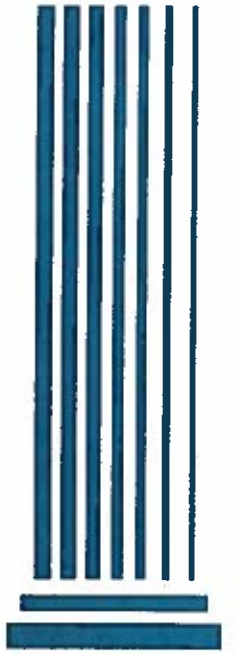
RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1998

STATE
ETHICS
COMMISSION



MASSACHUSETTS

The Massachusetts State Ethics Commission

RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1998

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission
One Ashburton Place, Room 619
Boston, Massachusetts 02108
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Included in this publication are:

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1998.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1998 SEC (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 1998.** Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-98-(number)*.

- **State Ethics Commission Advisories issued in 1998.** Cite Conflict of Interest Advisories as follows: *EC-ADV-98-(number)*.

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

Publication No. 18061 - 80 - 100 - 3/99 - 3.37 - C.R.
Approved by: Philmore Anderson III, State Purchasing Agent

TABLE OF CASES

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State Ethics Commission
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Summaries of Enforcement Actions
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In the Matter of Martin Nieski - The Commission authorized a Disposition Agreement resolving charges that former Dudley Selectman Martin Nieski violated the conflict of interest law in 1997. In the Agreement, Nieski admitted appearing before the selectmen on behalf of his wife's corporation while he served as a selectman. Nieski's wife owns Nieski Inc., a corporation doing business as Marty's, a Dudley liquor store. Nieski was seeking to have an annual liquor license fee of $1,100 waived. The Commission fined Nieski $250. In the Agreement, Nieski admitted 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. Nieski acted as an agent for Nieski Inc. before selectmen at an April 7, 1997 hearing. At the hearing, Nieski "argued extensively" that the $1,100 fee assessed to Marty's should be waived because the annual fee for 1997 had already been paid in January 1997 by Ideal Liquors, Inc., which then transferred its package store liquor license to Nieski Inc. in February 1997. Nieski did not participate as a selectman in this hearing.

In the Matter of J. Martin Auty - The Commission fined Mendon police officer J. Martin Auty $500 for his participation in the hiring of his stepdaughter, Sheri Tagliaferri, as a part-time police dispatcher in 1994 and as a part-time reserve police officer in 1994 and 1995. In a Disposition Agreement, Auty admitted that he violated G.L. c. 268A, §19 by screening and interviewing, as a member of a review committee, candidates other than Tagliaferri, who was one of 41 applicants for 12 police dispatcher positions. After the interviews, Auty participated in narrowing the pool to 12 final candidates; Tagliaferri was one of the finalists. On April 25, 1994, the selectmen approved all 12 candidates, including Tagliaferri. Auty also admitted that he violated G.L. c. 268A, §19 by screening and interviewing, as a member of a review committee, candidates other than Tagliaferri, who was one of 38 applicants for four to six reserve police officer positions. After these interviews, Auty participated in narrowing the pool - this time to five final candidates; Tagliaferri was again one of the finalists. In September, 1995, the selectmen appointed the five finalists as reserve officers. Section 19 of the conflict law generally prohibits a municipal employee from officially participating in matters, such as employment decisions, in which an "immediate family" member has a financial interest. As Auty's wife's child, Tagliaferri is a member of Auty's "immediate family" for the purposes of the conflict law.

Public Enforcement Letter 98-2 (In the Matter of James Ansart) - The Commission cited Hopedale Water and Sewer Commission Chairman James Ansart for having his engineering firm, J. M. Ansart, Inc., work as an unlisted subcontractor on the Hopedale Memorial Elementary School renovation contract. Section 20 of G.L. c. 268A, the state's conflict of interest law, in general prohibits a municipal official from having a direct or indirect financial interest in a contract with the municipality in which he serves. In a Public Enforcement Letter, the Ethics Commission cited Ansart for having a financial interest in a $510,000 subcontract with Congress Construction Company to provide general site work, excavations, foundation construction and installation of water and sewer lines for the 1994 school renovation project. Approximately $103,000 of the contract involved water, sewer and drain work which was inspected by employees of his own agency, the Water and Sewer Commission. Congress Construction served as the general contractor for the $6.6 million renovation contract. J. M. Ansart Inc. was the low bidder for one of the subcontracts with Congress Construction. The Public Enforcement Letter stated that, although no facts prove Ansart used his municipal position to obtain this contract -- Congress Construction asserts it did not even know Ansart was the Water and Sewer Commission chairman -- the public perception is created that Ansart could have somehow used his municipal position to obtain this substantial contract, especially where a significant portion of the contract would involve inspections by his own agency. As explained in the Public Enforcement Letter, "This section of the law is intended to prevent municipal officials from using their position to obtain contracts from their own town and to avoid the public perception that municipal officials have an "inside track" on such opportunities." Ansart was eligible to obtain an exemption to §20 of the conflict law which would have allowed him to receive the subcontract provided he made a written disclosure to the town clerk of his interest in the subcontract. He did not file such a disclosure. The Public Enforcement Letter notes that filing such a disclosure would give town officials and the public an opportunity to scrutinize the subcontract to ensure that abuses did not occur.

In the Matter of Allin P. Thompson - The Commission authorized a Disposition Agreement resolving charges that former Harwich Selectman Allin P. Thompson violated the conflict of interest law in 1995. In the Agreement, Thompson admitted acting as a real estate agent for his sister and brother-in law in their purchase of a property, a portion of which had been willed to the Town of Harwich. The Commission fined Thompson $1,000. In the Agreement, Thompson admitted his actions violated G.L. c. 268A, §17(a), which prohibits a municipal employee from receiving compensation from anyone other than the town in relation to matters in which the town has a direct and substantial interest, and §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. According to the Agreement, in September 1992, Harwich resident Chester Ellis died. His will specified that the Town of Harwich was to receive property he owned in West Harwich for use as a recreational park. However, Ellis owned only 75 percent of the property; Ellis' cousin owned the other 25 percent and was unwilling to give his portion to the town. Ellis had also owned 75 percent of an adjacent parcel which he left to certain designated charities; his cousin owned the other 25 percent of this property. The executor of Ellis' estate decided to sell the two properties jointly and divide the proceeds from the sale proportionally among the town, the co-owner and the designated charities. Thompson represented his sister and brother-in-law in the purchase of the joint property by initially negotiating the sale price, by filling out the purchase and sale agreement and by delivering the deposit check. Thompson's relatives paid $162,800 for the joint property, of which the town received $62,912. Thompson received $8,140 in broker's fees for representing his sister and brother-in-law.

Public Enforcement Letter 99-1 (In the Matter of John Massa) - The Commission cited Lynn Health Inspector John Massa for, as a health inspector, inspecting property that was managed by businesses for which he regularly served papers as a constable. 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. In a Public Enforcement Letter, the Ethics Commission explained that Massa was responsible as a health inspector for conducting apartment inspections in four buildings managed by International Realty and two buildings managed by Crowninshield Realty, two of the largest apartment management companies in Lynn. As a Lynn constable from approximately 1978 to 1996, Massa served and enforced eviction notices and court orders giving tenants 30 days to vacate apartments in these same buildings for International Realty and Crowninshield Realty. As a constable, Massa earned approximately $6,000 per year from International Realty and approximately $3,000 per year from Crowninshield Realty. The Public Enforcement Letter states that an inspector receiving $2,000 or $3,000 a year in private fees from a landlord would probably have a bias in favor of that landlord when it came time to inspect the landlord's property as a health inspector. The Letter notes that inspectors have a particularly important role in protecting the public health and safety. No inspector should act as an inspector regarding any situation where he has a potentially compromising relationship with the party he is inspecting without *first* fully disclosing the relevant facts to his appointing authority. For the purpose of giving guidance, the Commission stated that, "an inspector who in one year receives $100 or more in fees from someone he inspects must first disclose that fee relationship to his appointing authority or not inspect. The purpose of section 23 of the conflict law is to deal with appearances of impropriety. This subsection goes on to provide that the appearance of impropriety can be avoided if the city employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of a conflict. Massa did not file a detailed written disclosure that he had a steady, fairly high volume constable business relationship with two apartment management companies whose property he was responsible for inspecting.

In the Matter of Philip T. Corson - The Commission fined former City of Lynn Department of Public Works associate commissioner Philip T. Corson, who was responsible for all activities of the Pine Grove Cemetery, $10,000 for seven violations of G.L. c. 268A, the state's conflict of interest law. The violations stemmed from three instances in which Corson borrowed a total of $22,000 from three funeral home directors; one instance in which Corson borrowed $2,600 from a subordinate; and one instance in which he failed to turn over $3,000 intended to purchase cemetery perpetual care services. Section 23(b)(2) of the conflict law prohibits a municipal employee from using his position to obtain for himself or others an unwarranted privilege. Section 23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the municipal employee's favor in the performance of his official duties. In a Disposition Agreement, Corson admitted to violating §23(b)(2) of the conflict law by using his position to avoid repaying a loan of $2,600 from Assistant Cemetery Superintendent Harold Hayes. Corson continued to interact officially with Hayes while owing him money, which, according to the Disposition Agreement, had the effect of implicitly putting pressure on Hayes not to seek repayment. Corson also admitted to violating §23(b)(3) in connection with his supervision of Hayes. A reasonable person having knowledge of the unpaid loan would conclude that Hayes could unduly enjoy Corson's favor in personnel matters. Corson also admitted violating §23(b)(2) in 1992 by soliciting a loan of $15,000 from Walter Cuffe of Cuffe Funeral Home and by continuing to interact officially with Cuffe while owing him this money, which had the effect of implicitly putting pressure on Cuffe not to seek repayment. In addition, Corson violated §23(b)(3) by soliciting loans of $6,000 from Richard Parker of Parker Funeral Home in 1992 and $1,000 from David Solimine, Sr. of Solimine Funeral Home in 1996 and the $15,000 loan from Cuffe while having an official relationship with them which conduct would cause a reasonable person to conclude they could unduly enjoy Corson's favor in the performance of his official duties. (While the loans from Parker and Solimine also raise issues of Corson using his official position to get unwarranted privileges of substantial value, i.e., the loans, the Commission decided to accept Corson's assertion that the motive underlying loans from Parker and Solimine was friendship and past private business favors, respectively,

and not any intent by Corson to use his official position.) Finally, by appropriating for personal use $3,000 given to him by Len Sanford for two 20-year endowment flower beds, Corson violated §23(b)(2). According to the Disposition Agreement, he used his position to secure an unwarranted privilege of substantial value when he appropriated these funds.

Public Enforcement Letter 99-2 (In the Matter of William J. Devlin) - The Commission cited former Springfield Historical Commissioner William J. Devlin for violating the state's conflict of interest law, G.L. c. 268A, by preparing plans concerning property within the historic district that his clients submitted to the Springfield Historical Commission for approval. The Ethics Commission used Devlin's situation as an opportunity to educate the public on the point that a municipal employee violates the conflict law by receiving compensation from or acting as agent for a private party in connection with submitting documents to a municipal board, *even if* the municipal employee avoids making any personal appearances before the board. In a Public Enforcement Letter, the Commission cited Devlin, president of a small architectural firm, William J. Devlin AIA, Inc., for receiving compensation from and acting as an agent for private architectural clients in relation to matters pending before the Historical Commission. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the city in connection with any matter in which the city has a direct and substantial interest. Section 17(c) prohibits a municipal employee from acting as agent for anyone other than the city in connection with any matter in which the city has a direct and substantial interest. The Public Enforcement Letter stated that Devlin was appointed to the Commission in 1992. At the time of his appointment, Devlin stated his intention to do architectural work that would be submitted to his own board. Neither Historical Commission Chairman Francis Gagnon nor members of the city council subcommittee with which Devlin met just prior to his appointment stated any problem in his doing so. In 1994, he was informed by Gagnon that he should not represent clients before his own board. Devlin refrained from appearing on behalf of clients, but continued to submit work to the Historical Commission. In June 1995, Deputy City Solicitor Harry P. Carroll advised Devlin in a letter that he could not act as an agent or receive compensation from any party appearing before the Historical Commission. Carroll also advised Devlin to seek advice from the Ethics Commission. Devlin submitted a request for an opinion from the Ethics Commission in December 1995. In February 1996, the Legal Division of the Ethics Commission concurred with Carroll's advice that Devlin could not act as an agent or receive compensation from any third party appearing before the Historical Commission. On the same day that Devlin received this advice, he was removed from the Historical Commission by the mayor of Springfield.

In the Matter of James H. Quirk, Jr.

The Commission issued a Decision and Order dismissing the adjudicatory hearing of James H. Quirk, Jr., a Yarmouth attorney and former member of Yarmouth's Conservation Commission. The Commission found that the statute of limitations prohibiting the Commission from initiating the adjudicatory proceedings more than three years after a "disinterested person" knew or should have known of the violation barred the Commission's Enforcement Division from proceeding in the matter. On August 8, 1996, the Enforcement Division of the Commission issued an Order to Show Cause alleging that Quirk received compensation from private landowners for their lawsuit against the Town of Yarmouth for damages for land taken by eminent domain for conservation purposes at a time when Quirk was a member and chairman of the Yarmouth Conservation Commission. Section 17(a) of G.L. c. 268A in general prohibits a municipal official from receiving compensation from or acting as an agent for anyone other than the town in connection with matters in which the town has a direct and substantial interest. The Commission alleged that Quirk voted as a Conservation Commissioner to request that the town acquire the land in question for conservation purposes in 1987. After questions arose about Quirk's representation of the landowners, Quirk sought an opinion from special town counsel on April 7, 1992 which was reviewed by the Executive Director of the Ethics Commission, Andrew Crane, in June of 1992. Thus, according to the Decision, the Executive Director knew that Quirk's representation of the landowners was a potential violation as of June 1992 and the Ethics Commission knew or should have known of the alleged violations more than three years prior to the date that proceedings against Quirk were initiated

In the Matter of Paulin J. Bukowski

In the Matter of Herbert Hohengasser - The Commission fined Greenfield Plumbing and Gas Fitting Inspector Paulin J. Bukowski $1,500 and Alternate Plumbing and Gas Fitting Inspector Herbert Hohengasser $1,000 for their participation in inspections of work performed by immediate family members. In a Disposition Agreement, Bukowski admitted that he violated G.L. c. 268A, §19 by, between September 1992 and August 1994, issuing seven permits to and conducting seven inspections of work performed by his brother, Robert Bukowski, a Greenfield plumber. In a separate Disposition Agreement, Hohengasser admitted that he violated G.L. c. 268A, §19 by, between August and September 1995, issuing four permits to and conducting nine inspections of work performed by his son, Daniel, owner of Hohengasser Pumbing & Heating, Inc. Section 19 of the conflict law generally prohibits a municipal employee from officially participating in matters in which an "immediate family" member has a financial interest.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 570

IN THE MATTER
OF
MARTIN NIESKI

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Martin Nieski ("Nieski") 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 January 21, 1998, 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 Nieski. The Commission has concluded its inquiry and, on March 10, 1998, found reasonable cause to believe that Nieski violated G.L. c. 268A, §17(c).

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

1. Nieski was, during the time relevant, a member of the Dudley Board of Selectmen (the "Board"). As such, Nieski was a municipal employee as that term is defined in G.L. c. 268A, §1.[1/] Nieski had been a member of the Board since 1995.

2. Nieski Incorporated ("Nieski Inc.") is a Massachusetts corporation formed in 1996. At the time relevant, Nieski's wife Catherine ("Catherine") was the sole officer, director, and shareholder of the corporation.

3. On February 10, 1997, Nieski Inc. submitted to the Board an application to transfer a package store liquor license from Ideal Liquors, Inc. to Nieski Inc. Catherine signed the application for the corporation. The Board approved the transfer application on February 24, 1997.[2/]

4. The Town of Dudley assesses each package store license holder an annual fee of $1,100. Ideal Liquors paid the $1,100 annual liquor license fee in January 1997 when it renewed its license. Shortly after the Ideal Liquors license was transferred to Nieski Inc., the Town of Dudley sent Nieski Inc. a bill for the entire $1,100 annual fee.

5. On April 7, 1997, the Board held a hearing at the request of Nieski Inc. to discuss the $1,100 fee assessed.

6. At the April 7, 1997 meeting, Nieski appeared before the selectmen on behalf of Nieski Inc. and argued extensively that since Ideal Liquors had already paid the annual fee for its license, the Board should not have charged Nieski Inc. with the annual fee again. Catherine was also present and made brief comments to the board.

7. Section 17(c) of 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 town has a direct and substantial interest.

8. The decision whether to uphold, modify or waive assessment of the annual liquor license fee is a particular matter in which the Town of Dudley had a direct and substantial interest.

9. By appearing before the Board and advocating on behalf of Nieski Inc. regarding the $1,100 annual liquor license fee particular matter, Nieski acted as an agent for Nieski Inc. Therefore, by acting as Nieski Inc.'s agent in relation to a particular matter in which the town had a direct and substantial interest, Nieski violated §17(c).

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

(1) that Nieski pay to the Commission the sum of two hundred and fifty dollars ($250.00) as a civil penalty for violating G.L. c. 268A, §17; [3/] and

(2) that Nieski 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 14, 1998

[1/] Nieski is no longer a member of the Board.

[2/] Nieski did not participate as a Board member in this action.

[3/] The Commission generally imposes larger fines for §17 violations. *See, e.g., In re Reed,* 1997 SEC 860 (private surveyor who served on a Conservation Commission violates §17(c) and fined $1,500 for representing four private clients before his own board, three of those on multiple occasions). *In re Nutter,* 1994 SEC 710 (historic commission member fined $1,000 for representing client before his

own board). Here, however, Nieski was representing his wife's closely held corporation. The Commission has found the representation of family trusts and closely held corporations to be a mitigating factor in the past. *See, e g., In re Reynolds*, 1989 SEC 423 and *In re Zora*, 1989 SEC 401, both §17 cases where the Commission imposed no fine for several reasons, one of which was the fact that a family trust or closely held corporation was involved.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 569

IN THE MATTER OF J. MARTIN AUTY

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and J. Martin Auty ("Auty") 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 January 21, 1998, 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 Auty. The Commission has concluded its inquiry and on April 8, 1998, found reasonable cause to believe that Auty violated G.L. c. 268A.

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

1. At all relevant times, Auty was a police lieutenant in the town of Mendon. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In early 1994, the town of Mendon advertised for part-time dispatchers to serve the police and fire departments. The town planned to hire twelve dispatchers. Each dispatcher would work about 16 hours per week at $7.00 an hour.

3. Auty was appointed to serve on the review committee for the dispatcher positions.

4. By early March 1994, the town received about 41 applications, including one from Auty's stepdaughter. The review committee, including Auty, narrowed the list of applicants to 32 qualified candidates, including Auty's stepdaughter. Auty did not review his stepdaughter's application, but he reviewed the applications of the others to narrow the field of candidates.

5. The review committee, including Auty, began interviewing the candidates on March 19, 1994. Auty's stepdaughter was among those interviewed. Auty participated in the interviews of candidates other than his stepdaughter. He remained in the room during her interview but did not ask any questions.

6. After the interviews, the review committee, including Auty, narrowed the pool to twelve final candidates, including Auty's stepdaughter, and began background checks.

7. On April 25, 1994, the Board of Selectmen appointed all twelve candidates, including Auty's stepdaughter. The board did not question Auty's participation at this time.

8. In early July 1994, the police department advertised for part-time reserve police officers. The town expected to hire about four to six officers to work about 16 hours per week at $11.00 per hour.

9. The police department received about 38 applications, including one from Auty's stepdaughter.

10. Auty was again on the review committee for these positions.

11. The review committee, including Auty, screened out about twenty applicants, interviewed sixteen, narrowed the list to ten and eventually selected five finalists. Auty's stepdaughter was one of the five final candidates.

12. As before, Auty did not participate in interviewing his stepdaughter or reviewing her application, but he remained in the room during his stepdaughter's interview and participated in all other aspects of the process.

13. On March 20, 1995, the Board of Selectmen were given the names of the five finalists.

14. In September 1995, the Board of Selectmen interviewed the final candidates and appointed them as reserve police officers.

15. Section 19 of G.L. c. 268A, except as permitted by paragraph (b) of that section,[1] prohibits a municipal employee from participating[2] as such in a particular matter[3] in which, to his knowledge, he or his immediate family[4] has a financial interest.[5]

16. The determination of whom to appoint as a part-

time dispatcher in 1994 was a particular matter.

17. Auty's stepdaughter, a member of his immediate family and a candidate for a position as a part-time dispatcher, had a financial interest in that particular matter.

18. Auty participated in that particular matter by screening the applications of and interviewing the candidates other than his stepdaughter. When he did so, he knew that his daughter had a financial interest in the particular matter.

19. The determination of whom to appoint as part-time reserve officer in 1995 was also a particular matter.

20. Auty's stepdaughter, a candidate for a position as a reserve officer, had a financial interest in that particular matter.

21. Auty participated in that particular matter by screening the applications of and interviewing the candidates other than his stepdaughter. When he did so, he knew that his stepdaughter had a financial interest in the particular matter.

22. Accordingly, by participating in particular matters in which, to his knowledge, his stepdaughter had financial interests, Auty violated §19.[6/]

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

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

(2) that Auty 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 14, 1998

[1/] None of the exceptions to §19 apply in this case.

[2/] "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).

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

[4/] "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e). As his wife's child, Auty's stepdaughter is a member of Auty's immediate family.

[5/] "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 (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/] In his defense, Auty states that while he knew he was participating in particular matters, he was under the mistaken impression that he could avoid a violation of §19 by withdrawing from direct participation regarding his stepdaughter. The Commission has stated, however, that even indirect involvement constitutes participation for the purposes of the conflict of interest law. Specifically, in *In re Howlett*, 1997 SEC 859, the Commission found that a town assessor violated §19 by participating in the interviews of candidates for a position as senior clerk, even though he had avoided any direct action on his daughter's application and interview, and did not vote on the final selection. *See also* Commission Advisory No. 11, Nepotism, at 2 ("Personal and substantial participation involves *any* signficant involvement in the hiring process").

James Ansart
18 Dutcher Street
Hopedale, MA 01747

PUBLIC ENFORCEMENT LETTER 98-2

Dear Mr. Ansart:

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, while serving as the Hopedale Water and Sewer Commission ("WSC") chairman, having your engineering firm (d/b/a J.M. Ansart, Inc. (hereafter referred to as "JMA")), work as an unlisted subcontractor on the Hopedale Memorial Elementary School Renovation Contract. Based on the staff's inquiry (discussed below), the Commission voted on May 13, 1998 that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §20.

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 bringing to your

attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the 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 formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You were on the WSC from May 1990 until you resigned in August 1997. You served as the chairman during the period of 1994 through August 1997. The WSC members are elected and compensated.[1]

2. The WSC appoints the Water and Sewer Department ("WSD") superintendent and foreman as well as other WSD positions.

3. JMA does water and sewer construction work. The company was organized on November 6, 1987, under c. 156B. You were listed as the corporation president, treasurer, and sole director; your wife, Jennifer A. Ansart, was designated as the clerk.[2]

4. On September 14, 1994, the Town of Hopedale School Building Committee entered into a $6,624,515 contract with Congress Construction Company to serve as the general contractor for the renovation of the Memorial Elementary School.[3]

5. On October 11, 1994, Congress Construction entered into a $510,000 subcontract with JMA to provide various services relating to the school renovation contract, including general site work, excavations, foundation construction, and installing the water and sewer lines to the new building. Approximately $103,000 of this subcontract involved water, sewer, and drain work. Thereafter, JMA performed and was paid for these services.[4] [5]

6. The contract between Congress Construction and JMA incorporates by reference the general contract between Congress Construction and the Hopedale School Building Committee. JMA's contract with Congress Construction also states that Congress Construction will pay JMA "if, and only if" Congress Construction receives payment from the Hopedale School Building Committee.

7. Congress Construction informed us that they selected JMA for the water and sewer subcontract work because your company was the low bidder for the job. You had previously done a job for Congress Construction and the general contractor was satisfied with JMA's work. The facts that JMA was known to the general contractor and was local were further inducements to give the contract to JMA. Congress Construction asserts that it was not aware that you were a member of the Hopedale WSC when they awarded JMA the contract, but learned of your WSC position during the course of the work.

8. As the Hopedale Memorial School Renovation was a town project, all permits were waived. No permits were required to be pulled from the WSD.

9. JMA's work was inspected by the WSD superintendent and the WSD foreman. The WSD employees knew that JMA was your company. The WSD inspectors were aware that you were one of three members of their appointing authority. The WSD inspectors did not deal with you directly but with the JMA foreman. The WSD superintendent indicated that he never thought about his relationship with you when he was doing the inspection. He felt an obligation to the town to ensure that all of the work was done according to specifications. The WSD superintendent stated that you did not discuss the work or the inspection with him nor did you put any pressure on him to ensure the sewer lines passed inspection.

10. You told us that you did not participate as a WSC Commissioner in the Hopedale Memorial School renovation project in any way. The school building committee dropped off a set of plans for the project which you looked at, but you deny making any comments or suggestions to the school building committee. The review of the plans was handled by the WSC superintendent.

11. There is no evidence that JMA did not perform the subcontract water and sewer work satisfactorily.

II. Discussion

As the WSC chairman, you were a municipal employee subject to the conflict of interest law, G.L. c. 268A. You were subject to c. 268A generally and, in particular, to §20. (A copy of §20 is attached for your information.) Section 20 prohibits a municipal employee from having a direct or indirect financial interest in a contract made by an agency of the same municipality, of which financial interest he has knowledge or reason to know, unless an exemption is available. *See In re McMann*, 1988 SEC 379 (school committee member violates §20 by having a financial interest in contract with school district). "This provision is intended to prevent municipal employees from using their position to obtain contractual benefits from their own municipality, and to avoid the public perception that they have an "inside track" on such opportunities." *Commission Advisory No. 7. Board of Selectmen of Avon v. Linder*, 352 Mass. 581, 583 (1967) ("[Enactment of the conflict of interest law] was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.") *See also*

Quinn v. State Ethics Commission, 401 Mass. 210 (analyzing §7, the state counterpart to §20).

The contract between Congress Construction and the Town of Hopedale was a contract made by an agency of Hopedale. The subcontract between JMA and Congress Construction resulted in your having an indirect financial interest in Congress Construction's general contract with the town. The Commission has held that a municipal employee's interest in such subcontracts is prohibited by §20.[6] *EC-COI-90-17*. You obviously had knowledge of this financial interest. Therefore, by having such an interest in this municipal contract, there is reasonable cause to believe you violated §20.

The facts in your case are also troubling because you serve as the WSC chairman and the subcontract work you were hired to perform involved water and sewer work subject to the WSC's jurisdiction, and which would be inspected by your own subordinates at the WSC. Although we have no facts proving you used your municipal position to obtain this contract— Congress Construction asserts it did not even know you were the WSC chair— these facts certainly could create the public perception that you have somehow used your municipal position as an "inside track" to obtain this substantial contract. Consequently, we view this conduct as sufficiently serious to warrant a public resolution.

There are exemptions to §20 available to public employees under certain circumstances. In your case, you were eligible to obtain a §20(b) exemption. The statute states that §20 does not apply:

> b) to a municipal employee who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the con tracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the municipal employee files with the clerk of the city or town a statement making full disclosure of his interest...

In your case, you were not employed by the contracting agency (the Hopedale School Building Committee) nor does it appear that the WSC regulates the activities of that agency (and you do not appear to have official responsibility for any of the activities of the Hopedale School Building Committee). The general contract was awarded after a competitive bid process. Therefore, had you timely filed with the town clerk a statement making full disclosure of your interest, you apparently could have received the subcontract. You did not file such a disclosure, however.

The importance of strictly complying with the disclosure provision of §20 should be emphasized; the requirement is not a mere technicality. As discussed above, your subcontract involved a potential use of your municipal position to gain an "inside track" to this business opportunity. Requiring that you file public notice of this contract would be a substantial deterrent to your succumbing to any temptation to take advantage of that potential "inside track." At the same time, such a filing gives town officials and the public an opportunity to scrutinize such contracts to ensure that such abuses have not, in fact, occurred. (Moreover, had you properly filed a statement with the town clerk fully disclosing your financial interest in the contract, it might well have been that the town may have made alternative plans for the inspection of your work (i.e., having water department employees from another community rather than your own subordinates conduct the inspection.))

Nor do we conclude that you are entitled to the protection provided by §20(a). That section states that §20 does not apply to a municipal employee "who in good faith and within 30 days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or disposes of the interest..." The thirty-day time period is triggered at the time that a municipal employee learns of his financial interest in a contract, not when he learns that such an interest violates the law. *In re McLean*, 1981 SEC 75. If the 30 day period only began running when the municipal employee knew his interest violated the statute, enforcement of §20 would be virtually impossible because an employee could terminate his interest upon learning of a Commission investigation, no matter how long he had actually been in violation of the law. This interpretation would effectively nullify §20. *McLean, id.*[7] Thus, you are not entitled to the §20(a) "grace period" as you were obviously aware of your prospective financial interest in the general contract when you entered into the subcontract, and more than 30 days have passed since that time.

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 imposing a fine because (1) this is the first time the Commission has brought an enforcement action regarding a prohibited financial interest in a subcontract, an area where the Commission believes additional education is necessary; and (2) you could have obtained a §20(b) exemption (and did satisfy all but the disclosure requirements). The combination of these factors, in the Commission's view, makes a public enforcement letter appropriate.

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: June 3, 1998

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[1]WSC Commissioners are not designated as special municipal employees.

[2]JMA has since filed for bankruptcy.

[3]The contract lists 14 subcontractors that Congress Construction would use on the project. JMA is not listed as a subcontractor on the main contract.

[4]The architectural firm Alderman & MacNeish did the design work for the water and sewer system.

[5]There was no requirement for the School Building Committee or the Clerk of the Works to approve sub-contractors, however, the Clerk of the Works had to be notified whenever a new sub-contractor started work on the site.

[6]As indicated above in the fact section, the JMA/Congress Construction subcontract incorporates by reference the general contract between Congress Construction and the Hopedale School Building Committee, and expressly provides that JMA will be paid "if, and only if" Congress Construction receives payment from the municipality.

[7]To the extent that *EC-COI-89-22* appears to say anything to the contrary, the Commission reaffirms *McLean*.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 571**

IN THE MATTER OF ALLIN P. THOMPSON

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Allin P. Thompson ("Thompson") 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 November 19, 1996, 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 Thompson. The Commission has concluded its inquiry and, on April 8, 1998, found reasonable cause to believe that Thompson violated G.L. c. 268A.

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

1. Thompson was, during the time relevant, a member of the Harwich Board of Selectmen. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In September 1992, Harwich resident Chester Ellis died, specifying in his will that the town of Harwich was to receive property he owned in West Harwich ("the Property") for use as a recreational park. As a member of the Board of Selectmen, Thompson was aware of this devise.

3. In January 1993, the executor discovered that Ellis had owned only a 75% interest in the Property at the time of his death, with Ellis' cousin owning the other 25%. Therefore, Ellis had devised to the town only his 75% interest, subject to the executor's right to sell the property under license with the probate court's permission. The executor so informed the Board of Selectmen.

4. The co-owner was unwilling to give his 25% interest to the town, and the town was unwillingly to buy out the co-owner's interest. Accordingly, the executor decided to sell the Property — with the probate court's permission — and divide the proceeds between the town and the co-owner. The town's proceeds would be used for recreational purposes, in accordance with the dictates of Ellis' will.[1] The executor informed the Board of Selectmen of his plan.

5. In January 1995, the probate court issued licenses to sell the Property and other parcels within Ellis' estate. To increase the Property's market value, the executor arranged with his real estate broker to market the Property in combination with an adjacent parcel in which Ellis had also owned only a 75% interest. The asking price for the combined parcels was $152,800, which represented the combined inventory values approved by the probate court.

6. In August 1995, after the combined parcels had been on the market for six or seven months, Thompson's sister and brother-in-law told Thompson that they wanted to buy the Ellis property and asked Thompson to represent them as their broker in the transaction. Thompson, who had a broker's license, agreed.

7. In August 1995, Thompson contacted the executor and his real estate broker to inform them of his sister and brother-in-law's interest in buying the property. There were no other interested buyers at that time.

8. Thompson participated in the initial negotiations of the sale price on behalf of his sister and brother-in-law. Eventually, the parties (without Thompson) agreed upon a

purchase price of $162,800, divided as follows: $99,050 for the Property and $63,750 for the adjacent parcel. The $162,800 figure was $10,000 above the minimum sale price approved by the probate court. The parties signed the purchase and sale agreement on August 18, 1995.

9. In addition to participating in the initial negotiations, Thompson also participated by filling out the purchase and sale agreement and delivering the deposit check.

10. At or around the time of the closing in late November 1995, the town administrator warned Thompson that he might have a conflict of interest in acting as a private broker on this matter and should confer with town counsel.[2/] Thompson failed to do so.

11. Thompson did not attend the closing on November 29, 1995.

12. As the property was zoned for commercial use, the broker's commission on the transaction was 10% of the total sale price, or $16,280. Thompson and the executor's broker split the commission, each receiving $8,140. About $4,500 of each broker's commission was attributable to the sale of the Property alone.

13. On or about December 12, 1995, the town received and accepted its share of the proceeds from the sale of the Property ($62,912) to be used for recreational purposes.

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[3/] in which the municipality is a party or has a direct and substantial interest.

15. Section 17(c) of G.L. c. 268A prohibits a municipal employee from acting as agent for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

16. The probate court proceeding authorizing the sale of the Property pursuant to license was a particular matter.

17. As a beneficiary under Ellis' will, the town was a party to that particular matter. More specifically, the town had a direct and substantial interest in how much money it would receive as a result of the transaction.

18. Thompson represented his sister and brother-in-law in their purchase of the Property and adjacent parcel. Specifically, he acted as broker in negotiating the sale price, delivering the deposit check and filling out the purchase and sale agreement. Thus, he acted as agent for someone other than the town in connection with a particular matter in which the town was a party and/or had a direct and substantial interest. By doing so, Thompson violated §17(c).

19. Thompson received $8,140 ($4,500 from the sale of the Property) for representing his sister and brother-in-law in their purchase of the Property and adjacent parcel. Thus, he received compensation from someone other than the town in relation to a particular matter in which the town was a party and/or had a direct and substantial interest. By doing so, Thompson violated §17(a).

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

(1) that Thompson pay to the Commission the sum of one thousand dollars ($1,000.00) as a civil penalty for violating G.L. c. 268A, §17(a) and (c); and

(2) that Thompson 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 24, 1998

[1/] General Laws c. 202, §19 provides that the probate court may, upon petition of the executor and with the consent of all interested parties, license the executor to sell real estate belonging to the estate, in such manner as the court orders. The net proceeds of such sale shall be paid over to those persons who would have been entitled to the real estate had it not been sold.

[2/] Thompson denies that he received a warning from the Town Administrator at that time.

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

John Massa
c/o James P. Mahoney, Esq.
600 Chestnut Street
Lynn, MA 01904-2694

PUBLIC ENFORCEMENT LETTER 99-1

Dear Mr. Massa:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that as a City of Lynn health inspector you violated the state conflict of interest law, General Laws c. 268A, by inspecting property that is managed by businesses for which you regularly serve papers as a constable. Based on the staff's inquiry (discussed below), the Commission voted on June 9, 1998 that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23(b)(3).

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 bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the 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 formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You were a Lynn constable from approximately 1978 to 1996. Constables in Lynn are appointed by the mayor and approved by the city council. Lynn constables have not been designated "special" municipal employees.

2. As a constable you mainly served papers in landlord-tenant matters.[1] You charged $10-25, depending on the type of notice, and $85 to $150 to evict someone, depending on how many hours the eviction took.

3. You estimate you earned $8,000 to $12,000 per year as a constable.

4. You did most of your constable work for two clients, International Realty ("IR") and Crowninshield Realty ("CS").

5. IR and CS are management companies. They are among the largest apartment management companies in Lynn. They do not own the apartments they manage.

6. You served papers as a constable for IR for more than five years ending in 1996.[2] During that time, you received 90-95% of IR's business in the city. You estimate on average you earned approximately $6,000 per year from IR. You received virtually all of IR's constable business because you gave IR a volume discount.[3]

7. You worked for CS for at least the five years prior to and including 1996.[4] During that time, you also provided CS with the same volume discount, and, in return received approximately one-half of their constable business. You estimate on average you earned approximately $3,000 per year from CS.

8. You have been a code inspector in the City of Lynn Health Department for 22 years. Your salary is $35,000 a year. Your office hours as a code inspector are Monday, Wednesday, Thursday, 8:30 a.m. to 4:30 p.m; Tuesday 8:30 A.M. to 8:00 P.M; Friday 8:00 A.M. to 12 P.M.

9. As a code inspector you are responsible for conducting apartment inspections. Most of the inspections are apartment vacancy inspections.[5] (The department conducts over 5,000 vacancy inspections each year.) You also conduct inspections when complaints are received from tenants. You are primarily responsible for inspecting property located in East Lynn near the ocean ("your district").

10. As a code inspector, you have been virtually the exclusive inspector for the four IR-managed apartment buildings in your district and occasionally you have inspected IR buildings outside of your district as well. You have inspected IR units at a rate of 1-3 a month per apartment building.

11. You have conducted virtually all the code inspections for the CS properties located at 42 West Baltimore Street and 285 Lynn Shore Drive.

12. In 1996 four IR or CS tenants made code complaints to the Health Department following their receipt of an eviction notice delivered by you. You then conducted the inspection of the units.

13. You never disclosed to your supervisor, Lynn Health Department Director Gerald Carpinella, that you were inspecting units as to which you earlier served eviction notices for IR and/or CS. Nor did you disclose that you had an extensive constable relationship with IR and CS at the same time you were inspecting their properties. You also did not disclose that you were doing constable business in your own district.

14. Each year you file with the city clerk a letter stating that you are a constable and a health inspector. By letter to the city clerk dated July 11, 1996, you disclosed,

As directed under §20(b) of conflict law, I am filing notice stating that I have been appointed constable while also being employed as a full-time municipal employee.

15. Carpinella has known for many years that some of his inspectors, including you, were also working as constables. Carpinella was concerned that inspectors would do constable work for landlords they regulated. In the 1980s, Carpinella discussed this concern with the inspectors, including you. The matter was referred to City Solicitor Nicolas Curuby who wrote a letter to Carpinella on July 6, 1987 addressing the issue. In his letter Curuby said that inspectors should not serve process in their code inspector districts; and, before serving papers on any unit, the inspector should check to see if the department is involved with that unit.[6] Carpinella made the letter available to all of the health inspectors on July 9, 1987, including you. Carpinella did not know that you served papers as a constable for IR and CS and also as a health agent inspected apartment units managed by IR and CS.

16. You state that the day after receiving the Curuby letter you spoke to Curuby. According to you, he told you that it would be okay to serve papers in your own district provided you did not serve on the same unit that you had inspected as a code inspector. You submitted a copy of the July 6, 1987 letter with your own handwriting in the upper right hand corner stating, "meeting 7-24-87, okay to serve in my area but never serve to tenant with order from health department." According to you, Curuby agreed to follow-up this oral advice with something in writing, but you never received anything in writing from Curuby. You did not disclose to Curuby that you had a steady, fairly high volume constable business relationship with IR and CS.

17. Curuby has no recollection of your claimed 1987 meeting with him. He states that he would not, however, have contradicted his 1987 letter without talking to Carpinella, and he has no recollection of talking about this any further with Carpinella. (Carpinella has no recollection of any such discussion.)

II. Discussion

Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection's purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the municipal employee discloses in writing to his appointing authority (or if he does not have an appointing authority, files a written disclosure with the town or city clerk) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record. (If the employee is elected, his public disclosure to the town or city clerk must also be maintained as a public record.)

The Commission generally applies §23(b)(3) where an appearance arises that the integrity of a public official's action might be undermined by a private relationship or interest. *Flanagan*, 1996 SEC 757, 763. *Fact Sheet No. 1, "Avoiding 'Appearances' of Conflict of Interest."*

Clearly, if an inspector were receiving $2,000 or $3,000 a year in private fees from a landlord, he would probably have a bias in favor of that landlord when it comes time to inspect the landlord's property as a health inspector. The inspector would have to be concerned that an adverse inspection report by him might trigger a reduction of or even the entire loss of those fees. Performing such inspections under those circumstances cannot help but cause a reasonable person to conclude that the integrity of the public official's action might be undermined by the private fees he is receiving from the landlord. Consequently, absent a proper disclosure, such inspections would violate §23(b)(3).

The evidence indicates you inspected apartments on numerous occasions where those apartments were managed by either IR or CS, management companies with whom you had arrangements to provide nearly all, or most of their constable business, and from each of which you received several thousand dollars each year for your constable services. For the reasons discussed above, such conduct would appear to violate §23(b)(3) because a reasonable person would conclude that IR or CS might unduly enjoy your favor in the performance of your official duties as an inspector.[7]

In the Commission's view, a reasonable person, considering all of the facts, would give some weight to the fact that you do owe a fiduciary obligation to the city as a constable. Nevertheless, that same reasonable person, realistically reflecting on your receiving a substantial portion of your income from IR and CS, would conclude that you cannot help but have a bias in favor of those clients that might play a role in any dealings you would have with them as a health inspector. Consequently, there would be reasonable cause to believe such conduct violated §23(b)(3).

The point the Commission wants to emphasize is that inspectors have a particularly important role in protecting the public health and safety. It is essential that their objectivity, both in fact and through appearances, be maintained so that confidence in their inspections can be assured. Accordingly, no inspector should act as an

inspector regarding any situation where he has a potentially compromising relationship with the party he is inspecting without *first* fully disclosing the relevant facts to his appointing authority.

There is no simple formula for identifying when these other relationships are sufficiently significant that they implicate §23(b)(3). Again, *see generally, Fact Sheet No. 1, supra.* For the purpose of giving guidance, however, the Commission advises that an inspector who in one year receives $100 or more in fees from someone he inspects must first disclose that fee relationship to his appointing authority or not inspect.[8]

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.

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 per violation. The Commission chose to resolve this case with a public enforcement letter, rather than imposing a fine because there is no Commission precedent addressing whether a §23(b)(3) issue will arise when a public official acts officially with respect to someone with whom he has a significant constable fee arrangement; therefore, the Commission perceives the need to educate more than to punish in this area.

This matter is now closed.

DATE: August 20, 1998

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[1] You most frequently served a so-called "14-day notice" which informs a tenant that eviction proceedings will begin if back rent is not paid within 14 days. If that notice is ignored, the attorney for the landlord will typically next seek a court order giving the tenant 30 days to vacate, unless the back rent is paid during that time. You also served these orders. Finally approximately once a month, you enforced an eviction order and moved the tenant and his furnishings out of an apartment

[2] An IR employee initiated the arrangement.

[3] You set your fees on average approximately 30 to 40% below what other constables usually charge.

[4] A CS employee initiated the arrangement.

[5] Apartment vacancy inspections are inspections to certify that a vacant apartment is suitable for habitation. These inspections are required by city ordinance.

[6] The letter states, in part,

> To avoid possible conflict of interest, it is recommended that your inspectors be told that if they are asked to render [constable] services in their assigned district that they are not to accept the work. If after they make the preliminary notice, and the real property has been inspected by your office, none of the employees should accept further constable services.
>
> As you are aware, it is often the case, that when a notice to quit is made, the tenant comes to your office to ask for an inspection for possible violations. That is why the Constables in your office should make sure [of] the current status of the involved real property.

[7] This appearance problem would be exacerbated whenever such an inspection involved the same IR or CS tenant to whom you had recently served papers as a constable, as was the case in the four instances described above. (Indeed, any such inspection, following so closely on the heels of your serving papers on the same tenant, would in and of itself create an appearance problem even if you did not receive a significant amount of fees from the company that managed that unit.) This appearance problem would also be exacerbated by your continuing to serve papers in your own inspection district after the city solicitor told you not to. (As discussed above, you maintain that the city solicitor orally amended his written prohibition to allow you to serve papers so long as there was nothing pending in the department regarding the unit. In the Commission's view the weight of the evidence does not support your claim; however, even if the city solicitor did amend his advice as you claim, the amended advice was not in writing, was not reviewed by the Commission, and was not based on any awareness by him of the volume of the constable business that you were doing with these two clients in your district.)

[8] Your being a Lynn municipal employee as an inspector and also at the same time having been an appointed, paid Lynn constable, raises an issue under G.L.c. 268A, §20. Thus, §20 prohibits a municipal employee from having a financial interest in a contract with the same municipality. Your position as a Lynn constable would have given you a financial interest in a contract with Lynn. Where you were already a Lynn municipal employee as an inspector, that financial interest in a contract would appear to have violated §20. There are a number of exemptions in §20. The only one that could apply, however, is §20(b) which, among several other conditions, would have required that the availability of these constable positions be publicly noticed. That notice was not given. (Your filing a yearly disclosure with the city clerk of your having a constable position, citing §20(b) did not satisfy the requirements of §20(b).)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 572**

IN THE MATTER OF PHILIP T. CORSON

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Philip T. Corson ("Corson") 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 September 9, 1997, 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 Corson. The Commission has concluded its inquiry and, on May 12, 1998, found reasonable cause to believe that Corson violated G.L. c. 268A, §23.

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

1. From 1989 to 1997, Corson was the City of Lynn Department of Public Works associate commissioner responsible for the operation of the City of Lynn's municipal cemetery, the Pine Grove Cemetery ("the Cemetery"). As such, Corson was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. Corson was responsible for all of the activities at the Cemetery. This included maintaining the buildings and grounds, selling burial plots, providing burial services, and selling and providing perpetual care services. During the years Corson was responsible for the operations at the Cemetery, the Cemetery had 400 to 500 burials per year.

Obtaining a Loan from a Subordinate

3. At all times here relevant, Assistant Cemetery Superintendent Harold Hayes ("Hayes") was Corson's direct subordinate. Corson was responsible for approving all personnel decisions affecting Hayes such as assigning overtime work, approving vacations, and supervising Hayes on a daily basis. Hayes, in turn, supervised a working foreman and a number of laborers and clerical employees.

4. Hayes and Corson only knew each other through their work at the Cemetery. They were not friends and did not socialize.

5. In June 1990, Corson borrowed $2,600 from Hayes. There was no promissary note or any agreed upon interest rate. From 1990 to date, Hayes has made no effort to collect on this loan nor has Corson made any repayments.

6. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know using his position to secure an unwarranted privilege of substantial value for anyone not properly available to similarly situated individuals.

7. By continuing to interact officially with Hayes through 1996 while owing Hayes $2,600 (where the effect of such interaction was to implicitly put pressure on Hayes not to seek repayment), Hayes used his official position to secure an unwarranted privilege of substantial value, avoiding repayment, thereby violating §23(b)(2).

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

9. By continuing to supervise Hayes and act on personnel matters relating to Hayes, while owing Hayes $2,600, Corson acted in a manner which would cause a reasonable person to conclude that Hayes could unduly enjoy Corson's favor in personnel matters. Therefore, Corson violated §23(b)(3).

Borrowing Money from Funeral Home Directors

10. Corson regularly dealt with 10 to 12 funeral directors regarding burial service arrangements. The Cemetery's rules for burials had to be followed concerning prior notification to the Cemetery, days and times for services, time of arrival and leaving, parking and so forth. Corson had a certain amount of discretion with respect to enforcing these rules and as to whether any fines would be imposed for rules violations. In addition, Corson generally was the one to respond to any burial service complaints.

11. At the time relevant herein, Richard Parker and his brother owned the Parker Funeral Home in Lynn. The Parker Funeral Home is the fourth or fifth most frequent user of the Cemetery's burial services. As a funeral home director Richard Parker regularly dealt with Corson in arranging burial services.

12. Parker and Corson have known each other for approximately 20 years. They are good friends and golf together once in a while.

13. On or about June 2, 1992, Corson asked Parker for a $6,000 loan. Parker wrote a personal check in that amount to Corson. They otherwise had no note evidencing the loan, or any understanding when it would be paid back or whether interest would be paid. Parker informally approached Corson on one or two occasions asking when he might expect repayment. Thereafter, Parker took no further steps to collect the money. Corson made his first partial repayment on the loan in early 1997, i.e., after the commencement of the Commission's preliminary inquiry.

14. At the time relevant herein Walter Cuffe owned the Cuffe Funeral Home in Lynn. The Cuffe Funeral Home ranks first in activity at the Cemetery with approximately 175 funeral services per year. As a funeral home director, Cuffe regularly dealt with Corson in arranging burial services.

15. Although Corson had known Cuffe for many years, they had only a business relationship.

16. On June 25, 1992, Corson asked Cuffe for a $15,000 loan. At the same time, Cuffe provided Corson with a $15,000 business check. A few months later, Corson executed a note, backdated to June 25, 1992, calling for repayment of this $15,000 over a 12-month period beginning in February 1993 with an interest rate of 8%. Cuffe did informally seek repayment of the loan, although he did not commence any formal collections proceedings in court. Corson did not make any repayments. Consequently in or about July 1996, Cuffe complained to the mayor regarding the outstanding debt.[3]

17. At all times relevant herein, David Solimine, Sr. has owned the Solimine Funeral Home in Lynn. The Solimine Funeral Home is the second most frequent user of the Cemetery's burial services. As a funeral home director, Solimine regularly dealt with Corson in arranging burial services.

18. On August 31, 1996, Corson asked Solimine for a $1,000 loan. Solimine provided that amount in cash at that time. The loan was not evidenced by any note or other document, nor was there any understanding as to when it would be repaid or whether any interest would be paid. Corson did not make any repayments until after this matter became the subject of news stories in December, 1996.

19. Solimine and Corson have known each other for over 30 years, from a time when they were both involved in the wholesale greenhouse business. They regularly helped each other out during that time. They are business acquaintenances, not close friends. They do not socialize.

20. By soliciting a $15,000 loan from Cuffe, a funeral home director with whom he had regular official dealings, Corson used his official position to secure an unwarranted privilege[4] of substantial value, thereby violating §23(b)(2).[5]

21. By continuing to interact officially with Cuffe through 1996 while owing Cuffe money (where the effect of such interaction was to implicitly put pressure on Cuffe not to seek repayment), Corson used his official position to secure an unwarranted privilege of substantial value, avoiding repayment, thereby violating §23(b)(2).

22. By soliciting and accepting loans of $15,000, $6,000, and $1,000, respectively, from funeral home directors Cuffe, Parker, and Solimine while having an official relationship with them as an associate commissioner, Corson acted in a manner which would cause a reasonable person to conclude that Cuffe, Parker and Solimine could unduly enjoy Corson's favor in the performance of his official duties, thereby also violating §23(b)(3).

23. By continuing to interact officially with Cuffe, Parker, and Solimine through December 1996 while owing them money, Corson acted in a manner which would cause a reasonable person to conclude that Cuffe, Parker and Solimine could unduly enjoy Corson's favor in the performance of his official duties, thereby violating §23(b)(3).

Misappropriating Cemetery Funds

24. On May 20, 1994, Corson, as an associate DPW commissioner, sold to Len Sanford two 20-year perpetual care plans for $1,500 each. On that same day Sanford wrote a check for $3,000 made out to Corson.

25. Corson took this money for his personal use. When confronted by city officials about the incident,[6] Corson resigned his DPW position by letter dated June 6, 1997.

26. On July 18, 1997, the city filed suit against Corson for conversion of funds. On August 7, 1997, Corson and the city entered into an agreement for judgment by which Corson agreed to pay the city $3,112, the amount to be paid at a rate of $100 a month. As of July 1998, Corson had repaid $1,741.

27. By converting to his own personal use the $3,000 which the Sanfords gave him for the Cemetery's 20-year care of certain gravesites, Corson used his official position to secure an unwarranted privilege of substantial value, thereby violating §23(b)(2).

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

(1) that Corson pay forthwith to the Commission the sum of ten thousand dollars ($10,000.00) as a civil penalty for violating G.L. c. 268A, §23;

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

DATE: July 23, 1998

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[3] Perpetual care services involve long-term care programs for plantings at gravesites.

[4] The original borrowing *per se* would also raise issues under §23. *See*

In re Hilson, 1992 SEC 603, 604 (UMass director of public safety violates §23(b)(3) by borrowing money from subordinate). Where Corson solicited that loan in 1990, however, it is beyond the Commission's six year statute of limitations. 930 CMR 1.02(10).

[3/] In December 1996 the city placed Corson on administrative leave because of his failure to repay this loan to Cuffe.

[4/] The loan was an unwarranted privilege of substantial value because it involved Corson, in effect, taking advantage of an inherently exploitable situation, his regulatory relationship with a funeral director.

[5/] Corson's soliciting loans from Parker and Solimine also raises §23(b)(2) issues. The weight of the evidence, however, indicates that the motive underlying those loans was friendship and past private business favors, respectively, and not any intent by Corson to use his official position.

[6/] The Sanford family visited the sites on Memorial weekend 1997 and, observing no plantings, complained to city officials.

William J. Devlin
c/o Joel Castleman, Esq.
1145 Main Street
Springfield, MA 01103

PUBLIC ENFORCEMENT LETTER 99-2

Dear Mr. Devlin:

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 receiving compensation from and acting as an agent for private architectural clients in relation to matters pending before the Springfield Historical Commission, of which you were a member. Based on the staff's inquiry (discussed below), the Commission voted on July 22, 1998, to find reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c).

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 bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the 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 formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are a private architect and the president of William J. Devlin AIA, Inc., a small architectural firm. You were appointed to the Springfield Historical Commission ("the SHC") in June 1992 by Mayor Robert T. Markel.[1/]

2. Pursuant to the Historic Districts Act, G.L. c. 40C, no building within an historic district shall be constructed or altered "in any way that affects exterior architectural features" unless the historic commission issues a certificate of appropriateness, non-applicability or hardship with respect to such construction or alteration. *Id.* §6. A person desiring such certificate shall file an application together with such plans, specifications or other information as may enable the historic commission to make its determination. *Id.* Such certificate is a prerequisite to issuance of a building permit. *Id.* In determining matters before it, the historic commission "shall not consider interior arrangements or architectural features not subject to public view." *Id.* §7.

3. From about 1984 until your appointment to the SHC in June 1992, you would regularly attend SHC hearings out of personal interest and voluntarily provide photographic services to the board. In August 1987, SHC Chair Francis Gagnon asked if you would like to be on the SHC. Your response was positive, and throughout the following years, you expressed your continued interest in an appointment to a series of mayors and to Gagnon.

4. In a September 4, 1987 letter to Gagnon, you restated certain items that the two of you had discussed about an appointment, including your understanding that when "proposing work at my own houses, or representing a client's project, I simply abstain from voting, and can go to the petitioners' side of the table as I deem necessary." In a September 10, 1990 letter to Gagnon, you again stated your understanding that there was no restriction on your taking work as an architect in the various historical districts. Rather, you explained in the letter, when one of your jobs was being heard, you would excuse yourself as commissioner, make your presentation from the other side of the table and abstain from the voting. You also requested in that letter that Gagnon send you any written guidelines, handbook or appropriate statutes on being a commissioner.[2/]

5. Just before your June 1992 appointment, you met with a city council subcommittee. You told us that at that meeting, you informed the subcommittee and Gagnon that you intended to do architectural work in Springfield that you would submit to your own board. No one stated any problem with your doing so. You understood, however, that you could not vote on matters when you represented clients before your board.

6. Your reappointment to the SHC was approved in

April 1994.

7. On March 23, 1994, the McKnight Neighborhood Council, Inc. filed an application for a certificate of appropriateness from the SHC regarding installation of a handicap-access ramp on property within the historic district.[3] The application included plans prepared by you, but your handwriting did not appear on the application (as it had on previous applications). You expected to make the presentation on behalf of your client at the April 21, 1994 hearing.

8. According to you, Gagnon spoke with you just prior to the April 21, 1994 hearing and informed you that you should not represent people before your own board. You were upset by the short notice of this restriction, but you briefed your client on the presentation and stayed out of the room. You did not vote on the matter.

9. Thereafter, you expected to receive further conflict of interest advice from the city's legal department, but you did not hear from anyone. Thus, your understanding was that you could continue to submit work to the SHC, but you could not make the presentations yourself.

10. On May 10, 1994, you executed a contract with the Mental Health Association of Greater Springfield, Inc. ("the Mental Health Assoc."), which you had represented before your board in 1993.[4] Pursuant to the contract, you would provide architectural services to renovate a building at 30 High Street as a six-bedroom shelter.[5] Your compensation for basic architectural services — including design, drawings and specifications — was $16,200.[6]

11. Sometime in May 1995 the Mental Health Assoc. filed an application for a certificate of appropriateness from the SHC regarding the renovations to 30 High Street; your handwriting does not appear on the application. The application stated the proposed change as follows:

> Renovation of building to include restoration of front portion. Repair and restoration of rear portion. Alterations to include raising roof of rear portion and changing windows in rear portion. See accompanying drawings submitted under separate cover.

You had prepared the plans and architectural designs submitted to the SHC but did not plan to make the presentation at the public hearing, which was scheduled for June 1, 1995.[7]

12. On June 1, 1995, the date of the Mental Health Assoc. hearing, you received a letter dated May 31, 1995, from Deputy City Solicitor Harry P. Carroll. Carroll's letter constituted a legal opinion concerning the Mental Health Assoc.'s application on which you were listed as the architect of record. Carroll advised you on the restrictions of §17(a) and (c) for a special municipal employee. Carroll informed you that as you were a member of the SHC, any application filed with the SHC was a subject of your official responsibility. Thus, you could not "act as an agent for any person or entity filing an application with" the SHC and could not receive direct or indirect compensation from anyone other than the city in relation to any particular matter which was the subject of your official responsibility. Carroll further advised you "to refrain from acting as an agent for, or receiving compensation from, any party appearing before" the SHC, and "from participating or voting as a member of [the SHC] with respect to the application filed by" the Mental Health Assoc. without a determination from the Ethics Commission that such conduct was permissible. Carroll instructed you on how to request an opinion from the Ethics Commission. The letter was copied to the SHC.[8]

13. You told us that you received Carroll's opinion letter in the afternoon of June 1, 1995, and spoke briefly with Carroll prior to that evening's hearing.

14. Mary Wallachy of the Mental Health Assoc. made the presentation on the evening of June 1, 1995. You left the room and abstained from any official participation in the vote. The SHC approved the renovation plans.

15. You received a total of $16,200 from the Mental Health Assoc. for the base project and an additional $1,780 for the "restoration-oriented historic work." You received your first payment in March 1995, two payments in June 1995, two payments in late November 1995, two payments in December 1995, one payment in late January 1996, and the full payment for the restoration-oriented work ($1,780) in late August 1996.

16. By letter dated December 20, 1995, you sought an opinion from the Ethics Commission regarding the May 31, 1995 opinion from Carroll.[9] You provided a history of your work with the SHC, including your three client representations in 1993 and your last-minute withdrawal from a presentation on April 21, 1994. You indicated that you had had a number of other projects in historic districts that did not get as far as reviews. You also noted that you had a current contract with the Mental Health Assoc. to provide standard architectural services, for which you expected a major fee. You stated in your letter that it seemed natural to you that the architect on the SHC would have historic district projects, and you had been clear about that from the beginning.

17. A February 1, 1996 informal advisory opinion from the Legal Division informed you that the Legal Division concurred with Carroll's opinion, and provided the principles behind §17. The opinion clarified that "acting on behalf of" included signing documents or

submitting applications for another, and that any application filed with the SHC was clearly within your official responsibilities even if you refrained from official participation in the matter.[10]

18. On February 1, 1996, the mayor of Springfield officially removed you from the SHC based on your alleged violations of chapter 268A.[11]

19. Former SHC members told us that you were particularly conscientious about ethical issues. They also stated that prior to 1994 SHC members were unaware that they could not represent clients before the board.

II. Discussion

As a former member of the SHC you were a special municipal employee and, as such, subject to the following sections of G.L. c. 268A.

Section 17(a) prohibits a municipal employee, otherwise than as provided by law, from receiving or requesting compensation from anyone other than the municipality in relation to any particular matter[12] in which the municipality is a party or has a direct and substantial interest. Section 17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for anyone other than the municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest.[13]

In 1994 and 1995 you prepared plans that your clients submitted in support of their applications for certificates of appropriateness, but you did not write the applications or make the presentations yourself. As each of these matters concerned property within the historic district and were presented to the SHC for approval, they constituted particular matters in which the city had direct and substantial interests, and were the subject of your official responsibility. Your actions constituted acting as agent for private parties in connection with these matters. Moreover, you received compensation from private clients in relation to these matters. Accordingly, there is reasonable cause to believe that you violated §17(a) and (c).

The Commission is aware of the various efforts you made to comply with the conflict of interest law, but does not fully understand why you continued to submit documents—or allow your documents to be submitted—to your own board as late as May 1995. Arguably, you should have known by this time that you could not allow this to happen without violating §17. *Commission Advisory No. 13A* (Municipal Employees Acting as Agent) (issued in January 1993 and revised in July 1994);[14] *EC-COI-93-15* (selectman who is also a professional engineer may not receive compensation for preparing, nor place his professional seal on, documents to be submitted to a town agency).

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 a formal order which might have resulted in a civil penalty — because your conduct involved a rather subtle restriction imposed by §17: you received compensation from and acted as agent for private clients without making any personal appearances before your own board on their behalf. The Commission has never publicly resolved a §17 violation that did not involve personal appearances. Thus, your situation presents an opportunity for the Commission to educate the public on the point that a municipal employee violates §17 by receiving compensation from or acting as agent for a private party in connection with submitting documents to a municipal board, even if the municipal employee avoids making any personal appearances before the board.

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: August 26, 1998

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[1] The SHC comprises seven members appointed by the mayor to three-year terms, unpaid. One member of the board is required to be an architect, one a real estate agent, one a historian and one a representative of the Springfield Preservation Trust.

[2] You apparently did not receive anything in response to your request.

[3] You told us that you received $280 for this job.

[4] You had worked on other architectural projects for the Mental Health Assoc. prior to that.

[5] The project was a $220,000 rehab on a long-vacant house to provide transitional housing and support services for homeless people with a history of mental illness. The project was to receive both state and federal funding, including funding from historical entities. The renovations were scheduled to begin in July 1995.

[6] The $16,200 was divided as follows: $12,150 for design/documents, and $4,050 for the construction phase. The contract also specified that your $16,200 fee was for the "'base' project — the overall scope of the work, without the restoration-oriented historic work. For that MHC (Mass. Historic Commission)-funded work, the Architect's proposed fee is $1,780."

[7] You provided us with a copy of your notes regarding the June 1, 1995 presentation. These indicate your intention not to make the presentation because of conflict of interest laws.

[8] Carroll's opinion does not clarify that "acting as an agent" may include submitting documents on behalf of another. Thus, your

understanding at that time was that you could not appear or represent clients before the SHC, from which conduct you had refrained since April 1994. You told us that you had no understanding then regarding the submission of documents. Moreover, you believed that Carroll's opinion did not apply retroactively to work for which you had already contracted and which you had already performed, especially where it would have left your client in a difficult situation. Since then you have refused to take on any projects which would require you to have any dealings with the SHC.

[9] You told us that the six-month delay could have been because you were busy, but you also surmised that you were prompted to contact the Commission when the new mayor asked all board members to tender their resignations.

[10] This appears to be the first time that you were specifically told that "acting as agent" is not limited to making personal appearances, but can include submitting documents or applications on behalf of another.

[11] You later told the Legal Division that you were resigning from the SHC to pursue your private architectural practice, based on the Legal Division's opinion.

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

[13] These sections of §17 apply to special municipal employees in relation to those particular matters in which the special municipal employee officially participated at any time, or which were the subject of his official responsibility within the past year. Thus, a special municipal employee is prohibited from acting privately on those matters concerning his own municipal board or agency, even if the matter is before a different municipal board or agency.

[14] This advisory states that submitting applications or supporting documentation to a third party constitutes prohibited agency conduct, as does preparing documents that require a professional seal.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss **COMMISSION ADJUDICATORY DOCKET NO. 556**

IN THE MATTER OF JAMES H. QUIRK, Jr.

Appearances: Laurie Ellen Weisman, Esq.
Counsel for the Petitioner

David A. McLaughlin, Esq.
Counsel for the Respondent

Commissioners: Brown, Ch[1]., Larkin, Rapacki, Moore, Liacos

Presiding Officer: Commissioner Lynne E. Larkin

DECISION AND ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 8, 1996, the Petitioner initiated these proceedings by issuing an Order to Show Cause (OSC). *See* 930 C.M.R. §1.01(5)(a). The OSC alleges that the Respondent, James H. Quirk, Jr. (Quirk), while he was a member and chairman of the Town of Yarmouth's Conservation Commission (ConCom), violated G. L. c. 268A, § 17(a) by receiving a fee from private landowners for their lawsuit against the Town for damages for land taken by eminent domain for conservation purposes. The specific allegation is that he "received compensation from someone other than the town in relation to a particular matter in which the town had a direct and substantial interest, and in which Quirk had participated as a Conservation Commission member, and/or for which he had official responsibility within the prior year." In addition, the OSC alleges that Quirk violated G. L. c. 268A, § 17(c) by acting "as attorney for someone other than the town in prosecuting a claim against the town, and in connection with a particular matter in which the town had a direct and substantial interest, and in which Quirk participated as a Conservation Commission member, and/or for which he had official responsibility within the prior year."

On August 29, 1996, the Respondent filed an Answer in which, among other things, he asserted an affirmative defense of statute of limitations. On May 1, 1998, the Respondent filed a motion to dismiss the OSC and supporting memorandum (Motion), arguing that the statute of limitations bars all of the allegations against him. The Petitioner filed its opposition to the Motion on May 11, 1998. The Respondent and the Petitioner presented oral arguments on the Motion before all five members of the Ethics Commission on July 22, 1998.

II. FINDINGS

Based upon the joint Stipulation of Facts and other evidence the parties submitted in connection with the Motion, we find as follows:[2]

1. Quirk was a member of the ConCom from April 15, 1986 through June 30, 1994. As a member of the ConCom, he was a "special municipal employee" as defined in G. L. c. 268A, § 1(n).

2. During his tenure on the ConCom, Quirk was also a practicing attorney who had a general law practice that included eminent domain cases.

3. As a result of a Special Town Meeting on January 7, 1987, the Town's voters authorized the Board of Selectmen "to acquire by purchase, gift or eminent domain

for conservation purposes parcels of land." including, among other parcels, land owned by Thomas M. and Nora C. King (Kings).

4. On March 5, 1987, the ConCom, including Quirk, met in an executive session and voted to request that the Town acquire for conservation purposes the land authorized by the January 7, 1987 Special Town Meeting, including land owned by the Kings.[3]

5. The Board of Selectmen filed an Order of Taking by Eminent Domain, which included the Kings' land, on or about December 14, 1987, with the Barnstable County Registry of Deeds.

6. On or about December 23, 1987, the Kings met with Quirk and hired him to represent them in a lawsuit against the Town. On March 31, 1988, Quirk filed suit on behalf of the Kings, seeking compensation for the land taken. From that date through March 25, 1994, which was the date of execution on judgment in favor of the Kings in the amount of $376,911.66, Quirk, as the Kings' attorney, filed various court papers, corresponded with counsel for the Town and generally pursued his clients' claim against the Town. Quirk received $122,934.81 in fees for representing the Kings.

7. During the course of the litigation, the Board of Selectmen proposed settling the Kings' lawsuit by offering to return the land. On February 6, 1992, at a ConCom meeting which Quirk did not attend, the ConCom met in executive session to approve the Selectmen's proposed offer.[4]

8. Sometime in early 1992, the Board of Selectmen became concerned that Quirk had a conflict of interest as a result of his being a member of the ConCom while also representing the Kings in seeking damages for land in which the ConCom also had an interest. To address the Board's concerns, the Town obtained an opinion letter dated April 7, 1992 from special municipal counsel concerning Quirk's activities on behalf of the Kings.

9. The following excerpts from the April 7, 1992 opinion letter are relevant:

> This opinion relates to the activities of James H. Quirk, Jr. who is coincidentally acting as counsel for Thomas M. King in connection with a land damage action against the Town of Yarmouth (Barnstable Superior Court Civil Action Number 88-286) while a member (current Chairman) of the Conservation Commission of the Town of Yarmouth. . . .
>
> [O]n December 14, 1987 the Town went to record with a taking of land in which Thomas M. King and Nora C. King purportedly held an interest. The instrument of taking was recorded in Barnstable County Registry of Deeds .... The so-called King property was a portion of a larger parcel taken by eminent domain for conservation purposes. . . . No pro tanto award was paid at the time of the taking.
>
> The Kings commenced the land damage action against the town in April 1988. . . .
>
> It appears . . . that Mr. Quirk never participated in the process of selecting the King property as a candidate for taking action by the Board of Selectmen, nor did he participate in the process of recommending a taking of the King property. In adition, the Kings have never sought any action by the Conservatioon Commission relative to this land, The Board of Selectmen, unbeknownst to Mr. Quirk, having solicited the concurrence of the Conservation Commission, which obviously acted without the participation of Mr. Quirk, made a subsequent determination that the King property was not significant for conservation purposes and has offered to return the property to the Kings. This offer was proffered to the Kings via a letter of Town Counsel, . . . to . . . Quirk, as counsel for the Kings, dated February 14, 1992.
>
> Mr. Quirk has not participated in any actions by the Commission or the Town, upon which the Town subsequently determined that the King property is not significant for conservation purposes and offered to return the land to the Kings.
>
> Mr. Quirk is a 'special municipal employee' as that term is defined and employed in G. L. c. 268A, and there is no suggestion that his service involves more than sixty days service in any consecutive three hundred and sixty-five days. I do not find, based upon the foregoing specific facts, that Mr. Quirk has participated in the King matter as a member of the Conservation Commission or that Mr. Quirk has exercised official responsibility over any action pertinent to the particular facts set forth.

10. The April 7, 1992 opinion letter was filed with the Ethics Commission in June, 1992.

11. Andrew Crane, then Executive Director of the Ethics Commission, issued an opinion letter dated June 19, 1992 that states:

> Pursuant to the Commission's municipal advisory opinion regulation, 930 C.M.R. 1.03(3),[5] we have reviewed your opinion of April 7, 1992, and subsequent letters, concerning Conservation Commission Chairman James H.

Quirk, Jr.

> Assuming (as you represent) that as a Conservation Commission member Mr. Quirk is a 'special municipal employee' who does not serve more than 60 days in any relevant 365-day period, G. L. c. 268A, §17 prohibits him from acting as agent or attorney for, or receiving compensation from, anyone other than the Town in relation to any particular matter in which the Town is a party or has a direct and substantial interest, and either (a) in which he participated, or (b) which has been the subject of his official responsibility within one year. Your opinion states that the Conservation Commission concurred in the Selectmen's offer to return the subject property to the Kings, although Mr. Quirk did not participate. Nonetheless, the matter was under his 'official responsibility' merely by the Commission's having authority to make recommendations about it to the Selectmen while he was a Commission member. *EC-COI-87-17*. You have been unable so far to learn when the Commission last had such authority about this matter.
>
> Therefore, Mr. Quirk may not act as attorney for, or receive compensation from, any private party (including Thomas King), in relation to this land taking, for one year after the Commission last had (or has) authority to make recommendations about.

III. DECISION

Respondent argues that the OSC should be dismissed because the OSC issued more than three years after the Petitioner had knowledge or should have had knowledge of the alleged violations. In so arguing, the Respondent has emphasized the following portion of the Commission's statute of limitations regulation, 930 C.M.R. §1.02(10)(a): "An order to show cause must be issued within three years after a disinterested person learned of the violation."

This three year tort statute of limitations adheres to principles described in *Nantucket v. Beinecke*, 379 Mass. 345, 349-351 (1979). *See also Zora v. State Ethics Commission*, 415 Mass. 640, 647-648 (1993). *Beinecke* holds that the statute of limitations begins to run when a disinterested person capable of acting on behalf of the plaintiff to enforce the conflict of interest law knew or should have known of the wrong. *Id.* at 350-351.

Applying the general principles of *Beinecke* and the Commission's regulation to this case, the Petitioner must establish by a preponderance of the evidence that it did not know, nor should it have known, of the alleged violations more than three years prior to the issuance of the OSC. Under the Commission's regulation, once the Respondent raises the statute of limitations defense, the Petitioner may satisfy its burden by filing affidavits from the Enforcement Division's investigator responsible for the case, the Attorney General and the appropriate District Attorney's Office stating, respectively, that no complaints relating to the violation were received more than three years before the OSC issued. 930 C.M.R. § 1.02(10)(c)(1) & (2). *See e.g., In re Smith* 1998 SEC Docket No. 522 (Memorandum and Order April 22, 1998); *In re DiPasquale*, 1996 SEC Docket No. 526 (Memorandum and Order June 11, 1996).

Here, the Petitioner provided the affidavits. The Respondent, however, argues that the record contains other undisputed evidence from which to conclude that the Petitioner knew or should have known of the Respondent's alleged violations prior to August 8, 1993 (three years prior to the OSC). The Petitioner does not deny that the Executive Director of the Ethics Commission had knowledge of some of the relevant facts in 1992 but asserts that the Petitioner did not have knowledge of all of the crucial facts more than three years prior to the date of the OSC. As a result, the Petitioner argues that it did not know of the violations nor should it have known of the violations more than three years before the OSC issued. To resolve that issue, we consider the following legal principles.

To determine when the limitations period commenced, we must evaluate the Petitioner's level of knowledge and its duty to inquire further. "Reasonable notice that a . . . particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 210 (1990). The required level of knowledge is not notice of every fact that must be proved to support a claim, but rather knowledge that an injury has occurred. *Pagliuca v. Boston*, 35 Mass. App. Ct. 820, 824 (1994) (although the plaintiff may not have known of the severity of harm she suffered from the defendant's alleged violation of her civil rights until after her breakdown, she knew the necessary facts to make out a civil rights claim). The inquiry is whether, based on the information available to the Petitioner, a reasonably prudent person in the Petitioner's position should have discovered the cause of action. *See McGuinness v. Cotter*, 412 Mass. 617, 628 (1992). Thus, the cause of action accrues when the Petitioner knew, "or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action." *Gore v. Daniel O'Connell's Sons, Inc.*, 17 Mass. App. Ct. 645, 647 (1984). "The unknown factor, however, must be what the facts are, not the legal theory for the cause of action." *Id.* *See also Friedman v. Jablonski*, 371 Mass. 482, 485-487 (1976).[6]

Applying these principles to this case, we conclude the following. We first observe that §§ 17(a) *and* (c) of G. L. c. 268A apply to a special municipal employee in relation to a particular matter *either* "in which he has at any time participated as a municipal employee" *or* "which is or within one year has been the subject of his official responsibility." In this case, the Petitioner pled the alternative theories of the Respondent's participation in *or* official responsibility for the relevant particular matters to support allegations that the Respondent's conduct on behalf of the Kings violated both §§ 17(a) and (c).

As of June 1992, the Executive Director knew that the Respondent was a special municipal employee of Yarmouth as a member of its ConCom while also acting as the attorney for private landowners in a lawsuit against the Town for monetary damages for their land taken by eminent domain.[7] The Executive Director knew that the ConCom had authority "to make recommendations about [the Kings' property] to the Selectmen." The Executive Director concluded that such authority amounted to the Respondent's official responsibility for the land taking. Acknowledging that the Respondent might request or receive compensation for his services as the Kings' attorney,[8] the Executive Director, acting on behalf of the Commission pursuant to its municipal advisory opinion regulation,[9] warned the Respondent in the June 19, 1992 letter that "he may not act as attorney for, or receive compensation from, any private party (including Thomas King), in relation to this land taking . . . ." Thus, the Executive Director and, therefore the Commission, knew or should have known that both §§ 17(a) and (c) were potential causes of action, as of June 1992.[10]

The Petitioner argues that because the Respondent appears to have received compensation within the three year limitations period, the alleged violation of § 17(a) occurred less than three years prior to the OSC and is not barred. This argument fails because, as noted above, the Petitioner reasonably should have known more than three years prior to the OSC that the Respondent may have received or requested compensation as the attorney representing clients seeking damages for an eminent domain taking. *See Pagliuca*, 35 Mass. App. Ct. 820, 824. The Petitioner also argues that it had no knowledge, more than three years prior to the date of the OSC, of the Respondent's participation in the March 5, 1987 vote of the ConCom. Again, through the exercise of reasonable diligence based upon what it knew, the Petitioner could have learned of the Respondent's participation in the relevant particular matter. *See Friedman*, 371 Mass. at 486-487.

On this record, therefore, we conclude that the Petitioner knew or should have known of the alleged violations in the OSC more than three years prior to the date the OSC was issued. ○

IV. CONCLUSION

For all of the above-stated reasons, we conclude that there is no genuine issue of material fact as to whether the Petitioner knew or should have known of the alleged violations more than three years prior to the issuance of the OSC. Accordingly, the Respondent's motion for summary decision based upon the statute of limitations is **GRANTED** and this matter is dismissed.

DATE: September 23, 1998

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[1] Commissioner Brown is not a signatory to this Decision and Order because his resignation from the Commission became effective prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

[2] The parties submitted a joint Stipulation of Facts on December 11, 1996. In addition, the parties have presented evidence outside the pleadings and the Stipulation for purposes of the Motion. As a result, we consider the Motion as one for summary decision. *See* 930 C. M. R. § 1.01(6)(e) & (f).

[3] The Respondent disputes that he participated in an executive session of the ConCom on that date, arguing that proof of such facts is barred by *New England Box Co. v. C. & R. Construct'n Co.*, 313 Mass. 696, 702 (1943) and *Town of Dedham v. Frank Gobbi et al.*, 6 Mass. App. Ct. 883 (1978). For the purposes of the Motion, however, he assumes this finding arguendo.

[4] The Respondent disputes that the ConCom met in executive session on February 6, 1992 to approve the offer, also based upon the cases cited in note 3 *supra*, but assumes this finding arguendo.

[5] We note that 930 C.M.R. §1.03(3) states in pertinent part: "Following receipt of the opinion, the Commission, acting through the Executive Director, shall notify the . . . town counsel of any legal conclusions in the opinion which are inconsistent with Commission conclusions on similar issues under M.G.L. c. 268A or are otherwise, in the Commission's judgment, incorrect, incomplete or misleading."

[6] The policies that support imposing a limitations period on actions under the conflict of interest law are the same as those behind any statute of limitations. They "encourage plaintiffs to bring actions within prescribed deadlines when evidence is fresh and available," *Franklin v. Albert*, 381 Mass. 611, 618 (1980) and they "represent a judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

[7] Section 17(c) states, in relevant part, "No municipal employee shall . . . act as agent or attorney for anyone other than the . . . town . . . in connection with any particular matter in which the same . . . town is a party . . . ."

[8] Section 17(a) states, in relevant part, "No municipal employee shall . . . receive *or request* compensation from anyone other than the . . . town . . . in relation to any particular matter in which the same . . . town is a party . . . ." (emphasis added).

[9] See note 5 *supra*.

[10] We have considered only the extent of the Executive Director's

knowledge in circumstances in which he acted on behalf of the Commission pursuant to 930 C.M.R. § 1.03(3). Thus, we need not, and, therefore, do not, decide the extent to which knowledge of other Commission personnel might trigger the running of the statute of limitations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 578

IN THE MATTER
OF
HERBERT HOHENGASSER

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Herbert Hohengasser ("Hohengasser") enter into this Disposition Agreement ("Agreement") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to find order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On August 5, 1997, 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 Hohengasser. The Commission has conducted its inquiry and, on September 23, 1998, found reasonable cause to believe that Hohengasser violated G.L. c. 268A, §19.

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

1. Hohengasser was, during the time relevant, a Town of Greenfield alternate plumbing and gas fitting inspector. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As an alternate plumbing inspector, Hohengasser issued plumbing and gas permits and conducted preliminary and final inspections of the work done (pursuant to the permits) to ensure compliance with the building code. He only did this when the regular inspector was unavailable.

3. The town paid Hohengasser for these inspections as follows: $581 in 1996; $308 in 1995; and $347 in 1994.

4. Until February 1995, Hohengasser was doing business as a private plumbing contractor through a corporation, Hohengasser Plumbing & Heating, Inc. ("HP&H").

5. On March 1, 1995, Hohengasser sold his stock in the company to his son Daniel. Thereafter, Hohengasser had no financial interest in or connection with HP&H.[1]

6. Hohengasser acted as a plumbing inspector regarding the following HP&H jobs:

(1) August 8, 1995, issued plumbing permit #6003 to HP&H regarding installing a backflow preventer at the Franklin Medical Center; signed off on the final inspection the same day;

(2) August 10, 1995, issued plumbing permit #6006 to HP&H regarding plumbing repairs necessitated by a fire at 166 Hope Street; signed off on a rough inspection on August 9, 1995;[2]

(3) August 12, 1995, issued plumbing permit #6005[3] to HP&H for replacing a boiler at 21 Davis Street; signed off on the rough inspection on August 17, 1995;

(4) August 15, 1995, issued gas fitting permit #4491 to HP&H for replacing a boiler at 26 Shattuck Street; signed off on a boiler inspection on August 19, 1995;

(5) August 24, 1995, inspected 24 Shattuck Street (a second floor bathroom was remodeled);

(6) September 13, 1995, inspected 118 Hastings Street and 47 White Ave. (water and heating systems);

(7) September 15, 1995, inspected 212 Davis Street (final inspection); and

(8) September 21, 1995 inspected 26 Shattuck Street (additional remodeling work).

7. As HP&H's owner, Hohengasser's son Daniel had a financial interest in these inspections.

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

9. The decisions to issue permits and the inspection determinations were particular matters.[5]

10. Hohengasser participated[6] in those particular matters by issuing the permits and/or performing the inspections.

11. At the time he so acted, Hohengasser was aware

that his son Daniel owned HP&H. Therefore, he knew that his son had a financial interest in these particular matters.

12. Therefore, by issuing the permits and performing the inspections as described above, Hohengasser participated as a municipal employee in particular matters in which to his knowledge an immediate family member[7] had a financial interest, thereby violating §19.

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

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

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

DATE: October 22, 1998

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[1]/For example, he was not an officer, director or employee of HP&H.

[2]/Apparently, the plumber submitted the permit application and began the work on or before August 9, 1995.

[3]/Permit applications are submitted to the building inspector's office along with the fee. The application form is given a permit number and then forwarded to the plumbing inspector. Permit nos. 6005 and 6006 were applied for on August 10, 1995; however, Hohengasser reviewed them on different days.

[4]/None of the exception applies.

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

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

[7]/"Immediate family" means 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. 577

IN THE MATTER OF PAULIN J. BUKOWSKI

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Paulin J. Bukowski ("Bukowski") 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 October 16, 1997, 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 Bukowski. The Commission has conducted its inquiry and, on September 23, 1998, found reasonable cause to believe that Bukowski violated G.L. c. 268A, §§19 and 23(b)(3).

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

1. Bukowski had been, during the time relevant, a Town of Greenfield plumbing and gas fitting inspector. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. As plumbing and gas fitting inspector, Bukowski issued plumbing and gas permits and performed preliminary and final inspections of the work done (pursuant to the permits) to ensure compliance with the state plumbing and gas fitting code.

3. The town paid Bukowski a portion of the permit fees he collected. For the years relevant herein, Bukowski was paid $12,371 in 1994; $13,071 in 1993; and $12,946 in 1992.

4. Bukowski's brother Robert Bukowski ("Robert") was, during the time relevant, a plumber who did business in the Town of Greenfield.

5. Bukowski acted as a plumbing inspector regarding his brother Robert's jobs as follows:

(1) September 1992, issued plumbing permit #5422 to replace a toilet at 74 Mohawk Trail;

(2) April 13, 1993, issued permit #5549 to correct

a hot water cross connection serving 2 apartments at 8 Deven Court;

(3) September 1993, issued permit #5646, to replace a kitchen sink, bathroom sink, hot wate heater, bathtub and steam boiler at 27 Madison Circle.

(4) October 19, 1993, issued permit #5667 to replace and vent a kitchen sink, replace a laundry tray, wash machine waste pipe and valve, a hot water heater, and bathroom sink at 82 Sanderson Street;

(5) February 2, 1994, issued permit #5755 to replace a hot water heater at 24 Church Street;

(6) July 11, 1994, issued permit #5795 to replace a kitchen sink at 19 Prentice Avenue; and

(7) August 1, 1994, issued permit #5812 to replace a toilet, kitchen sink, bathroom sink and bathtub at 106 Federal Street.

6. Bukowski conducted all the inspections in connection with the above permits.

7. Robert had a financial interest in the permits and inspections.

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

9. The decisions to issue permits and the inspection determinations were particular matters.[2]

10. Bukowski participated[3] in those particular matters by issuing the permits and performing the inspections.

11. At the time he so acted, Bukowski was aware that his brother Robert had a financial interest in these particular matters.

12. Therefore, by issuing the permits and performing the inspections as described above, Bukowski participated as a municipal employee in particular matters in which to his knowledge an immediate family member[4] had a financial interest, thereby violating §19.

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

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

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

DATE: October 22,1998

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[1] None of the §19 exemptions apply.

[2] "Particular matter" means any judicial or other proceeding, application submission, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation to 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" means participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

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

OPINIONS

State Ethics Commission

Advisory Opinions

1998

Summaries of Advisory Opinions
Calendar Year 1998

• **EC-COI-98-1** - Under §4 of G.L. c. 268A, a member of the Fire Safety Commission and Automatic Sprinkler Appeals Board may not receive compensation from a client if he knows or reasonably should know that his services will require him to prepare reports or other submissions to the Automatic Sprinkler Appeals Board or will result in Appeals Board proceedings. The Commission member is also prohibited by §4 from receiving compensation from a client to provide testimony under oath before the Sprinkler Appeals Board.

• **EC-COI-98-2** - Section 23(b)(2) of G.L. c. 268A permits the chief of the Administrative Law Division of the Office of the Attorney General to use state time and state resources, to the extent necessary to perform duties as chair of the public law section of the Massachusetts Bar Association that are (i) in furtherance of the public interest; (ii) interconnected with her duties as division chief; and (iii) not used toward partisan political ends; provided that she obtains, in advance, her appointing authority's written approval of her proposed use of state time and resources and such written approval specifies that her use of state time and resources satisfies these three conditions.

• **EC-COI-98-3** - Under §18 of G.L. c. 268A, a former city councilor may represent a business association in a Superior Court appeal of a City Board of Health decision regarding citing a solid waste facility because his participation in certain City Council votes was not sufficiently personal and substantial participation in the siting decision such that he would be barred from acting as an attorney in a potential appeal of the decision.

• **EC-COI-98-4** - A member of the Massachusetts Turnpike Authority (MTA) Retirement Board, who was elected, as provided by statute, from among the current and retired employees of the MTA, may participate in his Board's determinations about whether to effect cost of living adjustments for retired members of the MTA Employees' Retirement System and their beneficiaries, as provided by statute, notwithstanding his personal financial interest, as a retiree-member, in such matters.

• **EC-COI-98-5** - Section 19(a) prohibits an elected member of a local school committee from approving payments to a non-profit corporation which is a vendor to the schools, where the school committee member sits on the non-profit's board of directors. Previously, in *EC-COI-87-32*, the Commission had opined that under certain circumstances the signing of payroll warrants could be considered merely ministerial. In the current opinion, the Commission concluded that the approval of payment warrants is not ministerial, and reversed *EC-COI-87-32* to the extent that it holds otherwise.

• **EC-COI-98-6** - For the purposes of G.L. c. 268A, §4, the term "serves" as it appears in the phrase "serves on no more than sixty days" means substantive services performed on any portion of a calendar day. Some of the functions a lawyer or paralegal perform may be ancillary and should not be counted toward the 60-day limit.

• **EC-COI-98-7** - A state employee is advised under §4 that she may not, in her private law practice, represent employees in their claims of unlawful discrimination against their employers filed and pending with the Massachusetts Commission Against Discrimination because the MCAD has a direct and substantial interest in such matters.

CONFLICT OF INTEREST OPINION
EC-COI-98-1*

FACTS:

You are a registered professional engineer who serves as the Chairman of the Fire Safety Commission ("Commission"), a position appointed by the Governor. The Commission was established pursuant to G. L. c. 6, §200 and consists of the state fire marshal or his designee, the chairman of the board of building regulations and standards or his designee, the fire commissioner of the City of Boston or his designee and six members appointed by the Governor. Of the six members appointed by the Governor: one shall be a member of the Fire Chiefs Association of Massachusetts; one shall be a member of the Massachusetts Association of Realtors; one shall be a member of the hotel and motel association; one shall be a registered professional engineer who is also a structural engineer; one shall be an inspector of wires with ten years experience; and one shall be a member of the sprinkler fitters union. Commission members who are not otherwise employees of the Commonwealth receive a stipend and necessary travel expenses incurred in the performance of their duties.

The duties of the Commission are periodically to meet "to alter, rescind, amend and repeal . . . rules and regulations providing for the implementation of a statewide plan to require the installation of automatic sprinklers in all buildings or structures subject to the provisions of section twenty-six A½ of chapter one hundred and forty-eight."[1] Any amendments, repeals, or new rules and regulations proposed by the Commission must be submitted to the General Court and referred to the appropriate joint Legislative standing committee. The Legislative committee is required, within thirty days, to hold a hearing and make a report to the Commission. After review of the report, the Fire Safety Commission may adopt final regulations. According to G.L. c. 6, §200, "[n]o member shall act as a member of the commission or vote in connection with any matter as to which his private right, distinct from public interest, is concerned."

According to the Commission's regulations, 530 CMR §§ 2.00 et. seq., upon the filing of the Commission's regulations with the Secretary of State, the head of the fire department in each municipality must serve notice on building owners indicating that the building is within the scope of the regulations. Any owner of a building or structure constructed prior to January 1, 1975 that exceeds seventy feet in height above mean grade must submit to the head of the fire department of his city or town a statement of intent, schedule, and fire protection systems data sheet for the installation of an automatic sprinkler system in compliance with G.L. c. 148, §26A½. A copy of this information also is filed with the Commission.[2]

Under G.L. c. 148, §26A½ and the implementing regulations, the head of the municipal fire department shall enforce and administer the provisions of the statute and the regulations.[3] 530 CMR §2.01(5). Prior to installation of a sprinkler system, an application for a permit is submitted to the local building official who forwards a copy to the head of the local fire department. 530 CMR §2.01(6). The permit application must contain specifications and plans certified by a Massachusetts professional engineer. 530 CMR §2.01(7). No work may begin on the sprinkler system until a permit is issued by the building official, with the approval of the fire department. 530 CMR §2.01(8).

In addition to the Commission duties outlined in G.L. c. 6, §200, the Commission, pursuant to G.L. c. 6, §201, also serves as the Automatic Sprinkler Appeals Board (Appeals Board). The Appeals Board hears appeals from local fire officials' determinations made in accordance with G.L. c. 148, §26A½ and §26G[4]. The Appeals Board has the power to reverse, affirm, or modify a local fire official's determination, order or requirement. Also, the Appeals Board may grant a variance from any provision of G.L. c. 148, §26A ½ or from any provision of the rules and regulations promulgated by the Commission; "may determine the suitability of alternate materials and methods of sprinkler installation"; and may provide reasonable interpretation of its rules and regulations and of c. 148, §26A½.

Finally, the Appeals Board may grant a waiver or an extension of time for compliance with G.L. c. 148,§ 26A½. You indicate that, in practice, waivers are rarely given. Most of the cases before the Board involve variance requests, time extension requests, and the review of alternative methods. You indicate that the parties before the Appeals Board are the property owner and the local fire official.

Under G.L. c. 6, §201, the Chairman of the Commission may designate five members of the Commission to sit as the Appeals Board in order to hold a public hearing. The chairman also schedules the time and place for the hearing. At that hearing, the selected members hear testimony under oath and take evidence. The Appeals Board issues a written decision and findings, which is appealable to the Superior Court under G.L. c. 30A. In any c. 30A appeal, the Appeals Board is named as a party and is represented by the Attorney General.

You state that the Appeals Board may meet once a month, but the full Commission meets only once a year. You state that the combined duties of the Commission and the Appeals Board require less than 800 hours per year.

In addition to your responsibilities on the Commission/Appeals Board, you own a sole proprietor-

ship business that engages in fire protection engineering and consulting services. You design and engineer fire protection and life safety systems, including sprinkler systems, standpipes and fire pumps, fire alarm and signaling systems; provide code consulting and hazard evaluation; design protection alternatives and approaches; and perform life safety system evaluations. (Technical Services) You provide .Technical Services in the commercial, residential and industrial markets and your clients include owners, property managers, architects, engineers, government agencies and contractors.

You indicate that your work is very technical and specific to each particular project, but you also provide educational and procedural information to your clients regarding compliance with building codes and regulations and appeal options. For example, if a client requires an alternative design, your services would include not only the original design and engineering of the system, but also your services as a technical advisor throughout any likely appeal process. You may prepare the forms to be submitted on appeal to the Appeals Board and, as the owner's technical advisor, provide testimony under oath to the Appeals Board. All of these services would be included in your engineering fee, which is paid by the client on a fixed cost or hourly basis. You have never been hired solely to represent a client on appeal.

Initially, any work you perform for a client would be submitted to the local building and fire officials and an appeal may or may not follow. If there is an appeal, your reports would become part of the record on appeal.

QUESTIONS:

1. May you, in your private engineering and consulting practice, receive compensation from a client to provide Technical Services in connection with an Appeals Board proceeding and/or to assist or represent the client in the appeals process before the Appeals Board?

2. May you, in your private engineering and consulting practice, receive compensation from a client to testify under oath on behalf of the client before the Appeals Board?

3. Does your private engineering and consulting practice limit your participation on the Commission/ Appeals Board?

ANSWERS:

1. G.L. c. 268A, §4 prohibits you from receiving compensation from a client if you know or reasonably should know that the Technical Services will require you to prepare reports or other submissions to the Appeals Board or likely will result in Appeals Board proceedings.

2. G.L. c. 268A, §4 prohibits you from receiving compensation from a client to provide testimony before the Appeals Board.

3. G.L. c. 268A, §§6 and 23 place restrictions on your participation as a Commission/Appeals Board member.

DISCUSSION:

SECTION 4

Provision of Technical Services

For purposes of the conflict of interest statute, you are a state employee.[5] As you serve less than 800 hours per year, you are considered to be a special state employee.[6] As such an employee, you are subject to G.L. c. 268A, §4.

G.L. c. 268A, §4(a) provides that "no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." Further, G.L. c. 268A, §4(c) provides that "no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." Section 4 applies to special state employees only in connection with matters in which they have participated or over which they have official responsibility as a state employee, or, if the employee serves for more than sixty days, matters which are pending in the employee's agency.

Section 4 is based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law*, 76 Harv. L. Rev. 1113, 1120 (1963). In discussing §17(a), the municipal counterpart to §4(a), we have stated

> [The section] seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence--by action or inaction--official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered

to the private interests when his sole loyalty should be to the public interest. *EC-COI-92-36. See also, Commonwealth v. Newman,* 32 Mass. App. Ct. 148, 150 (1992); *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977).

Further, §4(a) applies irrespective of whether the interests of the non-state party and the Commonwealth are adverse. As recognized by the Supreme Judicial Court, "[t]he Legislature's objective [in enacting §4] 'was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.' It can not fairly be said that unless public and private interests in a particular matter are adverse, there can be no appearance of conflict, nor can it properly be said that the Legislature has no legitimate interest in preventing such an appearance." *Edgartown v. State Ethics Commission*, 391 Mass. 82, 88 (1984) (citations omitted).

Proceedings before the Appeals Board and submissions to the Appeals Board are particular matters[7] in which you participate[8] or over which you have official responsibility[9] as a Commission/Board member. Further, we conclude that proceedings before the Appeals Board are of direct and substantial interest to the Commonwealth. The Appeals Board is empowered to grant exemptions and waivers from the requirements in the General Laws. Having established specific requirements regulating automatic sprinklers, the Commonwealth has a direct and substantial interest in any proposal to alter these requirements. *See Attorney General Conflict Opinion No.* 172, October 8, 1963 (Commonwealth has direct and substantial interest in rules and regulations pertaining to administration of insurance laws); *Compare EC-COI-97-2* (state board in essence resolves a private dispute and is not a party to an appeal of its decision). It is noteworthy that the Appeals Board is a party to any appeal of its decisions and thus, has a stake in its decision. *See EC-COI-97-2* (Commonwealth's interests in benefit's claim made by private party against private insurer before Industrial Accidents Board not sufficiently direct and substantial where Commonwealth's role is to provide an impartial forum and Commonwealth is not a party and does not have a stake in the Board's determination whether or not to award benefits).

On the other hand, we conclude that the Commonwealth does not have a direct and substantial interest in a permit determination by the local fire official that a fire system design or timetable complies with the statutory scheme under G.L. c. 148 and local bylaws and ordinances, if the local determination is not appealed to the Appeals Board. *See e.g., EC-COI-83-103* (member of state appeals board may be involved in projects for private clients as project is not under official responsibility until a lower board acts). Under c. 148, §26A½, the Legislature provided that the initial opinion or determination is to be made by the local fire official and that the fire official, not the Appeals Board, has the power to enforce the provisions of this section. *See EC-COI-92-22; 86-2.* Any interest of the Commonwealth in the possibility of an appeal of the local decision to the Appeals Board at some future time is not sufficiently direct and substantial to implicate §4. *EC-COI-80-94* (interest of Commonwealth in civil suit between private parties because of possibility of criminal prosecution in future arising from same events not direct and substantial). Under G.L. c. 6, §201, the Board has no authority to intervene in the local decision-making process, unless and until an aggrieved party petitions the Board. Further, although the Appeals Board reviews the local determination, it is not required to defer to the local authority. The Appeals Board is empowered to hold hearings, hear testimony, take evidence and issues findings and a decision "reversing, affirming or modifying in whole or in part" the local determination. G.L. c. 6, §201. As we stated in *EC-COI-97-2*, "[b]y using the modifying phrase 'direct and substantial,' the Legislature intended that the commonwealth's interest in the proceedings or the outcome be significant and direct to the commonwealth itself as an institution." *See EC-COI-93-5* (regulatory authority and oversight of activity alone not sufficient to find particular matter in which Commonwealth has direct and substantial interest); 83-120; 83-67; *Burton v. United States*, 202 U.S. 344, 391-396 (1906) (direct interest of government must be more than government's interest as "parens patriae" or interest government shares with all citizens).

Thus, we conclude that, under §4, you may not receive compensation from or provide Technical Services to a client in an Appeals Board proceeding. You may not receive compensation from a client to prepare or file submissions to the Appeals Board or to prepare the client's case and strategies to use before the Appeals Board.

You may not provide Technical Services if you know or reasonably should know that you will be required to prepare reports or other submissions to the Appeals Board, or if you know or reasonably should know that your client's project will become the subject of Appeals Board proceedings. The Ethics Commission, in *In re Hewitson, 1997 SEC 874,* recently advised professionals that "[w]here a public official is privately employed as a professional, such as a botanist, engineer, or surveyor, and is asked as such a professional to prepare a report which he knows or reasonably should know is likely to be submitted to a board, agency or commission in his own town, the public official has a duty to inquire as to whether the report will be so submitted. If the answer to the inquiry is yes . . . the public official will generally be barred by §17 [the municipal counterpart to §4] from accepting the job." Thus, at the time that you are approached by a client, you have a duty to inquire whether

your proposed work is reasonably likely to involve particular matters before the Appeals Board.

On the other hand, if, at the time you agree to do work for a client, you make the above-described inquiry and do not reasonably believe that the work will involve particular matters before the Appeals Board, but rather, will end with a local permit determination, then you may undertake the consulting work because the Commonwealth does not have a sufficiently direct and substantial interest. *See e.g., EC-COI-92-22; 86-2; 83-103.* If your client does appeal to the Appeals Board, you must cease providing Technical Services because, at the time of the appeal, the interest of the Commonwealth will be sufficiently direct and substantial.

Service As Expert Witness

You have stated that your fee for services includes technical support and, if required, your services as an expert technical witness if your client appeals to the Appeals Board. Under a literal reading of G.L. c. 268A, §4(a), your compensation for services as an expert witness before the Appeals Board is prohibited, unless some other paragraph in §4 limits the application of that section to state employees who become expert witnesses. As we concluded above, proceedings before the Appeals Board are of direct and substantial interest to the Commonwealth. Further, these proceedings are within your official responsibility, even if you do not personally participate in the hearing as a Board member. *EC-COI-90-11; 89-7.* Finally, any compensation you receive for your services as an expert witness is in connection with the Appeals Board proceeding.

The third to the last paragraph of §4 of G.L. c. 268A states:

> This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

Whether this paragraph will permit you, notwithstanding the general prohibition in §4(a), to receive compensation from a client to testify under oath as an expert witness is a question of first impression for the Ethics Commission.[10] We, in prior opinions, have indicated that this paragraph would permit state employees to testify on an uncompensated basis in proceedings in which the Commonwealth is a party or has a direct and substantial interest. *See EC-COI-83-103; 83-69* (consultant to Attorney General's Office, who was a special state employee, permitted to testify, on uncompensated basis, as expert witness, on behalf of private party in a court proceeding in which Attorney General's Office represented by special counsel); *83-45* (Department of Mental Health employee testified about her official report on behalf of non-state party in proceeding in which different state agency was a party); *80-94* (state employee could testify in arson prosecution on uncompensated basis about her private laboratory work). In each of these opinions, the Ethics Commission expressly reserved the question concerning witness compensation, stating, "[i]f you were to be compensated for your activities as an expert witness, the analysis under §4 might be different." *EC-COI-83-69.*

For the following reasons, we conclude that the "witness exemption" paragraph will not permit you to receive compensation for testifying as an expert witness. A review of the plain language of the witness exemption does not answer the compensation question because this statutory paragraph is silent concerning any compensation provision for witnesses.

When interpreting statutory language, we follow the principle that

> The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.

Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted). Viewing §4 in its entirety, unlike the witness exemption, each of the other seven paragraphs in § 4 which limit the application of the main prohibitions in §4(a) and §4(c) mentions compensation. Mindful of the canon of statutory construction that, "when the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present", we decline to infer a compensation provision for expert witnesses. *Commonwealth v. Galvin*, 388 Mass. 326, 330 (1983); *see also, Leary v. Contributory Retirement Appeal Board*, 421 Mass. 344, 348 (1995); *Tesson v. Commissioner of Transitional Assistance*, 41 Mass. App. Ct. 479, 482 (1996).

Section 4 contains two distinct prohibitions. Section 4(a) prohibits the receipt of compensation. For purposes of the conflict of interest law, "compensation" is defined as " any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, §1(a). Thus, under §4(a), a state employee may not, otherwise than as required by law for the proper discharge of official duty, receive any economic benefit from a non-state party for any services rendered in a particular matter in which the

Commonwealth is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting in a representational capacity as an agent or attorney in connection with any particular matter in which the Commonwealth is a party or has a direct and substantial interest. By his conduct, a state employee may violate either or simultaneously both of these sections. Buss, *The Massachusetts Conflict Of Interest Statute: An Analysis*, 45 B.U. L. Rev. 295, 324 (1965).

Section 4 and the witness exemption were enacted as part of the original 1962 conflict of interest legislation, c. 779 of the Acts of 1962. The language of the witness exemption has remained unchanged since 1962. In the original bill, H. 3650, the prohibitions against receiving compensation and acting as an agent were embodied in two separate sections, §4 (prohibiting compensation) and §5 (activities of agent or attorney). Yet another section, §8, established the "application of sections four and five to personnel administration proceedings, assistance by member of immediate family or personal fiduciary, necessary assistance to contractors and testimony." Section 8(d) stated "nothing in section 5 prevents a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt." The other paragraphs in §8 dealing with further exemptions to the main prohibitions, delineated whether each paragraph applied to §4 and/or §5 and also contained specific language regarding whether compensation was permitted.[11] Thus, in the original bill, the testimony exemption was intended only to limit the applicability of the prohibition against acting as an agent or attorney. No similar allowance was made for the compensation of witnesses.

H. 3807 was substituted for H. 3650 and contained revisions to H. 3650. In H. 3807, the original sections 4, 5 and 8 were consolidated into separate paragraphs of §4, replacing the language indicating whether the exemption applied to §4 and/or §5 with "this section." The language in the other exemptions relating to compensation remained unchanged. Although it is not completely free from doubt, there is no indication that the Legislature, in consolidating the original §§4, 5 and 8 and in making the necessary editorial changes for internal consistency, intended to deviate from its original intent that the witness exemption applied only to the prohibition against acting as an agent or attorney.

Our opinion that the witness exemption is intended only as an exemption to the §4(c) restrictions and not to the §4(a) restrictions is further supported by the analogous federal conflict of interest statute. The Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of interest statute. *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962, at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in the Congress; much of language of proposed conflict law taken and adopted from federal bill). The analogous federal counterparts to G.L. c. 268A are 18 U.S.C. §203(a), which prohibits compensation for any representational service as an agent or attorney or otherwise in relation to any particular matter in which the United States is a party or has a direct and substantial interest and 18 U.S.C. §205(a), which prohibits acting as agent or attorney for prosecuting any claim against the United States or from acting as agent or attorney before any department, agency, court, etc. in which the United States is a party or has a direct and substantial interest.

Title 18 U.S.C. §205(g) limits the application of 18 U.S.C. 205(a) (regarding acting as agent or attorney) and contains almost verbatim language to the witness exemption in G.L. c. 268A, §4. Title 18 U.S.C. §205(g) was part of the 1962 federal statutory scheme. Title 18 U.S.C. §203(a), concerning receipt of compensation, did not contain a comparable witness testimony exemption until the Congress added one in 1990. Pub. L. 101-280 §5(b)(5) (Ethics Reform Act of 1989). Thus, at the time of the 1962 enactment of G.L. c. 268A, the federal statute contained almost verbatim language regarding an exemption for witness testimony and the federal exemption served only as a limitation on the agency provisions of 18 U.S.C. §205(a).[12]

It appears that the Massachusetts Legislature chose to create a narrow exemption, adopted from the federal statute, recognizing the need to clarify that, as a practical matter, when a state employee is called by a non-state party to testify in a proceeding in which the Commonwealth is a party or has a direct and substantial interest, his actions will not be considered representational acts of agency. However, given the prophylactic purpose of § 4, to prevent even the appearance of conflicting loyalties between the public and private interest, the Legislature may not have been inclined to extend the exemption to include the receipt of an economic benefit for one's testimony in a proceeding in which the Commonwealth is a party or has a direct and substantial interest.

In conclusion, if the Legislature had intended to permit state employees to be compensated by someone other than the Commonwealth as expert witnesses in matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest, it could have done so explicitly. *See e.g., Bartlett v. Greyhound Real Estate Finance Co.*, 41 Mass. App. Ct. 282, 287 (1996). Consistent with the overall purpose of G.L. c. 268A, §4, we interpret the witness exemption narrowly and decline to infer that said exemption permits your compensation by someone other than the Commonwealth for your testimony in a Board proceeding.[13] *See e.g., Baker Transport, Inc. v. State Tax Commission*, 371 Mass. 872, 877 (1977) ("exception to the general rule to be

narrowly construed"); *Galvin*, 388 Mass. At 330 ("where statute appears not to provide for an eventuality, no justification for judicial legislation"); *Tesson*, 41 Mass. App. at 482 ("language of statute not to be enlarged or limited by construction unless its object and plain meaning require it").[14]

SECTION 6

Your opinion request also raises issues under G.L. c. 268A, §6, which governs a state employee's participation in matters in which he has a financial interest. Section 6 provides, in relevant part, that a state employee may not participate in a matter in which he, an immediate family member, a partner, or a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest. In prior precedent interpreting §6, we have advised a state employee that he may not participate in giving a state-mandated examination to an individual who was a student of his spouse whom the student compensated in exchange for preparing him for the examination, stating "[the spouse's] reputation as an instructor and the ultimate financial success of the . . . school which she will own is affected by the success rate of her students . . . ." *EC-COI-82-105; see also, 96-2, n.10; 82-176* (same).

Applying this precedent to your situation, we conclude that you have a financial interest in an Appeals Board review of any work which you have provided for a client and for which you have received compensation because the success of your business and your professional reputation depend upon the quality and integrity of your work.[15] For example, if the Appeals Board declines to accept or rely upon drawings or plans that you have designed, finding such drawings/plans inadequate, incomplete, or erroneous, this action may affect your reputation with the specific client whose appeal is pending, as well as the reputation of your business in general.

Accordingly, under G.L. c. 268A, §6, you must abstain, as a Commission/Appeals Board member, from participating in any Appeals Board proceeding in which your professional work will be reviewed by the Board, unless you receive an exemption from your appointing authority, the Governor, as described below. Further, you must abstain from participating as Chairman of the Commission in the selection of the Appeals Board panel that will hear an appeal involving your work, and you may not delegate the task of selecting the panel to another member of the Commission/Appeals Board. All of these actions constitute participation in a matter in which you have a reasonably foreseeable financial interest. *See e.g., EC-COI-92-33; 86-13.*

Under §6, if your Commission/Appeals Board duties would otherwise require you to participate in a matter reviewing your professional engineering work, in addition to abstaining from the matter, you must also fully disclose to the Governor, who is your appointing authority, and the State Ethics Commission, in writing, all relevant facts about the conflict of interest, including the facts surrounding your professional relationship with the Appeals Board appellant and the use of your work product. Upon receiving said disclosure, the Governor should delegate the particular matter to another Commission/Appeals Board member, assume responsibility himself, or make a written determination that you may participate because your interest is not so substantial as to affect the integrity of your services to the Commonwealth. Copies of this written determination by the appointing authority should be forwarded to you and to this Commission. If you do not receive a prior written determination from the Governor that you may participate in a particular matter, you will be required by §6 to continue abstaining from participation in the particular matter.

SECTION 23

G.L. c. 268A, §23 contains standards of conduct which are applicable to all state, county and municipal employees. Section 23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Under §23(b)(2), the Commission has consistently prohibited state employees from using their titles, public time and public resources to promote a private interest. *See, e.g., EC-COI-92-28; 92-12; 92-5* (legislator may not use state seal on correspondence to promote political campaign); *Public Enforcement Letter 89-4* (state employee may not use state letterhead, state time, state secretarial resources to promote private trip). Under this section, you may not use state resources or state time to promote your private business.

G.L. c. 268A, §23(b)(3) prohibits a municipal employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. For example, issues may be raised under this section if a matter involving a former client comes before the Commission/Appeals Board but you have not provided any Technical Services in connection with said matter before the Board so you are not required to abstain under §6. Nevertheless, this relationship creates an appearance of a conflict of interest or bias in one's official actions as a result of one's private interests. *EC-COI-92-40; 91-3; 89-19; 89-16.* In order to dispel the appearance of a conflict, §23(b)(3) requires that you file a written disclosure of the relevant facts, prior to participation as a Commission/Appeals board member, with the Governor, as your appointing authority. This

disclosure is a public record.

If you participate in a matter affecting a former client, you should take care under §23(b)(2) and §23(b)(3) to base any decisions affecting the former client on the merits, using objective standards and following all requisite procedures. If you are unable to judge the matter impartially, you should abstain. *See EC-COI-95-4.*

DATE AUTHORIZED: February 10, 1998

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

[1]G.L. c. 148, §26A½, in pertinent part, requires every building and structure of more than seventy feet above the mean grade, constructed prior to January 1, 1975, to be protected with an adequate system of automatic sprinklers. The statute provides a schedule for compliance, but allows the owner to seek a waiver or extension to the statutory schedule.

[2]The regulations also provide a choice of schedules for implementation of G.L. c. 148, §26A½, allowing for statutory compliance between 1991 and 1997. 530 CMR §2.03(3). At the end of each calendar year, the building owner is required to submit a progress report to the local fire official and to the Commission, summarizing progress under the chosen schedule. 530 CMR §2.03(4). The head of the fire department or persons authorized by the head of the fire department have the right to inspect any building or structure for compliance with 530 CMR §2.00 and G.L. c . 148, §26A½. 530 CMR §2.03(5).

[3]Under §26A½,

> The head of the fire department shall enforce the provisions of this section. Whoever is aggrieved by the head of the fire department's interpretation, order, requirement, direction or failure to act under the provisions of this section, may, within forty-five days after service of notice thereof, appeal from such interpretation, order, requirement, direction, or failure to act, to the board of appeals. . . .

[4]In any city or town which accepts its provisions, G.L. c. 148, §26G generally requires every building of more than seventy-five hundred gross square feet and every addition of more than seventy-five hundred gross square feet to be adequately protected by an automatic sprinkler system. Similar to G.L. c. 148, §26A½, under §26G, the head of the fire department is the enforcement officer and aggrieved parties may appeal to the Appeals Board.

[5]"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).

[6]"Special state employee," a state employee:

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

(2) who is not an elected official and

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

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

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

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

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

[10]The Ethics Commission has, in its precedent, applied this exemption to special, as well as to "regular"state employees. To do otherwise would create the anomalous result that a full- time state employee would be permitted, if requested by a private party, to testify under oath, on an uncompensated basis, before his agency, but a special state employee, under the special state employee restrictions in §4, would be prohibited from so testifying. *See e.g., Neff v. Commissioner of the Dep't of Industrial Accidents*, 421 Mass. 70, 75-76 (1995) (legislation not to be interpreted contrary to legislative intent). In enacting G.L. c. 268A, the Legislature intended that §4 apply less restrictively, not more restrictively, to special state employees. *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962 at 12-13. ("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").

[11]For example, §8(b) states "nothing in section 4 or 5 prevents a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility provided that the state official responsible for appointment to his position approves."

[12]The federal Office of Government Ethics, in interpreting the federal witness exemption, has promulgated a regulation stating

> an employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency. . . .

5 CFR §2635.805. Prior to authorizing service as an expert witness, the agency ethics official must determine, after consultation with the agency representing the government or having the most substantial interest in the matter, that service as an expert is in the government's interest and that the subject matter of the testimony does not relate to the employee's official duties. 5 CFR §2635.805(c). Finally, the regulation prohibits a special government employee (similar to a special state employee) from serving, "other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized" as described in 5 CFR §2635.805(c). 5 CFR §2635.805(a)(2).

[13]We note that G.L. c. 268A, §3 prohibits the offer or receipt of anything of substantial value to any person "for or because of testimony under oath or affirmation given or to be given by such person or any other person as a witness upon a trial, hearing or other proceeding, before any court, any committee or either house or both houses of the general court, or any agency, commission or officer authorized by the laws of the commonwealth to hear evidence or take testimony or for or because of his absence therefrom. . . ." The last paragraph of §3 states that these cited paragraphs "shall not be construed to prohibit the payment or receipt of witness fees provided by law or the payment by the party upon whose behalf a witness is called and receipt by a witness of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, in appearing or testifying." The purpose of §3, which, in part, prohibits the receipt of a gratuity for testimony or for a refusal to testify is fundamentally different from the purposes underlying §4, as discussed above. We do not read the last paragraph of §3 as permitting an expert witness fee otherwise prohibited by §4 because said fee would be in connection with a matter in which the Commonwealth is a party or has a direct and substantial interest.

[14]In this opinion, we do not address the issue of whether a state employee who serves as a witness in a proceeding in which the Commonwealth is a party or has a direct and substantial interest may receive a statutory witness fee from someone other than the Commonwealth. *See e.g.*, G.L. c. 262, §29.

[15]This situation would arise if some work that you performed on the municipal level resulted in an Appeals Board proceeding but, at the time that you undertook the work, you did not know nor did you have reason to know that your work would become part of an appeal to the Appeals Board.

CONFLICT OF INTEREST OPINION EC-COI-98-2*

FACTS:

You are the Chief of the Administrative Law Division ("Division Chief") of the Office of the Attorney General ("OAG"). Your official duties include advising counsel for all state agencies about legal issues that are or may be the subject of litigation, supervising other assistant attorneys general and special assistant attorneys general in the handling of litigation on behalf of state agencies, and directly handling such litigation yourself. Carrying out these duties often involves preparing educational materials and conducting training sessions for assistant attorneys general and agency counsel on legal issues related to government practice, drafting and reviewing proposed regulations and legislation, and recruiting and interviewing candidates for positions in the Division and the OAG in general.

Since August 1997, you have also been serving as Chair of the Public Law Section ("Section Chair") of the Massachusetts Bar Association, a private organization that supports the activities of lawyers within the Commonwealth. The mission of the Section is to promote congeniality among public and private sector lawyers, provide a forum for discussion of public law issues and ethical concerns, develop continuing legal education programs and materials, and promote public sector law as a career.

You report that your duties as Section Chair substantially overlap with your duties as Division Chief, and that it is difficult for you to confine your activities as Section Chair strictly to hours outside of your normal working hours as Division Chief. As a result, you requested the Attorney General's permission to spend approximately three hours per week on Section activities, and to use the Office's telephones, fax machine and word processor for such activities. The Attorney General acknowledged that your participation as Section Chair "reasonably fits within your area of official responsibilities as part of your role" as Division Chief. He granted your request in writing, allowing you to participate in Section Chair activities "to the extent it is necessary" during your normal working hours, with the proviso that you must provide advance notice to the OAG if the Section is going to take a public position on an issue of legal policy that differs from the position of the OAG. In such circumstances, the Attorney General concluded that it may be necessary for you to recuse yourself from further participation as Section Chair in the matter.

QUESTION:

Does G. L. c. 268A, §23(b)(2) permit you, as Division Chief, to use state time and state resources, such as the telephones, fax machine, and word processor, to perform your duties as Chair of the Public Law Section of the Massachusetts Bar Association when your appointing authority has determined in writing that your duties as Section Chair reasonably fit within your official state duties and has also approved your use of such state time and resources to the extent it is necessary?

ANSWER:

Section 23(b)(2) of G. L. c. 268A will permit you to use state time and resources, to the extent necessary, to perform those duties as Chair of the Public Law Section of the Massachusetts Bar Association that are (i) in

furtherance of the public interest; (ii) interconnected with your duties as Division Chief; and (iii) not used toward partisan political ends; provided that you obtain, in advance, your appointing authority's written approval of your proposed use of state time and resources and such written approval specifies that your use of state time and resources satisfies these three conditions.

DISCUSSION:

As an employee of the Attorney General's Office, you are a state employee[1] for purposes of the conflict of interest law. As such, you are subject to, among other sections of the conflict law, G. L. c. 268A, §23(b)(2) which prohibits a public employee from using or attempting "to use his official position to secure for himself or others *unwarranted* privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals." (emphasis added).

The term "unwarranted" is not defined in c. 268A.[2] As a result, we have noted that we may apply common experience and common sense in interpreting such words as they appear in the conflict law. *EC-COI-87-37*; *EC-COI-95-5*. In common usage "unwarranted" means "lacking adequate or official support"[3] or "having no justification; groundless."[4][5]

We previously have concluded that the use of public resources by public employees for *personal* purposes constitutes an *unwarranted* privilege not available to similarly situated individuals. *EC-COI-95-5*. "Section 23(b)(2) dictates that the use of public time and resources must be limited to serving the public rather than private purposes." *Id. See also EC-COI-92-4; 91-6* (public officials may not use public time, personnel, facilities, equipment (telephones, copiers, fax machines), titles, etc. in conducting private business).[6]

Your proposed use of state time and resources for Section activities does not appear to be for personal purposes. The issue here, rather, is whether the use of state resources and time in support of your Section activities is warranted, based upon the authorization you have already received. In circumstances similar to yours, we advised the Commissioner of the Department of Corrections, in *EC-COI-84-70,* that he could use Department staff and resources to process registration information in connection with a national conference on parole and probation, which was sponsored by a private, non-profit organization in which the Commissioner served as an officer, provided that the use of such resources was:

> 1. in furtherance of the public interest in general, rather than in pursuit of private gain (either of an individual or a particular private interest group);
>
> 2. interconnected with the business of that department of state government . . . ;[7]
>
> 3. not used toward partisan political ends; and
>
> 4. the state employee's appointing official approves the use of state resources for that purpose.

EC-COI-84-70. We further stated, "This last condition is critical. It ensures that a disinterested, accountable public official is making a judgment that there is an appropriate and not 'unwarranted' use of state resources."[8] *Id.*

We continue to believe that the above-described four conditions must be satisfied in order to determine that the use of public time or resources to support private organizations and related activities is warranted for purposes of §23(b)(2). We clarify that the public employee must obtain, in advance, his appointing authority's written approval of the proposed use of public time and resources and such written approval must specify that the public employee's proposed use of public time and resources satisfies each of the first three conditions.[9] Thus, provided that you and your appointing authority satisfy all these conditions, you may, to the extent necessary, use state time and resources to perform those Section activities interconnected with your duties as Division Chief.

DATE AUTHORIZED: May 12, 1998

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

[1] "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, ... G. L. c. 268A, §1(q).

[2] The legislative history concerning "unwarranted" as it appears in the conflict law does not elucidate its meaning.

[3] *Webster's Third New International Dictionary* (1964).

[4] *The American Heritage Dictionary, Second College Edition* (1985).

[5] The phrase "use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions" has been part of G. L. c. 268A since it was first enacted in its general current form. *See* St. 1962, c. 779, §1; St. 1975, c. 508; St. 1982, c. 612, §14; St. 1986, c. 12, §2. For purposes of this opinion, we assume that your use of state time and resources for your Section Chief duties would necessarily involve "privileges or exemptions of substantial value" because the amount of state time and resources you plan to devote to Section Chair activities would constitute something of "substantial value" under the conflict law. *See e.g., PEL 92-3*; *EC-COI-93-14*.

[6] *See also EC-COI-81-88* (state senator's allowing a non-profit

organization to use his state office space, telephones and other facilities constituted using his official position to secure an "unwarranted privilege" when such an organization would be receiving something not generally available to private interest groups); *EC-COI-82-112* (state representative who leased a word processor using personal funds for use in his state office may not use the word processor for purely personal or campaign-related purposes as long as it remains in his office because the use of state office space, electricity, lighting, etc. which accompanied its use for such purposes is an "unwarranted privilege arising out of [his] official position"); *PEL 92-3* (recreation department director who directed city employees to devote approximately 100 hours of city time towards the administrative needs of a non-profit unincorporated association that were unrelated to city business extended an unwarranted privilege of substantial value to that association).

[7] We noted that the exchange of ideas and knowledge, the development of programs, and public education as to the needs and goals of the corrections process were among the Commissioner's statutory duties.

[8] We also noted, however, that nothing in our opinion precluded the application of other statutes or regulations dealing with the use of state facilities or supplies.

[9] It is the appointing authority's responsibility, in the first instance, to determine whether he has legal authority to make such an approval. We have indicated that in certain circumstances we will defer to official personnel policy decisions in determining what is a warranted use of an official position. *See e.g., EC-COI-86-17* (as long as the public authority retains the discretion to determine the compensation package for its employees, the distribution of a free pass would not constitute the granting of an unwarranted privilege to its employees). The head of a public agency does not, however, have unlimited discretion. "[P]ublic resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees, even if those concerns are public-spirited in nature." *PEL 92-3. Compare EC-COI-84-128* (Secretary of Executive Office of Public Safety's participation in raising funds for Governor's prevention of drug and alcohol abuse campaign can reasonably be seen as part of the Secretary's official duties and lending the prestige of his office will not inure to benefit of a private individual, but rather to a state-sponsored project which will serve the public interest). *See also EC-COI-88-17* (we will customarily defer to the appointing official's discretion with respect to determining acts done within the proper discharge of official duties under §4(c), although an appointing official's discretion under §4 is not unlimited; in this opinion, we disagreed with the appointing official's determination of the employee's official responsibilities); *EC-COI-83-20; 83-137.*

CONFLICT OF INTEREST OPINION
EC-COI-98-3

FACTS:

You are an attorney in private practice. Until November 13, 1997, you were a City Councilor.

On November 11, 1997, you were approached by a business association that requested your services as an attorney to represent the association before the Board of Health in relation to a solid waste transfer station and recycling facility (jointly designated "Facility") site proceeding before the Board of Health ("Board").[1] The association is comprised of businesses who are abutters to the proposed Facility. After consulting with the Legal Division of the Ethics Commission you learned that you could not represent this association before a City board while you remained a City Councilor. Following this telephone conversation, you resigned from the City Council. You question whether, as a former municipal employee, you may represent the association if the Facility applicant appeals the Board siting decision to the Superior Court.

Solid Waste Facility Site Process

Under G.L. c. 111, §150A, a solid waste transfer facility may not be built in a municipality unless the local board of health has held a public hearing and assigned a site in accordance with the provisions of the statute. The determination by the local board of health to assign a site for a facility must be based upon site suitability criteria established by the state Department of Environmental Protection ("DEP") in cooperation with the state Department of Public Health ("DPH").

Any applicant wishing to establish a new facility on a site not previously assigned must file a site assignment application simultaneously with the local board of health, DEP and DPH. 310 CMR §16.08(1). Upon receipt of the application, DEP accepts comments for 21 days prior to making a determination that the application is complete. After notice of completeness, the applicant is required to notify abutters to the site, including any abutting towns' boards of health. Following notice to abutters, within 60 days, DEP conducts a review of the application to determine "whether the proposed site meets the criteria[2] established under [the statute] for the protection of the public health and safety and the environment." G.L. c. 111, §150A; 310 CMR §16.10. Also within 60 days, DPH reviews the application and comments upon "any potential impact of a site on the public health and safety." G.L. c. 150, §150A.

Following its review and determination, DEP sends its decision and the DEP record to the local board of health. Until DEP determines that the proposed site meets the statutory criteria, the board of health may not hold hearings or make a determination concerning the application. *Id.*

Within 30 days of receiving DEP's report, the local board of health conducts a public hearing in which the parties have the right to present evidence, cross-examine witnesses, make objections and oral arguments. 310 CMR §16.20 (10). The hearing officer may permit intervention in the proceedings, after a determination that the persons seeking to intervene "are specifically and substantively affected." 310 CMR §16.10(9). Any abutter or group of abutters may register as a party. Further, any group of ten or more citizens may register as a party to the public hearing if damage to the environment

is or might be at issue, but such intervention by a ten citizen group is limited to the issue of damage to the environment. The board of health also may hire consultants to advise it by, among other things, determining whether the data is complete and accurate, whether correct analytical techniques were used, whether the data supports the conclusions and what other data needs to be obtained. Board of health consultants may examine records, visit the proposed site, review the DEP report, and make comments relating to technical issues concerning site suitability. 310 CMR §16.30(2)(c)(3).

Under G.L. c. 111, §150A, "a local board of health shall assign a place requested by an applicant as a site for a new facility. . . unless it makes a finding, based on the siting criteria established by [the statute] that the siting thereof would constitute a danger to the public health or safety or the environment." Under the statute and 310 CMR §16.20(12), "the board of health may include in any decision to grant a site assignment such limitations with respect to the extent, character and nature of the facility. . . as may be necessary to ensure that the facility. . . will not present a threat to the public health, safety or the environment." The board of health is required to put its decision in writing and to include in the decision a statement of reasons and findings of fact. G.L. c. 111, § 150A; 310 CMR §16.20(10)(k)(4).

Any person aggrieved by the board of health decision may appeal said decision to the superior court under the provisions of G.L. c. 30A, §14.[3]

Procedural Background of City Solid Waste Transfer Site Proceeding

On April 12, 1996, a Company applied to DEP for a site suitability assessment pursuant to G.L. c. 111, §150A, for a 1000-ton Facility to be located in the City (First Application).[4] On September 20, 1996, the DEP issued a report denying suitability because "the project proponent had not demonstrated that the local roadways accessing the site could handle the volume of traffic to be generated by the facility." *Decision and Statement of Reasons*, Board of Health, March 4, 1998. Because DEP issued a suitability denial, the Board of Health never reviewed the first application. 310 CMR §16.15(1) (if DEP issues report that site fails to meet criteria, then site assignment process is complete and board of health shall not hold public hearing).

Subsequently, on June 24, 1997, the Company again simultaneously applied for a site assignment with the Board and for a site suitability assessment with DEP for a 600-ton Facility on the same site in the City as the First Application (Second Application). On October 10, 1997, DEP issued a report finding that the site application met the statutory criteria set forth in G.L. c. 111, §150A.

The Board received the DEP decision on October 13, 1997. The Board appointed a hearing officer and retained special counsel to the Board. On November 17, 1997, the hearing officer commenced hearings on the site application. You indicate that 24 groups were allowed to intervene or register as parties in the proceeding. In March 1998, the Board denied the site assignment, finding that the application was materially incomplete and deficient, such that a new application would be required to be filed for DEP's consideration. The Board further found that the proposed operations would be a danger to the public health, safety and the environment. Finally, the Board considered a number of possible conditions to impose on the site, but found that, if the site were approved and all of the conditions implemented, the site would continue to be a danger to the public health, safety and the environment. The applicant may file an appeal of this Board decision in the Superior Court.

The City Council's Involvement In Solid Waste Transfer Facility Site Process

Under G.L. c. 111, §150A, DEP's regulations, and the governance of the City, the City Council has no official responsibility for any aspect of the Site Assignment decision. By G.L. c. 11, §150A, the Board has the sole responsibility, on the local level, for the site assignment decision. Approval of the design of the facility is the responsibility of DEP. The City Council did not petition to intervene in the Board proceedings. Further, there are no zoning issues to come before the City Council as the site currently is zoned for heavy industry.

Nevertheless, you state that, as a City Councilor you participated in three votes relating to the siting of a Facility in the City. First, you explain that, on January 16, 1996 you voted to "request the City Manager to organize a task force to study the site assignment process for locating transfer stations." You state that the purpose of this vote was to require the City Manager and his staff to educate themselves regarding the site assignment process in general. A task force was formed. You did not participate in the task force and you do not know if the task force ever met. No task force report was submitted to the City Council. This vote occurred prior to the filing of the First Application with DEP.[5]

Second, you state that, on October 29, 1996 you voted to "draft and send letters to our local [state house] delegation to express the council's opposition to placing a transfer station on any location within the city limits." At the time of this vote, DEP had denied the First Application. The Board of Health had never reviewed the First Application for a site assignment. No site assignment application was pending at the time of this vote. You characterize this vote as a desire by the City Council to express, to the state delegation, the city's opposition to siting <u>any</u> transfer station <u>anywhere</u> within the City limits.

According to you, the City Councilors felt that the City had borne a disproportionate share of the environmental burden in the area. At this meeting, you commented that the transfer station project could still be viable and you predicted that the applicant would return with a smaller facility plan. You urged the Council to review its zoning bylaws and other ordinances.[6] You state that your comments were based on your speculation that the applicant would try again as the applicant was heavily invested in the project and you wanted the City to be prepared.

Finally, you indicate that, on November 4, 1997, subsequent to the submission of the Second Application, you voted to "transfer $20,000 from the city manager's contingency fund to the Inspectional Services Dept. to fund the possible use of expert witnesses in the board of health hearings for the trash transfer station." It is your understanding that the experts had been retained to assist the Board, as permitted by DEP regulation 310 CMR §16.30(2)(c)(3), but that the City's Chief Financial Officer and the City Manager recommended the motion in order to replenish funds that had been expended out of the Law Department budget for experts. The City Council is required to approve the transfer of all funds over $50 from one line item to another. At this meeting you made a second to the motion to transfer the funds and voted on this transfer. You did not participate in any other substantive discussion concerning the transfer of funds. The City Council was not involved in any recommendation that the Board hire experts to assist it or in approving what experts the Board would hire. This November 4, 1997 vote was the only vote that the City Council took, while you were a member, that related to the second application for site assignment.

QUESTION:

As a former municipal employee, may you, consistent with G.L. c. 268A, §18, represent a business association in a Superior Court appeal of a City Board of Health decision?

ANSWER:

Yes.

DISCUSSION:

Recognizing that there are circumstances where a government employee's loyalty to the government should continue even after he leaves public service, the Legislature, in G.L. c. 268A, placed certain restraints on the activities of government employees after they leave the government. The restrictions on former municipal employees are contained in G.L. c. 268A, § 18. Section 18(a) prohibits a former municipal employee from receiving compensation from or acting as agent or attorney for anyone, other than the City, in connection with a particular matter[7] in which the City is a party or has a direct and substantial interest and in which he previously participated as a City employee. Section 18(b) prohibits a former municipal employee, within one year of leaving municipal service, from appearing personally[8] on behalf of anyone, other than the City, before any City agency, in connection with any matter in which the City is a party or has a direct and substantial interest and in which he had official responsibility[9] in the two years prior to leaving municipal government.[10]

As the Commission has commented, in discussing G.L. c. 268A, §5, the state counterpart to §18,

> the undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. . . the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182; *see also, EC-COI-92-17.* In the sections of the conflict of interest law concerning former government employees, the Legislature sought to balance its concern that a former government employee remain loyal to the government in matters in which he was most involved with a desire not to entirely prevent a former employee from using expertise gained in government service in his private employment. *EC-COI-92-17.*

Not every action taken by a municipal employee while serving the government will trigger the prohibitions of §18. To implicate §18(a), the municipal employee must have personally and substantially participated in a particular matter while in government service. For purposes of our analysis, we consider the relevant particular matter to be the Board proceeding because that is the proceeding in connection with which you are receiving compensation and acting as an attorney.[11] You acknowledge that you voted, while a member of the City Council, in three instances where the subject matter concerned a proposed Facility. At issue is whether, by voting as a City Councilor, you personally and substantially participated in the Board proceeding. For the reasons discussed below, we conclude that you did not personally and substantially participate in the Board proceeding.[12]

"Participation" is defined in G.L. c. 268A, § 1(j) as

> participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the

rendering of advice, investigation or otherwise.

The modifying terms "personally and substantially" are not further defined in the statute. When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "personally" from Webster's Third New International Dictionary (unabridged) is "so as to be personal: in a personal manner: as oneself: on or for one's own part." The term "substantial" is defined as "existing as or in substance: material: important, essential." *Accord*, Black's Law Dictionary (6th Ed.).

Additionally, in its precedent, the Commission has relied on the interpretation of the federal Office of Government Ethics in construing the term "personal and substantial", as the Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of interest statute, including the phrase "personal and substantial." *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962, at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in Congress; much of language of proposed conflict law taken and adopted from federal bill); *EC-COI-87-33* (expressly relying on federal regulation). The federal counterpart to §18(a), restricting former federal employees, is 18 USC §207(a),[13] which also contains the term "participate personally and substantially." By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has further described and clarified the phrase "personal and substantial participation" in a manner consistent with the dictionary definition, stating:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. (emphasis added).

For example, formulation of a particular matter, through discussion, in preparation for a vote, as well as voting on the matter is personal and substantial participation. *Graham v. McGrail*, 370 Mass. 133, 138 (1976); *see, e.g., EC-COI-87-33*. Under our precedent, it is not necessary for one to be the final or ultimate decision-maker to have participated personally and substantially in the decision. If one discusses or makes recommendations on the merits of a matter one will be deemed to have participated personally and substantially in a matter. *See EC-COI-89-2* (discussion of the merits of a particular matter); *EC-COI-79-74* (participation found where employee discussed with decision-makers factors that were central considerations of the final evaluation of a contract even if employee did not participate in selection, final review, approval and execution of contract); *In re Craven*, 1980 SEC 17, *aff'd, Craven v. State Ethics Commission*, 390 Mass 101, 202 (1983) (state representative participated by using position to exert pressure on agency to award contract). Morever, one may participate in a particular matter by supervising or overseeing others. *See EC-COI-93-16; 87-27; 89-7.*

In comparison, if a public employee merely provides information to the decision-makers, without providing any substantive recommendation, or the employee's actions are peripheral to the merits of the decision process, the employee's actions will not be considered to be personal and substantial participation. *See e.g., EC-COI-85-48* (forwarding claim to appropriate staff for review and determination); *82-138; 82-82* (providing peripheral information in the decision-making process). For example, in *EC-COI-81-113*, a state employee, in his state position, provided technical advice to a city, advising the city not to provide certain information in its response to a request for proposals for a grant awarded by the state agency. Subsequently, the state employee left state government and was approached by the city to serve as a consultant to the city under the grant. The Ethics Commission concluded that the advice the employee rendered to the city occurred at a preliminary stage in the process and was peripheral and immaterial to the final grant determination. The Commission contrasted this state employee's involvement with that of the state employee in *EC-COI-79-74* cited above, who rendered advice related to the central considerations in the final evaluation of a contract and whose expert opinion was sought by decision-makers. *Id.; EC-COI-79-74.*

Similarly, in *EC-COI-88-11*, a state employee had one telephone conversation with a city official concerning the city's interest in developing a parcel of property. The state employee advised the city official that the city needed a plan to develop the property. This action by the state employee was not deemed to be personal and substantial participation such that the state employee, having left state service, was precluded from consulting for the city on issues relating to the city's creation of a master development plan for the property. *See also, EC-COI-81-159* (initial suggestions regarding division's operational needs not related to ultimate decision to contract).

In each of the opinions discussed above, the Commission reviewed the public employee's actions while in the government and weighed whether the actions were material and of substance to the particular matter at issue so that the employee's sole loyalty in the matter should remain with the government. We now turn to a consideration of whether each or any of your City Council votes constituted personal and substantial participation in the Board proceeding at issue.

Relying on the plain meaning of the words "personal and substantial", the federal interpretation of the phrase and our precedent, we conclude that your January 16, 1996 vote to request the City Manager to organize a task force to study and educate the City Manager's office about the siting process did not constitute participation, within the G.L. c. 268A, § 1(j) definition, in the Board proceeding. At the time of this vote, no application was pending before the Board. The purpose of the task force was to encourage City officials to educate themselves about the siting process in general. We characterize this vote as preliminary and peripheral to any actual proceeding.

Additionally, based on your understanding and characterization of the November 4, 1997 vote, we consider that vote to transfer funds from the City Manager's line item to the Inspectional Services Department line item to be an administrative matter that was peripheral to the Board proceeding. It is your understanding that the Board had retained experts to help the Board better understand the data and that some funding had been paid from the Legal Department budget. The transfer was to replenish the Legal Department's budget. The City Council offered no advice, recommendation, or took other substantive action regarding the merits, such as, whether the Board should retain experts, the nature of the experts to be retained, the identity of the experts, or how the experts should be utilized in the Board proceedings.

We consider the October 29, 1996 vote to write the statehouse delegation a "closer call," but conclude that, by this vote, you, as a City Councilor, did not personally and substantially participate in the Board proceeding, as required by G.L. c. 268A, § 1(j). When the City Council voted to notify the local state house delegation that the Council was opposed to the siting of any Facility anywhere in the City, it was making a general policy statement,[14] unrelated to the merits of a specific application. At the time of the vote no application was pending, although you, at least, suspected that the applicant would submit another application. The City Council did not send its statement to the Board or to DEP, thus attempting to influence those officials who were the decision-makers. *See e.g., In re Craven,* 1980 SEC 22; *EC-COI-81-113.* Moreover, the City Council had no authority to intervene in any specific siting proceeding.

In conclusion, your participation in these specific City Council votes was not sufficiently personal and substantial participation in the siting decision such that you should be barred from acting as an attorney in a potential appeal of the siting decision. As the Commission has indicated, the purpose of the restrictions on former public employees "is to bar . . . former employees, not from benefitting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer." *EC-COI-93-16* (quoting *EC-COI-92-17*). You did not have access to any confidential information from the Board proceedings or any "inside" familiarity with the proceedings. Your City Council votes of January 16, 1996, October 29, 1996 and November 4, 1997 were not material to the Board proceeding and do not constitute personal and substantial participation in that proceeding so as to preclude your representation of private parties in connection with that proceeding.

DATE AUTHORIZED: May 12, 1998

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[1]Members of the Board are appointed by the City Manager with confirmation by the City Council.

[2]The criteria to be used by DEP and the local board of health in reviewing a site assignment application are contained in G.L. c. 111, §150A½. Among the considerations are the impact on municipal water supplies; proximity of water sources and wetlands; proximity to residential areas; air quality; potential for creation of a nuisance from noise, litter, rodents, or flies; potential for adverse public health consequences; traffic impact.

[3]According to G.L. c. 111, §150A, "for the limited purposes of such an appeal, a local board of health shall be deemed to be a state agency under the provisions of said chapter thirty A and its proceedings and decision shall be deemed to be a final decision in an adjudicatory proceeding."

[4]On June 11, 1996, MVP also applied to the Zoning Board of Appeals for a special permit for the site. The Zoning Board of Appeals denied the permit because of a lack of jurisdiction.

[5]You have been informed that, on August 13, 1996, the City Manager sent a letter to DEP expressing his concerns about the first application and its potential effect on the City. The City Manager initiated this contact with DEP and had not been directed to do so by the City Council.

[6]In preparing this opinion, the Ethics Commission staff reviewed two videotapes of the October 29, 1996 City Council meeting and the November 4, 1997 meeting.

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

[8]The State Ethics Commission has concluded that "appears

personally" includes contacting one's former agency in person, in writing or orally, regarding a substantive matter. *EC-COI-87-27.*

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

[10] This opinion does not address the prohibitions of G.L. c. 268A, §18(b). We conclude that G.L. c. 268A, §18(b) is not applicable to the situation you present because, under G.L. c. 111, §150A, the City Council did not have any official responsibility for the siting decision. The City Council had no authority "to approve, disapprove or otherwise direct" any Board action in the siting decision.

[11] We acknowledge that you have asked whether you may represent the association in the Superior Court, not before the Board. However, your proposed Court representation would be "in connection with" the Board proceeding for purposes of §18(a) because the two proceedings are integrally related. *See e.g., EC-COI-92-17.*

[12] By this conclusion, we do not in any way imply that you did not personally and substantially participate in the City Council proceedings. Your votes as a City Councilor constituted personal and substantial participation in those particular matters.

[13] 18 USC §207(a)(1) places a permanent restriction on former federal employees who make, with intent to influence, any communications or appearance before any department, agency, or court of the United States in connection with a particular matter in which the United States is a party or has a direct and substantial interest; in which the federal employee had participated personally and substantially; and which involved a specific party or specific parties at the time of the participation.

[14] In considering whether the adoption of an agency budget is a particular matter, the Supreme Judicial Court observed, "the definition seems to refer primarily to judicial or quasi-judicial proceedings rather than to legislative or managerial action. . . . the Legislature has clearly indicated its intention to exclude from the statute some determinations of general policy, and such an exclusion seems to be essential if the statute is to be workable." *Graham*, 370 Mass. at 139; *see also, Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 34 (1984). We think that the Supreme Judicial Court's observation in *Graham* is particularly apt to describe the action of the City Council on October 29, 1996.

CONFLICT OF INTEREST OPINION
EC-COI-98-4*

FACTS:

You were the Secretary-Treasurer of the Massachusetts Turnpike Authority ("MTA"), whose governing body is the Massachusetts Turnpike Authority Board ("MTA Board"). You have retired from that position and receive a retirement allowance through the Massachusetts Turnpike Authority Employees' Retirement System ("MTAERS" or "System"), which is administered by the MTAERS Board. The MTAERS members are all of the MTA's current employees who have active accounts with the System and former MTA employees who have accounts with the System but are not currently contributing, including retirees. There are currently approximately 2,000 MTAERS members. The MTAERS members elected you to serve as a member of the 5-member MTAERS Board, established and composed as described below.

Chapter 32 of the General Laws ("Chapter 32"), originally adopted shortly after World War II, established a uniform framework providing retirement systems and pension rights and benefits for public employees in the Commonwealth. The MTAERS Board was created pursuant to G.L. c. 32, §20, Subdivision 4 ½ ("MTAERS Statute"), which provides that the Board comprise five members,[1] as follows: the first member is the MTA's chief financial officer who is to serve ex officio; the second member is appointed by the MTA's "appointing authority," which you have informed us is the MTA's Board of Directors; the third and fourth members are "elected by the members in or retired from service of such [retirement] system from among their number"; and the fifth member (who may not be an employee, retiree or official of the governmental unit) is appointed by the other four.[2] The MTAERS Board currently has a support staff consisting of a secretary to the Board, a bookkeeper and a clerk/typist, all of whom are on the MTA's payroll and receive MTA benefits. The MTA's general counsel is the MTAERS Board's legal adviser. G.L. c. 32, § 20, Subdivision 4 ½(e).

Last year, the Legislature revised the method for granting cost of living adjustments ("COLAs") to retiree-members (and such persons' beneficiaries, if any)[3] of many of the public employee retirement systems governed by Chapter 32. This was done through its enactment of Chapter 17 of the Acts of 1997 ("Chapter 17"), entitled "AN ACT relative to the annual cost of living adjustments for retirees," which was signed into law on June 6, 1997.[4] Prior to 1976, pursuant to Chapter 32, §102, COLA benefits were provided as a matter of law without further action by the Legislature or retirement boards. In 1976, the COLA mechanism was modified to require annual approval of any such COLA increase through legislation passed by the Legislature and approved by the Governor.[5] St. 1976, c. 126, §1, amending Chapter 32, §102. With the enactment of Chapter 17, the Legislature ended its and the Governor's roles in determining whether COLAs are to be granted to retiree-members and their beneficiaries for most of the public employee retirement systems subject to Chapter 32 by creating a statutory scheme that may, at the option of the subject retirement system, be accepted and effected.

As applied to the MTAERS, COLAs may be effected as provided by Chapter 17, §8, codified as G.L. c. 32, § 103 ("New COLA Statute").[6]

Pursuant to the New COLA Statute, the MTAERS Board (by majority vote) may consider and vote upon whether or not to accept the COLA process ("COLA Process") prescribed by the New COLA Statute ("COLA Acceptance Decision").[7] If the MTAERS Board accepts the COLA Process and if the MTA Board thereafter approves such acceptance, that 2-step action will irrevocably effect the COLA Process for the MTAERS. If the COLA Process is so effected, then thereafter the MTAERS Board must vote on whether or not to adopt the cost of living adjustment ("Annual COLA Decision") "recommended" each year in an annual report required to be made by PERAC. The MTAERS Board may elect not to pay PERAC's recommended COLA Adjustments if "the Board determines that the cost of living adjustment recommended by said report shall substantially impair the funding schedule of said system" and files with PERAC a "notice of its election not to pay and an analysis of the impact on the funding schedule."

If the MTAERS Board were to accept the COLA Process and the MTA Board were to approve such acceptance and, thereafter, the MTAERS Board were to approve an annual COLA, the retirement benefits of MTAERS retiree-members, including you, and their beneficiaries would be increased. Currently, there are approximately 650 MTAERS retiree-members and beneficiaries receiving retirement benefits.

QUESTION:

May you participate in the MTAERS Board's consideration of and vote on the COLA Acceptance Decision and, if accepted, subsequent Annual COLA Decisions?[8]

ANSWER:

Yes.

DISCUSSION:

The MTAERS Board is a state agency;[9] as a member of the MTAERS Board, you are a state employee[10] within the meaning of G.L. c. 268A, the conflict of interest law. As such, Section 6 of G.L. c. 268A is relevant to your request.

A. Section 6

G.L. c. 268A, §6 prohibits a state employee from participating in any particular matter[11] in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. "Participation"[12] includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30; 90-5; 87-25; Graham v. McGrail*, 370 Mass. 133, 137-138 (1976). The financial interest may be of any size and may be either positive or negative; it must, however, be direct and immediate or reasonably foreseeable in order to implicate §6. *See EC-COI-93-20; 84-96; 84-98* (describing these principles under §19, the municipal counterpart of §6). Whether a financial interest is reasonably foreseeable must be determined on a case-by-case basis.

The Decisions are particular matters. As a MTAERS retiree-member, you currently receive a retirement allowance. The threshold question is whether you have a direct and immediate or a reasonably foreseeable financial interest in the outcome of either or both of the MTAERS Board's Decisions. For the reasons discussed below, we conclude that you do. However, based on principles of statutory construction, we further conclude that you will not be precluded from participating in the Decisions.

COLA Acceptance Decision

If the MTAERS Board's vote on the COLA Acceptance Decision is negative, the possibility of your receiving a COLA will be foreclosed; if that vote is positive, you will receive a COLA provided that the MTA Board approves such acceptance and the MTAERS Board thereafter approves an annual COLA. In short, the MTAERS Board's COLA Acceptance Decision is a "make-or-break" decision that would directly and immediately affect your financial interest.[13]

Annual COLA Decision

The outcome of each of the MTAERS Board's Annual COLA Decisions would also directly and immediately affect your financial interest as a MTAERS retiree-member receiving a retirement allowance. That is because, the MTAERS Board must either approve PERAC's recommended COLA Adjustment (in which case, your retirement allowance would be increased) or not approve such Adjustment (in which case, your retirement allowance would not be so increased).

Consequently, on its face, §6 would prohibit you from participating, as a MTAERS Board member, in either Decision because of your financial interest therein. However, were we to apply that prohibition literally, without regard for the statutory schemes creating the MTAERS Board, establishing an optional COLA Process and charging the MTAERS Board with the pivotal role in

determining whether or not to effect COLAs, we would be barring you from participating as one of the two statutorily prescribed, elected representatives of the approximately 2,000 MTAERS members.

When, as is here the case, G.L. c. 268A prohibits conduct that the Legislature, in another statutory scheme, appears to permit, the two provisions must somehow be reconciled. When attempting to so reconcile such inconsistent provisions, we have looked to principles of statutory construction for guidance. "[W]here two statutes are inconsistent and mutually repugnant, the later statute governs." *Mirageas v. Massachusetts Bay Transportation Authority*, 391 Mass. 815, 819 (1984). Legislation is to be interpreted on the assumption that the Legislature was aware of existing statutes. *Condon v. Haitsma*, 325 Mass. 371, 373 (1950); Sutherland, *Statutory Construction*, § 45.12 (5th Edition). It cannot be presumed that the Legislature would pass a "barren and ineffective statute." *Allen v. City of Cambridge*, 316 Mass. 351, 355 (1944); Sutherland, *Id.*

In *EC-COI-87-42*, we reviewed a statute enacted after, but without any specific reference to, G.L. c. 268A, permitting municipal wiring inspectors to engage in private electrical work in their municipalities, which would ordinarily have been prohibited by G.L. c. 268A, § 17, and concluded that the Legislature intended to permit such employment notwithstanding the applicable provisions of §17. More recently, in *EC-COI-90-15*, we reached a similar conclusion when reviewing a comparable statute permitting municipal plumbing inspectors to engage in private plumbing work in their municipalities.

In the case before us, the express provisions and plain meaning of G.L. c. 268A prohibiting your participation in the Decisions appear to collide with the plain meaning of the very specific MTAERS Statute and New COLA Statute contemplating that all five MTAERS Board members participate in the Decisions. Neither the MTAERS Statute nor the New COLA Statute contain any specific reference to G.L. c. 268A. Therefore, we will resort to the above-referenced principles of statutory construction to reconcile this collision.

When reviewing the chronology of the enactment of the relevant laws, we observe that G.L. c. 268A, §6, in relevant part, has been in effect since 1963.[14] The Legislature, in 1996, expanded the composition of the MTAERS Board and other retirement boards[15] and, in 1997, with the enactment of the New COLA Statute, affirmatively shifted to them a pivotal role, at the option of such boards, in effecting COLAs for the members of their respective retirement systems. Given that chronology, we must presume that the Legislature knew that certain retirement board members (in the case before us, at least three) might or would have a personal financial interest in COLAs[16] and that the Legislature knew of the restrictions contained in G.L. c. 268A, §6, in effect since 1963. Even without that chronology, we would be guided here by the presumption that, when enacting the MTAERS Statute and the New COLA Statute in 1996 and 1997, respectively, the Legislature did not intend thereby to authorize a futile, barren or meaningless scheme authorizing those three MTAERS Board members to decide matters that they might or would be barred by §6 from deciding. *See Allen* at 355.

Thus, in order to give the New COLA Statute meaning, we conclude that the Legislature must have intended to permit you, despite your financial interest, to participate in the Decisions without violating §6. A contrary result would be unreasonable in these circumstances because we would be determining that, although the Legislature has provided that MTA employee-members or retiree-members of the MTAERS must be elected by the MTAERS members (now approximately 2,000 in number) to two of the five MTAERS Board seats, nevertheless, such individuals could be barred by §6 from participating in some of the very matters that could affect the MTAERS members most directly.

As further support for our conclusion, we note that retirement board members are subject to overriding obligations as fiduciaries who are required to "discharge [their] duties for the exclusive purpose of providing benefits to members and their beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of any enterprise of a like character and with like aims." *See* G.L. c. 32, §§1, 23(3).

Our conclusion is also consistent with the view we expressed in *EC-COI-94-1*, involving a member of the State Board of Retirement, who (like you) filled a seat on the Board, as contemplated by statute, to which he was elected as a current employee-member of the State Employees' Retirement System. We advised the individual that he would be permitted to "participate in particular matters which affect generally the financial interests of members of the retirement system." *Id.*, n. 4. We further advised him, however, that he would still be prohibited from participating in particular matters, such as a dispute concerning his own retirement benefits, that came before his board.

In sum, we take this occasion formally to restate our advice in *EC-COI-94-1*. You may participate in particular matters that affect generally the financial interest of the members of MTAERS members and their beneficiaries, but you may not participate in particular matters that affect you or your immediate family members uniquely, such as disputes about your or their retirement

allowances or other benefits. By so restricting your participation, we are only permitting you to participate to the extent necessary to avert the collision between statutory schemes. In so holding, we are again guided by principles of statutory construction that instruct us: "If reasonably practicable, [a statute] is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. . . . Statutes 'alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there is some positive repugnancy between them.'" *Walsh v. Commissioners of Civil Serv.*, 300 Mass. 244, 246 (1938), quoting *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 17 (1908).

DATE AUTHORIZED: June 9, 1998

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

[1]In St. 1996, c. 306, which became effective November 7, 1996, the Legislature revamped Chapter 32 in a number of ways, including increasing from three to five members the number of members of almost all of the 106 public employee retirement boards that are subject to Chapter 32. The MTAERS Board's composition was increased from three to five members by St. 1996, c. 306, §28.

[2]Currently, the MTAERS Board has only four members because of a deadlock in selecting the fifth member and because the MTAERS Statute provides no mechanism for appointing the fifth member in such event.

[3]MTAERS retirees may elect various options for receiving retirement benefits, including options where they alone receive such benefits and options where they and their beneficiaries receive benefits.

[4]Public Employee Retirement Administration Commission (PERAC) personnel provided us information about the history, operation and implementation of the various public employee retirement laws discussed.

[5]Under this COLA procedure and its predecessor the MTAERS Board played no role.

[6]The retirement systems covered by the New COLA Statute include those for counties, cities and towns and for the MHFA, the MTA, MassPort, the MWRA, the Greater Lawrence Sanitary District, the Blue Hills Regional Vocational School and the Minuteman Regional Vocational Technical School District. The New COLA Statute explicitly excludes from its operation the State Employees' Retirement System and the Teachers' Retirement System.

[7]Three MTAERS Board members constitute a quorum.

[8]We shall refer to the COLA Acceptance Decision and the Annual COLA Decisions collectively as "Decisions."

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

[10] "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). We note that you may, in fact, be a "special state employee" to whom certain provisions of the conflict of interest law apply less restrictively; however, nothing in this analysis turns on that classification. *See* G.L. c. 268A, §1(o)(1).

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

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

[13]We recognize the possibility that the MTAERS Board might, after having voted not to accept the COLA Process, at some later time have occasion to reconsider the matter, but that does not change this determination.

[14]The applicable prohibition contained in the first paragraph of §6 was enacted by St. 1962, c. 779, §1, and has not since been amended.

[15]In fact, the Legislature had occasion, as recently as 1997, to review the composition of the MTAERS Board when it again amended the MTAERS Statute to change the member who is to serve ex officio from the MTA's secretary-treasurer to the MTA's chief financial officer. *See* St. 1997, c. 3, §1.

[16]By making this observation, we do not intend to conclude that each of those three MTAERS Board members' financial interest is the same. For example, if any of those three Board members were current MTA employee-MTAERS members whose rights to receive retirement benefits had not yet vested, their personal financial interest might be too remote to implicate §6. By contrast, your financial interest as a MTAERS retiree-member currently receiving a retirement allowance is the sort that would ordinarily implicate §6.

CONFLICT OF INTEREST OPINION
EC-COI-98-5

FACTS:

You are an elected member of a local School Committee. In addition, you are an unpaid member of the Board of Directors of a non-profit corporation ("the Non-Profit") which provides various services to your town's Public Schools as well as other schools in the area. You have requested an opinion from the Commission concerning whether, as a School Committee member, you may sign Schedules of Departmental Bills Payable (Schedules) prepared by the School Department for payment of vendors (including the Non-Profit) which provide goods or services to the school system.

The procedure for preparation of the Schedules is as follows. First, the vendor submits an invoice to the Office of the Superintendent. The invoice is examined by the administrative staff in the Superintendent's Office to ensure that it conforms to the relevant order/contract for services or goods. The invoice is then either approved for payment, adjusted for payment or returned unpaid to the vendor. In cases other than those in which the invoice is returned unpaid, the Superintendent's staff attaches an account number to the invoice and forwards it to the appropriate school administrator for review and approval. For example, invoices for special education services are forwarded to the Special Education Director. Once the appropriate administrator confirms that the services were performed and approves the invoice for payment, it is returned to the Superintendent's office and placed on a Schedule. The Schedule is then placed in the office of the School Committee and its members are advised that the Schedule is ready for signature. Town procedure requires the signature of three of the five members of the School Committee for approval. The School Committee does not vote on these Schedules, or, in the normal course, conduct any review or investigation of matters on the Schedule. Once three Committee members' signatures are obtained on the Schedule, the Superintendent's Office delivers the Schedule to the Town Accountant's Office. Each Schedule states immediately above the signatures of the Committee members, "To The Accounting Officer: The following named bills of the School Department have been approved by the School Committee, and you are requested to place them on a warrant for payment." The Town Accountant then creates a warrant for the payment of the accounts which is delivered to the Board of Selectmen. Three members of the Board of Selectmen must approve the warrant. Once these signatures are affixed to the warrant, it is delivered to the Town Treasurer who reviews the contents against account records and issues the payment check to the vendor.

QUESTION:

As a School Committee member, may you sign Schedules of Departmental Bills Payable which include payments to the Non-Profit despite the fact that you sit on the Non-Profit's Board of Directors?

ANSWER:

No, because in so doing you would be participating in a particular matter in which a business organization that you serve as a director has a financial interest, in violation of G.L. c. 268A, §19(a). We also take this opportunity to reconsider the reasoning of our opinion in *EC-COI-87-32*, and to the extent it is inconsistent with our opinion announced today, we reverse *EC-COI-87-32*.

DISCUSSION:

G.L. c. 268A, §19(a) provides in relevant part that "a municipal employee who participates as such an employee in a particular matter[1] in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as an officer, director, trustee, partner or employee . . . has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both." It is clear that the payment of the Non-Profit's invoice is a "particular matter" and that the Non-Profit, a business organization of which you serve as a director, has a financial interest in this particular matter. The question remains, however, whether your signing of the warrant constitutes "participation" in this particular matter within the meaning of the statute. In essence, this is a question of whether the action of each Committee member who signs the Schedules is personal and substantial or merely ministerial.

"Participation" is defined in G.L. c. 268A, §1(j) as

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

The modifying terms "personally and substantially" are not further defined in the statute. When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "personally" from Webster's Third New International Dictionary (unabridged) is "so as to be personal: in a personal manner: as oneself: on or for one's own part." The term "substantial" is defined as "existing as or in substance: material: important, essential." *Accord*, Black's Law Dictionary (6th Ed.).

Additionally, in its precedent, the Commission has relied on the interpretation of the federal Office of Government Ethics in construing the term "personal and substantial", as the Legislature, in promulgating c. 268A, sought guidance from and adopted portions of the federal conflict of interest statute, including the phrase "personal and substantial." *See* Report of the Special Commission on Code of Ethics, H. 3650, March 15, 1962 at 8 (as to format and pattern of proposed conflict legislation used bill HR 8140 pending in Congress; much of language of proposed conflict law taken and adopted from federal bill); *EC-COI-87-33* (expressly relying on federal regulation). By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has further described and clarified the phrase "personal and substantial participation" in a manner consistent with the dictionary definition, stating:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort.

In determining whether School Committee members "participate" in the particular matter of the payment of an item on the Schedule of bills payable, we look to the statutory scheme underlying the process. G.L. c. 41, §56 provides the basis for the procedure followed in your town, as outlined in the "Facts" section of this opinion. The statute provides in relevant part:

> The selectmen and all boards, committees, heads of departments and officers authorized to expend money shall approve and transmit to the town accountant as often as once each month all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which they have the expenditure. Such approval shall be given only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered to or for the town . . . The town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same, and the treasurer shall pay no money except upon such warrant approved by the selectmen . . .The town accountant may disallow and refuse to approve for payment, in whole or in part any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant... (Emphasis added.)

As set forth above, the duty to determine that the charges are correct and that goods and services ordered were actually delivered or rendered falls on the "boards, committees, heads of departments and officers authorized to expend money," in this case, the School Committee. Your town has established a system whereby the propriety of a given bill is determined by the administrator responsible for that matter and the final Schedule of accounts payable is thereafter forwarded to the School Committee for a final "sign-off" by a majority of members of the Committee. In essence, the School Committee has delegated to school administrators its responsibility under the statute to determine the correctness of all accounts payable. Upon receiving the assurance of the appropriate administrators that the charges are correct, the School Committee approves them, in the normal course, without further review or investigation. While this system may be reasonable and efficient for the conduct of school department business, we do not believe that it renders the actions of the Committee members merely ministerial. Where, by statute, it is the responsibility of the Committee to certify the correctness of accounts payable, the Committee's decision to delegate this responsibility to school department staff cannot make the actions of the members of the Committee who signify their approval of the expenditures by signing the Schedules insubstantial. G.L. c. 41, §56 clearly gives the members not only the power to approve bills which are correct, but the concomitant power to disapprove those bills which are not correct. Such power, whether exercised or not, implies discretion and judgment, and removes the signing of the Schedules from the realm of the ministerial.

We take this opportunity to reconsider our ruling in *EC-COI-87-32*. In that opinion, the Commission considered whether members of a Fire District Prudential Committee could sign a payroll warrant for firefighters where three Committee members had immediate family members who were on the payroll. The authorization process in that case required the fire chief (who was not a member of the Committee) to review and approve the accuracy of the payroll and to verify the hours in which each firefighter performed services during the payroll period. The Commission concluded that the Committee members may properly sign the payroll warrants, stating:

> In this case the signing of the warrant is peripheral to the determination of the correctness of the hours worked. It is the fire chief and not the Committee who certifies the hours of each firefighter. If the hours are certified by the fire chief, the firefighter is entitled to the appropriate compensation. The signing of the warrant which authorizes the paycheck is therefore ministerial and cannot be characterized as substantial.[2] If the number of hours certified by the fire chief became an issue or the subject of dispute, however, then the signing of the warrant by any member of the Committee could constitute substantial participation. In such a case abstention will generally be required if the dispute concerns an immediate family member. *See* G.L. c. 268A, §19.

The function of a fire district prudential committee, at least as to the question of expenditure of

funds, is equivalent to the function of the selectmen as to town funds. G.L. c. 48, §72 provides: "Such [fire] districts shall choose a prudential committee, which shall expend, for the purposes prescribed by the district, the money so raised or borrowed, and shall choose a treasurer, who shall give bond for the faithful performance of his official duties in a sum and with sureties approved by the prudential committees. He shall receive all money belonging to the district, and shall pay over and account for the same according to its order or that of the prudential committee."

As is clear from our opinion in *EC-COI-87-32*, the prudential committee's power to expend funds necessarily implies the power to withhold funds for questioned or disputed items. Indeed, as to selectmen, that power is statutorily explicit. G.L. c. 41, §52 provides, in relevant part, that selectmen may "disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful, or excessive . . ." In *Treasurer of Rowley v. Rowley*, 393 Mass. 1 (1984), the court considered a claim by a town treasurer that he had the right to disallow a payment authorized by the selectmen which he considered improper. The court contrasted the statutory duty of the selectmen to disallow certain payments under §52 with the limited powers of the treasurer under G.L. c. 41, §35 which it deemed "largely ministerial" and held that the treasurer was without authority to withhold payment. *Id.* at 7, quoting *Graton v. Cambridge*, 259 Mass. 310, 314 (1927). *Accord, Weiner v. Boston*, 342 Mass. 67, 69 (1961); *Lenox v. City of Medford*, 330 Mass 593 (1953); *King v. Mayor of Quincy*, 270 Mass. 185, 187 (1930).

In essence, once the prescribed procedure has been followed by a city council or town board of selectmen or a prudential committee, the treasurer's duty to disburse funds is mandatory and not discretionary, and therefore is simply ministerial. The power of city councillors, town selectmen or prudential committee members to approve payment warrants, however, includes a large measure of discretion. For this reason, we do not consider the approval of payment warrants by members of such bodies to be ministerial. Rather, such approval is significant and important to the particular matter, and therefore "participation" within the meaning of the G.L. c. 268A, §1(j).[3] We conclude, therefore, that individuals who sit on such bodies, or other bodies capable of authorizing expenditures, may not participate in any particular matter, including the approval of payment warrants, where such participation implicates a financial interest under G.L. c. 268A, §19. We note that *EC-COI-87-32* was explicitly limited to the certification of a payroll by an appointing authority which does not actively supervise employees. We recognize, however, that the reasoning of *EC-COI-87-32* is inconsistent with the reasoning of the opinion we reach in this case. Therefore, to the extent *EC-COI-87-32* is inconsistent with the opinion we announce today, we now reverse.

Based on the foregoing, we conclude that you may not approve (in this case, by signing) Schedules of accounts payable which include payments to the Non-Profit, because in so doing you would be participating personally and substantially in a matter in which a business organization that you serve as a director has a financial interest, in violation of G.L. c. 268A, §19 (a).

Date Authorized: June 9, 1998

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

[2] This opinion is limited to the certification of a payroll by an appointing authority which does not actively supervise employees. [Footnote in original.]

[3] Indeed, "through approval" comprises part of the statutory definition of "participate." G.L. c. 268A, §1(j).

CONFLICT OF INTEREST OPINION
EC-COI-98-6

FACTS:

You are a member of a law firm, a professional corporation ("firm"). Since August 1992, you have also been serving as an unpaid Special Assistant Attorney General ("SAAG") of the Office of the Attorney General ("OAG"). As a SAAG, you represent the Commonwealth in a lawsuit against private parties ("case").

For several years, in compliance with G. L. c. 268A, §4, you have recused yourself from working on, and have renounced any share in the law firm's profits from, particular matters in which the firm represents private parties and which are pending in the OAG during the 365-consecutive day periods in which you served more than sixty days as a SAAG. You anticipate, however, that the case again will require you to serve on more than sixty days during a 365-day period. If that becomes necessary, you may have to stop working on that case and may have to resign as a SAAG in order to avoid violating G. L. c. 268A, §4 because you doubt that you will be able to continue to recuse yourself from firm matters pending in the OAG.

You believe that your resignation would not be in the Commonwealth's best interest because of your long history with the case. Moreover, you believe that your resignation would deter other attorneys from serving as

SAAG's on a *pro bono* basis because they might be unable to forbear from working on private particular matters pending in the OAG and/or would not be willing to give up their law firms' profits from such particular matters.

QUESTION:

For purposes of calculating the 60-day limitation in the phrase " . . . 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" as it appears in §4 of G. L. c. 268A, should service on part of a "day" constitute one of the "sixty days"?

ANSWER:

Yes. For the purposes of G. L. c. 268A, §4,[1] the term "serves" as it appears in the phrase "serves on no more than sixty days" means substantive services, as described below, performed on any portion of a calendar day.

DISCUSSION:

As an unpaid SAAG, you are a special state employee[2] for purposes of the conflict of interest law. As such an employee, you are subject to §4 of G. L. c. 268A.

Section 4(a) provides that "no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest." In addition, §4(c) provides that "no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest."

Section 4 applies to a special state employee only in relation to particular matters in which he has at any time participated[3] or over which he has or within one year has had official responsibility[4] or which are "pending in the state agency in which he is serving." The restriction concerning matters "pending in the state agency . . . ," however, "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." *See* G. L. c. 268A, §4. (emphasis added).

We begin by noting that the terms "serves" and "days" as they appear in §4 and throughout the conflict law are not defined in the statute. When construing statutory language, we first review the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). In common usage, "serves" means to be of use or answer the needs of or to perform the duties of (an office or post). *Webster's Third New International Dictionary of the English Language (unabridged)* (1993). "Day" is defined as "the mean solar day of 24 hours beginning at mean midnight" or "the hours of the daily recurring period established by usage or law for work (an 8-hour ~)." *Id.* As one commentator has noted, the word "serves" suggests "rendering service more than it does availability for service." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 299, 340 (1965).

The Commission's interpretation of §4 has been consistent with the plain meaning of these terms. "A day is not counted for the purposes of the 60-day limit unless *services are actually performed*." *EC-COI-90-12*[5] (emphasis added); *85-49*. To calculate days served for purposes of the sixty-day limit, we have concluded that a "special" employee who has served only part of a day is considered to have served for a complete day. *EC-COI-80-31; 80-32; 80-66; 84-129; 85-49*. Similarly, if an attorney serving as a special employee assigned one of his firm's associates to perform work under his supervision, the employee is considered as having served on each day in which the associate performed such billable services. *EC-COI-84-129; 85-49*.[6] In view of our advice that, for example, a SAAG who serves more than sixty days must cease representing private clients before the OAG, *EC-COI-82-49; 82-50*, we have advised special employees that they must keep accurate records of their daily services. *See e.g. EC-COI-82-49; 82-50; 90-12; 90-16*.

Additionally, the legislative purpose behind §4 also supports our interpretation. We have noted that the Legislature's inclusion of the sixty-day limit in §4 recognizes that special state employees whose services exceed sixty days in a one year period are likely to possess and exercise influence in their agencies' actions. *EC-COI-85-49*. The goal of §4 is to prevent divided loyalty as well as influence peddling. *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610 (1984). *See also, Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984). "The 60-day period . . . is an arbitrary, but necessary, line drawn by the legislature to prohibit a special state employee from eventually doing what a regular state employee could not. . . . The §4 restriction recognizes that the opportunities to influence pending agency matters increase with the amount of time spent working for that

agency." *EC-COI-91-5. See also EC-COI-96-1.* Further, as we discussed in some detail in *EC-COI-96-1*, the federal conflict of interest law, 18 U.S.C., §§203 and 205, upon which §4 is based contains a similar 60-day limitation and appears also to be intended to guard against abusing inside influence.[7]

As a result of your situation, you ask us to reconsider the Commission's precedent and re-examine the method for calculating the sixty-day limitation.[8] You argue that a litigator serving as a SAAG in a complex law suit will likely serve more than sixty days when work on any part of day counts for an entire day. Some days may include only a five minute telephone call, others may include several hours preparing a brief. In either event, you believe that such work does not make the litigator so closely allied with the OAG that he would be able to use the leverage of his SAAG position to exert influence on other particular matters that are pending in the OAG and in which the litigator is involved in his private practice. Finally, you assert that it is the unusual case that would require a litigator to devote more than sixty eight-hour days in any 365-day period. Such a case, you believe, would seem to be the only one in which the sixty-day provision of § 4 ought to be implicated.

The logical result of your argument is that the calculation of the sixty-day period should be based on services performed over a total of sixty, eight-hour days (480 hours), rather than on services performed on any part of a day.[9]

We disagree with such a requirement because it would subvert the Legislature's intent behind the sixty-day provision, as derived from the language of the statute and the policy supporting a time limit for special employees as we discussed above. We note that had the Legislature meant the terms "serves on" and "sixty days" as they appear in §4 to mean "serving for sixty, eight hour days," it could have applied a more specific hourly limit as it did in G. L. c. 268A, §1(o) (state employee deemed "special state employee" if he does not earn compensation for "more than eight hundred hours during the preceding three hundred and sixty-five days") or G. L. c. 268A, §7(b) ("the employee is compensated for not more than five hundred hours during a calendar year"). In view of the canon of statutory construction that, "when the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present," we decline to infer an hourly standard. *Commonwealth v. Galvin,* 388 Mass. 326, 330 (1983); *see also, Leary v. Contributory Retirement Appeal Board,* 421 Mass. 344, 348 (1995); *Tesson v. Commissioner of Transitional Assistance,* 41 Mass. App. Ct. 479, 482 (1996).[10] Further, the Legislature's use of the phrase "serves *on*" suggests that service on any part of day should count for purposes of the sixty-day provision, rather, than as you argue, that only a full eight-hour day of services should be considered. We must consider each word in the statute and cannot assume that the word "on" should be disregarded. *Commissioner of Corp. & Tax. v. Chilton Club,* 318 Mass. 285, 288 (1945).

You and the OAG also suggest that we consider a *de minimis* standard, arguing that a brief telephone call on only one day not be counted as service on that day for purposes of the sixty-day period. The OAG has suggested that we could designate a period of time, such as two hours, that an individual must work on a day before he is determined to have served a day for purposes of the sixty-day calculation. In our precedent, we have considered the substance of the work performed in determining whether a special employee has performed services. We stated in *EC-COI-85-49* that we distinguish "between the substantive legal services the contract calls for [the employee] to provide, and the ancillary services that go along with those substantive services, such as secretarial, word-processing, and photocopying services." In that opinion, we concluded that time spent on substantive legal services, whether performed by lawyers or paralegals must be counted as services performed on a day and included in the sixty-day calculation. Time spent on purely ancillary services, however, need not be counted. We noted that we made such a distinction between ancillary and substantive work only in relation to paralegals and non-legal support staff and stated that any work an *attorney* performed under the contract is presumed to be substantive, therefore "all attorney time must be counted towards the sixty-day limit." *Id. at n. 3.*[11] Thus, a five minute telephone call that covers substantive legal issues cannot be discounted simply because it consumed only five minutes of a day.

Upon further reflection, after reviewing *EC-COI-85-49*, we conclude that some of the functions a lawyer or paralegal perform may be ancillary and should not be counted toward the 60-day limit. For example, a telephone call that concerns only non-substantive matters (e.g., scheduling meetings) might not be included in calculating the sixty-day limit. Similarly, administrative business that does not involve any substantive matters, such as a call to locate missing copies to an enclosure would not count as service on a day for calculating the sixty-day limit.[12]

Thus, we modify our advice in *EC-COI-85-49* and now conclude that non-substantive functions lawyers or paralegals perform need not be counted towards the sixty-day limit. We re-emphasize, however, that for purposes of his keeping an account of service on a day for purposes of the sixty-day limit, a special employee must continue to count service involving, for example, only a brief conversation covering substantive matters.

In conclusion, we defer to the specific legislative

determination of the time limitation under which a special employee currently operates and must construe that provision as it is written. *Brennan v. Election Commissioners of Boston*, 310 Mass. 784, 789 (1942); *City Council of Peabody v. Board of Appeals of Peabody*, 360 Mass. 867, 867 (1971); *Tesson v. Commissioner of Transitional Assistance*, 41 Mass. App. Ct. 479, 482 (1996). The Legislature established the sixty-day limit of §§4, 11 and 17 of G. L. c. 268A through St. 1962, c. 779, §1, which, like the sixty-day limit of those sections' federal counterparts, has not changed since it was enacted.[13] We reiterate that for the purposes of the conflict law, the term "serves" as it appears in the phrase "serves on no more than sixty days" means substantive services, as described above, performed on *any portion* of a calendar day.

DATE AUTHORIZED: July 22, 1998

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[1] Our analysis will also apply to the county and municipal counterparts, G. L. c. 268A, §§11 and 17 respectively, which contain the same clause as §4.

[2] "Special state employee," a state employee:

(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, ... G. L. c. 268A, §1(o).

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

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

[5] *See also* Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 340 (1965).

[6] "Because the concern addressed by the statute is the potential for influencing pending agency matters if the employee serves more than sixty days, it is clear that the issue is the total number of days on which work is performed for a given project, and not the total number of people who actually perform the work. Thus a day on which more than one firm partner or associate performs any work under the contract will be counted as one day for purposes of calculating the sixty-day limit." *EC-COI-85-49*.

[7] Our view has been consistent with the federal government's long standing interpretation of 18 U.S.C., §§203 and 205. The federal Office of Government Ethics (OGE), in applying 5 CFR §2635.807, one of the regulations that implement 18 U.S.C., §§203 and 205, continues to rely on the interpretation set forth in the former *Federal Personnel Manual's* guideline for special government employees:

At the time of [an appointee's] original appointment and the time of each appointment thereafter, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday or holiday on which duty is performed should be counted equally with a regular work day.

5 CFR §735 Appendix C (2)(c) (November 9, 1965) (Revised July 1969) *Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)*. Although most of 5 CFR §735 as it then appeared was substantially changed and rendered obsolete upon the implementation of 5 CFR §2635 (*see Federal Register*, Vol. 57, No. 230, November 30, 1992 at 56433), the OGE continues to rely on this specific guideline when providing advice on what "serves on a day" means for calculating the sixty-day limit.

[8] We also have the benefit of a submission on your behalf from the Office of the Attorney General, which also argues for the reexamination and reinterpretation of our precedent.

[9] Thus, if such an hourly limit were the standard, special employees would be advised to keep accurate records to calculate such a 480-hour limit, regardless of how those 480 hours were distributed over a 365-day period.

[10] Additionally, in view of our discussion above concerning the purpose of the 60-day limitation, we cannot discern how a special employee who serves on only four hours per day over a sixty day period is any less likely to be in a position to exert influence in his agency than one who serves on six hours per day for sixty days. Similarly, it is difficult to distinguish how the employee who serves four hours per day is more likely to be able to exert such influence than one who serves on only two hours per day for a sixty day period. Even under your hourly calculation, each such employee would arrive at the limit at a different number of days over a 365-day period (the four hour per day employee at 120 days, the six hour per day employee at 80 days, and the two hour per day employee at 240 days). *Compare EC-COI-91-5*. Again, had the Legislature believed that an employee's degree of inside influence needed to be measured at the hourly, rather than daily, standard, it could have so specified. Nothing in the statutory language or legislative history suggests that the Legislature intended to permit such disparities by enacting the explicit sixty-day limit. "Our conclusion is consistent with the long-held policy that the provisions of the state conflict of interest law should be broadly implemented and that exemptions for special state employees should be narrowly construed." *Id.*

[11] *Cf. EC-COI-87-27* (with respect to §5's purpose to ensure that former state employees do not use their prior governmental associations to derive unfair advantage, "there may be certain communications which relate solely to procedure and which are so de **minimis** so as not to present an opportunity to derive unfair advantage.") (emphasis in the original). *See also United States v. Quinn*, 141 F. Supp. 622, 629 (S.D.N.Y. 1956) (under 18 U.S.C. §281, which was superceded by 18 U.S.C. §203, calls made by a Congressman to inquire of the status of the matter and in which the merits of the case were not discussed were not "the rendition of services of the nature contemplated under the statute." Section 281 prohibited members of Congress from receiving compensation "for any services rendered or to be rendered, . . . in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency ....").

[12] We do not draw a distinction between so-called "billable" and "non-billable" time because, as in your situation, an attorney serving on a *pro bono* basis does not "bill" his client (although some *pro bono* clients require bills in order to determine the value of the free legal services they receive). Moreover, we would not want attorneys or anyone else serving as special public employees to avoid the sixty-day limit simply by *not* billing even minimal time involving substantive work. *Compare EC-COI-84-129* ("It would frustrate the

statutory policy to permit special state employees to avoid reaching the sixty day limit by assigning their work to other employees in the law firm. Such a construction would elevate technical form over substance in a way which would undermine the statute.").

[13] We note that the Commission has no regulatory authority under G. L. c. 268B, §3 to interpret the statute in ways that would change the time limitation, as the OAG has suggested. Any such change, therefore, must be made by the Legislature.

CONFLICT OF INTEREST OPINION
EC-COI-98-7

FACTS:

You are employed as an attorney by the Massachusetts state agency XYZ ("XYZ State Agency" or "XYZ"). Your XYZ job responsibilities include your representing XYZ in discrimination proceedings filed with the Massachusetts Commission Against Discrimination ("MCAD") by XYZ employees against XYZ.

Outside your work hours for XYZ State Agency, you engage in the private practice of law. In your law practice, you wish to represent private clients in their claims of unlawful employment discrimination against their private (not public agency) employers. As discussed in more detail below, such claims must be filed with the MCAD.

QUESTION:

Does G.L. c. 268A permit you, during your own time, to engage in the private practice of law representing private clients in their claims of unlawful employment discrimination against their private (not public agency) employers filed and pending with the MCAD (hereinafter, Cases) while you are also a full-time employee of XYZ State Agency?

ANSWER:

No, because the MCAD has a direct and substantial interest in such Cases.[1]

DISCUSSION:

A. Overview of MCAD Process

The MCAD, established by G.L. c. 6, §56, is composed of three, full-time Commissioners and their staff members. The MCAD's jurisdiction includes discrimination based on race, color, religious creed, national origin, ancestry, age, sex, sexual orientation, handicap and, to a limited extent, the status of having a criminal record. G.L. c. 151B, §4. In this overview, we will focus, in particular, on the MCAD's process as it relates to Cases such as those you wish to undertake in which complainants are represented by their own attorneys.[2]

The MCAD is authorized, pursuant to G.L. c. 151B (sometimes, "Statute") and its implementing regulations, 804 CMR §1.00 ("Regulations"),[3] to receive, investigate, issue investigative dispositions, conduct hearings about and adjudicate complaints of unlawful discrimination and to order a broad range of remedies therefor. G.L. c. 151B, §§3, 5; 804 CMR §§1.03(2), 1.08, 1.10, 1.11, 1.13-1.16. At any stage while a matter is pending before the MCAD, the MCAD may seek injunctive relief. G. L. c. 151B, §5.[4]

Among those who may file complaints with the MCAD are: persons aggrieved or their duly authorized representatives, the Attorney General, the MCAD, employers whose employees refuse to cooperate with the provisions of c. 151B, and organizations whose purposes include the elimination of discrimination, some of whose members are aggrieved. G.L. c. 151B, §5; 804 CMR §1.03(1). Complainants, not their attorneys, must sign and verify their complaints, G.L. c. 151B, §5; 804 CMR §1.03(3); their attorneys must file appearances. G. Napolitano, *An Introduction to the MCAD Case Processing System*, Meet the MCAD '97 - Trends, Tips and Practical Advice from Staff of the MCAD §2.3, MCLE Publication No. 97-15.03 (1997). Complaints must be filed with the MCAD within six months of the unlawful conduct. G.L. c. 151B, §5; 804 CMR §1.03(2).

The Statute "creates a parallel judicial and administrative enforcement scheme." 45 S. Moriearty, J. Adkins & S. Lipsitz, Employment Law, Massachusetts Practice, §8.38 (1995). Although complaints of discrimination must be filed with the MCAD as a prerequisite to a filing with the superior court, after filing, the complainant may elect to withdraw the matter from the MCAD by filing a civil action with the superior court pursuant to G.L. c. 151B, §9.[5] If such election is made, the MCAD is required to dismiss the administrative proceeding.[6] G.L. c. 151B, §9; 804 CMR §1.13(2)(d). If the matter is not removed to superior court, it generally proceeds through the MCAD, as described below.

Investigation and Initial Determination

After a complaint is filed, the MCAD's Investigative Unit screens it to assure that it meets minimal jurisdictional requirements. Napolitano, *supra*, §§2.1-2.3. An Investigating Commissioner is assigned to the Case and notifies the respondent of the complaint. 804 CMR §1.03(6). The respondent has 21 days to serve an answer on the MCAD and the complainant. 804 CMR §1.03(7).

The Investigative Unit then undertakes its

investigation, whose purpose is to enable the Investigating Commissioner to determine whether or not "probable cause" exists, *i.e.*, whether there is "sufficient evidence upon which a fact-finder could form a reasonable belief that the respondent committed an unlawful practice." 804 CMR §1.13(7)(a). During its investigation, the MCAD has a wide range of powers to gather information. MCAD investigators may conduct initial investigative conferences with the parties; conduct on-site visits; interview witnesses and request documents; issue subpoenas to compel attendance of persons and production of documents; issue interrogatories;[7] when necessary to preserve evidence, depose witnesses; and conduct informal fact-finding conferences, at which there are no stenographic records or sworn statements. 804 CMR §§1.08, 1.10, 1.11.

You characterize as "limited" the role of private attorneys prior to the MCAD's public hearing of a Case. For example, during the investigation, the parties have very limited rights to conduct their own discovery.[8] Even at fact-finding conferences, the role of the parties' attorneys is limited. L. Girton, *Pursuing Claims at the Massachusetts Commission Against Discrimination*, 75 Mass. L. Rev. at 152, 158-159 (1990). While they may make opening and closing statements and propose questions and lines of inquiry to the MCAD's investigator, they may not ask questions of the witnesses. 804 CMR § 1.08(2), (3); Girton, *Id.*

At the culmination of the investigation, the MCAD investigator recommends an investigative disposition of the Case to the Investigating Commissioner, who then issues a determination as to probable cause (PC) or lack of probable cause (LOPC) or some other disposition, *e.g.*, lack of jurisdiction. The complainant has limited rights to seek reconsideration of an LOPC determination through a "preliminary hearing" before the Investigating Commissioner. G.L. c. 151B, §5; 804 CMR §§1.13(7)(c), (7)(d); Girton, *supra* at 159. The complainant has no right to appeal any such LOPC determination to the other two Commissioners or to court under G.L. c. 30A. However, if not time-barred, the complainant may commence a civil action for damages and/or injunctive relief in superior court under G.L. c. 151B, §9.

Conciliation

If there is a PC determination, the MCAD is first required to "endeavor to eliminate the unlawful practice complained of . . . by conference, conciliation and persuasion" (collectively, "conciliation"). G.L. c. 151B, §5; 804 CMR §1.13(8)(a). The Investigating Commissioner or, more typically, his or her designee/ MCAD attorney conducts the conciliation session(s). Napolitano, *supra* at 36, §§3.1. If conciliation efforts result in a settlement agreement, the MCAD dismisses the complaint, and the agreement constitutes a final MCAD order, which can be judicially enforced. 804 CMR §1.13(6).[9]

Public Hearing, Decision and Remedies

If conciliation efforts fail, the Investigating Commissioner certifies the Case for public hearing, and the respondent must answer the complaint, as it may have been amended, within 15 days. G.L. c. 151B, §5; 804 CMR §1.15(2)(a). A Commissioner (who had no prior involvement with the matter) is assigned as the Hearing Commissioner and conducts the public or adjudicatory hearing in accordance with G.L. c. 30A. G.L. c. 151B, §3, Subsection 6.

This stage of the MCAD proceedings has been described as "administrative litigation." Napolitano, *supra* at 39, §4.0. The parties may engage in discovery, including serving interrogatories, serving subpoenas requiring the attendance and testimony of witnesses and the production of documents and taking depositions; the Hearing Commissioner may conduct pre-hearing conferences and issue pre-hearing orders; and the parties' attorneys present their cases at the public hearing, during which they may cross-examine witnesses.[10] 804 CMR §§1.09(2), 1.10(1), 1.15(3); 45 Moriearty, Adkins & Lipsitz, *supra*, §8.46; Napolitano, *supra* at 39, §4.0. The Investigating Commissioner may participate in the public hearing, but only as a witness. G.L. c. 151B, § 5. *See East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 447 (1986). The MCAD is not bound by the rules of evidence, except for the rules of privilege. G.L. c. 151B, §5; 804 CMR §1.15(14).

After the public hearing, the Hearing Commissioner issues a written decision, which may include orders. 804 CMR §1.15(20). If the complainant prevails, the MCAD can order "broad and comprehensive remedies," including back pay and benefits, damages for emotional distress, injunctive relief, other make-whole relief and compliance reporting. 45 Moriearty, Adkins & Lipsitz, *supra*, §8.51. Those remedies may redress and/ or correct the specific harm to the complainant and provide broader, prophylactic relief for those similarly situated. *See, e.g., Katz v. Massachusetts Comm'n Against Discrimination*, 365 Mass. 357, 365-366 (order requiring equal opportunity advertising); *McKinley v. Boston Harbor Hotel*, 14 Mass. Discrim. L. Rep. 1226, 1246 (1992) (order requiring training program, including civil rights and AIDS awareness).

Appeal

The losing party may appeal the decision and order(s) to the other MCAD Commissioners[11] and, thereafter, to superior court under the standards of G.L. c. 30A, §14(7). G.L. c. 151B, §§3(6), 6; 804 CMR §§1.16(1), 1.17.[12] On appeal to the superior court, the

MCAD is named as defendant. If the prevailing party is not also named, that party may intervene as a defendant." *Massachusetts Practice, supra* at 398, §8.47. Although the MCAD may designate the prevailing party's attorney as its agent for purposes of defending its decisions and any orders, we are informed that it rarely does so. 804CMR §1.17(2).

Judicial Enforcement

As noted above, either party to an MCAD consent order, a pre-determination settlement effected through conciliation (or otherwise) or an MCAD final decision and order(s) may file a complaint with the MCAD alleging violations thereof, and the MCAD is required "to proceed to obtain enforcement by filing a petition in the appropriate state court" through one of its own attorneys or by designating counsel for the party aggrieved as its agent. G.L. c. 151B, §6; 804 CMR §1.18(2).[13]

B. Application of G.L. c. 268A

As an XYZ employee, you are a state employee for purposes of G.L. c. 268A. As such, your conduct is regulated by G.L. c. 268A, the conflict of interest law. In particular, §4 is relevant to your request.

Section 4 contains two distinct operative provisions that generally regulate what a state employee may "do on the side." Section 4(a) provides that "no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter[14] in which the commonwealth or a state agency is a party or has a direct and substantial interest." Section 4(c) provides that "no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest."

Section 4 broadly and uniformly restricts all regular (as distinguished from "special")[15] state employees (other than legislators). Accordingly, if any state agency has a direct and substantial interest in or is a party to a particular matter, then §4's prohibitions apply; it makes no difference whether it is the regular state employee's own state agency or another state agency that has the interest or is a party.[16]

MCAD proceedings and the concomitant submissions, determinations and decisions are particular matters. You seek to be compensated by and act as attorney for private parties in connection with such particular matters.

The critical question here is whether the MCAD is a party to or has a "direct and substantial interest" in employment discrimination Cases. For the reasons discussed below, we conclude that the MCAD has a direct and substantial interest in such Cases (and may, at some stage, become a party) and that, therefore, you may not receive compensation from or act as attorney for complainants in connection with such Cases.

As we wrote in *EC-COI-97-2*, discussed below:

> When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES,* 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "interest" from Webster's Third New International Dictionary (unabridged) is "right, title or legal share in something; something in which one has a share of ownership or control." In legal parlance, the term "interest" is "the most general term that can be employed to denote a right, claim, title, or legal share in something." Black's Law Dictionary. Within the context of G.L. c. 268A, §4, interests of the Commonwealth would include proceedings affecting the Commonwealth's legal rights or liabilities, pecuniary interests, property interests or proceedings where the Commonwealth would have a stake in the proceedings. *See EC-COI-91-10* (Commonwealth has interest if outcome would require expenditure of public funds, exposure to liability, implicate government's rights and responsibilities); . . . . (Emphasis added.)

While merely remote, tenuous or inconsequential interests will not make the Commonwealth's interest "direct and substantial," the Commonwealth "may have a significant interest in a matter even when that interest is not financial or proprietary." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 330-332 (1965).[17] It is that type of intangible, but significant, interest that can vest the Commonwealth and/or a state agency with a "stake" in proceedings before such agency sufficient to render the interest direct and substantial even though no legal rights or liabilities or pecuniary or property interests of the Commonwealth or such agency are affected and even though neither the Commonwealth nor such state agency is a party to the proceeding.

Since 1978, when the Commission was created and charged as the primary civil enforcement agency under G.L. c. 268A, *see* G.L. c. 268B, §3(i), we have

engaged in a case-by-case approach when determining whether §4 applies. When undertaking such analyses, we have in mind the two actual or potential ills targeted by Section 4: divided loyalty and influence peddling. *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610 (1984), citing *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (Liacos, J. dissenting); *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984); Buss, *supra* at 323.

> This section [municipal counterpart to §4] of the statute reflects the old maxim that 'a man cannot serve two masters.' It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions.

Canon case, *supra* at 504. (Emphasis added.) *See also, EC-COI-92-36.*

When reviewing litigation pending before state courts, we have found that the Commonwealth is a party to and has a direct and substantial interest in all criminal matters and in civil matters in which the Commonwealth is named as a party. *See EC-COI-89-31; 81-77.* Conversely, we have found that the Commonwealth would not ordinarily have a direct and substantial interest in a civil lawsuit between private parties merely because the litigation was before a state court, *i.e.*, absent some showing that the Commonwealth would be directly affected by the outcome. *See EC-COI-91-10; 82-132; 80-54.*

By contrast, when reviewing or discussing various types of administrative proceedings, until our decision in *EC-COI-97-2*, we have generally determined that such proceedings are or may be of direct and substantial interest to the subject administrative agency.[18] With that decision, we signaled our intention, when presented with administrative proceedings before state agencies involving disputes between private parties, to review them in greater depth to determine whether the Commonwealth or the subject state agency has a direct and substantial interest.

In *EC-COI-97-2*, we concluded that a state employee who was also a private attorney "on the side" was permitted to represent clients who were not state employees at workmen's compensation proceedings before the Massachusetts Division of Industrial Accidents (DIA) involving private parties (the employee/claimant and the insurer) seeking to resolve a contested claim and entailing one or more phases. Those phases are: (i) informal attempted conciliation before a DIA conciliator; (ii) a conference before an administrative law judge who (based on the parties' identifying of the issues, summarizing the anticipated testimony, making oral arguments and submitting documents, such as medical reports, wage statements and affidavits from witnesses) decides whether and to what extent relief should be granted and issues a conference order embodying that decision; (iii) adjudicatory hearing, where the rules of evidence apply and sworn testimony is taken, before the same administrative law judge who presided at the conference; and (iv) appeal to a 3-member Industrial Accident Review Board and finally to the Appeals Court.[19] A party in interest may also seek judicial enforcement of an administrative law judge's order. G.L. c. 152, §§10, 10A, 11, 11(C) and 12; *EC-COI-97-2.*

The MCAD proceedings under consideration here are similar to, but distinguishable from, those DIA proceedings.[20] The MCAD proceedings also consist of one or more phases, depending on various variables, *e.g.*, whether and when the Case is removed to state court or settled; whether there is a PC or LOPC determination; what is the MCAD's decision and order(s); whether an appeal is instituted; and whether, at any stage, judicial enforcement is sought. For ease of reference, we have characterized those phases as the Investigative Phase (consisting of Investigation and Initial Determination), the Conciliation Phase, the Public Hearing Phase, the Appeal Phase (first internal and thereafter to superior court) and the Judicial Enforcement Phase as described in Part A above. As reflected by the discussion below, it appears to us that the character and extent of involvement of MCAD personnel in the various Phases is more extensive and MCAD's "stake" in such proceedings is more significant than that of a court or DIA, whose role is only "to provide an objective and impartial forum" for private parties.

First and, perhaps most telling, in an appeal to court of an MCAD decision and order(s), the MCAD is a necessary and active party. The MCAD's being the party required to be named in such appeal reflects the significance and breadth of the MCAD's role in such proceedings even though, in practice, if the aggrieved party fails to name the prevailing party in such an appeal, the MCAD "file[s] a motion to dismiss for failure to name an essential party," G. Napolitano, *supra* at 48, § 4.10. By contrast, in DIA proceedings, the DIA is not a required party if there is an appeal to court of a decision of the Industrial Accident Review Board pursuant to G.L. c. 152, §12(2) and G.L. c. 30A, §14.[21]

Second, the degree and kind of involvement by MCAD personnel in the Investigative Phase of a Case may be so extensive that it could be likened more to the role played by other agencies (including law enforcement agencies) having investigative, adjudicatory and enforcement powers. After a complaint is filed, MCAD investigators begin their investigation and continue their involvement until the Investigating Commissioner reaches and issues a PC, LOPC or other determination and any "appeals" therefrom or reconsideration thereof have been concluded. During the Investigative Phase,

MCAD personnel are authorized and/or required to play a significant, affirmative role in a Case while private attorneys play a limited role. Girton, *supra* at 158. Those MCAD activities include conducting investigative and fact-finding conferences and on-site visits; interviewing witnesses and reviewing documents; by subpoena, compelling attendance of persons and production of documents; preparing and issuing interrogatories; and, when necessary, deposing witnesses.

By contrast, in the DIA proceedings, the administrative law judge who makes the initial determination about granting relief relies on presentations and submissions made by the parties. DIA personnel do not engage in independent investigation (as do MCAD personnel during the Investigative Phase of a Case) to reach their initial determinations.

Third, MCAD personnel may or must play other affirmative (rather than neutral) roles during the Investigative and other Phases. The MCAD's fashioning of broad and comprehensive range of remedies, especially those aimed at eliminating an employer's unlawful discriminatory practices generally, not just those affecting the complainant, reflects the MCAD's performance of its broader remedial charge to minimize or eliminate unlawful discrimination, even in proceedings (such as the Cases you wish to undertake) between two private parties. The MCAD's Investigating Commissioner is authorized to seek "appropriate injunctive relief," G.L. c. 151B, §5, "to enjoin ongoing sexual, racial or other unlawful harassment." Girton, *supra* at 157. If the Investigating Commissioner issues a PC determination, he or she is required to endeavor to use the conciliation process "to eliminate the unlawful practice," thus playing a proactive, remedial role. The MCAD may be required to enforce a consent order or a settlement agreement reached between the parties to a Case. 804 CMR §1.18(2). Also, as discussed above, the Regulations authorize the MCAD to designate as its agent for various purposes private attorneys representing the parties.

By contrast, DIA personnel adjudicate only the rights and obligations of the parties before them and do not fashion remedies to address a broader spectrum of concerns. Also, the party in interest, not DIA, must enforce a DIA orders.

The extent of MCAD's investment in matters pending before it is also evidenced by the character and extent of involvement of its personnel in connection with its administrative proceedings, other than Cases in which complainants are represented by their own attorneys. For example, MCAD personnel assist *pro se* complainants in drafting and filing their complaints. Napolitano, *supra* at 4-7, §§2.2, 2.3, and, if there is a PC determination, the MCAD assigns an attorney to represent *pro se* complainants during the Conciliation/Public Hearing Phase. G.L. c. 151B, §5; Girton, *supra* at 160-161.[22/] The MCAD's authority to initiate its own proceedings to eradicate and remedy the effects of unlawful discrimination also evidences the breadth of its charge and that of its personnel. G.L. c. 151B, §5; 804 CMR §1.03(1).

As the foregoing review amply demonstrates, the MCAD proceedings under review here are distinguishable from the DIA proceeding addressed in *EC-COI-97-2*, where the DIA was only to "provide an objective and impartial forum" akin to a court, in adjudicating disputes between a private claimant against a private insurer or employer. In short, in light of the considerations above as well as the MCAD's extensive regulatory scheme, we conclude that the MCAD has a sufficient stake in proceedings before it to vest it with a direct and substantial interest within the meaning of §4. We also take this occasion to clarify that a state agency may have a "stake" in proceedings before it that is not financial or proprietary and that, thus far, it is only in the singular circumstances presented in *EC-COI-97-2* that we concluded that an administrative agency would not have a direct and substantial interest in proceedings before it.

Our conclusion is consistent with the plain language of §4 and the principles on which it is based as well as the weight of our precedent. In particular, it is §4's prophylactic purposes, seeking to preclude circumstances having the potentiality (not just the actuality) of placing a state employee in divided loyalty or influence peddling situations, that would give rise to concern were you to represent complainants in such Cases.[23/] As §4 targets potential as well as actual ills, it will restrict you, as a full-time, regular state employee, from working "on the side" representing private clients in connection with Cases just as it would restrict a regular MCAD employee or a regular state employee of any other state agency (including someone who never has official dealings with the MCAD). In point of fact, because, in your XYZ position, you regularly practice before the MCAD, the potential of your using inside influence on MCAD employees for the benefit of your private clients is more than theoretical. As we wrote in *EC-COI-93-5*, n. 2:

> In seeking to effectuate this statutory purpose [of §4], we find it useful to determine the likelihood that a public employee will have an opportunity to have dealings with government officials on behalf of a private party. Where we find such likelihood, we will apply the restrictions of §4.

Given our conclusion, we advise you that, in your private law practice, you will be prohibited by §4 from representing clients in connection with such Cases during their pendency with the MCAD, during any injunctive or enforcement proceedings brought by the MCAD and/or during any appeal of MCAD's decisions.[24/]

We point out that, §4 would not restrict you from representing clients such as those you seek to represent in connection with actions brought in superior or federal court where the MCAD is not a party and over which it has no jurisdiction. We also point out that, if you were a "special state employee"[15] of XYZ State Agency, rather than a regular state employee, §4 might permit you to work "on the side" on Cases before MCAD as you have proposed.

DATE AUTHORIZED: September 23, 1998

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[1]In addition, under G.L. 268A, §4, discussed below, you may not represent a state employee in such claims against his or her state agency-employers as they would be parties to or have a direct and substantial interest in such proceedings.

[2]Our overview is based on the sources cited and discussions with MCAD personnel about the agency's practice and procedures. We do not, for example, address MCAD housing discrimination proceedings or, except as specifically noted for purposes of comparison, MCAD proceedings initiated by the MCAD or those involving *pro se* complainants.

[3]This opinion does not reflect proposed revisions to the Regulations that have been circulated for public comment but have not yet been promulgated.

[4]To prevent irreparable injury, complainants' attorneys may also seek temporary injunctive relief "during the pendency of or prior to the filing of a complaint with" the MCAD. G.L. c. 151B, §9.

[5]A complainant may remove the matter within 90 days after filing the complaint only with the consent of the Investigating Commissioner; thereafter, the complainant may remove the matter as a matter of right. G.L. c. 151B, §9. In *Lavelle v. Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997), the court held that, in certain types of cases, respondents may seek *de novo* judicial relief in the form of a jury trial, but only after having fully exhausted the MCAD's administrative remedies.

[6]Superior court actions must be filed within three years of the unlawful conduct. G.L. c. 151B, §9. The MCAD has taken the position in *Alves v. Town of Freetown*, 17 Mass. Discrim. L. Rep. 1627 (1995) that, if complainants file their actions in federal court, that may result in the MCAD's dismissal of the correlative MCAD matter. *See also Christo v. Edward G. Boyle Ins. Agency*, 402 Mass. 815 (1988).

[7]The parties or their attorneys may assist by drafting interrogatories for submission to the adverse party.

[8]A party may be permitted to conduct discovery "upon a showing that a witness or evidence may become unavailable." 804 CMR §1.09(1)(a).

[9]Under MCAD Policy No. 96-1, the agency also recognizes privately arranged alternative dispute resolution through mediation or arbitration. Napolitano, *supra* at 37, §3.2.

[10]We note that the Regulations provide that the complainant's counsel may be designated as the MCAD's agent "for purposes including conciliation, presentation of the case at public hearing, or enforcement of a pre-determination settlement, consent order, or final order of the [MCAD]" if, upon motion of the complainant's counsel, the MCAD determines that the interests of the complainant and the MCAD "are without contflict." 804 CMR §1.07(5)(b). We are informed that currently this agent-designation procedure is rarely, if ever, used during interal MCAD proceedings but that it is sometimes used to enforce MCAD orders in court. *See also* 804 CMR §§1.17(2) and 1.18(2), discussed below, also authorizing the MCAD to so designate private attorneys as its agents during and after the conclusion of its proceedings.

[11]The Hearing Commissioner who heard a Case does not sit on such appeal, but the Investigating Commissioner does.

[12]In certain circumstances, the respondent may also seek a *de novo* jury trial. *See* n. 5.

[13]Ordinarily prevailing complainants may also file such judicial enforcement actions without MCAD involvement. Napolitano, *supra* at 48, §4.1.

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

[15]"'Special state employee,' a state employee: (1) who is performing service or holding office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more that eight hundred hours during the preceding three hundred and sixty-five days. . . ." G.L. c. 268A, §1(o).

[16]By contrast, §4 applies less restrictively to special state employees.

[17]*See also* Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott 3, 16 (Pound, Griswold & Sutherland 1964), discussing §17, the municipal counterpart to §4: "It is hard to hypothesize a 'particular matter' involving municipal action in which it can be said with assurance that the municipal interest is indirect and insubstantial. But the [direct and substantial] requirement does prevent coverage of private transactions in which the municipal interest is remote or inconsequential."

[18]*See, e.g., EC-COI-82-82* (§4 generally prohibits state employees from representing private clients in proceedings before state agencies*); 82-50* (special state employee of the MCAD prohibited from representing private clients in proceedings pending before agency); *83-12* (state employee would be prohibited from representing client/insured driver in a surcharge appeal proceeding against the insurer before the Merit Rating Board were it not for §4's exemption for representation of immediate family members; *84-9* (submissions and applications to and determinations of Appellate Tax Board); *83-12* (state employee prohibited from representing client/property owner contesting municipal tax assessment in proceedings before Appellate Tax Board); *91-10* (proceedings before the Department of Industrial Accidents, other than those addressed in *97-2); 79-83* (proceedings before state agency)*; 82-33* (regulatory or adjudicatory proceedings before state agencies); *89-12, 85-17, 83-59, 81-77* (applications for licenses, permits, approvals, etc.); *93-5, 90-13* (submissions of reports).

[19]We are informed by DIA legal counsel that such court appeals are not commonly instituted.

[20]Here and in the following discussion, when referring to DIA proceedings, we mean the type of proceeding reviewed in *EC-COI-97-2*.

[21]The DIA receives notice of such appeals, but, by way of an answer, must only accumulate and file with the court its record of the proceedings under review. G.L. c. 152, §§14(2) and (4).

[22]At the Appeal Phase, the MCAD no longer provides an attorney for the *pro se* litigant.

[23]In discussing the counterpart sections of the federal conflict of interest statute, currently codified as 18 U.S.C. §§203 and 205, on which §§4(a) and (c) were modeled, one commentator wrote that they were based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law*, 76 Harv. L. Rev. 1113, 1120 (1963).

[24]While recognizing that G. L. c. 268A will bar you, in your private practice of law, from representing employees in proceedings against their employers filed with the MCAD, a necessary prerequisite to their commencing judicial civil proceedings under the Statute, we do not agree with your suggestion that your being so barred denies your prospective private clients any constitutional rights or remedies. They can engage other attorneys or, if they choose, act *pro se*, in which event, the MCAD will assign them an MCAD attorney for the Conciliation/Public Hearing Phase.

[25]*See* n. 15.

COMMISSION ADVISORY NO. 98-1

THE CONFLICT LAW AND LEGISLATORS' PRIVATE EMPLOYMENT

This advisory explains how the conflict of interest law, General Laws Chapter 268A, applies to state senators and representatives who also have other private employment. It explains the limitations G.L. c. 268A establishes for legislators (1) as legislators and (2) in their private positions.

I. BACKGROUND

State representatives and senators are state employees as defined in the conflict of interest law, G.L. c. 268A, and public officials as defined in the financial disclosure law, G.L. c. 268B.

II. LIMITATIONS AS LEGISLATORS

As described below:

> a legislator may not act on special legislation in which she or her private employer has a financial interest.
>
> a legislator must disclose in writing to the Ethics Commission prior to taking any action which would substantially affect his own financial interest.

(a) Participating in legislative business (§6)

The conflict law prohibits a legislator from participating in a particular matter in which (to his knowledge) he, his partner or a business organization in which he is serving as officer, director, trustee, partner or employee has a financial interest. A legislator participates not only by voting, but also by engaging in debate or discussion or by giving a recommendation or advice concerning the particular matter. Participation also includes informal lobbying of legislative colleagues and intervening with a public agency.

This prohibition applies to any financial interest that is direct or reasonably foreseeable, whether such financial interest is positive or negative. Whether a financial interest is reasonably foreseeable must be determined on a case-by-case basis following examination of all the relevant facts.

Section 6 of the conflict law precludes a legislator's participation only if the matter on which action is sought is a "particular matter" for purposes of the conflict law. The definition of "particular matter" includes "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding . . ." but specifically excludes the enactment of **general** legislation as well as home rule petitions of cities, towns, counties and districts "for special laws relating to their governmental organizations, powers, duties, finances and property." The Commission has stated that general legislation establishes rules which are "uniformly applicable to all individuals or organizations similarly situated."

The feature that distinguishes special from general legislation is the "particularity of the scope and purposes of the act's provisions." If a bill provides assistance to all cities, towns and counties as well as to the Commonwealth, the Ethics Commission has concluded that the bill is a matter of general legislation. In addition, even though the subject matter of a bill may have a special effect upon one or more individual cities or towns, if the main purposes of the bill are to achieve state, regional or general objectives, the bill will not be considered special legislation. In contrast, if the legislation creates an exception or special rule which does not apply to other similarly situated individuals, the legislation will be regarded as special legislation. Legislation that practically affects a single community is regarded as special legislation, even where the act is drafted in more general terms.

Thus, §6 **does not** prohibit a legislator from participating in any **general** legislation which may affect her financial interest or that of her private employer. However, §6 **does** prohibit a legislator from acting on any special legislation, any budget line item or any constituent service, in which the legislator or her private employer has a financial interest.

(b) Filing Disclosures (§§6A, 23)

Section 6A of the conflict law requires a legislator to make and file a full written disclosure with the Ethics Commission if the legislator is required knowingly to take any action as a legislator which would substantially affect his own financial interests, unless the effect is no greater than the effect on the general public. This section is distinguishable from §6 because its application is not limited to particular matters (i.e., §6A applies to general and special legislation as well as to home rule petitions by localities and other actions such as constituent services). Moreover, it does not prohibit the legislator from taking the required action; it does, however, require advance disclosure of the required action and the potential conflict of interest. For example, a legislator who is a partner in a law firm, and thus has a financial interest in the law firm, may participate (consistent with §6) in a committee hearing concerning general legislation in which his law firm has a financial interest; pursuant to §6A, however, prior to taking such action, the legislator must file a written disclosure with the Ethics Commission describing the action required and the potential financial interest.

Section 23(b)(3) prohibits a public employee from knowingly or with reason to know engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence her or unduly enjoy her favor in the performance of her official duties, but allows the employee to dispel any such impression by filing a written public disclosure of the relevant facts and circumstances prior to acting. For example, this provision requires a legislator to make such a disclosure to the Ethics Commission and/or the House or Senate Clerk whenever the legislator or any non-state entity with which the legislator is affiliated (e.g., her private employer, a private non-profit organization on whose board she serves, private clients, a family member) has a private interest that would be affected by legislative business in which the legislator participates (this requirement to make a disclosure applies to interests other than financial interests covered by the §6 abstention requirement discussed above). Note that the disclosures under §§6A and 23(b)(3) are required regardless of whether the legislative business in question is special or general legislation.

III. LIMITATIONS FOR LEGISLATORS IN THEIR PRIVATE POSITIONS

(a) Contacting state agencies on behalf of others (§4)

Section 4 prohibits a legislator from appearing personally before any state agency for any compensation[1] other than his legislative salary, unless:

1. the particular matter before the state agency is ministerial in nature, such as the filing or amend ment of tax returns, applications for permits or licenses, incorporation papers, or other docu ments; or

2. the appearance is before a court of the Com monwealth; or

3. the appearance is in a quasi-judicial proceeding. A proceeding is considered quasi-judicial if all of the following are true: the action of a state agency is adjudicatory in nature; the action of the state agency is appealable to the courts; and both sides are entitled to representation by counsel and such counsel is neither the attorney general nor coun sel for the state agency conducting the proceed ing.

Note that a legislator "personally appears" before a state agency even if she contacts the agency in writing or by telephone on behalf of another.

(b) Having interests in state contracts (§7)

Section 7 of G.L. c. 268A in general prohibits a state employee from having a direct or indirect financial interest in a state contract (e.g., a construction contract, a loan, a contract providing goods to a state agency). In certain circumstances, exemptions may be available; legislators should seek further advice to determine whether their situation qualifies for one of these exemptions.

Note that §7 generally prohibits a legislator from holding any other paid position or contractual employment arrangement with the Commonwealth. However, several exemptions exist which may allow a legislator to hold certain positions. For example, a legislator may teach or perform related duties for compensation in an educational institution of the Commonwealth provided that certain requirements are satisfied. A legislator may also be employed for compensation on a part-time basis by certain state facilities which operate on a continuous basis, such as hospitals or correctional facilities, provided that certain requirements are satisfied. Again, legislators should seek further advice to determine whether their situation qualifies for one of the §7 exemptions.

(c) Other restrictions on private activities (§23)

Section 23(b)(1) prohibits a public employee from "accept[ing] other employment of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office." In a 1991 advisory opinion, the Ethics Commission applied this provision to prohibit a state legislator from providing paid consulting services that involve the Massachusetts Legislature. Therefore, in compensated work for a private employer, a legislator may not provide advice about Massachusetts legislative matters, including advice on "how to receive some advantage or favorable treatment from the legislature, or how to lobby colleagues."

Furthermore, §23(b)(2) prohibits a state employee from using or attempting to use her official position to secure for herself or others unwarranted privileges of substantial value which are not properly available to similarly situated individuals. This provision prohibits a legislator's use of state time, facilities, personnel or equipment to benefit her private activities or those of her private employer. To comply with §23(b)(2), a legislator must conduct any private business entirely outside of state time and without the use of state resources.

DATE AUTHORIZED: May 12, 1998

This advisory is general in nature. For specific questions, public officials and employees should contact Senate or House counsel or the Legal Division of the Ethics Commission at 617-727-0060 or 888-485-4766.

[1/] A legislator may contact state agencies on behalf of constituents or others if the legislator receives no compensation from the individual(s) on whose behalf he is contacting the state agency.

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