr. ("Flaherty") has served in the House of Representatives ("House") of the Legislature from January 1965 to the present. During that time, Flaherty served as the chairman of the Committee on Counties (1971-1982); chairman of the Committee on Taxation (1983); and Majority Leader (1985-1990). In 1991, Flaherty was elected Speaker of the House and he is currently serving his third term in that office.

8. As a state representative and as Speaker, Flaherty participates, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. As Speaker, Flaherty presides over the House, manages and administers the business organization of the House and recommends to the Democratic caucus for their ratification all majority party leadership and committee assignments. Thus, as Speaker, Flaherty has and exercises considerable influence and control over the House, both as to legislative and administrative matters.

9. During the period here relevant, Gosman owned a luxury, top floor, five bedroom condominium in Newport, Rhode Island. Gosman from time to time allowed some of his family members, employees and

friends to use the Newport condominium without charge.

10. In or about April 1991, Cataldo offered Flaherty use of Gosman's Newport condominium. In or about April 1991, Cataldo informed Gosman that he had invited Flaherty to stay at the Newport condominium.

11. Cataldo and Flaherty were friendly, but were not close personal friends.

12. There is evidence to indicate that Cataldo provided Flaherty and his personal guests with the use of the Newport condominium a total of five times, on the following dates:

a. April 12-14, 1991;
b. July 8-9, 1991;
c. December 8-9, 1991;
d. February 22-23, 1992; and
e. July 17-26, 1992.

13. Neither Gosman nor Cataldo was present when Flaherty used the Newport condominium. The only people present at the Gosman condominium were Flaherty's guests.

14. The value of Flaherty's and his guests' use of the Gosman Newport condominium was approximately $7,000. Flaherty did not pay anything for the use of the Gosman condominium.

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

16. Massachusetts legislators are state employees.

17. Anything worth $50 or more is of substantial value for G.L. c. 268A, §3 purposes.[1/]

18. By providing Flaherty with the use of the Newport condominium on five occasions in 1991 and 1992 valued at $7,000, while Flaherty had been, was or soon would be in a position as Speaker to take official actions on matters affecting his own and Gosman's business interests, Cataldo gave items of substantial value to Flaherty for or because of an official act or acts performed or to be performed by Flaherty. In doing so, Cataldo violated §3(a).[2/]

19. The Commission is aware of no evidence that Flaherty was ever asked to take or took any official action concerning any proposed legislation which would affect the financial interests of Gosman or Cataldo or their businesses in return for the gratuities as described above.[3/] However, even if the gratuities were intended only to foster official goodwill and access, they were still impermissible.[4/]

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

(1) that Cataldo pay to the Commission the total sum of seven thousand five hundred dollars ($7,500) as a civil penalty for violating G.L. c. 268A, §3(a), and

(2) that Cataldo 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: March 28, 1996

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

[2/] In determining whether the items of substantial value have been given for or because of official acts or acts within one's official responsibility, 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 *Commission Advisory No. 8: Free Passes* (issued May 14, 1985):

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

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

[4/] Section 3 applies to generalized goodwill-engendering entertainment of legislators by private parties, even where no specific legislation is discussed. *In re Massachusetts Candy and Tobacco Distributors,*

Inc., 1992 SEC 609 (company representing distributors violates §3 by providing a free days's outing (a barbecue lunch, golf or tennis, a cocktail hour and a clam bake dinner), worth over $100 per person, to over 50 legislators, their staffers and family members, with the intent of enhancing the distributors' image with the Legislature and where the legislators were in a position to benefit the distributors). This rule of law was clearly stated in Flaherty's 1990 Disposition Agreement with the Commission. *In re Flaherty*, 1991 SEC 498.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 515

IN THE MATTER
OF
JAMES B. TRIPLETT

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

Michael P. Angelini, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch., Burnes, Larkin and McDonough

Presiding Officer: Commissioner Nonnie S. Burnes, Esq.

DECISION AND ORDER

I. Procedural History

On February 22, 1996, after two days of the Adjudicatory Hearing in this matter, the Petitioner and Respondent filed a Joint Motion for Resolution of the Adjudicatory Proceedings on Certain Charges and Continuation of the Adjudicatory Proceeding Regarding Certain Charges. The Joint Motion requested the following action on certain charges of the Order to Show Cause: (1) that the Commission resolve charges 2, 6 and 8 by authorizing the Commission's Executive Director to execute a Disposition Agreement; (2) that the Commission dismiss charges 1, 3, 4, 5 and 7; and (3) that the Commission continue the adjudicatory proceeding as to charges 9 and 10. Along with the Joint Motion, the Commission was presented with a draft Disposition Agreement signed by the Respondent.[1/]

II. Decision

Pursuant to 930 CMR 1.01:(6)(d), dismissal may be granted only by majority vote of the Commission. After reviewing the parties' requests and the draft Disposition Agreement, we decide that the Joint Motion is **ALLOWED.** Accordingly charges 1, 3, 4, 5 and 7 of the Order to Show Cause are hereby dismissed. The Executive Director is authorized to execute the draft Disposition Agreement by which the Respondent agrees to pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for his course of conduct in violating G.L. c. 268A, §23(b)(3). Finally, the presiding officer will continue the adjudicatory hearing with regard to charges 9 and 10 of the Order to Cause.

DATE: March 27, 1996

[1/] The Petitioner and Respondent also filed with the presiding officer a Motion to Impound the above-referenced Joint Motion for Resolution and draft Disposition Agreement. That motion was allowed by the presiding officer on February 29, 1996 thereby requiring impoundment until the need for such has ended. With the issuance of this Decision and Order, the impoundment of documents shall cease.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 515

IN THE MATTER
OF
JAMES B. TRIPLETT

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and James Triplett ("Triplett") 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 May 25, 1993, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry

found reasonable cause to believe that Triplett violated G.L. c. 268A, §23.

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

1. At all times relevant here, Triplett served as the police chief in the Town of Oxford. As such, Triplett was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Triplett is an attorney, having been admitted to the Massachusetts Bar in 1988. With his admission to the Bar, Triplett began building a small practice as a private attorney, much of it involving Oxford clients.

3. From at least December 1991 until late December 1992, Triplett served as Barbara Kiley's attorney in her efforts to sell the property located at 51 Rocky Hill Road, Oxford. Triplett also served as Barbara Kiley's attorney in a contempt action brought against her in Worcester Probate Court for her failure to make mortgage payments on the 51 Rocky Hill Road property as required by a divorce judgment. Triplett filed his appearance in the contempt proceedings on June 17, 1992, the same date on which the proceedings were resolved with a judicial order holding Barbara Kiley responsible for the mortgage and tax payments on the property.

4. Beginning in February 1991 and ending in March 1993, Triplett was of counsel to the law firm Avis, Eden, Tolins & Rafferty. At some point prior to November 1991, Barbara Kiley of Oxford consulted Triplett as an attorney in connection with a possible personal injury case to be brought on behalf of her son Christopher. In November 1991, Triplett referred the personal injury case to Attorney Richard J. Rafferty, Jr. of Avis, Eden, Tolins & Rafferty. In June 1992, Triplett contacted Barbara Kiley and made arrangements to obtain another written statement from Christopher Kiley in connection with the personal injury case, the original statement having been lost. Christopher Kiley provided Triplett with the statement. On June 19, 1992, Triplett arranged to have the statement delivered to Rafferty.

5. On or about May 29, 1992, the house owned by Barbara Lafleche (formerly known as Barbara Kiley) and Donald LaFleche at 51 Rocky Hill Road burned down. As police chief, Triplett had overall responsibility for the Oxford Police Department's investigation of the fire at 51 Rocky Hill Road. The investigation determined that arson was the probable cause of the fire.

6. As police chief, Triplett assigned various police officers to conduct the investigation, in cooperation with the State Fire Marshall's office.

7. On December 4, 1992, as part of the police arson investigation, Triplett, along with a police detective, interrogated Christopher Kiley at the police station. Kiley was a suspect and was read his rights, including his right to obtain an attorney. Kiley signed a statement indicating he understood his rights and then was interviewed by Triplett and the detective. The interview lasted approximately two hours. Triplett and the detective also interviewed a purported Kiley alibi witness on the same date.

8. Before participating in the arson investigation, Triplett made no disclosure to the Board of Selectmen regarding his above-described attorney-client relationship with Barbara Kiley or the fact that at some point prior to November 1991 he had consulted with Barbara Kiley regarding a potential personal injury case to be brought on behalf of her son Christopher, or that a law firm as to which he was of counsel was then representing Christopher Kiley regarding the suit, Triplett having referred the matter to that firm in November 1991.

9. General Laws c. 268A, §23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him, or unduly enjoy his favor in the performance of his official duties. Section 23(b)(3) further provides that it shall be unreasonable to so conclude if such employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion.

10. By participating as described above as police chief in the arson investigation (1) where Christopher Kiley was then a personal injury law client of a law firm with which Triplett served as of counsel, where Triplett had at some point prior to 1991 consulted with Barbara Kiley regarding Christopher Kiley's personal injury case and in November 1991 referred that matter to the firm, and, even after the arson investigation had started, Triplett assisted that firm regarding Christopher Kiley's lawsuit; and (2) where Kiley's mother was Triplett's law client regarding the sale of the property that was the subject of the investigation, and where he had also acted as her attorney in a court proceeding in June 1992 on a matter which also involved the property; Triplett knowingly acted in a manner which would cause a reasonable person to conclude that Christopher Kiley and his

mother could unduly enjoy his favor in the performance of his official duties as police chief. By doing so, Triplett violated G.L. c. 268A, §23(b)(3).

I.

11. Pursuant to G.L. c. 138, §56, chiefs of police have the responsibility to enforce the state laws regulating the sale of alcohol. Under this authority, Triplett supervises the enforcement of the state alcohol laws by causing to be conducted occasional enforcement actions and regular police inspections of Oxford's alcohol establishments. In addition, during the time relevant herein, Triplett would report to the Board of Selectmen as to each barroom which was authorized a late (2:00 A.M.) closing. The Board's renewal of that late closing privilege would depend significantly on whether any license violations, noise complaints and so forth were reported for the prior six months.

12. Bolero II, Inc. holds an Oxford alcohol license and does business as "Manny's" at 124 Main Street, Oxford. At all times relevant herein, Manny's was one of the largest bars in Oxford, and it had a late closing privilege (along with all other bars in Oxford that had requested the privilege).

13. On January 20, 1990, Lisa DeJesus was injured while a patron at Manny's. As a result of her injury, DeJesus brought a lawsuit against Bolero II, Inc. on June 25, 1990. Between June 1991 and January, 1992 , Triplett helped represent Bolero II, Inc. in its defense of the lawsuit, by assisting in its responses to discovery requests filed by DeJesus and in arranging meetings with various witnesses.

14. Emanuel Leo is the manager of Manny's. Leo is also the president, director and owner of Bolero II, Inc.

15. From 1989 to 1991, Triplett served as Leo's attorney in four real estate transactions.

16. On November 27, 1989, the Ethics Commission advised Triplett in writing that in order to avoid violating the conflict of interest law he should disclose to his appointing authority, the Board of Selectmen, his legal representation of any town business people who held licenses subject to his jurisdiction.

17. Triplett made no disclosure of his representation of Leo and Bolero, II, Inc. to the Oxford Board of Selectmen.

18. By being in a position to direct and, in fact, on several occasions directing police department actions in connection with the enforcement of liquor and other laws affecting Manny's, all while he had a significant private attorney-client relationship with Bolero II, Inc. and Leo, Triplett knowingly acted in a manner which would cause a reasonable person to conclude that Leo and Bolero II, Inc. could unduly enjoy his favor in the performance of his official duties as police chief. By doing so, Triplett violated G.L. c. 268A, §23(b)(3).

II.

19. Lullman Paradis Funeral Home, Inc. is a corporation which does a funeral home business in Oxford. It is substantially owned by Diane Paradis.

20. Triplett served as attorney for Diane Paradis and Lullman Paradis Funeral Home, Inc. in 1989 and was paid for those services on February 14, 1990.

21. In August 1990, Paradis and Lullman Paradis Funeral Home, Inc. submitted a site plan to the Oxford Planning Board for an expansion of the funeral home's parking lot.

22. On August 27, 1990, the Planning Board conducted a public hearing on the parking lot expansion matter[1/] and Triplett testified in his capacity as police chief that the funeral home's parking lot expansion would promote public safety by getting traffic off the street.[2/]

23. During his remarks, Triplett failed to disclose his attorney-client relationship with Paradis and the Lullman Paradis Funeral Home, Inc.

24. By speaking in his capacity as police chief at the Planning Board hearing regarding the funeral home's parking lot plans, and failing to disclose his attorney-client relationships with the funeral home and Paradis, Triplett knowingly acted in a manner which would cause a reasonable person to conclude that Paradis and Lullman Paradis Funeral Home, Inc. could unduly enjoy his favor in the performance of his official duties as police chief. By doing so, Triplett violated G.L. c. 268A, §23(b)(3).

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

(1) that Triplett pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for his course of conduct in violating G.L. c. 268A, §23(b)(3); and

(2) that Triplett 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 3, 1996

[1/] Paradis and the funeral home were represented at this hearing by Oxford attorney Frank Morgan.

[2/] This testimony was consistent with a safety report prepared by the police department safety officer.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 551

IN THE MATTER
OF
FRANCIS H. BEAUDRY

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Francis Beaudry ("Beaudry") 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 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 Beaudry. The Commission has concluded its inquiry and, on February 14, 1996, found reasonable cause to believe that Beaudry violated G.L. c. 268A, §19.

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

1. Beaudry has been an elected member of the Warren Board of Selectmen (the "Board") since May 1993. As such, Beaudry is a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Board has jurisdiction over wage and personnel issues affecting town employees.

3. Joseph O'Keefe ("O'Keefe") is Beaudry's wife's brother. O'Keefe has been a Warren Cemetery Department employee since 1992 as a laborer.

4. During a Board meeting on September 20, 1993, the Board reviewed a list of proposed hourly wage increases for various town positions, including O'Keefe's position with the Cemetery Department.[1/] The proposed figures were to be submitted for approval at the Special Town Meeting which was to take place on September 21, 1993. Beaudry pointed out that Cemetery Department hourly rates appeared low in comparison to rates for other town positions. Beaudry acted as a selectman when he made this comment.

5. As a result of Beaudry's input, the other two selectmen revised the figures for the Cemetery Department.[2/] Beaudry did not participate in the revision of the figures. The Board considered the revised list on September 21, 1993. The Board reached a general consensus to submit the list to Town Meeting for approval. Beaudry joined in this consensus.

6. When he made his comment at the September 20, 1993 Board meeting, Beaudry was aware that his brother-in-law was a Cemetery Department employee.

7. The Town Meeting eventually approved all the increases proposed by the Board. Subsequently, the wage increases were adopted by the Board of Cemetery Commissioners.[3/]

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

9. The decision to submit a list of hourly wage increases to Town Meeting was a particular matter.

10. Beaudry participated[5/] in that particular matter by pointing out that the Cemetery Department wages seemed low in comparison to other department wages, and by joining in the final consensus to submit the proposed list to Town Meeting.

11. Beaudry's brother-in-law, Beaudry's wife's brother, was an immediate family member.[6/]

12. Beaudry's brother-in-law had an obvious financial interest in any salary increase for the position of Cemetery Department laborer.

13. Beaudry was aware of his brother's-in-law financial interest in these matters.

14. Therefore, by acting as described above, Beaudry participated as a Board of Selectmen member in a particular matter in which to his knowledge an immediate family member had a financial interest, thereby violating §19.

15. Beaudry cooperated with the Commission's investigation.

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

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

(2) that Beaudry 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 3, 1996

1/ The cemetery positions were three of fifteen positions which were considered for salary adjustments.

2/ The first figures suggested an hourly wage increase for the position of laborer from $6.50 an hour to $7.00 an hour. After the figures were revised, the wage was increased to $8.00.

3/ Beaudry is a member of the Board of Cemetery Commissioners. He abstained from participation in this matter.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 499

IN THE MATTER OF RAYMOND HEBERT

Appearances: Andrew Lawlor, Esq.[1/]
Stephen P. Fauteux, Esq.
Counsel for Petitioner

William F. Sullivan, Esq.
Counsel for Respondent

Commissioners: Brown, Ch., Burnes, Larkin and McDonough

Presiding Officer: Commissioner George D. Brown, Esq.

DECISION AND ORDER

I. Procedural History

On October 4, 1994, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Raymond Hebert, while he served as the Town of Norton Building Inspector, violated G.L. c. 268A, §3 and §23(b)(3) by his receipt of various gratuities from developers within his jurisdiction and by having private commercial and/or personal relationships with developers under his jurisdiction which he failed to disclose to his appointing authority. Specifically, the OTSC alleged that Thomas Grossi, James Chabot, and Arthur Amaral were developers in Norton who were involved in construction projects in Town during 1990-1991. During this time period, the Respondent allegedly issued various permits to each of these developers and inspected each developer's projects. Allegedly, in July

1991, the Respondent began construction on his private residence at 200 South Worcester Street in Norton. The OTSC alleges that, during the construction of his home, the Respondent accepted a 20% builder's discount for appliances from Grossi, and construction plans, construction framing and excavation services, and 300 feet of waterline from Chabot, in violation of §3. The Petitioner also alleges that, by accepting the builder's discount from Grossi, the plans, services, and waterline from Chabot, and by entering a private commercial relationship with Arthur Amaral to construct his personal residence, at the same time that the builders were subject to his regulation, the Respondent acted in a manner that would cause a reasonable person, having knowledge of the relevant circumstances to conclude that the builders could improperly influence him, or unduly enjoy his favor in the exercise of his official duties, in violation of §23(b)(3).

The Respondent filed an Answer on October 31, 1994 in which he admitted that, from January 7, 1987 until October 3, 1991 he served as the Building Inspector in the Town of Norton, although he denied that he was a municipal employee, as he indicates that, during much of this time his duties were taken away from him. He further admitted that he built a house at 200 South Worcester Street. The Respondent asserted the following affirmative defenses: the action is barred by the statute of limitations; the complaint fails to state a claim upon which relief can be granted; any deficiencies in the Respondent's duties were caused by the actions of the Town of Norton; and any deficiencies in the Respondent's performance of his duties were caused by individuals for whom the Respondent is not responsible. The only affirmative defense which the Respondent pursued prior to hearing was the statute of limitations. The Respondent filed a motion to dismiss on grounds that the conduct was beyond the statute of limitations. 930 CMR 1.01(6)(d). Commissioner Brown,[2/] in a memorandum and order, denied the motion without prejudice on March 15, 1995. The Respondent has not pursued this matter further during these proceedings.

Pre-hearing conferences were held on December 19, 1994 and February 7, 1995, with Commissioner Brown presiding. At these conferences, procedural issues were discussed, primarily focusing on discovery, scheduling, the motion to dismiss, and the potential admissibility of certain FBI testimony at the adjudicatory hearing, as well as settlement.

An adjudicatory hearing was conducted on March 29, 1995, April 4, 1995, April 5, 1995 and April 19, 1995. At the conclusion of the evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR 1.01 (9)(k). The Petitioner and Respondent submitted briefs on October 19, 1995. The parties presented their closing arguments to the full Commission on March 22, 1996. 930 CMR 1.01(9)(e)(5). Deliberations began in executive session on March 27, 1996. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on April 29, 1996.

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.

II. Findings of Fact

1. Between January 1987 and October 3, 1991 Raymond Hebert held the position of Building Inspector and Zoning Enforcement Officer in the Town of Norton. Specifically, during the months of July, August and September, 1991, Hebert performed the duties of Building Inspector. Hebert's appointing authority was the Executive Secretary of the Town of Norton. While Hebert served as the Building Inspector he received salary and benefits from the Town of Norton.

2. The purpose of the state building code is to provide a minimum standard of safety for people using and occupying structures.[3/] A local building inspector enforces the building code through the issuance of permits, inspections during construction, and the investigation of complaints by citizens. A local building inspector may refuse to issue a permit for noncompliance with the building code or zoning ordinance.

3. Raymond Hebert, as Building Inspector, oversaw all private building construction in Norton, and his duties included enforcement of the state building code.[4/] If Raymond Hebert, during his tenure as Building Inspector, found some defect or violation of the building code, he had the authority to order corrections made, or to halt the construction.

4. A building inspector conducts several inspections to determine whether construction is in compliance with the building code. The basic inspections include the foundation inspection, framing inspection, insulation inspection, and occupancy inspection. Additional inspections, in the building inspector's discretion, may be performed while construction is progressing.

5. Raymond Hebert conducted foundation inspections, framing inspections, insulation inspections, and occupancy inspections for housing construction in Norton, during his tenure as building inspector.

6. To obtain a building permit, one must submit an application, appropriate set of construction plans, municipal fee, and other required approvals, such as septic system approval, zoning approval, street opening permits. While he served as Building Inspector, Hebert assisted builders and others in completing permit applications.

7. As Building Inspector, Hebert reviewed construction plans at the beginning of construction to determine that construction would comply with the local zoning ordinances.

8. Raymond Hebert, as Building Inspector, issued foundation permits which permitted a contractor to dig a foundation.

9. Raymond Hebert, as Building Inspector, performed foundation inspections. Foundation inspections involve looking at the soil conditions, footings and foundation at the building site to determine whether the footings meet the requirements of the plan, whether the footings are installed properly and whether there are soil problems that have not been addressed by the contractor.

10. As Building Inspector, Hebert made the decision whether or not to issue building permits to builders in Norton.[5/] A builder cannot begin construction until a building permit had been issued. When deciding whether to issue a building permit, Hebert interpreted the state building code requirements, and the local zoning ordinances. Hebert did not issue a building permit in all cases.

11. During construction a building inspector performs a rough framing inspection. During the rough framing inspection, the building inspector reviews the frame construction of the house before the insulation and sheetrock are applied to determine the appropriate size, and spacing of the structural members and whether proper materials were used for siding, flooring, sheathing, framing, and roof framing.

12. During construction, the building inspector performs an insulation inspection to determine whether the amount of insulation installed is of the proper thickness and proper heat resistance, and whether the method of installation is proper.

13. The occupancy inspection is the final and most important inspection in construction, and is the only inspection required under the state building code. In the final occupancy inspection, a building inspector must determine whether the building is substantially complete, constructed according to the building code, and safe for occupancy.

14. Following the occupancy inspection, the building inspector issues an occupancy permit certifying that the building is safe for occupancy.

15. Raymond Hebert, as Building Inspector, had the authority to deny issuance of an occupancy permit.

16. In financing a new house construction, banks generally require a certificate of occupancy.[6/] If the building inspector does not issue an occupancy permit, transfer of the property from builder to homeowner may be delayed. A delayed occupancy permit can have economic consequences for a developer, including delayed sale of the property.[7/]

17. If a building inspector finds a violation of the local zoning ordinance he is required to notify the appropriate person, and if the violation is not corrected, a building inspector can suspend the building permit until the zoning violations were adequately addressed.

18. During 1990 and 1991, Hebert had disputes with the builders in Norton.[8/]

19. Hebert began construction of a house on a piece of property he owned at 200 South Worcester Street in late July or early August 1991.

20. In 1990-1991, Thomas Grossi was engaged in the business of purchasing property and building houses through the business entity FAL Inc.

21. In 1991, Raymond Hebert, as Building Inspector, issued the following permits to Thomas Grossi, his wife Dora Grossi, or FAL Inc.:

Foundation Permit, 162 Woodland Road (April 17, 1991); Building Permit, 162 Woodland Road (April 23, 1991); Occupancy Permit, 162 Woodland Road (July 24, 1991); Building Permit, 10 Island Road (July 3, 1991); Foundation Permit, 6 Cedar Road (July 31, 1991); Building Permit, 6 Cedar Road (July 31, 1991).

22. As Building Inspector, Hebert performed the foundation, framing, insulation, and occupancy inspections for the construction at 162 Woodland Rd.

and 10 Island Rd., and he performed the foundation, framing, and insulation inspections for 6 Cedar Road.

23. As Building Inspector, Hebert had declined to issue Grossi permits for two contiguous lots.

24. While he was a Building Inspector and while he was building his house, Hebert knew Grossi was a developer in Town who was likely to come before him for permits and inspections in the future.

25. Mr. Grossi offered to purchase the appliances for Hebert's house through the account of a friend, Kelly Lewis, at Caloric Appliance Company. In 1991, Kelly Lewis, a real estate agent, had an account at Caloric Appliance Company that permitted her to purchase appliances at a discount.

26. During the relevant time frame, the Caloric Appliance Company operated a wholesale warehouse which provided a discount on the purchase of major appliances to customers, such as appliance dealers, builders, and apartment managers and others in the trades who opened an account. There was no cost to open an account at Caloric Appliance Company. According to industry practice, the wholesale discount averaged 25% from the retail prices.[9/]

27. Hebert accepted Grossi's offer to obtain appliances for his house at a discount from Caloric Appliance Company.

28. Grossi utilized Kelly Lewis' account to purchase a stove, refrigerator, dishwasher and range hood for Hebert's house.[10/] Grossi paid approximately $930 for the appliances.[11/]

29. Grossi charged Hebert what the cost to Grossi was and Hebert reimbursed Grossi for 100% of the cost.

30. Hebert received a discount on the appliances from the retail price.[12/]

31. Grossi offered to use his truck to pick up the appliances from the warehouse in Taunton. Hebert accepted Grossi's offer to use Grossi's truck. Hebert and Grossi took Grossi's pick-up truck to obtain the appliances from the warehouse. Grossi did not charge Hebert for the use of the pick-up truck, and Hebert did not pay for the use of the truck.

32. Grossi has known Raymond Hebert and his family since Hebert was 14 or 15 years old.

33. Grossi became social friends with Hebert in 1988-1989 when Grossi began buying property in Norton.

34. In 1990-1991, Grossi met Hebert for lunch approximately three times each week.

35. Grossi attended several social events with Hebert during the relevant time period, and had been a guest at Hebert's apartment.

36. Grossi and Hebert considered themselves to be personal friends.

37. After Hebert was terminated as Building Inspector, the friendship continued and became closer. After the termination, Grossi lent Raymond Hebert money for Hebert's living expenses.

38. In 1990-1991, James Chabot was a partner in J & R Enterprise, Inc. ("J&R"). J & R is a corporation organized to build homes for a profit. Chabot's partner in 1990-1991 was Ronald Coolidge who, at the relevant time, was the Alternate Building Inspector in Norton.

39. In 1990-1991, J & R built approximately 10 houses per year in Norton.[13/]

40. In 1990-1991, Hebert issued J & R the following permits:

building, foundation, occupancy permits for 312A South Worcester Street (June 25, 1991, June 25, 1991, September 4, 1991); building and foundation permits for 320A South Worcester Street (June 25, 1991; June 25, 1991); foundation, building and occupancy permits for 5 Fordham Drive (June 25,1991, June 25, 1991, Sept. 11, 1991); foundation, building and occupancy permits for 18 Fordham Drive (April 8, 1991, April 8, 1991, May 23, 1991); foundation, building and occupancy permits for 1 Island Road (December 21, 1990, February 1, 1991, February 26, 1991); building and occupancy permits for 8 Fordham Road (February 5, 1991, March 29, 1991); foundation, building and occupancy permits for 115 Barros Street (April 11, 1991, May 15, 1991, July 29, 1991); building permit and occupancy permit for 58 West Hodges Street (September 24, 1990; November 15, 1990).

41. As Building Inspector, Hebert performed all of the inspections in connection with the above permits.

42. Hebert began building his home at the same time that J & R was building a house at 5 Fordham Drive, Norton.

43. As Building Inspector, Hebert granted all of the permits for and performed all the inspections for 5 Fordham Drive.

44. At the time Hebert was building his house, he knew that Chabot was a builder in Norton, and that Chabot would likely appear before him, as Building Inspector, for permits and inspections in the future.[14/]

45. At the construction of 8 Fordham Drive, Hebert required J & R to remove a deck from the house in order to obtain an occupancy permit, based on Hebert's interpretation of the zoning ordinance in Norton. Chabot and Coolidge disagreed with Hebert's interpretation of the zoning requirements for 8 Fordham Drive.

46. Hebert's refusal to issue an occupancy permit until action was taken regarding the deck delayed sale of the property at 8 Fordham Drive. J & R lowered the price of the house at 8 Fordham Drive as a result of removing the deck off the house.

47. Following a citizen complaint regarding water in a cellar hole, Hebert, as Building Inspector, issued a temporary cease and desist order at the 58 West Hodges Street J & R construction site.

48. At J & R's request, Hebert, as Building Inspector, wrote a letter, dated November 14, 1990, ordering stone veneer to be removed from the property. J & R requested the letter because Chabot and Coolidge were concerned about the liability of J & R for the veneer which they had not placed on the house.

49. At 1 Island Road, Hebert was going to decline to issue an occupancy permit. Hebert and Chabot had a disagreement over the interpretation of the building code relating to a basement door. Chabot convinced Hebert that Hebert's interpretation of the building code was incorrect.

50. In late April or May 1991, Hebert arrived at the J & R job site at 18 Fordham Drive for an inspection. Chabot had not expected to see Hebert that day and had not requested an inspection.

51. During the course of that inspection Hebert requested a copy of the construction plans for the house on 18 Fordham Drive. Chabot had drawn the plans for 18 Fordham Drive on the computer in his office, by modifying other plans for a prior house.

52. Chabot gave Hebert a copy of the plans and permission to use the plans. Chabot did not charge Hebert a fee for the plans and Hebert did not pay for the plans.

53. Hebert used the plans in the construction of his home.

54. The house at 18 Fordham Drive passed all of Hebert's inspections.

55. On two or three weekends, Chabot stopped by Hebert's job site at 200 South Worcester Street, and volunteered his assistance. At the Hebert job site, Chabot assisted in pre-cutting parts, putting two walls together and building a second floor wall, and using an excavator owned by J & R to backfill around Hebert's foundation.

56. Chabot considers himself an expert framer.[15/]

57. The "going rate" of pay for a framer is $15-$20 per hour.[16/]

58. Chabot spent 16 hours performing framing services at Hebert's job site.[17/] Chabot spent an additional two to four hours providing backfilling services at Hebert's job site.

59. The value of Chabot's services to Hebert was at least $320.[18/]

60. Chabot did not charge Hebert for his services at the construction site and Hebert did not pay Chabot for the services.

61. Hebert purchased waterline for $111.59 for his home.

62. The amount of waterline Hebert purchased was insufficient to finish the construction at 200 South Worcester Street.[19/]

63. At Chabot's job site on Margaret Drive in Norton, Hebert and Arthur Amaral asked Chabot if they could borrow waterline for use in the construction of Hebert's house, and return the coil later.

64. Chabot supplied them with a 300 foot coil of 1" copper tubing waterline, and expected Hebert to return a similar coil of waterline. The value of the coil of waterline was between $100-$200.[20/]

65. Hebert did not pay for or return a similar coil.

66. In 1991, Chabot was also a Planning Board member in Norton. As a Planning Board member, Chabot had an ongoing relationship with Hebert, as the Building Inspector, regarding matters before the Planning Board.

67. Hebert met Chabot for the first time after Hebert became Building Inspector. Chabot considered himself to be a friend, but not a close friend of Hebert's. Chabot considered his dealings with Hebert to be more business than social in nature.

68. Chabot and Hebert had never been to each other's homes. Chabot had lunch or dinner with Hebert on several occasions in seven or eight years, and had attended one seminar with Hebert, but had never attended family gatherings, sporting events or cultural events with Hebert.

69. Arthur Amaral has conducted his construction business through Norton Construction Company and through Doral Realty Trust.

70. During 1990-1991, Arthur Amaral was issued the following permits by Raymond Hebert, as Building Inspector:

> Building Permit, 6 Harvey Street (September 30, 1991); Occupancy Permit, 6 Harvey Street (October 2, 1991); Building Permit, 4 Harvey Street (November 12, 1990); Occupancy Permit, 4 Harvey Street (May 6, 1991).

71. As Building Inspector, Hebert conducted inspections of Amaral's work.

72. As Building Inspector, Hebert cited Amaral for a building code violation regarding a foundation.

73. Hebert, while he was building his home, knew Amaral was a builder in Norton, and that it was likely that Amaral would appear before him in the future for permits and inspections.

74. During mid-winter 1991, Hebert discussed with Amaral a plan in which Amaral would act as general contractor and build a house for Hebert.[21/] In exchange for these services, Hebert agreed to pay Amaral between $41,000 and $45,000.[22/]

75. The agreement between Hebert and Amaral was oral and not reduced to a writing.

76. Hebert paid Amaral by several checks and with substantial cash payments. Hebert did not pay Amaral the total agreed upon price.[23/]

77. Amaral performed all of the site work, helped clear trees, excavated the foundation hole, excavated the septic system holes, framed the majority of the house, hung the drywall, did the finish carpentry, and built the decks. When Amaral stopped work at the job site, the house was substantially complete.

78. Hebert and Amaral were good friends. This friendship began before Hebert became Building Inspector.

79. Hebert met Amaral on a social basis five to six times per week.

80. Hebert served as the "best man" at Amaral's wedding.

III. Decision

The Petitioner has alleged violations of G.L. c. 268A, §3 and §23(b)(3). As a preliminary jurisdictional matter we must decide whether Raymond Hebert, at the relevant time, was a municipal employee subject to G.L. c. 268A. G.L. c.268A, §1(g) 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, 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.

The Respondent has admitted that he was the Building Inspector and Zoning Enforcement Officer for the Town of Norton ("Town") between January 1987 and October 3, 1991 and that he was the Building Inspector in July, August, and September 1991 when he was involved in constructing his home. However, in his Answer, the Respondent denied he was a municipal employee as he had been relieved of his duties for much of the time.

We conclude that Raymond Hebert was a municipal employee who was subject to the conflict law. He admits that the position of Building Inspector and Zoning Enforcement Officer is a position in the Town and that he was charged with regulating private construction in the municipality and interpreting the local zoning bylaw. He admitted that the position was an appointed position and that he received the salary

and benefits of a Town employee. He further admits that he held these positions between January 1987 and October 3, 1991. During the most relevant three months, July, August, and September 1991, he performed his duties as Building Inspector by issuing permits and conducting inspections.[24] Accordingly, for the relevant time period of 1990-1991, we find that Raymond Hebert was "a person performing services for or holding an office, position, employment or membership in a municipal agency."

A. Section 3

Section 3(b) provides, in relevant part, that a municipal employee may not, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, ask, demand, exact, solicit, seek, accept, receive or agree to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him.

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

The General Court did not establish a statutory dollar amount for substantial value. Subsequently, in *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976), the Massachusetts Appeals Court opined that it would be "difficult to conceive of circumstances in which $50... could not be found "substantial" in the context of §3(b)." The Commission relied upon the *Famigletti* decision when it established a $50 threshold as a guideline for public employees who are offered gifts, meals, or other benefits during the course of their official employment. See *In re Michael*, 1981 SEC 59,69; *Commission Advisory No. 8 (Free Passes)* (1985). In *EC-COI-93-14*, the Commission re-affirmed its decision that substantial value is $50 or more. The term "substantial value" is not limited to cash gifts and, for example, has been interpreted to include discounts (*In re Michael*, 1981 SEC 59), pavement of home driveway (*In re Murphy*, 1992 SEC 613); services of painter for apartment interior (*In re Shay*, 1992 SEC 591), carpentry services for personal residence (*In re Stanton*, 1992 SEC 580).

In its determination of whether a "for or because of" nexus exists between a public employee's official actions and a gratuity, the Commission has stated

> To establish a violation of §3(b) the Petitioner need not demonstrate either a corrupt intent in an employee's conduct or an understood "quid pro quo" between the receipt of the thing of substantial value and the performance of official acts. (citations omitted) Further, there need be no showing that the performance of any official acts was in fact influenced by the receipt of the thing of substantial value. Under 3(b) the petitioner must establish a relationship between the solicitation or receipt of the thing of substantial value and the performance of an employee's official acts...

In re Antonelli, 1982 SEC 101, 108.

In essence, we have evaluated whether the public employee is in a position to use his authority to assist the donor, whether the donor has substantial interests that have or may be expected to come before the public employee, and whether the official has a prior relationship with the donor. See *EC-COI-92-19; 91-14; 85-42; In re Mahoney*, 1983 SEC 146. If the public employee has a prior private relationship with a donor, the evidence must establish that the friendship or private relationship is the motive for receipt of the gratuity. *In re Flaherty*, 1990 SEC 498, 499 and n.6.

The Ethics Commission's position that no "quid pro quo" is required to be proven is consistent with precedent from the Massachusetts courts. See *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976) (showing of corrupt intent not necessary for conviction under §3). Federal courts, interpreting similar language in the federal gratuities statute (upon which §3 was based), have also concluded that neither a specific intent on the part of the donor or donee is required nor a "quid pro quo". See e.g., *United States v. Bustamante, 45 F.3d 933, 940-941 (5th Cir. 1995);*[25] *United States v. Niederberger*, 580 F.2d 63, 69 (3rd Cir. 1978); *United States v. Evans*, 572 F.2d 455, 479 (5th Cir. 1978); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976). As articulated by the *Evans* court, "it is not necessary that the official

actually engage in identifiable conduct or misconduct nor that any special 'quid pro quo' be contemplated by the parties nor even that the official actually be capable of providing some official act as 'quid pro quo' at the time." *Evans*, 572 F.2d at 479.

1. Thomas Grossi

The Petitioner alleges that, during 1990 and 1991, Thomas Grossi was developing and building houses in the Town of Norton which required various permits and inspections by the building inspector. While Raymond Hebert was constructing his home in the late summer of 1991, Grossi arranged for Hebert to obtain a discount, in excess of $50, on appliances through a friend of Grossi's and Grossi and Hebert used Grossi's truck to deliver the appliances to Mr. Hebert's house.

Hebert admits that Grossi appeared at the house site and offered to purchase Hebert's appliances through the account of Grossi's friend at a wholesale warehouse. Mr. Hebert also admits that he permitted Grossi to make these arrangements and he accepted Grossi's offer that he and Grossi use Grossi's pick-up truck to obtain the appliances. He admits that he paid Grossi in full for the appliances and he agrees that he received a discount on the appliances from the retail price.

The Respondent contends that Grossi offered his assistance with the appliances because of a longstanding friendship between the two men.[26/] The Petitioner counters with the argument that Grossi's assistance in obtaining the discount was to obtain good will with the Building Inspector.

Raymond Hebert knew that Grossi was a developer in Norton. During the summer of 1991, Raymond Hebert took official actions regarding Grossi's building projects.[27/] There was substantial testimony regarding the duties of a building inspector from Paul Piepiora, a state building inspector, whose area includes Norton, and from Raymond Hebert. From this testimony a reasonable inference can be drawn that a building inspector is in a position to exercise discretion and enforcement powers in connection with a developer's construction project in a manner that could create expense and delay for the developer. Hebert also testified that, while he was Building Inspector, he knew it was likely that Grossi would come before him in the future for building permits, and he knew it was likely he would have to do inspections on Grossi's properties.

However, there was substantial testimony concerning the friendship between Grossi and Hebert. Grossi testified that he knew Hebert since he was 14 or 15 years old and Grossi frequented the cafe where Hebert's mother worked. He became social friends with Hebert in 1988-89 when he started buying property in Norton. In 1990-91 Grossi estimates he went out to lunch with Hebert approximately 3 times a week. He also attended other social occasions with Hebert, such as a New Year's Eve party, Hebert's birthday party, Arthur Amaral's wedding. On occasion, Hebert and Grossi had spent the night at each other's homes. Each man considered the other to be a friend. Of significance, they became closer friends after Hebert was terminated as Building Inspector. They spent more time together and Grossi provided Hebert with an unsolicited loan to help Hebert with his expenses.

We find that Grossi and Hebert's testimony regarding their relationship is credible. We conclude that the friendship was the motive for Hebert's acceptance of the discount. Accordingly, the Petitioner has not proven, by a preponderance of the evidence that Hebert, while Building Inspector, accepted a gratuity for or because of any official action or action to be performed. Therefore, G.L. c. 268A, §3 has not been violated.[28/]

2. James Chabot

The Petitioner alleges that Hebert accepted construction plans, 300 feet of waterline, and assistance with framing and excavation at his home from James Chabot in violation of §3.[29/]

i. Construction Plans

Hebert admitted, in his testimony, that he asked Chabot for a copy of the construction plans that Chabot had prepared for 18 Fordham Drive and that he did not pay for the plans. Chabot testified that this solicitation occurred, on one weekend day in late April or May 1991, when Hebert arrived unexpectedly at the job site at 18 Fordham Drive for an inspection. Chabot gave Hebert permission to use the plans and Hebert used these plans in the construction of his home. Chabot had originally prepared these plans for 18 Fordham Drive on the computer in his office, by modifying other plans for a prior house.

Although both parties agree that a copy of construction plans was given to Hebert, there is a question whether the state of the evidence is such that the Commission could ascertain by a preponderance of the evidence, whether the plans are an item of substantial value.

Based on the state of the evidence before us, we conclude that the Petitioner has not met its burden of proof. There is insufficient reliable and credible

evidence from which we can find that the construction plans are an item of substantial value.

Mr. Piepiora, the state building inspector, was asked what the typical cost of an architectural set of drawings for a single family house would be and he responded with a guess "I really don't know what the cost would be I would suspect, my guess, would be they could range from $200 to $800 depending on the level of detail. I really don't know." We do not find that Mr. Piepiora has the requisite knowledge or expertise to provide an opinion regarding the value of construction plans. Additionally, his answer was not framed within the context of the particular plans at issue.

Mr. Chabot testified that he spent an estimated eight hours preparing the plans. He testified that he had a gross income of $140,000 per year, based on an average 10 hour workday. Petitioner asks us to use these figures to find that the cost of Chabot's time to prepare the plans was $40 per hour. However, Chabot testified that he does not charge to prepare plans, nor does he charge clients by the hour. He charges the client a package deal for the construction of a home and does not know the value of his services to prepare a plan. Mr. Chabot's former business partner, Ronald Coolidge, testified that he did not know the value of the copy of the plans. We consider the hourly rate a hypothetical figure and, given Chabot's testimony, we do not find that the rate has sufficient indicia of reliability for us to draw a reasonable inference of value. Accordingly, we conclude that the Petitioner has not proven, by a preponderance of the evidence, that acceptance of the construction plans was an item of substantial value, violative of §3.[30/]

ii. Construction Services

Hebert, in his testimony, acknowledged that Chabot worked on his home on some weekends, that he assisted in putting up the second floor wall, assisted in framing, and assisted in backfilling. Hebert admitted that he did not pay Chabot for these services. Chabot testified that he stopped at Hebert's building site to "give him a hand" in the initial framing on two or three weekends. He assisted in pre-cutting parts one day, assisted in putting a couple of walls together, and worked on building the front second floor wall. Chabot also testified that, on one weekend, he provided the use of his excavator and backfilled around Hebert's foundation. Chabot estimated he spent 2-4 hours backfilling at Hebert's house. He spent 16 hours framing Hebert's house.

Chabot testified that, in his experience with hiring framers at J & R, the going rate of pay was $15-$20 per hour. We find that Chabot's testimony, based on his personal experience at J & R and his knowledge of the construction trade regarding the rate of pay for framers, is credible and reliable. We conclude that Hebert received services from Chabot valued, at a minimum, at $320, and that these services constituted an item of substantial value under §3.[31/]

The Respondent argues that, even if the services are of substantial value, the services were not given "for or because of official acts." He asserts that Chabot helped him "for the fun of it" and that building his house was similar to a "barn raising". We do not find this testimony credible. Although Chabot testified that he considered Hebert a friend, he characterized the relationship as more business than friendship. The relationship did not develop until after Hebert became Building Inspector. They did not go to each other's homes and their social interactions were infrequent. There is no evidence that the friendship continued or became stronger after Hebert was terminated as Building Inspector. We note that, in the year after Hebert was terminated as Building Inspector, Chabot and Hebert ran against each other for the office of selectman. On this evidence, we are unable to draw a reasonable inference that the services were received by Hebert because of friendship.

Chabot was a developer who, in 1990-1991, did a significant amount of construction business in Norton.[32/] In 1990-1991 Hebert issued J&R its permits, inspected its properties, and issued the occupancy permits.[33/] Significantly, J & R was building a house at 5 Fordham Drive during the same time period that Hebert was building his house. Hebert performed all the inspections and granted all the permits for 5 Fordham Drive. Hebert testified that, at the time he was building his house, he knew Chabot was a builder in Town, he knew it was likely in the future that he would be issuing permits and inspecting Chabot properties.

We recognize that a local building inspector has substantial regulatory authority over local builders and developers. As Mr. Hebert acknowledges, building inspectors may decline to issue building permits, thus preventing the start of construction. Raymond Hebert, as Building Inspector, at times, declined to issue a building permit or an occupancy permit. Building inspectors may halt or shut down construction, creating delay and expense for builders. The denial of an occupancy permit can delay the sale of the property. Building inspectors also exercise discretion in the thoroughness of their inspections and in their

interpretation of the language and requirements of the building code or local zoning ordinance.

Hebert admitted that (in 1990 and 1991) he "crossed swords" and had disputes with builders over the interpretation of the building code. Chabot testified that he tried to avoid Hebert when Hebert was in a "bad mood." Hebert had made decisions against J&R's financial interest. At 8 Fordham Drive, Hebert required J&R to remove a deck from the house in order to obtain an occupancy permit, which upset the principals at J&R. Additionally, he issued a cease and desist order temporarily at West Hodges St. after a complaint of water in a cellar hole. A dispute had also arisen over the occupancy permit for 1 Island Rd, which was issued at the end of February 1991.

Hebert also assisted Chabot and took official actions which benefitted J&R. J&R requested that Hebert write a letter to the owner of the West Hodges St. property, who had put stone veneer on the front of the house.[34/] Hebert wrote the letter, dated November 14, 1990.

On the basis of this evidence, we find that Chabot had substantial interests in matters coming before Hebert and that Hebert was in a position to and did exercise authority over Chabot before and during the time that Hebert accepted free construction services. See *EC-COI-92-19; 91-14; 85-42.*

As a defense, Hebert denies that he was in a position to give Chabot favors or that he treated Chabot differently from other developers in Norton, or that he gave some developers preferential treatment. We agree that there is no evidence that Hebert gave Chabot a quid pro quo in exchange for his services. To find a violation of §3, proof of a quid pro quo is not required or necessary. See e.g., *United States v. Bustamante*, 45 F.3d 933, 940-941 (5th Cir. 1995); *In re Antonelli*, 1982 SEC 101, 108. Therefore, we reject Hebert's defense.

We find, by a preponderance of the evidence, that Hebert received construction services for his personal benefit from Chabot for or because of his official actions or actions to be performed.

iii. Waterline

Chabot testified that, while he was on a job site on Margaret Drive in Norton, he was approached by Hebert and Amaral. He was informed that they were installing waterline at Hebert's house, had discovered that they did not have sufficient line to complete the work, and questioned whether they could borrow some waterline and return the coil later. Chabot supplied them with a 300 foot coil of 1" copper tubing waterline. He estimated the value at between $100-$200. Chabot gave Hebert the coil of waterline and asked him to return a similar coil. Hebert did not return the coil.

Hebert testified that had no knowledge of borrowed waterline. He stated that he prepared a check for $111.59 for waterline and that the plumber took the check to the store and purchased the waterline.

We find Chabot's testimony credible and not inconsistent with Hebert's testimony. While Hebert purchased waterline, Chabot testified that he provided waterline because the amount Hebert had was inadequate.

Additionally, we find Chabot's testimony regarding the value of the waterline credible and reliable, given the cost to him and his substantial experience building homes, all of which would require waterline. We find that the waterline Hebert received from Chabot was of substantial value for purposes of §3. For the reasons stated above regarding the acceptance of free construction services, we also find that the receipt of the waterline was for or because of official actions or actions to be performed, and was to be used by Hebert in the construction of his personal residence.

Therefore, we conclude that the Respondent violated §3 by accepting free construction services and waterline from James Chabot.

B. Section 23(b)(3)

The Petitioner alleges that, by entering a private commercial relationship with Arthur Amaral, a builder whom he regulated, Hebert acted in a manner that would cause a reasonable person to conclude that the builder could improperly influence him or unduly enjoy his favor in the performance of his official duties in violation of G.L. c. 268A, §23(b)(3). The Petitioner also alleges that, by accepting a discount, construction plans, waterline and labor from James Chabot and Thomas Grossi, builders whom he regulated, Hebert acted in a manner that would cause a reasonable person to conclude that the builders could improperly influence him or unduly enjoy his favor in violation of G.L. c. 268A, §23(b)(3).

Section 23(b)(3) of the conflict of interest law is the standards of conduct section and provides that

> [n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

The Commission has long held that §23(b)(3) is applicable where a public employee does, or may perform, actions in his official capacity which will affect a party with whom he has a significant private relationship. See e.g., *EC-COI-92-7; 89-16; In re Foresteire*, 1992 SEC 590; *In re Cobb*, 1992 SEC 576; *In re Garvey*, 1990 SEC 504; *In re Keverian*, 1990 SEC 460. The Commission has stated that

> [w]e have recognized that the inherently exploitable nature of public employees' private business relationships with those under their jurisdiction presents serious problems even without an actual finding that the public employee actively solicited the business....In the Commission's view, the reason for this prohibition is two-fold. First, such conduct raises questions about the public employee's objectivity and impartiality. For example, if lay-offs or cutbacks are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy such a relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse. Vendors and subordinates may feel compelled to provide private services where they would not otherwise do so. And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains.

EC-COI-92-7 (citing *In re Keverian*, 1990 SEC 460, 462). In *EC-COI-92-7*, the Commission reiterated that a written public disclosure from a public employee to his appointing authority was mandatory if the public employee was in a position to take official actions regarding a private party with whom the public employee has a private business relationship. The disclosure should include facts indicating that the business relationship is entirely voluntary on the part of the private party and that the private party, not the public employee initiated the relationship, if the relationship commenced after the employee's public employment began. *Id.*

The Commission has also required a written disclosure under §23(b)(3) when the private business relationship is based, in large part, on friendship between the parties. For example, in *In re Keverian*, 1990 SEC 460, the House Speaker had a "50 year history of family, cultural, ethnic and friendship ties between" the House Speaker and a rug dealer who had a contract with the House Speaker's office. The dealer stored, cleaned and repaired the House Speaker's rugs, sold rugs to him at or slightly above cost, and allowed the Speaker to keep rugs on consignment for long periods of time without paying for them or returning them. *Id.* at 462. The Commission stated that "[w]hile the evidence indicates that [the dealer] was motivated by friendship in providing these favors, in the commission's view these personal ties and favors only serve to enhance the appearance of favoritism that arises when a public official has private dealings with a vendor who does business with his office." *Id.* at 463, n.2.

1. Arthur Amaral

The Petitioner has alleged that, by entering a private commercial relationship with Arthur Amaral, a builder whom Hebert regulated, the Respondent violated §23(b)(3). The Respondent asserts that, taking the evidence most favorable to him, a reasonable person could not conclude that Raymond Hebert was unduly influenced. The Respondent misses the point. Section 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the Respondent actually gave preferential treatment.[35] The Legislature, in passing this standard of conduct, focused on the perceptions of the citizens of the community, not the perceptions of the players in the situation. As the Commission has recently stated, it "will evaluate whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest." *In re Flanagan*, 1996 SEC 757.

Here, it is not seriously disputed that Hebert and Arthur Amaral had a longstanding friendship, which

existed prior to Hebert's appointment as Building Inspector. In addition to this friendship, Hebert entered a private commercial relationship with Amaral to build his personal residence. According to Hebert, Amaral was going to control all aspects of construction except the financing. The price for construction would be $41,000-$45,000. This was a verbal contractual agreement. Hebert never received any bills or invoices from Amaral. Hebert testified that he paid Amaral by check and with substantial cash payments. Hebert estimates that he paid Amaral approximately $12,000 - $13,000 for his work.

Construction began on Hebert's house in late July or early August 1991. Amaral and his crew basically performed all of the construction. Amaral did the site work, helped clear trees, excavated the foundation hole, excavated the septic system holes, framed the majority of the house, hung the drywall, did the finish carpentry, built the decks. When Amaral stopped working at the site, the house was substantially complete.

At the same time that Amaral was building Hebert's house, he remained a builder who was subject to Hebert's regulatory authority. Hebert, as Building Inspector, performed inspections and issued permits in late September 1991 regarding Amaral's construction at 6 Harvey Street. Hebert testified that, while he was Building Inspector, he knew Amaral was a developer in town and he knew it was likely that Amaral would appear before him in the future, and he knew it was likely he would be required to inspect Amaral's projects. Based on this evidence, we find that a citizen in the community would reasonably question whether the objectivity and impartiality of the Building Inspector was clouded by this ongoing private relationship. See *EC-COI-92-7; In re Keverian*, 1990 SEC 460, 462.

2. Grossi and Chabot

Grossi and Chabot were builders who were subject to Hebert's regulatory authority in 1991. Hebert issued permits and inspected their properties. The builders had a financial interest in these inspections.

At the same time that Hebert was taking official actions which affected Chabot and Grossi's interests, he was privately accepting assistance with an appliance discount, free construction services, construction plans, and waterline for his personal residence. In the case of Chabot, he sought construction plans in the midst of an official inspection.

Concerning Thomas Grossi, as well as with Arthur Amaral, the appearance of favoritism was enhanced by the friendship between the two men. *See In re Keverian*, 1990 SEC 460, 463, n.2. While friendship may be a defense to a violation of §3, it can be the essence of a violation of §23(b)(3) as friendship raises questions about a public official's impartiality in the exercise of his official duties in matters affecting his friend.

Hebert's conduct in taking official actions affecting Grossi and Chabot while he was also accepting assistance from these builders in his private capacity would cause a reasonable person knowing these facts to conclude that these developers could likely enjoy Hebert's favor in the performance of his official duties.

3. Disclosure

Section 23, as well as the Commission's precedent, requires that a public employee, in order to dispel an appearance of a conflict, disclose the relevant facts, in writing, to his appointing authority. The disclosure serves to let the public know the relevant facts and permits the appointing authority to review the situation and take whatever steps he may deem to be appropriate to protect the public interest. No evidence of such a disclosure was entered in this case.

The Respondent asserts that the Petitioner has the burden of proving that no disclosure was made. We disagree and find that the burden of proof rests with the Respondent.

In *In re Cellucci*, 1988 SEC 346, the Commission considered that a written determination from one's appointing authority under §19(b)(1) was an exemption to be proven by the Respondent. According to the Commission,

> Were we to assign the burden of proof of the exemption to the Petitioner, such an allocation would be plainly inconsistent with the expressed intent of the original framers of G.L. c. 268A. In its Final Report, the Special Commission on Code of Ethics explained that the format they had chosen for the statute 'was deliberately designed in order to avoid the necessity of indictment and proof which must carry the burden of negating all such possible exceptions and exemptions' and declared that '[i]t was the judgment of the Commission that the burden of proof of an exception or exemption should be on the public official who claims it.'

Id. at 349 (citations omitted).

In the common law, the general pleading rule applicable to all civil and criminal cases is "where the

duty or obligation or crime is defined by statute, if there be an exception in the enacting clause, or an exception incorporated into the general clause, descriptive of the duty or obligation or crime, then the party pleading must allege and prove that his adversary is not within the exception; but if the exception is in a subsequent, separate or distinct clause or statute, then the party relying on such exception must allege and prove it." *Sullivan v. Ward*, 304 Mass. 614, 615 (1939); see *Murray v. Continental Insurance Company*, 313 Mass. 557, 563 (same); *Madden v. Berman*, 324 Mass. 699, 702 (1949) (burden of showing that defendant fell within proviso in statute was upon defendant).

In G.L. c. 268A, §23(b)(3), the language, " [i]t shall be unreasonable to so conclude (that a person would be unduly influenced or unduly enjoy a public employee's favor) if such...employee has disclosed in writing to his appointing authority...the facts which would otherwise lead to such a conclusion," is contained in a subsequent separate sentence from the standard of conduct. Applying the general pleading rule, the burden of proof would lie with the Respondent to demonstrate that he made a written disclosure to his appointing authority. This allocation of the burden of proof is also consistent with the legislative history of c. 268A.

The Respondent has not met his burden of proof in this case. The lack of a disclosure in relation to Amaral is particularly troubling as Hebert's agreement with Amaral was not in writing and numerous cash payments were exchanged. Given these circumstances, it would be very difficult for a member of the public to trace or discover the relationship, absent a disclosure.

Accordingly, we conclude that the Respondent has violated G.L. c. 268A, §23(b)(3) by accepting the builder's discount from Grossi, the plans, services, and waterline from Chabot, and by entering a private commercial relationship with Amaral to construct his personal residence, at the same time that he issued permits, conducted inspections and otherwise regulated these developers as Building Inspector. Raymond Hebert's actions would cause a reasonable person, having knowledge of all of the relevant circumstances, to conclude that these builders could 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 undue influence of these builders.

IV. Conclusion

In conclusion, the Petitioner has proved by a preponderance of the evidence that Raymond Hebert violated G.L. c. 268A, §3 by accepting free construction services and waterline from James Chabot. The Petitioner has also proved, by a preponderance of the evidence that Raymond Hebert violated G.L. c. 268A, §23(b)(3) in relation to his public dealings with Arthur Amaral, Thomas Grossi, and James Chabot. We conclude that the Petitioner has not proven by a preponderance of the evidence that Raymond Hebert violated §3 by accepting construction plans from James Chabot and a builder's discount from Thomas Grossi.

V. Order

Pursuant to the authority granted it by G.L. c. 268B, §4(j),[36] the Commission hereby orders Raymond Hebert to pay the following civil penalties for violating G.L. c. 268A, §3 and §23(b)(3). The Commission orders Raymond Hebert to pay $1,000 (one thousand dollars) for violating G.L. c. 268A, §3. The Commission further orders Raymond Hebert to pay a civil penalty of $2,000 (two thousand dollars) for his course of conduct with the three builders in violation of G.L. c. 268A, §23(b)(3). We order Mr. Hebert to pay these penalties totaling $3,000 (three thousand dollars) to the Commission within thirty days of his receipt of this Decision and Order.

DATE: April 29, 1996

---

[1] Andrew Lawlor was the counsel of record during the adjudicatory hearing of this case. He left the Commission prior to the filing of briefs and argument. The new counsel of record for the Petitioner is Stephen Fauteux.

[2] Commissioner Brown was the duly designated presiding officer in this proceeding. See G.L. c. 268B, §4(e).

[3] In making findings regarding the building inspector's duties we credit the testimony of Mr. Hebert regarding his job responsibilities and the testimony of Paul Piepiora. We find that Paul Piepiora is qualified to render an opinion regarding the duties of building inspectors for the following reasons. Mr. Piepiora has served as a state building inspector for ten years. His duties as a state inspector include permit issuance and inspection of all state building projects within the assigned district, inspection and certification of state-owned facilities, and the provision of assistance to building inspectors in the assigned district. The Town of Norton is within his jurisdiction, and has been within his jurisdiction for nine years. Prior to his Commonwealth position, he served as an assistant and deputy building inspector for ten years. Mr. Piepiora also has private sector experience in framing, roofing, siding, interior finish, drafting and structural design.

[4] We credit Hebert's testimony concerning his duties as the Norton Building Inspector.

[5] We credit Hebert's testimony.

[6] We credit Mr. Hebert's and Mr. Piepiora's testimony.

[7] We credit the testimony of Mr. Hebert and Mr. Piepiora, as well as the testimony of Mr. Chabot and Mr. Coolidge.

[8] In regards to this finding, we credit Hebert's testimony, as well as Grossi's, Chabot's and Coolidge's testimony.

[9] We credit the testimony of David Lawrence Smith, the former manager of the Caloric Appliance Company discount warehouse. Based on his experience as manager and his experience working in the appliance industry, we find Mr. Smith to be competent and knowledgeable to testify regarding the practice of the industry. Ms. Lewis testified that she thought the discount she received for these appliances was $25-$50 per appliance, but on review of this testimony, we consider her estimate to be a guess, not reliable evidence.

[10] In regards to his finding we credit Grossi's testimony. This testimony was corroborated through Agent O'Connor, an FBI agent who testified that, in an interview with Hebert, Hebert stated that Grossi purchased the stove, range hood, refrigerator, and dishwasher for Hebert's house.

[11] In an interview with Agent O'Connor, Hebert stated that the cost was $950.

[12] We credit Hebert's testimony in making this finding.

[13] Mr. Chabot testified that J & R built 10-12 houses per year in Norton. Mr. Coolidge's estimate was 9-10 houses.

[14] We credit Hebert's testimony in this regard.

[15] We consider Chabot to be credible in his testimony on this point. We also credit his experience in the construction trade as a principal of J & R who has built numerous houses.

[16] Chabot was asked if he had hired framers on his job sites. He testified that he had hired framers at J & R and that he paid the framers "between $15 and $20 an hour, depending on the man." Twenty dollars per hour was paid to an experienced framer. We credit Chabot's testimony, based on his personal experience hiring framers in the construction trades and working in the construction trade.

[17] The number of hours is based upon Chabot's testimony that he spent four hours putting up walls and twelve hours working on the second floor wall. Although Chabot spent some time pre-cutting parts, he was unable to provide a precise reliable figure. Because a reliable figure was not placed in evidence, the time for pre-cutting the parts is not included in this finding.

[18] This figure is arrived at by multiplying the number of framing hours (16) by $20 per hour (framing rate).

[19] We find Chabot's testimony credible on this point. Hebert testified that he purchased the original waterline. He testified that he did not receive free waterline from Chabot because he purchased waterline. However, he was not certain in his testimony whether Arthur Amaral ran out of waterline and solicited an additional amount. We do not find Chabot's testimony and Hebert's testimony inconsistent where Chabot testified that the amount Hebert had purchased was inadequate for the job.

[20] We credit Chabot's testimony concerning value based on his cost, and his experience in the construction trade.

[21] Agent O'Connor of the FBI testified at the adjudicatory hearing regarding five interviews he had with Arthur Amaral. Arthur Amaral asserted his privilege against self-incrimination at the hearing and did not testify, although he had been served with a subpoena. Our findings regarding the relationship with Arthur Amaral are based on Hebert's testimony at the hearing. We decline to give Agent O'Connor's testimony substantial weight as he did not have a strong personal recollection of the interviews and relied heavily on his notes and reports. Some of his testimony was multiple level hearsay and, because of an agreement the Petitioner had with the U.S. Attorney, cross examination of Agent O'Connor was limited.

[22] We acknowledge that this figure is the subject of dispute between Hebert and Amaral, but we credit Hebert's testimony.

[23] Hebert testified that he paid Amaral between $12,000 and $13,000. In evidence are checks to Amaral from Hebert totalling $2830.

[24] Hebert issued Thomas Grossi an occupancy permit for 162 Woodland Road on July 24, 1991. He issued a building permit for 10 Island Road on July 3, 1991. He issued a foundation permit and a building permit for 6 Cedar Street on July 31, 1991. He issued J & R various permits for 312A South Worcester Street, 320A South Worcester Street, 5 Fordham Drive, and 115 Barros Street. He also issued permits to Arthur Amaral for 6 Harvey Street on September 30, 1991 and October 2, 1991. He admitted he had performed all of the applicable inspections associated with these permits.

[25] According to the *Bustamante* court,

> To find a public official guilty of accepting an illegal gratuity a jury must find that the 'official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.' Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. (citations omitted).
>
> *Id.* at 940.

[26] Hebert testified that "I think that Mr. Grossi did that as a favor to me, not because I was his building inspector but because I was his friend, and if he expected any more out of me because of that, then, he wasn't the friend that I expected him to be."

[27] In evidence are seven permits Hebert issued to Grossi between April 17, 1991 and July 31, 1991. Grossi testified that he built three houses in Norton in 1991. He indicated that Hebert inspected homes he built on 10 Island Rd. and 10 Woodland Rd. These inspections and permits were issued in July 1991.

[28] Because of the conclusion we reach on the nexus element, we decline to consider whether the opportunity to obtain a discount on the appliances was an item of substantial value.

[29] The Petitioner, in its brief, argues that Hebert solicited free loam from Chabot and there was a great deal of testimony concerning the loam. Hebert denies this allegation. The Petitioner did not include this charge in the Order To Show Cause and the Commission never made a reasonable cause determination regarding this charge. We disagree with the Petitioner that we may read the Order To Show Cause broadly, in order to encompass this allegation. As a matter of due process, we decline to address this allegation.

[30] We note that, if substantial value had been proven, we would have found a violation of §3 under these facts, particularly where Hebert solicited an item for his personal benefit at the same time as he

exerted his official powers over the donor through an inspection. Here the requisite nexus has been established.

31/ We agree with Chabot's opinion that he would be considered to be an expert framer, based on his experience in the construction trades.

32/ Chabot testified that J & R built 10-12 houses in Norton each year during the 1990-1991 period.

33/ Exhibit 6 lists the following J&R permits: building, foundation, occupancy permits for 312A South Worcester Street (June 25, 1991, June 25, 1991, September 4, 1991); building and foundation permits for 320A South Worcester Street (June 25, 1991; June 25, 1991); foundation, building and occupancy permits for 5 Fordham Drive (June 25,1991, June 25, 1991, Sept. 11, 1991); foundation, building and occupancy permits for 18 Fordham Drive (April 8, 1991, April 8, 1991, May 23, 1991); foundation, building and occupancy permits for 1 Island Road (Dec. 21, 1990, Feb. 1, 1991, Feb. 26, 1991); building and occupancy permits for 8 Fordham Road (Feb. 5, 1991, March 29, 1991); foundation, building and occupancy permits for 115 Barros Street (April 11, 1991, May 15, 1991, July 29, 1991); building permit and occupancy permit for 58 West Hodges Street (Sept. 24, 1990; Nov. 15, 1990).

34/ J&R believed that the application of the veneer was a violation of the building code and the company did not want to be held liable for an accident as the owner had placed the stone after J&R finished building the house.

35/ If preferential treatment was actually given, such conduct would raise serious concerns under G.L. c. 268A, §2, §3, and §23(b)(2).

36/ The Commission has the authority under G.L. c. 268B, §4(j) to assess civil penalties of not more than two thousand dollars for each violation of G.L. c. 268A.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 552

IN THE MATTER
OF
FRANK R. MAZZILLI

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Frank Mazzilli ("Mazzilli") 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(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Mazzilli. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Mazzilli violated G.L. c. 268A, §§17 and 23(b)(2).

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

1. Mazzilli was, during the time relevant, the Carver, Marion, Wareham Regional Landfill Committee ("Landfill Committee") chairman. As such, Mazzilli was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As of 1993, the Landfill Committee was operating a large landfill located in Carver, Massachusetts ("Landfill"). The Landfill served as a rubbish disposal site for the region. As of 1993, the Landfill Committee was basically in the process of closing the Landfill.

3. During the time relevant, Mazzilli owned a large piece of property in Carver located at 73 Main Street off Route 58.

4. As of May/June, 1993, Mazzilli was leasing space on that property to Phillip LaMarca. LaMarca was operating a tire recycling business.1/ By this time, because of various mechanical and financial difficulties, a huge number of tires, approximately 25,000, shredded and otherwise, had accumulated on the site. One of LaMarca's primary difficulties was finding a landfill that would accept the shredded tires at a price he could afford.

5. The volume and nature of the tire material was such that in early 1993 the Carver fire chief began pressing LaMarca to have them removed; however, as the owner of the site, Mazzilli was ultimately responsible for their removal.

6. Energy Answers Corporations Operators, Inc. ("EACO") provides various operational services at landfills. As of May 1993, EACO had a contract with the Landfill Committee to accept demolition debris to help raise revenues to pay for the close of the Landfill.2/

7. EACO employed William Bigelow III ("Bigelow") as its site supervisor at the Landfill. He was responsible for the day-to-day operation of the Landfill.

8. In or about late May or early June, 1993, Mazzilli contacted Bigelow regarding the tires. Mazzilli explained that LaMarca was Mazzilli's tenant and needed a place where he could dump shredded tires. Mazzilli asked Bigelow to accept the tires. Bigelow agreed.[3/]

9. While EACO usually charged anywhere from $25 to $45 per ton for debris, EACO gave LaMarca a price of $15 per ton. According to the testimony of Howland and Bigelow, EACO did this because it could use the shredded tires as road base. In other words, the shredded materials were not debris, but rather could be used in lieu of something which EACO would have to otherwise pay for, such as gravel or other suitable fill materials.

10. Between May 1993 and July, 1993, LaMarca dumped approximately 880 tons of tires, for which he paid $13,224 in fees. Apparently, only 250 to 500 tons of this material could be used as road base. The rest were treated as regular debris. (Nevertheless, LaMarca only paid $15 per ton for all this dumping.)

11. At various points while LaMarca was dumping as described above, he had difficulty paying for the dumping fees. On several such occasions, Mazzilli assured EACO that the bills would be paid. Consequently, EACO continued to allow LaMarca to dump notwithstanding those financial difficulties.

12. At some point in or about late June 1993, Bigelow concluded that EACO had accepted all the tires it could use for road fill. He did not want to accept any more tires for this purpose. He communicated this to LaMarca and Mazzilli. Mazzilli, however, asked Bigelow to continue accepting shredded tires for road fill. After Bigelow consulted with his superiors, EACO decided to continue accepting the materials. Eventually, at some point in or about July 1993, Bigelow and his superiors concluded that the Landfill could accept no more tire material at road fill rates and so communicated that to LaMarca. Thereafter, the Landfill accepted no more such tires at the $15 rate.

13. LaMarca could not afford to dump the tires at the regular debris rate. He could find nowhere else to dump the tires at a price he could afford. Consequently, he stopped doing business as a tire recycler, leaving a large inventory of used or shredded tires on Mazzilli's property.

14. Mazzilli eventually paid for the cost of removing these tires himself. The cost was approximately $50,000.

15. Section 17(c) of the Conflict of Interest Law, G.L. c. 268A, prohibits a municipal employee from acting as agent for anyone other than the municipality in relation to a particular matter in which the municipality has a direct and substantial interest.

16. The contract between the Landfill Committee and EACO was a particular matter.[4/]

17. The Landfill Committee had an obvious direct and substantial interest in that contract both because it was responsible for the proper closing of the Landfill and because it had an interest in a portion of the dumping fees generated.

18. Mazzilli acted as LaMarca's agent in introducing LaMarca to Bigelow, asking Bigelow to accept LaMarca's tires at their first meeting, and thereafter on at least one occasion asking Bigelow to accept more tires.

19. These actions were in relation to the Landfill Committee/EACO contract because (1) they involved material which would be placed into the Landfill, and, therefore, these actions could affect the proper closing of the Landfill under the contract; and, (2) because the material was not characterized as debris, these actions affected the Landfill Committee's portion of the dumping fees under the contract.

20. Therefore, by acting as LaMarca's agent in relation to a contract in which the Landfill Committee had a direct and substantial interest, while being a municipal employee as a member of the Landfill Committee, Mazzilli violated §17(c) on numerous occasions as described above.

21. Section 23(b)(2) prohibits a municipal employee from using or attempting to use his official position to secure an unwarranted privilege of substantial value for anyone not properly available to similarly situated people.

22. By introducing LaMarca to Bigelow, by asking Bigelow to accept the tires, and by on at least one occasion asking Bigelow to continue accepting the tires at the reduced $15 rate, Mazzilli, as the Landfill Committee chair, put Bigelow in an implicitly pressured situation such that Bigelow would be strongly compelled to grant those accommodations to LaMarca. Such requests under such circumstances involve the use of public position for an unwarranted privilege.[5/]

23. The privilege was clearly of substantial value because the rate LaMarca was paying was considerably below the market rate for debris.[6/]

24. Therefore, by introducing LaMarca to Bigelow, by asking him to accept the tires, and by on at least one occasion asking Bigelow to continue accepting LaMarca's tires, Mazzilli used his public position to secure unwarranted privileges of substantial value for LaMarca, thereby violating §23(b)(2).[7/]

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

(1) that Mazzilli pay to the Commission the sum of seven thousand five hundred dollars ($7,500.00) as a civil penalty for violating G.L. c. 268A, §17(c) and 23(b)(2) in his dealings with Bigelow;[8/] and

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

DATE: May 2, 1996

[1/] Basically, LaMarca would accept used tires for a small fee, shred them, and then dispose of them at various landfills in the area. He would make a profit if the fees he charged exceeded the fees he paid the landfills.

[2/] Pursuant to this contract, the Landfill Committee was to receive a certain portion of the dumping fees for debris.

[3/] Bigelow discussed Mazzilli's request with his (Bigelow's) supervisor at EACO, Eban Howland.

[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/] The Commission has made clear that a public official may not solicit people he regulates for private commercial accommodations. The reason for this prohibition is that the regulatee is an inherently exploitable position vis-a-vis the regulator.

[6/] Even if the road base rate was reasonable, the original decision by EACO to accept the tires as "road base" as opposed to debris was itself a decision worth thousands of dollars to LaMarca. While the decision may have been justified on the merits, namely that the materials could, in fact, be used for road base, the decision was made under inherently strained circumstances. In any event, the evidence makes clear that at some point during the summer of 1993 Bigelow continued to accept the tires at the reduced rate even though they no longer could be used as road base. In that respect, the accommodation was certainly of substantial value. Thus, where between 380 to 630 tons of tires should have been charged the normal rate of $25 to $45 per ton, LaMarca saved $10 to $30 per ton, or a total of between $3,800 and $18,900.

[7/] In effect, Mazzilli was also securing an unwarranted privilege for himself as well because as the property owner he was ultimately responsible for disposing of the tires.

[8/]Included in this $7,500 penalty is the recognition that Mazzilli personally benefitted by having these tires removed from his property.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 555

IN THE MATTER
OF
HAROLD R. PARTAMIAN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Harold R. Partamian ("Partamian") 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 9, 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 Partamian. The Commission has concluded its inquiry and, on June 12, 1996, voted to find reasonable cause to believe that Partamian violated G.L. c. 268A.

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

1. Partamian was the executive secretary of the state Board of Registration in Pharmacy ("Board") from July 1987 to February 1994.[1/] This was a full-time salaried position. Prior to becoming the Board executive secretary, Partamian was a pharmacy investigator[2/] for the Board, from 1980 until July 1987. As the Board executive secretary and as a pharmacy investigator, Partamian was, at all times here relevant,

a state employee as that term is defined in G.L. c. 268A, §1(q).

2. During most of his state employment, Partamian, who is a registered pharmacist, was privately employed on a part-time (Saturdays) basis as a pharmacist. From 1982 to 1984, Partamian worked at the Hill View Pharmacy in North Reading. From 1984 to December 10, 1993, Partamian worked at a pharmacy in Woburn owned by Insta-Care Pharmacy Service Corporation ("Insta-Care"). From this private part-time work, Partamian annually earned between $5,000 and $8,000.

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

4. Partamian failed to do as he was advised by the Commission's Legal Division. In a July 1992 disposition agreement with the Commission, Partamian was fined $1,000 for violating G.L. c. 268A, §6, by, in 1986 and 1987, as a pharmacy investigator, investigating two complaints which had been filed with the Board against Insta-Care and, as Board executive secretary, signing a report on behalf of the Board relating to a third investigation concerning Insta-Care indicating that the Board had resolved that investigation without a finding of a violation.[3/]

5. Despite the 1992 disposition agreement and the 1993 "Formal Warning," Partamian continued to take actions as Board executive secretary concerning matters affecting Insta-Care, as set forth in the following paragraphs.

6. On July 12, 1993 and November 4, 1993, Partamian, as Board executive secretary, issued notices of informal Board conferences to Insta-Care.[4/] The notices informed Insta-Care of pending allegations and warned that failure to attend the scheduled hearings could result in disciplinary action. Partamian also, as Board executive secretary, rescheduled informal Board conferences concerning Insta-Care from August 24, 1993 to September 14, 1993 and then to December 7, 1993.[5/]

7. On November 24, 1993, Partamian, as Board executive secretary, took part in a Board meeting concerning alleged illegal distribution of controlled substances at an Insta-Care wholesale pharmacy. Partamian took the minutes of the meeting and advised the Board on procedure. Some time after the meeting had been concluded, Partamian polled the Board members regarding the issue of whether the Insta-Care wholesale pharmacy should be closed.[6/] The Board decided to close the Insta-Care wholesale pharmacy pending an imminent danger hearing.

8. On November 30 and December 7, 1993, Partamian, as Board executive secretary, took part in imminent danger hearings concerning the above-mentioned Insta-Care wholesale pharmacy which had been scheduled to determine whether the pharmacy should remain closed. Partamian, as Board executive secretary, scheduled and tape-recorded the hearings and was present at the Board's deliberative executive sessions concerning how the matters should be handled.[7/]

9. On December 3, 1993, Partamian, in accordance with his routine practice as Board executive secretary, answered a telephone call, which turned out to be a complaint call concerning alleged safety problems involving an Insta-Care pharmacy. During this telephone conversation, Partamian gave the complainant advice as to how to informally deal with Insta-Care concerning the alleged problems. Partamian also advised the complainant that the complainant could either try to resolve the matter informally with Insta-Care or submit to the Board in writing full particulars regarding the alleged problems. Despite the fact that the matter involved Insta-Care, Partamian failed to tell the complainant to send any complaint to the Board to the attention of the Board chairman and not to himself. Partamian did not inform the Board or the Division Director that he had received the telephone complaint concerning Insta-Care.

10. On or about December 6, 1993, the December 3, 1993 telephone complainant mailed to the Board a written complaint (together with supporting documents) concerning the alleged safety violations on the part of the Insta-Care pharmacy. The complaint letter was addressed to Partamian, as Board executive secretary. Thereafter, after determining the contents of the letter and that it concerned Insta-Care, Partamian did not turn the letter and the supporting documents

over to the Board or to the Division Director and he did not advise either the Board or the Division Director that he had received the written complaint. Nor did Partamian turn the complaint letter and supporting documents over to the Division's Investigative Unit. Instead, Partamian placed the complaint letter and the supporting documents in his desk and subsequently failed to take any further action on the complaint. The complaint letter and supporting documents remained in Partamian's desk until after he left his position as Board executive secretary in February 1994.[8/]

11. As a result of Partamian's actions and omissions, the December 3, 1993 telephone complainant's information concerning the alleged safety violations by Insta-Care was not properly processed until the December 6, 1993 complaint letter was found in Partamian's desk after he left his employment with the Board in February 1994.

12. On December 10, 1993, Partamian was laid off from his part-time employment at Insta-Care.

13. Section 6 of G.L. c. 268A, except as otherwise provided in that section,[9/] prohibits a state employee from participating[10/] as such in a particular matter[11/] in which, to his knowledge, a business organization by which he is employed has a financial interest.[12/] None of the exemptions to §6 is applicable in this case. At no time did Partamian receive a §6 exemption to participate as Board executive secretary in matters in which Insta-Care had a financial interest.[13/]

14. The informal Board conferences, Board meetings, imminent danger hearings and complaints concerning Insta-Care described above in paragraphs 6 through 11 of this Agreement were particular matters within the meaning of G.L. c. 268A.

15. Partamian's part-time employer, Insta-Care, had a financial interest known to Partamian in each of the above-described particular matters concerning it which were before the Board or were the subject of investigation by the Division. Each such matter involved allegations of improper conduct by Insta-Care in its pharmacy business in Massachusetts, which might, if true, have led to the Board's taking action prejudicial to Insta-Care's pharmacy business activities in the Commonwealth.

16. As described above, between June and December 1993, Partamian, as Board executive secretary, took part in particular matters relating to Insta-Care. Partamian's involvement in these particular matters ranged from routine administrative actions (*e.g.*, tape-recording hearings) to acts entailing the exercise of significant discretion (*e.g.*, handling the telephone and written complaints concerning Insta-Care).[14/] Partamian's advice to the telephone complainant on December 3, 1993 concerning how to resolve the complaint informally, Partamian's failure to turn the December 6, 1993 complaint letter over to the Board, to the Division Director or to the Division's Investigative Unit, and Partamian's retaining possession of the complaint letter in his desk were each acts of personal and substantial participation by Partamian as Board executive secretary in particular matters in which Insta-Care had a financial interest.

17. Thus, as Board executive secretary, Partamian participated officially as a state employee in particular matters in which, to his knowledge, his private employer had a financial interest. In so doing, Partamian violated G.L. c. 268A, §6.

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

(1) that Partamian pay to the Commission the sum of three thousand two hundred and fifty dollars ($3,250.00) as a civil penalty for violating G.L. c. 268A;[15/] and

(2) that Partamian 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 26, 1996

[1/] Partamian was appointed executive secretary by the Board. Under a subsequent reorganization, while Partamian was Board executive secretary, the Board, together with other State boards of registration, became part of the Division of Registration ("Division"). Since the re-organization, all executive secretaries of the boards of registration within the Division are appointed by, report to and are subject to removal by the Division Director.

[2/] Partamian's statutory position was that of "agent" of the Board under G.L. c. 13, §25.

[3/] In addition, Partamian was fined an additional $500 in the 1992 disposition agreement for violating G.L. c. 268B, §7 by failing to disclose his Insta-Care income on his 1987 and 1988 statements of financial interests. Also, in a February 18, 1993 "Formal Written Warning", the Division Director reminded Partamian of his duty as an executive secretary to report to the Division Director any matter which might pose a conflict of interest.

[4/] According to Partamian, these conference notices were issued at the Board's direction.

[5/] According to Partamian, these hearing and conference schedulings and reschedulings were consistent with usual Board practice.

[6/] According to Partamian, the usual procedure was for the executive secretary to poll the Board members by telephone some time after the meeting had adjourned.

[7/] At the December 7, 1993 meeting, Partamian, in response to an inquiry directed toward him by one of the Board members, started to explain the procedure generally followed by the Board in a given instance, when the Board's legal counsel, who was also present, admonished Partamian that his answering could pose a conflict of interest because of his employment with Insta-Care. Partamian did not complete his answer and did not further contribute to the meeting.

[8/] According to Partamian, he did not deliberately keep the complaint letter and supporting documents in his desk to delay any investigation of Insta-Care or to otherwise benefit the company.

[9/] Section 6 requires a state employee whose duties would otherwise require him to participate in a particular matter in which there is a prohibited financial interest to advise his appointing official and the Commission in writing of the nature and circumstances of the particular matter and make full disclosure of the financial interest. The appointing official must then either assign the matter to another employee, or assume responsibility for the matter, or make a written determination (and file it with the Commission) that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services (in which case the employee may participate in the matter).

[10/] "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).

[11/] "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).

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

[13/] At no time did Partamian make the disclosures required by §6 to the Division Director, who was, at the relevant time, Partamian's "appointing official."

[14/] While some of Partamian's actions were apparently sufficiently routine and non-discretionary as to be ministerial, and thus not participation for G.L. c. 268A purposes, on several occasions Partamian's actions amounted to personal and substantial official participation in particular matters in which Insta-Care had a financial interest.

[15/] That a $3,250 fine has been imposed in this case is reflective of the seriousness of the violations, in and of themselves, and of the exacerbating circumstances of Partamian's failure to reform his conduct following his 1992 disposition agreement with the Commission. That a higher fine has not been imposed is due in part to the fact that Partamian resigned from his position as Board executive secretary in lieu of facing the prospect of a formal discharge based on essentially the same reasons as those enumerated in this Agreement.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 557

IN THE MATTER
OF
RICHARD PENN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Richard Penn ("Penn") 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 8, 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 Penn. The Commission has concluded its inquiry and, on August 8, 1996, found reasonable cause to believe that Penn violated G.L. c. 268A.

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

1. During the time relevant, Penn was a member of the Revere City Council. As such, Penn was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. Penn is also an employee of Wonderland Greyhound Park, Inc. ("Wonderland"). Wonderland and Westwood Development, Inc. are wholly owned subsidiaries of Westwood Group, Inc. ("WGI").

3. WGI owned fifteen acres of land abutting Wonderland Greyhound Park. WGI had used the land

to secure a $3 million loan from U.S. Trust Company. In December 1983 WGI conveyed the property to Wonderland subject to U.S. Trust's mortgage, and Wonderland assumed WGI's mortgage note as a co-obligor. In May 1992 Westwood Development, Inc. used nine acres of the property to secure a $4.5 million note from MSCGAF Realty Trust. Wonderland agreed to act as a guarantor of Westwood Development's $4.5 million note. On April 15, 1993, Revere Realty Group, Inc. took title to lots 6, 7, & 8 of the parcel. Thus, Westwood Development owned nine acres of the original fifteen acres, while Revere Realty Group owned the remaining six acres.

4. On March 22, 1993, Penn sought advice from the Commission on whether he could participate in the Revere City Council's review of the special permit application submitted by the Revere Realty Trust. Penn disclosed that Revere Realty Trust was seeking to build a shopping center on land owned by the general manager for Wonderland and by Wonderland itself, and that he was an employee of Wonderland and a city councilor.

5. On April 12, 1993 the Commission's Legal Division issued an informal advisory opinion to Penn, which provided in pertinent part as follows:

> Section 19 prohibits municipal employees from participating in particular matters in which they or their immediate family members or partners, or a business organization in which he is serving as officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. See, e.g. *EC-COI-89-19*. The financial interest must be "direct and immediate, or at least reasonably foreseeable." *EC-COI-84-123; 84-98; 86-25; 84-96*.
>
> Under §19, your employer's financial interests are imputed to you. Since the [Wonderland Greyhound] Park has a financial interest in the special permit, you may not participate as a city councillor in that particular matter. Participation includes discussion and informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30*. Under §19, if *any* financial interest is implicated, no matter how small, or whether the affect is positive or negative, participation is impermissible. *EC-COI-84-96*.

6. National Development Associates of New England ("National Development"), the developer of the fifteen acres, planned to build a 157,500 square-foot retail shopping complex on the property. On July 9, 1993, National Development submitted a special permit application to the Revere City Council to exceed the 10% retail use restriction for the zoning area encompassing the property.[1/] National Development's purchase and sale agreement was conditioned on the City's issuance of the special permit. The permit application listed Revere Realty and Westwood Development as the owners of the affected land.

7. Pursuant to the advice received from the Commission, Penn attended but did not participate in an August 30, 1993 City Council public hearing on the special permit application.

8. On November 17, 1993, Penn submitted a letter to Revere City Planner Frank Stringi, which provided in pertinent part as follows:

> So as to address concerns of the abutters to Wonderland Marketplace, please run the following conditions by Jack O'Neil [National Development's Representative]:
>
> 1. No business will be allowed to be open to the public between the hours of 12 midnight to 7:00 a.m.
>
> 2. No deliveries nor trash pickups will be allowed between the hours of 10:00 p.m. and 7:00 a.m.
>
> Also, in order to make exiting onto North Shore Rd. safer, I would recommend that the west side of No. Shore Rd. from Butler Circle to Kimball Ave. be designated as no parking. (State approval is needed). The three houses near Kimball should be allowed to purchase resident stickers.
>
> In my opinion, the costs for a pedestrian walkway across No. Shore Rd. at the Wonderland MBTA should be borne by the State and MBTA, not New England Development.

9. According to a November 23, 1993 memorandum from City Planner Stringi to the Site Plan Review Committee[2/] and the city council, a December 2, 1993 Site Plan Review meeting was scheduled to discuss issues relating to the revised site plan for National Development's Wonderland Marketplace project. Stringi's memorandum highlighted nine changes from the original site plan, including the construction of a pedestrian walkway area. In addition, Stringi's memorandum states that "Other mitigation measures to be discussed at this site plan review meeting include: restriction on hours of deliveries and store operation ...."

10. On December 13, 1993, the City Council approved the special permit subject to eight pages of conditions, based on recommendations made by the Site Plan Review Committee. Two of Penn's recommendations were incorporated as conditions to the permit: that no deliveries or trash pickup be allowed between the hours of 10:00 p.m. and 7:00 a.m.; and that parking be removed along the west side of North Shore Road. With regard to Penn's recommendation on the pedestrian walkway, the permit required only that National Development study the feasibility of constructing a pedestrian overpass in coordination with the MBTA and the state Highway Department.

11. General Laws c. 268A, §19 prohibits a municipal employee from participating[3/] as such in any particular matter[4/] in which, to his knowledge, his employer has a financial interest.[5/]

12. The decision by the city council on National Development's special permit application was a particular matter.

13. Penn's employer, Wonderland Greyhound Park, had a financial interest in this particular matter as follows. First, the likelihood of Wonderland Greyhound Park's, as a guarantor, having to cover Westwood Development, Inc.'s $4.5 million mortgage note was directly linked to Westwood Development, Inc.'s ability to pay its debts. Second, Westwood Development, Inc.'s (and Revere Realty Group, Inc.'s) ability to pay its debts was certainly affected by its sale of the property securing the note. Third, the sale of the property was conditioned on the city council's issuance of the special permit. Therefore, Wonderland Greyhound Park, Inc. had a financial interest in the special permit particular matter.

14. By seeking and receiving an informal advisory opinion from the Commission, Penn knew that his employer, Wonderland Greyhound Park, had a financial interest in the sale.

15. Penn participated as a city councilor in that particular matter on November 17, 1993, by recommending conditions for the special permit to City Planner Stringi.

16. Accordingly, by making recommendations that ultimately helped shape the special permit proposal for a vote, Penn participated as a city councilor in a particular matter in which his employer had a financial interest. Therefore, Penn violated §19.

17. Penn's violation is aggravated by his having received an April 12, 1993 warning from the Legal Division not to participate in the matter.[6/]

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

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

(2) that Penn 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, 1996

1/ Although Penn's request for advice from the Commission disclosed that Revere Realty Trust was submitting a special permit application for developing the property, National Development actually submitted the application.

2/ The Site Plan Review Committee had the responsibility of developing a list of conditions establishing the terms under which the city council could grant the special permit.

3/ General Laws c. 268A, §1(j) defines participation as "participate in agency action or in a particular matter personally and substantially as a ... municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." To participate in the formulation of a matter for a vote through work sessions is to participate in the matter. *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

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

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

6/ The Legal Division advised Penn that his prohibited participation included "discussion and informal lobbying of colleagues, as well as voting (binding and non-binding)." The language "discussion and

informal lobbying" was broad enough to place Penn on notice that he should not inject himself into the process by recommending conditions to be placed on the special permit.

Richard Penn
382 Ocean Avenue, Apt. 807
Revere, MA 02151

PUBLIC ENFORCEMENT LETTER 97-1

Dear Mr. Penn:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as a member of the Revere City Council in matters in which Wonderland Greyhound Park, Inc., a private corporation of which you are an employee, had a financial interest. Based on the staff's inquiry (discussed below), the Commission voted on August 8, 1996, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §19. In view of certain mitigating circumstances, the Commission 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 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. At all times relevant, you were a member of the Revere City Council. You were also an employee of Wonderland Greyhound Park, Inc. ("Wonderland").

2. Wonderland and Westwood Development, Inc. are wholly owned subsidiaries of Westwood Group, Inc. ("WGI"). WGI owned fifteen acres of land abutting Wonderland Greyhound Park. WGI had used the land to secure a $3 million loan from U.S. Trust Company. In December 1983 WGI conveyed the property to Wonderland subject to U.S. Trust's mortgage, and Wonderland assumed WGI's note as a co-obligor. In May 1992 Westwood Development, Inc. used nine acres of the property to secure a $4.5 million note from MSCGAF Realty Trust. Wonderland agreed to act as a guarantor of Westwood Development's $4.5 million note. On April 15, 1993, Revere Realty Group, Inc. took title to lots 6, 7, & 8 of the parcel. Thus, Westwood Development owned nine acres of the original fifteen acres, while Revere Realty Group owned the remaining six acres.

3. On March 22, 1993, you sought advice from the Commission on whether you could participate in the Revere City Council's review of the special permit application submitted by the Revere Realty Trust. You disclosed that Revere Realty Trust was seeking to build a shopping center on land owned by the general manager for Wonderland and by Wonderland itself, and that you were an employee of Wonderland and a city councilor.

4. On April 12, 1993, the Commission's Legal Division issued an informal advisory opinion to you, which provided in pertinent part as follows:

> Section 19 prohibits municipal employees from participating in particular matters in which they or their immediate family members or partners, or a business organization in which he is serving as officer, director, trustee, partner or employee has a direct or reasonably foreseeable financial interest. See, e.g. *EC-COI-89-19*. The financial interest must be "direct and immediate, or at least reasonably foreseeable." *EC-COI-84-123; 84-98; 86-25; 84-96*.
>
> Under §19, your employer's financial interests are imputed to you. Since the [Wonderland Greyhound] Park has a financial interest in the special permit, you may not participate as a city councillor in that particular matter. Participation includes discussion and informal lobbying of colleagues, as well as voting (binding and non-binding). *EC-COI-92-30*. Under §19, if any financial interest is implicated, no matter how small, or whether the affect is positive or negative, participation is impermissible. *EC-COI-84-96*.

5. National Development Associates of New England ("National Development"), the developer of the fifteen acres, planned to build a 157,500 square-foot retail shopping complex on the property. On July 9, 1993, National Development submitted a special

permit application to the Revere City Council to exceed the 10% retail use restriction for the zoning area encompassing the property.[1] National Development's purchase and sale agreement was conditioned on the City's issuance of the special permit. The permit application listed Revere Realty and Westwood Development as the owners of the affected land.

6. Pursuant to the advice received from the Commission, you attended but did not participate in an August 30, 1993 City Council public hearing on the special permit application.

7. Sometime in December 1993 City Council President Arthur Guinasso sought an advisory opinion from City Solicitor Richard Villiotte on the upcoming city council vote on the special permit application, which required a two-thirds majority of the city council (at least eight of the eleven councilors) to pass. Believing that at least four councilors had conflicts of interest as they or their family members were Wonderland employees, Guinasso sought Villiotte's advice on invoking the Rule of Necessity to permit all eleven councilors to vote on the matter.[2]

8. Six councilors had no hint of a conflict of interest. At least four city councilors had apparent §23(b)(3) conflicts of interest in the matter, as their family members but not themselves were employees of Wonderland.[3] You were the only councilor with a §19 problem by virtue of your employment at Wonderland.[4]

9. Villiotte researched the Rule of Necessity and provided the city council with a written opinion on December 9, 1993. Relevant portions of that opinion provide:

> It is my understanding that several city councilors may have a conflict of interest or have the appearance of a conflict because of their own employment or the employment of a member of their immediate family by Wonderland Greyhound Park, Inc. It is also my understanding that if all of the councilors who have a conflict of interest are disqualified from voting on the Wonderland Marketplace special permit, then the Council cannot act on said permit; because it will not have a sufficient number of councilors who can vote to constitute the two-thirds vote required (or conversely the four votes necessary to deny the special permit).

Villiotte suggested the following procedure: (1) all councilors who may be disqualified from voting advise the council president prior to the vote; (2) if the number of councilors disqualified is four or more, making an affirmative two-thirds vote impossible, the council president should invoke the Rule of Necessity; (3) all disqualified councilors would then be eligible to vote under the Rule of Necessity; and (4) the meeting minutes should clearly state that the Rule of Necessity was invoked due to the insufficient number of qualified councilors to reach a two-thirds vote.

10. Villiotte's opinion was read into the record of the city council's December 13, 1993 meeting. Thereafter, pursuant to Villiotte's opinion, you and Councilors Tata, Singer and Santos-Rosa gave notice to Council President Guinasso of your "concerns relative to apparent conflicts of interest." Guinasso then invoked the Rule of Necessity to enable all city councilors to vote on the matter.[5]

11. Eight city councilors voted in favor of the special permit application, including yourself, Guinasso, Santos-Rosa, Singer and Tata. One councilor voted in opposition to the permit, and two councilors voted present.

II. Discussion

As a member of the Revere City Council you are a municipal employee within the meaning of G.L. c. 268A, §1(g). 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 §19 of the statute.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating[6] as a municipal employee in a particular matter[7] in which to his knowledge he or a business organization in which he serves as an employee has a financial interest.[8] While §19(b)(1) provides an exemption for appointed municipal employees, there is no exemption for elected employees.

The decision by the city council on the special permit application was a particular matter. As explained below, your employer had a financial interest in this particular matter.[9] You knew of this financial interest, as indicated by your seeking and receiving an informal advisory opinion from the Commission. Nevertheless, you participated as a city councilor in this particular matter on December 13, 1993, by voting on

the special permit application. Therefore, it appears that you violated §19.

As stated above, you voted on the special permit matter only after the city council president invoked the Rule of Necessity in reliance on City Solicitor Villiotte's advice. In advising the city council, however, Villiotte did not appreciate that invoking the Rule of Necessity was not required if all of the conflicted councilors, except for you, cured their conflicts by filing §23(b)(3) disclosures. Villiotte believed "a conflict was a conflict" for purposes of applying the Rule of Necessity.

Nevertheless, resort to the Rule of Necessity was unnecessary because an adequate number of city councilors had no conflicts or could have cured their conflicts.[10/] You were the only councilor with a §19 problem by virtue of your own employment at Wonderland. Your §19 conflict could not be cured. Thus, as you were the only councilor truly disqualified from voting, the Rule of Necessity was improperly invoked.

Reliance on a city solicitor's advice is a defense to a conflict of interest charge only if the opinion is in writing and has been submitted to and approved by the Commission. Had Villiotte submitted his opinion to the Commission, it would have been reviewed for accuracy. Because Villiotte did not submit his opinion, your §19 violation is mitigated but not excused by reliance on the city solicitor's faulty written advice. See *Public Enforcement Letter 87-4 (In the Matter of Walter Johnson)*(selectman violated §17 despite good faith reliance on erroneous town counsel opinion).

III. Disposition

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.[11/]

This matter is now closed.

DATE: August 9, 1996

[1/] Although your request for advice from the Commission disclosed that Revere Realty Trust was submitting a special permit application for developing the property, National Development actually submitted the application.

[2/] The Commission has emphasized that the Rule of Necessity should be invoked only as a last resort when a board is unable to act on a matter because it lacks the number of members required to take a valid official vote, solely because members are disqualified from acting. *EC-COI-93-12; Commission Fact Sheet: Rule of Necessity.*

[3/] Of the four city councilors with §23(b)(3) conflicts, two councilors were in fact qualified to vote. Councilor Tata's son was a maintenance worker at Wonderland who had no direct or reasonably foreseeable interest in the matter. Thus, Tata's conflict implicated only §23(b)(3). Tata had disclosed his conflict in writing to the city clerk, thereby curing his conflict and leaving him free to vote on the special permit. Councilor Santos-Rosa was also free to vote as she had no family member employed by Wonderland at the time and, therefore, no conflict.

[4/] Generally, §19 does not prohibit public officials from participating in particular matters in which their family members' employers have a financial interest, although §19 may prohibit public officials from participating in those particular matters where, for example, a family member will be executing the contract for the employer. On the other hand, §23(b)(3) reaches conduct different than that addressed by §19. Section 23(b)(3) forbids municipal employees from acting in a manner which would cause a reasonable person to conclude that the public official is likely to act or fail to act as a result of kinship. A reasonable person would conclude that city councilors with family members employed by Wonderland might vote for the special permit as a result of kinship.

[5/] It appears that Guinasso also had a conflict as his wife and son-in-law were employees of Wonderland, although the December 13, 1993 city council minutes do not indicate that he disclosed his conflict at that meeting.

[6/] "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).

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

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

[9/] First, the likelihood of Wonderland's having to cover Westwood Development, Inc.'s $4.5 million mortgage note, as a guarantor, was directly linked to Westwood Development, Inc.'s ability to pay its debts. Second, Westwood Development, Inc.'s (and Revere Realty Group, Inc.'s) ability to pay its debts was certainly affected by its sale of the property securing the note. Third, the sale of the property was conditioned on the city council's issuance of the special permit.

Therefore, Wonderland had a financial interest in this particular matter.

10/ The four city councilors with apparent §23(b)(3) conflicts of interest in the matter either had cured or could have cured their conflicts by a public disclosure. Thus, at least ten councilors were not disqualified from voting.

11/ The Commission is authorized to resolve violations of G.L. c. 268A with civil fines of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than imposing a fine, after careful consideration of all the facts of this case, including: (i) your reliance upon the faulty written advice of the city solicitor; (ii) a Superior Court judge's order annulling the city council's December 13, 1993 vote (Civil Action No. 94-0154-E, Lauriat, J.); and (iii) the lack of evidence that you intentionally manipulated the city council's invocation of the Rule of Necessity to enable you to vote. While none of these facts is by itself determinative, the combination of all of these factors, in the Commission's view, made a public disposition without a fine appropriate.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 558

IN THE MATTER
OF
ARMAND GAGNE

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Armand Gagne ("Gagne") 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 13, 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 Gagne. The Commission has concluded its inquiry and, on July 11, 1995, found reasonable cause to believe that Gagne violated G.L. c. 268A.

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

1. Gagne was, during the time relevant, the chairman of the Board of Selectmen for the town of Dighton.1/ As such, Gagne was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. The town allows elected officials, including selectmen, to participate in many of the benefits enjoyed by full-time employees, such as the county retirement fund, the health insurance program, and the tuition reimbursement program.

3. In the late 1970s or early 1980s, sometime prior to Gagne's becoming a town official, the town implemented the tuition reimbursement program to encourage town employees to further their education in work-related areas. For a number of years in the 1980s, the town budgeted no money for the program. The town reinstituted the program for fiscal year 1989 with a $5,000 appropriation made at the May 2, 1988 Town Meeting. Additional appropriations of $5,000 and $4,800 were made for fiscal years 1990 and 1991, respectively.

4. The tuition reimbursement program provides the following procedure:

a. The employee/applicant must request and receive prior approval of the Department Head before registration and attendance at class(es).

b. The course(s) must be job-related.

c. The tuition payment will be paid upon successful completion of the course(s).

d. Books, teaching aids and materials, lab fees, student fees are *not* covered under this policy.

(5) And finally, the final financial payment requires approval of the Board of Selectmen.

5. In early 1991 Gagne informed the two other selectmen on the Board, Gene Nelson ("Nelson") and Frank Costa ("Costa"), that he planned to attend town management courses at Suffolk University. Gagne requested that they approve his participation in the tuition reimbursement program.

6. In a letter dated March 20, 1991, Nelson and Costa advised Suffolk University that the town "will be responsible for the tuition cost of Armand Gagne's attendance in your program for the Spring semester, 1991. The monies have been appropriated into the

'Town Tuition Account,' at the Annual Town Meeting of May 7, 1990." Thus, Nelson and Costa approved the payment of Gagne's tuition for the Spring 1991 semester.

7. Throughout fiscal years 1992 and 1993, Gagne continued to enroll in courses at Suffolk University for each of the subsequent semesters. According to Nelson and Costa, they were unaware that Gagne's program was continuing beyond the Spring 1991 semester.

8. Between April 3, 1991, and December 30, 1992, Gagne and at least one of the other two selectmen approved nine treasury warrants authorizing a total of $22,447 in tuition payments to Suffolk University for Gagne.[2/]

9. For various reasons, neither Costa nor Nelson reviewed the nine warrants prior to signing them.

10. Between one and nineteen days before the Board of Selectmen authorized each of the nine treasury warrants, Gagne submitted a Suffolk University tuition invoice to the town accountant for payment. In his capacity as chairman of the Board of Selectmen, and therefore "Department Head" for the purposes of the tuition reimbursement policy, Gagne approved each invoice for payment.

11. During his enrollment at Suffolk University, Gagne twice participated as a selectman in appropriating funds for the tuition reimbursement account without publicly disclosing his financial interest in those funds:

a. At a November 4, 1991 special Town Meeting, the town approved Gagne's motion to appropriate and transfer $4,800 to fund the tuition account for fiscal year 1992; and

b. At a June 30, 1992 special Town Meeting, Costa motioned to transfer an unused $10,000 appropriation to the tuition reimbursement account "to fund education, training and tuitions, (#902) within general government." When a citizen questioned the propriety of that transfer, Gagne and Police Chief Spratt explained that the $10,000 was needed to pay for police officer retraining, estimated at $750 per police officer. After the transfer was approved, the town learned that the police retraining would cost only a small administrative fee of approximately $200. Therefore, the additional $10,000 remained available to fund Gagne's tuition.

12. During fiscal years 1991 through 1993, the town appropriated a total of $24,400 to fund the tuition reimbursement account.[3/] The amounts paid out from the account during those years were $980 to Fire Department employees, $200 for the Police Department retraining, and $22,260 to Suffolk University for Gagne,[4/] leaving a balance of $960.

13. Gagne completed his course work at Suffolk University in March 1993, earning a Master of Public Administration degree.

14. Section 19 of G.L. c. 268A prohibits a municipal employee from participating[5/] as such an employee in a particular matter[6/] in which to his knowledge he has a financial interest.

15. The decisions and determinations by the Board of Selectmen to authorize payment of Gagne's tuition, and to transfer funds to the tuition reimbursement account, were particular matters.

16. Gagne participated as a selectman in each such decision and determination as follows: by approving the tuition invoices for payment as "Department Head"; by signing the treasury warrants after personally ensuring that the tuition payments would be included therein;[7/] and by moving to have funds transferred or explaining such transfers at special Town Meetings.

17. As a student enrolled at Suffolk University, Gagne knew that he had a financial interest in these particular matters because they would result in his tuition being paid.

18. Accordingly, by participating in his official capacity in the decisions to authorize tuition payments and to transfer funds to the tuition reimbursement account, particular matters in which he had a financial interest, Gagne violated G.L. c. 268A, §19.

19. Gagne fully cooperated with the Commission throughout its investigation.

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

(1) that Gagne pay to the Commission the sum of five thousand dollars ($5,000) as a civil penalty for his course of conduct in violating G.L. c. 268A, §19; and

(2) that Gagne 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 22, 1996

[1/]Gagne did not seek re-election as a selectman, pending resolution of this matter.

[2/]The warrants are dated as follows: April 3, 1991; July 3, 1991; November 6, 1991; February 12, 1992; July 22, 1992; August 19, 1992; August 26, 1992; September 30, 1992; and December 30, 1992. Three of the warrants were authorized by Gagne and only one other selectman. The other six were signed by all three selectmen.

[3/]The town appropriated $4,800 for each of fiscal years 1991, 1992, and 1993, and transferred an additional $10,000 for fiscal year 1993, as described above.

[4/]Suffolk University reimbursed the town $187 after Gagne challenged the imposition of a $225 executive fee. Thus, there is a $187 difference between tuition costs approved on the nine treasury warrants, $22,447, and the tuition actually paid, $22,260.

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

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

[7/]Ordinarily, the signing of a treasury warrant for payroll without more does not amount to participation. *EC-COI-87-32* (signing payroll warrant is not personal and substantial participation unless the payroll item is in dispute; signing the warrant is peripheral to certification of the hours worked and included therein). In this case, however, Gagne sighed each treasury warrant after personally certifying his own tuition invoices to be included therein, thereby ensuring at every step that his tuition would be paid. See also *id.* footnote 2 (This opinion is limited to the certification of a payroll by an appointing authority which does not actively supervise employees").

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 515

IN THE MATTER
OF
JAMES B. TRIPLETT

Appearances: Stephen P. Fauteux, Esq.
Karen Gray, Esq.
Counsel for Petitioner

Michael P. Angelini, Esq.
Counsel for Respondent

Commissioners: Brown, Ch., Burnes, Larkin, McDonough and Rapacki

Presiding Officer: Commissioner Nonnie S. Burnes, Esq.

AMENDED DECISION AND ORDER[1/]

I. Procedural History

On January 19, 1995, the Petitioner initiated these proceedings by issuing an Order to Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR 1.01(5)(a). The OTSC alleged that Town of Oxford Police Chief James Triplett ("Triplett"), violated G.L. c. 268A, §23 in relation to several different matters. In particular, the Petitioner alleged that Triplett violated §§23(b)(2) and (b)(3) by directing that Laurie Carlsen, the daughter of a former Oxford police officer, be released from police arrest without a bail hearing being held, and by delaying the initiation of a criminal complaint against her.[2/]

Triplett filed an Answer on March 24, 1995 in which he denied the charges relating to the Carlsen incident. He asserted various affirmative defenses, including that the period of limitations for such acts has expired. Numerous pre-hearing conferences were held during 1995 and 1996. At those conferences, procedural issues were discussed primarily focusing on discovery and scheduling.[3/] The Adjudicatory Hearing, with Commissioner Burnes presiding,[4/] was held on five separate dates: February 7, February 8, March 4, March 5 and April 4, 1996.[5/]

II. Findings of Fact

1. Throughout 1991 and 1992, Triplett served as the police chief for the Town of Oxford.

2. At 7:49 p.m. on Sunday, September 8, 1991, Oxford Police Officer Carol LaFleche[6] was dispatched to the scene of a two-car automobile accident on Clover Street in the Town of Oxford. Officer LaFleche determined that one of the operators, later identified as Laurie Carlsen, was intoxicated.

3. Officer LaFleche identified herself as a police officer and asked Ms. Carlsen for her driver's license and registration. Ms. Carlsen refused to comply with Officer LaFleche's request and responded to Officer LaFleche with profane language.

4. Officer LaFleche attempted to place Ms. Carlsen under arrest. Ms. Carlsen resisted and, in doing so, she physically assaulted Officer LaFleche by kicking at her, trying to bite her and by pulling a clump of hair from the officer's head.

5. Oxford Police Officer George Vranos was dispatched to the accident scene where he subsequently placed Ms. Carlsen into his police vehicle in order to transport her to the police station.

6. Ms. Carlsen was placed under arrest at the accident scene for failing to submit to a police officer, assault and battery on a police officer, operating under the influence of alcohol and disorderly conduct.

7. Ms. Carlsen was transported to the Oxford Police Station by Officer Vranos.

8. After being brought into the station, Ms. Carlsen became combative as Officer Vranos attempted to unhandcuff her. Ms. Carlsen charged at Dispatcher Patrick Purcell who was assisting Officer Vranos.

9. Ms. Carlsen refused to cooperate with Officer Vranos as they attempted to conduct booking procedures. Because of her combative behavior, Ms. Carlsen was not fingerprinted or photographed.

10. With the assistance of Officer McCann, Officer Vranos placed Ms. Carlsen in the police station's "female cell." While attempting to remove the handcuffs, Ms. Carlsen continued to be combative. She grabbed the antenna of a police radio and stretched it from its original position. As a result, Ms. Carlsen was also charged with the malicious destruction of property.

11. At 9:11 p.m., Officer LaFleche, accompanied by Officer Vranos, entered the cell in which Ms. Carlsen was held and reread her rights. Ms. Carlsen did not respond.

12. Ms. Carlsen is the daughter of the late Robert Carlsen, a former Oxford police officer. For a period of twelve years, Robert Carlsen and Triplett both served in the Oxford Police Department.

13. At the suggestion of Sgt. Abrahamson, Robert Carlsen was telephoned and subsequently arrived at the station. Robert Carlsen asked of Officer LaFleche what had happened. Officer LaFleche informed Robert Carlsen of the charges pending against his daughter. He asked Officer LaFleche if there was anything she could do for him. Robert Carlsen then asked Officer LaFleche to call Chief Triplett. She did not respond. Dispatcher Purcell subsequently telephoned Triplett at his home.

14. Robert Carlsen spoke with Triplett over the telephone.

15. Officer LaFleche subsequently spoke with Triplett using a telephone in the sergeant's office. Among other things, Triplett discussed with Officer LaFleche releasing Ms. Carlsen to her father. There was no discussion, however, concerning whether Ms. Carlsen had been bailed.[7] Triplett told Officer LaFleche that if Ms. Carlsen gave her a hard time upon her release, she was authorized to place Ms. Carlsen back in the cell.

16. At 12:10 a.m. on September 9, 1991, Ms. Carlsen was released from the cell to her father. Upon leaving the station Ms. Carlsen called Officer LaFleche names and made profane gestures.

17. During the evening of September 8, 1991, a bail commissioner was never contacted by Police Department with regard to Ms. Carlsen's arrest. Ms. Carlsen was, therefore, released by the Oxford Police Department without a bail commissioner being contacted or bail being set.

18. Subsequent to Ms. Carlsen's release, Officer LaFleche left the original paperwork concerning Ms. Carlsen's arrest on Triplett's desk.

19. Triplett delivered the application for criminal complaint concerning Ms. Carlsen to Dudley District Court on Friday, September 13, 1991.[8/]

20. A magistrate's hearing concerning the charges against Ms. Carlsen was conducted at the Dudley District Court on October 16, 1991.

21. Ms. Carlsen's case was finally disposed of on March 19, 1992 when the three traffic violations with which she had been charged (including Operating Under the Influence of alcohol) were continued for one year without a finding and the assault and battery on a police officer charge was dismissed. According to the Application for Complaint, on October 16, 1991, the malicious destruction of property and disorderly conduct charges were dismissed. (Exhibit 61).

22. Triplett and Robert Carlsen had not previously been and were not at times relevant to the arrest of Ms. Carlsen friendly with each other.[9/]

23. Triplett did not make a written disclosure to his appointing authority regarding his involvement in events following the arrest of Ms. Carlsen.[10/]

III. Allegations

The Petitioner alleges that "[b]y directing Laurie Carlsen's release from police arrest without a bail hearing first being held, and by delaying the initiation of a criminal complaint against Laurie Carlsen so that her father would have an opportunity to persuade the arresting officer to drop the charges, Triplett knowingly, or with reason to know, used or attempted to use his office as chief of police to secure for Laurie Carlsen an unwarranted privilege or exemption of substantial value which was not properly available to similarly situated individuals." In support of its allegation that Triplett thereby violated §23(b)(2) the Petitioner further alleges that "[f]ollowing Laurie Carlsen's arrest and release, Robert Carlsen requested that Triplett refrain from seeking a criminal complaint against his daughter until he had the opportunity to persuade Lafleche not to pursue charges." The Petitioner also alleges that "Triplett agreed, and held up the Laurie Carlsen criminal complaint application for two weeks. During this period, Robert Carlsen unsuccessfully tried to convince Lafleche to drop the criminal charges."

With regard to §23(b)(3), the Petitioner alleges that "[b]y directing Laurie Carlsen's release from police arrest without a bail hearing first being held, and by delaying the initiation of a criminal complaint against Laurie Carlsen so that her father would have an opportunity to persuade the arresting officer to drop the charges, Triplett knowingly, or with reason to know, acted in a manner which would cause a reasonable person to conclude that he can be improperly influenced and that Robert and Laurie Carlsen can unduly enjoy his official favor as police chief." In support of its allegation, the Petitioner alleges that "Robert Carlsen and Triplett were friendly, and served together on the Oxford Police Department for 12 years." According to the Petitioner, "Triplett made no written disclosure to the Board of Selectmen detailing his delay of the Laurie Carlsen complaint application, or his release of Laurie Carlsen from police arrest."

IV. Decision

As a preliminary matter, we must decide whether, at the relevant time, Triplett was a municipal employee[11/] subject to G.L. c. 268A. In his Answer, the Respondent admitted that he is the chief of police, but he denied, without explanation, that he is a municipal employee. We conclude that at the time relevant to the allegations in question here, the Respondent was a municipal employee who was subject to the conflict of interest law.[12/]

A. Section 23(b)(2)

Section 23(b)(2), in relevant part, provides that "No current officer or employee of a . . . municipal agency shall knowingly or with reason to know: . . . (2) use or attempt to use his official position to secure for himself or others unwarranted privileges which are of substantial value and which are not properly available to similarly situated individuals."

We find that the Petitioner has failed to prove by a preponderance of the evidence that Triplett violated §23(b)(2). The record is devoid of direct evidence that Triplett knew or had reason to know that Ms. Carlsen had not been bailed prior to her release during the early morning of September 9, 1991. Furthermore, we cannot reasonably infer such a finding based on the circumstantial evidence in the record. As to the allegation that Triplett used his position to delay the initiation of a criminal complaint against Laurie Carlsen so that her father would have an opportunity to persuade the arresting officer to drop the charges, the Petitioner has relied heavily on the deposition of Robert Carlsen. After reviewing the deposition transcript, we

decline to credit Robert Carlsen's deposition on this point. Moreover, the record does not contain sufficient other evidence of Triplett's use of his position to secure for Laurie Carlsen an unwarranted privilege or exemption of substantial value. We therefore find that the Petitioner has failed to prove by a preponderance of the evidence[13] that a violation of §23(b)(2) occurred.

B. Section 23(b)(3)

Section 23(b)(3) of the conflict of interest law provides that

> [n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know . . .
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party. 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.

We find that the Petitioner has failed to prove by a preponderance of the evidence that Triplett and Robert Carlsen were friendly as alleged.[13] Moreover, we find no other basis for concluding that Triplett acted in a manner which would cause a reasonable person to conclude that he could be improperly influenced or that Robert and Laurie Carlsen could unduly enjoy his favor in the performance of his official duties. Accordingly, we find that the Petitioner has not proven by a preponderance of the evidence that Triplett acted in a manner violative of §23(b)(3).

V. Conclusion

After weighing the evidence, we conclude that the Petitioner has not proven, by a preponderance of the evidence, that Triplett violated G.L. c. 268A, §§23(b)(2) and 23(b)(3) by directing that Laurie Carlsen be released from police arrest without a bail hearing first being held, and by delaying the initiation of a criminal complaint against her.

DATE: September 12, 1996

---

[1] This Amended Decision and Order supersedes a previous Decision and Order.

[2] The OTSC contained a total of ten counts alleging various violations of §§23(b)(2) and (b)(3). In its Decision and Order dated March 27, 1996, the Commission allowed a joint motion of the parties requesting that it: (1) resolve charges 2, 6 and 8 by authorizing the Commission's Executive Director to execute a Disposition Agreement; (2) dismiss charges 1, 3, 4, 5 and 7; and (3) continue the adjudicatory proceeding as to charges 9 and 10 (concerning the Laurie Carlsen incident). Accordingly charges 1, 3, 4, 5 and 7 were dismissed. The Commission's Executive Director executed a Disposition Agreement in relation to charges 2, 6 and 8 by which the Respondent agreed to pay to the Commission the sum of two thousand dollars ($2000) as a civil penalty for his course of conduct in violating G.L. c. 268A, §23(b)(3).

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

[4] Oxford Selectman Herbert Rhinehart submitted a Statement for the Record pursuant to 930 CMR 1.01(8) on April 29, 1995. That statement was subsequently amended on several occasions and became part of the record in this case.

[5] LaFleche now uses the name Carol Knapp.

[6] There was no direct evidence to contradict Triplett's testimony that no discussion about bail occurred.

[7] We credit the testimony of Triplett, Fleming and Black.

[8] We credit the testimony of Triplett and Saad.

[9] The Petitioner and the Respondent stipulated to this factual finding.

[10] Municipal employee is defined, in relevant part, 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).

[11] With respect to the Respondent's limitations defense, the Petitioner has met its burden under the Commission's statute of limitation regulation, 930 CMR 1.02(10), in that it has filed a affidavit from the Enforcement Division Investigator responsible for the case indicating no complaint relating to this alleged violation was received more than three years before the OTSC issued. (Exhibit 1). An affidavit from Triplett's public agency employer was also submitted during the hearing indicating that the agency was not aware of any complaint more than three years prior to the issuance of the OTSC. (Exhibit 2). Pursuant to the above-cited regulation, the Respondent may only prevail on a statute of limitations defense if he can show that more than three years before the issuance of the OTSC, the relevant events were a matter of general knowledge in the community or the subject of a complaint filed with the Ethics Commission, the Attorney General, the District Attorney or the respondent's public agency (in the case of a §23 violation). We find that Respondent has failed to

meet this burden under the regulation and the statute of limitations defense therefore must fail.

[12]The Petitioner must prove by a preponderance of the evidence that the Respondent violated the conflict of interest law. See 930 CMR 1.01(9)(m)2; *Craven v. State Ethics Commission*, 390 Mass. 191, 200 (1983). The Respondent's assertion that the Petitioner should be held to a standard of "clear and convincing proof" is incorrect.

[13]To the contrary, the record suggests finding that a certain degree of animosity had developed between Triplett and Carlsen.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 553

IN THE MATTER
OF
HERBERT KUENDIG

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Herbert Kuendig ("Kuendig") enter into this Disposition Agreement ("Agreement") pursuant to Section 5 of the Commission's **Enforcement Procedures**. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On April 11, 1995, 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 Kuendig. The Commission has concluded its inquiry and, on November 15, 1995, found reasonable cause to believe that Kuendig violated G.L. c. 268A, §17(a) and (c).

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

1. Kuendig was, during the time relevant, a Scituate Planning Board member. As such, Kuendig was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. During the time relevant, Kuendig d/b/a Kuendig Design was engaged in architectural design work.

3. In 1992 Larry Deraney ("Deraney") hired Kuendig to redesign a house which had been completely destroyed by fire. Deraney wanted the new house to have an accessory dwelling,[1/] which would require Planning Board approval. Deraney paid Kuendig between $1,000 and $1,500 for this design work.

4. In September 1992 Kuendig submitted the design work for the accessory dwelling to the Planning Board and appeared before the board on behalf of Deraney regarding the accessory dwelling permit matter. Kuendig abstained from participation as a Planning Board member on the matter.[2/]

5. Section 17(a) of G.L. c. 268A prohibits a municipal employee from directly or indirectly receiving compensation from anyone other than the municipality in relation to a particular matter[3/] in which the municipality has a direct and substantial interest.

6. The Planning Board's determination regarding Deraney's accessory dwelling permit was a particular matter. The town had a direct and substantial interest in that particular matter.

7. Kuendig received between $1,000 and $1,500 for designing the plans for the Deraney's accessory dwelling, which he knew would go before the Planning Board in relation to the issuance of an accessory dwelling permit, and for appearing before the board in relation to that permit.

8. Therefore, by directly receiving compensation from Deraney for designing a plan and appearing before the Planning Board in relation to the Planning Board's determination regarding the accessory dwelling permit, Kuendig received compensation in relation to a particular matter in which the town had a direct and substantial interest, thereby violating §17(a).

9. Section 17(c) of G.L. c. 268A prohibits a municipal employee from acting as agent or attorney for anyone other than the municipality in relation to a particular matter in which the town has a direct and substantial interest.

10. By appearing before the Planning Board on Deraney's behalf regarding the accessory dwelling permit particular matter, Kuendig acted as Deraney's agent in relation to a particular matter in which the town had a direct and substantial interest, thereby violating §17(c).

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

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

(2) that Kuendig 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: September 17, 1996

[1/]The Scituate Zoning Bylaw c. 14, §200 defines "accessory dwelling" as "a separate housekeeping unit complete with its own sleeping, cooking and sanitary facilities that is substantially contained within the structure of a single-family dwelling or business structure, but functions as a separate unit.

[2/]Kuendig understood, based on information provided by the then Planning Board chairman, that he could represent private clients before the Planning Board as long as he abstained as a board member on the matters. As discussed infra. Kuendig's understanding was incorrect.

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 523

IN THE MATTER OF JAMES RUSSO

Appearances: David A. Wilson, Esq.
Laurie E. Weisman, Esq.
Counsel for the Petitioner

Anita M. Reinold, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch., Larkin, McDonough, Rapacki

Presiding Officer: Commissioner Paul F. McDonough, Jr., Esq.

DECISION AND ORDER

Having been informed of the death of the Respondent, James Russo, the Commission hereby terminates the above-captioned matter.

DATE: October 15, 1996

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 524

IN THE MATTER
OF
KEVIN B. KINSELLA

Appearances: Karen Gray, Esq.
Counsel for Petitioner

Thomas E. Finnerty, Sr., Esq.
Counsel for Respondent

Commissioners: Brown, Ch., McDonough, Burnes, Larkin and Rapacki

Presiding Officer: Commissioner Paul F. McDonough, Jr., Esq.

DECISION AND ORDER

I. Procedural History

On May 10, 1995, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR § 1.01 (5)(a). The OTSC alleges that Kevin B. Kinsella, while serving as a selectman in the Town of Scituate, violated G.L. c. 268A, §23(b)(2) by attempting to use his official position as selectman to secure for his son the unwarranted privilege and exemption from arrest, bail and prosecution for a charge of operating a motor vehicle under the influence of intoxicating liquor (OUI). The Petitioner has charged that Kevin Kinsella attempted to use his position as a selectman to secure for his son the privilege or exemption from arrest, bail, and prosecution by contacting the chief of police to obtain his son's release from custody and to give Kevin Kinsella "professional courtesy" in relation to his son's arrest.

The Respondent filed an Answer in which he generally denied the charge, except he admitted that Stephen Kinsella is his son and he further answered that the Scituate Police Department violated his son's constitutional rights by failing to contact a bail commissioner in a timely manner and failing to allow his son to obtain a blood test in a timely manner. He also asserted that he was merely seeking the release of his son on the night of his arrest; that his son was acquitted of the charges; and that the usual disposition by a court for a first time offender is probation for one year and attendance at an alcohol education program, after which the charges are dismissed. The Respondent did not assert any affirmative defenses.

An adjudicatory hearing was held on December 7, 8 and 18, 1995.[1/] At the conclusion of the evidence, the parties were invited to submit legal briefs to the full Commission. 930 CMR § 1.01(9)(k). The Petitioner submitted a brief on March 27, 1996. The Respondent submitted a brief on June 10, 1996. The parties presented their closing arguments before the Commission[2/] on August 8, 1996. 930 CMR 1.01(9)(e)(5). Deliberations began in executive session on August 8, 1996. G.L. c. 268B, §4(i); 930 CMR 1.01(9)(m)(1). Deliberations were concluded on October 15, 1996.

II. Findings of Fact

1. Between 1991 and the present, Kevin Kinsella has served as an elected selectman in the Town of Scituate. Among their duties, the Board of Selectmen review the police department budget, make general policies regarding the police department, and hire the town administrator. The town administrator hires the police chief.

2. Stephen Kinsella is Kevin Kinsella's son.

3. At approximately 3:00 a.m. on May 11, 1992, Stephen Kinsella was arrested by the Scituate police for OUI and failure to stay in lanes.

4. Shortly after the arrest, Mr. Kinsella learned his son was arrested when he received a call from his son at the police station. As a result of this telephone call, Kevin Kinsella went to the Scituate police station. He spoke with Officer Bud Thorn who was the officer at the desk that night and he asked Officer Thorn if he could see his son.

5. Officer Thorn introduced him to the arresting officer, Officer Whittier. Mr. Kinsella did not approach Officer Whittier and request that he drop the charges.

6. Officer Thorn offered to and did bring Stephen to see his father. Mr. Kinsella asked Officer Thorn if he could take his son home, but Officer Thorn informed him that the police could not release his son

as the bail commissioner refused to come to the police station after 11:30 at night, and a person who had been arrested could not be released until bail was set.

7. Officer Thorn suggested that Chief Nielen might let Kinsella take his son home and asked Mr. Kinsella if he wanted Thorn to call the chief. Officer Thorn called the chief and informed him of Stephen Kinsella's arrest, and that Mr. Kinsella was at the station and wanted to talk to the chief.

8. Chief Nielen called the station and spoke with Mr. Kinsella. Kinsella asked the chief if he could take his son home and he asked if he could bail his son. The chief informed Mr. Kinsella that the bail commissioner would not come out after 11:30 at night, so Kinsella's son would have to stay in the jail until the morning.

9. On May 11, 1992, Mr. Kinsella did not ask Chief Nielen to drop the charges pending against his son.

10. Later May 11, 1992, Stephen Kinsella was taken by the Scituate Police to the District Court where he was arraigned on the charges of OUI and failure to stay in lanes and released on personal recognizance.

11. In the afternoon of May 13, 1992, Kevin Kinsella called Chief Nielen from the Scituate selectman's office and requested a meeting with the chief.[3/] According to Mr. Kinsella's testimony, he was concerned with publicity and did not want to meet the chief at the police station or in the selectman's office.[4/] Prior to May 13, the arrest had not been publicized and Kinsella hoped that there would continue to be no publicity surrounding his son's arrest.

12. Kinsella and the chief agreed to meet at the Cole Parkway, a large parking area at the harbor, in the center of Scituate. The meeting was held in Kinsella's car and lasted between forty-five minutes and one hour. Kinsella requested that the meeting be "confidential and off the record" because of his concern about publicity.

13. Among the things discussed at the May 13 meeting were Kinsella's displeasure that his son had not been released on bail on the night of the arrest, that Kinsella believed that this refusal to call the bail commissioner violated his son's constitutional rights, and that the Scituate police were violating the bail laws. Mr. Kinsella was concerned that the Town might be subject to civil liability in the future if the police department continued its bail practices.

14. Kinsella asked Chief Nielen for "professional courtesy". According to Mr. Kinsella's testimony, in using the term "professional courtesy", his intent was to seek the police chief's assistance in keeping his son's arrest from being publicized in the media.[5/]

15. By the end of the conversation, Chief Nielen believed, by Kinsella's use of the term "professional courtesy", that Mr. Kinsella wanted him to intercede in his son's case or to drop the charges. Chief Nielen believed that Kevin Kinsella was very disappointed with how his son's case had been handled by the police.[6/]

16. Kinsella did not explicitly ask the police chief to drop the charges against his son or to speak to the District Attorney about the charges or to intervene in the court proceedings against his son. Chief Nielen did not intercede in the arrest, bail, or prosecution of Stephen Kinsella.

III. Decision

A. Jurisdiction

As a preliminary matter we must decide whether, at the relevant time, Mr. Kinsella was a municipal employee[7/] subject to G.L. c. 268A. In his Answer, the Respondent admitted that he is a selectman in the Town of Scituate, but, he denies, without explanation, that he is a municipal employee.

We conclude, as a matter of law and fact, that, at all times relevant, Mr. Kinsella was a municipal employee. Clearly under G.L. c. 268A, §1 a selectman is a person "performing services for or holding an office in a municipal agency". By statute, G.L. c. 41, §1 includes the position of selectman as a town officer. Finally, in *Board of Selectmen of Avon v. Linder*, 352 Mass. 581 (1967), the Supreme Judicial Court, within the context of reviewing a violation under the precursor to §23(b)(2), stated "[t]he defendant as a member of the Board of Selectmen, the highest town office, is a municipal officer or employee within the meaning [of §23]." *Id.* at 583.

B. Section 23(b)(2)

G.L. c. 268A, § 23 contains the "standards of conduct" applicable to all state, county, and municipal employees. Section 23(b)(2), in relevant part, provides

that "No current officer or employee of a ...municipal agency shall knowingly, or with reason to know, use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals." Under 930 CMR § 1.01 (9)(m)(2), in order to establish a violation of G.L. c. 268A, the Commission must find that the Petitioner has proven its case by a preponderance of the evidence.[8/]

1. Conversation Of May 11, 1992

The Commission finds that there is not a preponderance of the evidence (direct or circumstantial) that Mr. Kinsella attempted to use his position to obtain an unwarranted privilege or exemption from arrest or bail for his son on the evening of May 11, 1992. We find credible Mr. Kinsella's testimony that Officer Thorn, not Kinsella, suggested that the chief be contacted. The Petitioner has not provided evidence to dispute this fact and Police Chief Nielen confirmed that Officer Thorn placed the telephone call. The chief also testified that he had previously received telephone calls at home from concerned parents and that he considered Kinsella, that night, to be a concerned parent.

There is also no evidence to show that Kinsella directly or indirectly asked either the arresting officer or the chief to drop the charges on the evening of May 11, 1992. Nor is there evidence that he requested that the police bypass proper bail procedures. Kinsella's unrefuted testimony was that he wanted to pay whatever bail would be set for his son so that he could take his son home.

2. Conversation Of May 13, 1992

We must determine whether Kinsella, by holding a private conversation with the police chief regarding his son's arrest, knowingly or with reason to know attempted to use his selectman's position to obtain an unwarranted privilege or exemption for his son. In our review of all of the evidence, we acknowledge that this is a very close case. This case does not present the situation of a direct request for a favor. Rather, we must weigh the testimony of the two individuals who were the participants in the conversation at issue.

We find that Police Chief Nielen was sincere and credible in his belief and interpretation of the conversation he had with Mr. Kinsella on May 13, 1992. He believed that the Respondent was requesting the police chief's intervention and leniency in the criminal proceedings against Stephen Kinsella.[9/]

However, we also find that Kevin Kinsella was credible in his testimony regarding the reasons he requested a conversation with the police chief. We find that the Respondent was concerned about and wanted to minimize the publicity surrounding his son's arrest. We find, based on Kinsella's testimony, which we credit, that Kinsella's intent in initiating the conversation with the police chief was not to influence his son's case, but rather, as a father, to defend his son, and, as a selectman, to criticize the bail practices of the Scituate Police Department and to share his concerns that the bail laws were being violated by the Scituate Police.[10/]

Because we find both witnesses to the conversation to be credible, we conclude that the Petitioner has not met the preponderance of the evidence standard in this case. The Petitioner cannot prevail "if the question is left to guess, surmise, conjecture or speculation, so that the facts established are equally consistent [with no violation as with a violation]". *Tartas' Case*, 328 Mass. 585 (1952).

Although we do not conclude that the Petitioner has proved its case, we do not condone the Respondent's conduct, which can best be described as extremely poor judgment under the circumstances. The Respondent's conduct suggested an abuse of power which, at the time, warranted investigation by this Commission.

IV. Conclusion

After weighing the evidence, a majority of the Commissioners conclude that the Petitioner has not proven, by a preponderance of the evidence, that Mr. Kinsella violated G.L. c. 268A, §23(b)(2) in his conversations with the Scituate police chief.

DATE: October 15, 1996

[1/]Commissioner McDonough was the duly designated presiding officer in this proceeding.

[2/]Present at the closing arguments were Commissioners Brown, McDonough, Larkin, and Rapacki. The closing arguments were stenographically recorded, and Commissioner Burnes was provided with and read the transcript of the closing arguments. She participated in the deliberations and decision of this case. In rendering this Decision and Order, each of the Commissioners has considered the testimony, evidence and argument of the parties.

[3/]We find Kevin Kinsella credible in his testimony regarding the date of this meeting. Chief Nielen's best recollection was that this

meeting was a couple of weeks after the arrest. Chief Nielen made an entry in his diary of a meeting approximately May 27, 1992, but did not make the entry contemporaneously with the event. Kinsella's memory of the dates is supported by the testimony of Selectmen Andrew Zilonis and Donald Brown who testified that, prior to May 24, 1992, Kinsella had a private meeting with each of them and told each of them that he had met with the chief.

4/We find credible Kinsella's testimony.

5/We find credible Kinsella's testimony.

6/We find credible Chief Nielen's testimony.

7/G.L. c. 268A, §1(g) 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, 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).

8/The Supreme Judicial Court has defined the preponderance of the evidence standard as follows:

> The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there.

Sargent V. Massachusetts Accident Company, 307 Mass. 246, 250 (1940);see also *Callahan v. Fleischman*, 262 Mass. 437, 438 (1928) (in civil case, trier should be satisfied "if, after fairly weighing the conflicting evidence, he feels sure that his finding is supported by a greater weight of trustworthy evidence than is opposed to it").

9/At the time of the May 13, 1992 conversation, the bail and arrest of Stephen Kinsella was not at issue as he had been arraigned in the District Court and had obtained bail. The judicial proceedings were pending against Stephen.

10/Kevin Kinsella admitted that he has never taken any official action in a public forum as a selectman to address the bail issues in Scituate, but he testified credibly that he thought it would be inappropriate to address such issues while his son's case was pending in the court.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 559

IN THE MATTER
OF
FRED L. GILMETTI

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Fred L. Gilmetti ("Gilmetti") enter into this Disposition Agreement ("Agreement") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On July 11, 1995, 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 Gilmetti. The Commission has concluded its inquiry and, on April 29, 1996, found reasonable cause to believe that Gilmetti violated G.L. c. 268A, §17(c).

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

1. Gilmetti was, during the time relevant, a Whitman Planning Board (the "Board") member. As such, Gilmetti was a special municipal employee as that term is defined in G.L. c. 268A, §1.1/Gilmetti has been a member of the Board since 1978.

2. During the time relevant, Gilmetti was president of F.L.G. Builders, Inc., a general construction contractor. During this time, Gilmetti did not earn a salary from the company.

3. On October 15, 1991, the Board approved a two-lot subdivision on Pin Oak Way. In November 1991, F.L.G. Builders, Inc. entered into negotiations to buy the subdivision. As part of the agreement, it was assumed that F.L.G. Builders, Inc. would construct a road for the subdivision.

4. Due to financial difficulties, F.L.G. Builders, Inc. was only able to purchase one of the two lots. Nevertheless, it was agreed that F.L.G. Builders, Inc. would still build the road. The total bond for the work

was $22,000, of which F.L.G. Builders, Inc. put up $11,000, and the seller put up the remainder.

5. By February 1, 1994, F.L.G. Builders, Inc. had not completed the road. During a Board meeting on February 1, 1994, the other lot owner and the original owner of the subdivision requested a completion date for the road. Gilmetti, speaking on behalf of F.L.G. Builders, Inc. and not as a Board member,[2/] stated that the work would be completed by May 31, 1994, weather permitting.

6. As of June 14, 1994, the road work had not been completed. During a Board meeting on this date, the Board decided to grant an extension of August 1, 1994, for the completion of the road.

7. During a Board meeting on July 12, 1994, the Board read a letter from Gilmetti, on behalf of F.L.G. Builders, Inc., pertaining to a manhole issue at the road site. The letter stated that Gilmetti had investigated an allegation that a drain manhole cover had been buried, and that F.L.G. Builders, Inc., or any of its agents, was in no way responsible for the unlawful burying of any materials on Pin Oak Way.

8. During a Board meeting on August 2, 1994, Gilmetti reported that the road had been completed. Gilmetti requested release of the bond for the work. The Board's engineer recommended that the Board wait until it rained to insure that there was proper drainage. The Board voted to hold $500 of the bond.

9. Section 17(c) of G.L. c. 268A prohibits a municipal employee from acting as agent or attorney for anyone other than the municipality in relation to a particular matter in which the town has a direct and substantial interest.

10. The ongoing determination by the Board as to whether the Pin Oak Way road construction was adequate and whether it should release the performance bond involved determinations and/or decisions which were particular matters.

11. By appearing before and submitting a letter to the Board on behalf of F.L.G. Builders, Inc. regarding the Pin Oak Way road construction particular matter, Gilmetti acted as agent for F.L.G. Builders, Inc. in relation to a particular matter in which the town had a direct and substantial interest, thereby violating §17(c).

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

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

(2) that Gilmetti 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 1, 1996

[1/]Gilmetti is still a member of the Whitman Planning Board.

[2/]Gilmetti abstained from participating as a Board member on all matters pertaining to the Pin Oak Way road construction.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 529

IN THE MATTER
OF
ANGELO M. SCACCIA

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Paul W. Shaw, Esq.
Counsel for Respondent

Commissioners: Brown, Ch., Burnes, Larkin and Rapacki[1/]

Presiding Officer: Commissioner George D. Brown, Esq.

DECISION AND ORDER

I. Procedural History

On June 20, 1995, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 CMR §§ 1.01(1)(a) *et seq.* The OTSC alleged, among other things, that Angelo M. Scaccia ("Scaccia") violated G.L. c. 268A, §3(b) by accepting: free meals and golf from Theodore Lattanzio ("Lattanzio"), a registered legislative agent for Philip Morris USA ("Philip Morris"); free golf on two occasions from F. William Sawyer ("Sawyer"), a registered legislative agent for John Hancock Mutual Life Insurance Company ("Hancock"); a free meal from William Carroll ("Carroll"), a registered legislative agent for the Life Insurance Association of Massachusetts, Inc. ("LIAM"); and a free meal from Richard McDonough ("McDonough"), a registered legislative agent for Anheuser-Busch Companies, Inc. ("Anheuser-Busch"), among other organizations. The Petitioner further alleged that Scaccia violated G.L. c. 268A, §23(b)(3) by knowingly, or with reason to know, receiving each of these gratuities[2/] and taking subsequent actions as a legislator. According to the Petitioner, Scaccia acted in a manner that would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that these legislative agents could improperly influence or unduly enjoy his favor in the performance of his official duties, or that Scaccia was likely to act or fail to act as a result of undue influence of these legislative agents. Additionally, the Petitioner alleged that Scaccia violated G.L. c. 268B, §6 on three occasions by knowingly and willfully accepting from legislative agents gifts aggregating $100 or more in a calendar year. Finally, the Petitioner alleged that Scaccia violated G.L. c. 268B, §7 on two occasions by filing false Statements of Financial Interests ("SFI"). He failed to disclose his receipt of gratuities aggregating over $100 from Lattanzio on his SFI for calendar year 1991 and failed to disclose his receipt of gratuities aggregating over $100 from Sawyer and Carroll on his SFI for calendar year 1993.

On June 27, 1995, Scaccia filed an Answer in which he admitted that he is a Massachusetts State Representative and that he was House chairman of the Joint Committee on Taxation from 1991 through 1993. He admitted that he attended a Council of State Governments conference in Hauppauge, New York on July 30, 1991 and that he attended a Conference of Insurance Legislators in Amelia Island, Florida on March 11 and 12, 1993. Scaccia denied all of the other allegations in the OTSC and asserted the following affirmative defenses: that the OTSC failed to state a claim upon which relief can be granted, and that the Respondent's 1991 conduct is beyond the statute of limitations.

Pre-hearing conferences were held on July 26, 1995, September 11, 1995 and October 16, 1995. At those conferences, issues surrounding discovery were discussed and Commissioner George Brown, as the presiding officer, addressed scheduling and management of the hearing.

On July 21, 1995, Scaccia filed a Motion for Judgment On the Pleadings. He filed a substitute motion on August 4, 1995. On October 2, 1995 Commissioner Brown entered an Order denying without prejudice the Motion For Judgment on the Pleadings and permitting it to be renewed before the full Commission at the end of the adjudicatory hearing. In his adjudicatory hearing brief, the Respondent has raised all of the issues originally addressed in the previously filed Motion For Judgment On the Pleadings.

To protect information subject to the confidentiality provisions of G.L. c. 268B, §4 from disclosure at the hearing, the parties drafted a confidentiality agreement. On October 20, 1995, Commissioner Brown incorporated this agreement into a Protective Order.

Evidentiary hearings were held on eleven days: October 25, 26, and 27, November 1, 3, 13, and 29, December 1, 6, 1995, January 23, and February 15, 1996. During discovery and throughout the adjudicatory hearing, Scaccia invoked his state and federal privileges against self-incrimination.[3/] The Petitioner asked the Respondent a substantial number of questions on the record, to which Respondent's invocation of privilege was stipulated through his legal counsel.

After the conclusion of the evidentiary portion of the hearing, on June 14, 1996, the parties submitted legal briefs. 930 CMR 1.01(9)(k). The parties also presented their closing arguments before the full Commission on August 6, 1996. 930 CMR § 1.01(9)(e)(5). Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 CMR § 1.01(9)(m)(1).

In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, evidence and argument of the parties, including the hearing transcript.[4/]

II. Findings of Fact

Angelo M. Scaccia

1. Scaccia is, and at all times relevant to this proceeding, has been a Massachusetts state representative from the Hyde Park-Readville area of Boston.

2. Sandra Scaccia is Scaccia's wife. From 1991 through 1994, Michael Scaccia, Scaccia's son, was a dependent resident of Scaccia's household.

3. As a state representative, Scaccia is compensated as provided in G.L. c. 3, §9, which does not provide that state representatives are entitled to receive free meals or golf from private parties as part of their compensation package. Moreover, the receipt of free meals or golf by legislators is not authorized by law for the proper discharge of their official duties.

4. As a state representative during 1991, 1992 and 1993, Scaccia participated in hearings and debates concerning proposed legislation and drafted, filed and voted on proposed legislation.

5. From 1991 through 1993, Scaccia served as House chairman of the Joint Committee on Taxation ("Committee").

6. The Committee, which has primary responsibility for proposed legislation which relates to taxation, holds hearings and takes written and oral testimony.

7. Chairmen of the Legislature's committees have extensive power over the fate of legislation. In particular, chairmen can schedule hearings and play a key role in a committee's decision to advance or not advance bills to the full General Court.

8. As a state representative and as a member and House chairman of the Committee, Scaccia voted on and took other official action between 1991 and 1993 concerning proposed legislation relating to the tobacco, alcoholic beverages, and insurance industries.

9. Scaccia attended a Council of State Governments ("CSG") conference in Hauppauge, New York from July 28 through August 1, 1991 with his wife, Sandra, and son, Michael. The Council of State Government holds periodic conferences to bring elected officials and private sector organizations together to discuss matters affecting their common interests.

10. Scaccia's campaign committee paid $1075.65 of Scaccia's expenses for attending the Hauppauge CSG conference of which $914.95 was for accommodations, $64.50 for meals, $90.20 for gasoline and $6.00 for tolls. There is no evidence that the Committee paid for Scaccia's golf at Hauppauge during his July, 1991 stay.

11. Scaccia attended a National Conference of Insurance Legislators ("NCOIL") conference at Amelia Island Plantation Resort ("Resort") in Amelia Island, Florida from March 12 through 14, 1993. The conference was designed to bring state legislators from around the United States together to be educated about issues that affected the insurance industry. Scaccia arrived at the Resort on March 9, 1993.

12. Scaccia's son, Michael, arrived at Amelia Island on or before Wednesday, March 10, 1993.[5/]

13. Scaccia's campaign committee paid $1,422.50 of his expenses at Amelia Island of which $384.50 was for airfare, $972.00 was for lodging and $66.00 was for transportation to the airport. There is no evidence

that the Committee paid for Scaccia's meals and golf at Amelia Island during his March, 1993 stay.

Theodore Lattanzio/Philip Morris

14. In 1991, Lattanzio was employed by Philip Morris as a registered legislative agent. Lattanzio was Philip Morris' Regional Director of Government Affairs for the New England region through July 1991. Lattanzio's responsibilities in that position included monitoring legislation in Massachusetts relative to Philip Morris' interests and supervising and directing the activities of William Delaney, Sr. and William Delaney, Jr., Massachusetts registered legislative agents under contract with Philip Morris to lobby on its behalf in Massachusetts.

15. Philip Morris sells tobacco products in Massachusetts subject to state regulation and taxation. Through its Miller Brewing Company ("Miller"), Philip Morris sells alcoholic beverages in Massachusetts subject to state regulation and taxation.

16. Lattanzio first met Scaccia in 1990 at the Eastern Regional Conference in Manchester, New Hampshire when Lattanzio was serving as Philip Morris' Regional Director for the New England Region, a position in which he monitored legislation in the six New England states relative to Philip Morris' interests. At the 1990 Eastern Regional Conference, Lattanzio incurred a business expense relative to Scaccia.[6/] Lattanzio and Scaccia were not personal friends.

17. Lattanzio was present at the July, 1991 CSG conference to represent Philip Morris. Philip Morris was additionally represented at that conference by Massachusetts lobbyist Delaney, Sr., as well as others.

18. On July 29, 1991, Scaccia, his wife and his son had dinner with Lattanzio. According to Lattanzio's business records, eleven people were present at this dinner, all of whom were either lobbyists for Philip Morris (or its subsidiary, Miller) or state legislators from New England states and their family members.

19. The July 29 dinner was not a CSG conference event.

20. Lattanzio paid for the July 29, 1991 dinner (for eleven people), the cost of which totalled $645.00.[7/]

The per person cost of the July 29 dinner was $58.63 and the amount attributable to Scaccia, his wife and his son was $175.89. The record contains no evidence that Scaccia paid for his own dinner or those of his wife and son on July 29, 1991.

21. Lattanzio invited a group of people to play golf on July 30, 1991. Lattanzio handed out golf cart keys to the participants. Of the nineteen golfers on July 30, 1991, five were tobacco company lobbyists (three representing Philip Morris), twelve were state legislators from Lattanzio's New England Region (and their family members) and two were lobbyists for Massachusetts non-tobacco business interests. Five of the nineteen individuals who golfed on July 30, 1991 (including Scaccia and his son) had attended the dinner Lattanzio hosted the night before.

22. The July 30 golf outing was not a CSG conference event.

23. Lattanzio paid for Scaccia and his son, Michael, as well as seventeen others (including himself), to play golf on July 30, 1991 at a total cost of $1,068.13.[8/] The cost per person of the July 30 golf was $56.21 per person and the amount attributable to Scaccia and his son totalled $112.42. The record contains no evidence that Scaccia paid for his own and his son's golf on July 30, 1991.

24. Lattanzio reported the cost of the July 29, 1991 dinner and of the July 30, 1991 golf to Philip Morris as a business expense. Philip Morris reimbursed Lattanzio for business-related expenses.[9/]

25. The following bills relating to the tobacco and alcoholic beverages industries were pending before the Committee in 1991: H. 1127, An Act Relative To The Sales Of Tobacco Products and Alcoholic Beverages; H.1835, An Act To Increase The Excise Tax Imposed By The Sale Of Cigarettes; H. 3161, An Act To Restrict Cigarette Sales in Vending Machines; H. 4084, An Act Relative To The Taxation of Cigarettes; H. 4823, An Act Further Regulating The Cigarette Tax. On February 27, 1991, the Committee, with Scaccia as chairman, held public hearings on the following bills concerning tobacco products: H.1290, An Act To Prohibit the Sale of Tobacco Products In Certain Health Care Facilities and Pharmacies; H. 1293, H. 2215, An Act To Increase The Fee For Licensing Cigarette Vending Machines; and H. 3161, An Act To Prohibit The Sale of Tobacco Products In Certain Health Care Facilities And Pharmacies. (Exhibit P-56). In

November 1991, Scaccia voted as a House member on proposed amendments to H. 6280, An Act To Improve Health Care Access and Financing, which contained an increase in the cigarette tax and against which the tobacco interests lobbied. Tobacco related bills before the Committee in 1992 included: H. 1037, An Act To Prohibit The Sale Of Individual Cigarettes; H. 1234, An Act To Increase The Excise Tax Imposed By The Sale Of Cigarettes; H. 2751, An Act Relative To The Taxation Of Cigarettes; and H. 3823, An Act Relative To Health And Tobacco.

F. William Sawyer/John Hancock

26. In 1993, Sawyer was employed by Hancock as a senior registered legislative agent in Massachusetts. In that capacity, Sawyer sought to influence legislators in relation to legislation affecting Hancock's business and to advocate for the passage of bills which advanced Hancock's interests. In 1993, Sawyer was generally known to Massachusetts legislators as a Hancock representative because of his appearances on behalf of Hancock at the State House. The record contains no evidence of a personal friendship between Sawyer and Scaccia.

27. Hancock is a Massachusetts-based insurance company whose business activities are taxed and regulated by the Commonwealth.

28. On March 11, 1993, Scaccia played golf at the Amelia Island Golf Links with Sawyer and Massachusetts State Representatives Thomas P. Walsh (T. Walsh) and William Cass (Cass). In 1993, T. Walsh was the House vice-chairman of the Committee. At that time, Cass was a member of both the Committee and the Joint Health Care Committee.

29. The March 11 golf outing was not a NCOIL conference event as the conference did not begin until March 12th and no golf outings were scheduled as part of the conference.

30. Sawyer paid for Scaccia and three others (including himself) to play golf on March 11, 1993 at a total cost of $360.40.[10/] The cost per person of the March 11 golf outing was $90.10. T. Walsh and Cass did not pay for their own golf or that of anyone else. The record contains no evidence that Scaccia paid for his own golf on March 11, 1993.

31. Hancock reimbursed Sawyer for the cost of the March 11, 1993 golf as a business expense.[11/]

32. On March 12, 1993, Sawyer drove Scaccia, his son, Michael, and Cass to the Tournament Players Club Sawgrass golf club ("TPC Sawgrass") at Ponte Vedra Beach, Florida. At TPC Sawgrass, Scaccia golfed in a threesome with Sawyer and Massachusetts State Representative Honan, then House vice-chairman of the Government Regulations Committee and member of the Health Care Committee. Honan was not registered for the NCOIL conference. Scaccia and Sawyer shared a golf cart while Michael golfed with Cass.

33. The March 12 golf outing was not a NCOIL conference event.

34. Sawyer paid for Scaccia and three others (including himself) to golf on March 12, 1993 at a total cost of $415.52.[12/] The cost per person of the March 12 golf outing was $103.88 per person. Neither Honan, nor Cass paid for his own or anyone else's golf on March 12, 1993. The record contains no evidence that Scaccia paid for his own or his son's golf on March 12, 1993.

35. Hancock reimbursed Sawyer for the cost of the March 12, 1993 golf outing as a business expense.[13/]

36. In 1993, Scaccia, as a state representative sponsored or co-sponsored several bills relating to the insurance industry: H. 3030, An Act Relative to the Restructuring of the Automobile Insurance System; H. 3777, An Act Relative to Mental Health Benefits; H. 3778, An Act Relative to Insurance Information and Privacy; and H. 3779, An Act to Improve Access to Rehabilitation Services.

William Carroll/LIAM

37. In 1993, Carroll was employed by LIAM as its president, chief executive officer, and registered legislative agent in Massachusetts. Carroll has been employed by LIAM since 1985.

38. LIAM is a trade association of Massachusetts-based commercial life, health and disability insurers. Among LIAM's purposes are collective information gathering and collective advocacy concerning legislative and regulatory issues of interest to LIAM's members. Hancock was a LIAM member in 1993. The insurance business activities of LIAM's members are taxed and regulated by the Commonwealth.

39. In 1993, Scaccia knew Carroll and that he was a legislative agent for LIAM. Carroll had appeared before and submitted written testimony to the Committee chaired by Scaccia prior to March 12, 1993. Carroll and Scaccia were not personal friends.

40. On March 12, 1993, Sawyer drove Scaccia, his son Michael, T. Walsh and his wife, Honan and his guest and Sawyer's wife, in Sawyer's rental van from the Amelia Island Plantation approximately two miles to the Ritz-Carlton Hotel ("the Ritz"). Scaccia and his son had dinner with Sawyer and others at the Ritz restaurant, The Grill.[14/] There were a total of 24 persons at the Ritz dinner all of whom were either Massachusetts legislators (and their guests) or representatives of businesses with an interest in Massachusetts insurance legislation. All of the private sector diners were insurance industry lobbyists with the exception of Francis Carroll with whom William Carroll had worked on insurance issues.

41. The March 12, 1993 Ritz dinner was not an official event of the NCOIL conference. The only scheduled conference event on the evening of March 12th was a 6:00 p.m. to 7:30 p.m. reception at the Amelia Island Plantation Executive Conference Center.

42. Scaccia does not drink alcohol and in 1993 Scaccia's son Michael was 19 years old.

43. At the end of the March 12, 1993 dinner, Carroll paid for the dinner (for 24 people) which totalled $3,089.16.[15/] Deducting from this total, the portion attributable to alcoholic beverages, the cost of the dinner (for 24 people) was $1,417.19. The cost per person of the March 12 dinner was therefore $59.04 and the amount attributable to Scaccia and his son was $118.08. The record contains no evidence that Scaccia paid his own or his son's dinner on March 12, 1993.

44. LIAM reimbursed Carroll for the March 12, 1993 dinner as a business expense.[16/]

45. Scaccia had been told that the March 12, 1993 Ritz dinner function was sponsored by Carroll and several lobbyists.[17/]

46. Prior to and during 1993, LIAM, through its agents, engaged in lobbying activities regarding how insurance is taxed in the Commonwealth. In 1993 and in prior years, Carroll had dealings with Scaccia as House chairman of the Committee, including corresponding with him and personally giving testimony before the Committee. By letter dated March 30, 1993, addressed to Scaccia and Senator William Keating, as Joint Taxation Committee chairs, Carroll filed written testimony on behalf of LIAM supporting H. 4434, An Act Reforming The Taxation Of Domestic Life Insurance Companies, which would repeal the state net investment income tax. This bill was heard by Scaccia's Committee on March 24, 1993. In 1992, LIAM's then eight members paid $22.2 million to the Commonwealth in net investment income taxes. In addition, by two letters, each dated March 31, 1992, and addressed to Scaccia and Keating, Carroll submitted testimony supporting H. 3466, An Act Reforming the Taxation of Domestic Life Insurance Companies, a 1992 bill repealing the state net investment income tax, and opposing H. 2378, 2568, Acts Relative to Bank Taxation and Competitive Equality, and H. 2912, An Act Relative to the Taxation of Banks and Bank-like Entities.

47. House 53, An Act Further Regulating Insurance, was the National Association of Insurance Commissioners ("NAIC") accreditation bill and was regarded by LIAM and its members (including Hancock), as important to insuring their nationwide competitiveness. The Insurance Committee held a public hearing on H. 53 on March 22, 1993. Carroll testified in favor of H. 53 at that public hearing. Although LIAM supported H. 53, Carroll sought changes before its passage, including changes to its extraordinary dividends language. Some of these changes were sought by LIAM in the Insurance Committee itself and others in the Committee on Bills in Third Reading. In a closely related matter, in March 1993, LIAM sought changes to the funding of the state Insurance Commission in the House Ways and Means Committee. On June 16, 1993, the Insurance Committee reported out favorably an amended version of H. 53 (H. 5220) to the House Ways and Means Committee. The full House subsequently voted on H. 53.

Richard McDonough/Anheuser-Busch

48. In 1993, McDonough was employed as a registered legislative agent and lobbyist by Anheuser-Busch, the Association of the Magistrates & Assistant Clerks Magistrate of the Trial Courts of the Commonwealth ("Magistrates Association") and Massachusetts Fine Art Auctioneers, Inc. ("Auctioneers, Inc.").

49. Anheuser-Busch produces alcoholic beverages which are sold in Massachusetts and, therefore, are subject to state regulation and taxation. The Magistrates Association represents the interests of the magistrates and assistant clerks of the Commonwealth's trial courts and the assistant registers of probate of the Commonwealth's trial courts. Auctioneers, Inc. serves as a coordinating group for auction and appraisal houses in Massachusetts and lobbies with regard to Massachusetts legislation concerning the auction and appraisal profession.

50. McDonough sometimes visited the State House office of the Committee while Scaccia was House chairman thereof. The record contains no evidence of a personal friendship between McDonough and Scaccia.

51. On March 11, 1993, Scaccia and his son, Michael, had dinner with McDonough at the Amelia Inn restaurant.[18/] Also present were McDonough's wife, Cass, and Massachusetts State Representative DiMasi and his wife. DiMasi was not registered for the NCOIL conference. DiMasi has a close personal friendship with both Scaccia and McDonough.[19/] All seven diners at the March 11, 1993 dinner were from Massachusetts, including the three legislators (Scaccia, Cass and DiMasi) and the one lobbyist, McDonough.

52. The March 11, 1993 dinner was not a NCOIL conference event as the conference did not begin until March 12th.

53. Prior to the conclusion of the March 11, 1993 dinner, McDonough left the Amelia Inn to pick up Senator Havern's wife at the airport. At the conclusion of the meal, DiMasi asked the waiter for the check and was told that the dinner had been charged to McDonough's room number. DiMasi thereafter informed Scaccia that the waiter had charged the March 11 dinner to McDonough's tab. In response to Scaccia's question of whether McDonough was coming back, DiMasi said "[n]o he isn't, but don't worry about it, Angelo, I'll take care of it".[20/]

54. McDonough paid for the March 11, 1993 Amelia Inn dinner,[21/] the cost of which (for seven people) totalled $343.79.[22/] The cost per person of the March 11 dinner was $49.11, and the amount attributable to Scaccia and his son was $98.22. The record contains no evidence that Scaccia paid for his own or his son's meal at the March 11 dinner.

55. In 1993, proposed legislation relating to the sale of alcoholic beverages in Massachusetts was pending before the Committee: H. 3678, An Act Imposing a Tax on Alcoholic Beverages for the Operation of Health Care Facilities. In addition, in 1993, by Scaccia's own petition, H. 3364, An Act Relative to the Granting of Licenses for the Sale of Alcoholic Beverages was before the Government Regulations Committee. In 1993, Scaccia also filed a bill affecting the interests of Massachusetts auctioneers, H. 2952, An Act Further Regulating the Conduct of Auctioneers, and co-sponsored three bills affecting the Massachusetts trial court: H. 3781, An Act Relative to the Appointment of Family Service Officers in the Probate and Family Court Department; H. 3785, An Act Authorizing Payment for Accumulated Sick and Vacation to Retiring Justices of the Trial Court; and H. 3789, An Act to Provide Indemnification to Members of the Judiciary.

Scaccia's Statements of Financial Interests

56. On May 19, 1992, Scaccia filed or caused to have filed with the Commission his SFI for calendar year 1991. Scaccia's 1991 SFI was completely filled out, contained responses to each of the SFI's sections and questions, and was not, on its face, deficient. The 1991 SFI was signed by Scaccia and dated May 7, 1992. Scaccia did not, however, report his and his immediate family members' receipt in July 1991 of gifts of free meals and golf from lobbyist Lattanzio and Philip Morris.

57. On May 17, 1994, Scaccia filed or caused to be filed with the Commission his SFI for calendar year 1993. Scaccia's 1993 SFI was completely filled out, contained responses to each of the SFI's sections and questions, and was not, on its face, deficient. The 1993 SFI was signed by Scaccia and dated May 16, 1994. Scaccia did not, however, report his and his son's receipt in Florida in March 1993 of gifts of free meals and golf from lobbyists Sawyer, McDonough and Carroll and their respective employers and principals.

III. Decision

The Petitioner has alleged that Scaccia violated G.L. c. 268A, §§3(b) and 23(b)(3) as well as §§6 and 7 of G.L. c. 268B. At all times relevant, Scaccia has been a member of the General Court. Thus, Scaccia is a state employee within the meaning of G.L. c. 268A,[23/] and is a public official required to file a

Statement of Financial Interest under G.L. c. 268B, §5.[24]

A. Statute of Limitations

As a preliminary matter, we must decide whether the charges against Scaccia in relation to the 1991 Hauppauge, New York conference are time barred.[25] The Ethics Commission has, by regulation, established a statute of limitations to be applied to Commission proceedings.[26]

Under 930 CMR § 1.02(10), an order to show cause must be issued within three years after a disinterested person learned of the violation. When a statute of limitations defense is asserted, the Petitioner has the burden of showing that a disinterested person learned of the violation no more than three (3) years before the order was issued. The Petitioner may satisfy its burden by obtaining affidavits from the Department of the Attorney General, the Office of the District Attorney, and from the Commission investigator assigned to the case stating that no complaint relating to the violation was received more than three (3) years before the OTSC was issued. With respect to any violation of G.L. c. 268A, §23 an affidavit from the Respondent's public agency that the agency has reviewed its files and the agency was not aware of any complaint relating to the violation more than three (3) years before the order was issued satisfies the Petitioner's burden. If the Petitioner meets his burden under 930 CMR § 1.02(10)(c), the Respondent will prevail on his statute of limitations defense only if he shows that more than three (3) years before the order was issued, the relevant events were either a matter of general knowledge in the community, or the subject of a complaint to the Ethics Commission, the Department of the Attorney General, the appropriate Office of the District Attorney, or, with respect to a §23 violation only, the Respondent's public agency.

In this case, the OTSC was issued and filed on June 20, 1995. The alleged conduct took place on July 29 and July 30, 1991, almost four years before the OTSC issued. The Petitioner has met his burden of proof under the regulation, which the Respondent does not dispute. Scaccia, on the other hand, has not met his burden in that he has not alleged, let alone demonstrated that more than three years before the OTSC was issued, the relevant events were either a matter of general knowledge in the community, or the subject of a complaint to the Ethics Commission, the Department of the Attorney General, the appropriate Office of the District Attorney or Scaccia's own agency, the House of Representatives. Nor has Scaccia shown that any other disinterested person "capable of acting" on the matter knew or should have known of the alleged wrongful conduct. Scaccia's statute of limitations defense, therefore, fails.

B. Section 3(b)

Section 3(b) of G.L. c. 268A provides: "Whoever, being a present or former state, county or municipal employee or member of the judiciary, or person selected to be such an employee or member of the judiciary, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him" violates §3.

Section 3(b) establishes a gratuity offense. As the word "gratuity" implies, §3(b) proscribes the receipt of an item of "substantial value" (the "gratuity") even if the gratuity is intended only to "reward" the public official for actions he has already taken or which he may take in the future. For this reason, there need not be evidence of corrupt intent in an employee's conduct or an understood *quid pro quo* between the receipt of a thing of substantial value and the performance of official acts. "The official act might otherwise be properly motivated; and the gratuity, though unlawful, might not be intended to influence the official's mindset with regard to that particular action." *United States v. Sawyer*, 85 F.3d 713, 730 (1st Cir. 1996). Instead, it is enough that the public official received something of substantial value for or because of an official act performed or to be performed by him. See *In re Antonelli*, 1982 SEC 101, 108; *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976).[27] As we have previously emphasized, to interpret §3 otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their public duties, and permit multiple remuneration for doing what public employees are already obliged to do - a good job. Thus, our interpretation of §3 fosters public credibility in government institutions by imposing on public employees constraints which are conducive to the reasoned, impartial performance of public functions.

In addition, the Commission has set $50 as the threshold at which it will consider gifts, meals or other

benefits to be of "substantial value" for purposes of §3. See *EC-COI-93-14* ("We believe that the $50 threshold serves the public interest in maintaining the integrity of the government decision-making process, and provides a realistic and workable measure which public officials may use to guide their conduct.").

1. Theodore Lattanzio

The Petitioner alleges that Scaccia violated §3(b) when he accepted from Lattanzio on July 29 and 30, 1991 gratuities worth $50 or more for or because of official acts or acts within Scaccia's official responsibility performed or to be performed by him.

The evidence indicates that on July 29, 1991, Scaccia, his wife and his son had dinner with Lattanzio and others, while the Scaccias were in Hauppauge, New York attending the CSG conference. The July 29 dinner was not part of the CSG conference agenda. Indeed, the guests at the July 29 dinner were but a small subset of the CSG conference participants. Besides the Scaccias, the dinner guests included legislators from New Hampshire and representatives of Philip Morris -- Lattanzio's employer[28] -- or companies in which Philip Morris holds interests (e.g., Miller Brewing Company). Specifically, for Philip Morris, the dinner guests included Lattanzio, William Delaney, Sr., Philip Morris' outside counsel and principal of Delaney Associates (Philip Morris' lobbyists in Massachusetts), and Miller Brewing Company lobbyists Anne Keaney and Trish McCarthy. The Philip Morris representatives, including Lattanzio, were responsible for Philip Morris' lobbying activities in Massachusetts and New Hampshire as well as the other New England States. Additionally, legislators from Massachusetts and New Hampshire (and their families) attended this dinner. There is no evidence in the record that Scaccia paid for this dinner for himself or his family. Rather, the record discloses that the July 29 dinner was paid for by Lattanzio, who was reimbursed for this expense by Philip Morris. Moreover, from the foregoing, a reasonable inference may be drawn that Scaccia was aware that a representative of Philip Morris paid for his meal and those of his wife and son.[29]

The evidence also indicates that Lattanzio invited a group of people to play golf on July 30, 1991. Lattanzio, himself, handed out golf cart keys to the July 30 golf participants. Scaccia and his son, Michael, were among the 19 people who golfed as part of Lattanzio's group that day. Besides Scaccia and his son, the July 30 golfers included five tobacco industry lobbyists (three of whom were from Philip Morris), ten individuals who were legislators or family members of legislators and two lobbyists for non-tobacco Massachusetts business interests. Five of the nineteen people who golfed on July 30 (including Scaccia and his son) had attended the July 29 dinner. As with the dinner the night before, the July 30 golf was not part of the CSG conference agenda. There is no evidence in the record that Scaccia paid for his own golf or that of his son on July 30. Rather, according to the record, Lattanzio paid for the July 30 golf, for which he was reimbursed by Philip Morris. Moreover, where Lattanzio extended the golf invitation, personally handed out the keys to the golf carts, and the Scaccias had dined with Lattanzio and the other Philip Morris representatives the night before, the Commission reasonably infers that Scaccia was aware that Lattanzio paid for his and his son's golf on July 30, 1991.

The record also contains substantial evidence of Scaccia's official acts or acts within his official responsibility that he performed with regard to Philip Morris' interests. Both before and after the July 29 dinner and July 30 golf, legislation was pending before the Massachusetts legislature of interest to Philip Morris, including various pieces of tax legislation before the Taxation Committee chaired by Scaccia. Scaccia acted officially with regard to this legislation both before and after the July 29 dinner and July 30 golf, including holding hearings and voting on this legislation.

The July 29 dinner, as well as the July 30 golf for Scaccia and his family members, respectively, cost $50 or more and, thus, were "of substantial value" for purposes of §3. See Findings of Fact ("Findings"), ¶¶19, 22.

Finally, Scaccia's receipt of the July 29 dinner and July 30 golf for himself and his family members was not provided for by law for the proper discharge of his official duties. Moreover, Scaccia and Lattanzio are not personal friends and, therefore, friendship could not have been the motive for receipt of the gratuities.

In addition to the foregoing evidence establishing a violation of §3(b), we draw an adverse inference against Scaccia as to his awareness that gratuities given to him by Lattanzio were "for or because of" any official act or act within his official responsibility performed or to be performed by him based on his invocation of his privilege against self-incrimination. See *Labor Relations Commission v. Fall River*

Educators' Association, 382 Mass. 465, 471-472 (1981) (refusal to testify on a subject peculiarly within the knowledge of witness warranted an inference in civil action that was adverse to party).

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on July 29 and 30, 1991, Scaccia received gratuities of substantial value from Lattanzio, for or because of official acts or acts within his official responsibility that Scaccia performed, in violation of §3(b).

2. F. William Sawyer

The Petitioner alleges that Scaccia violated §3(b) when he accepted from Sawyer on March 11 and 12, 1993 gratuities worth $50 or more for or because of official acts or acts within his official responsibility performed or to be performed by him.

The evidence indicates that on March 11, 1993, Scaccia played golf in a foursome with Sawyer at Amelia Island Golf Links, while Scaccia was attending a NCOIL conference at the Amelia Island Plantation Resort in Amelia Island, Florida. The March 11 golf outing was not part of the NCOIL conference agenda.[30/] Playing golf with Sawyer and Scaccia were Massachusetts State Representatives T. Walsh and Cass. Walsh was invited by Sawyer to play golf on March 11. Walsh and Cass each testified that they did not pay for the March 11 golf outing.

On March 12, 1993, Sawyer drove Scaccia, his son, Michael, and Cass to TPC Sawgrass at Ponte Vedra Beach, Florida. The March 12 golf outing was not part of the NCOIL conference agenda. Scaccia played golf with Sawyer and Honan as a threesome. Scaccia and Sawyer shared a golf cart. Honan testified that he did not pay for his own golf or anyone else's. Scaccia's son, Michael, golfed with Cass.

In 1993, Sawyer was employed by Hancock as a registered legislative agent in Massachusetts. At that time, Scaccia knew Sawyer. Moreover, the record permits the reasonable inference that Scaccia knew Sawyer to be a legislative agent for Hancock where all of the legislators who testified stated that they were aware that Sawyer was so employed, and DiMasi testified that he had an indication that Scaccia knew Sawyer worked for Hancock because of Sawyer's appearances at the State House.[31/] The record does not indicate that Scaccia paid for his own golf on either March 11 or 12. Rather, the record demonstrates that the March 11 and 12 golf was paid for by Sawyer, who was reimbursed for this expense by his employer, Hancock. From the foregoing evidence, a reasonable inference may be drawn that Scaccia was aware that Sawyer paid for his golf on March 11 and 12, 1993.

The record also contains substantial evidence of Scaccia's official acts or acts within his official responsibility performed by him with regard to Hancock's interests. Both before and after the March 11 and 12 golf, tax legislation of interest to Hancock was pending before Scaccia's Committee. Scaccia acted officially regarding this legislation after the March 11 and 12 golf, including holding Committee hearings on such legislation. Additionally, during 1993, Scaccia, himself, sponsored and filed several bills affecting the insurance industry.

Both the March 11 and March 12 golf cost $50 or more and, thus, were "of substantial value" for purposes of §3. See Findings, ¶¶29, 33.

Finally, Scaccia's receipt of the March 11 and 12 golf is not provided for by law for the proper discharge of his official duties. Moreover, Scaccia and Sawyer are not personal friends and, therefore, friendship could not have been the motive for receipt of the gratuities.

In addition to the foregoing evidence establishing a violation of §3(b), we draw an adverse inference against Scaccia as to his awareness that gratuities given to him by Sawyer were "for or because of" any official act or act within his official responsibility performed or to be performed by him based on his invocation of his privilege against self-incrimination.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on March 11 and 12, 1993, Scaccia received gratuities of substantial value from Sawyer, for or because of official acts or acts within his official responsibility that Scaccia performed, in violation of §3(b).

3. William Carroll

The Petitioner alleges that Scaccia violated §3(b) when he accepted from Carroll on March 12, 1993 a gratuity worth $50 or more for or because of official acts or acts within his official responsibility performed or to be performed by him.

The evidence indicates that on March 12, 1993, Scaccia and his son had dinner with Carroll at the Ritz

Carlton Hotel while Scaccia was attending the NCOIL conference. The March 12 dinner was not part of the NCOIL conference agenda. Attending the March 12 dinner in addition to Scaccia and his son were twenty-two individuals, all of whom were either Massachusetts legislators (or their guests) or representatives of businesses with an interest in Massachusetts insurance legislation. There is no evidence in the record that Scaccia paid for his or his son's meals on March 12. Rather, the record discloses that the March 12 dinner was paid for by Carroll and that LIAM reimbursed Carroll for the dinner as a business expense. Moreover, Scaccia, through his counsel, admits that he was informed that Carroll was a sponsor of the March 12 dinner. (Exhibit P-77). Therefore, it is reasonable to conclude that Scaccia was aware that his meal and that of his son during the March 12 dinner was paid for, at least in part, by Carroll, whom Scaccia knew to be a legislative agent.

There is also substantial evidence of Scaccia's official acts or acts within his official responsibility performed by him with regard to LIAM's interests. Both before and after the March 12 dinner, there was legislation pending before the Committee of interest to LIAM's members (including Hancock, as explained above). Scaccia acted officially regarding such legislation after the March 12 dinner. Additionally, during 1993, Scaccia, himself, sponsored and filed several bills affecting the insurance industry.

The cost of the March 12 dinner for Scaccia and his son, respectively, was $50 or more and, thus, was "of substantial value" for purposes of §3.[32] See Findings, ¶42.

Finally, Scaccia's receipt of the March 12 dinner is not provided for by law for the proper discharge of his official duties. Moreover, Scaccia and Carroll are not personal friends and, therefore friendship could not have been the motive for receipt of the gratuities.

In addition to the foregoing evidence establishing a violation of §3(b), we draw an adverse inference against Scaccia as to his awareness that gratuities given to him by Carroll were "for or because of" any official act or act within his official responsibility performed or to be performed by him based on his invocation of his privilege against self-incrimination.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on March 12, 1993, Scaccia received a gratuity of substantial value from Carroll, for or because of official acts or acts within his official responsibility that Scaccia performed, in violation of §3.

4. Richard McDonough

The Petitioner alleges that Scaccia violated §3(b) when he accepted from McDonough on March 11, 1993, a gratuity worth $50 or more for or because of official acts or acts within his official responsibility performed or to be performed by him.

The evidence indicates that on March 11, 1993, Scaccia and his son, Michael, had dinner with McDonough and others at the Amelia Inn restaurant, while Scaccia was attending the NCOIL conference at the Amelia Island Plantation Resort. DiMasi, a close personal friend of Scaccia, also attended the March 11 dinner. See Findings, ¶51. Before his early departure from the dinner, McDonough, unbeknownst to DiMasi, arranged for the dinner to be put on his (McDonough's) room tab.[33] Consequently no check was ever brought to the guests at the March 11 dinner. After inquiring of the waiter, DiMasi learned that McDonough had arranged for payment of the dinner. Although DiMasi thereafter apprised Scaccia of McDonough's handling of the bill for the March 11 dinner, DiMasi also assured Scaccia that he would "take care of it". See Findings, ¶53. From the foregoing, we find that Scaccia, relying on the assurance of his close personal friend DiMasi, reasonably could have concluded that he was receiving for himself and his son, a meal that would be paid for by DiMasi rather than McDonough.

Accordingly, we conclude that the Petitioner has failed to prove by a preponderance of the evidence that on March 11, 1993, Scaccia received a gratuity from McDonough for or because of official acts or acts within his official responsibility performed or to be performed by him.[34]

C. Section 23(b)(3)

Section 23(b)(3) of the conflict of interest law, the standards of conduct section, provides that

> [n]o current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know . . .
>
> (3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person

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

As the Commission has recently stated, "[s]ection 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the Respondent actually gave preferential treatment. The Legislature, in passing this standard of conduct, focused on the perceptions of the citizens of the community, not the perceptions of the players in the situation." *In re Hebert*, 1996 SEC 800. In a recent case, the Commission indicated that in applying §23(b)(3) to a public employee, it will evaluate whether, "due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest." *In re Flanagan*, 1996 SEC 757. See also *In re Antonelli*, 1982 SEC 101, 110 (evaluating precursor of §23(b)(3), Commission indicated major purpose of section to prohibit public employee from engaging in conduct which will raise questions over impartiality or credibility of his work). We emphasize that public disclosure of the facts which would otherwise lead to the conclusion that a public employee's integrity has been undermined serves an important public interest. In addition, the §23(b)(3) disclosure provision affords a simple mechanism by which public employees may avoid violations of §23(b)(3).

1. Lattanzio

The evidence indicates that subsequent to July 30, 1991, Scaccia acted officially as a state representative concerning legislation relating to the taxation of tobacco products. We find that by accepting dinner and golf (for himself and his family) from Lattanzio (a legislative agent for Philip Morris) and thereafter taking official actions affecting the interests of Philip Morris, Scaccia, "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 Philip Morris could likely enjoy his favor in the performance of his official duties or that Scaccia would likely act or fail to act as a result of Lattanzio's undue influence. Consequently, where the record contains no evidence that Scaccia publicly disclosed his July 29 and 30 receipt of dinner and golf prior to taking official actions affecting the interests of Philip Morris, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that Scaccia violated §23(b)(3).

2. Sawyer and Carroll

The evidence indicates that subsequent to March 11 and 12, 1993, Scaccia acted officially as a state representative concerning legislation relating to the insurance industry. We find that by accepting golf from Sawyer (a legislative agent for Hancock) and dinners from Carroll (a legislative agent for LIAM) and thereafter taking official actions affecting the interests of Hancock and LIAM, Scaccia, "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 Hancock and LIAM could likely enjoy his favor in the performance of his official duties or that Scaccia would likely act or fail to act as a result of Sawyer or Carroll's undue influence. Consequently, where the record contains no evidence that Scaccia publicly disclosed his March 11 and 12 receipt of golf and a dinner prior to taking official actions affecting the interests of Hancock and LIAM, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that Scaccia violated §23(b)(3).

3. McDonough

As stated earlier, we find that Scaccia reasonably could have concluded that he received the March 11 dinner from his personal friend, DiMasi, rather than McDonough. Accordingly, we find that the Petitioner failed to establish that Scaccia "knowingly or with reason to know," (subsequent to his acceptance of the March 11 dinner) acted in a manner which would cause a reasonable person, with knowledge of the relevant circumstances to conclude that Anheuser-Busch (or the other organizations represented by McDonough) could likely enjoy his favor in the performance of his official duties or that Scaccia would likely act or fail to act as a result of McDonough's undue influence. Consequently, we conclude that the Petitioner has not demonstrated by a preponderance of the evidence that Scaccia violated §23(b)(3) in this instance.

D. G.L. c. 268B, Section 6

Section 6 of G.L. c. 268B provides, in relevant part: [N]o public official or public employee or member of such person's immediate family shall knowingly and wilfully solicit or accept from any legislative agent, gifts[35] with an aggregate value of one hundred dollars or more in a calendar year.

The record demonstrates that Lattanzio was a registered legislative agent for Philip Morris in 1991 and that Sawyer and Carroll were registered legislative agents for Hancock and LIAM, respectively, in 1993. In addition, we have drawn the reasonable inference, in the case of Lattanzio and Sawyer, and the record itself demonstrates, in the case of Carroll, that Scaccia knew Lattanzio, Sawyer and Carroll each to be a legislative agent and that Scaccia was aware of his receipt of gratuities from each of these legislative agents. We also have found the value of the gratuities which Scaccia received from each of these legislative agents to be $100 or more. Accordingly, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that Scaccia violated G.L. c. 268B, §6.

E. G.L. c. 268B, Section 7

Section 7 of G.L. c. 268B provides for civil and criminal penalties for "any person who wilfully affirms or swears falsely in regard to any material matter before a commission proceeding under paragraph (c) of section 4 of this chapter, *or who files a false statement of financial interests under section 5 of this chapter* . . . ." (emphasis added). G.L. c. 268B, §5(g) states, in relevant part, that "reporting persons shall disclose, to the best of their knowledge . . . the name and address of the donor, and the fair market value, if determinable, of any gifts aggregating more than one hundred dollars in the calendar year, if the recipient is a public official and the source of the gift(s) is a person having a direct interest in legislation . . ."

The Petitioner has alleged that Scaccia violated G.L. c. 268B, §7 by filing his 1991 and 1993 SFI's without disclosing his receipt in calendar year 1991 of gratuities provided by Lattanzio aggregating more than $100 and in calendar year 1993, of gratuities provided by both Carroll and Sawyer aggregating more than $100. According to the Petitioner, Scaccia thereby twice filed false SFI's.

As detailed above, the record indicates that in March of 1991 Scaccia received gratuities from Lattanzio aggregating more than $100 and that the source of such gifts was Philip Morris, a company with an interest in legislation before the Massachusetts House of Representatives in 1991. The record also shows that in July of 1993, Scaccia received gratuities from Sawyer and Carroll, which in each case aggregated to over $100. The source of such gifts respectively was Hancock and LIAM, both of which are organizations which had an interest in legislation before the Massachusetts House of Representatives in 1993. Additionally, we have drawn reasonable inferences as to Scaccia's awareness that he was receiving gratuities from Lattanzio, Sawyer and Carroll and their positions as legislative agents.

Scaccia has admitted that he is a state representative. As such, he is required to file a yearly statement of financial interest. G.L. c. 268B, §5(b). Scaccia concedes, without admitting that he received any of the aforementioned gratuities, that he failed to disclose these gratuities on his 1991 and 1993 SFI's. (Respondent's Brief at 67).

Accordingly, we find that the Petitioner has demonstrated by a preponderance of the evidence that Scaccia filed false SFI's for calendar years 1991 and 1993 in violation of G.L. c. 268B, §7.

IV. Conclusion

In conclusion, the Petitioner has proved by a preponderance of the evidence that Angelo Scaccia violated G.L. c. 268A, §3(b) on five occasions by accepting: a meal and golf from Theodore Lattanzio; golf on two occasions from F. William Sawyer; and a meal from William Carroll. The Petitioner has also proved by a preponderance of the evidence that Angelo Scaccia violated G.L. c. 268A, §23(b)(3) with respect to the above-described gratuities. Additionally, the Petitioner has proved by a preponderance of the evidence that Angelo Scaccia violated G.L. c. 268B, §6 by accepting from Theodore Lattanzio, F. William Sawyer and William Carroll gifts aggregating $100.00 or more in a calendar year. Finally, the Petitioner has proved by a preponderance of the evidence that Angelo Scaccia violated G.L. c. 268B, §7 on two occasions through his filing of false Statements of Financial Interests for calendar years 1991 and 1993.

We conclude that the Petitioner has not proved by a preponderance of the evidence that Angelo Scaccia violated G.L. c. 268A, §§3(b) or 23(b)(3) in relation to Richard McDonough.

V. Order

Pursuant to the authority granted it by G.L. c. 268B, §4(j), the Commission hereby orders Angelo Scaccia to pay the following civil penalty for violating G.L. c. 268A, §§3(b) and 23(b)(3) and G.L. c. 268B, §§6 and 7. We order Angelo Scaccia to pay $3,000.00 (three thousand dollars) to the State Ethics Commission within thirty days of his receipt of this Decision and Order.

DATE: November 19, 1996

[1/] Commissioner Paul F. McDonough, Jr. has abstained from participation in the adjudication of this matter.

[2/] "Gratuities" is used to refer to things of substantial value.

[3/] Additionally, Sandra Scaccia (Scaccia's wife), Richard McDonough, and William Sawyer invoked their privileges against self-incrimination.

[4/] Commissioner Burnes is not a signatory to this Decision and Order because her resignation became effective prior to its issuance. She did, however, fully participate in the Commission's deliberations and decision in this matter.

[5/] We credit the Amelia Island Plantation, Amelia Golf Links business record signed by Michael Scaccia which reflects expenses incurred on March 10, 1993. Additionally, because statements contained in the Affidavit of Michael Scaccia dated October 30, 1995 are contradicted by the testimony of live witnesses, who were subject to cross-examination, and properly authenticated business records admitted at the hearing, we do not credit the Affidavit.

[6/] We credit Lattanzio's business records.

[7/] We credit Lattanzio's business records.

[8/] We credit Lattanzio's business records.

[9/] We credit Lattanzio's testimony and business records.

[10/] We credit the Amelia Island Plantation Guest Folio business record reflecting the expenses incurred by Sawyer on March 11, 1993.

[11/] We credit the testimony of Bruce Skrine, Corporate Secretary and keeper of the records for Hancock.

[12/] We credit the business record of Sawgrass TPC Golf Course relating to the expenses incurred by Sawyer on March 12, 1993.

[13/] We credit the testimony of Bruce Skrine, Corporate Secretary and keeper of the records for Hancock.

[14/] We credit Carroll's testimony that an individual identified to him as Michael Scaccia was an attendee at the March 12, 1993 dinner at the Ritz. As stated above, we do not credit the Affidavit of Michael Scaccia dated October 30, 1995.

[15/] We credit the business record (Guest Check No. 6430) from the Ritz-Carlton restaurant, The Grill, dated March 12, 1993.

[16/] We credit Carroll's testimony on this point.

[17/] We credit the admission of Scaccia's counsel contained in his June 8, 1994 letter to the Petitioner.

[18/] We credit Cass' testimony concerning Michael Scaccia's attendance at the March 11, 1993 dinner. As stated above, we do not credit the Affidavit of Michael Scaccia dated October 30, 1995.

[19/] We credit DiMasi's testimony on this point.

[20/] We credit DiMasi's testimony for this finding.

[21/] In his Proposed Findings and Rulings, the Respondent admits this fact. *See* ¶44.

[22/] We credit the Amelia Island Plantation Guest Folio business record (and attached guest check, reference no. 74796) reflecting the dinner expenses incurred by McDonough on March 11, 1993. The total amount relied upon for this finding does not include the beverage expenses incurred by McDonough on March 11, 1993 as reflected in the business record (and attached guest check, reference no 21411).

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

[24/] *See* G.L. c. 268A, §1(q)

[25/] Scaccia does not raise a statute of limitation defense in relation to the alleged gratuities given at the 1993 Amelia Island conference.

[26/] The Commission first adopted a three-year statute of limitations in an adjudicatory decision, *In re Saccone*, 1982 SEC 87, 93-94 (*rev'd* on other grounds, 395 Mass. 326 (1985)). In that decision, the Commission expressly adopted the reasoning of *Nantucket v. Beinecke*, 379 Mass. 345 (1979), in which the Court held that the essence of a legal action under G.L. c. 268A, §21, brought by Nantucket to void a deed tainted by the conflict of interest of certain Town employees, sounded in tort, as a violation of official duty. *Id.* at 348-349. The Supreme Judicial Court also determined that the trial judge was correct in deciding that "the statute [of limitations] commences to run when the plaintiff knew or should have known of the wrong." *Id.* at 350. In discussing the circumstances under which the Town would be charged with notice for purposes of the running of the statute of limitations, and the Court stated "as a general proposition, that only when those disinterested persons who are capable of acting on behalf of the town knew or should have known of the wrong, should the town be charged with such knowledge." *Id.* at 351. Sometime between 1982 and 1984, the Commission's statute of limitations was codified in 930 CMR § 1.02(10). In *Zora v. State Ethics Commission*, 415 Mass. 640, 647-648 (1993), the Supreme Judicial Court, affirming its reasoning in *Beinecke*, held that a three-year statute of limitations applies to proceedings under G.L. c. 268A.

[27/] In contrast, no §3 violation occurs where the public employee has a prior friendship with the donor and the evidence establishes that the friendship is the motive for the receipt of the gratuity. See *In re Hebert*, 1996 SEC 800. Scaccia has not alleged a friendship with the donors in this case, nor would the evidence support such a finding.

[28/] In 1991, Lattanzio was employed by Philip Morris as a registered legislative agent in Massachusetts. From the record, it is reasonable to infer that in 1991 Scaccia knew Lattanzio to be a legislative agent for Philip Morris based on that fact that Lattanzio had previously met Scaccia at the 1990 Eastern Regional Conference in Manchester, New

Hampshire. In 1990 Lattanzio was serving as Philip Morris' Regional Director for the New England Region, a position in which he monitored legislation in the six New England states relative to Philip Morris' interests. The record reflects that Lattanzio incurred a business expense relating to Scaccia at that time. Additionally, we draw an adverse inference against Scaccia regarding his knowledge of Lattanzio as a legislative agent for Philip Morris based on his invocation of his privilege against self-incrimination. See *Quintal v. Commissioner of the Department of Employment & Training*, 418 Mass. 855, 861 (1994) (in a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self-incrimination).

[29]Indeed, Scaccia's counsel admitted during his closing argument before the Ethics Commission that such an inference would be reasonable. (Closing Transcript at 41).

[30]Indeed, the conference did not begin until March 12, 1993 and no golf was scheduled as part of the conference.

[31]Additionally, we draw an adverse inference against Scaccia regarding his knowledge of Sawyer as a legislative agent based on his invocation of his privilege against self-incrimination.

[32]The record contains evidence that, subsequent to his return to Boston, Carroll sought and received contributions of $500 and $600 from Francis Carroll (of the Small Business Service Bureau, Inc.) and insurance company lobbyist Arthur Lewis, respectively, toward the cost of the March 12 dinner. However, the record lacks evidence that a third lobbyist, who had previously expressed an interest in contributing to the cost of the March 12 dinner, provided Carroll with any contribution. The happenstance that some contributions were later made does not alter our conclusion that on March 12, 1993, Scaccia received from Carroll a gratuity of substantial value.

[33]Scaccia admits that the March 11 dinner was paid for by McDonough. See Findings, ¶53, n. 15.

[34]We need not reach the issue of whether the meals accepted by Scaccia on March 11, 1993 for himself and his son were of substantial value.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 560

IN THE MATTER
OF
JOHN E. MURPHY

DISPOSITION AGREEMENT

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

On December 10, 1996, the Commission voted to find reasonable cause to believe that Murphy violated G.L. c. 268B, §6.

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

1. During the period relevant here, Murphy was a registered legislative agent in Massachusetts for various clients. As a legislative agent, Murphy would track, monitor and seek to oppose, promote or otherwise influence legislation that was of interest to a client.

2. Charles F. Flaherty, Jr. ("Flaherty") has served in the House of Representatives ("House") of the Massachusetts State Legislature ("Legislature") from January 1965 to the present. During that time, Flaherty served as the chairman of the Committee on Counties (1971-1982); chairman of the Committee on Taxation (1983); and Majority Leader (1985-1990). In 1991, Flaherty was elected Speaker of the House and served in that capacity until his resignation as Speaker on April 9, 1996.

3. As a state representative, Majority Leader and Speaker, Flaherty participated, by speech and debate, by voting and by other means, in the process by which laws are enacted in the Commonwealth. As Majority Leader, Flaherty had and exercised considerable influence and control over the House, both as to legislative and administrative matters.

4. In late July 1990, Murphy signed a lease to rent a four bedroom vacation house with a swimming pool in Cotuit, Massachusetts ("Cotuit house") for the period of August 1, 1990, to September 4, 1990. Murphy and Richard Goldberg ("Goldberg")[1/] shared the $11,645 cost of this vacation home. Murphy paid $2,000 rent plus $645 for the use of the telephone. Goldberg paid $9,000 rent.

5. In August and September 1990, Murphy and Goldberg made the Cotuit house available for use by Flaherty and Flaherty's guests. Murphy and Goldberg and their guests also used the house.

6. Flaherty used the Cotuit house four out of the five weekends of the rental period, plus many weekdays. In all, Flaherty used the Cotuit house a total of approximately 21-25 calendar days.[2/] Flaherty's use of the Cotuit house was worth no less than $2,775. Flaherty paid nothing for the use of the Cotuit house.

7. During 1990-1992, Murphy lobbied the Legislature on behalf of such clients as racetracks, solid waste facilities, hospitals, a billboard company, an electric utility, and an entity seeking compensation for an eminent domain taking.[3/]

8. G.L. c. 268B, §6 prohibits a legislative agent from knowingly and willfully offering or giving to a public official gifts with an aggregate value of $100 or more in a calendar year.

9. By in 1990 giving Flaherty the use of the Cotuit house (valued at no less than $2,775), Murphy as a legislative agent gave gifts within the meaning of G.L. c. 268B, §1(g) to Flaherty, a public official. Where these gifts equalled or exceeded $100 in value in a calendar year, they were prohibited by G.L. c. 268B, §6.[4/] Therefore, by giving these gifts, Murphy violated G.L. c. 268B, §6.

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

(1) that Murphy pay to the Commission the total sum of two thousand dollars ($2,000) for violating G.L. c. 268B, §(6) and

(2) that Murphy 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: December 17, 1996

[1/]In the spring/summer 1990 Goldberg had retained Murphy to lobby the Legislature regarding an eminent domain taking by the state which would adversely affect Goldberg's business interests near Logan Airport.

[2/]Not all of these days involved overnight stays.

[3/]The Commission is not aware of any evidence that Murphy lobbied Flaherty regarding Goldberg matters. Murphy did, however, lobby Flaherty regarding some of his other clients' matters during 1991 and 1992.

[4/]Although Murphy and Flaherty were close personal friends, friendship is not a defense to a §6 violation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 526

IN THE MATTER
OF
JULIE A. DIPASQUALE

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

Thomas R. Kiley, Esq.
Matthew L. Schemmel, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch., McDonough, Larkin[1/] and Rapacki

Presiding Officer: Commissioner Edward D. Rapacki, Esq.

DECISION AND ORDER

I. Procedural History

On June 6, 1995, the Commission issued an Order to Show Cause alleging that the Respondent violated §§19 and 23(b)(3) of G. L. c. 268A.[2/] On December 6, 1996, prior to an adjudicatory hearing in this matter, the Petitioner and Respondent filed a Joint Motion to Dismiss ("Joint Motion"). The Joint Motion requested that the Commission dismiss the adjudicatory proceeding and approve a Public Enforcement Letter in settlement of this matter. In support of settling this matter, the Public Enforcement Letter states, among other reasons, that the public interest would be better served by explaining the application of the law to the facts, with the expectation that the advice will ensure understanding of and future compliance with the conflict of interest law. The Letter also states that after reviewing all the pertinent evidence, it appeared that the Respondent attempted to comply with the conflict of interest law by abstaining from matters specifically directed to her immediate family members, and she believed in good faith that she could participate in particular matters involving determinations of general policy.

II. Decision

Pursuant to 930 CMR §1.01:(6)(d), dismissal may be granted only by a majority vote of the Commission. After considering the Joint Motion and the Public Enforcement Letter, the Joint Motion is **ALLOWED**.

III. Order

Accordingly, all charges in the Order to Show Cause are hereby dismissed. The Executive Director is authorized to execute the Public Enforcement Letter. The adjudicatory proceedings against the Respondent are dismissed.

DATE: December 10, 1996

[1/] Commissioner Larkin abstained from the deliberations and vote on this matter.

[2/] In the Order to Show Cause, the Petitioner requested that the Commission find:

Charge 1 that the Respondent, while a member of the Somerville School Committee, violated §§19 and 23(b)(3) by participating in the January 27, 1992 School Committee vote to request the Civil Service Commission conduct a compliance audit of the School Department's hiring practice when the Respondent's sister was seeking a promotion and claiming that the promotion should be awarded under the Civil Service law.

Charge 2 that the Respondent violated §§19 and 23(b)(3) by participating in the May 4, 1992 School Committee vote to request that the Civil Service Commission authorize the School Department to fill vacant principal clerk stenographer positions sought by the Respondent's sister with a promotion eligibility list that ranked her sister as the top applicant.

Charge 3 that the Respondent violated §§19 and 23(b)(3) by participating in the May 28, 1992 School Committee vote to request authorization form the Civil Service Commission to use a promotion eligibility list that included four names, including the Respondent's sister, to fill four vacant clerk positions, some of which were sought by her sister.

Charge 4 that the Respondent violated §§19 and 23(b)(3) by participating in the School Committee's Personnel Sub-Committee's vote on March 1, 1994 and the School Committee's March 7, 1994 vote to adopt changes in the School Department's method of ranking applicants for teacher positions when the Respondent's daughter was an applicant for employment as a teacher with the School Department.

Julie A. DiPasquale
c/o Thomas R. Kiley, Esq.
Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110-2600

PUBLIC ENFORCEMENT LETTER, 97-2

Dear Ms. DiPasquale:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as a member of the Somerville School Committee in matters in which your sister and daughter had financial interests. Based on the staff's inquiry (discussed below), the Commission voted on April 11, 1995, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §§19 and 23(b)(3) and authorized adjudicatory proceedings. On June 6, 1995, the Commission staff issued an Order to Show Cause. You have answered that Order.

For the reasons discussed below, the Commission does not believe that further proceedings are warranted.

Instead, the Commission has determined that the public interest would be better served by explaining its application of the law to the 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 further formal action against you in this matter and have stipulated to the dismissal of the formal charges initiating the prior proceedings.

I. Facts

1. You were a member of the Somerville School Committee ("the School Committee") from 1984 through November 1995.

2. Julie Marie DiPasquale ("Julie") is your daughter and Eileen Bakey ("Bakey") is your sister.

I.

3. In October 1991, Eileen Bakey was a clerical employee of the Somerville School Department. She worked as a senior clerk-typist at Somerville High School.

4. In October 1991 a vacancy for a principal clerk-stenographer arose in the office of Assistant Superintendent William Fasciano, Somerville Public Schools. Shortly thereafter, the School Department posted a notice of clerical vacancy for the position, indicating that the position was to be filled provisionally pending a civil service examination.

5. Bakey applied for the principal clerk-stenographer vacancy. Several other qualified clerical employees also applied for the position.

6. A 1988 civil service list ("the 1988 list") had been established by the Department of Personnel Administration on October 28, 1988, pursuant to a June 11, 1988 promotional examination for principal clerk, Somerville public schools.

7. Seven clerical employees, ranked in order of their exam scores, were certified in the 1988 list as eligible for promotion to principal clerk. On December 5, 1988, the list was used to promote the third and sixth persons to principal clerk positions.

8. The first person on the 1988 list had retired in September 1991. Bakey was listed second. Thus, Bakey was effectively number one of the four persons remaining on the list.

9. Karen Cooke, a junior clerk-typist, was not on the 1988 list.

10. On November 18, 1991, the School Committee approved the provisional promotion of Cooke to the principal clerk-stenographer vacancy. The School Committee's vote was not implemented and Cooke was never assigned to the position.

11. On or about January 10, 1992, five School Department secretaries, including Bakey, filed appeals with the Civil Service Commission ("Civil Service"), challenging the non-use of the 1988 list to fill the principal clerk-stenographer vacancy and requesting an investigation into the employment practices of the School Department. Three of those five secretaries were from the ward that you represented.

12. On or about January 10, 1992, you learned that Bakey and your constituents had applied for the principal clerk-stenographer position and had filed complaints with Civil Service. At about the same time, you learned of the existence of the 1988 list on which Bakey's name appeared.

13. On January 22, 1992, the Rules Subcommittee of the School Committee voted on a motion/recommendation that the School Committee join with the five secretaries in their request that Civil Service conduct an immediate investigation into the School Department's hiring practice. You voted in favor of the motion. The motion was approved.

14. On January 27, 1992, the School Committee reviewed the Rules Subcommittee's recommendation and voted on a motion to request in writing a compliance review ("audit") by Civil Service into the hiring practices of the School Department. You voted in favor of the motion. The motion was approved.

15. In Spring 1992, a second principal clerk-stenographer position, in the Department of Curriculum and Instruction, became vacant.

16. On May 4, 1992, the School Committee voted on a motion to request the use of the 1988 list and to offer the two principal clerk-stenographer vacancies to Agnes McAnneny and Eileen Bakey.

17. You split your vote on the May 4, 1992 motion as follows: you voted in favor of the request to use the 1988 list, and voted "present" on offering the two vacancies to McAnneny and Bakey. The motion was approved.

18. Sometime prior to May 28, 1992, two additional principal clerk vacancies arose in the Lunch and Special Education Departments.

19. On May 28, 1992, the School Committee voted on a motion to have Assistant Superintendent Fasciano requisition Civil Service, by certified mail, to use the 1988 list to appoint four people from this list. You voted in favor of this motion. The motion was approved.

20. When you participated in each of the foregoing votes beginning on January 22, 1992, you knew that your sister was the highest ranked person on the 1988 list who was interested in obtaining a position as a principal clerk-stenographer in the School Department. The School Department was not obligated to appoint the highest ranked person on the list and had some history of by-passing such persons.

21. You yourself were a School Department clerical employee prior to your service on the School Committee. It has been your consistent position throughout your tenure on the School Committee that civil service law should be followed in hiring and promoting clerical employees.

22. In August 1992, Bakey accepted an appointment to the principal clerk-stenographer position in the office of Assistant Superintendent Fasciano.

23. The position paid about $2,000 more than Bakey's position as senior clerk.

II.

24. Pursuant to the Somerville "School Committee Policy on Method of Hiring Teachers" applicable for the 1993-94 school year, teachers were selected from an eligibility list established annually.

25. The Teacher Eligibility List ranked candidates by score, with the highest possible score being 1,000 as follows: 500 possible points from the National Teacher Examination ("NTE"); 300 possible points from an interview with a three-member committee; and 200 possible points based on an applicant's training and experience.

26. Pursuant to the 1993-94 policy, a person's NTE score was good only from the current year or one of the two previous years.

27. Your daughter Julie was listed on four Teacher Eligibility Lists for the 1993-94 school year: K-3, 4-6, 7-8 and Choice. Julie was ranked seventh on the K-3 and 4-6 lists, second of two on the 7-8 list, and fourth on the Choice list.

28. On February 2, 1994, Julie requested that she be considered for a teaching position in Somerville for the 1994-95 school year.

29. Prior to March 1, 1994, you knew that your daughter was interested in becoming a Somerville school teacher, had been on the 1993-94 Teacher Eligibility Lists, had taken the NTE and was working as a substitute teacher in Somerville.

30. On March 1, 1994, the Personnel Subcommittee of the School Committee reviewed proposed changes to the School Committee's policy on calculating scores for the Teacher Eligibility List. You participated in that review and forwarded the Subcommittee's motion to the School Committee to accept the proposed changes.

31. The proposed changes were as follows:

(a) Set up a mathematical deviation formula to adjust interview scores that are skewed.

(b) Candidate will be listed in numerical order with the certification. This list will be inclusive of all elementary teachers.

(c) Make sure that lists are established for all areas of secondary.

(d) Re-state that NTE is good for five years. No NTE exam needed for vocational teachers.

(e) Proposed eligibility lists will be inclusive in most secondary areas especially in SPED and Foreign language.

(f) Principals in Somerville will be asked to rate substitute teachers annually to be

added to their overall experience score. These teachers must have substituted at least three (3) quarters during the school year.

(g) Long-term subs shall be appointed from the list of eligible teachers. If a permanent position should arise, anyone holding a long-term position will be considered as being on the list.

32. On March 7, 1994, the School Committee voted on a motion to adopt the proposed changes to the policy on calculating scores for the Teacher Eligibility List. You voted in favor of the motion.

33. According to the 1994-95 Teacher Eligibility Lists, Julie placed fifth on the Elementary (1-6) list.

34. On September 2, 1994, Principal Ellen O'Brien of the Healey School recommended to Anthony Caliri, Human Resources Manager, that Julie be offered the position of sixth grade teacher for the 1994-95 school year.

II. Discussion

As a member of the Somerville School Committee you were a municipal employee within the meaning of G.L. c. 268A, §1(g). 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 §§19 and 23(b)(3) of the statute.

Section 19 of G.L. c. 268A prohibits a municipal employee from participating[1/] as a municipal employee in a particular matter[2/] in which to her knowledge she or an immediate family member has a financial interest.[3/]

The controversy concerning the use of the 1988 civil service list to fill the principal clerk-stenographer vacancy in 1992 was a particular matter. You knew that your sister had a financial interest in this particular matter as an applicant for the vacancy. Nevertheless, you participated as a member of the School Committee in this particular matter on January 22, January 27, May 4 and May 28, 1992. Thus, there is reasonable cause to believe that you violated §19 on each of these occasions.

In addition, the Personnel Subcommittee's decision to propose and the School Committee's decision to approve changes to the teacher eligibility list were particular matters. You knew that your daughter had a financial interest in these particular matters as a teacher applicant.[4/] Nevertheless, you participated as a member of the School Committee in this particular matter on March 1 and 7, 1994. Thus, there is reasonable cause to believe that you violated §19 on each of these occasions.

This same conduct also suggests a violation of 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 her favor in the performance of her official duties. Your participation in matters affecting the financial interests of your sister and daughter would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that you participated in these matters to benefit members of your own family and that you could be unduly influenced in the performance of your official responsibilities as a member of the School Committee. Thus, there is reasonable cause to believe that you violated §23(b)(3).

You have asserted that your split May 4, 1992 vote on the Bakey matter was an attempt to comply with the conflict of interest law as articulated and that your conduct in both matters falls within the general policy exemption to §19 and, by application of §23(d), is also exempt from §23(b)(3).[5/] In Julie's case, you point specifically to the Education Reform Act of 1993, which removed school committees from hiring decisions and relegated them to policy matters, and which you argue coincides precisely with the general policy exemption.

The general policy exemption set forth in §19(b)(3) states that it shall not be a violation of §19

> if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.

Section 19(b)(3) allows you to act as a school committee member on any determination of "general policy" which affects a substantial segment of your community's population in the same way. For

example, you have a child in the public school system, and students currently get free milk at lunch, but because of budgetary concerns, the School Committee is considering charging a nominal fee for the milk. This plan would affect your financial interest because of your child, but it would also affect much of the town's population. Thus, you could participate in deciding on the proposal. Ethics Commission Brochure, *The Conflict of Interest Law and School Committee Members*.

You have stated that you participated in these particular matters because you believed them to involve matters of general policy, exempt under §19(b)(3). While you had a good faith belief that you could participate in these matters, the Commission disagrees with your interpretation of the law and takes this opportunity to educate you and others as to its reasoning.

First, in the case of your 1992 participation, you assert that you participated in the particular matter to promote use of proper civil service procedure and not to benefit your sister. Second, in the case of your 1994 participation, you assert that you participated in the particular matter to effect amendments to the teacher eligibility lists, not to benefit your daughter.

Assuming that you were participating in particular matters involving determinations of general policy, the §19(b)(3) exemption would not apply unless your sister's and daughter's interests were shared with a substantial segment of the population of Somerville. Otherwise, a matter couched in terms of general policy might nevertheless affect the financial interests of only a few residents of the municipality. *See Belin v. Secretary of the Commonwealth*, 362 Mass. 530, 535 (1972).

The Commission has determined that 10% is a substantial segment of the population of the municipality for purposes of this exemption. *EC-COI-92-34; EC-COI-93-20*. Somerville's population was 72,303 in 1992 and 68,940 in 1994. In the case of your sister, only a handful of school department clerical employees, certainly less than 7,230, shared her interest. In the case of your daughter, only a handful of teacher applicants, certainly less than 6,894, shared her interest. Thus, your sister's and daughter's interests were not shared with a substantial segment of the Somerville population. *In re Khambaty*, 1987 SEC 318 (school committee member violated §19 by voting on matters in which school teacher wife had financial interest; §19(b)(3) did not apply because wife's interest not shared with substantial segment of community).

For the foregoing reasons, your conduct is not exempt from §19 by application of the general policy exemption.

III. **Disposition**

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than pursuing its formal order which might have resulted in a civil penalty because on a review of all the pertinent evidence it appeared that you were attempting to comply with the conflict of interest law by abstaining from matters specifically directed to your immediate family members, and because you believed in good faith that you could participate in particular matters involving determinations of general policy. Your cooperation with the Commission in fashioning this educational letter was also a consideration.

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

This matter is now closed.

DATE: December 18, 1996

[1/] "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).

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

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

[4/] Your daughter had a financial interest in these particular matters because the proposed changes resulted in your daughter's advancing a few places on the teacher eligibility list and her NTE score remaining valid for an additional two years.

[5/] Section 23(d) provides that any "activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section."

State Ethics Commission

Advisory Opinions

1996

Summaries of Advisory Opinions
Calendar Year 1996

EC-COI-96-1 - In an appeal of an Energy Facilities Siting Board decision to the Supreme Judicial Court, the Board will be represented by a Special Assistant Attorney General ("SAAG") because the Attorney General will oppose the Board on the matter. For the purposes of applying the limitations of G.L. c. 268A, §4 to the private activities of a "special state employee", the Commission finds that -- in these narrow circumstances -- the SAAG serves only the Board, and not the Attorney General's Office; therefore, the SAAG may continue to represent private clients in litigation which does not involve the Board, but in which the Attorney General is a party. However, under G.L. c. 268A, §23(e), the Attorney General may impose provisions more restrictive than those of G.L. c. 268A, §4.

EC-COI-96-2 - A member of a municipal board of assessors may conduct private appraisals of properties in town; however, he must follow the restrictions of G.L. c. 268A, §§ 17, 19 and 23.

EC-COI-96-3 - A full-time state employee is advised that the "critical need exemption" to G.L. c. 268A, §7 will allow her to continue her part-time job with a state vendor which provides domestic violence shelter services through a network of "safe houses".

CONFLICT OF INTEREST OPINION
EC-COI-96-1*

FACTS:

A decision of the Energy Facilities Siting Board ("Board"), a state agency within the Department of Public Utilities,[1] has been appealed to the Supreme Judicial Court. The appeal arose from the Attorney General's opposition to the Board's decision. When the Attorney General opposes a decision by a state agency, he has the authority to appoint legal counsel to represent the agency in a court proceeding. G. L. c. 12, §3. An attorney so appointed is designated a Special Assistant Attorney General ("SAAG") for the purposes of representing the state agency.[2]

In a prior appeal of other Board decisions, the private attorney appointed to represent the Board received a letter of appointment from the Attorney General. In pertinent part, the letter reads:

> I hereby appoint you a Special Assistant Attorney General for the purpose of representing the Energy Facilities Siting Board in the following related cases: . . .
>
> A copy of the Office's Guidelines for Special Assistant Attorneys General, including reporting procedures, is enclosed for your information. Particular attention is drawn to the fact that, in order to maintain a consistent legal policy for the Commonwealth, Special Assistants are subject to the authority of the Attorney General to direct their activities, except in matters referred due to conflict of interest. This appointment is being made because of such a conflict of interest. Accordingly, the Office of the Attorney General will not direct and control your activities in the representation of your client.
>
> You should also be aware that your service as a Special Assistant Attorney General qualifies you as a "special state employee" within the meaning of the Massachusetts Conflict of Interest Law, G. L. c. 268A, §§1-25, and therefore subjects you to the provisions of that statute.
>
> Your appointment will terminate with the completion of your case assignment.

The SAAG representing the Board in the prior appeal resigned his appointment just before completion of the appeal because the Attorney General believed that the SAAG might have a conflict of interest under c. 268A. The source of potential conflict was a second case pending before the Supreme Judicial Court in which that same SAAG in his private practice represented a client opposed by the Attorney General. The second case did not involve the Board. The Attorney General concluded that the SAAG had a conflict of interest under G. L. c. 268A, §4 because he had been serving the Attorney General's Office in the first case for more than sixty days while also representing a private party in a second case pending in the Attorney General's Office.

The *Guidelines for Special Assistant Attorneys General*, March 9, 1993, which is provided to each SAAG, states that, under §4, a SAAG who performs work as a SAAG on more than sixty days during any 365 day period may not act as agent or attorney or accept or request compensation from anyone other than the Commonwealth in relation to any matter pending in the Attorney General's Office. *Guidelines* at 4-5. The *Guidelines* also states that SAAGs are subject to the authority of the Attorney General to direct their activities except with respect to matters referred because of conflicts of interest. "The scope of the authority delegated to each Special Assistant is limited to that described in the designation letter." *Guidelines* at 8. Reporting requirements under the *Guidelines* state that SAAGs must regularly report the status of litigation they are handling for the Office. "Special Assistants appointed to handle a particular case or cases should report at the time of any significant case activity or every six months, whichever is sooner. . . . In addition, . . . Special Assistants [appointed to handle specified types of cases] should report and consult with the Office of the Attorney General in *advance of any particularly significant or unusual event* in any case." *Guidelines* at 11 (emphasis in original).

In cases such as this one involving the Board, the private attorney designated a SAAG receives neither support nor direction from the Attorney General's Office, according to the former SAAG who represented the Board in the prior appeal before the Supreme Judicial Court. His interaction with the Office consists of submitting a monthly accounting of his services so the Attorney General's Office may pay his bill.[3]

QUESTION:

For the purposes of §4, in which agency is a SAAG serving when he is appointed to represent a state agency in a particular matter before a tribunal when the Attorney General opposes that state agency in that same particular matter?

ANSWER:

In circumstances in which a private attorney is appointed a SAAG to represent a state agency before a tribunal when the Attorney General opposes that state agency in such proceedings, the SAAG is serving only that state agency and not the Office of the Attorney General for purposes of applying the restrictions of §4.

DISCUSSION:

Section 4 generally prohibits state employees from being paid by or representing non-state parties in a particular matter of direct and substantial interest to the state. A special state employee, such as a SAAG, is subject to this prohibition only

> in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

G. L. c. 268A, §4.

The §4 exemption for special state employees represents a determination that the broad restrictions of §4 would make it impossible for the Commonwealth to have the service of specialists for special assignments. *Report of the Special Commission on Code of Ethics*, House No. 3650 of 1962, p. 13; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 335 (1965). Similar policy concerns support the federal conflict of interest laws upon which §4 is based.[4/]

At the heart of the issue is what agency does a SAAG serve who is retained to represent a state agency because of the Attorney General's conflict of interest?

The possibility that a special state employee might simultaneously serve two state agencies in connection with the same particular matter in which the agencies oppose each other appears not to have been contemplated under the conflict of interest law.[5/] Our research indicates that service only to a single agency in the context of the §4 exemption for special state employees has been considered.[6/] See, e.g., *Report of the Special Commission on Code of Ethics*, House No. 3650 of 1962, p. 13;[7/] Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 299, 337-340 (1965)(suggesting an expansive definition of agency but not one that extends beyond a governmental department);[8/] Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law: Essays for Austin Wakeman Scott*, 3, 16-17 (1964) (discussing §17, the municipal counterpart to §4); Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1149-1151 (discussing the federal law upon which G. L. c. 268A is based).

Our prior opinions that consider the special state employee exemption address only the §4 issues when a special state employee might represent private parties before the single agency to which he was assigned. See, e.g., *EC-COI-84-129* (attorney who acts as labor counsel to MHFA may represent clients before MHFA in matters in which he did not participate or have official responsibility so long as he serves MHFA less than sixty days); *85-21* (consultant to the Executive Office of Energy Resources may not represent non-state parties in connection with matters pending in EOER); *90-12* (attorney who provides mediation services to Department of Environmental Protection may not represent private clients in connection with any matter pending within DEP); *90-16* (volunteer lawyers who serve as special assistant district attorneys to handle appeals for the district attorney are prohibited from privately representing clients in connection with matters pending in the district attorney's office). See, also, *Commission Advisory No. 13, Agency, Part B: State Employees Acting as Agent*.

An early Ethics Commission opinion, *EC-COI-80-66*, however, concluded that a SAAG who represented the Division of Water Pollution Control ("DWPC") could not also represent a private client before another state agency if the Attorney General's Office became involved in the other state agency matter and if the SAAG served more than sixty days during any three hundred and sixty-five day period. That opinion, however, appeared to assume without explanation that, for the purposes of §4, the SAAG would be serving both the agency to which he was assigned and the Attorney General's Office. That opinion also did not describe the reasons why a SAAG was assigned to represent the DWPC. See *EC-COI-80-66*. We agree with that opinion's conclusion with respect to SAAGs not assigned because of the Attorney General's opposition to a state agency's decision. With respect to the limited circumstances of the instant case, however, we clarify that particular conclusion of *EC-COI-80-66*.

In determining which agency the SAAG serves in these particular circumstances, we are guided by the legislative purpose behind §4. The goal of §4 is to prevent divided loyalty as well as influence peddling. *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610

(1984); *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984)(construing §17, the municipal counterpart to §4); *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977), cert. denied, 435 U.S. 933 (1978) (construing §17; Liacos, J., dissenting on other grounds. Section 17 "seeks to preclude circumstances leading to a conflict of loyalties." *Id.*). The concerns of §4 would not be raised when a SAAG represents only the Board in one particular matter opposed by the Attorney General while also representing only a private party in a second particular matter opposed by the Attorney General, so long as the second matter was not pending with the Board. Here, the loyalty of the SAAG is to the state agency to which he is assigned---the Board. He is to represent that agency's position in opposition to the Attorney General's. His duty to the Attorney General consists of only filing regular reports and submitting an accounting so he may be paid for his services. Moreover, the Attorney General's designation letter acknowledges that his Office is *not* the SAAG's client. It states that because of a conflict of interest, the Attorney General will not direct and control the SAAG's activities in the representation of the Board.

"The [additional] concern addressed by §4 is the potential for influencing pending agency matters." *EC-COI-91-5*. The sixty day limit, although arbitrary, represents a legislative decision that a special state employee whose services require more than that amount of time with an agency will have increased opportunities to influence that agency's pending matters. *EC-COI-91-5; 85-49.*[9/] The underlying assumption in the language from §4, "in the state agency in which he is serving" is a special state employee's ability to influence that particular state agency. It therefore follows that if a SAAG representing the Board does not have the opportunity to influence the Attorney General's Office in other matters pending in the Office, the §4 concerns will be adequately addressed.[10/] The scope and nature of the SAAG's services do not reach beyond the Board, his immediate agency. See Buss, *infra*, at note 8.

Here, the SAAG is in no position to exert influence over other matters pending in the Attorney General's Office. The SAAG does not work with the Attorney General's Office in representing the Board. Except for receiving fees for his services, he receives no other support directly or indirectly from the Attorney General's Office. Although a SAAG must regularly submit reports to the Attorney General, the *Guidelines* specifically state that the Attorney General does not direct the SAAG in matters referred to him because of conflicts of interest. His interaction with the Office and its staff is comparable to that of any private attorney who represents a private client opposing the Attorney General. His opportunity to influence any other particular matter pending in the Attorney General's Office is no greater than any other private attorney's.

We conclude that in these circumstances, the §4 phrase "state agency in which he is serving" applies to the agency to which a SAAG has been assigned when the SAAG is otherwise a private attorney who has been appointed to represent that state agency in a particular matter opposed by the Attorney General. Therefore, §4 would not prohibit such a SAAG from also representing other parties in other particular matters that are pending in the Attorney General's Office and are not pending with the Board.[11/]

The question of what is the agency in which the SAAG serves in the instant case elicits different answers from the parties. The Board seizes on the language of the Attorney General's SAAG appointment letter that purports to yield certain controls of the Attorney General over a SAAG. The letter states that the Attorney General will not direct and control the SAAG's activities in representing the state agency because the matter was referred to a SAAG due to a conflict of interest.[12/] The letter implies what the parties have confirmed; the Attorney General opposes the Board's decision. The Board argues that "serving" the Attorney General under such circumstances would ignore the specific directive of the appointment letter.[13/]

The Attorney General asserts that all SAAGs, regardless of the reasons for their appointment, serve the Office of the Attorney General. To support this assertion, the Attorney General cites several reasons. First, SAAGs derive their authority to act on behalf of the Commonwealth from their appointment. The Attorney General retains the right to terminate or to modify their appointment at any time.

Second, although the case on appeal appears to involve a "conflict of interest" because the Attorney General is one of the appellants who opposes the Board's decision, the Commonwealth can have only one interest. It is the responsibility of the Attorney General to determine that one interest. See G. L. c. 12, §3.[14/]

Third, if the Board's conclusion were affirmed, the powers granted to the Attorney General would be restricted, which would run contrary to the mandate of G. L. c. 12, §3.

Although the Attorney General cites all of these reasons, he emphasizes his role in determining a unified

and consistent legal policy for the Commonwealth. *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163 (1975). *Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977) notes that the Legislature clearly allocated complete responsibility for all of the Commonwealth's legal business to the Attorney General.[15/] The appointment of a SAAG to represent a state agency in a particular matter in which an Assistant Attorney General appears in opposition to that state agency does not modify or restrict the powers granted to the Attorney General under G. L. c. 12, §3, to control all litigation involving the Commonwealth. Moreover, in the instant case should the Attorney General decide that the suit should not be defended, he could decline to appoint a SAAG. Finally, the Attorney General argues that "is it incumbent upon the Attorney General to resolve whatever tensions may arise between different views of the Commonwealth's interests, deciding what the overall interest of the Commonwealth is, and then acting in the manner he deems most appropriate given the interest."

Based upon these reasons, the Attorney General asserts that it would constitute an impermissibly adverse effect upon his authority if, for purposes of §4, a SAAG in these circumstances were deemed to serve only the agency to which he was assigned.

We do not disagree with the Attorney General's discussion of the sources of his authority. Statutory authority and the opinions of the Supreme Judicial Court support his duty "to set a unified and consistent legal policy for the Commonwealth." *Secretary of Administration & Finance* at 163. Our application of §4 in these circumstances will not, contrary to the Attorney General's argument, restrict his authority.

In the limited circumstances of a conflict between an agency and the Attorney General, the Attorney General has yielded certain authority to the SAAG. Our conclusion would not provide the SAAG with more authority or power with respect to his representation of the Board than what had been delegated by the Attorney General. Nothing in our analysis would prevent the Attorney General from dismissing the SAAG assigned to the Board.

We note that under §23(e), in pertinent part, the head of a state agency is permitted to establish and enforce additional standards of conduct. We have said that the Commission, absent special circumstances, will defer to an agency code of conduct governing conflicts of interest that is consistent with the principles of §23. *EC-COI-93-23* (agency imposed standards stricter than those of §3 and §23(b)(2)); *85-12*. Therefore, §23 will permit the Attorney General to determine whether, in these circumstances, provisions more restrictive than §4's are necessary in light of this opinion.

DATE AUTHORIZED: March 27, 1996

---

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

1/ G. L. c. 164, §69H.

2/ SAAGs may be appointed for several reasons, including, for example: to represent the state or its agencies when the Attorney General's Office does not have a particular legal expertise to represent the matter; to provide legal services when the Attorney General cannot provide personnel; to represent one division of the Attorney General's Office in a matter in which other divisions represent diverse interests; or to represent a state agency when the Attorney General opposes that agency's action.

3/ We have the benefit of submissions from the Board, which first raised the question in a request for an advisory opinion, and the Legal Counsel to the Attorney General.

4/ See 18 U.S.C., §§203, 205 (as amended through May 4, 1990, Pub. L. 101-280), which contain nearly identical provisions that narrow the scope of restrictions with respect to special government employees. One of the major purposes of the federal law is to facilitate the government's use of private experts on a part-time basis without depriving the government of protection against unethical conduct on their part. 1962, *U.S. Code Cong. and Admin. News*, 3852, 3853.

5/ Ordinary definitions of the word "serve" do not help us to answer whether one serves only the Board or both the Board and the Attorney General. *Webster's Third New International Dictionary of the English Language* (1964) offers several applicable definitions: to be of use; answer a purpose; have a function; to hold an office; discharge a duty or function; act in a capacity; to be a servant to; work for; to give the service and respect due to.

6/ The federal conflict of interest laws upon which §4 is based, 18 U.S.C., §§203, 205 (as amended through May 4, 1990, Pub. L. 101-280) and their legislative history appear to contemplate service to a single agency—that to which the special employee is assigned. See *Memorandum of Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849*, Feb. 1, 1963, reprinted in 18 U.S.C. §201 note, at 279, 280 (1969) and 1962, *U.S. Code Cong. and Admin. News*, 3852.

7/ A special state employee is subject "to the prohibition against receiving outside compensation or representing private interests with respect to matters in which the State is involved only in situations in which he or *the agency in which he is serving* is concerned, and such special employee is free to deal with *other state agencies* in a private capacity. This again is necessitated by the determination that imposing broad disabilities on special employees would render it impossible for the Commonwealth to have the service of specialists or other capable people for *specific assignments in departments or agencies*." *Id.* (emphasis added).

8/ Buss suggests the following analysis for determining the size of

one's agency:

> If the special employee is serving in the office of a head of a department, presumably every matter in any division of the department is pending in his agency. But suppose the positions are reversed: the special employee works in the division and the matter is pending on a higher departmental level or in some other division of the executive department. There appear to be two possible approaches to resolving this problem. Under the first, emphasis would be placed on determining the identity of the employee's immediate employer. Since a person is a state employee by reason of his connection with 'a state agency,' it is at least reasonable to conclude that he serves only one state agency. Under the alternative approach, the employee's agency for purposes of applying this provision would depend upon the particular circumstances of a given case. If it is clear that the scope and nature of an employee's services reach beyond his immediate agency, the employee's agency should be broadly construed in the context of the more inclusive administrative unit, and exemption based on this provision should be narrowed accordingly. When attention is focused on the other part of the problem, namely, where is the matter pending, it is somewhat easier to conclude that the answer will be determined by practical considerations comparable to those suggested under the second alternative approach outlined above. *Id.* at 338.
>
> It would appear that an employee's contact with matters pending in *the agency he is serving*, other than those with which he is directly concerned, would tend to depend on the number of days during which he was present and attending to *that* agency's business. *Id.* at 340 (emphasis added).

[9/] The Senate Committee on the Judiciary's comment on the §203 limitation on special government employees recognizes that such an employee "may attain a considerable degree of influence in an agency he serves." *Id.* at 3858. In discussing the merits of a fifteen day verses a sixty day limit the Committee noted, "The 15-day limit seems much too short and no doubt would often make unavailable to an agency the needed services of an individual with specialized knowledge or skills who must appear before that agency in other connections in his private capacity. The 60-day standard set by the committee seems a more reasonable one, particularly when it is borne in mind that the first restriction applicable to special Government employees continues in effect in any event." *Id.* at 3858-59. The Committee also noted that agencies must make certain that persons serving part-time "who also appear on behalf of outside organizations do not abuse their access to the agency for the benefit of those organizations." *Id.* at 3859. As with G. L. c. 268A, §4, the federal counterparts are intended to guard against abusing access to and influence in an agency.

[10/] We also note that in our continuing efforts to apply Chapter 268A in a comprehensible fashion, we have attempted to be precise in identifying the public agency in which a public employee serves. The Commission's "jurisdiction has consistently been based on the destination of the services which a state employee provides rather than on the identity of the appointing official of the employee. Otherwise, jurisdiction under G. L. c. 268A would result in anomalies such as judges being considered employees of the governor and executive branch." *EC-COI-90-18*, n. 3.

[11/] Our conclusion does not change our interpretation of the §4 provisions that apply to the SAAG with respect to his private involvement in other particular matters that might come before the Board. In addition, in circumstances in which the Attorney General's Office decided to appoint a SAAG to represent an agency's position with which the Attorney General agreed but may not have the personnel or expertise available to represent the agency, the SAAG would serve *both* the agency and the Attorney General's Office. We assume such a SAAG would be supervised by and have the support of the Office as well as the agency he represents.

[12/] Although neither the appointment letter nor the *Guidelines* so state explicitly, we assume that the specific conflict of interest is governed by the *Canons of Ethics and Disciplinary Rules Regulating the Practice of Law*. See *S.J.C. Rule 3:07, DR-5-105 (A) and (B)*, as appearing in 382 Mass. 781 (1981), which generally proscribes the simultaneous representation of clients with adverse interests.

[13/] The Board also argues that the Attorney General's position limits the availability of qualified counsel to represent the Board on such appeals because the area of law in issue is highly specialized. It is likely that counsel with the necessary expertise will also represent private clients who are opposed by the Attorney General with respect to other issues related to the same body of law.

[14/] In pertinent part, G. L. c. 12, §3 provides:

> The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, . . . and in such suits and proceedings before any other tribunal, including prosecutions of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. . . . All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

[15/] In *Feeney*, the issue was whether the Attorney General could prosecute an appeal over the expressed objections of state officers whom he represented. The court held that the Attorney General acted within his authority pursuant to G. L. c. 12, §3 when he prosecuted such an appeal. 373 Mass. at 368.

CONFLICT OF INTEREST OPINION
EC-COI-96-2

FACTS:

A Town Board of Assessors is made up of five elected, uncompensated members. Certain members of the Board are licensed real estate appraisers.

QUESTION:

Does the conflict of interest law allow a Board member, who is also a licensed real estate appraiser, to be paid to perform appraisals of properties located in Town?

ANSWER:

Yes, subject to the limitations set forth below.

DISCUSSION:

Board members are municipal employees under the conflict of interest law.[1] The following provisions of c. 268A are relevant to the question.

Section 17

Section 17(a) prohibits municipal employees from receiving compensation[2] from anyone, other than their 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 municipal employees from acting as agents[4] for anyone other than the municipality in any claim against the municipality or for anyone in connection with any particular matter in which the municipality has a direct and substantial interest. This section is based on the principle that "one cannot serve two masters." A member of the Board who is also a private appraiser would be restricted from participating or receiving compensation in certain particular matters.

For example, such a member would not be allowed, under §17(a), to be paid by a private party to prepare materials such as affidavits or valuation forms that would be submitted to the Board. One could not be paid to perform an appraisal for the express purpose of seeking an abatement. If one were to perform such types of work for no pay, one would still not be able to act as an agent for a private party before any Town boards or officials. Signing or submitting forms on behalf of a private party or appearing personally before Town officials would constitute acting as an agent. Representing any private party in any matter relating to a property assessment such as a challenge to the assessment or an abatement application would be prohibited.

Additionally, if the Town were interested in leasing or purchasing properties, it is conceivable that value as established by an appraisal would be of direct and substantial interest to the Town. A Board member could not be paid by or represent a private party in connection with such an appraisal.[5] Similarly, a Board member could not conduct an appraisal for a private party in an eminent domain proceeding by the Town or in connection with a tax taking or sale.

Section 17 would not, however, prohibit a Board member from performing appraisals conducted only for private parties and not related to any official action by the Town. For example, §17 would not bar a Board member from conducting an appraisal in connection with private financing.

Section 19

In pertinent part, §19 provides that a municipal employee may not participate in any particular matter in which he, an immediate family member[6] or partner, a business organization in which he is an officer, director, trustee, partner, or employee has a financial interest. The definition of participation includes not only voting but also formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations on particular matters. *EC-COI-92-90.* The financial interest may be of any size and may be either positive or negative so long as it is direct and immediate *or* reasonably foreseeable. *EC-COI-92-24; 84-96; 84-98.* For example, a Board member could not participate in Board matters concerning his own property or property of his immediate family.[7]

Section 23

Certain provisions of §23, which specifies standards of conduct that apply to all public officials, are pertinent. Under §23(b)(2), a public employee may not use his official position to secure unwarranted privileges or exemptions of substantial value[8] for himself or others. Section 23(b)(3) prohibits a public 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. To dispel such an impression, the public employee must make a written public disclosure in advance of participating in the matter of all the facts and circumstances. *EC-COI-91-3; 89-19.* An elected official must file such a disclosure with the municipal clerk. In addition, if an appearance of a conflict of interest arises in a public meeting, officials are advised to make a verbal disclosure to be included in the meeting minutes. *Commission Fact Sheet, Avoiding "Appearances" of Conflicts of Interests, Standards of Conduct (Section 23).*

Finally, §23(c) prohibits a public 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 material or data which is exempt from the definition of a public record.[9] *EC-COI-91-1*.

Under §23(b)(2), a Board member may not use his title as an Assessor, municipal time or resources to promote or benefit private interests. Although final assessments are a matter of public record, one could not use, for example, computer data bases or programs not available to the public to get information for a private appraisal business.

We acknowledge that appraisals are performed for purposes not related to the Board's responsibilities or other municipal matters. For example, private parties secure appraisals for financings, sales, or marketing efforts. Neither the Board member nor the private party may have contemplated that the appraisal would be used in connection with a municipal matter. However, such an event may occur. If such an appraisal were to be submitted to the Board at a later time in connection with a particular matter, §23(b)(2) requires the Board member who performed the appraisal to apply objective criteria to that matter. *EC-COI-89-23*. In addition, as described below regarding §23(b)(3), the Board member must also make a public disclosure of all the facts and circumstances regarding his work on the appraisal in order to dispel the appearance of a conflict of interest. See also *EC-COI-89-29*. If the Board member cannot be objective about the matter because of his prior private work on the appraisal, he must abstain from participating in that particular matter before the Board.[10]

Issues under §23(b)(3) often arise because of one's relationships with non-immediate family members which do not involve financial interests under §19. If a former private appraisal client of a Board member were to bring a matter before the Board, not involving the Board member's private appraisal, that Board member must fully disclose his history with the client in order to dispel an appearance of bias or influence prior to participating in the matter. Similarly, again when §19 or §17 issues are not involved, if a Board member assisted a party in completing an abatement application for no pay, that Board member must disclose his prior relationship. See also *EC-COI-89-16*.[11]

DATE AUTHORIZED: March 27, 1996

---

[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).

Although a non-paid municipal position may qualify to be designated for "special municipal" employee status, our records do not indicate that the Board of Assessor positions have been so designated. The definition of a special municipal employee is 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).

Certain provisions of the conflict law apply somewhat less restrictively to special municipal employees. If the Town were to designate the Board positions as "special municipal" employees, you should seek further advice from the Commission.

[2] "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for service rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

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

[4] The State Ethics Commission has concluded that "the distinguishing factor of acting as agent within the meaning of the conflict law is

'acting on behalf of' some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications." *In re Sullivan*, 1987 SEC 312, 314-315; See also *In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

[5] If the Town were to retain a Board member for pay to perform an appraisal for the Town's benefit, then that Board member could have an issue under §20 of the conflict law. Section 20 generally prohibits municipal employees from having an interest in another contract with the same municipality. This prohibition, however, contains several exemptions and qualifications. If such an issue arises, you should seek further guidance from the Commission.

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

[7] Note that the exemption under §19(b)(1) is not available to elected officials. *EC-COI-90-1*.

[8] "Substantial value" is $50 or more. *EC-COI-93-14*.

[9] G. L. c. 4, §7.

[10] There may be circumstances in which a private appraisal performed by a Board member is called into question by the Board. Other Board members might criticize the integrity of that Board member's private work. For example, a recently performed private appraisal might have a valuation that is less than the Board's assessment. We have concluded that in certain circumstances a public official would have a reasonably foreseeable financial interest in an official decision because of the effect of that decision on the official's private reputation. In *EC-COI-82-105* and *82-176*, the Commission held that driving schools have financial interests in decisions by the Registry of Motor Vehicles ("RMV") to grant licenses to applicants from their driving schools because of the effect such decisions have on the reputation and success of the schools. Therefore, the Commission held that RMV inspectors who also worked privately for driving schools would have to comply with §6, the state counterpart to §19, and not act as RMV inspectors in connection with license applications by students from the driving schools at which they teach.

Even in circumstances not implicating §17, if a Board member's appraisal were to be used by a *former* client in connection with Board matters, §19 might be implicated because of the effect of the Board's decisions on his private reputation as an appraiser. If such a circumstance were to occur, the Board member should seek further guidance from the Ethics Commission prior to participating in the Board matters.

[11] Note that §23(e) expressly permits a head of a municipal agency to establish and enforce additional standards of conduct. We have said that the Commission, absent special circumstances, will defer to an agency code of conduct governing conflicts of interest that is more restrictive than c. 268A and consistent with its principles. *EC-COI-93-23*.

CONFLICT OF INTEREST OPINION
EC-COI-96-3*

FACTS:

You are a full-time supervisor in an on-going protective service unit within the Department of Social Services ("DSS"). You have served as a DSS employee since 1978. In addition to the foregoing, you are also employed on a part-time basis (20 hours per week) as a Safe Home Coordinator and Counselor by Adult/Adolescence Counseling, Inc. ("AAC") in its domestic violence program known as "Services Against Family Violence" ("Services"). You applied for this position in response to a job advertisement in the *Boston Globe*.

As part of its Services program, AAC operates a Safe Home Network ("SHN") which provides a safe place/shelter to women and children seeking to escape domestic violence. Utilizing donated space in hotels/motels or personal homes, individuals or families seeking shelter contact a 24-hour hotline through which they are directed to a safe home location. Such locations are not publicized and change periodically for security purposes. The SHN model is currently a popular adjunct to many battered women's programs and provides the shelter function for most such programs. You state that the SHN model is less costly than a single site shelter. Moreover, the SHN model provides greater security than a single site shelter because it is difficult for a batterer to track a domestic violence victim where the safe home locations are not publicly disclosed and such locations change periodically. The SHN as well as the other domestic violence services offered by AAC are available free of charge on a 24-hour per day basis.

The Services program is funded by various resources including a contract with the DSS, community development block grants from several area communities, corporate and foundation grants and individual contributions. The DSS contract, which, among other things, requires AAC to provide a domestic violence safe home, constitutes approximately 81% of the total revenues for the Services program.

With regard to your particular responsibilities at AAC, you are involved in recruiting homes and/or hotels/motels for use as SHN locations. You also participate in the training of volunteers who provide services through the SHN program. You provide coverage for the 24-hour hotline service and counseling services to SHN clients when you work all night/on call shifts. You do not participate in the financial management of the SHN. AAC's contract with the

DSS contemplates the particular services with which you are involved as an AAC employee (the 24-hour hotline, individual and group counseling, and safe home services).

QUESTION:

In light of your DSS employment, does the conflict of interest law allow you to retain the above described part-time employment arrangement?

ANSWER:

Yes, provided that you comply with certain conditions.

DISCUSSION:

In your DSS position, you are a state employee[1/] for purposes of the conflict of interest law.

Section 7 of G.L. c. 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency unless an exemption applies. We have previously found that the §7 prohibition is relevant to a state employee who is additionally employed by a private organization which has a contract with a state agency to perform certain services. In particular, where a state employee works for a state agency vendor to provide services under a state contract, we have held that the state employee has an indirect financial interest in the private employer's state contract. See *EC-COI-81-141; 85-81.* In your case, where the tasks which you perform in your private capacity are contemplated under AAC's funding arrangement with DSS, we find that you have an indirect financial interest in the contract between AAC and DSS.

The last paragraph of §7, commonly known as the "critical need" exemption, provides that:

> [t]his section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for the care of mentally ill or mentally retarded persons, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

We have previously applied this exemption to group residence homes operated by private vendors of the Commonwealth where the major funding source for the group home is a state agency, where the services provided are similar to those provided by similar state facilities and where the program operates on a twenty-four hour per day basis. See *EC-COI-83-71.* In contrast, we refused to apply the exemption in a situation involving periodic daytime respite care services because we found that services provided only during the daytime on an "as needed basis" or under a regularly scheduled basis of four hours per week were not sufficiently continuous to meet the requirement of the exemption. As we have previously concluded "[i]n order to qualify for the exemption, employees must be working, at a minimum, in a program which provides round-the-clock services." *EC-COI-83-73.*

In order to determine the applicability of the exemption to the case at hand, we must decide whether the SHN is a facility within the meaning of the final paragraph of G.L. c. 268A, §7. We note that the Legislature did not provide a definition for the word "facility" as used in the critical need exemption. We therefore look to other sources including the legislative history of the critical need exemption. We are guided by the following premise of statutory construction:

> [The] intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objective which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous.

Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted);

O'Brien v. Director of DES, 393 Mass. 482, 487-88 (1984).

The word "facility" ("facilities" plural) as defined in *Webster's Third New International Dictionary* (1961) means: ". . . 5 a: something that promotes the ease of any action, operation, transaction, or course of conduct . . . b: something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." As one court concluded, after noting a dictionary definition and looking at relevant case law, "the word facility is a very broad term and is intended to embrace anything, including human agencies which aid or make easier the performance of activities." *Extendicare, Inc. v. State Coordinating Council for Health Planning*, 532 P.2d 1119, 1122 (1975). Where courts, in seeking to define the word facility, have been forced to look to broad dictionary definitions and have recognized the ambiguous nature of the term, we find no generally accepted common law meaning upon which we may rely in examining the facts before us.

We therefore turn to the legislative history and purpose underlying the critical need exemption. See generally, *Commonwealth v. Collett*, 387 Mass. 424, 433 (1982) ("when phraseology of statute is ambiguous, court may look to various steps in its enactment to resolve ambiguity"). Prior to 1983, the Ethics Commission consistently advised full-time state employees that §7 prohibited them from being additionally employed by human services providers[2/] pursuant to contracts with the state agencies by which they were employed. See *State Ethics Commission Compliance Letter 81-21* (July 29, 1981); *EC-COI-81-141, Attorney General Conflict Opinion No. 798.* In late 1981, the Commission proposed a bill, H. 1235 (1982), which made various amendments to G.L. c. 268A. Among those amendments was a new exemption to allow state employees to work part-time in certain human service facilities, subject to a series of restrictions. In 1982, the Legislature considered H. 1235, and the critical need amendment. With certain minor changes, the Commission's original proposal[3/] was later enacted (St. 1982, c. 612, §7, effective March 29, 1983).[4/] As we have previously recognized, in amending §7, it was the intent of the Legislature "to create an exemption which would permit state employees to work in twenty-four hour human service programs which customarily have difficulty obtaining sufficient staffing."[5/] *EC-COI-83-73.*

As for the SHN, with regard to which you serve as a coordinator and counselor, we acknowledge that AAC does not operate its own shelter facility through which domestic violence services are provided. However, there appear to be sound reasons, namely cost and security, for providing domestic violence services through a network of locations rather than a single, permanent AAC operated facility. In order to find a facility within the meaning of the critical need exemption, we will not therefore require that providers of social service programs, which would otherwise meet the requirements of the critical need exemption, provide services at a particular fixed location.

We conclude that your part-time employment fits within the range of situations about which the Legislature was concerned when adding the 1982 exemption.[6/] Where the SHN, in effect, is the functional equivalent of a facility which is principally funded by the state and the SHN offers services similar to those which would otherwise be provided by the DSS itself,[7/] we find that you are employed in a facility which is covered by the critical need exemption. Moreover, where through the SHN, AAC provides domestic violence services on an around-the-clock basis, we find that the exemption's requirement of uninterrupted and continuous operation is met.[8/] We believe that in applying the exemption to your situation where, for good reason, AAC chooses not to operate its domestic violence safe home out of a fixed facility, we are giving G.L. c. 268A, §7 a workable meaning which is consistent with the statutory language, the legislative intent and our prior opinions interpreting the exemption.

Accordingly, we find that you will meet the initial criteria of the critical need exemption. We note that you do not participate in or have official responsibility for the financial management of the SHN.[9/] Therefore, assuming that you comply with the other exemption criteria,[10/] you may continue your part-time employment arrangement without violating §7.

DATE AUTHORIZED: April 29, 1996

---

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

1/ "State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. 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).

[2/] These providers included both state facilities and private organizations providing services under contract with the Commonwealth.

[3/] As originally drafted the Commission's proposed exemption was limited to state facilities providing services 24 hours per day, 7 days per week. Through a proposal from the House floor on July 1, 1982, Representative Cerasoli successfully amended the exemption to include within the class of eligible institutions any facility principally funded by the state which provides services similar to those provided by (state) mental health care, public health and correctional facilities and which operates on an uninterrupted and continuous basis. Under the amended language, it appears that the House sought to expand the exemption's coverage to include private providers of social services which were principally funded by the state and which operated on a 24-hour per day basis.

[4/] The Commission conveyed to the Senate its support for House 1235 as amended through the efforts of Representative Cerasoli. See *Memorandum to Members of the Massachusetts Senate from Maureen McGee, Executive Director of the State Ethics Commission,* dated July 8, 1982.

[5/] This legislative intent may be discerned from the Commission's stated purpose in proposing the exemption:

> Because it appears to be difficult for such institutions to hire sufficient staff to provide continuous coverage, and because individuals who are already state employees are often among those most qualified and willing to work in state institutions, it seems appropriate to allow state employees to accept such positions as long as certain safeguards are met. *An Act Amending The Laws Regulating the Conduct of Employees: Overview of Major Recommendations*, Publication of the State Ethics Commission, (undated).

[6/] This conclusion is supported by the House floor amendment to the original Commission proposal whereby the scope of the exemption was expanded to cover a wider range of social service facilities.

[7/] We find that the services provided through the SHN are intended to address the public health issues surrounding the problem of domestic violence. Moreover, such services are statutorily mandated by G.L. c. 18B, §2(A)(14) which requires the DSS to provide "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." See 110 CMR 7.091:(3) ("Services to women in transition shall be provided by agencies or individuals under contract to the Department. Shelters shall be located in facilities that provide a safe, temporary residence in an anonymous location and shall be accessible on a 24-hour-a-day, seven-day-a-week basis.").

[8/] This application of the exemption is based on the fact that you work in relation to the SHN which operates on a 24 hour per day basis. Were you to work in other AAC programs which provide services on a limited, daytime basis, the critical need exemption would not be applicable. See *EC-COI-83-73* (pursuant to critical need exemption, the fact that provider runs certain programs on an around-the-clock basis does not afford state employee the opportunity to work after hours in all programs of that provider).

[9/] This is the case in both your DSS position and with regard to your work with AAC.

[10/] The other requirements of the exemption are:

1. You may not be compensated in your AAC position for more than four hours in any day in which you are otherwise compensated by the Commonwealth;
2. You may not be compensated at a rate which exceeds that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty; and
3. The head of the Services program must make and file with the Ethics Commission a written certification that there is a critical need for your services.

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