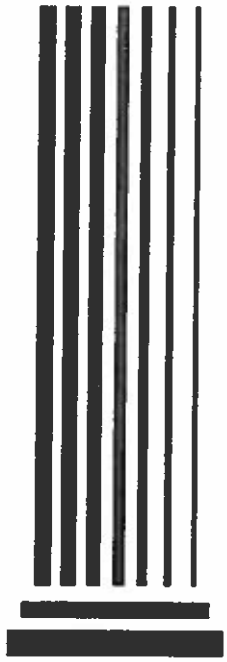
RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1999

STATE
ETHICS
COMMISSION



MASSACHUSETTS

The Massachusetts State Ethics Commission
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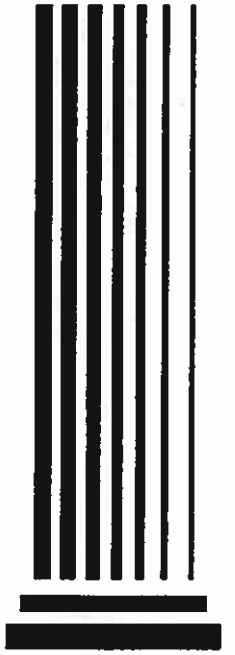

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The Massachusetts State Ethics Commission

Included in this publication are:

•**State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1999.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1999 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 1999.** Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-99-(number)*.

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

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In the Matter of Robert Muzik - The Commission fined Robert Muzik, former owner of Muzik's Limousine and Sedan Service of Vineyard Haven, $500 for violating the conflict law by giving illegal gratuities in 1993 and 1995 to Woods Hole, Martha's Vineyard and Nantucket Steamship Authority terminal agents. In a Disposition Agreement, Muzik admitted that he violated G.L. c. 268A, §3(a) by giving items of substantial value, i.e., a $200 gift certificate in 1993 and $50 in cash in 1995, to terminal agents. Section 3(a) generally prohibits the giving or offering of anything of substantial value to any public official for or because of any official act or acts performed or to be performed by such employee. According to the Agreement, Muzik regularly used Steamship Authority ferries to transport his limousine and his clients between Woods Hole and Martha's Vineyard. On some occasions during peak usage periods, Muzik could not secure return trips for his limousine. Instead of calling the Steamship Authority reservations number, he contacted assistant terminal agents who were responsible for determining the number of vehicles allowed onto the ferry to persuade them to allow Muzik's limousine on the ferry as a special circumstance. Otherwise, Muzik would have to send his client on the ferry as a walk-on passenger while he waited with the vehicle as a standby passenger, in which case Muzik would arrange for alternate transportation for the client when the ferry docked. In June 1993, Muzik gave a $200 gift certificate to a Woods Hole assistant terminal agent and his wife. The assistant terminal agent turned the gift certificate over to the Steamship Authority's general counsel who returned the gift to Muzik with a letter warning Muzik that the gift violated the conflict of interest law. In December 1995, Muzik sent another assistant terminal agent a Christmas card containing a $50 bill. The assistant terminal agent immediately turned it over to the Steamship Authority's general counsel. In the Disposition Agreement, Muzik acknowledges that he gave these gifts to assistant terminal agents for or because of official acts performed or to be performed by the assistant terminal agents, i.e., allowing Muzik's limousine on the ferry when he did not have a reservation.

In the Matter of C. Samuel Sutter - The Commission's Enforcement Division issued a Disposition Agreement in which former Bristol County Assistant District Attorney C. Samuel Sutter admitted violating the conflict law by participating as an assistant district attorney in a matter in which the law firm Casey & Thompson P.C. had an interest at a time when the law firm was representing him in a personal matter. Casey & Thompson P.C. is a law firm practicing in Bristol County. John Casey and Bruce Thompson are shareholders in the firm. Between December 1994 and March 14, 1995, Sutter solicited legal advice from Casey concerning his recent separation from his wife. On March 14, 1995, Sutter, as an assistant district attorney, represented the Commonwealth regarding a motion to dismiss in district court as to which Thompson represented the defendant. At the time of this motion, Sutter was still consulting with Casey regarding the separation and he expected that the law firm of Casey & Thompson would represent him on the matter if it continued. Sutter did not disclose to the District Attorney his private relationship with the law firm of Casey & Thompson. Sutter admitted that he violated G.L. c. 268A, §23(b)(3) by participating as an assistant district attorney in a matter in which Casey & Thompson had an interest at a time when he had, through his dealings with Casey, a private relationship with the law firm. Section 23(b)(3) prohibits a state 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 state employee's favor in the performance of his official duties. According to the Agreement, Sutter had no prior knowledge that Thompson would be representing the defendant in the motion to dismiss and , because he had been dealing only with Casey about his personal matter, it did not occur to him that his litigating a matter with Thompson would create an appearance problem. Nevertheless, the Commission concluded that Sutter had the opportunity and obligation to inform the judge that he had a conflict, obtain a continuance, disclose the conflict to the District Attorney and have the District Attorney decide who should handle the matter.

In the Matter of Jennie Caissie - The Commission cited Oxford Selectman Jennie Caissie for participating in a decision to issue a permit to a competitor of her family's fruit stand. According to a Public Enforcement Letter, Caissie was significantly involved in the discussion concerning the issuance of an outdoor business permit in 1997 to Gary Kettle for a fruit stand while Caissie's family operated a competing outdoor fruit stand. Section 19 of G.L. c. 268A, the state's conflict of interest law, in general, prohibits a municipal official from officially participating in matters in which an "immediate family" member has a financial interest. The Public Enforcement Letter stated that Caissie's family's fruit stand and Kettle's proposed fruit stand were in the same business and operated 2 ½ miles away from each other at basically the same times during the year. Because Kettle's proposed fruit stand would compete with Caissie's family's fruit stand, Caissie's family had a financial interest in the decision to award the permit. While Caissie participated significantly in the selectmen's discussion by, for example, questioning the environmental and traffic impacts of Kettle's proposed fruit stand, she abstained from the final vote. A 1976 Massachusetts Supreme Judicial Court decision concluded that participating involves more than just voting, and includes any significant involvement in a discussion leading up to a vote.

In the Matter of David D. Ellis - The Commission fined

Lynn City Councilor David D. Ellis $500 for exploiting his official regulatory power to coerce Lynn business owner Emilio Rosario to take down Ellis' opponent's campaign signs. Rosario owns and operates Commercial Auto Body at 165 Commercial Street in Lynn. In a Disposition Agreement, Ellis admitted to violating G.L. c. 268A, §23(b)(2) by using his official position as a City Councilor to effect the removal of his opponent's signs in a political election. Section 23(b)(2) of the conflict law prohibits a municipal official from using his position to obtain for an unwarranted privilege of substantial value. "The use of signs in a political campaign" is of substantial value. According to the Disposition Agreement, in August 1997, Rosario allowed Ellis and subsequently Ellis' opponent, Peter Capano to put signs on the side of Rosario's building. Soon after Capano put up his campaign signs next to Ellis' campaign signs, Ellis began tearing down Capano's signs. When Rosario questioned Ellis about his actions, Ellis told Rosario that he (Ellis) could have a car which was illegally parked in front of Rosario's shop towed. Ellis also reminded Rosario of a December 1996 Council hearing at which the City Council considered revoking Rosario's license to operate and told Rosario that he (Ellis) had assisted Rosario in resolving that matter. "Rosario feared retaliation from Ellis if he did not allow Ellis to remove [Capano's] signs," the Disposition Agreement stated. The Agreement also noted Ellis' assertion that he did not intend to cause Rosario to fear retaliation.

In the Matter of Frank Martin - The Commission cited Lawrence firefighter Frank Martin for receiving compensation in connection with fuel storage tank removals which required permits from the Lawrence Fire Department. Martin was also cited for "pulling" permits for most of the tank removals for which he was paid. Section 17(a) of the conflict of interest law 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. In a Public Enforcement Letter, the Commission explained that Martin, doing business as Martin Oil Burner Service & Underground Tank Removal, was paid in connection with 29 tank removals in the City of Lawrence between March 1994 and April 1997. The Fire Department, which requires permits for the removal of any tank which has been used for the storage of flammable materials, issued permits for each removal. Martin personally "pulled" permits for 26 of the 29 tank removals. According to the Public Enforcement Letter, "The city has a direct and substantial interest in these matters because those permits involve activities which can potentially significantly affect the public health and safety."

In the Matter of Harry L. Brougham
In the Matter of Hugh K. Hubbard - The Commission cited Belchertown Water District commissioners Harry L. Brougham and Hugh K. Hubbard for violating the conflict law by signing warrants for payments to family members. Brougham signed warrants authorizing payments to his son Michael Brougham who owns M. Brougham Excavating Company. Hubbard signed warrants approving salary payments for his wife, Carol Hubbard, the water district clerk treasurer. In Disposition Agreements, Brougham and Hubbard admitted that they violated G.L. c. 268A, §19 by signing the warrants. According to the Disposition Agreements, between 1994 and 1997, M. Brougham Excavating Company performed work totaling $34,470 for the District. During this time period, Brougham signed 25 warrants approving a total of $17,350 in payments for bills to the company. Hubbard's wife, Carol, was appointed clerk treasurer in September 1994. She is supervised by the commissioners, including her husband, and receives an annual salary of approximately $10,000, as set by town meeting. During the period of 1992 through 1998, Hubbard as a water district commissioner approved weekly warrants authorizing his wife to receive a total of $45,000 in salary payments. 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.

In the Matter of Sylvia Killion
In the Matter of John P. Sullivan - The Commission issued two Disposition Agreements in which former Department of Mental Health Southeastern Area Management Information System director Sylvia Killion and her supervisor, DMH Southeastern Area director John P. Sullivan, admitted violating the conflict law. Killion paid a civil penalty of $2,000 and Sullivan paid a civil penalty of $500. According to the Disposition Agreements, Sullivan, who had a close personal relationship with Killion, authorized 678 hours of over-time for her in 1996 and 1997. All other MIS staff employees combined received a total of 60.5 hours during this same period of time. Sullivan also authorized Killion to work a flex-time schedule which included one evening shift and one day at home each week. Killion failed to work a significant number of over-time and flex-time hours for which she received compensation. Killion admitted that she violated G.L. c. 268A, §23(b)(2) by receiving compensation for over-time and flex-time hours she did not work. Section 23(b)(2) of the conflict law prohibits a state employee from using her position to obtain for herself or others an unwarranted privilege. By receiving compensation for over-time and flex-time hours that she did not work, Killion knowingly used her MIS director position to obtain an unwarranted privilege of substantial value which was not properly available to other similarly situated individuals. Killion resigned from her position in April, 1998. Sullivan admitted that he violated G.L. c.

268A, §23(b)(2) by using his position to authorize Killion to receive compensation for over-time and flex-time hours even though he had reason to know Killion did not work all the hours for which she received compensation. Sullivan also admitted violating G.L. c. 268A, §23(b)(3) by authorizing Killion to receive compensation for over-time and flex-time hours in disproportion to other MIS staff and by not requiring documentation of such work. Section 23(b)(3) prohibits a state 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 state employee's favor in the performance of his official duties. The Disposition Agreement stated that a reasonable person with knowledge of all the relevant circumstances could conclude that Sullivan's relationship with Killion improperly influenced him in the performance of his official duties.

In the Matter of Michael Sweeney
In the Matter of Lucien Rainville - The Commission fined Blackstone Fire Chief Michael Sweeney and part-time call firefighter Lucien Rainville for violating the conflict of interest law. Sweeney was fined $1,000 for participating in the award of and subsequent changes to a $58,000 contract to refurbish a town ambulance between the town and Bert's Body Works, Inc., a corporation specializing in refurbishing ambulances. Bert's is owned by Rainville and his wife, who is Sweeney's sister. Rainville was fined $500 for representing Bert's in all its dealings with the town regarding the contract. In a Disposition Agreement, Sweeney admitted that he violated G.L. c. 268A, §23(b)(3) by participating in awarding the contract to Bert's by helping the town administrator to write the bid package and by reviewing the bids. In addition, after Sweeney realized that the bid specifications had not included automatic snow chains for the ambulance, Rainville proposed waiving the required performance bond to cover the cost of the chains. Sweeney discussed the matter with the town administrator who agreed to waive the performance bond by substituting a bank check. Sweeney then allowed Rainville to submit a regular company check to guarantee the work, instead of the required bank check. By awarding a contract to his brother-in-law's company and by making changes to that contract, Sweeney acted in a manner which would cause a reasonable person to conclude that Bert's and/or Rainville could unduly enjoy Sweeney's favor in the performance of his official duties. 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 separate Disposition Agreement, Rainville admitted he violated G.L. c. 268A, §17(c) by acting as an agent for Bert's by submitting the bid for the contract, requesting written confirmation of the contract award, negotiating changes regarding the waiving of the performance bond to pay for automatic snow chains, issuing an invoice to the town and signing the contract. 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.

In the Matter of Cathie Thomas - The Commission fined Hampden Probate Court Clerk Cathie Thomas $2,000 for exploiting her official position to gain access to the criminal offender record information (CORI) record of Abraham Kasparian, Jr., an opponent of Thomas' uncle, Richard Thomas, in the 1996 race for a seat on the Hampden County Commission. In a Disposition Agreement, Thomas admitted to violating G.L. c. 268A, §23(b)(2) by using her official position as a court employee to request and receive a printout of Kasparian's CORI record from a Hampden Superior Court probation officer who was authorized to access such records. Section 23(b)(2) of the conflict law pro-hibits a state official from using her position to obtain an unwarranted privilege of substantial value. According to the Disposition Agreement, the probation officer believed that Thomas was authorized to have access to CORI records as a court employee; she was not. After Thomas received the printout, she gave it to her uncle who turned it over to a reporter who subsequently published it. Richard Thomas pleaded guilty to unlawful possession of CORI information and paid a $5,000 fine and the probation officer who provided the record was suspended without pay for 20 days by the Commissioner of Probation.

In the Matter of William R. Shemeth, III - The Commission authorized a Disposition Agreement resolving charges that Spencer selectman William R. Shemeth, III violated the conflict of interest law by acting as attorney for a private client in connection with a matter in which the town had an interest. Shemeth's client faced, among other counts, two counts of damaging a Spencer police cruiser stemming from an incident that occurred in 1994. While the client ultimately was found guilty on these two counts (and all of the other counts) and ordered to serve two years in the house of correction, no restitution was made to the town for the damage done to the police cruiser. The Commission fined Shemeth $500; Shemeth also agreed to pay the Town of Spencer $485.60 for the damage done to the police cruiser by his client. In the Agreement, Shemeth admitted that he violated G.L. c. 268A, §§17(a) and 17(c) by representing the defendant in *Commonwealth v. Andrews,* who was charged with assault and battery on his girlfriend, being a disorderly person, two counts of assault and battery on a police officer and two counts of malicious damage of property. Shemeth was paid under a contract with the Worcester Bar Advocates to provide legal services for indigent defendants. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the

town in connection with any matter in which the town has a direct and substantial interest. Section 17(c) 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, by acting as attorney for and by receiving compensation from someone other than the town in relation to a particular matter in which the town had a direct and substantial interest, i.e., charges involving damage to a police cruiser and assault and battery on a police officer, Shemeth violated the conflict of interest law.

In the Matter of Brian J. Martin - The Commission issued a Disposition Agreement in which Lowell City Manager Brian J. Martin admitted violating the conflict law by awarding a contract to National Security Protective Services, a company owned by two of his friends. Martin paid a civil penalty of $1,750. According to the Disposition Agreement, Martin admitted violating G.L. c. 268A, §23(b)(3) by awarding a contract to National Security Protective Services, a company owned by two of his friends with whom he had made trips to Foxwoods and Atlantic City. The Disposition Agreement notes that National's price was, by a substantial margin, not the lowest one submitted. In addition, the expressed basis for rejecting the lowest price proposal was questionable. 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. Martin could have avoided violating §23(b)(3) by disclosing the relevant facts in writing to his appointing authority, the City Council, prior to his taking any official action concerning the award of the security contract to National. Martin, however, made no such disclosure.

In the Matter of Joseph F. Donovan - The Commission cited Brockton building commissioner Joseph F. Donovan ("Donovan") for violating the state's conflict of interest law by performing inspections of work done by his son. Donovan paid a civil penalty of $3,000. In a Disposition Agreement, Donovan admitted that he violated G.L. c. 268A, §19 by determining that work done by his son, Joseph E. Donovan ("Joseph"), owner of Donovan Plumbing, complied with the state code. Donovan also signed the building permit cards indicating his inspection of the work. According to the Disposition Agreement, between January 1994 and July 1998, Donovan, who did not issue permits or collect fees related to Joseph's work, inspected Joseph's plumbing and gas fitting work on thirty occasions. 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.

In the Matter of Kevin Hayes - The Commission issued a Disposition Agreement in which Spencer Selectman Kevin Hayes admitted violating the conflict law by invoking his selectman position in order to avoid arrest and/or the issuance of a traffic citation against him. Hayes also paid a fine of $1,000. On July 13, 1999, the Commission's Enforcement Division issued an order to show cause alleging Hayes violated the conflict law. This Disposition Agreement concludes the matter involving Hayes. According to the Disposition Agreement, when Spencer Police Officer David Bera pulled Hayes over for speeding on August 25, 1998, Hayes told Bera, "I guess you don't know who I am. I am a selectman in this town. My name is Kevin Hayes." Hayes refused to provide his license and registration and insisted that Bera call Spencer Police Chief David Darrin to the scene. When Darrin arrived, Hayes told him that his officers were harassing citizens. Hayes also told Darrin that he was a selectmen. Darrin told Bera to write Hayes a warning for speeding and for failure to have his license and registration in his possession. If Darrin had not intervened, Bera would have arrested Hayes for refusing to provide his driver's license and issued Hayes a citation for speeding. By citing his position as a selectman during his conversations with Chief Darrin and Officer Bera in order to secure for himself the unwarranted privilege of avoiding arrest and/or the issuance of a traffic citation, Hayes violated G.L. c. 268A, §23(b)(2). Section 23(b)(2) of the conflict law prohibits a municipal employee from using his position to obtain for himself an unwarranted privilege of substantial value not available to similarly situated individuals.

In the Matter of Paul Gaudette - Former Dracut Building Inspector Paul Gaudette was fined $2,000 for violating the conflict law by issuing permits for his own property and by acting as building inspector on matters of interest to the company which provided him with a loan to purchase the property. In a Disposition Agreement, Gaudette admitted that he violated G.L. c. 268A, §§19 and 23(b)(3). In July 1996, Gaudette and his wife purchased a lot on Diamond Drive in Dracut for $65,000 from Charles Kleczkowski of K&K Equipment, Inc. K&K Equipment, whose principals are Kleczkowski and his wife, develops properties in Dracut. The Gaudettes made a $1,000 deposit on the property and borrowed $64,000 from K&K Equipment secured by a 9.5% mortgage due in full in September 1996. On the due date, the Gaudettes and K&K Equipment amended the mortgage, making it due in full on or before the date of occupancy. At the same time, the Gaudettes paid K&K Equipment $50,000 toward the principal, leaving a principal balance due of $14,000. According to the Disposition Agreement, in August 1996, Gaudette submitted an application for a building permit for a new house at 42 Diamond Drive. In his capacity as building inspector, Gaudette reviewed and approved the application. Gaudette incorrectly set the permit fee, based on the square footage of the proposed

building, at $425 (it should have been $495); he signed the excavation and foundation permit; and he issued the building permit. Section 19 of the conflict law generally prohibits a municipal employee from officially participating in matters, such as issuing permits or establishing fees, in which he has a financial interest. In April 1997, K&K Equipment discharged the mortgage on the Diamond Drive property. The Gaudettes issued two personal checks to Kleczkowski in June 1997 for $9,000 and $5,000. They paid no interest on the loan. During the time Gaudette had his mortgage arrangement with K&K Equipment and after repaying the loan without interest, he acted as building inspector on at least 20 matters that were of significant interest to K&K. These included issuing building permits and approving final inspections for houses owned or developed by K&K Equipment or the Kleczkowskis. Section 23(b)(3) of the conflict law 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. The Disposition Agreement does not address any gratuity issues regarding whether Gaudette paid fair market value for his property or should have paid interest on the $64,000 loan. Those matters were under review by other government offices.

In the Matter of Norman Melanson - The Commission issued a Disposition Agreement in which Leominster Assessor Norman Melanson admitted violating the conflict law by accepting a loan of a $1,000 computer for use at his home by Vision Appraisal Technology, a company providing property assessment software and technical support to Leominster. Melanson paid a civil penalty of $500. According to the Disposition Agreement, Melanson admitted violating G.L. c. 268A, §23(b)(3) by accepting the computer for personal and assessor-related purposes, by failing to disclose the arrangement to anyone in his department, by keeping the computer for much longer than necessary to familiarize himself with the valuation software and by failing to return the computer until city officials made an issue of it. At the time he had the computer, Melanson, as an assessor, had participated and would be participating in several large contracts between the city and Vision Appraisal Technology. 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. Martin could have avoided violating §23(b)(3) by disclosing the relevant facts in writing to his appointing authority, the Mayor, prior to his taking any official action concerning Vision Appraisal Technology. Melanson, however, made no such disclosure.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY DOCKET NO. 580

IN THE MATTER
OF
ROBERT MUZIK

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Robert Muzik ("Muzik") 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 March 12, 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 Muzik. The Commission has concluded its inquiry and, on August 5, 1997, found reasonable cause to believe that Muzik violated G.L. c. 268A, §3.

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

1. Muzik was, during the time relevant, a limousine company owner who regularly used the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority's ("Steamship Authority") ferries to transport his limousine and his clients between Woods Hole and Martha's Vineyard.

2. The responsibility for loading vehicles onto ferries rests with the Steamship Authority terminal agent or assistant terminal agent on duty. That person, following United States Coast Guard regulations, determines the vehicle load configuration for a particular departure. Thus, the number of vehicles loaded onto a given ferry fluctuates depending on the size and weight of the vehicles, such as tractor-trailers, trucks, construction vehicles, buses, and large and small passenger vehicles. In most cases, the terminal agent or assistant terminal agent on duty can adjust the configuration to accommodate additional vehicles.

3. Ferry use greatly increases during the summer months. Customers with vehicles can secure reservations in advance for a specific departure date and time. Reservations for the summer usually sell out by mid-February. The number of reservations accepted per departure is limited due to uncertainty regarding the number of vehicles that will actually be allowed onto the ferry (due to vehicle size and weight differences). At the time relevant herein, passengers (with vehicles) without reservations during peak usage periods were allowed passage on a standby, first come-first-served basis, after passengers with reservations and those with special circumstances.[1]

During peak ferry usage, it was not uncommon for standby passengers to have to wait many hours to secure passage.[2]

4. During peak usage periods, Muzik would attempt to secure return trip reservations at the Woods Hole terminal by calling one of the assistant terminal agents directly, as opposed to calling the Steamship Authority reservations number. On at least some occasions, he could not secure a return trip reservation for his limousine. If a standby list was in effect, Muzik would either have to persuade the terminal agent or assistant terminal agent on duty to allow his limousine on the ferry as a special circumstance, or he would have to send his client on the ferry as a walk-on passenger while Muzik waited with the vehicle as a standby passenger, in which case Muzik would arrange for alternate transportation for the client when the ferry docked at Martha's Vineyard.

5. In June 1993, Muzik gave a $200.00 gift certificate to a Woods Hole assistant terminal agent and his wife. When Muzik did so, the assistant terminal agent had performed and was expected to continue to perform official acts regarding passage for steamship passengers and vehicles, including Muzik, his clients and limousine. Muzik had no private, social or business relationship with either the assistant terminal agent or his spouse.

6. The assistant terminal agent turned the gift certificate over to the Steamship Authority's general counsel, who returned the gift to Muzik with a letter warning Muzik that the gift violated the conflict of interest law.

7. In or about December 1995, Muzik sent another Woods Hole assistant terminal agent a Christmas card containing a $50.00 bill. When Muzik did so, the assistant terminal agent had performed, and was expected to continue to perform official acts regarding passage for steamship passengers, including Muzik, his clients and limousine. Muzik had no private, business or social relationship with this assistant terminal agent. Upon receiving this gratuity, the assistant terminal agent immediately turned it over to the Authority's general counsel.

8. Section 3(a) of G.L. c. 268A prohibits, otherwise than provided by law, the giving or offering of anything of substantial value to any public official for or because of any official act or acts performed or to be performed by such employee[3][4]

9. The $200.00 gift certificate and the $50.00 cash gratuity were items of substantial value.

10. The Steamship Authority assistant terminal

agents are public employees.

11. Muzik gave the $200.00 gift certificate and the $50.00 cash gratuity to these public employees for or because of an official act or acts performed or to be performed by those public employees. In doing so, Muzik violated §3(a).

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

(1) that Muzik pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268A, §3(a), and

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

DATE: January 20, 1999

[1/] Special circumstances usually involve medical circumstances or family emergencies.

[2/] The standby procedure was eliminated in 1997.

[3/] The Commission considers anything with a value of $50.00 or more to constitute "substantial value" for §3 purposes. *See, e.g., In re Scaccia*, 1996 SEC 838.

[4/] The Commission considers anything with a value of $50.00 or more to constitute "substantial value" for §3 purposes. *See, e.g., In re Scaccia*, 1996 SEC 838.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 581

IN THE MATTER OF C. SAMUEL SUTTER

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and C. Samuel Sutter ("Sutter") 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 February 10, 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 Sutter. The Commission has concluded its inquiry and, on July 22, 1998, found reasonable cause to believe that Sutter violated G.L. c. 268A.

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

1. Sutter was, during the time relevant, a Bristol County assistant district attorney ("ADA").[1/] As such, Sutter was a state employee as that term is defined in G.L. c. 268A, §1.

2. Casey & Thompson P.C. is a law firm practicing in Bristol County. John Casey ("Casey") and Bruce Thompson ("Thompson") are shareholders in the firm.[2/]

3. In December 1994, Sutter solicited legal advice from Casey concerning his recent separation from his wife.[3/] Between December 1994 and March 14, 1995, Sutter and Casey consulted on several occasions regarding this matter.

4. On March 14, 1995, Sutter as an ADA represented the Commonwealth regarding a motion to dismiss in the district court as to which Thompson represented the defendant.[4/]

5. As of March 14, 1995, Sutter was still consulting with Casey regarding the above-described personal matter, and he expected that the law firm of Casey & Thompson would represent him on that matter if it continued.[5/]

6. Sutter did not disclose to his appointing authority, the District Attorney ("the DA"), his private relationship with the law firm of Casey & Thompson.

7. General laws chapter 268A, §23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

8. By participating as an ADA in a matter in which the law firm of Casey & Thompson had an interest at a time when he had through his dealings with Casey a private relationship with Casey & Thompson in a personal matter, Sutter acted in a manner which would cause a reasonable person with knowledge of all the relevant circumstances to conclude that the attorneys at Casey &

Thompson could improperly influence Sutter or unduly enjoy his favor in the performance of Sutter's official duties, thereby violating G.L. c. 268A, §23(b)(3).[6/] [7/]

9. By way of mitigation, Sutter notes that on March 14, 1995, he was filling in in the district court, received several files scheduled for hearing or trial for that day for the first time on that morning, and had no prior knowledge that Thompson would be representing the defendant until shortly before the hearing began. According to Sutter, due to the time pressures of handling several cases that day on short notice and because he had been dealing only with Casey about his personal matter, it did not occur to him that his litigating a matter with Thompson would create an appearance problem.

The Commission is not unmindful of the difficulties faced by an ADA in district court session and does find these circumstances to be somewhat mitigating. Nevertheless, it concludes that he had the opportunity and obligation to inform the judge that he had a conflict, obtain a continuance for the purpose of disclosing the conflict to the District Attorney, and have the District Attorney decide who should handle the matter.[8/]

10. Sutter cooperated with the Commission's investigation.

In view of the foregoing violation of G.L. c. 268A by Sutter, the Commission has determined that the public interest would be served by the disposition of this matter without further civil penalty. In disposing of this matter by this disposition agreement, Sutter waives all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: January 20, 1999

[1/]From January 1994, to February 6, 1995, Sutter was the Supervisory ADA at the Attleboro District Court. On February 6, 1995, Sutter was transferred to Superior Court. He continued to appear in the Attleboro District Court to fill in for ADAs who were ill or on vacation, but a new Supervisory ADA was appointed for the Attleboro District Court.

[2/]The other major shareholder of the firm is not relevant to these proceedings.

[3/]They had no prior attorney-client relationship.

[4/]The defendant was being prosecuted for operating under the influence of alcohol. On February 28, 1995, Thompson filed a motion to dismiss the case on various grounds. On March 14, 1995, Sutter and Thompson engaged in an evidentiary hearing which involved presenting witnesses and making oral arguments regarding the motion. After the hearing, the judge took the matter under advisement. While the matter was under advisement, Sutter took steps so that the matter would be appealed in the event that the judge allowed the motion. The judge did allow the motion to dismiss, the Commonwealth did appeal, and the judge's decision was eventually reversed by the Appeals Court and the case was remanded back to the district court.

[5/]The law firm of Casey & Thompson did continue to represent Sutter. Sutter has paid for a substantial portion of these services and intends to pay the outstanding balance.

[6/]Section 23(b)(3) provides in relevant part: "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion."

[7/]There is no evidence to indicate that Sutter provided Casey & Thompson with any preferential treatment or that he conducted himself other than in a professional manner regarding the above described evidentiary hearing.

[8/]As a matter of public policy it is important that public officials not engage in activity which creates the appearance that their integrity has been undermined. In a recent decision and order, *In re Scaccia*, 1996 SEC 838, the Commission stated its position:

> "Section 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the [public employee or official] actually gave preferential treatment. The Legislature, in passing this standard of conduct, focused on the perceptions of the citizens of the community, not the perceptions of the players in the situation." *In re Hebert*, 1996 SEC 800. [I]n applying §23(b)(3) to a public employee, [the Commission] will evaluate whether, 'due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest.' *In re Flanagan*, 1996 SEC 757. See also *In re Antonelli*, 1982 SEC 101, 110 (evaluating precursor of §23(b)(3), Commission indicated major purpose of section to prohibit public employee from engaging in conduct which will raise questions over impartiality or credibility of his work). *Id.* at 848.

This policy concern is especially applicable to our criminal justice system where appearances of conflict of interest must be avoided if our citizens' confidence in the integrity of the system is to be maintained.

Jennie Caissie
c/o Attorney Michael V. Caplette
Three Bowlen Avenue
Southbridge, MA 01550-2455

PUBLIC ENFORCEMENT LETTER 99-3

Dear Ms. Caissie:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as an Oxford Board of Selectman ("BOS") member in a decision to issue an outdoor business permit to Gary Kettle ("Kettle") for a fruit stand while your family operated a competing outdoor fruit stand. Based on the staff's inquiry (discussed below), the Commission voted on

January 13, 1999, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §§19 and 23(b)(3).

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. Oxford covers 26.71 square miles with 81 miles of public roads. Oxford's population is 13,298.

2. You serve as an Oxford selectman, having been elected in May 1997.

3. Your immediate family[1] has owned and operated a fruit and vegetable stand at 233 Main Street in Oxford since 1995. Your family's business permit allows the stand to operate from July to December. Goods are sold off a truck and trailer parked at 233 Main Street.

4. On August 12, 1997, Kettle appeared before the BOS requesting an outdoor business permit to operate a fruit and vegetable stand on Charlton Street in Oxford. Kettle has not previously operated such a stand in Oxford. Kettle wanted to build a wooden fruit stand 20 feet by 24 feet, with a parking area of 300 feet by 50 feet. Kettle's business permit application states that his stand would operate from April to December. It would be approximately 2 ½ miles from your family's fruit stand.

5. According to the BOS minutes, you were significantly involved in the discussion concerning Kettle's application for this permit.[2]

6. The BOS approved Kettle's permit application. The vote was 3-0 with you abstaining and one BOS member absent.

7. You sent the following letter dated October 17, 1997, to the State Ethics Commission:

> An issue came before the Board of Selectmen regarding whether to issue Mr. Kettle a permit to build a fruitstand at a location in close proximity to a major river in Oxford. The Board of Selectmen voted to issue Mr. Kettle the permit. In lieu (sic) of the fact that I hold a fruitstand permit in Oxford and sell vegetables in the community, I did not vote on the issue when it came before the Board of Selectmen, as I believed it to be improper for me to take action on the matter.[3]

II. Discussion

As a selectman, you are a municipal employee subject to the conflict of interest law, G.L. c. 268A.[4] You are subject to c. 268A generally and, in particular, to §19[5] which prohibits a municipal employee from participating[6] in particular matters[7] in which she or a member of her immediate family[8] has a financial interest.[9] The concern of this section is that the objectivity and integrity of municipal employees can be compromised if they act on matters affecting the financial interests of people or businesses with whom they are closely related. The Massachusetts Supreme Judicial Court has determined that participation involves more than just voting, and includes any significant involvement in a discussion leading up to a vote. *See Graham v. McGrail*, 370 Mass. 133, 138 (1976). In that case, the Court advised, "The wise course for one who is disqualified from all participation is to leave the room." Id.

Your family's fruit stand business and Kettle's proposed fruit stand would be competitors. Both are in the same business (selling fruits and vegetables) and operate in a small town. The stands are 2 ½ miles away from each other and operate basically at the same times during the year. Furthermore, in your above-described October 17, 1997 letter, you in effect concede that it would have been improper for you to vote on Kettle's permit because you would be competitors.

The decision to approve Kettle's application for a permit to operate a fruit and vegetable stand was a particular matter. Because Kettle's proposed business, if approved, would compete with your family's fruit stand, you and/or your immediate family had a financial interest in this decision. You were aware of that financial interest. Your involvement in this decision was substantial because you contributed significantly to the discussion leading up to the vote. Therefore, by participating in the discussion concerning Kettle's application for an outdoor permit to operate a fruit and vegetable stand, there is reasonable cause that you violated §19.

In the future, to avoid violating §19, you should completely abstain from any involvement in a particular matter in which your family's business has a financial interest (either directly, or indirectly through actions affecting a competitor) and you should consider leaving the room if a group discussion is involved, as the Court advised in *Graham v. McGrail, supra.*[10]

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 it believes the public interest would best be served by doing so.

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: February 25, 1999

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[1] Your family has owned and operated the fruit stand for a number of years. The permit has either been in your and/or your father's name.

[2] Examples of your involvement are:

> "Selectman Caissie asked how close the fruit stand was to the river."
>
> "Selectman Caissie asked if this [the fruit stand being only 16 feet from the river bank] was a pollution issue."
>
> "Selectman Caissie said that she had a concern about people pulling out around that corner on Charlton Street."
>
> "Chairman Saad said that he would entertain a Motion to grant the Outdoor Business Permit. Selectman Caissie asked that the Board's vote be contingent upon the Conservation Commission's decision."

[3] There are four fruit stand permits in Oxford (this number includes your and Kettle's businesses).

[4] A copy of G.L. c. 268A is attached for your information.

[5] Section 19 provides in pertinent part,

> (a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter 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, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

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

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

[8] "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters.

[9] "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*.

[10] Your actions also raise concerns under §23. Section 23 is the so called "code of conduct" section of the conflict of interest. The subpart of that section which appears to apply to your situation is §23(b)(3). 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, with knowledge of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy her favor in the performance of official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence. 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 public employee discloses in writing to her appointing authority (or if she does not have an appointing authority, discloses in a manner which is public in nature (such as filing a written disclosure with the town clerk)) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority or town clerk (for elected employees) must maintain that written disclosure as a public record.

Even if for some reason you and/or your immediate family did not have a financial interest in the Kettle permit particular matter which triggered a §19 problem, there would still be reasonable cause to believe that you violated §23(b)(3). That is, by participating in matters affecting a competitor's permit application, you acted in a manner which would cause a reasonable person to conclude that you might be unduly influenced by your family's business interests in the performance of your official selectman duties. Your having a competitor relationship with Kettle would give you a bias as to Kettle's application. It would not matter whether, in fact, you acted on or were affected by that bias. The mere fact that a reasonable person could conclude that you had the bias would be enough to create an appearance problem under §23(b)(3). Consequently, if there had not been a §19 bar to your participating, as discussed above, you still should not have participated under §23(b)(3) unless you first made a written §23(b)(3) disclosure. Again, on the present facts, §19 would appear to have applied for the reasons discussed above.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 582

IN THE MATTER
OF
DAVID ELLIS

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and David Ellis ("Ellis") enter into this Disposition Agreement pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j). On February 10, 1998, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by Ellis. The Commission concluded that inquiry, and on December 16, 1998, found reasonable cause to believe that Ellis violated G.L. c. 268A, §§23(b)(2) and 23(b)(3).

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

1. From January 1994 until the present, Ellis has served as a ward councilor on the City Council ("the Council") in the City of Lynn. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. The Council serves as the licensing authority in Lynn. As such, it has the ability to issue, suspend and revoke business licenses.

3. Commercial Auto Body is an auto body repair shop in Lynn, located at 165 Commercial Street. Commercial Auto Body is owned and operated by Emilio Rosario ("Rosario").

4. Commercial Auto Body is in Ellis' ward.

5. As a city councillor Ellis would occasionally conduct site visits at Commercial Auto Body.

6. At the November 12, 1996 Council meeting, Ellis requested a public hearing to show cause why Commercial Auto Body's license should not be revoked.[1] The reason for the revocation according to Ellis, was that Rosario was not complying with certain parking restrictions.

7. On December 17, 1996, the Council held a hearing concerning Commercial Auto Body's license. Rosario and his attorney appeared to represent Commercial Auto Body. No one appeared to make a case for closing Rosario down. Ellis moved to table the action against Rosario on the condition that Rosario agree not to park vehicles on Commercial Street, not do any auto repair work on the sidewalk and post "No Parking" signs on Commercial Street. The vote to table was 10 yes and 1 no with Ellis voting in favor of the motion.

8. In 1997, Ellis was running for re-election as the ward councilor. The election was to be in September 1997. Ellis' opponent in the election was Peter Capano ("Capano").

9. Sometime in early August 1997, Ellis approached Rosario and asked if he could place his campaign signs on Rosario's Commercial Auto Body property. Rosario agreed and three days later, Ellis put up four of his campaign signs on the side of Rosario's building.

10. Shortly thereafter, Capano came to Rosario's shop and asked if he could put up some of his campaign signs on that same building. Rosario wanted to remain neutral and therefore agreed to also let Capano put up his campaign signs. Capano put up his campaign signs next to Ellis' campaign signs on Rosario's building.

11. Shortly thereafter, Ellis went to Commercial Auto Body and began tearing down Capano's campaign signs. Rosario asked Ellis what he was doing. Ellis asked Rosario who he was supporting in the campaign; either him (Ellis) or his opponent (Capano). Rosario stated that he just wanted to run his business and that he did not care who put signs on his building. Ellis told Rosario that he was the city councilor for that ward and that one of the cars parked in front of Rosario's business was parked illegally and he (Ellis) could have the car towed. Rosario then told Ellis he could take down Capano's signs. As Ellis proceeded to take down his opponent's signs, Ellis reminded Rosario of the December 1996 incident involving Rosario's license to operate and indicated to Rosario that he (Ellis) had assisted him in resolving that matter.

12. Rosario feared retaliation from Ellis if he did not allow Ellis to remove the signs.

13. Ellis asserts that he did not intend for his comments to cause Rosario to fear retaliation. Ellis now understands how his statements could have been so interpreted by Rosario, although he did not mean for this to occur.

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

15. Ellis' exploiting as an elected public official

his official regulatory power to, in effect, coerce Rosario to take down Ellis' opponent's campaign signs was a use by Ellis of his official city councilor position.

16. Ellis' use of his official position to effect the removal of his opponent's campaign signs in a political election was an unwarranted privilege.

17. The use of signs in a political campaign as described above is of "substantial value."[2/] The same observation would seem to apply to such campaign signs placed on the walls of small businesses for public view. Accordingly, a public official's use of his official position to effect the removal of his opponent's campaign signs is an unwarranted privilege of substantial value.

18. The unwarranted privilege which Ellis obtained for himself was not available to "similarly situated individuals."

19. Thus, by using his position as a city councilor to get Rosario to take down his opponent's campaign signs, Ellis knowingly or with reason to know used his councilor position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of §23(b)(2).

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

(1) that Ellis pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for the violation of G.L. c. 268A, §§23(b)(2); and

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

DATE: March 16, 1999

[1/] As a ward councilor, Ellis could request a hearing to revoke a business license in his ward at any time. A majority Council vote is necessary to revoke a business license.

[2/] A campaign sign advocating the election of a certain candidate posted in public view potentially increases the likelihood that that candidate will be elected. Similarly, the lack of such campaign signs backing the candidate's opponent is of benefit to that candidate. Consequently, in the Commission's view, such postings (or the prevention of such postings by an opponent) involve items of substantial intangible value within the meaning of §23(b)(2). As the Supreme Court said in *In City of Ladue v. Gilleo*, 114 S.Ct. 2038, 2045 (1994), as to residential signs in political campaigns:

> [S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate - an impact that money can't buy. [fn. 12, p. 2045 citing D. Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (rev. ed. 1981).

The same observation would seem to aply to such campaign signs placed on the walls of small businesses for public view.

Frank Martin
c/o Michael Early, Esq.
114 Washington Street, Rear
Haverhill, MA 01832

PUBLIC ENFORCEMENT LETTER 99-4

Dear Mr. Martin:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, G.L. c. 268A, by receiving compensation from or acting as an agent for private parties in relation to City of Lawrence Fire Department ("Fire Department") matters. Based on the staff's inquiry (discussed below), the Commission voted on November 18, 1998, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c). The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You have been a full-time Lawrence firefighter for approximately 13 years. You currently earn $50,000 per year as a firefighter.

2. Since 1993 you have done business as Martin Oil Burner Service & Underground Tank Removal, located at 15 North Boylston, Lawrence, Massachusetts. In this business you install and service oil burners and remove fuel storage tanks.

3. The Lawrence Fire Department requires permits for the removal of any tank which has been used for

the storage of flammable materials. These typically involve underground tanks such as full storage tanks, as well as tanks located in buildings such as basement oil heating tanks.[1]

4. The Fire Department conducts on-site inspections when underground tanks are removed. The Fire Department acts as an extra set of eyes for the state DEP by watching for any signs of soil contamination and insuring that the tank is empty. No inspection occurs with basement tanks. As to both underground and basement tanks, permits are held open until the property owner or contractor returns the permit with a receipt evidencing proper disposal of the tank. As to underground removals, because of the concern regarding soil contamination, frequently, an environmental consultant is hired to observe the removal and file a report with the property owner. In the event of a determination of soil contamination, the property owner has 48 hours to notify the DEP.

5. You were paid in connection with 29 tank removals in the City of Lawrence between March 1994 and April 1997.[2] The Fire Department issued a permit for each such removal. Of those 29 permits, 26 involved you pulling the permit from the Fire Department.[3] Fourteen of those 29 involved underground tank removals, and the remainder involved above-ground tanks such as basement heating fuel tanks. You were paid anywhere from several hundred to several thousand dollars for each job depending on the circumstances.

6. We uncovered no evidence to suggest you used your Fire Department position to benefit your private business, or that customers chose you because of your Fire Department position.[4]

II. Discussion

As a City of Lawrence firefighter you are a municipal employee as that term is defined in G.L. c. 268A, §1. General Laws c. 268A, §17(a) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from receiving compensation from anyone other than the city in relation to any particular matter in which the city is a party or has a direct and substantial interest. General Laws c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which the city is a party or has a direct and substantial interest.

Decisions to issue permits for tank removals are particular matters.[5] The city has a direct and substantial interest in these matters because those permits involve activities which can potentially significantly affect the public health and safety. You received compensation for the tank removal work you did in relation to a permit on each of the 29 occasions described above. Furthermore, you acted as an agent for your clients in each of the 26 occasions when you pulled the permit.

By accepting payment for tank removal work, you received compensation from someone other than the City of Lawrence in relation to particular matters in which the city had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(a). In addition, by "pulling" permits on 26 occasions, you acted as agent for someone other than the city in relation to particular matters in which the city had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(c). *See, e.g., Townsend, Jr., 1986 SEC 276* (disposition agreement in which Conservation Commission member pays $1,000 fine for violating §17(a) and (c) by acting as a paid engineer on behalf of private client in relation to Conservation Commission matters.)

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 it believes there is need for further education on this issue.[6]

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: April 21, 1999

[1] General Laws c. 148, §38A prohibits any "underground tank" which has been used for the keeping or storage of flammable or combustible fluids from being removed unless a permit for such removal has first been obtained from the state fire marshal or the official designated by him to grant permits in the city where the tank is located. Section 38A goes on to provide that any violation of any regulation adopted by the Massachusetts Board of Fire Prevention Regulations with respect to a tank removal shall be presumed to constitute irreparable harm to the public health, safety, welfare and the environment. In your view, c. 148, §38A does not apply to basement tanks. Both the Department of Public Safety Underground Storage Tank Department and the Lawrence Fire Department, however, take the position that c. 148, §38A does apply to basement tanks.

[2] March 1994 was the first month in which we found a record for such work.

[3] As to the three instances in which you did not pull the permit, the homeowner pulled one, and a licensed site professional who hired you to remove the tanks pulled the other two.

[4] Your Fire Department duties do not include any involvement in issuing these tank removal permits or conducting the inspections.

[5] No municipal 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 city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

[6] Although this is the first time the Commission has brought a public enforcement action regarding "pulling" permits or work done in connection with those permits, the Commission has previously stated through its published opinions that such actions violate §17. *See, e.g., EC-COI-92-1, 88-9 and 87-31.* Moreover, it should be noted that the Legislature has apparently endorsed the Commission's position by carving out certain exemptions which allow public inspectors to do work in relation to permits issued by their own departments provided they do not inspect that work. *See, e.g., G.L. c. 166, §32A* (a wiring inspector is also an electrician may perform electric work in his own town provided that someone else inspects that work). There are similar schemes for board of health inspectors (G.L. c.111, §26(g)), building inspectors (G.L. c. 143, §3(z)) and plumbing and gas inspectors (G.L. c. 142, §12). Significantly, in 1998 the Legislature amended §17 to add language expressly allowing a municipal employee to apply on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic permit and to allow that person to receive compensation in relation to that permit. "Unless such an employee is employed by or provide services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency." Through all of these actions the Legislature appears to have recognized that certain exemptions to §17 may be necessary to make local government workable, but unless one qualifies for such an exemption, a local public official who is also a contractor should not pull a permit or do work in relation to that permit. The most recent §17 amendment makes particularly clear that this should not happen where the public employee is employed by the permit granting agency, such as was the case in your situation. In light of the Commission's prior publications and what appears to be a legislative endorsement of its position, it now appears appropriate to begin bringing public enforcement cases as to these types of §17 violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY DOCKET NO. 585

IN THE MATTER OF HUGH K. HUBBARD

DISPOSITION AGREEMENT

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

On July 22, 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 Hubbard. The Commission has concluded its inquiry and, on April 21, 1999, by a majority vote, found reasonable cause to believe that Hubbard violated G.L. c. 268A.

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

1. Hubbard was, during the time relevant, a member of the Belchertown Water District Commission ("BWDC"). As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Hubbard has served on the BWDC since 1988.

2. The BWDC is an elected, three member board which oversees the operation of the Belchertown Water District ("District"). The BWDC meets monthly to review and approve bills and to authorize significant expenditures.

3. The commissioners sign the pay warrants. A minimum of two commissioners must sign a warrant before it can be paid.

4. In September 1994, the BWD commissioners appointed Hubbard's wife, Carol Hubbard ("Carol"), clerk treasurer. Carol receives an annual salary of approximately $10,000.[1]

5. Carol is supervised by the BWD commissioners including her husband, Hubbard.[2]

6. Carol is paid monthly. The BWD commissioners, including Hubbard, approve the weekly warrant with her monthly salary on it.

7. The number of hours Carol works per week varies with the time of year and the amount of work. During the annual meeting and any period of heavy BWD construction activity, it may take her up to 25 hours per week to prepare the invoices, warrants, and payments. During slower times, she may only need three hours per week to get all of her work done. No one other than the BWD commissioners certifies the number of hours Carol works each month. By approving the weekly warrant with her monthly salary on it, the BWD commissioners, in effect, certify that she has satisfactorily performed her duties.[3]

7. During the period of 1994 through 1998, Hubbard as a BWD Commissioner approved weekly warrants authorizing his wife to receive a total of $45,000 in salary payments.

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

9. The decisions by the BWDC to approve the pay warrants were particular matters.[5]

10. Because Hubbard was substantially and personally involved in making the foregoing decisions, he participated[6] in those particular matters.[7]

11. Each such decision involved a Hubbard immediate family member, Hubbard's wife. Hubbard's wife had a financial interest in those particular matters. Hubbard was, of course, aware of her financial interest in these decisions at the time he so participated.

12. Therefore, by participating in the payment decisions as described above, Hubbard repeatedly participated in particular matters as a BWDC member in which to his knowledge his wife had a financial interest, thereby violating §19.

13. Hubbard did not realize that signing the pay warrants certifying the hours worked and authorizing payment of his wife's salary violated c. 268A.[8]

In view of the foregoing violation of G.L. c. 268A by Hubbard, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings.[9] In disposing of this matter by this disposition agreement, Hubbard waives all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: May 3, 1999

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[1] Town meeting votes on Carol's salary; it has ranged between $9,000 to $10,200.

[2] The BWD auditor also conducts an annual audit to determine if Carol is performing all of her responsibilities.

[3] *See* General Laws, c. 41, §56 which provides: "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 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 as the case may be..."

[4] None of the exceptions applies here.

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

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

[7] General Laws, c. 41, §56 makes the board approval significant.

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

[9] The Commission chose not to impose a fine because it believes there is a wide-spread impression that it is permissible for a public employee to approve routine payroll warrants for family members. This impression is incorrect, although the existence of the misapprehension is somewhat mitigating. Payroll warrants, even those that are routine in nature (i.e., a standard set amount) are still particular matters in which the payee (the immediate family member) has a financial interest. Moreover, the Commission wants to emphasize that it does not consider a public employee's authorizing such warrants under these circumstances to be unimportant, however, routine it may be. *See EC-COI-98-5*, and in particular, G.L. c. 41, §56 cited therein which requires board members to certify that services have been performed and should be paid for. This certification was particularly important in Hubbard's situation where there was no department head's approval other than the board's (although as indicated in *EC-COI-98-5*, a board's certification pursuant to c. 41, §56 is significant even if it comes after a department head's approval.).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 586

IN THE MATTER
OF
HARRY L. BROUGHAM

DISPOSITION AGREEMENT

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

On July 22, 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 Brougham. The Commission has concluded its inquiry and, on April 21, 1999, by a majority vote, found reasonable cause to believe that Brougham violated G.L. c. 268A.

The Commission and Brougham now agree to

the following findings of fact and conclusions of law:

1. Brougham was, during the time relevant, a member of the Belchertown Water District Commission ("BWDC"). As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1(g). Brougham has served on the BWDC since 1958.

2. The BWDC is an elected, three member board which oversees the operation of the Belchertown Water District ("District"). The BWDC meets monthly to review and approve bills and to authorize significant expenditures.

3. The BWD commissioners appoint a full-time paid superintendent. The superintendent oversees the day-to-day operation of the District Water Department.

4. The BWD commissioners authorized the BWD superintendent to contract with vendors for any emergency repairs,[1] and for routine maintenance jobs under $1000, without first getting the approval of the commissioners.[2] The superintendent is responsible for certifying that the work performed by the contractors was completed satisfactorily. The commissioners do not inspect the contractor's work. The commissioners do, however, sign the weekly pay warrants authorizing the treasurer to pay the contractors hired by the superintendent. A minimum of two commissioners must sign the warrant before it can be paid. In addition, G.L. c. 41, §56 gives a board responsibility for determining that warrants submitted for payment are correct and that the work was done.[3]

5. M. Brougham Excavating is a sole proprietorship owned by Brougham's son, Mickey. Brougham does not have a financial interest in the business.

6. Between 1994 and 1997, M. Brougham Excavating performed work totaling $34,470 for the District. During this time period, Brougham, as a BWD commissioner, signed 25 warrants approving a total of $17,350 in payments for bills where M. Brougham Excavating was the payee.[4]

7. Except as otherwise permitted in that section,[5] G.L. c 268A, §19 in relevant part prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he or an immediate family member has a financial interest.

8. The decisions by the BWDC to approve bills from M. Brougham Excavating were all particular matters.[6]

9. Because Brougham was substantially and personally involved in making the foregoing decisions, he participated[7] in those particular matters.

10. Each such decision involved a company owned by Brougham's son, an immediate family member. Brougham's son had a financial interest in those particular matters. Brougham was, of course, aware of those financial interests at the time he so participated.

11. Therefore, by participating in the payment decisions as described above, Brougham repeatedly participated in particular matters as a BWDC member in which to his knowledge his son had a financial interest, thereby violating §19.

12. Brougham did not realize that signing the pay warrants violated c. 268A.[8]

In view of the foregoing violation of G.L. c. 268A by Brougham, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings.[9] In disposing of this matter by this disposition agreement, Brougham waives all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: May 3, 1999

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[1] The superintendent does not need the Commissioners' approval for contracts for emergency repairs regardless of the price.

[2] For scheduled maintenance work over $1000 and large projects, the superintendent must obtain estimates from three bidders which he submits to the commissioners.

[3] General Laws, c. 41, §56 states: "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 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 as the case may be..."

[4] The District superintendent had certified that the work in relation to each bill had been satisfactorily performed.

[5] None of the exceptions applies here.

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

[7] "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).

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

[9] The Commission chose not to impose a fine because it found somewhat mitigating that Brougham's action took place after the appropriate department head had certified the work was done satisfactorily. Even so, the Commission wants to emphasize that it does not consider a board's actions in authorizing warrants under these circumstances to be a mere "rubber stamping" of the department head's approval. Instead, G.L. c. 41, §56 requires board members to exercise independent responsibility in approving such bills. In the Commission's view, such action is significant (*see EC-COI-98-5*).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 591

IN THE MATTER OF SYLVIA KILLION

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Sylvia Killion ("Killion") 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 February 10, 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 Killion. The Commission has concluded its inquiry and, on September 23, 1998, found reasonable cause to believe that Killion violated G.L. c. 268A.

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

1. Killion was, during the time here relevant, the Department of Mental Health ("DMH") Southeastern ("SE") Area Management Information Systems ("MIS") director. As such, Killion was a state employee as that term is defined in G.L. c. 268A, §1.

2. As the DMH SE MIS director, Killion was responsible for all the computer hardware and software issues in the region. In particular, Killion supervised a wide area network ("WAN") covering the entire region. Her office was in the Brockton Multi-Service Center, however, she also visited the various outlying facilities to deal with MIS issues.

3. Killion is a Bargaining Unit 6 employee. She is paid on an hourly basis.

4. John P. Sullivan is the DMH SE Area director. As such, Sullivan is responsible for all DMH personnel and facilities in that region. Sullivan was Killion's supervisor and she reported directly to him.

5. Sullivan and Killion did not know one another when she transferred to DMH from the Executive Office of Administration & Finance, but their close working relationship at DMH developed into a close personal friendship extending outside the office. It extended as well to their respective families. The friendship of the families was known to others within the DMH SE Area office.

6. Sullivan's policy for the SE Area required full justification for overtime requests and set specific criteria that had to be met for each period of overtime requested.

7. Between February 11, 1996, and June 7, 1997, Sullivan authorized Killion to work 528 hours of overtime, mostly in 10 hour per week increments. Sullivan signed and authorized all 53 of Killion's overtime slips as the program manager.[1]

8. In FY 96 Killion's overtime pay rate was $33.53/hour. In FY 97 her overtime pay rate was $38.94/hour. Ten hours of overtime each week meant an extra $389.40 each week in her check or an extra $20,284.00 per year.

9. During this same period of time when Killion individually received 678 hours of overtime, all other MIS staff employees combined received a total of 60.5 hours.

10. Killion failed to work a significant number of the overtime hours for which she received compensation.[2]

11. Killion was authorized to work the following flextime schedule: Monday through Wednesday 8:00 a.m. to 5:00 p.m., Thursday 2:00 p.m. to 11:00 p.m. and six hours Friday at home.[3] In fact, Killion usually arrived at work between 9:00 and 9:30 a.m. on Monday through Wednesday, and between 3:30 and 4:00 p.m. on Thursdays. Killion left work almost every Thursday night between 9:30 and 10:00 p.m..

12. Of the 1,100 employees in the SE Area, less than 10 are authorized flextime. Of the people authorized flextime, Killion is the only one allowed to work at home.

13. Killion did not work a significant number of the flextime hours for which she received compensation.

14. In April 1998, Killion resigned from her position.

15. Section 23(b)(2) G.L. c. 268A prohibits a municipal employee from knowingly or with reason to know using or attempting to use her position to obtain for herself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

16. Killion used her position as MIS director to receive compensation for overtime and flextime hours that she did not work.

17. This use of position resulted in Killion obtaining the unwarranted privilege of receiving compensation for hours she did not work.

18. The compensation she received for the hours not worked exceeded $50. Therefore, the privilege was of substantial value.[4]

19. The privilege which Killion received was not available to similarly situated individuals.

20. Thus, by receiving $50 or more in compensation for overtime and flextime hours that she did not work, Killion knowingly used her MIS director position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of §23(b)(2).

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

(1) that Killion pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for the violation of G.L. c. 268A, §23(b)(2); and

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

DATE: August 16, 1999

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[1]DMH was only able to locate 53 overtime slips for Killion for the period February 11, 1996 to June 7, 1997. These 53 slips totaled 528 hours of overtime. The payroll records for this 69 week period, however, indicate that Killion was paid for 678 hours of overtime.

[2]Given the absence of accurate records, it is now impossible to approximate how many of these hours were not worked.

[3]Killion was not required to nor did she document the flextime at home hours.

[4]The Commission defines "substantial value" as anything with a value of $50. *See Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY DOCKET NO. 590

IN THE MATTER OF JOHN P. SULLIVAN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and John P. Sullivan ("Sullivan") 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 February 10, 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 Sullivan. The Commission has concluded its inquiry and, on September 23,1998, found reasonable cause to believe that Sullivan violated G.L. c. 268A.

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

1. Sullivan is the Department of Mental Health ("DMH") Southeastern ("SE") Area director. As such, Sullivan is a state employee as that term is defined in G.L. c. 268A, §1.

2. As the DMH SE Area director, Sullivan is the manager responsible for all DMH personnel and facilities in that region.

3. Sylvia Killion ("Killion") was, during the time here relevant, the DMH SE Area Management Information Systems ("MIS") director.

4. As the DMH SE MIS director, Killion was responsible for all the computer hardware and software issues in the region. In particular, Killion supervised a wide area network ("WAN") covering the entire region. Her office was in the Brockton Multi-Service Center, however, she also visited the various outlying facilities to deal with MIS issues.

5. Sullivan and Killion did not know one another when she transferred to DMH from the Executive Office of Administration & Finance, but their close working relationship at DMH developed into a close personal

friendship extending outside the office. It extended as well to their respective families. The friendship of the families was known to others within the DMH SE Area office. Sullivan did not disclose this friendship in writing to his own appointing authority prior to his acting on personnel matters affecting Killion.

6. Killion was employed in a position covered by the Unit Six collective bargaining agreement between the Commonwealth of Massachusetts and the National Association of Government Employees. She was paid on an hourly basis. Sullivan was her supervisor at all times relevant to this matter.

7. Overtime was covered by Section 7.2 of the Collective Bargaining Agreement for Unit 6. It provides:

> H. Overtime shall be distributed as equitably and impartially as practicable among persons in each work location who ordinarily perform such related work in the normal course of their workweek. Department heads and union representatives at each location shall work out procedures for implementing this policy of distributing overtime work.

8. DMH's policy for the SE Area required full justification for overtime requests and set specific criteria that had to be met for each period of overtime requested.

9. Between February 11, 1996, and June 7, 1997, DMH's available records show Sullivan authorized Killion to work 528 hours of overtime, mostly in 10 hour per week increments. Much of this overtime work was authorized to be done on weekends at home. Sullivan signed and authorized all 53 of Killion's overtime slips as the program manager.[1]

10. On at least 24 occasions, Killion's overtime slips lack an articulation of reasons for the overtime, contrary to DMH policy.[2]

11. During this same period of time when DMH payroll records indicate that Killion individually received 678 hours of overtime pay, all other SE Area MIS staff employees combined received a total of 60.5 hours, according to DMH payroll records.

12. There is no evidence before the Commission that Sullivan, who was the department head at the Brockton location, attempted to work out a procedure for more equitably distributing overtime work among SE Area MIS Staff, as required by Section 7.2H of the Collective Bargaining Agreement.

13. In FY 96 Killion's overtime pay rate was $33.53/hour. In FY 97 her overtime pay rate was $38.94/hour. Ten hours of overtime each week meant an extra $389.40 each week in her check or an extra $20,284.00 per year.

14. Killion has acknowledged in a disposition agreement with the Commission, *In re Killion*, 1999 SEC 936 that she failed to work a significant number of the overtime hours for which she received compensation.[3]

15. Killion was authorized to work the following flextime schedule: Monday through Wednesday 8:00 a.m. to 5:00 p.m., Thursday 2:00 p.m. to 11:00 p.m. and six hours Friday at home. In her disposition agreement Killion also acknowledges (a) that she usually arrived at work between 9:00 and 9:30 a.m. on Monday through Wednesday, and between 3:30 and 4:00 p.m. on Thursday, and (b) Killion left work almost every Thursday night between 9:30 and 10:00 p.m.

16. Killion was not required to document any work she did at home.

17. Killion has acknowledged in a disposition agreement with the Commission, *In re Killion*, 1999 SEC 936 that she did not work a significant number of the flextime hours for which she received compensation.

18. As Killion's supervisor, Sullivan had reason to know that Killion was not performing all the overtime and/or flextime hours for which she received compensation. This conclusion is based on the following: (1) Sullivan provided Killion with virtually all of the DMH SE area overtime, yet there was no particular increase in her duties to justify that extent of overtime; (2) in violation of Sullivan's own policy, Sullivan authorized Killion to perform significant amounts of overtime without any preauthorization justification; (3) Sullivan did not require nor did Killion offer later justification for her overtime hours; and (4) Killion's family commitments, of which Sullivan was aware, would make it difficult for her to work any significant overtime and especially not 678 hours during the time described above.

19. In April 1998, Killion resigned from her position.

20. Section 23(b)(2) G.L. c. 268A prohibits a public employee from knowingly or with reason to know using or attempting to use his position to obtain for himself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

21. Sullivan used his position as DMH SE Area director to authorize Killion to receive compensation for overtime and flextime hours, even though, as set forth above, Sullivan had reason to know Killion did not work all the hours for which she received compensation.

22. This use of position resulted in Killion obtaining the unwarranted privilege of receiving compensation for hours she now acknowledges she did not work.

23. The compensation she received for the hours she now acknowledges she did not work exceeded $50. Therefore, the privilege was of substantial value.[3]

24. The privilege which Killion received was not available to similarly situated individuals.

25. Thus, by authorizing Killion to receive $50 or more in compensation for overtime and flextime hours that Sullivan had reason to know that she did not work, Sullivan used his DMH SE Area director position to obtain an unwarranted privilege of substantial value for Killion not properly available to other similarly situated individuals, thereby violating §23(b)(2).

26. General laws chapter 268A, §23(b)(3) prohibits a public employee from knowingly or with reason to know acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

27. By authorizing Killion to receive compensation for overtime and flextime hours in disproportion to other MIS staff and by not requiring documentation of such work, Sullivan with reason to know acted in a manner which would cause a reasonable person with knowledge of all the relevant circumstances to conclude that his private relationship with Killion improperly influenced him in the performance of his official duties, thereby violating G.L. c. 268A, §23(b)(3).

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

(1) that Sullivan pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §§23(b)(2) and 23(b)(3); and

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

DATE: August 16, 1999

[1] DMH was only able to locate 53 overtime slips for Killion for the period February 11, 1996 to June 7, 1997. These 53 slips totaled 528 hours of overtime. The payroll records for this 69 week period, however, indicate that Killion was paid for 678 hours of overtime.

[2] All but one of Killion's slips authorize 10 hours overtime per week.

[3] Given the absence of accurate records, it is now impossible to approximate how many of these hours were not worked.

[4] The Commission defines "substantial value" as anything with a value of $50. *See Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 592

IN THE MATTER OF MICHAEL J. SWEENEY

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Michael J. Sweeney ("Sweeney") 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 December 16, 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 Sweeney. The Commission has concluded its inquiry and, on May 12, 1999, found reasonable cause to believe that Sweeney violated G.L. c. 268A.

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

1. Sweeney is the fire chief for the town of Blackstone, a position he has held for over seven years. As such, he is a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In addition to his duties as fire chief, Sweeney is also in charge of supervising the town's ambulance service. His appointing authority is the town administrator.

3. Bert's Body Works, Inc. ("Bert's") is a Blackstone business that specializes in repairing and refurbishing ambulances. It is owned by Sweeney's sister Roberta and her husband Lucien Rainville. Roberta is named as the corporate president and works for Bert's on a part-time basis as bookkeeper. Lucien is primarily responsible for the day-to-day operations of Bert's.

4. In spring 1996, the town of Blackstone decided to refurbish its 1988 ambulance by remounting it on a new chassis and installing new equipment. Town Meeting approved a transfer of $60,000 from the ambulance

services account to pay for the work. The cost of a new ambulance would have been about $100,000.

5. Sweeney and the town administrator put together the bid package to request proposals on refurbishing the ambulance. The town administrator handled the legal and statutory requirements per G.L. c. 30B, and Sweeney handled that part of the bid package describing the vehicle and the scope of the work to be done. The town issued the request for proposals in June or July 1996.

6. Bert's and one other bidder submitted bids for the refurbishing work. On July 26, 1996, the town administrator opened the bids with Sweeney present. Bert's bid was for $58,086. The other bid was for $58,469, did not include transportation costs to and from the bidder's location in Georgia, and indicated the wrong chassis model for the remount.

7. The town administrator, who was going on vacation shortly after the bid opening date, left the bids with Sweeney to review. According to Sweeney's review, both bids were in compliance with the bid specifications, but Bert's bid was about $400 lower.

8. Sometime after the bid opening, Sweeney told Lucien Rainville, his brother-in-law, that the town was awarding the contract to Bert's. There was no formal confirmation from the town administrator and no contract executed at that time, although Sweeney subsequently issued a notice of award letter on Blackstone Fire department stationery.

9. At some point in August 1996, Sweeney realized that the bid specifications had not included Onspot chains for the vehicle,[1] even though he had intended to include those items as part of the refurbishing work. Sweeney discussed this matter with Lucien Rainville, who suggested that the town could save $1,886 on the contract by waiving the performance bond, and then use that money to pay for the Onspot chains.[2]

10. Sweeney then spoke with the town administrator, who was concerned that Bert's provide a financial instrument to guarantee the work. Eventually, the town administrator agreed to waive the performance bond requirement if Bert's submitted a bank check for $58,086.

11. Instead of a bank check, Sweeney received a regular company check from Bert's for $58,086. Sweeney did not require Bert's to provide a bank check as the town administrator had asked, and he did not deposit or cash the check provided. Thereafter, Bert's purchased and installed the Onspot chains for a total cost of $1,886. Thus, the total cost of the refurbishing work remained $58,086.

12. In late November or early December 1996, when Bert's was about to deliver the refurbished ambulance, the town administrator first learned that Sweeney and Lucien Rainville were related by marriage.

13. Bert's delivered the refurbished ambulance in mid-December 1996, and received payment from the town in the amount of $58,086. The town received valid service for its money.

14. According to Sweeney's testimony taken under oath, he knew that his brother-in-law owned Bert's and that his sister Roberta worked for the company, but he did not know that Roberta was a co-owner.

15. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.[3]

16. By participating in the award of the ambulance remounting contract to Bert's, his brother-in-law's company, Sweeney created an appearance that his involvement in awarding the contract may have been based in part on his brother-in-law's having a financial interest in the contract. In addition, by allowing Bert's to submit a regular company check in lieu of a performance bond, Sweeney created an appearance that his allowing Bert's to do so may have been based in part on his brother-in-law's having an interest in this arrangement. Therefore, by his above-described conduct, Sweeney acted in a manner which would cause a reasonable person knowing all of the relevant facts to conclude that Bert's and/or Rainville could unduly enjoy Sweeney's favor in the performance of his official duties.[4] Consequently, Sweeney violated §23(b)(3) on at least two occasions.[5]

17. Sweeney cooperated fully in this investigation.

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

(1) that Sweeney pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating G.L. c. 268A, §23(b)(3); and

(2) that Sweeney waive all rights to contest the findings of fact, conclusions of law and terms and condi-

tions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: September 21, 1999

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[1]Onspot chains are mounted to the underside of the vehicle and install on tires automatically at the push of a button, for better traction in snow.

[2]In fact, Bert's had provided the town with an alternative bid of $56,200 in its original proposal, indicating that the town could save $1,886 on the contract by waiving the performance bond requirement. Bert's usually provided this option in addition to its standard bid.

[3]Section 23(b)(3) further provides, "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion." Sweeney made no such disclosure.

[4]As the Commission stated in *In re Keverian*, 1990 SEC 460, 462, regarding situations where public officials have private dealings with people that they regulate in their official capacities, "And even if in fact no abuse occurs, the possibility that the public official may have taken unfair advantage of the situation can never be completely eliminated. Consequently, the appearance of impropriety remains." Here, too, for the same reason, the appearance of impropriety unavoidably arises when a fire chief participates in awarding a contract affecting a family member, even if in fact no actual abuse occurs.

[5]G.L. c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which *to his knowledge* an immediate family member has a financial interest. As a general rule, a municipal employee participating in the award of a contract to a company owned in part by his sister would violate §19. *See, e.g., In re Studenski*, Comm. Dkt. No. 211 (June 23, 1983). Here, Sweeney has asserted under oath that he did not know that his sister was a co-owner of Bert's, and no evidence to the contrary has been presented. *See In re Manca*, 1993 SEC 621.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 593

IN THE MATTER OF LUCIEN RAINVILLE

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Lucien Rainville ("Rainville") 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 December 16, 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 Rainville. The Commission has concluded its inquiry and, on May 12, 1999, found reasonable cause to believe that Rainville violated G.L. c. 268A.

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

1. Rainville was, during the time relevant, a part-time call firefighter in the town of Blackstone. As such, Rainville was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. In addition, Rainville and his wife own Bert's Body Works, Inc. ("Bert's"), a Blackstone business that specializes in repairing and refurbishing ambulances. Rainville is primarily responsible for the day-to-day operations of Bert's.

3. In spring 1996, the town of Blackstone decided to refurbish its 1988 ambulance by remounting it on a new chassis and installing new equipment. Town Meeting approved a transfer of $60,000 from the ambulance services account to pay for the work. The cost of a new ambulance would have been about $100,000.

4. Blackstone Fire Chief Michael Sweeney was in charge of the town's ambulance service.[5] Chief Sweeney and the town administrator put together the bid package to request proposals on refurbishing the ambulance. The town issued the request for proposals in June or July 1996.

5. Rainville, on behalf of Bert's, intended to bid on the contract, but before doing so, Rainville asked Chief Sweeney whether Bert's could bid in light of Rainville's status as a part-time call firefighter. Chief Sweeney checked with the town administrator, who responded that he did not think that Rainville's fire department affiliation would constitute a conflict of interest under G.L. c. 268A. Thereafter, Rainville prepared and submitted Bert's bid.

6. On July 26, 1996, the town administrator opened the two bids that were received. Bert's bid was for $58,086. The other bid was for $58,469, did not include transportation costs to and from the bidder's location in Georgia, and indicated the wrong chassis model for the remount.

7. Because Bert's bid was $400 lower and otherwise qualified, the town awarded the contract to Bert's. Rainville, on behalf of Bert's, requested written confirmation from the town, which Bert's received in October 1996.

8. At some point in August 1996, Chief Sweeney, who was supervising the refurbishing work on behalf of

the town, realized that the bid specifications had not included Onspot chains for the vehicle,[2] even though Chief Sweeney had intended to include those items as part of the refurbishing work. Chief Sweeney discussed this matter with Rainville, who suggested that the town could save $1,886 on the contract by waiving the performance bond, and then use that money to pay for the Onspot chains.[3]

9. The town administrator agreed to waive the performance bond requirement if Bert's submitted a bank check for $58,086. Instead of a bank check, Bert's provided a regular company check for $58,086, which Chief Sweeney accepted. Thereafter, Bert's purchased and installed the Onspot chains for a total cost of $1,886. Thus, the total cost of the refurbishing work remained $58,086.

10. In late November or early December 1996, when Bert's was about to deliver the refurbished ambulance, Rainville submitted an invoice for $58,086 to the town. Rainville also signed the contract for the work. On both occasions, Rainville was acting on behalf of Bert's.

11. Bert's delivered the refurbished ambulance in mid-December 1996, and received payment from the town in the amount of $58,086. The town received valid service for its money.

12. 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.

13. The contract to refurbish and remount the ambulance was a particular matter.

14. The town was a party to that contract and had a direct and substantial interest in the particular matter.

15. Rainville represented Bert's in all its dealings with the town in connection with the contract particular matter. Specifically, Rainville acted as Bert's agent in the following situations: submitting the bid for the work; requesting written confirmation of the contract award; negotiating certain changes (regarding the waiving of the performance bond to pay for the Onspot chains); issuing an invoice to the town; and signing the contract.

16. Thus, Rainville acted as agent for someone other than the town in connection with a particular matter in which the town was a party and had a direct and substantial interest. By doing so, Rainville violated §17(c).[4]

17. Rainville cooperated in this investigation.

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

(1) that Rainville pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §17(c); and

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

DATE: September 21, 1999

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[1] Sweeney and Rainville are related by marriage, but that fact is not relevant to this disposition agreement.

[2] Onspot chains are mounted to the underside of the vehicle and install on tires automatically at the push of a button, for better traction in snow.

[3] In fact, Bert's had provided the town with an alternative bid of $56,200 in its original proposal, indicating that the town could save $1,886 on the contract by waiving the performance bond requirement. Bert's usually provided this option in addition to its standard bid.

[4] In addition, Rainville's conduct raises issues under §20 of the conflict of interest law, which prohibits a municipal employee from having a financial interest, direct or indirect, in a contract made by a municipal agency of his own municipality, in which the municipality is an interested party and of which financial interest the employee has knowledge or reason to know. In this case, Rainville, as a co-owner of Bert's, had a financial interest in the contract to refurbish the ambulance, the town was a party to that contract, and Rainville knew of his own financial interest. Thus, it appears that Rainville violated §20. We find it somewhat mitigating, although not a complete defense, that Rainville raised the conflict of interest issue before bidding on the contract and received word from the town administrator that it was not a problem for him to bid. Moreover, this fact mitigates Rainville's §17(c) violations somewhat.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 594

IN THE MATTER OF CATHIE THOMAS

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Cathie Thomas ("Thomas") enter into this Disposi-

tion Agreement pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j).

On April 22, 1999, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by Thomas. The Commission concluded that inquiry and on June 23, 1999, found reasonable cause to believe that Thomas violated G.L. c. 268A, §23(b)(2).

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

1. From December 1985 to until the present, Thomas has been a Hampden Probate Court Clerk. As such, she is a state employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. Criminal offender record information ("CORI") is restricted by law; only certain individuals have lawful access to such information. Unlawful solicitation and/or possession of CORI records have potential civil and criminal penalties.[1]

3. CORI is accessed by a computer terminal in each courthouse. Court employees who have CORI access log on to the computer by entering a unique and confidential password.[2] Thomas was not CORI cleared and did not have CORI access.

4. Alberto Perez ("Perez") is a Hampden Superior Court probation officer. By virtue of his official position, Perez had access to CORI information.

5. Perez and Thomas knew each other only through their official positions as court employees; they are not friends.

6. In 1996, Thomas' uncle, Richard Thomas ("Richard"), was running for a compensated seat on the Hampden County Commission. One of his opponents was Abraham Kasparian, Jr. ("Kasparian").

7. On or about September 6, 1996, at the Hampden Court House where they both worked, Thomas asked Perez for Kasparian's CORI record. Thomas gave Perez Kasparian's name and date of birth.

8. Perez agreed to obtain Kasparian's CORI record for Thomas.

9. On September 6, 1996, Perez accessed and printed out a copy of Kasparian's CORI record.

10. After Perez printed a copy of Kasparian's CORI record, he gave it to Thomas at the Hampden Court House. Perez told Thomas that she could look at it but that she should throw it away after she was done. Perez stated that he gave Thomas the report only because she was a fellow court employee and he thought she was CORI-cleared. Perez stated that he would never have given the CORI report to a non-court employee.[3]

11. Thomas kept Kasparian's CORI record printout and thereafter gave it to her uncle on September 6, 1996. Richard gave Kasparian's CORI record to a newspaper reporter on September 9, 1996. It was then published.[4] [5]

12. Section 23(b)(2) of G.L. c. 268A prohibits a public employee from knowingly or with reason to know using or attempting to use her official position to obtain for herself or others an unwarranted privilege or exemption of substantial value which is not properly available to similarly situated individuals.

13. Thomas requested and received from fellow court employee Perez confidential CORI information concerning her uncle's political opponent. Thomas knew or had reason to know that but for her position as a court employee, Perez would not have accessed the information for her. Therefore, Thomas knew or had reason to know that she was using her official position to obtain this information.

14. Neither Thomas nor her uncle was authorized to have access to CORI records. Therefore, Thomas' use of her official position to obtain such information for herself and/or her uncle was an unwarranted privilege or exemption.

15. Thomas' obtaining access to Kasparian's CORI records was of substantial value because she gave it to her uncle knowing or with reason to know that he would use it to gain advantage in his political campaign for a county commissioner position.

16. The privilege of obtaining another's CORI record is not properly available to similarly situated individuals (all non-CORI-cleared individuals, which includes the general public).

17. Thus, by using her official position as a Hampden Probate Clerk to secure for herself and/or her uncle the unwarranted privilege of access to and use of her uncle's political opponent's CORI record, Thomas violated G.L. c. 268A, §23(b)(2).

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

(1) that Thomas pay to the Commission the sum of two thousand ($2,000.00) as a civil penalty for the

violation of G.L. c. 268A, §23(b)(2); and

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

DATE: September 23, 1999

[1/] *See* G.L. c. 6, §177 (imposes potential civil damages of not less than one hundred and not more than one thousand dollars for each violation plus costs) *and* c. 6, §178 (imposes potential criminal fines of not more than five thousand dollars or imprisonment in a jail or house of correction for not more than one year or both)

[2/] Many employees are cleared to see CORI information, but do not have a password and cannot access CORI records themselves.

[3/] Perez assumed Thomas was CORI-cleared because she worked in the court.

[4/] Richard plead guilty to unlawful possession of CORI information and paid a $5,000 fine.

[5/] The Commissioner of Probation suspended Perez without pay for 20 work days.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 595

IN THE MATTER OF WILLIAM R. SHEMETH, III

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and William R. Shemeth, ("Shemeth") 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 13, 1999, 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 Shemeth. The Commission has concluded its inquiry and, on September 15, 1999, found reasonable cause to believe that Shemeth violated G.L. c. 268A.

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

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

2. The selectmen are the appointing authority for the police officers.[2/] Shemeth, in his capacity as selectman, participates and/or is responsible for disciplinary action over police officers.

3. Shemeth is also an attorney engaged in the private practice of law.

4. In 1991, Shemeth contracted with the Worcester Bar Advocates ("WBA") to represent indigent defendants. Shemeth received compensation from the court for the legal services he provided.[3/]

5. Between 1994 and 1998, as a public defender, Shemeth was assigned approximately 50 cases involving defendants who were investigated and/ or arrested by Spencer police officers. Several of these cases resulted in Shemeth cross-examining Spencer police officers in court.

6. In July 1994, the WBA assigned Shemeth to represent the defendant in the case of *Commonwealth v. Andrews* (Docket no. 9469CR646). The defendant was charged with assault and battery on his girlfriend, being a disorderly person, two counts of assault and battery on a police officer[4/] and two counts of malicious destruction of property (damage done to a police cruiser estimated at a cost of $485.60 to repair).

7. Shemeth, in his representation of the defendant, submitted to the court a tender of plea to resolve the case. The tender suggested a plea arrangement which included restitution to the town for damage done to the police cruiser. The court, however, rejected this tender of plea.

8. Upon this rejection, the defendant elected to have the matter heard before a jury. As a result of a subsequent pretrial conference, a plea agreement was ultimately agreed upon by which the defendant was found guilty of all counts and ordered to serve two years in the house of correction. No restitution was requested or ordered.

9. 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[5/] in which the municipality is a party or has a direct and substantial interest.

10. 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.

11. As a judicial proceeding, the case of *Commonwealth v. Andrews* was a particular matter.

12. Where charges alleged in *Commonwealth v. Andrews* involved damage done to a police cruiser amounting to $485.60 and assault and battery on a police officer, the town had a direct and substantial interest in that criminal proceeding.[6]

13. Shemeth represented the defendant in *Commonwealth v. Andrews*. Thus, he acted as attorney for someone other than the town in connection with a particular matter in which the town had a direct and substantial interest. By doing so, Shemeth violated §17(c).

14. Shemeth received compensation for representing the defendant in *Commonwealth v. Andrews*. Thus, 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. By doing so, Shemeth violated §17(a).

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

(1) that Shemeth pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating G.L. c. 268A, §17(a) and (c);

(2) that Shemeth pay to the Town of Spencer the sum of four hundred eighty five dollars and sixty cents ($485.60) for the damages done to the police cruiser; and

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

DATE: September 28, 1999

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[1] Shemeth was elected to the Board of Selectmen in May 1994 and served until May 1998.

[2] In 1945, Spencer accepted c. 41, §97 (Police departments; establishment) and in 1980 accepted c. 41, §97A (Police departments; chief of police; powers and duties).

Section 97 provides:

> In towns which accept this section or have accepted corresponding provisions of earlier laws there shall be a police department established under the direction of the selectmen, who shall appoint a chief of police and such other police officers as they deem necessary, and fix their compensation in an amount not in the aggregate exceeding the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually or for a term of years not exceeding three years, as the selectmen shall determine, and the selectmen may remove such chief or other officers for cause at any time during such appointment after a hearing.

[3] In 1998, Shemeth decided not to renew his contract with the WBA because of possible conflicts of interest.

[4] No permanent or temporary disability claims were filed by any police officer for any alleged injuries received in connection with the above-described assault and batteries.

[5] "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).

[6] As the Commission has recently stated, a municipality has a direct and substantial interest in a particular matter at least where that legal matter affects its legal rights or liabilities, pecuniary interest, property interest or involves a proceeding that the municipality would have a stake in the outcome. *See EC-COI-97-2*. Moreover, a criminal proceeding involving an assault and battery on one or more of its police officers could well give the town a "significant interest" in the matter even though that interest is neither financial nor proprietary. *See EC-COI-98-7*.

8

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY DOCKET NO. 597

IN THE MATTER
OF
BRIAN J. MARTIN

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Brian J. Martin ("Martin") 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 3, 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 Martin. The Commission has concluded the inquiry and, on November 17, 1999, found reasonable cause to believe that Martin violated G.L. c. 268A, §23(b)(3).

The Commission and Martin now agree to the

following findings of fact and conclusions of law:

1. Martin is the Lowell city manager. Martin was appointed to this full-time, salaried position by the Lowell City Council ("City Council") in August 1995. Martin was a Lowell assistant city manager from 1989 to August 1995 and a Lowell city councillor from 1981 until 1989. In 1984 and 1985, Martin was Lowell's mayor.

2. As Lowell city manager, Martin is the city's chief executive officer. As such, Martin is the awarding authority for city contracts.

3. Lowell has four municipal public parking garages and one municipal public parking lot. The city contracts with a private security company for security at its public parking facilities. Under the contract for security services for Lowell's public parking facilities ("the security contract"), the security company provides uniformed security guards to patrol the city's public parking facilities for a specified number of hours per week, according to the agreed daily schedule for each garage. During the period here relevant, none of Lowell's public parking facilities had full-time, i.e., 24-hours-per-day-seven-days-per-week, security.

4. Since 1978, Lowell Municipal Parking Garage Administrator A.L. "Ed" Trudel ("Trudel") has had responsibility for supervising the municipal parking facilities' security provider. Until 1996, Trudel was the city official who recommended to the city manager which security company should be hired. Until 1996, Trudel used an invitation to bid process to select the lowest responsible and responsive bidder to recommend to the city manager for the award of the security contract.[1] In 1990 and again in 1993, Trudel selected Reliable Security Guard Agency, Inc. ("Reliable") of Salem, New Hampshire, pursuant to an invitation to bid process, to recommend to the city manager, and Reliable was awarded the security contract for three-year periods respectively ending June 30, 1993 and June 30, 1996.[2]

5. In February 1996, because the security contract was then coming due to be rebid for a new three-year period, Trudel sent a draft of a proposed invitation to bid for the contract to the Lowell city solicitor's office for review. After discussion with City Solicitor Thomas E. Sweeney ("Sweeney"), Martin directed Trudel to use a request for proposal ("RFP") process for the security contract instead of the invitation to bid process.[3] Because Martin chose to have the RFP process used, Martin subsequently was not bound by G.L. c. 30B, §5 to award the security contract to the lowest bidder, but instead was permitted under G.L. c. 30B, §6 to award the contract to an offerer who did not submit the lowest price proposal.[4]

6. In early April 1996, the city issued an RFP for the security contract and Martin appointed a committee of five persons, with Trudel as chairman, to review the security contract proposals and select a security company to recommend to Martin for the award of the security contract.

7. At all times here relevant, Francis J. Elliott ("Elliott") and Raymond F. Ralls ("Ralls") were the owners and officers of National. During the relevant period, the security company operated from offices at 131 East Merrimack Street, Lowell.

8. At all times here relevant, Martin was friends with Elliott and Ralls.[5] In 1996, Martin, Ralls and Elliott were all longtime members of the Lowell YMCA. Martin, Martin's father (also a longtime Lowell YMCA member), Ralls and Elliott played handball together at the YMCA for a number of years and had, as of 1996, known each other for many years. This YMCA membership and handball connection existed and remained intact throughout 1996. Additionally, in the early 1990s, Martin, his late brother (who was then ill), Ralls and several other persons traveled together to Atlantic City, New Jersey, where they visited several casinos. Also in the early 1990s, Martin, his father, and several other persons traveled together to Foxwoods casino ("Foxwoods") in Connecticut to celebrate Martin's father's birthday and Ralls, who was at Foxwoods, joined the celebration.

9. In early April 1996, Martin made a day trip to Foxwoods with Ralls and Elliott and two or three other persons. The group traveled together in a rented limousine. Martin paid his own expenses for the day trip. Martin paid for his share of the cost of the limousine at National's Lowell headquarters the day after the trip.

10. In May 1996, the security contract RFP committee was unable to decide to whom the contract should be awarded.[6] The RFP committee opened the proponents' price proposals[7] prematurely in violation of G.L. c. 30B. Trudel informed City Solicitor Sweeney of this situation and Sweeney advised Trudel to cancel the RFP. Thus, the first security contract RFP fell through.

11. On or about May 29, 1996, after discussion with Sweeney, Martin informed Lowell Police Superintendent Edward F. Davis, III ("Davis") that Martin was assigning the Lowell police department ("police department") the task of selecting a security company to recommend to Martin pursuant to a new security contract RFP. Davis, in turn, delegated the security contract RFP responsibilities to Captain Chauncy E. Normandin ("Normandin").

12. The second security contract RFP was issued on or about July 13, 1996 and then reissued on or about August 3, 1996, apparently because the July RFP was not properly published. Four security companies, including Reliable and National, submitted proposals at the police department on August 28, 1996.

13. In or about early July 1996, Davis was asked for documentation of vandalism and theft in the municipal parking garages during Reliable's tenure as the garage security contractor.[8] Davis in turn asked Normandin to obtain such documentation from existing police records. When Normandin reported to Davis that there were no existing police reports of vandalism and theft in the garages, Davis asked Normandin to obtain vandalism and theft documentation from the head of the police department's narcotics bureau, Lt. William Busby ("Busby").[9]

14. On July 17, 1996, Busby wrote a memorandum to Davis concerning vandalism and theft at the Ayotte Garage where the police department then had two fenced lots for impounded vehicles. Busby's memorandum referred only to the Ayotte Garage and generally described vandalism and theft involving several vehicles over a one and one half year period, but did not give any specifics as to when the vandalism and theft occurred.[10] The memorandum further stated Busby's opinion that the then current garage security company (Reliable) was not providing the services for which it was being paid.[11]

15. As of July 17, 1996, the police department had never complained to Reliable about vandalism and theft at the Ayotte Garage. Nor had the police department ever complained to Trudel or to Martin or to anyone else in the city administration about Reliable's performance. While apparently certain vehicles parked in the Ayotte Garage had been vandalized and items had been stolen from parked vehicles, the police department had, as of July 17, 1996, made no effort to determine whether the vandalism and thefts had occurred while Reliable employees were on duty and, thus, whether the vandalism and thefts were in fact attributable to any failure by Reliable to adequately perform its duties under the security contract.[12]

16. On September 11, 1996, Normandin sent Martin his evaluations of the RFP proponents. Normandin: (1) disqualified one proponent as "non-responsive", (2) found one proponent to be only "advantageous", and (3) found two proponents, Reliable and National, each to be "highly advantageous." Along with his evaluations and reference checks done by a fellow police officer,[13] Normandin provided Martin with a copy of Busby's July 17, 1996 memorandum.

17. Upon receiving from Normandin the evaluations, references and Busby's July 17, 1996 memorandum on September 11, 1996, Martin did not make any effort to determine whether Reliable was in fact responsible for the vandalism and theft reported in the Busby memorandum. For example, Martin did not ask the police department why it had not previously complained about Reliable's performance. Martin also did not discuss the Busby memorandum with Normandin, Davis or Busby. Nor did Martin ask Trudel, the city official with the greatest knowledge of Reliable's job performance, whether there was a vandalism problem in the city parking garages.[14] [15]

18. On September 13, 1996, Martin awarded the security contract to National. Martin's award decision was explained in a September 13, 1996 public document entitled "Report of Awarding Authority." According to the report, the security contract was awarded to National (despite Reliable's lower price proposal)[16] due to "substandard performance" by Reliable, citing incidents of vandalism to and thefts from vehicles at the Ayotte Garage as described in Busby's July 17, 1996 memorandum. Also on September 13, 1996, Martin by letter to Elliott notified National of the security contract award to National. A letter of the same date informed Reliable of the award to National.

19. Reliable protested the security contract award to National to the state Inspector General. This protest delayed the formal award of the security contract to National and the execution of the contract between National and Lowell for nearly two months.

20. The Inspector General asked for an explanation of the award of the security contract to National. In response, on September 30, 1996, Sweeney provided the Inspector General with a copy of the September 13, 1996 Report of the Awarding Authority. On November 6, 1996, Sweeney advised the Inspector General that during Reliable's last three years of service under the security contract there had been ninety acts of vandalism or theft reported in the city parking garages, of which twenty-three acts had occurred while Reliable was apparently on duty.[17] Having received this explanation, the Inspector General took no action concerning the award of the security contract to National.[18]

21. On November 8, 1996, the city and National executed a contract for garage security services through June 30, 1999.[19] The contract was signed by Martin, Sweeney and City Auditor James T. Kennedy on behalf of the City of Lowell and by Elliott on behalf of National.

22. At no time during the security contract RFP and award process did Martin disclose to his appointing authority, the City Council, that he was longtime friends with the owners of National and had made trips with them to Foxwoods and Atlantic City. Nor did Martin, prior to or at the time of the award of the security contract, disclose to the City Council that he was awarding the security contract to National despite the fact that National's price proposal was, by a substantial margin, not the lowest submitted in response to the RFP. Finally, Martin did not, prior to or at the time of the award of the security contract, disclose to his appointing authority his basis for not awarding the security contract to Reliable, the company that submitted the lowest price proposal.[20]

23. On February 19, 1997, Reliable filed suit against Lowell in Middlesex Superior Court alleging bad faith by the city in awarding the security contract to National. The complaint alleged that Martin favored National in the award of the contract because of his personal relationship with the company's owners. The case was settled in April 1999. Lowell, without admitting liability, paid Reliable nearly $70,000 to settle the lawsuit.

24. As Lowell city manager, Martin is a municipal employee as defined in G.L. c. 268A, §1. As such, Martin is subject to the provisions of the conflict of interest law, G.L. c. 268A.

25. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence the employee or unduly enjoy the employee's favor in the performance of the employee's official duties, or that the employee is likely to act or fail to act as the result of kinship, rank, position or undue influence of any part or person. Section 23(b)(3) further provides, as to appointed employees such as Martin, that "[i]t shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority... the facts which would otherwise lead to such a conclusion."

26. Martin, by awarding the security contract to National, a company owned by two of his friends with whom he had made trips to Foxwoods and Atlantic City, particularly where National's price proposal was, by a substantial margin, not the lowest one submitted and where, under the above-stated circumstances, the expressed basis for rejecting the lowest price proposal was questionable,[21] knowingly acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that National's owners Ralls and Elliott could improperly influence Martin or unduly enjoy Martin's favor in the performance of his official duties as city manager. In so doing, Martin violated §23(b)(3).[22]

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

(1) that Martin pay the Commission the sum of one thousand seven hundred and fifty dollars ($1,750.00) as a civil penalty for violating G.L. c. 268A, §23(b)(3);[23] and

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

DATE: November 18, 1999

[1] Pursuant to G.L. c. 30B, §5, where the invitation for bids process is used, the contract must be awarded to the "lowest responsible and responsive bidder."

[2] Reliable submitted a lower bid than the other bidders, including a Lowell-based security company, National Security Protective Services, Inc. ("National"). National had held the security contract in the late 1980s, but was terminated by Trudel in November 1988 prior to the end of the three-year contract period.

[3] Martin had received complaints about the invitation to bid process from prior unsuccessful bidders on the security contract. Martin discussed the complaints with Sweeney, who advised Martin that the RFP process could be used and that a contract could be awarded to a company not submitting the lowest price proposal. Sweeney also advised Martin that Martin needed a good reason for by-passing the lowest bidder and that the reason had to be stated in writing.

[4] Under G.L. c. 30B, §6, when the RFP process is used, the contract may be awarded to the offeror who did not submit the lowest price provided that "the chief procurement officer shall explain the reasons for the award in writing, specifying in reasonable detail the basis for determining that the quality of supplies or services under the contract will not exceed the governmental body's actual needs."

[5] Martin, Ralls and Elliott all testified that Martin is friends with Ralls and Elliott; none testified, however, that Martin is particularly close friends with either Ralls or Elliott.

[6] Both Reliable and National were among the security companies which submitted proposals in response to the April 1996 security contract RFP. The committee split between those members favoring Reliable and those favoring National.

[7] Reliable's price proposal was lower than National's.

[8] According to Davis, the request came from Lowell City Hall. Also according to Davis, he cannot recall specifically from whom he received the request, but his best recollection is that it came from either Martin or Sweeney. Sweeney denies that he or anyone in the city solicitor's office made the request. According to Martin, he has no recollection of discussing garage vandalism and theft with Davis or of asking Davis for documentation of such vandalism and theft. Based upon its investigation, the Commission concludes that Martin requested the garage vandalism and theft documentation.

[9] Prior to becoming police superintendent, Davis had been head of the narcotics bureau.

[10] These acts of vandalism and theft had not been made the subjects of police reports and thus no record of the dates and times of the acts existed at the time Busby wrote his memorandum.

[11] During the relevant period, the Ayotte Garage was, pursuant to the security contract, not guarded by Reliable on a full-time (24-hours-per-day-seven-days-per-week) basis. Busby testified that he was not aware of this fact in July 1996. Busby testified that, at the time of his memorandum to Davis, he did not park in the Ayotte Garage, had never read the security contract, had never spoken with any security company employees about garage security, and did not know the name of the then current security company. Busby further testified that he would not have stated in his July 17, 1996 memorandum that

the security company was not providing the services for which it was being paid had he known that the company was not contractually required to provide full-time security at the Ayotte Garage.

[12] In the Commission's view, the police department's failure to complain to Reliable or the city administration about the Ayotte Garage vandalism and thefts indicates that the police department either did not consider the vandalism and thefts to be significant or did not consider Reliable to be responsible for the problems at the Ayotte Garage.

[13] Reliable's references were favorable, as were those of National.

[14] Based upon its investigation, the Commission concludes that had Martin asked Trudel, Trudel would have informed Martin that Reliable's performance was satisfactory and that, based upon Trudel's years of experience with Lowell's public parking facilities, the amount of theft and vandalism which occurred in the garages did not exceed the amount which is, as a practical matter, unavoidable in such facilities.

[15] Martin maintains that under G.L. c. 30B, §6, he was only required to explain his reasons for the security contract award in writing, which, in Martin's view, he did on September 13, 1996, as described *infra* in paragraph 18. The Commission makes no finding as to whether Martin complied with G.L. c. 30B. In any case, Martin's purported compliance with the specific requirements of G.L. c. 30B, §6, did not avoid his violation of the conflict of interest law, G.L. c. 268A, as set forth in this Agreement.

[16] On its face, Reliable's price proposal was $148,397.33 lower than National's because National had mistakenly based its price on a full three-year contract period whereas Reliable had properly based its price on the less than three-year period stated in the August RFP. In fact, Reliable's price was about $100,000 lower than National's for the actual security contract period.

[17] Thus, according to Sweeney's figures (which were based on information Sweeney obtained from Trudel after September 13, 1996), more than two thirds of the vandalism and thefts at the city parking garages occurred when Reliable was not on duty and there were slightly fewer than eight reported thefts or acts of vandalism per year while Reliable was on duty, or about two such acts per year per garage.

[18] Sweeney also asserted to the Inspector General that Reliable's bid was non-responsive to the RFP in the manner in which its price proposal was stated and should be rejected on that basis alone. In fact, however, Reliable's price proposal was in the proper form and that submitted by National was not, as set forth above in footnote 16.

[19] Pursuant to the security contract, the city agreed to pay National a total not to exceed $783,198.30.

[20] Martin did not, prior to or at the time of the award of the security contract, provide the City Council with a copy of the "Report of Awarding Authority."

[21] This is not to say that an impartial awarding authority could not have made the same decision as Martin and awarded the security contract to National. It is to say, however, that in the Commission's view the expressed rationale for Martin's decision was so apparently weak as to, combined with Martin's friendship and gambling trips with Ralls and Elliott, give the appearance of being a pretext for the contract award to National.

[22] Martin could have avoided violating §23(b)(3) by disclosing the relevant facts in writing to his appointing authority, the City Council, prior to his taking any official action concerning the award of the security contract to National. Martin, however, as set forth above, made no such disclosure.

[23] That the Commission has imposed a substantial fine in this case is reflective of the seriousness of Martin's violation of §23(b)(3). The Commission notes that if, prior to awarding the security contract to National in September 1996, Martin had disclosed to his appointing authority (the City Council) that he was friends with the company's owners and had made gambling trips with them and that National's price proposal was not the lowest one submitted, the City Council might have decided that Martin should not participate in the contract award or have required from him a stronger justification for the award to National. Furthermore, Martin's failure to make the required disclosures, followed by the relevant circumstances subsequently becoming public in the context of the Reliable lawsuit, cast a cloud of suspicion over the security contract award and tended to undermine public confidence in the fairness of government contract awards in Lowell. In addition, Martin's actions triggered Reliable's lawsuit and led to Lowell paying Reliable nearly $70,000.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 598

IN THE MATTER OF JOSEPH F. DONOVAN

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Joseph F. Donovan ("Donovan") 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 December 16, 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 Donovan. The Commission has concluded its inquiry and, on November 17, 1999, found reasonable cause to believe that Donovan violated G.L. c. 268A, §19.

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

1. Donovan is and has been since his appointment in March 1993, a City of Brockton plumbing and gas fitting inspector. As such, Donovan is a municipal employee as that term is defined in G.L. c. 268A, §1. Donovan's position is salaried and has been full time since January 1994.

2. As a plumbing and gas fitting inspector, Donovan performs preliminary and final inspections of plumbing and gas fitting work done in Brockton to ensure

compliance with the state plumbing and gas fitting code.

3. Donovan's son Joseph E. Donovan ("Joseph") is a licensed plumber and gas fitter. Joseph owns a business, Donovan Plumbing, and has done plumbing and gas fitting for fifteen years in Brockton and neighboring communities.[1]

4. Donovan inspected Joseph's plumbing and gas fitting work on thirty occasions between January 1994 and July 13, 1998.[2] In each case, Donovan determined whether his son's work complied with the state code and signed the building permit card indicating his inspection of the work.[3]

5. The Commission is aware of no evidence indicating that any of the work performed by Joseph and inspected by Donovan was not fully up to code.

6. Donovan self-reported his inspection of his son's work to the Commission and fully cooperated with the Commission's investigation.

7. Except as otherwise permitted by that section, G.L. 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]

8. The plumbing and gas fitting inspections were particular matters.[5] Joseph had a financial interest[6] in each of these particular matters.

9. Donovan participated[7] in the particular matters of the inspections by performing the inspections. Each time Donovan inspected his son's work, Donovan knew that his son had a financial interest in the inspection.

10. Therefore, by performing the inspections as described above, Donovan participated as a municipal employee in particular matters in which to his knowledge an immediate family member[8] had a financial interest. Each time he did so, Donovan violated §19.

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

(1) that Donovan pay to the Commission the sum of three thousand dollars ($3,000.00) as a civil penalty for violating G. L. c. 268A §19;[9] and

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

DATE: November 23, 1999

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[1] Donovan does not have any financial interest in Donovan Plumbing.

[2] Donovan's co-workers issued permits and collected fees for this work. Donovan did not issue the permits for his son's work or receive permit fees from his son.

[3] In a few instances when the building permit card was not at the site, Donovan noted the inspection in his log book.

[4] None of the G.L. c. 268A, §19 exemptions apply in this case.

[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 by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. *G.L. c. 268A, §1(k).*

[6] "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. *See Graham v. McGrail*, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. *See EC-COI-84-98.* The interest can be affected in either a positive or negative way. *See EC-COI-84-96.*

[7] "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).*

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

[9] The Commission has statutory authority to impose a fine of up to $2,000 for each violation of G.L. c. 268A. While each inspection of his son's work was a separate violation of §19 for which a separate fine of up to $2,000 could have been imposed, the Commission has chosen to impose a $3,000 fine for Donovan's course of conduct in light of his self-reporting of his conduct and his full cooperation with the Commission's investigation.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 589

IN THE MATTER
OF
KEVIN HAYES

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Kevin Hayes ("Hayes") enter into this Disposition Agreement pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court pursuant to G.L. c. 268B, §4(j). On December 16, 1998, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by Hayes. The Commission concluded that inquiry, and on April 22, 1999, found reasonable cause to believe that Hayes violated G.L. c. 268A, §23(b)(2).

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

1. From 1988 until the present, Hayes has served on the Board of Selectman ("BOS") in the Town of Spencer. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. The BOS acts as the police commissioners. Acting as police commissioners, the BOS appoints the police chief and each individual police officer based on the police chief's recommendation, and holds disciplinary hearings as needed.

3. On August 25, 1998, Spencer Police Officer David Bera ("Officer Bera") observed Hayes speeding in his car. Officer Bera followed Hayes and paced his speed. Officer Bera activated the radar gun which showed that Hayes was traveling 50 MPH in a 35 MPH zone. Hayes entered a 25 MPH zone and did not slow down. Officer Bera activated his radar gun again and clocked Hayes going 47 MPH in a 25 MPH zone.

4. Officer Bera pulled Hayes over for speeding and asked Hayes for his license and registration. Hayes said, "I guess you don't know who I am. I am a selectman in this town. My name is Kevin Hayes." Hayes refused to provide his license and registration and insisted that Officer Bera call Spencer Police Chief David Darrin ("Chief Darrin") to the scene.[1] Officer Bera asked again for Hayes' license. Hayes refused and said, "No, get your chief down here now." Officer Bera told Hayes he was risking arrest by refusing to provide his license. Hayes said, "You do whatever you think you need to. If your chief is in right now, I want him down here."

5. Officer Bera used the radio in his police cruiser to contact the police station. Officer Bera advised Chief Darrin that Hayes was refusing to produce his license until he could speak to the chief at the scene. Chief Darrin agreed to come to the scene.

6. Officer Bera asked Hayes to wait in his vehicle until the chief arrived. Hayes refused. Officer Bera told Hayes that Chief Darrin would be on the scene within one minute.

7. When Chief Darrin arrived, Hayes told him, "Your officers are harassing citizens." Chief Darrin told Hayes to give his license and registration to Officer Bera. Hayes told Chief Darrin he was a member of the BOS.

8. Chief Darrin told Officer Bera to write Hayes a warning for speeding and for failure to have his license and registration in his possession. If Chief Darrin had not intervened, Officer Bera would have arrested Hayes for refusing to provide his driver's license and issued Hayes a citation for speeding.

9. Although Hayes did not explicitly ask Chief Darrin for special consideration, Chief Darrin concluded, based on all the circumstances, that Hayes was, in effect, asking for special treatment based on his being a selectman.

10. Officer Bera left the scene and Chief Darrin tried to calm down Hayes.

11. If Officer Bera had not made the citation a warning, Hayes' total fine could have been $240 (plus cost of release from custody should he have been arrested for refusing to provide a license).[2]

12. Hayes asserts that he made the remarks to the police officers out of frustration[3] and that he did not intentionally attempt to use his selectman position to avoid being issued a ticket.[4]

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

14. By citing his position as a selectman during his conversations with Chief Darrin and Officer Bera, and otherwise making it clear during those conversations that as a selectman, he did not expect to be arrested or issued a ticket, knowingly or with reason to know, Hayes used or attempted to use the power of his official position.

15. Under the circumstances, Hayes normally would have been arrested for refusing to show the officer his license and should have been issued a citation for speeding. Being able to avoid being arrested or issued a ticket under the above circumstances was an unwarranted privilege.

16. The potential penalties associated with the traffic citations described above were at least $240; and, therefore, of substantial value.[5]

17. The privilege of not being arrested and/or issued a traffic citation under the circumstances as described above was not properly available to similarly situated individuals facing similar penalties, as it was not based on guilt or innocence or appropriate extenuating circumstances, but rather on Hayes' position as an elected official.

18. Thus, by knowingly or with reason to know, using his official position as a selectman to secure for himself the unwarranted privilege of avoiding arrest and/or the issuance of a traffic citation, Hayes violated G.L. c. 268A, §23(b)(2).

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

(1) that Hayes pay to the Commission the sum of one thousand ($1,000.00) as a civil penalty for the violation of G.L. c. 268A, §23(b)(2); and

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

DATE: December 2, 1999

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[1]Hayes, as a selectman, previously voted in favor of hiring and retaining Darrin as chief.

[2]Bera wrote a warning for traveling 50 MPH in a 35 MPH zone (otherwise a $100 fine); however, Bera could have written a citation for traveling 47 MPH in a 25 MPH zone. The fine for 47 MPH in a 25 MPH zone is $170. The fine for no license in possession and registration in possession is $70 ($35 each). Therefore, Hayes could have been facing fines totaling $240. In addition, Hayes' automobile insurance rates would increase as a result of the citations.

[3]According to Hayes, prior to being stopped by the police, Hayes' truck in which he had been carrying trash broke down. Hayes had to transfer all the trash from the truck and place it in the car that he was driving when he was stopped. He was already in an excited and agitated state and the police detaining him added to his frustration which resulted in Hayes acting in the manner as described above.

[4]Mr. Hayes maintains that he did not intend for his conduct to be perceived as an attempt to use his official position to secure any such unwarranted accommodation. The Commission previously addressed this point in *In the Matter of Richard Singleton*, 1990 SEC 476 (fire chief violates §23(b)(2) by telling a company's representative that certain fire department inspections could take forever while in the same conversation asking the company to maintain its business with his son). In *Singleton*, the Commission said, "General Laws c. 268A, §23(b)(2), however, embodies an objective test by which a public employee's conduct is judged by what the employee knew or had reason to know at the time of his conduct." *See also In the Matter of Galewski*, 1991 SEC 504 (assistant building inspector fined $1,000 for violating §23(b)(2) by asking a developer, during the course of an inspection, whether the developer could build Galewski a house he could afford); Thus, even if Mr. Hayes did not know his conduct would be perceived as an attempt to secure an unwarranted privilege of substantial value, he had reason to know his conduct would be so perceived.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 599

IN THE MATTER OF PAUL GAUDETTE

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Paul Gaudette ("Gaudette") 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 June 23, 1999, 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 Gaudette. The Commission has concluded its inquiry and, on December 15, 1999, found reasonable cause to believe that Gaudette violated G.L. c. 268A.

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

1. Gaudette was, during the time relevant, the building inspector for the town of Dracut. As such, Gaudette was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The building inspector's duties include issuing building permits based on submitted applications and plans, and enforcing the zoning and building codes.

3. On July 26, 1996, Gaudette and his wife bought

lot 33A on Diamond Drive in Dracut (number 42 Diamond Drive) from Charles Kleczkowski("Kleczkowski") for $65,000. The lot contained 150,718 square feet of land (3.31 acres)

4. Kleczkowski was then the treasurer, agent/clerk and sole director of K&K Equipment Inc., a development company located in Dracut. Kleczkowski's wife, Lucille, was the president of the corporation. Kleczkowski and/or K&K Equipment were in the process of developing a number of properties in Dracut, including a large subdivision known as Glenwood Estates.

5. At the time of the closing, Gaudette and his wife made a $1,000 deposit on the property and borrowed $64,000 from K&K Equipment to cover the balance of the purchase price. Gaudette and his wife also borrowed $110,000 as a construction loan from the Jeanne D'Arc Credit Union, secured by a first mortgage on 42 Diamond Drive. K&K Equipment's $64,000 loan to purchase the property was secured by a second mortgage on the property, with interest due at the rate of 9½% per annum. Payment in full (principal and interest) was due September 30, 1996.

6. In order to obtain a construction loan from the Jeanne D'Arc Credit Union, Gaudette had to expend certain sums that were not refundable even if Gaudette were unable to obtain a building permit and had to cancel the construction loan.[1] First, Gaudette had to pay for an initial credit report ($50), an initial appraisal (about $250), and a flood-zone determination certificate ($25). In addition, Gaudette had to pay various attorneys' fees and loan closing costs to record the credit union's lien. Gaudette's total expenditure was at least $350.

7. On or about August 21, 1996, Gaudette submitted an application for a building permit to construct a new home at 42 Diamond Drive. He identified himself as the contractor on the job. Gaudette estimated the square footage of the house to be 2,200 and the cost of the work to be $85,000.[2]

8. In his capacity as building inspector, Gaudette also reviewed the building plans for compliance with the building and zoning codes, and found that the plans were in compliance.[3] Thereafter, Gaudette signed the application, thereby authorizing the issuance of a building permit to himself. Gaudette also set the fee for the permit at $425 (equal to 0.5% of the construction costs). Thereafter, Gaudette forwarded the building plans to the fire department for approval.[4]

9. In 1996, the formula for calculating building permit fees was $45 times the square footage of the building, times $5/1000 ($.005). Accordingly, the fee for Gaudette's building permit should have been $495 ($45 x 2200 x $.005), not $425.

10. On August 22, 1996, Gaudette in his capacity as building inspector signed the excavation and foundation permit for 42 Diamond Drive.

11. On or about September 26, 1996, a certified plot plan for 42 Diamond Drive was submitted to the building department based on the foundation having been poured. The plan demonstrated that the location of the foundation met the applicable zoning requirements. Thereafter, Gaudette as building inspector issued himself the building permit to begin construction on the house.

12. On September 30, 1996, the Gaudettes and K&K Equipment amended the terms of the mortgage note securing the $64,000 loan. According to the amendment, the balance of principal and interest was now payable in full on or before the date on which the Gaudettes took occupancy of the property at 42 Diamond Drive. At the same time, the Gaudettes paid K&K Equipment $50,000, which K&K Equipment acknowledged as payment of a portion of the outstanding principal. The principal balance due was then $14,000.

13. Gaudette completed construction on 42 Diamond Drive in April 1997, and took occupancy shortly thereafter.[5]

14. K&K Equipment discharged the (second) mortgage on 42 Diamond Drive on April 18, 1997.

15. On June 10, 1997, Gaudette and his wife issued two personal checks on their joint bank account to Charles Kleczkowski. One check was for $9,000 and the other was for $5,000; they were numbered sequentially and signed by Gaudette's wife. Kleczkowski deposited both checks on June 25, 1997.

16. The Gaudettes repaid a total of $64,000 on their loan: $50,000 to K&K Equipment and $14,000 to Charles Kleczkowski directly; the Gaudettes paid no interest on their loan. Apparently, Kleczkowski has a history of not charging interest on certain loans.

17. During the time that Gaudette had a mortgage arrangement with K&K Equipment, Gaudette acted as building inspector on at least twenty matters that were of significant interest to K&K Equipment and/or its principals, Charles and Lucille Kleczkowski. These matters included issuing building permits and approving final inspections for houses within the Glenwood Estates subdivision, as well as for other properties owned and/or developed by K&K Equipment and its principals.

18. Except as otherwise permitted, G.L. c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he has a financial interest.[6]

19. The building inspector's decisions to issue an

excavation and foundation permit and a subsequent building permit for 42 Diamond Drive were particular matters.[7]

20. As the building inspector for Dracut, Gaudette participated[8] personally and substantially in the decisions to issue the excavation and foundation permit and the building permit for 42 Diamond Drive by reviewing the application and plans, setting the building permit fee and issuing the permits.

21. Gaudette had a financial interest in the particular matters because, as the owner of 42 Diamond Drive and applicant for the permits, he was obligated to pay the permit fee as established by the building inspector. In fact, as Gaudette was able to establish his own permit fee, he set the fee at $425 when it should have been calculated at $495, based on the square footage of the house.

22. Moreover, Gaudette had a financial interest in the decisions to issue the permits because he had expended considerable sums of money (at least $350) to obtain a construction loan from the credit union. Those sums were not refundable even if Gaudette had been unable to get a building permit.

23. Finally, Gaudette had a financial interest in the decisions to issue the permits because obtaining a building permit would ensure that he had paid $65,000 for a buildable lot and not just a vacant parcel of land.

24. Gaudette had knowledge of his own financial interests in the decisions to issue the permits when he acted as building inspector in issuing them. He knew that he would be obligated to pay the stated permit fee, he knew that he had expended nonrefundable sums of money to obtain his construction loan (which loan he would have to cancel if he could not obtain his building permit), and he knew that his securing a building permit would ensure his being able to build a house on the lot he had purchased.

25. Therefore, by participating as building inspector in the decisions to issue the permits, particular matters in which to his knowledge he had financial interests, Gaudette violated §19.[9]

26. 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 any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.[10]

27. By acting as building inspector on matters of interest to K&K Equipment and/or its principals while having a $64,000 loan/mortgage arrangement with K&K Equipment and after repaying the loan without any interest, Gaudette acted in a manner that would cause a reasonable person to conclude that K&K Equipment and/or its principals could unduly enjoy Gaudette's favor in the performance of his official duties. By doing so, Gaudette violated §23(b)(3).[11]

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

(1) that Gaudette pay to the Commission the sum of two thousand dollars ($2,000) as a civil penalty for violating §§19 and 23(b)(3); and

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

DATE: December 16, 1999

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[1] According to Gaudette, he knew that it was a buildable lot which complied with the Dracut zoning bylaw when he and his wife purchased it.

[2] In fact, the square footage was approximately 2,150, just under the estimated 2,200.

[3] There is no evidence that the lot was not a valid building lot or that the plans were not in compliance.

[4] According to Gaudette, this was his usual practice with respect to building permit applications, so long as the cost estimates were within normal limits.

[5] Gaudette did not perform the inspections on his own house; those inspections were performed by other building inspectors acting on behalf of the town.

[6] None of the §19 exemptions apply here.

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

[8] "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).

[9] Gaudette maintains that the lot was in fact a valid building lot and that he was entitled to a building permit for the lot. The Commission

makes no finding as to these facts. In any event, Gaudette's purported compliance with the zoning bylaws does not avoid his violation of the conflict of interest law, G.L. c. 268A, as set forth in this Agreement. The §19 violation addresses solely the impropriety of Gaudette's issuing permits to himself.

[10] Section 23(b)(3) further provides, "It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion." Gaudette made no such disclosure.

[11] This Agreement does not address any gratuity issues regarding whether Gaudette paid fair market value for his property or should have paid interest on the $64,000 loan. Those matters are currently under review by other government offices.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 600

IN THE MATTER
OF
NORMAN MELANSON

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Norman Melanson ("Melanson") 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 February 10, 1999, 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 Melanson. The Commission has concluded its inquiry and, on October 20, 1999, found reasonable cause to believe that Melanson violated G.L. c. 268A.

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

1. At all relevant times, Melanson was a Board of Assessors ("BOA") member for the City of Leominster. As a BOA member, Melanson was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. The BOA is a three member, full time, compensated working board. All of the BOA's members are appointed by the mayor.[1] The BOA is responsible for the valuation of real estate for tax purposes.

3. Vision Appraisal Technology ("Vision") is a company that provides computer software and technical support to municipalities regarding property assessments. Between 1993 and the present, Vision has received several contracts from Leominster totaling in excess of $400,000.[2][3]

4. Melanson, as an assessor, participated in the award of the above-described Leominster/Vision contracts.

5. Melanson's involvement with Vision contracts included preparing the contract specifications, submitting them to the purchasing agent, subsequently reviewing and double-checking the chief assessor's work to ensure bids met the minimum criteria and minimum specifications and performing evaluations of the contractors.

6. In the spring of 1997, Vision installed a new Windows-based valuation software program into the city assessors' office's computers. At that point, Melanson's computer experience was limited, and he had had no experience with the new valuation software or Windows itself. Consequently, Melanson needed to spend a considerable amount of time familiarizing himself with the new software program. To that end, it appears that Vision loaned Melanson a computer loaded with the program to be used by him at his home.[4]

7. Melanson used the computer for both assessor and personal use.

8. There was no documentation of the loan of the computer from Vision to Melanson. Melanson did not disclose his possession of the computer to his appointing authority.

9. The computer was valued at approximately $1,000. To lease a comparable computer would have cost approximately $75 per month.

10. Vision has loaned several computers to towns for business purposes. Vision was unable to produce, however, any case where it loaned a computer to a public official for home use.

11. In or about the summer 1997, the chairman of the board of assessors came to Melanson's house to load certain game software onto the computer. Melanson did not tell the chairman that the computer was on loan from Vision.

12. In October 1997, certain city officials, having learned that Melanson had possession of Vision's computer, criticized Melanson for having the computer.

Melanson promptly returned the computer to Vision.

13. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence the employee or unduly enjoy the employee's favor in the performance of the employee's official duties, or that the employee is likely to act or fail to act as the result of kinship, rank, position or undue influence of any part or person.

14. By accepting a loan of a $1,000 computer from Vision for use at his home, which computer could be readily used for personal or assessor-related purposes, by failing to disclose this arrangement to anyone in his department, by keeping the computer for much longer than necessary to familiarize himself with the valuation software, and by failing to return the computer to Vision until city officials made an issue of it, all while Melanson, as an assessor, had and would be participating in several large contracts Vision had with city, Melanson knowingly acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that Vision could improperly influence Melanson or unduly enjoy Melanson's favor in the performance of his official duties as assessor. In so doing, Melanson violated §23(b)(3).[5/6]

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

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

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

DATE: December 29, 1999

[1/] Melanson was first appointed to the BOA in 1984. From 1994 to April 1997, Melanson was acting chief assessor. In April 1997, a new chief assessor was appointed and Melanson became a regular BOA member.

[2/] In Leominster, all city contracts are handled by the purchasing agent. The city's contracting system starts with the contracting agency drawing up the contract specifications. Using the specifications drawn up by the contracting agency, the city's purchasing department develops the request for proposal ("RFP"). The contracting agency reviews the RFP to ensure that the specifications are correct and the contract is put out for bid. Bids are reviewed by the contracting agency to ensure that they meet the contract specifications. The contracting agency ranks the bidders based on their analysis of the technical specifications and then the purchasing department awards the contract.

[3/] Total contracts awarded between 1993 and 1996 amounted to $419,560 (1993 four year term $286,560 contract; March 1996 $98,000 contract; and October 1996 $35,000 contract). Vision was subsequently awarded additional contracts with Leominster.

[4/] Melanson and Vision employees testified credibly that the computer was loaned to Melanson for a legitimate business purpose (i.e., for Melanson to learn the new software); it was not a gift nor was it intended for Melanson's private use.

[5/] Melanson could have avioded violating §23(b)(3) by disclosing the relevant facts to his appointing authority, the mayor. Melanson, however, made no such disclosure.

[6/] There would not have been an appearance problem if Vision had publicly given and/or loaned the computer to the assessors' office. On the other hand, if the computer had been given to Melanson as a gratuity for his personal use at home for or because of official acts or acts within his official responsibility performed or to be performed by him, both Vision and Melanson would have violated G.L. c. 268A, §3.

OPINIONS

Summaries of Advisory Opinions
Calendar Year 1999

EC-COI-99-1 - G.L. c. 268A, §5(a) would prohibit a former state employee from being compensated by, or acting as agent for, a company in selling or marketing its services under a statewide blanket contract to individual public agencies because the company's contractual relationship with individual agencies is part of the same particular matter (the statewide blanket contract) which the former state employee participated in as a member of the procurement management team that helped to select that company.

EC-COI-99-2 - Under § 20, a city councilor would have a prohibited financial interest in a contract with his city if, as an associate in a law firm, he were to provide legal services to the city's school ocmmittee by assisting the partner in his firm who is counsel under contract to the school committe. For purposes of the city councilor's qualifying for the § 20(b) exemption, in his capacity as city councilor, he is not employed by an agency that regulates the activities of the school committe and he does not have official responsibility for any of the activies of the school committee.

EC-COI-99-3 - Section 17 prohibits a call firefighter who is also a professional engineer, and who is not a special municipal employee, from designing fire protection systems for installation in that town given that such designs must be approved by the fire department before a building permit may issue. Because the firefighter's own agency is the equivalent of a permit-granting agency, the 1998 amendment to §17 allowing greater latitude for "moonlighting" employees does not apply to these facts. Section 17 also prohibits another firefighter who is a full-time employee from performing, in his private capacity, oil burner work which requires a permit from the fire department. The permit is a matter in which the town has "a direct and substantial interest," and, because the firefighter is seeking a permit from his own agency, the 1998 amendment to §17 does not apply.

EC-COI-99-4 - Section 19(a) prohibits a selectman from approving or disapproving a school department payroll warrant because such approval or disapproval constitutes participation in a particular matter in which the selectman's immediate family has a financial interest. By following the procedures for invoking the rule of necessity, the selectman would be allowed to approve or disapprove a school department payroll warrant under circumstances where a statute requires the town to pay town employees weekly (or on another prescribed basis); another selectman is absent; and, due to the disqualification of the selectman under §19, the board cannot obtain a quorum to act before it is statutorily required to do so.

EC-COI-99-5 - The Hampshire Council of Governments, which consists of twenty municipalities from the former Hampshire County, is a municipal agency for purposes of the conflict of interest law and, as a result, Councilors are municipal employees of each of the Council's member municipalities.

EC-COI-99-6 - Where town bylaws require a board to evaluate landscape plans, § 17(a) prohibits a review board member who is a special municipal employee: (a) from implementing landscape plans he reviewed, even if he had no expectation of doing the work at the time of the review; and (b) from implementing landscape plans he did not review, because review board members have official responsibility for reviewing the plans, approving the issuance of a building permit, and inspecting the completed work.

EC-COI-99-7 - The principals of a Massachusetts general partnership, which is a member of a company which entered into a five-year contract with a state agency for the provision of certain professional services, are state employees under G.L. c. 268A, §1(q) and qualify for special state employee status pursuant to §1(o)(2)(a). Section 4 does not prohibit the partners from receiving compensation from or acting as the agent for a private corporation with respect to a development project because the partners did not participate in the project as state employees; it is not the subject of their official responsibility; and they served as state employees on less than 60 days in the relevant period of 365 days.

State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-99-1

FACTS:

You are a former full-time employee of state agency XYZ and have been considering employment in the private sector.[1] In 1997, while still an XYZ employee, you were asked to serve on the Procurement Management Team ("PMT") which evaluated potential vendors responding to the Executive Office for Administration and Finance's ("EOAF") Operational Services Division ("OSD") Request for Responses for Services ("RFR").[2]

OSD created the RFR.[3] The RFR, covering over 55 pages (including attachments), describes the terms and conditions for submitting a bid, bidder instructions, technical/business specifications, bidder history and references, and sample configurations for providing services. The RFR states in its first paragraph, "The purpose of this Procurement is to establish a Statewide Contract for . . . Services . . . . The intent of the Statewide Contract is to provide a vehicle to allow state agencies, authorities, cities and towns and Eligible Entities to purchase . . . services and associated hardware . . . that meet their specific and unique needs in a consistent, cost effective and coordinated manner." This type of contract is commonly known as a blanket contract. For purposes of this opinion, we will refer to the Statewide Contract as the Blanket Contract.

The Blanket Contract is made up of several parts: (1) the RFR; (2) the responses from the selected vendors ("Vendor Responses"); (3) the "Commonwealth Terms and Conditions" ("Standard Terms and Conditions"); and (4) the "Commonwealth of Massachusetts Standard Contract Form" ("Standard Form"). All four parts are interdependent. When a state agency, for example, selects a vendor from the list of qualified vendors that appear in the Blanket Contract, the agency and the vendor execute the Standard Form. The Standard Form covers the specific work the agency requires, but the Form alone does not represent the complete contractual relationship between the vendor and the state. By the time an agency selects a vendor from the Blanket Contract, the vendor has already agreed to the terms and conditions set forth in the RFR and the Standard Terms and Conditions. Similarly, the state has already evaluated and relied upon the representations and warranties required in the RFR and those in the Vendor Responses. The RFR expressly incorporates by reference the terms of 801 CMR § 21.00, the regulation governing state agency procurement of commodities or services ("Regulation").[4] . Pursuant to the Regulation, the Standard Form incorporates by reference the Standard Terms and Conditions, the RFR and the Vendor Responses. *See 801 CMR §§ 21.02(2), 21.07(2)(b) and (c).*[5] The parties with whom we discussed the blanket contracting process all agree that although a public agency uses only the Standard Form when it engages a vendor under the Blanket Contract, the Standard Form does not represent the entire contractual relationship between the vendor and the state.[6] (emphasis in the original).

Because vendors have been selected through the RFR process and entered into the Blanket Contract, the public agency and the vendor it selects do not need to negotiate the major terms, conditions, representations or warranties that appear in the RFR, Standard Terms and Conditions, or the Vendor Responses.[7] The goal of the blanket contracting process is to simplify contracting for public agencies. Each agency may select services from an approved vendor without having to conduct its own bidding process to assess a vendor's qualifications and to negotiate general terms, conditions, warranties or representations that appear elsewhere in the Blanket Contract. Instead, each agency, having selected a vendor from the group approved under the Blanket Contract, uses the Standard Form, a one-page document, and adds to the Standard Form specific requirements for the services it seeks.

OSD published the Blanket Contract and its components on the internet as an Update. The Update describes the Blanket Contract for the benefit of the public agencies that require such services. Among other things, the terms of the Blanket Contract include the contract's duration, quoting and pricing characteristics, testing procedures, providing drawings, required warranties, response and repair times, and performance guarantee.[8] The Update advises that due to the complex and constantly evolving nature of the services, "the Procurement Management Team ("PMT") recommends that before deciding on any Services, the user solicit three estimates from contractors on this Statewide Contract. There are ceiling prices in this Contract and users are encouraged to negotiate downward on all quotes to obtain best value." You and five other individuals, along with each individual's e-mail address, are listed on the PMT.

After OSD created the RFR, it selected state employees to serve on the PMT. A PMT is generally a standing body that exists throughout the duration of the Blanket Contract. The PMT not only selects qualified vendors but also helps to ensure that the state is receiving the services the Blanket Contract covers. You had no role in creating the RFR. Your responsibilities within XYZ did *not* include the approval or purchase of the particular equipment and services. You were selected, however, because of your specific expertise in the subject matter. Other PMT members had expertise in other areas, such as business evaluation. When OSD issues a Request for Responses, it often selects experts from other agencies to be part of evaluation teams when its staff does not have the necessary expertise.

Your team evaluated each bidder's response to the RFR against the criteria set forth therein. According to the RFR, the PMT performed the following functions.

It evaluated bidders' responses by assigning points to the technical responses. Points were awarded for desirable specifications outlined in the evaluation criteria. Each bidder submitted its history and references which the PMT reviewed to ensure that the bidder's history, financial stability and experience met the RFR's specifications. Again, points were assigned to these criteria. The PMT also contacted the bidders' references to confirm the bidders' ability to perform and the accuracy of the statements within the bidders' responses. Finally, the PMT visited one of the customer references the bidders provided to evaluate the customer's input on design, installation, project management, quality and overall satisfaction. After reviewing the technical responses, references, and the PMT visit, the PMT team leader released the cost responses to the PMT, which, in turn, reviewed those responses and assigned points based on a cost evaluation formula. Total points were the sum of the points awarded for technical response, references, customer visit, cost response and points for any minority business enterprise participation.[9]

Following this process, you and your fellow PMT members selected ten qualified vendors. After completing the selection process, you report that you had no further role as a PMT member.

One of the vendors which you and the other PMT members selected and that entered into the Blanket Contract, ABC Corporation, has discussed the possibility of hiring you. If you were to accept ABC's offer, you would resign from state employment. ABC would like you to represent it in sales of its services to agencies of the Commonwealth under, among other things, the Blanket Contract.[10] You have also discussed the possibility of performing marketing for ABC, which has been an approved Commonwealth vendor for over eight years.

QUESTION:

If you were to become a former state employee, would G. L. c. 268A, § 5(a) prohibit you from receiving compensation from, or acting as agent for, ABC to sell or market its services under the Blanket Contract to individual public agencies where you participated as a state employee in reviewing the RFR and selecting the qualified vendors, including ABC?[11]

ANSWER:

G. L. c. 268A, § 5(a) would prohibit you from being compensated by, or acting as agent for, ABC in selling or marketing its services under the Blanket Contract to individual public agencies because ABC's contractual relationship with individual agencies is part of the same particular matter (the Blanket Contract) in which you participated as a member of the Procurement Management Team that helped to select ABC.

DISCUSSION:

As an employee of XYZ, you were a state employee[12] subject to the conflict of interest law. If you leave state employment in order to work as a private employee of ABC, you will become a former state employee for purposes of the conflict of interest law.[13]

Section 5(a) of G. L. c. 268A provides that a former state employee may not "act as agent or attorney for," or receive "compensation directly or indirectly from anyone other than the commonwealth or a state agency, in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest *and in which he participated* as a state employee while so employed." (emphasis added).

This Commission has commented that

> Section 5 is grounded on several policy considerations. The undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. Moreover, § 5 precludes a state employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his own personal future interest. Finally, 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, 185; *see also EC-COI-92-17; EC-COI-98-3*.

The statutory purpose of § 5 "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-92-17* (emphasis added); *see also EC-COI-93-16; EC-COI-95-11*.

First, we must identify the "particular matter(s)" in issue. The term "particular matter" is defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, . . . decision, determination, [or] finding . . ." G. L. c. 268A, § 1(k). According to this definition, the Blanket Contract is a particular matter. You do not disagree. Instead, you argue that the Standard Form contract that ABC and a state agency would enter into, because the agency had chosen ABC from the Blanket Contract list of qualified vendors, would be sufficiently distinct from the RFR process in which you participated as a member of the PMT to constitute a different particular matter.[14] You argue that you would be paid by ABC

to sell its services pursuant only to the Standard Form contract between it and the state agency. You assert that your being paid to sell ABC's services to a specific state agency would not violate § 5(a) because your private compensation would be sufficiently unrelated to your selecting ABC as one of ten qualified vendors. In effect, you argue that your private work for ABC would be in connection with a particular matter in which you did not participate and for which you did not have official responsibility as a member of the PMT and as a state employee.

Considering the purpose of § 5, your argument perhaps might be persuasive if ABC's contractual relationship were with *only* the public agency that selects it from the Blanket Contract list and only the Standard Form memorialized such a relationship. For the following reasons, however, we conclude that the Blanket Contract and the Standard Form used for a public agency's specific work constitute a single contract and agreement, thus the same particular matter under § 5.

The Standard Form and the contractual relationship it memorializes do not exist, as a matter of fact and law[15/] separately and apart from the Blanket Contract. Although the Standard Form describes the specific work to be performed, as negotiated between the vendor and the agency that selects it, the Standard Form relies upon the other components of the Blanket Contract for most of the terms, conditions, warranties and representations that are part of the vendor's contract for services. The Standard Form alone does not contain all of the essential terms of the contractual relationship between a vendor and an agency. The entire agreement between the vendor and the agency can be ascertained only by reading together the Standard Form and the other parts of the Blanket Contract. In selling or marketing ABC's services as a qualified vendor under the Blanket Contract, you would be compensated by ABC, or acting as its agent, in connection with not only the specific agreement between ABC and a given agency but also the other parts of the Blanket Contract because neither the other parts nor the specific agreement under the Standard Form alone constitute the entire contract. The parties to the Blanket Contract, including the Standard Form, include not only ABC and the specific agency that selects it but also the Commonwealth, through OSD. Thus, we cannot differentiate the Standard Form as being a particular matter distinct from the Blanket Contract.

We note that you do not dispute having "participated" in the process of selecting qualified vendors for purposes of the conflict law. "Participate" is defined, in relevant part, as participating "in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G. L. c. 268A, § 1(j). Here, you provided your technical expertise to evaluate the bidders' responses to such technical aspects of the RFR. *See e.g., EC-COI-79-74* (state employee whose expert opinion had been sought on factors that were central considerations in the final evaluation of the contract deemed to have participated in the contract even though he claimed to have no role in selecting the ultimate contractor or in the final review, approval or execution of the contract). *See also EC-COI-98-3 and cases and opinions cited therein.*

In *EC-COI-93-16*, we concluded that a former state employee who had participated in creating a request for proposals (RFP) could not receive compensation from a private entity in connection with the contracts his former state agency awarded to that same entity pursuant to the RFP. As we noted in *EC-COI-93-16*, "although in two early Commission opinions we concluded that 'participation in the development of an RFP is not, in and of itself, substantial "participation"... in the award of the contract,' (*EC-COI-79-51; see also 79-85*), we have subsequently made it clear that the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs." Here, you participated, personally and substantially, in awarding the Blanket Contract by helping to select the qualified vendors. *Contrast EC-COI-82-82* (former state employee not barred under § 5(a) when he had no role in formulating RFP, he attended informational meetings that were not part of selection process, and he dissociated himself from any participation in the selection process). We, therefore, conclude that your compensation for selling or marketing ABC's services as a qualified vendor under the Blanket Contract to individual agencies, would be in connection with the same particular matter in which you participated as a state employee.

Finally, the fact that, on behalf of the Commonwealth, you reviewed and evaluated the technical qualifications of each of the successful bidders while helping to select them for the Blanket Contract, but now want to help ABC compete against the same bidders for the same work under the Blanket Contract, is contrary to § 5's policy against making official judgments, intentionally or unintentionally, towards one's personal future interests and deriving unfair advantage for oneself or others.[16/]

DATE AUTHORIZED: January 13, 1999

[1/] You no longer work for XYZ and are currently employed at UVW state agency.

[2/] At your request, we discussed with various officials at OSD the Commonwealth's contracting process and the role of a PMT. OSD has expressed interest in your request and our response because our guidance will apply to other state employees who agree to serve on PMT's.

[3/][Deleted]

[4/]Although the RFR alone does not constitute a contract, it contains numerous conditions with which vendors must comply in order to do business with public agencies within the Commonwealth. For example, Section 4.1.6 of the RFR states:

Upon request from a Commonwealth agency or eligible entity, the Bidder, now Contractor, will provide a **written quote** for Telecommunications/Date Cabling Services. The Bidder **must** quote **all costs** associated with providing an agency . . . Services based on their particular needs. The Bidder **must** provide quotes to agencies that include all items . . . Oversight errors on the part of the Bidder when providing a quote will result in correction by the Bidder at no cost to the agency. (emphasis in the original)

[5/]The following language is included in the Standard Form: "[T]he Contractor certifies . . . that is has submitted a Response to a Request for Response (RFR) issued by the Department and that this Response is the Contractor's offer as evidenced by the execution below of the Contractor's authorized signatory, and that this Response may be subject to negotiation by the Department, and that the terms of the RFR, the Contractor's Response and any negotiated terms of the Response shall be deemed accepted by the Department and included as part of this Contract, which incorporates by reference the Commonwealth Terms and Conditions, . . ."

[6/]Vendors are made aware of this in the documentation OSD provides. For example, the RFR states:

> By executing **the Standard Contract Form**, the Contract [sic] certifies under the pains and penalties of perjury that it has submitted a Response to a Request for Response (RFR) issued by the Procurement Management Team and that this Response is the Contractor's offer as evidenced by the execution by the Contractor's authorized signatory, that the Contractor's Response may be subject to negotiation by the Procurement Management Team, and that the terms **shall** be deemed accepted by the Procurement Management Team and included as part of the Contract upon execution **of the Standard Contract Form** by the Procurement Management Team's authorized signatory. (emphasis in the original)

[7/]Pursuant to 801 CMR § 21.07 (1)(a), the RFR and the Vendor Responses determine what elements of performance or cost may be negotiated between the vendor and the agency that selects it. If an RFR is silent as to what can be negotiated, the vendor and the agency may negotiate on the details of performance identified within the scope of the original RFR and the response, and may not increase or change the scope of performance or costs.

[8/] [Deleted]

[9/] [Deleted]

[10/][Deleted]

[11/]We note that you requested and received an informal opinion letter from the Legal Division that covered this question and other conflict of interest issues that these facts raise. Following receipt of that letter, you requested that we conduct a formal review of these facts, focusing only on this question concerning your potential private employment. We note that this opinion is limited to an analysis of your involvement in the Blanket Contract and does not apply to other state contracts or other particular matters.

[12/]"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).

[13/]Although you are currently a former XYZ employee for purposes of § 5, the fact that you are also a current state employee, as an employee of UVW, for purposes of other provisions of the conflict law, makes you subject to § 4 of G. L. c. 268A. Section 4 prohibits you from being paid by, or acting as agent for, ABC in relation to *any* particular matter of direct and substantial interest to the Commonwealth or to which the Commonwealth or a state agency is a party.

[14/]See discussion below concerning participation.

[15/] See *801 CMR § 21.07 (2)(b) and (c)*. To determine when instruments deriving from a given transaction should be read together, case law considers the simultaneity of execution, identity of subject matter and parties, cross-referencing, and interdependency of provisions. *Chelsea Industries, Inc. v. Florence*, 358 Mass. 50, 55-56 (1970); *Gilmore v. Century Bank & Trust Co.*, 20 Mass. App. Ct. 49, 56 (1985).

[16/]G. L. c. 268A, § 23(c)(1) also prohibits a former state employee from accepting "employment or engag[ing] in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority."

CONFLICT OF INTEREST OPINION
EC-COI-99-2

FACTS:

You are an elected member of a City Council ("Council"). You are also an attorney who engages in the practice of law in the ("City") as an associate in a law firm ("Firm"). Beginning prior to your election as a Councilor and continuing through the present, one of the members of the Firm has served as special counsel ("Special Counsel") to the School Committee ("School Committee"), a position for which the Committee publicly advertised. You have been asked to assist the Special Counsel in performing legal work for the School Committee and the School Department.[1/] Your salary as an employee of the Firm would not change as a result of your allocating time to School matters. Your salary compensates you for such legal work as it does for any work you do for the Firm and its clients, and is derived from all the Firm's revenues.

Pursuant to statute and the City's Charter,[2/] the Council and the School Committee are separate, popularly elected municipal bodies. The independence and broad powers of the School Committee are well-established.[3/] By statute, the School Committee has "the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the requirements of

law and statewide goals and standards established by the board of education." *G. L. c. 71, § 37.* Among its other powers, the School Committee "may employ legal counsel for the general purposes of the committee and may expend money therefor from the funds appropriated by said city or town for school purposes."[4] G.L. c. 71, § 37F.

The Council is a legislative body. *See* G.L. c. 43, § 3; *Charter.* The relationship between the Council and School Committee is limited to the following. First, according to the Charter, "If there is a vacancy in the school committee by failure to elect or otherwise, the municipal council and school committee, sitting jointly, shall elect a suitable person to fill the vacancy until the next annual election." *Charter, § 21.*

Second, the Council appropriates[5] money for the School Department budget as well as for all other municipal departments. *Charter, § 11.* Pursuant to G.L. c. 44, § 32, which governs the general municipal budget process, the Mayor submits to the Council the annual budget, which is a statement of the amounts he recommends for proposed expenditures for the City for the next fiscal year. G.L. c. 44, § 32 (¶1). The Council may either approve, reduce or reject the recommended amounts with respect to all departments, including the School Department. Id.(¶3). However, several special statutory provisions apply to the School budget, as described below.

As a result of the enactment of the Massachusetts Education Reform Act of 1993, *St. 1993, c. 71* (Act), every municipality in the commonwealth "shall annually appropriate for the support of public schools in the municipality" an amount determined by a statutorily-prescribed formula and calculated by the commissioner of education, known as the district's "foundation budget."[6] *See* G.L. c. 70, §§2 & 6; *603 CMR § 10.06.* Thus, taking into account the required foundation budget, among other things, the School Superintendent and School Committee recommend to the Mayor a proposed School Department budget. The Mayor, in turn, proposes a School budget to the Council.[7] As with other proposed municipal department budgets, the Council may either approve, reduce or reject the total recommended School Department budget.[8] G.L. c. 44, § (¶3). However, in contrast to the situation with other department budgets, the Council cannot increase or decrease line items within the School Department appropriation nor can it place any restrictions on those funds. Rather, it can only make non-binding monetary recommendations about increasing or decreasing line items within the total School Department appropriation. G.L. c. 71, § 34.[9] For example, the Council cannot decrease or increase the line item within the School budget for legal expenses.

QUESTION:

For the purposes of qualifying for the G. L. c. 268A, § 20(b) exemption, which would allow you to have an indirect financial interest in the Special Counsel's contract with the School Committee by being compensated for legal work performed for the Special Counsel, are you as a Councilor "employed by. . . an agency which regulates the activities of the contracting agency"(the School Committee), or do you have "official responsibility for any of the activities of the contracting agency"?

ANSWER:

As a Councilor, you are not "employed by . . . an agency which regulates the activities" of the School Committee, and you do not have "official responsibility for any of the activities" of the School Committee. Accordingly, you may be able to qualify for an exemption under G. L. c. 268A, § 20(b) if you can satisfy all the other exemption requirements.

DISCUSSION:

As an initial matter, we note that as a Councilor, you are a municipal employee within the meaning of the conflict of interest law.[10] As such, § 20 of G.L. c. 268A is relevant to your inquiry. In pertinent part, that section provides:

> A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city . . . in which the city . . . is an interested party of which financial interest he has knowledge or has reason to know shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

G.L. c. 268A, § 20(a).

Section 20 serves two purposes. First, this section is intended to prevent a municipal employee from influencing the awarding of contracts by any municipal agency in a way which might be beneficial to the employee. *EC-COI-81-93; EC-COI-95-9. See also* W.G. Buss, *The Massachusetts Conflict of Interest Law: An Analysis,* B. U. Law Rev. 299, 368, 374 (1965).

Second, the conflict law "is concerned with the appearance of and the potential for impropriety as well as with actual improprieties." *Quinn v. State Ethics Commission,* 401 Mass. 210, 214 (1987) (holding that § 7, the state counterpart to § 20, prohibited a state employee from having an interest in his contract as a bail commissioner). Thus, in drafting this restriction, "the Legislature did not want a[n] . . . employee to use his position as a[n] . . . employee to obtain for himself a financially beneficial contract, *and* the Legislature did not want the . . . employee's actions and judgment to be clouded because of an extracurricular contract." *Id.* at 221 (Liacos, J. dissenting) (emphasis added). *See also EC-COI-95-9* ("The section [7] seeks to avoid the perception and the

actuality of a state employee's enjoying an 'inside track' on state contracts or employment").

Here, you would have at least an indirect financial interest in the Special Counsel's contract with the School Committee because of your compensated legal work with the Special Counsel on School matters.[11] *See, e.g., EC-COI-85-60* (any salary that is derived from a firm's public contract constitutes an indirect financial interest in that contract); *EC-COI-84-98* (all financial interests, no matter how insubstantial or insignificant, are covered by the prohibition except financial interests consisting of ownership of less than one percent of stock in a corporation that has a municipal contract). *See also EC-COI-95-9; EC-COI-93-10.*

Section 20, however, also contains certain exemptions, providing in relevant part:

> This section shall 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 contracting 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 and the interest of his immediate family,[12] . . .

G.L. c. 268A, § 20(b) (emphasis added). As one commentator has noted, this exemption "contains as its central purpose a requirement that the financial interest of the . . . employee be in a contract made by an agency in which that employee is not an important participant." Buss, *supra* p. 4, at 377. This is the only exemption from the general prohibition which might allow you, as a Councilor, to have an indirect financial interest in the Special Counsel's contract to provide legal services to the School Committee.[13] A municipal employee must be able to comply with each condition contained in § 20(b) in order to qualify for the exemption. *See, e.g., EC-COI-93-7.*

Here, the "contracting agency" is the School Committee. Thus, in order to qualify for the § 20(b) exemption, you must not, as a Councilor, participate in, or have official responsibility for, any activities of the School Committee *and* the Council must not regulate the activities of the School Committee.[14]

As an initial matter, we consider whether the joint role of the Council and the School Committee in filling a vacancy on the School Committee constitutes an activity of the School Committee within the meaning of § 20(b). "Activity" is not defined in G. L. c. 268A. Based on the well-established canon of statutory construction, statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them. *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983). Thus, we look to the dictionary definition of "activity" which reads, "function or duties" or "natural or normal function or operation." *Webster's Third New International Dictionary* (1993).

We conclude that the School Committee's joint role in filling a vacancy among its membership is not an activity of the School Committee within the meaning of § 20(b) because the School Committee (as well as the Council) lacks unilateral authority to make such an appointment. Instead, the Charter expressly makes filling a vacancy the responsibility of both bodies sitting jointly. Moreover, filling such a vacancy appears to be an unusual event rather than a "normal function" of either the School Committee or the Council.[15]

Participation in Any School Committee Activities

Chapter 268A defines "participate," in pertinent part, as "participate in agency action or in a particular matter personally and substantially as a . . . municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." *G. L. c. 268A, § 1(j).* Thus, if you were to approve, disapprove, discuss, recommend, advise about and\or vote on any Council non-binding monetary recommendations regarding School Department line items, you would be deemed to have participated in the formulation of the School Department budget. *See Graham v. McGrail*, 370 Mass. 133, 139-140 (1976) ("[A] 'decision' is a 'particular matter.' The formulation of a budget may include a multitude of particular decisions". . . .). You may, however, satisfy the § 20(b) "no participation" requirement simply by abstaining from all participation[16] as a Councilor concerning all Council non-binding monetary recommendations about line items.[17]

Official Responsibility for Any Activities of the School Committee

In addition, to qualify for the § 20(b) exemption, you must not have official responsibility for any activities of the School Committee. Official responsibility turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36. See also* Buss, *supra* p. 4, at 321-322. Thus, even if you recuse yourself from all Council participation relating to School Department line items, you could not shed your "official responsibility" for those matters if such responsibility exists.

"Official responsibility" is defined by statute as "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."[18]

G.L. c. 268A,§ 1(i). The statute does not define "operating authority" or "administrative authority."

However, federal regulation, which has provided certain guidance in interpreting G.L. c. 268, reads, "'Administrative' authority as used in the [federal] definition means authority for planning, organizing and controlling matters rather than the authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations." *5 CFR § 2637.202(b)(3)*. Thus, the federal regulation provides the example that a "comptroller would not have official responsibility for all programs in the agency, even though she must review the budget, and all such programs are contained in the budget." *5 CFR § 2637.202(b)(3)*. According to the dictionary definition, 'administrative' "connotes or pertains to administration, especially management, as by managing or conducting, directing, or superintending the execution, application or conduct of persons or things." *Black's Law Dictionary* (5th Ed.).

The issue here is whether the Council, by approving, reducing or rejecting the School Department budget and\or by making non-binding monetary recommendations, has official responsibility for any of the activities of the School Committee. We conclude that it does not for the following reasons.

First, we do not believe that simply because the Council appropriates the total School Department budget it has official responsibility for any activity of the School Committee. Rather, as the Supreme Judicial Court has observed, appropriation of funds specified in a budget is a uniquely legislative function performed by the Council in a city government. The preparation and submission of the budget are executive acts performed by the Mayor, with input from the School Committee and Superintendent in the case of the School Department budget. *Bell v. Assessors of Cambridge*, 306 Mass. 249, 254 (1940).

Moreover, although the Council can approve, reduce or reject the total School Department budget, by doing so it "may *not limit the authority* of the school committee to determine expenditures within the total appropriation." *G. L. c. 71, § 34* (emphasis added). Thus, the Legislature expressly has prohibited the Council from directing, managing, conducting or superintending the School Committee's use of its budget. Additionally, by definition, non-binding monetary recommendations cannot direct or control the School Committee's actions. Thus, for example, by making a non-binding monetary recommendation and\or approving, reducing or rejecting the total School Department budget, the Council could not direct or control the School Committee regarding whether or how to spend money on legal services. The decisions about allocations within the School budget and the programs and services those allocations fund are activities uniquely within the official responsibility of the School Committee.

Accordingly, we conclude that the Council does not have official responsibility for any activity of the School Committee within the meaning of G.L. c. 268A, § 20(b). *Compare EC-COI-84-125* (§ 20(b) deemed not available to a city councilor who wished to be appointed a reserve police officer where the city council voted on each budget line item for city departments and the city council may authorize reserve police officers to be paid); *EC-COI-86-7* (Designer Selection Board (DSB) has official responsibility for activities of the Division of Capital Planning and Operations (DCPO) because the DSB is responsible for the actual selection of designers for DCPO projects).

Regulates the Activities of the School Committee

We must also decide whether the Council "regulates the activities" of the School Committee within the meaning of § 20(b). The word "regulate" is not defined in G.L. c. 268A. We have said that "'regulate' means to govern or direct according to rule or bring under the control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists." *EC-COI-83-158* (from *Black's Law Dictionary*, 5th ed. West, 1979); *EC-COI-91-9; EC-COI-85-80* (distinguishing "those . . . agency relationships which have an indirect, incidental effect on the contracting . . . agency's activities from those relationships where one agency has determinative or regulatory authority over the other").

As described above, some obvious similarities exist between the definitions of "regulates" and "official responsibility." At the same time, we recognize that, by using the two different terms in the same section, the Legislature likely intended to mean something different by each.[8] We find it unnecessary, however, to reach that issue as explained below.

Section 20(b) requires not only that the employee not have "official responsibility for <u>any</u> of the activities of the contracting agency," but also that he not be employed by "an agency which regulates <u>the</u> activities of the contracting agency." As both a theoretical and practical matter, a municipal employee may personally lack official responsibility for any activity of the contracting agency, yet he may be employed by an agency which regulates the activities of the contracting agency. In such a case, the employee would not be eligible for the § 20(b) exemption.

In your case, your official responsibility as Councilor vis-a-vis the School Committee's activities is the same as the Council's official responsibility for the School Committee's activities. Because we have determined that the Council lacks official responsibility for any of the ac-

tivities of the School Committee, it follows that the Council does not regulate the activities of the School Committee. Under no set of circumstances could we conclude that the Council directs or governs the activities of School Committee, particularly given that the Legislature has expressly stated otherwise with respect to the School Department budget allocations, and educational policy and programmatic issues. *See* G.L. c. 71, §§ 34 & 37.

For all the foregoing reasons, we conclude that, as a Councilor, you are not "employed by . . . an agency which regulates the activities of" the School Committee and you do not "have official responsibility for any of the activities of" the School Committee for purposes of G. L. c. 268A, § 20(b). Accordingly, if you can satisfy the remaining requirements of the § 20(b) exemption (including obtaining the approval of the City Council as required in § 20(b)(4); *see* language quoted in footnote 12), you will be allowed to perform and be compensated for private legal work for the Special Counsel to the School Committee.

We believe that our conclusion is consistent with the underlying purposes of § 20 and the conflict of interest law, generally. As one commentator has noted in the context of § 7 (the state counterpart to § 20), "even an indirect interest should entail an actual interest — a stake — rather than a mechanical connection."[20] Buss, *supra* p. 4, at 375. As we observed at the outset, the Special Counsel's contract with the School Committee and your related legal work antedated your election as a Councilor. If you satisfy the other requirements of the § 20 (b) exemption described above, we believe you will eliminate the actuality and perception of an "inside track" on prospective issues relating to the Special Counsel's contract, such as renewal and compensation.

DATE AUTHORIZED: March 10, 1999

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[1] You report that the Special Counsel also serves as counsel to the Superintendent and the School administration. You assisted the Special Counsel in providing legal services to the School Committee and School Department prior to your election as a Councilor.

[2] [Deleted]

[3] As stated by the Supreme Judicial Court, "The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the public schools within the jurisdiction of that body unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith." *Leonard v. School Committee of City of Springfield*, 241 Mass. 325, 329 (1922); *see also Davis v. School Committee of Somerville*, 307 Mass. 354 (1940).

[4] Additional school committee powers include receiving and expending grants or gifts for educational purposes (G.L. c.71, § 37A), entering into contracts regarding employee retirement programs (*id.* § 37B), adopting educational objectives to promote racial balance (*id.* § 37C), establishing disciplinary policies and procedures regarding the conduct of students and teachers (*id.* § 37H), and applying to the board of education for a grant for the cost of a magnet school (*id.* § 37J).

[5] The dictionary defines "appropriation" in the public law context to mean, "the act by which a legislative department of government designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense." *Black's Law Dictionary* (Fifth Ed.)

[6] This amount need not all be included in a school department's budget but also may be met by including amounts appropriated in other municipal department budgets, such as the health department.

[7] The Mayor is not required to recommend the budget amount the School Committee and Superintendent recommend to him. *See Superintendent of Schools of Leominster v. Mayor of Leominster*, 386 Mass. 114 (1982). However, you report that since the adoption of the Act, the Council has never been presented with a budget that exceeds the foundation budget. Rather, you state that the City has had difficulty in reaching the required appropriation.

[8] Statute 1987, c. 329 provides that in municipalities which accept that Act's provisions, the city council on recommendation of the school committee may by a two-thirds vote increase the total amount appropriated for the support of the schools. However, based on the records of the Secretary of State and on City municipal records, it does not appear that the City has accepted this Act. Accordingly, the Council cannot increase the School budget.

[9] That statute provides: "Every city . . . shall annually provide an amount of money sufficient for the support of public schools . . . , provided however, that no city . . . shall be required to provide more money for the support of public schools than is appropriated by vote of the legislative body of the city . . . . In acting on appropriations for educational costs, the city . . . appropriating body shall vote on the *total amount of the appropriations requested and shall not allocate appropriations among accounts or place any restriction on such appropriations.* The superintendent of schools . . . may address the local appropriating authority prior to any action on the school budget as recommended by the school committee . . . The city . . . *appropriating body may make nonbinding monetary recommendations to increase or decrease certain items allocating such appropriations.* The vote of the legislative body of a city or town shall establish the total appropriation for the support of the public schools, but *may not limit the authority of the school committee to determine expenditures within the total appropriation.*" G.L. c. 71, § 34 (emphasis added).

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

[11] The Ethics Commission has consistently taken a broad view of what constitutes a contract for purposes of the conflict of interest law. "The term 'contract' is not limited solely to a formal, written document setting forth the terms of two or more parties' agreement. Rather, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other(s) constitutes a contract for [c. 268A] purposes." *EC-COI-85-5; EC-COI*

[12] If the initial exemption requirements are satisfied, § 20(b) further requires that if the contract is one for personal services:

> (1) the services will be provided outside the normal working hours of the municipal employee,
> (2) the services are not required as part of the municipal

employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year.
(3) the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of that agency is available to perform those services as part of their regular duties, and
(4) the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section, . . .

G. L. c. 268A, § 20(b).

[13] Apparently to mitigate the harsh application of § 20 to selectmen and town councilors who held appointed municipal positions prior to their election, the Legislature passed what we refer to as the "selectman's exemption" and "town councilor's exemption," respectively. *See G.L. c. 268A, § 20 (¶¶ 12 & 14); St. 1982, c. 107 as amended by St. 1984, c. 459; EC-COI-93-4;* and *St. 1985, c. 252, § 3.* The Legislature, however, has not enacted an analogous exemption for city councilors or alderman in city forms of government, and we have refused to conclude that such an exemption is implied. *EC-COI-93-7.* We also note that G.L. c. 268A, § 7 (the state counterpart to § 20) contains an express exemption for members of the General Court. *See* G.L. c. 268A, § 7(c).

[14] By doing work for the Special Counsel through your salaried position at the Firm, we do not consider you to be employed by the School Committee for purposes of § 20(b). We do not offer an opinion on whether the other § 20(b) criteria can be satisfied because you have asked us to focus solely on these threshold criteria.

[15] Further, even if making a joint appointment to the School Committee were an activity of the School Committee, you could abstain from participation in such an activity. Additionally, we do not believe the Council would have official responsibility for or regulatory control over such an activity within the meaning of § 20(b) because it could not direct, govern, manage, superintend or control the School Committee's vote in filling the vacancy. *See* discussion below about "official responsibility" and "regulates."

[16] The Supreme Judicial Court has noted, "Ordinarily the wise course for one who is disqualified from all participation in a matter is to leave the room." *Graham v. McGrail*, 370 Mass. at 138.

[17] Under G.L. c. 268A, § 19, which prohibits a municipal employee from participating in a particular matter in which he or an organization by which he is employed has a financial interest, you would be prohibited from participating in non-binding monetary recommendations about School Department line items, as well as all other particular matters affecting your financial interest and\or that of the Firm. However, if those particular budget line items from which you abstain are considered separately and are approved by a qualified quorum of the Council, and those items then are included in a consolidated vote on all or part of the School budget, you may participate in the consolidated vote. *See Graham v. McGrail*, 370 Mass. at 140-141.

[18] This definition is based on federal law, Title 18 U.S.C. § 202(b), which has served as guidance in interpreting G. L. c. 268A because the latter statute was modeled in large part on federal law. *See* Buss, *supra* p. 5, at 321; *EC-COI-98-1.* Under the federal regulation which interprets Title 18 U.S.C. § 202(b), "the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, . . . job description or delegation of authority." *5 CFR § 2637.202(b)(2).*

[19] *See, e.g., St. 1982, c. 612; State Ethics Commission Bulletin, January, 1983, Vol. V, No. 1.*

[20] As Buss further notes:

> Conflict-of-interest legislation accomplishes its purpose when it produces disinterested public employees; to the extent the statutory language permits, it should be interpreted with that objective in mind and not regardless of the effect on recruiting able public employees. Buss *supra* p. 5, at 375.

CONFLICT OF INTEREST OPINION
EC-COI-99-3

FACTS:

You are the Chief of the Fire Department in a town in Massachusetts ("Town"). You have inquired on behalf of and with the permission of two firefighters in Town regarding the application of G.L. c. 268A, § 17, as recently amended by St. 1998, c. 100, to private work which each firefighter wishes to do "on the side."

"Firefighter A"

Firefighter A is a call firefighter[1] with the Town Fire Department. He serves as a call firefighter fewer than sixty days per year. Call firefighters in the Town have not been designated as "special municipal employees"[2] Firefighter A is a registered Professional Engineer (PE) in Massachusetts. In addition to being a call firefighter, he is self-employed as a consulting engineer. Among the work he performs for clients is the design of fire protection systems.[3] For example, an architect or contractor who is constructing or renovating a building might contract with him to do the design and drawings for the building's fire suppression system. As the consulting engineer on such a project, he does not personally apply for any permits. However, his design work is part of the materials submitted (whether by the contractor, architect or owner) to the local Building Department for a building permit.[4] Pursuant to 780 CMR § 903.2, the Building Department submits the plans to the Fire Department and the Fire Department must approve the plans before the Building Department may issue a permit.[5] After construction, a Certificate of Occupancy may not be issued until the Professional Engineer responsible for designing the system certifies that the fire protection systems have been installed in accordance with the approved design.[6] Firefighter A wishes to design fire protection systems for construction within the Town.

"Firefighter B"

Firefighter B is a full-time firefighter employed by the Town. Firefighter B also has a license to perform plumbing and heating work, which he does during his own time.

Recently, Firefighter B has received requests to replace boilers. To expand his business, he enrolled in a

class on oil burner installation and, upon completion of that class, passed the Massachusetts Department of Safety's test to be licensed to perform such work. As a result, he is now licensed to perform oil burner work. *See* G.L. c. 148, § 10D.

Installation or alteration of fuel oil burning equipment requires a permit issued by the local Fire Department. 527 CMR § 4.00. As a firefighter, Firefighter B is not involved in inspecting oil burners. Most of his oil burner work would be in private residences in the Town.

QUESTIONS:

1. As a Town call firefighter, and a regular municipal employee, may Firefighter A design for compensation fire protections systems for installation in the Town?

2. As a Town full-time firefighter, may Firefighter B perform oil burner work in the Town which requires permits issued by the Town Fire Department?

ANSWERS:

1. No, because in doing so Firefighter A would be receiving compensation from someone other than the Town in relation to a particular matter (the building permit for construction of the fire protection system) in which the Town is a party or has a direct and substantial interest, in violation of G.L. c. 268A, § 17(a). The most recent amendment to § 17 does not alter this result. A reading of § 17 which allowed co-workers of Firefighter A to approve or disapprove his fire protection drawings would undermine the clear statutory purpose of the amendment.

2. No, because in doing so Firefighter B would be receiving compensation from, and acting as agent for, someone other than the Town in relation to a particular matter (the permit for the oil burner work) in which the Town is a party or has a direct and substantial interest, in violation of G.L. c. 268A, § 17(a) and (c). The most recent amendment to § 17 does not alter this result, because that amendment does not apply to employees seeking permits from the agency by which they are employed.

DISCUSSION:

"Firefighter A"

Section 17(a) prohibits a municipal employee from receiving compensation[2] 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. In addition, § 17(c) prohibits a municipal employee from acting as agent[4] or attorney for anyone other than the municipality in any claim against the municipality or for anyone in connection with any particular matter in which the municipality has a direct and substantial interest. In general, any "particular matter" that involves municipal action, such as a permit granted by a municipality, is considered to be of direct and substantial interest to the municipality. *Commonwealth v. Canon*, 373 Mass. 494, 498 (1977); *EC-COI-88-21*. Section 17 is based on the principle that "one cannot serve two masters." These provisions, which prohibit municipal employees from providing assistance to private parties regarding matters of direct and substantial interest to the municipality, have been called "the essence of conflict-of-interest legislation." W. G. Buss, *The Massachusetts Conflict of Interest Law: An Analysis*, B. U. Law Rev. 299, 322 (1965).

A significant amendment to § 17 was recently enacted which affects the type of private work some municipal employees may do "on the side." In 1998, the Legislature added the following provision to § 17:

> This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, unless such employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

G. L. c. 268A, § 17 as amended by St. 1998, c. 100 (H. 5102) (effective May 1, 1998)

This exemption allows a municipal employee to apply for and, more significantly in the case of Firefighter A, to receive compensation in connection with a permit, so long as the employee is not employed by the permit-granting agency or an agency that regulates the activities of the permit-granting agency.

As an initial matter, we believe that Firefighter A, by designing for compensation fire protection systems to be installed in the Town, is receiving compensation "in relation to" the building permit. Although, Firefighter A does not personally apply for the permit or install the system, his design work is undertaken with the knowledge that it will be submitted to the Town as a necessary part of the permit application. *See*, 780 CMR § 903.1.3. He is further aware that his designs must comply with applicable code requirements and be approved by the Fire Department. In essence, his work is a necessary part of the permit application and would likely not exist apart from it. We therefore conclude that his design work is "in relation to" the building permit.

We must next consider the questions of whether Firefighter A is employed by the permit-granting agency or an agency which regulates the activities of the permit-granting agency. Read literally, the phrase "permit-grant-

ing agency" would, on these facts, appear to refer to the Building Department. However, an absolute prerequisite for the issuance of the permit by the Building Department is the Fire Department's "review and approval" of the fire protection design documents. 780 CMR § 903.2. Although the Fire Department may not be the permit-granting agency, its approval is legally necessary in order for the Building Department to issue the permit. Because the Fire Department shares with the Building Department approval power for the type of building permit at issue here, the Fire Department may properly be considered, on these facts, the functional equivalent of a permit-granting agency.[10] As explained below, we therefore conclude that because Firefighter A is employed by the Fire Department, he may not design for compensation fire protection systems for installation in the Town.

We believe that this view is consonant with the underlying purposes of the recent amendment to § 17. The amendment was intended to moderate some of the harsh results of the application of §§ 17(a) and (c) to municipal employees. For example, prior to the amendment, a firefighter "moonlighting" as a carpenter could not apply for a building permit from the Building Department to build a deck for a Town resident. By applying for such a permit, the firefighter would have been "acting as agent" for someone other than the Town in a matter of direct and substantial interest to the Town, in violation of § 17(c). *See, EC-COI-88-9.*

The amendment altered this state of affairs by allowing a municipal employee to apply for a permit, or be paid in relation to one, so long as the employee's own agency is not the agency which issues the permit, and is not an agency which regulates the activities of the permit-issuing agency. This serves to prevent the conflict of interest which would arise if, for example, an employee's permit application were to be reviewed by a co-worker, subordinate or superior in his own agency. That is in all essential respects the case here. Because the Fire Department's approval is required for any building permit involving a fire control system, Fire Department colleagues of Firefighter A would necessarily review and approve (or disapprove) his designs. We believe that this is just the type of conflict which § 17, including the amendment, seeks to prevent.

We are mindful of the argument that because Firefighter A is not employed by the "permit-granting agency", i.e., the Building Department, he should be able to avail himself of the exemption in the recent amendment to § 17. "Ordinarily, if the language of the statute is plain and unambiguous it is conclusive as to legislative intent." *Sterilite Corporation v. Continental Casualty Co.*, 397 Mass. 837, 839. Statutory interpretation also requires, however, a consideration of such factors as "the evil or mischief toward which the statute was apparently directed", *Meunier's Case*, 319 Mass. 421, 423 (1946); the underlying purpose of the legislation, in that "the purpose and not the letter of the statute controls", *Walsh v. Ogorzalek*, 372 Mass. 271, 274 (1977); and the "fair import" of the statute, *Thatcher v. Secretary of Commonwealth*, 250 Mass. 188, 191 (1924). As the *Sterilite* court opined, "time and again we have stated that we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history." *Sterilite, supra,* at 839.

A consideration of the totality of the circumstances in this matter, including the fact that the Fire Department's approval of Firefighter A's design work is a legal prerequisite to the approval of the building permit, leads us to conclude that the legislature did not intend to allow a municipal employee to do outside work which would be reviewed by his own agency simply because that agency's name does not appear at the top of the permit to be granted. Therefore, we conclude that the amendment does not, on these facts, exempt a municipal employee from the application of §§ 17 (a) and (c). Accordingly, Firefighter A may not receive compensation for the design of a fire safety system to be installed in the Town, where such installation is subject to a building permit which must be approved by the Fire Department based on its review of the design plans.[11] As discussed below, to the extent that §§ 17 (a) and (c) may create difficulties for a town attempting to attract and retain call firefighters, such difficulties may be eliminated or ameliorated by the Board of Selectmen designating call firefighters as special municipal employees.

Analysis If Call Firefighters Are Designated as "Special Municipal Employees"

The position of call firefighter is not currently designated as a "special municipal employee"[12] in the Town, although it appears that the position is likely eligible to be so designated by the Board of Selectmen. We will, therefore, discuss the issues raised as they would apply to Firefighter A if he became a special municipal employee.

In general, a special municipal employee is an employee who "occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days" *and* whose position has been officially designated by the Board of Selectmen as that of "special municipal employee." G.L. c. 268A, § 1(n).

The conflict of interest statute establishes exemptions or other provisions applicable only to special municipal employees (or to special state or special county employees.) Such an exemption exists in § 17:

> "A special municipal employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days."

This exemption thus provides that a special municipal employee may, not withstanding §§ 17(a) and (c), receive compensation from someone other than the municipality, or act as agent for someone other than the municipality, in matters in which the municipality is a party or has a direct and substantial interest, *if* certain conditions are met. In the case of Firefighter A, clause (c) of the exemption is the relevant condition which must be met.[13]

That clause states that §§ 17(a) and (c) still apply to a special municipal employee regarding a particular matter pending in employee's own municipal agency, unless that special municipal employee serves sixty or fewer days in any one year period. Because permits which are issued by or require the approval of the Fire Department are "pending in the municipal agency" in which a firefighter is serving, a firefighter who is a special municipal employee would not be permitted to receive compensation in connection with such a permit, or act as agent in connection with such a permit, *unless* the firefighter serves "on no more than sixty days during any period of three hundred and sixty-five days."

Firefighter A states that he works significantly fewer than 60 days per year as a call firefighter. Therefore, if call firefighters become classified by the Board of Selectmen as special municipal employees of the Town, he may work in his private capacity as an engineer on matters requiring a permit from (or a permit sign-off from) the Town Fire Department, so long as he continues to work as a call firefighter on no more than 60 days in any 365 day period, and he does not as a municipal employee participate in or have official responsibility for the particular matter of the permit or permit sign-off.

"Firefighter B"

As a full-time firefighter, Firefighter B is a municipal employee[14] subject to the conflict of interest law. As described in detail below, the oil burner work he seeks to do within the Town will be prohibited under § 17 of G. L. c. 268A.

The same general principles discussed above regarding Section 17 apply to Firefighter B. A permit the Fire Department issues for oil burner work is a particular matter of direct and substantial interest to the Town. *Commonwealth v. Canon,* 373 Mass. 494, 498 (1977); *EC-COI-88-21.*

The recent amendment to § 17, discussed above, affects the types of private work Firefighter B might do "on the side" but does not allow him to pull permits from his own agency, the Fire Department. Although there may be some question as to whether an oil burner installation permit falls into any of the categories of permits listed in the amendment (i.e., "building, electrical, wiring, plumbing, gas fitting, or septic system"), it is not necessary to reach that issue. This is so because even if an oil burner permit were to be considered, for example, a building, electrical or wiring permit, this exemption expressly prohibits an employee from receiving compensation in relation to permits his own agency issues. Therefore, in any event, this exemption does not apply to Firefighter B because the permit for oil burner installation is issued by his employer, the Fire Department. Thus, the portions of the conflict statute applicable to these facts are §§ 17(a) and (c). Those sections prohibit Firefighter B from performing oil burner installation work in the Town because he would be receiving compensation and/or acting as agent in relation to a particular matter (the permit) in which the Town is a party or has a direct and substantial interest.

Please note that the recently-enacted exemption set forth above expressly allows Firefighter B to pull other permits, for example, plumbing or gas fitting permits, as long as the permit-granting agency is *not* the Fire Department.[15] In addition, § 17 does not apply to Firefighter B pulling permits in towns other than the Town because such permits would not be "particular matters" of "direct and substantial interest" to the Town.

Date Authorized: March 10, 1999

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[1] Call firefighters are called to work for a particular incident, as required. They are paid an hourly rate for the actual time worked.

[2] "Special municipal employee" is defined as " a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.

For this purpose compensation by the day shall by considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception." G.L. c. 268A.

[3/4]"Fire protection system" is defined as "[d]evices equipment and systems used to detect a fire, activate an alarm, suppress or control a fire, or any combination thereof." 780 CMR § 902.1. In general, all fire protection systems must be designed by a registered professional engineer and bear the engineer's original stamp and signature. 780 CMR § 903.1.3

[4]The engineer "shall be responsible for the review and certify that all shop drawings conform to the approved fire protection construction documents as submitted for the building permit and approved by the building official." 780 CMR § 903.1.3

[5]" . . . the building official shall transmit one set of the fire protection construction documents and building construction documents to the head of the fire department or his designee for review and approval . . ." 780 CMR § 903.2.

[6]The certification must state that "the fire protection systems have been installed in accordance with the approved fire protection construction documents and that he has reviewed the shop drawings for conformance to [the applicable regulations] and has identified deviations if any . . ." 780 CMR § 903.4.

[7]"Compensation, any money, thing of value or economic benefit conferred on or received by any person in return for service rendered or to be rendered by himself or another." G.L. c. 268A, § 1(a).

[8]"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).

[9]The State Ethics Commission has concluded that "the distinguishing factor of acting as agent within the meaning of the conflict law is 'acting on behalf of' some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications." *In re Sullivan*, 1987 SEC 312, 314-315; See also, *In re Reynolds*, 1989 SEC 423,427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

[10]In addition, although the Fire Department's approval is required in order for the Building Department to issue a building permit under these circumstances, we do not believe that the Fire Department therefore "regulates" the Building Department within the meaning of the statute. The word "regulate" is not defined in G.L. c. 268A. We have said that "regulate" means to govern or direct according to rule or bring under the control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists." *EC-COI-83-158* (from *Black's Law Dictionary*, 5th ed. West, 1979); *EC-COI-91-9*. The issue here is whether the necessity of the Fire Department sign-off on the building permit for a fire protection system is sufficient to deem the Building Department "regulated" by the Fire Department. We have distinguished "those . . . agency relationships which have an indirect, incidental effect on the . . . agency's activities from those relationships where one agency has determinate or regulatory authority over the other." *EC-COI-85-80*. We conclude that the facts before us do not present a situation in which the Fire Department has "regulatory authority" over the Building Department.

[11]He is free to design for compensation fire protection systems for installation in towns other than the town in which he is a firefighter.

[12]See definition in footnote 2, above.

[13]Clauses (a) and (b) of the exemption concern municipal emplioyees who in their official capacities either participate in or have official responsibility for a particular matter. Since Firefighter A does not participate in or have official responsibility for the Fire Department's review of his own private design drawings, these provisions are inapplicable to him.

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

[15]See, however, the discussion above regarding Firefighter A and the interpretation of the phrase "permit-granting agency."

CONFLICT OF INTEREST OPINION
EC-COI-99-4*

FACTS:

You serve as Town Counsel to the Town of Swansea ("Town"). The Town has a three-person Board of Selectmen ("Board"). One of the Board's responsibilities is to approve payroll warrants for all departments. You write on behalf and with the permission of one of the Board members who has an immediate family member employed by the Swansea School Department ("School Department").

You describe the process of payroll payment in Swansea as follows. On a weekly basis, each Town department head reviews his or her department's payroll forms, including time sheets and vouchers (collectively, "Payroll Forms") and, if everything is accurate and complete, swears to and signs the Payroll Form for the preceding week. Department heads[1/] forward their signed weekly Payroll Forms to the Selectmen's Office. There, the Town Administrator[2/] reviews the signed Payroll Forms, and if accurate and complete, countersigns them. The signed Payroll Forms are then forwarded to the Town Treasurer who draws a warrant upon the Treasury for payment of the payroll. The warrant generally is broken down by departments. Upon approval of the warrant by the Selectmen, the Treasurer pays payroll from the Treasury.[3/]

QUESTION:

1. Under the reasoning of *EC-COI-98-5*, does § 19 prohibit a Selectman from approving or disapproving a payroll warrant for the School Department in which his immediate family member is employed?

2. If the answer to the preceding question is yes, would the rule of necessity allow the Selectman to approve or disapprove a payroll warrant for the School Department if one of the other two Selectmen is absent and a quorum of the Board is necessary to approve payroll warrants within the time period required by statute?

ANSWER:

1. Yes, § 19 prohibits the Selectman from approving or disapproving a School Department payroll warrant because such approval or disapproval constitutes participation in a particular matter in which the Selectman's immediate family member has a financial interest.

2. Yes, so long as the Selectman follows the procedures for invoking the rule of necessity discussed herein, the rule would allow him to approve or disapprove a School Department payroll warrant under circumstances where a statute requires the Town to pay Town employees weekly (or on another prescribed basis); another Selectman is absent; and, due to the disqualification of the Selectman under § 19, the Board cannot obtain a quorum to act before it is statutorily required to do so.

DISCUSSION:

Approval\Disapproval of School Department Payroll Warrants

The Selectmen are municipal employees within the meaning of the conflict of interest law. G.L. c. 268A, § 1(g). As such, section 19 is relevant to your inquiry. General Laws c. 268A, §19 (a) provides, in relevant part, that "a municipal employee who participates as such an employee in a particular matter[4] in which to his knowledge he, his immediate family[5] 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 . . ."

It is clear that payment of the School Department payroll is a particular matter within the meaning of G.L. c. 268A and that the Selectman's immediate family member employed by the Department has a financial interest in that particular matter. The remaining question is whether, by approving or disapproving the School Department payroll warrant, the Selectman "participates" in that particular matter within the meaning of the statute. The conflict law defines "participate" 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." G.L. c. 268A, §1(j) (emphasis added).

In *EC-COI-98-5*, the Commission opined that *§ 19(a)* prohibits an elected member of a local school committee from approving payment schedules for payment to a nonprofit corporation vendor to the schools, where the school committee member sits on the board of directors of the nonprofit corporation. In determining whether School Committee members "participate" in the particular matter of the payment of an item on the schedule of bills payable, the Commission looked to the statutory scheme underlying the payment of town monies. General Laws c. 41, § 56, which is included in sections governing town accountants, 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).

Section 52 of G.L. c. 41, which is included in sections governing town auditors, is also relevant to your inquiry:

> All accounts rendered to or kept in the departments of any city shall be subject to the inspection of the city auditor or officer having similar duties, and in towns shall be subject to the inspection of the selectmen. The auditor or officer having similar duties, or the selectmen, may require any person presenting for settlement an account or claim against the city or town to make oath before him or them, in such form as he or they may prescribe, as to the accuracy of such account or claim.[6] . . . The auditor or officer having similar duties in cities, and the selectmen in towns shall approve the payment of all bills or pay rolls of all departments before they are paid by the treasurer, and may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive; and in that case the auditor or officer having similar duties, or the selectmen, shall file with the city or town treasurer a writ-

ten statement of the reasons for the refusal; and the treasurer shall not pay any claim or bill so disallowed. This section shall not abridge the powers conferred on town accountants by sections fifty-five to sixty-one, inclusive.

As is evident from the foregoing, the powers of the selectmen under § 52 are similar to the powers of the town accountant under § 56. The Supreme Judicial Court observed, "[T]he Legislature has empowered the town accountant and the board of selectmen to disallow claims against the municipality which appear to be unlawful." *Treasurer of Rowley v. Town of Rowley, et al.*, 393 Mass. 1, 6 (1984). The Court further explained:

> The [1913] Joint Special Committee on Municipal Finance, in recommending that "some official in every city and town of the State should be given the statutory authority to investigate every item of every bill if necessary, and to refuse to sanction payment of a bill if such course seems to him to be necessary," noted that in towns which have a town accountant, that official "has the legal right . . . to ascertain whether or not the charges made . . . are irregular." House Doc. No. 1803, *supra* at 63. To ensure that at least some official has the right to challenge the lawfulness of a claim for payment, the committee suggested that the board of selectmen also be given that right. *Id.*

Id. at 6-7.

The Legislature's intent appears to be to ensure that the Board has authority to disallow fraudulent, unlawful or excessive claims.[7] The Selectmen's authority to approve the payroll warrants before they are paid implies a corresponding authority to disapprove warrants, at least based on fraud, unlawfulness or excessiveness. *See, e.g., Town of Rowley*, 393 Mass. at 3; *accord* A. Cella, *Massachusetts Practice: Municipal Law* § 113 (1971) ("In certain respects the selectmen are watchdogs of the town treasury. They must approve the payment of all bills or payroll before they are paid by the town treasurer.") .

You argue that the Selectmen's role regarding warrants is "predominantly ministerial," especially given that a payroll claim may only be disallowed if it is "fraudulent, unlawful or excessive" and "a written statement of the reasons for refusal" is provided. We disagree for the following reasons.

Based on the dictionary definition, a "ministerial act" is "[o]ne which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done." *Black's Law Dictionary* (6th Ed. 1990) (emphasis added). If the Selectmen disapprove a warrant as fraudulent, unlawful or excessive, there can be no question that they are exercising judgment and discretion which the Legislature vested in them because it deemed such judgment to be important to the integrity of the municipal finance process. Similarly, even if the Selectmen approve a payroll warrant, there can be no question that prior to doing so, they must exercise their judgment to determine whether the claim is fraudulent, unlawful or excessive. As the Commission noted in *EC-COI-98-5* with respect to the School Committee's power to approve and disapprove bills, "[s]uch power, whether exercised or not, implies discretion and judgment," and removes the approval of payroll claims and warrants from the realm of the ministerial. Similarly, we conclude here that the Selectmen's approval or disapproval of payroll claims and warrants, even after the department head has approved such claims, is not ministerial and constitutes "participation" within the meaning of G.L. c. 268A.[8]

We earlier determined that the School Committee's immediate family member has a financial interest in the particular matter of payment of the School Department payroll. Thus, under G.L. c. 268A, § 19, the Selectman cannot approve or disapprove the School Department payroll warrant unless he is authorized to do so by means of another statute or other legal authority, such as the rule of necessity.[9]

Rule of Necessity

As the Commission stated in *EC-COI-93-13*:

> The rule of necessity was established by courts to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice or interest when no other official or agency is available to make that decision. *See Moran v. School Committee of Littleton*, 317 Mass. 591, 594 (1945); *Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that the rule would apply in proper circumstances where public officials could not participate due to GL. c. 268A); *see also Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272 (1990).

The Commission historically has stressed the narrow circumstances in which the rule of necessity may properly be invoked in conflict situations under G.L. c. 268A. *See, e.g., EC-COI-92-24; 82-10; 80-100.* In general, only where a municipal body cannot obtain the quorum necessary to take action because of disqualification based on conflicts of interest under G.L. c. 268A may the rule provide a mechanism by which all members may act notwithstanding any conflicts of interest. *EC-COI-93-13.* In short, the rule of necessity is a tool of last resort. *EC-COI-92-24.*

In *EC-COI-93-13*, the Commission considered

a situation in which a board of selectmen was required by statute to act on a licensing matter within a certain period of time, one of the three board positions was vacant because of the death of a selectmen, a special election to fill the vacancy could not be held due to statutory requirements until after the time required to act on the licensing matter, and one of the two remaining selectmen was disqualified from participating in the licensing matter under G.L. c. 268A, § 19. Under those narrow circumstances, the Commission concluded that "the rule of necessity should apply where statutory time restrictions require the Board to act, where a vacancy on the Board cannot be filled in time to meet those restrictions and where, as a result, the Board cannot obtain a quorum due to the disqualification of one or more of its members." *Cf. EC-COI-93-3* (rule [of necessity] could be applied in a situation where, because of conflicts of interest and the type of matter being considered (requiring a super-majority for an affirmative vote), the body could never approve (or act affirmatively with regard to) the matter). The Commission in *EC-COI-93-13* specifically reserved the question of "the appropriateness of invoking the rule of necessity where the board is required by law to act on a matter within a limited time period and where one of its members is unable to participate for reasons other than vacancy before the expiration of the period in which the board must act." *EC-COI-93-13* n. 4.

Town employees generally must be paid on a weekly (or other prescribed) basis, so long as certain statutory requirements are satisfied.[10] *See* G.L. c. 148, § 149; A. Cella, *Massachusetts Practice: Municipal Law* § 213 (1971). Thus, the situation you present requires the Commission to address whether the rule of necessity can be invoked where the Selectman is disqualified from approving School Department payroll warrants due to a conflict of interest under § 19(a), a second Selectman is absent due to illness, business, vacation or other reason, and the result is that a quorum of the Selectmen is unavailable to approve the weekly warrant for the School Department payroll. Similar to the situation in *EC-COI-93-13*, if the Selectmen fail to obtain a quorum to approve payroll warrants and, consequently, the Treasurer cannot make payment within the time frame required by statute, the Town would violate state law.

The statutes do not appear to provide for any substitutes for or alternatives to the selectmen's approving warrants where a selectman is disqualified due to a conflict of interest or absent. Section 56 of G.L. c. 41 provides, "If there is a failure to elect or a vacancy in the office of selectmen, the remaining selectman or selectmen, together with the town clerk, may approve such warrant." Based on a plain meaning reading, the statute does not authorize the town clerk or anyone else to approve a warrant in the event of an absence on the Board for a reason other than failure to elect or vacancy. In this regard, we note the familiar principle of statutory construction, "the expression of one thing is an implied exclusion of other things omitted from the statute." *Glorioso v. Retirement Board of Wellesley, 401 Mass. 648, 650 (1988).* Had the Legislature intended to provide for the situation where a Selectman could not approve a warrant due to absence for a reason other than failure to elect or vacancy, it could have done so. *Cf. EC-COI-94-5* (G.L. c. 150E, § 1 provides that the "employer" for collective bargaining purposes is the "chief executive officer" or a designated representative); *EC-COI-83-114* (G.L.c. 43, § 27 provides that where mayor has an interest in a municipal contract and would otherwise be required to sign the contract, city clerk may sign).

Thus, neither state law nor any other authority of which we are aware[11] provides for substitutes or alternative arrangements when a quorum of selectmen is unavailable to timely approve warrants for reasons other than failure to elect or vacancy in the office. We are, nonetheless, mindful of the need to give the conflict of interest law a workable meaning. *See Graham v. McGrail*, 370 Mass. 133, 140 (1976); *EC-COI-83-114*. Accordingly, we conclude that where a statute requires the Selectmen to approve payroll warrants on a weekly (or other prescribed) basis, where one Selectman is absent, and where the Board cannot otherwise obtain a quorum due to the disqualification of the Selectman whose immediate family member works for the School Department, the rule of necessity can be invoked on behalf of the disqualified Selectman. We strongly suggest, however, that the rule be used only upon prior written advice from town or city counsel since improper use of the rule could result in a violation of § 19.[12] *See EC-COI-93-3* n. 11; *92-24*. The rule should be used sparingly, as a last resort only.[13]

Date Authorized: April 22, 1999

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

[1] The School Committee ultimately reviews and approves the School Department Payroll Forms and forwards them to the Town Treasurer.

[2] Swansea does not have a Town Accountant; it does have a part-time Town Auditor.

[3] A similar process is followed for payment of Town bills other than payroll.

[4] "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."

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

[6] Under G.L. c. 41, § 41, prior to payment of any salary to a town employee, the payroll for such salary must be sworn to by the head of

the department or other person designated in accordance with that section.

[7] This is especially important in towns such as Swansea which does not have a Town Accountant.

[8] We deem irrelevant the fact you note that the Selectmen play no role in setting School Department salaries. You have not identified and we have failed to locate any authority to suggest that the requirements of G.L. c. 41, §§ 52 and 56 do not apply to School Department payroll notwithstanding the autonomy of School Committees in many other respects. *See, e.g., G.L. c. 71, § 34.* The reasons for auditors, selectmen and accountants to review and approve all payroll warrants for fraud, lawfulness and excessiveness apply equally to the School Department payroll. Finally, the issue is not, as you suggest, whether the Selectmen have discretion to disallow lawful payroll claims but rather whether they must exercise discretion in determining whether payroll claims are lawful.

[9] The exemption available to appointed officials and employees under G.L. c. 268A, § 19(b)(1) is not available to selectmen because they are elected. *EC-COI-83-114* n. 4. If it is possible to segregate the School Department warrant from the other department warrants, the Selectman disqualified as to participation in the School Department warrant may approve or disappove the balance of the department warrants.

[10] We do not have information about and, therefore, do not comment on whether and how collective bargaining agreements may affect statutory requirements.

[11] You have informed us that no relevant charter provisions exist in Swansea.

[12] As we noted in *EC-COI-92-24*, it is advisable for municipal counsel to establish advance guidelines describing the circumstances under which the rule should be invoked. Use of the rule should be noted in the minutes of the meeting at which it is invoked and, in order to satisfy the requirements of § 23(b)(3), the otherwise disqualified Selectman should, if possible, make an advance written disclosure, to be filed with the Town Clerk, of the relevant facts that created the conflict of interest and necessitated use of the rule in order to obtain a quorum. *See EC-COI-93-3.* If such an advance written disclosure is not possible, the Selectman should include a § 23(b)(3) disclosure in the minutes of the meeting. In addition, § 23(b)(2) is relevant, providing that no public employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. Therefore, if the disqualified Selectman participates in reviewing School Department warrants based on the rule of necessity, he must apply objective criteria to those as well as all other department warrants.

[13] For example, in the event of a short-term absence of a Selectman, if the Board can reasonably reschedule a meeting to allow that Selectman to participate in approving warrants within the statutory time period or can make arrangements for that Selectman to approve warrants at a different time, outside the meeting but within the statutory time period, then such arrangements should be made to avoid the need to invoke the rule of necessity on behalf of the disqualified Selectman.

CONFLICT OF INTEREST OPINION
EC-COI-99-5*

FACTS:

The Board of Selectmen of the Town of Amherst appointed you the Town's representative (Councilor) to the Hampshire Council of Governments (Council).

Pursuant to St. 1998, c. 300, Hampshire County government was dissolved. Following the provisions set forth in St. 1998, c. 300, § 45, adding § 30(b) to c. 48 of the Acts of 1997, a majority of voters in the twenty municipalities of the *former* Hampshire County approved the *Hampshire Council of Governments Charter* (Charter) which created the Council. The Charter's Preamble states that the twenty municipalities that were within the former County "have vital common concerns that transcend the borders of individual municipalities" and have adopted the Charter to establish "the means to serve [the] municipalities effectively, and to place the Council of Governments on a firm financial footing in order to deal with regional issues which transcend the existing boundaries of municipal governments." The Council retains powers and duties previously conferred upon Hampshire County and its County Commission except those powers concerning functions transferred to the Commonwealth. *See St. 1998, c. 300, §§ 11, 13, 16.* As a result of the County's dissolution, the operation and management of the County Jail and the House of Correction, the Registry of Deeds and the court houses were transferred to the Commonwealth. *Id. at § 11.* However, the Council acquired the "historic courthouse at 99 Main Street in the city of Northampton, the Hampshire Care nursing facility on River Road in Leeds, and the land on which they are situated . . . , and the fixtures and improvements located thereon" and leased the courthouse to the Commonwealth for its continued use as the trial court's law library. *Id. at § 20, amending § 7 of c. 48 of the Acts of 1997.* If the Charter had not been approved, "all powers and duties of Hampshire county government [would have been] transferred to the commonwealth effective January 1, 1999." *St. 1998, c. 300, § 13, amending § 3 of c. 48 of the Acts of 1997.*

The Charter describes the Council as a "body politic and corporate for the purposes of regional cooperation in matters of common interest among the members of the Council." Some of the Council's powers include: the power of eminent domain with respect to any powers of the former County; the power to construct and maintain public improvements; the power to administer trust funds of the former County and to have all possible protections from tort liability afforded to municipalities; the powers of municipalities with respect to creating special fund accounts for the purpose of providing any service authorized by the Charter; the power to establish membership assessments and service charges; the power to retain the powers and authorities of the former County's

executive and legislative bodies including any responsibility of the former County for which the Commonwealth has no explicit jurisdiction; and the powers of town selectmen under G. L. c. 41, §§ 52, 56 for approval of bills and warrants. *Charter, Article One. See also St. 1998, c. 300, § 45, adding § 30(b) to c. 48 of the Acts of 1997.*

The Council may accept or participate in any grant, donation or program available to any political subdivision of the Commonwealth as well as in any grant, donation or program made available to counties by any other governmental or private entity. *St. 1998, c. 300, § 45, adding § 30(d) to c. 48 of the Acts of 1997; Charter, Article Five, § 7.* The Legislature authorized the Commonwealth to provide a grant of $950,000 to the Council. *St. 1998, c. 300., § 45, adding § 35 to c. 48 of the Acts of 1997.* The grant, however, has not been funded in the state budget and, if it is funded, no additional such legislative grants are anticipated. Although the Council currently has received grants from the Department of Public Safety and the Department of Public Health, most of its funding comes from its member municipalities, described below.

To "provide, purchase or otherwise make available services on a regionalized basis," the Council may impose a regional assessment, as set forth in the Charter, which shall be allocated among the members of the Council in proportion to their respective equalized valuations as reported to the General Court by the Commissioner of Revenue. The regional assessment shall be based upon the budget the Council adopts and shall be used to provide regional or municipal services or programs, or for planning, organizing and administering such services or programs, and maintaining property in connection with such services or programs. *St. 1998, c. 300, § 45, adding § 30(i) to c. 48 of the Acts of 1997; Charter, Article One, § 2(c) vii.*[1]

The Council may "sue and be sued . . . contract and be contracted with. . . buy, sell, lease, hold and dispose of real and personal property" as well as "appropriate and expend funds for Council . . . purposes, retain, administer and release trust funds of the former County." *Charter, Article One, § 2(c) v.*[2] The former County Treasurer has been designated as the Council's Director of Finance and has the power and duties of a municipal treasurer pursuant to G. L. c. 41, § 35 and G. L. c. 44, §§ 54, 55 and 55A.

The Council performs several functions. It "may administer and provide regional services to cities and towns and may delegate such authority to subregional groups of such cities and towns." *St. 1998, c. 300, § 45, adding § 30(g) to St. 1997, c. 48.* It "may enter into cooperative agreements with regional planning commissions or may merge with such commissions to provide regional services." *Id.* The Council shall determine what regional services it may provide to member municipalities, which may include, but not be limited to, engineering, inspectional services, planning, economic development, public safety, emergency management, animal control, land use management, tourism promotion, social services, health, education, data management, regional sewerage, housing, computerized mapping, household hazardous waste collection, recycling, public facility siting, coordination of master planning, vocational training and development, solid waste disposal, fire protection, regional resource protection, regional impact studies and transportation. *St. 1998, c. 300, § 45, adding § 30(h) to c. 48 of the Acts of 1997.* It has the power "to contract with or enter into agreements with any other entity or governmental unit and to provide jointly or for the other, or in cooperation with other entities, any service, activity, or undertaking which that entity or governmental unit is authorized by law to perform." *Charter, Article One, § 2 (c) vi.* It may construct, acquire, operate and maintain public improvements, capital projects, personal property and real property or other enterprises for any public purpose. *Charter, Article One, § 2(c) iv.*

The legislative power of the Council is vested in a board of councilors made up of members chosen at municipal general elections for terms of two years. Councilors shall be residents and registered voters of the municipalities that elect them, and shall qualify for the ballot in towns in the same manner as candidates for the board of selectmen and in cities in the same manner as at-large candidates for the city council.[3] There shall be at least one councilor elected from each municipality, however, "any municipality whose population comprises more than ten per cent of the population of the Council . . . shall elect one councilor for each ten per cent or portion thereof." *Charter, Article Three, § 1.* The Council shall elect annually from its membership a chairman, vice-chairman, and three other members, no more that one of whom shall be from any single municipality, to serve as a executive committee. The Council shall choose a moderator, who shall not be a member of the executive committee, to preside over its meetings. *Id. at § 2(a).* The Council shall meet at least once per month. *Id. at § 2(b).* The executive committee shall meet at least twice per month and shall report to the Council at least once per month. *Id. at § 2(d).*

Municipalities that were not within the former County may join the Council under the following conditions: (1) a vote by a majority of the citizens, or a vote of the legislative body of the municipality, at the choice of the municipal executive body; (2) a two-thirds affirmative vote of the councilors of the Council; and (3) a commitment to belong for at least three years. *Charter, Article Two, § 1(b).* After three years of membership, any municipality may withdraw from the Council by an affirmative vote of its legislative body. *Id. at § 2(a).*

The Charter may be amended in either of two

ways. A proposed amendment shall be submitted to the voters of each municipality only after two-thirds of the weighted votes of the Council approves, or after at least five per cent of the number of residents of the member municipalities registered to vote in the preceding state election signs a petition. Proposed amendments shall become effective if a majority of the voters in the member municipalities approve at a biennial state election held at least ninety days following the Council's vote to submit the amendments. *Charter, Article Seven, §§ 1, 2.*

QUESTION:

Is the Council a state or municipal agency for purposes of the conflict of interest law?

ANSWER:

The Council is a municipal agency for purposes of the conflict of interest law and, as a result, you are a municipal employee of each of the Council's member municipalities.

DISCUSSION:

There is no question that the Council is a governmental entity because governmental actions created it, it performs essentially governmental functions, government officials control it and it receives public funds. *See e.g., EC-COI-95-2; EC-COI-94-7; EC-COI-92-26.* The issue is whether the Council is a state[4] or municipal[5] entity for purposes of the conflict of interest law.[6]

We have said that the focus of the analysis is on the level of government a public agency serves. *EC-COI-95-2; EC-COI-91-3.* "When an agency possesses attributes of more than one level of government, the State Ethics Commission will review the interrelation of the agency with the different government levels in order to determine the agency's status under c. 268A." *EC-COI-91-3.* "We have considered which level of government funds and oversees the entity, and whether the entity carries out functions similar to those of a particular level of government." *EC-COI-95-2.* We conclude, based upon the factors below, that the Council is a municipal agency for purposes of the conflict law, although the Council has a few characteristics which we have associated with state agencies.

Municipalities oversee and primarily fund the Council, and the Council's functions are aimed at serving municipalities regarding, for example, planning, economic development and safety issues. Most of its operating budget is funded from the municipal assessments and service charges. The Council's Director of Finance has the power and duties of a municipal treasurer. Municipalities, rather than any state agency, choose members to serve on the Council. The Legislature has expressly given the Council certain municipal powers, duties and attributes regarding the handling of finances and tort liability. The Legislature has no role in amending the Charter or in a municipality's decision to join or withdraw from the Council. None of the Council members is required to be a state official or is appointed by state officials. Its enabling legislation and Charter do not indicate that state agencies control it.

We also observe that, in the enabling legislation for the Council, the Legislature expressly allocated certain functions of the former County to the Commonwealth while delegating other functions to the Council. That division of functions indicates that where a public function at the state level of government was required, the Legislature intended the state to control those functions. As a result, the state has determined that it should control the Jail, House of Correction, Registry and courts that were subject to the former County's control. Although the Legislature determined that all of the former County's functions would be transferred to the Commonwealth if the Council were not created, the municipalities of the former County, rather than any state agency, approved the Charter. Similarly, although an act of the Legislature dissolved the County and outlined the procedure for creating the Council, it was the decision of the member municipalities, rather than a state-mandated requirement, to approve the Charter in order to continue to have some of the regional services of the former County. *See e.g. EC-COI-92-26* (Martha's Vineyard Collaborative created by municipalities as a means by which municipalities fulfill their educational responsibilities and is an instrumentality of those municipalities); *EC-COI-91-3* (the municipal level of government has the most direct and substantial interest in decisions of the Martha's Vineyard Commission). The Council is not, as the statutory definition of "state agency" requires, an "instrumentality within . . . any independent state authority, district, commission, instrumentality or agency" because the Council is accountable to only its members, who represent their respective municipalities, rather than to any current state official or state agency. *See McMann v. State Ethics Commission,* 32 Mass. App. Ct. 421, 424-425 (1992).

In contrast, we concluded that the Metropolitan Area Planning Council (MAPC) is a state, rather than municipal, agency for purposes of the conflict law in *EC-COI-95-2* even though the MAPC provides some services similar to the Council's. For example, among other services, the MAPC conducts research and/or studies to help identify needs and formulate goals for the development and redevelopment of resources and facilities within MAPC's district. *Id.* These services, generally advisory in nature, are intended to supplement, rather than replace or regulate, the activities of local bodies such as planning boards, zoning boards or boards of aldermen. *Id.* We observed, however, the significance of the state's, rather than the municipalities,' control over the MAPC.

There are major differences between the MAPC

and the Council. Approximately one-quarter of the MAPC members and *ex officio* members are selected by the Governor or are employees of state agencies and authorities while none of the Council is or is required to be a state employee or appointed by state officials. The Legislature created the MAPC to provide a "state regional planning function that is *separate* and *distinct* from each of its member municipalities' local planning bodies." *EC-COI-95-2* (emphasis added). The MAPC was established as a state agency[7] while the Council was established only after municipalities accepted the Charter. Finally, the legislation that dissolved Hampshire County government shows the Legislature retained for the Commonwealth functions of greater interest to the state while delegating to the Council other functions of greater interest to municipalities.

Although this is a hybrid entity, including both municipal and state attributes, we conclude that the Council has more attributes of a regional municipal entity. The Council, therefore, is a municipal agency for purposes of the conflict of interest law.

In *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 n.5 (1992), the Appeals Court held that a regional school district is an instrumentality of each of its member municipalities, rather than an independent municipal entity, and that a member of the district's school committee is a municipal employee for purposes of the conflict of interest law. Since then, we have concluded that similar regional municipal agencies are also instrumentalities of each member municipality. *See e.g., EC-COI-92-26; EC-COI-92-27; EC-COI-92-40* (the Martha's Vineyard Land Bank Commission, to which each member town elects a representative, is not an independent municipal entity but rather an instrumentality of each member town). We have further concluded that a member of a regional municipal agency is a municipal employee of each member municipality. *See e.g., EC-COI-94-9* (a member of the Hampden-Wilbraham Regional School Committee who was elected by the Wilbraham voters is a municipal employee of both Wilbraham and Hampden). It follows, therefore, that, in your capacity as a Councilor, you are a municipal employee[8] of each of the Council's member municipalities for purposes of the conflict law, although the Town of Amherst appointed you to the Council. *EC-COI-94-9.* [9]

DATE AUTHORIZED: September 15, 1999

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

[1] The Council may impose a regional assessment up to the rate of .0001 of the equalized valuation of each member municipality as reported to the General Court by the Commissioner of Revenue in accordance with G. L. c. 58, § 10C. *Charter, Article Five, § 6(a).* The Council's operating budget is approximately $1,000,000. The operating budget for the Hampshire Care nursing facility is approximately $5,000,000. In addition, the Council operates an insurance pool for municipalities, which is funded by premiums municipalities or municipal employees pay.

[2] The Council assumed certain unfunded pension liabilities of former County employees. *St. 1998, c. 300, § 18, amending § 6, c. 48 of the Acts of 1997.* Those liabilities have been funded by contributions from the member municipalities.

[3] You were appointed, rather than popularly-elected, because there was a tie in the municipal election. Under § 5 of the Charter, a vacancy because of a "failure to elect to the office of Council of Governments councilor shall be filled . . . by appointment in the towns by the board of selectmen."

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

[5] "Municipal agency," any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. *G. L. c. 268A, § 1(f).*

[6] We need not consider whether the Council is a county entity because the County as a form of government dissolved pursuant to legislation.

[7] First established pursuant to St. 1963, c. 668, the MAPC was funded by an appropriation of the General Court, "'charged as assessments upon the various cities and town comprising the district,' such assessment to be certified by and paid to the state treasurer." *EC-COI-95-2.* We noted that St. 1963, c. 668 amended G. L. c. 6, § 17 to place the MAPC under the supervision of the Governor. *Id.*

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

[9] Your status as a municipal employee of each member municipality may be significant in applying other sections of G. L. c. 268A to your conduct. We recommend that you seek further advice from the Legal Division concerning your specific circumstances.

CONFLICT OF INTEREST OPINION
EC-COI-99-06

FACTS:

As Counsel to a town in Massachusetts ("Town") you have requested an advisory opinion on behalf of members of the Review Board ("RB"). The Town established the RB "in recognition of the fact that beautiful communities can be created only through a deliberate search for beauty on the part of the community leadership, architects, engineers, planners, realtors and the building industry, backed by an appreciation of the visual world by the people." Town By-Law.

The RB consists of five members, appointed by the Board of Selectmen for three year terms, one of whom must be a registered architect and one of whom must be a registered engineer or registered land surveyor. *Id.*

According to Town By-Laws, the Planning Board ("Planning Board"), the Zoning Board of Appeals ("ZBA") and/or the Building Commissioner ("Building Commissioner") are required to forward all landscape plans for buildings in Business, Industrial or Multifamily Dwelling Zones to the RB. The RB must review the landscape plans and make recommendations to the appropriate board within 14 days. The Planning Board and the ZBA have discretion to incorporate RB recommendations as conditions for approval. *Id.*

Town By-Laws require the RB to evaluate landscape plans in relation to existing and proposed landscape and buildings. The Town Manual ("Manual")[1] requires the RB to evaluate landscape plans (proposed trees, plants, paving, benches, fencing, screening, lights, fountains, terracing, signs, stones, planters, parking areas and foundation treatment) in light of the following factors: conformity with Town By-Laws governing site development setbacks, screening, parking, and buffer zones; conjunction with contiguous adjacent property, street rights-of-way, and existing or proposed buildings; visual harmony with the surroundings; environmental impact; enhancement of the character, value and attractiveness of the surroundings through design, scale and location; character of the existing landscape to be preserved; and, preservation of existing stands of trees.

In practice, and based on the Manual, the RB operates as follows: an applicant who applies to the Building Commissioner for a building permit ("permit") in a business, industrial or multifamily dwelling zone is instructed to provide two copies of a landscape plan ("plan") to the RB; the RB evaluates the plan in accordance with the factors listed above and meets with the applicant to reach agreement on modifications the RB recommends; once agreement is reached, the RB and the applicant sign two plans; the RB maintains one copy and forwards the other to the Building Commissioner; the RB approves the issuance of the permit; the RB Chairman signs the Building Permit Application Sign-On Sheet[2] ("Sign-On Sheet"); when the work is completed, the RB (or a majority of the RB) does a site inspection, followed by the RB Chairman's signing the Building Commissioner's Sign-Off Sheet ("Sign-Off Sheet").[3]

QUESTIONS:

1. May an RB member be compensated by a private client for landscape work implementing a plan the RB member reviewed if, at the time of the review, the RB member had no foreseeable expectation of performing such work?

2. May an RB member who does not participate in a review of the plan or inspection of the work be compensated by a private client for landscape work done pursuant to the plan?

ANSWERS:

1. No, an RB member may not be compensated by a private client to implement a plan the RB member reviewed because such compensation would be in relation to a particular matter of direct and substantial interest to the Town and one in which the RB member participated.

2. No, an RB member may not be compensated by a private client for landscape work done pursuant to the plan, even if the RB member does not participate in the review or inspection of the work, because the RB member has official responsibility for review of the plan, approval of the issuance of a building permit, and inspection of the work.

DISCUSSION:

RB members are individuals performing services for a municipal agency,[4] and, as such, are considered municipal employees subject to the conflict of interest law.[5] G.L. c. 268A, § 1(g). Town records show that RB members have been classified as special municipal employees.[6] As municipal employees, RB members are subject to § 17 of the conflict of interest statute.[7] Section 17(a) provides that no municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation[8] from anyone other than the city or town or municipal agency in relation to any particular matter[9] in which the same city or town is a party or has a direct and substantial interest. This section, which is designed to prohibit divided loyalties, applies when a public employee, who is expected to demonstrate undivided loyalty to the public interest, represents the interests of an "outsider" in a matter to which the public is a party or has a direct and substantial interest. *See* W.G. Buss, *The Massachusetts Conflict-Of-Interest Statute: An Analysis*,

45 B.U. Law Rev. 299, 322 (1965).

The prohibitions of § 17 are less restrictive in the case of a special municipal employee, such as an RB member. A special municipal employee may receive compensation from anyone other than his municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest, provided that the particular matter is not one (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving.[10]

The first question is whether an RB member may be compensated for private work implementing a plan he reviewed, assuming he had no foreseeable expectation of performing such work at the time of the review.[11] The answer turns on whether such compensation is in relation to a particular matter of direct and substantial interest to the Town and in which the RB member participated.

First, if the RB member reviews the plan and makes recommendations for modifications, we find that such action constitutes personal and substantial participation. *See EC-COI-92-3* ("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 also, EC-COI-89-2* (discussion of the merits of a particular matter). Next, the RB's review of the plan is a particular matter of direct and substantial interest to the Town, because Town By-Laws require an applicant to submit a plan to the RB for review and the Manual requires the RB's approval prior to the issuance of a permit. *See EC-COI-87-31* (where the Commission concluded that an application for a building permit, the decision to issue the permit, and the permit itself are all "particular matters" to which the town is a party or in which the town has a direct and substantial interest). Thus, if an RB member is later compensated to implement the plan, such compensation would be in relation to his earlier review of the plan, a particular matter in which he participated. We conclude that § 17(a) prohibits the receipt of such compensation.[12]

The second question is whether an RB member may be compensated by a private client for work the RB inspects if the RB member did not review the plan and will not inspect the work. Since RB members are special municipal employees, the narrow question is whether the RB member would be compensated in relation to subjects within his official responsibility. The statute defines "official responsibility" as "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).

In determining what constitutes a public employee's official responsibility, the Commission has cited the interpretation of federal law on which G.L. c. 268A was modeled, which provides that "the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, . . . job description or delegation of authority." 5 CFR § 2637.202(b)(2); Title 18 U.S.C. § 202(b). *See* Buss, *supra*, at 321; *EC-COI-99-2.* We therefore look to the sources of RLRB authority and the scope of that authority.

The primary source of RB members' official responsibility springs from Town By-Laws which *require* the Planning Board, the ZBA and the Building Commissioner to forward landscape plans to the RB for review and recommendations and *require* the RB to report back to the appropriate board. Town ByLaws also *delegate* to the RB the task of evaluating landscape plans.

The secondary source of RB members' official responsibility comes from the Manual, which assigns to the RB a shared responsibility for community planning.[13] The Manual also provides the equivalent of a job description, instructing RB members on specific criteria to apply in evaluating plans, such as "[c]onformity with the Town By-Laws governing site development set-backs, screening, parking and buffer zones," "conjunction with contiguous adjacent property, street rights-of-way, and existing or proposed buildings," and "environmental impact." Finally, the Manual delineates the process by which RB members exercise their authority through meeting with the applicant, maintaining a copy of approved plans, signing the Sign-On Sheet of the Building Commissioner, and performing a site inspection when the work is completed.

Official responsibility attaches as soon as the RB receives an applicant's plan, since RB members may then exercise their authority to evaluate the plan. *See* Buss, *supra*, at 337 ("consistent with the meaning of the concept, [ ] official responsibility should attach at precisely that point of time when the official's authority would become exercisable with respect to the application in any degree or respect"). The RB's evaluation of the plan, approval of the issuance of a building permit, and inspection of the completed work are all particular matters which remain subjects of RB members' official responsibility until the inspection is conducted and the RB Chairman signs the Sign-Off Sheet.[14] *EC-COI-88-9* ("A town always retains jurisdiction to determine that work is in accordance with the specifications stated on the application for a building permit"). As a fundamental matter, an RB member can not absolve himself of official responsibility by not participating in a particular matter but only by, "in effect, resign[ing] from his position." Buss, *supra*, at 320-321. *See, e.g., EC-COI-81-14* (member of area board had official responsibility over any particular matter before the board whether or not he participated in the matter as an area board member); *Public Enforcement Letter 96-1* (special permit site plan review was a subject of zoning board of appeals member's

official responsibility even though he abstained from participating in the matter as a ZBA member).

In sum, if an RB member receives compensation to implement a plan, such compensation would be in relation to particular matters which are (or within one year have been)[15] subjects of his official responsibility. *See EC-COI-88-9* (§ 17 prohibits part-time town building inspector, even if a special municipal employee, from receiving compensation for carpentry services which require an application for a building permit or subsequent inspection or approval by the town, since he has official responsibility for enforcement and administration of the building code and permits issued pursuant to the code); *EC-COI-83-17* (member of Board of Underwater Archaeological Resources prohibited from receiving compensation in connection with excavation from the holder of a permit granted by the Board, since the application for a permit, the decision to grant the permit, and decisions regarding oversight of the operation all are particular matters within the Board member's official responsibility). We conclude that § 17 (a) prohibits the receipt of such compensation because the RB has official responsibility - the direct administrative and operating authority - for evaluating and approving all landscape plans in business, industrial and multifamily dwelling zones, and for inspecting the completed work implementing those plans.

DATE AUTHORIZED: November 17, 1999

[1] The "Town Review Board" Manual titled "Criteria and Procedural Design," bears the Town Seal and provides in its Preamble: "The design of the creation of the Town Review Board is delineated in Article [ ] of the Town Meeting . . . and the Board was subsequently established by the Selectmen so that aesthetic community planning could become the shared responsibility of architects, planners, engineers, realtors, town officers, as well as community leadership."

[2] The Sign-On Sheet provides the following: the property location, type of construction, name of owner, name of contractor; the heading: "This is to certify that the following departments have been informed of the proposed construction and do hereby approve of the issuance of a building permit"; the heading "For All Applicants," followed by a list of various Town departments and agencies with a signature line and date for each, such as "Fire Department, by____date___"; the heading "For Business/Industrial/Business-Professional (in addition to the above)," and a list of the following boards, with a signature line and date for each: Board of Health; Board of Selectmen; Design Review Commission; Disabilities Commission; Historical Commission; and Review Board.

[3] You question the Building Commissioner's practice of requiring RB approval as a condition for issuing a Certificate of Occupancy (CO); however, that matter is not relevant to our analysis.

[4] "Municipal agency", any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, § 1(f)

[5] "Municipal employee", a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, § 1(g)

[6] "Special municipal employee", a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall by considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. G.L. c. 268A, § 1(n).

[7] As an initial matter, although Town By-Laws describe the RB as "not regulatory but rather advisory," a consideration of the following factors which the Commission has previously applied to advisory committees rules out concluding that the RB is an ad hoc advisory committee whose members are not subject to the conflict law: the establishment of the RB through Town By-Laws as a permanent board; the structure and composition of the RB membership; the formality of the process by which the RB operates; the authority which the RB exercises in relation to a building permit; RB inspection of the final work. *See EC-COI-93-22* (discussion of factors the Commission considers in determining whether a particular entity is a public instrumentality for purposes of G.L. c. 268A). Moreover, the Town has expressly classified RB members as special municipal employees within the provisions of G.L. c. 268A. In the future, should the RB be redesigned to serve as an ad hoc advisory committee, you may seek additional advice.

[8] "Compensation", any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, § 1(a).

[9] "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).

[10] Clause (c) applies only in the case of a special municipal employee who serves on more than 60 days during any period of 365 consecutive days. The application of clause (c) is not relevant to our analysis.

[11] Section 19 prohibits a municipal employee from participating as such an employee in a particular matter 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 arrangement concerning prospective employment, has a financial interest. G.L. c. 268A, § 19. If an RB member participates in the RB review of landscape plans at a time when he knows or has a reasonable expectation that he will perform such work, § 19 will be violated.

[12] An RB member may receive compensation for landscape work in Town so long as the Town does not require the RB's review (such as for work which is not in a business, industrial or multi-family zone).

[13] *See* footnote 1, *supra*.

[14] If the RB did not inspect the completed work, the Town nevertheless has a direct and substantial interest in the work, since "[t]he direct and substantial interest of the [T]own is determined by the requirement of issuing a permit, and not by the practice of inspection."

[15] Even if one year passed since the RB reviewed the plan, the RB still has official responsibility for inspecting the completed work.

CONFLICT OF INTEREST OPINION
EC-COI-99-7

FACTS[1]:

X and Y are principals of a Massachusetts general partnership. There are no other professional employees on the partnership's regular payroll except X and Y.

The ABC Contract

In June 1996, ABC, a state agency, entered into a five-year contract with a company ("Company"), of which the partnership is a member, for the provision of certain professional services ("ABC Agreement").

Services under the ABC Agreement are to be provided pursuant to an annual business plan approved by ABC and in accordance with certain guidelines devised jointly by the Company and certain ABC personnel. ABC retains control over all policy making decisions regarding the subject of the ABC Agreement and has an oversight and approval role with respect to the Company's performance. The Company has no authority to bind ABC without its specific permission.

Pursuant to the ABC Agreement, the Company shall ensure that certain named individuals, including X and Y, each remain active in the operation and management of the Company and its performance under the ABC Agreement.

At the time the ABC Agreement was executed it was anticipated and agreed to between X and Y and the Company that during the first six months of the ABC Agreement, X and Y's services would require 2.5 days per week. Later efforts were anticipated to require 1 day per week. During the first six months of the ABC Agreement, X and Y have, in fact, each worked approximately 2-3 days per week on matters covered by the ABC Agreement. Thereafter, they have each devoted one day per week to these efforts. During the past 365 days, X and Y's duties for ABC have required less than one day per week, therefore resulting in each of them working on the Company business for less than 60 days in that time period.

According to X and Y, it was understood prior to the execution of the ABC Agreement that they would not sign the Agreement if they were to be considered special state employees. To that end, apparently, the ABC Agreement provides that no member of the Company or its personnel shall, by virtue of the Agreement, be a "special state employee" as defined under applicable Massachusetts law.

On the other hand, under another section of the ABC Agreement, the Company agrees that it has read and is fully aware of the provisions and requirements of G.L. c. 268A as one of at least five statutes applicable to the ABC Agreement and the Company's performance thereunder.

The Project

In July 1998, X and Y entered into an agreement with a private corporation ("Corporation") to provide compensated services to the Corporation in connection with a certain development ("Project"). In furtherance of certain of the Project's objectives, X, on behalf of the Project development team, proposed a certain mutually beneficial agreement between ABC and the Corporation to which ABC has agreed in principle, subject to the fulfillment of certain contingencies.

According to its agency counsel, it is ABC's position that the Project and X and Y's involvement therein is outside the ABC Agreement and is not a subject of X and Y's official responsibility under that contract.[2]

X states that he has occasionally provided professional services for ABC in the past.

Based on the foregoing, X and Y have asked the following questions.

QUESTIONS:

1. Are X and Y state employees under G.L. c. 268A, § 1(q), by virtue of the ABC Agreement?

2. If so, does G.L. c. 268A, § 4, prohibit them from receiving compensation from or acting as the Corporation's agent with respect to the Project?

ANSWERS:

1. Yes.

2. No, because X and Y did not participate in the Project as state employees; it is not the subject of their official responsibility; and they served on less than 60 days in the relevant period of 365 consecutive days.

DISCUSSION:

We first address whether X and Y are state employees by virtue of the contract between the Company and ABC. In doing so, we look to the expansive definition of "state employee" contained in G.L. c. 268A.

State employee, for purposes of the conflict law, is defined as "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). ABC is a state agency for purposes of the conflict law. G.L. c. 268A, § 1(p).[3]

Generally speaking, the state employee definition is broad enough to include anyone doing work for the state, including so-called "independent contractors." See Buss, The Massachusetts Conflict of Interest Law: An Analysis, 45 B.U. Law Rev. 299, 312 (1965) ("there is virtually no room" for an argument that the Massachusetts law does not reach independent contractors; such argument "is precluded because the definition encompasses a person 'performing services for' an agency, by 'contract of hire or engagement,' even when that person is serving on an 'intermittent' or 'consultant' basis."); Braucher, Conflict of Interest in Massachusetts in Perspectives of Law, Essays for Austin Wakeman Scott 8, 10 (1964) ("the reference to 'consultant' suggests that some persons who contract to supply services may be included even though for other purposes they would be classified as independent contractors rather than employees. That suggestion is strengthened by a reference to 'contract of hire or engagement' as an alternative to election or appointment."). Relying on the plain language, we have previously opined that the definition applies to consultants who provide services on an intermittent basis, whether or not they receive compensation. *See, e.g., EC-COI-87-8* (principal of consulting group providing real estate development services to a city is a municipal employee for purposes of the conflict law).

Our conclusion is supported by the legislative history of the definition of "state employee." Briefly stated, prior to enacting G.L. c. 268A in 1962, the Legislature passed a comparatively short statute that essentially established a code of ethics for public employees. That statute, c. 610 of the Acts of 1961, defined "officer or employee" for purposes of that law as "a person performing services for, or holding an office, position or employment in an agency (including independent consultants who receive compensation for such services)." In reaching this definition, the Legislature declined to adopt the definition of "state employee" contained in S. 492 proposed by then Governor Volpe. The Volpe bill would have specifically exempted from the definition of state employee "employees of privately-owned corporations or business performing work for or on behalf of the commonwealth pursuant to the provisions of a contract awarded in accordance with law."

The Legislature recognized that the 1961 statute was inadequate and so ordered the creation of a Special Commission on the Code of Ethics which was charged with proposing a more comprehensive piece of legislation. In 1962, the Legislature enacted c. 779 of the Acts of 1962 which defined "state employee" as "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, but excluding members of the judiciary, but not excluding any other officers and employees of the judicial department." The definition contained in the 1962 legislation was developed by the Special Commission whose report is indicative of its thought process. There the Special Commission expressed its intent to have enacted a comprehensive definition that "applies to all levels of government in the Commonwealth including the state, counties, municipalities, authorities, boards and commissions. It includes public officials in every capacity at all of these levels, whether elected, appointed or engaged, whether paid or unpaid, whether full-time or part-time." Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650, p. 19 (hereafter "1962 House Doc. No. 3650"). Taken together, the legislative history confirms a legislative intent to include within the conflict law's scope virtually anyone who performs services for the government, including employees or principals of privately-owned businesses.

X and Y, however, contend that they are not covered by G.L. c. 268A, §1(q) because of that section's use of the word "person" which they argue is not intended to cover entities or their personnel. We disagree. By definition in G.L. c. 4, § 7, Twenty-third, the word "person" for purposes of construing the General Laws "include[s] corporations, societies, associations and partnerships." For the reasons set forth above, it is clear that "person" in § 1(q) is intended to be broad enough to include the

employees of corporations or other entities performing services under a contract of hire or engagement with the Commonwealth. Indeed, a 1977 amendment to § 1(q) confirms that the personnel of a corporation under contract to the Commonwealth are state employees (or special state employees) unless specifically exempted.[4]

Notwithstanding the broad statutory definition in G.L. c. 268A, § 1(q), this Commission has recognized that there are situations where the connection between an individual and the state agency is "too remote" to warrant state employee status. "In recognition of this principle, the Commission has previously held that a contract between a state or municipal agency and a corporation does not generally operate to bring employees of the corporation within a definition of public employee." *EC-COI-87-8* (citing example of a secretary who performs typing services for a corporation under contract to a state agency).

Instead, this Commission has established certain factors to determine when an employee of a private business entity should be deemed a state employee. These factors are:

1. whether the individual's services are expressly or impliedly contracted for;

2. the type and size of the business entity;

3. the degree of specialized knowledge or expertise required of the service. For example, an individual who performs highly specialized services for a corporation which contracts with a public agency to provide those services may be deemed to be performing services directly to that agency;

4. the extent to which the individual personally performs services under the contract, or controls and directs the terms of the contract or the services provided thereunder; and

5. the extent to which the person has performed similar services to the public entity in the past. *EC-COI-89-35.*

No one factor is dispositive; rather the Commission will employ a balancing test of all of the factors as applied to the circumstances. Under the circumstances presented here, we conclude that X and Y, by virtue of the contract between the Company and ABC, are each state employees for purposes of G.L. c. 268A.

Important to our analysis is the fact that X's and Y's services are expressly called for in the ABC Agreement. Specifically, the ABC Agreement requires that X and Y each remain active in the Company's operation and management and in the performance of its obligations under the Agreement.

Second, X and Y are principals of a small general partnership which, significantly, has no professional staff on its regular payroll except for X and Y. It is expected that the partnership's services under the ABC Agreement will be provided by these two principals.

Third, the services provided under the ABC Agreement are not clerical or ministerial. Rather, the services, including feasibility analysis, market studies and appraisal and valuation reports, are "professional, highly specialized and call for discretion and judgment." *EC-COI-87-8.*

Fourth, given the partnership's size, the Company's structure and governance, and the intent of the parties as expressed in the ABC Agreement, it is clear that X and Y perform their contract services personally and play an active role in the delivery of the Company's contract services generally. While X and Y do have some discretion in carrying out these functions, their discretion is not absolute. ABC has the right to approve critical aspects of their performance through an annual business plan, certain general guidelines, and other points of supervision.

Finally, X states that he has occasionally provided professional services for ABC in the past. Thus, based on our analysis of each of the relevant factors, we conclude that X and Y are state employees under G.L. c. 268A.

Nonetheless, X and Y, relying on the ABC Agreement which states that no member of the Company or its personnel shall be a "special state employee," argue that they are not covered by the law. Again, we disagree.

In essence, X and Y contend that they and ABC have bargained to waive their coverage under G.L. c. 268A and, with it, the protections afforded by the statute. However, "[t]here never has been at any time in Massachusetts an absolute right in its inhabitants to make all such contracts as they pleased." *Opinion of the Justices,* 109 Mass. 589, 592 (1895). To the contrary, the Legislature retains power to enact statutes for the common good and, in so doing, limits the extent to which contracts may be drafted to operate at variance with that intent. *See United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 245 (1952) (*quoted in Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 321 (1996)) ("[t]he Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.")

Massachusetts courts have held that "where laws are enacted on grounds of general policy their uniform application for the protection of all citizens alike is desirable, and an agreement to waive those provisions is generally declared invalid, but where they are designed solely for the protection of rights of private property, a

party who may be affected can consent to a course of action, which if taken against his will, would not be valid." *Washington National Bank v. Williams,* 188 Mass. 103, 107 (1905). This rule applies even where the party purporting to waive the statutory protection is a government agency or official. *White Construction Co., Inc. v. Commonwealth,* 11 Mass. App. Ct. 640, 647 (1981) (state contract that limited architect's liability held unenforceable; "It is not within the power of the [Commonwealth's] Director of Building Construction to nullify the statutory requirements. Officers of governmental agencies have authority to bind their governmental bodies only to the extent conferred by the controlling statute.")

Clearly, the Legislature has stated that there shall be a comprehensive conflict of interest law that extends the entire span of governmental service. Its purpose is "[to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain." 1962 House Doc. No. 3650, p. 18. In general, the conflict of interest law is designed to restrain government employees from engaging in conduct which might be inimical to the best interest of the general public. *Id.* at 21 ("the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.")

Moreover, we have examined ABC's enabling statute. We are not aware of any statute which gives ABC power to alter the definition of state employee contained in G.L. c. 268A, §1(q). The conflict of interest law itself does not confer such power. Therefore, based on guiding principles of contract law, we conclude that ABC may not by contract declare that The Company, its members or its personnel shall not be subject to the conflict of interest law.

Our conclusion that X and Y are state employees not only is consistent with applicable law, it also is the only sensible conclusion reading the ABC Agreement in its entirety. Specifically, we are mindful that the ABC Agreement enumerates G.L. c. 268A as one of the laws applicable to the Agreement and X and Y's performance thereunder. There is no point in requiring X and Y to read and presumably understand the requirements of the state's conflict of interest law if neither they nor any of the Company's personnel is subject to that law. In other words, to give the contract the meaning urged by X and Y is to render the ABC Agreement self-defeating in this important respect. This we will not do. Accordingly, we conclude that X and Y are state employees by virtue of ABC Agreement.

Applying the Conflict of Interest Law

We next turn to applying the conflict of interest law to X and Y, in particular with respect to the Project. Before doing so, however, we note that X and Y qualify for special state employee status pursuant to G.L. c. 268A, §1(o)(2)(a).[5] We assume that, in light of this opinion, they will file the disclosure called for in that section. Thus, for the balance of this opinion, we will assume that X and Y are "special state employees."[6]

Section 4

Section 4(a) of G.L. c. 268A prohibits a state employee from directly or indirectly receiving or requesting compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee from acting as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. The section is aimed at divided loyalty, as well as influence peddling. *See Commonwealth v. Cola,* 18 Mass. App. Ct. 598, 610 (1984); *Edgartown v. State Ethics Commission,* 391 Mass. 83, 89 (1984) (construing G.L. c. 268A, §17, the municipal counterpart to § 4).

A special state employee is subject to the prohibitions of § 4(a) and (c) only in relation to a particular matter (1) in which he has at any time participated[7] as a state employee, or (2) which is or within one year has been a subject of his official responsibility, or (3) which is pending in the state agency in which he is serving. Clause (c) only applies to a special state employee who serves as such for more than sixty days during any period of three hundred and sixty-five consecutive days.

Our analysis under the "participation" prong is simple. That is, there are no facts to indicate that X or Y participated as special state employees in any aspect of the Project.

We also readily conclude that the Project is not and within the last year has not been the subject of their official responsibility. "Official responsibility" is defined by statute as "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). In applying this definition, we have recently said that we will rely, at least in part, on the regulation that interprets the federal law on which this definition is modeled, Title 18 U.S.C. § 202(b). *EC-COI-99-2.* Under that regulation, "the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, . . . job description or delegation of authority." *5 CFR § 2637.202(b)(2).*

Here, X and Y's authority derives solely from the ABC Agreement which in effect contains their job description. ABC, through its counsel, asserts that the Project does not fall within the ABC Agreement's scope. Based on this assertion, we conclude that the Project is not and within one year has not been the subject of X's or Y's official responsibility.

A more difficult question is presented when we ask whether X and Y are prohibited from receiving compensation or acting as The Corporation's agent in the Project because the Project is a matter pending in the state agency in which they are serving. We begin our analysis by examining the origin of the 60-day standard.

The Massachusetts conflict of interest law is the product of extensive study and proposals by the Special Commission. See 1962 House Doc. No. 3650. In drafting the legislation the commission modeled much of the statute on the Federal conflict of interest provisions proposed by H.R. 8140, 87th Cong., 1st Sess. (1961). That Congress was faced with two problems — an existing array of inconsistent, overlapping and incomplete provisions, and a statutory scheme that created unnecessary obstacles to recruiting qualified people for government service. Of the latter problem, the drafters of the House Committee on the Judiciary report accompanying H.R. 8140 wrote:

> But if the statutes often leave important areas unregulated, they also often serve as a possible bar to securing important personal services for the Government through excessive regulation when little or no ethical problem really exists. Fundamentally, this is because the statutes fail to take into account the role, primarily in the executive branch of our Government of the part-time or intermittent adviser whose counsel has become essential, but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required by these laws. Such problems are encountered when the Government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist.
>
> In general, these difficulties stem from the fact that even occasional consultants are regarded as "officers or employees" of the Government, whether or not compensated. As such, they are within the prohibitions applicable to regular full-time employees.

House Committee on the Judiciary, Bribery, Graft, and Conflicts of Interest, H.R. Rep. 748, 87th Cong., 1st Sess., pp. 4-5 (July 20, 1961).[8]

To correct this "intolerable situation," H.R. 8140 proposed creating a class of "special government employees" to whom the conflict of interest law would apply less restrictively. *Id.* at 14.

Not surprisingly, the Massachusetts Special Commission on Code of Ethics reached a similar conclusion and struck a similar balance. On the one hand, the definition of "state employee" would be broad and would apply basic ethical standards to consultants who work on a part-time or intermittent basis. On the other hand, the proposed legislation would define "special employees" as "those who serve without compensation or those whose condition of employment permits some personal and private activities on the part of the state employee." 1962 House Doc. No. 3650, pp. 12-13. The Special Commission noted that, without the classification, it would be "impossible for the Commonwealth to have the service of specialists or other capable people for specific assignments in departments or agencies." *Id.*

In short, both Congress and the Massachusetts legislature elected to single out for more relaxed treatment under the conflict law those individuals who serve government on a limited basis. Yet, Congress "recognize[d] that an intermittent or temporary consultant or adviser may attain a considerable degree of influence in an agency he serves and that [the restriction concerning matters pending in the agency in which he serves] is a reasonable one in principle." 1962 U.S. Code Cong. and Adm. News, p. 3858. Thus, Congress proposed the 60-day standard that was ultimately adopted by the Massachusetts Legislature as well.

Based on this legislative history, we conclude that the 60-day provision should be read to achieve two basic objectives: (1) to encourage government service by qualified professionals; and (2) to impose the greater statutory restrictions only where there is real potential for divided loyalty and influence peddling. With these principles in mind, we turn to applying the 60-day standard to the government services of X and Y.

As a general rule in calculating the 60-day limit, we have counted only those days on which services are actually performed. *EC-COI-90-12.* A special state employee who works only part of a day is considered to have served for a complete day. *EC-COI-98-6.* Moreover, we have applied the 60-day standard over a "'floating' period [of 365 consecutive days] (that is, looking to both prior and subsequent service) as opposed to a fixed, prospective only period of 365 days." *EC-COI-91-5.* We have said that it is the employee's responsibility to keep accurate records of their service. *EC-COI-90-16.*

Here, the ABC Agreement commenced in June 1996. During the first six months of the ABC Agreement, X and Y worked 2-3 days per week. Since that time, they have each worked one day per week. Thus, based on their own records, during the first consecutive 365-day period of the ABC Agreement, X and Y each served on between

78 and 104 days, with the majority of that service (between 52-78 days) coming in the first six months of the ABC Agreement.

X and Y agreed to provide compensated services on the Project in July 1998. Applying a "floating" period of 365 consecutive days, we calculate that in the 365-day period surrounding the X and Y's deal to provide compensated services the Corporation, X and Y served under the ABC Agreement on no more than 60 days. They in fact each served on only 52 days in that period. Moreover, assuming that they continue to provide services at the rate contemplated by their agreement with the Company, they, for the balance of the ABC Agreement's five-year term, will never serve more than 52 days in a consecutive 365-day period.

A special state employee shall be subject to G.L. c. 268A, § 4 in relation to a particular matter pending in the state agency in which he is serving only where he "serves on no more than sixty days during *any* period of three hundred and sixty-five consecutive days." (emphasis supplied). Here, it could be argued that X and Y are subject to the more restrictive conflict provision because they served more than 60 days during the *first* consecutive 365-day period of the ABC Agreement. Thus, it could be argued, § 4 applies in the more restrictive fashion for the balance of the ABC Agreement's five-year term.

On the other hand, it could be argued, as do X and Y, that the statutory language requires an examination of the given 365-day period closest to the event that would otherwise trigger § 4 — here, the agreement to provide services to The Corporation. Under this reading, the more restrictive provision is <u>not</u> applicable because in that given period of 365 consecutive days, the 60-day limit was <u>not</u> reached or exceeded.

The Commission has not dealt squarely with the argument X and Y now raise. However, in *EC-COI-85-49*, the Commission considered § 17 as applied to a special municipal employee/partner in a law firm under contract to a municipal agency. The legal services called for in the contract included "investigation, negotiation and possible litigation" in connection with a parcel of land owned by the agency. While not stated explicitly in the facts, the contract at issue in *85-49* clearly had the potential to run for more than 365 days. With regard to the 60-day limit, the Commission wrote:

> If you were to provide services under the contract for more than sixty days, you could not be retained by or represent other clients in connection with any matters before [the municipal agency] during the *duration* of your municipal employment because such matters would be considered to be pending in the agency in which you are serving. (emphasis supplied)

In other words, *EC-COI-85-49* could be read to decide that once the 60-day limit is reached, the restriction relating to matters pending in the employee's state agency would apply for the duration of the contract that creates state employee status. However, we decline to so read this opinion for two reasons. First, where we are not convinced that the 1985 Commission squarely confronted the issue raised by X and Y, we decline to speculate on what that Commission would have opined. Second, we conclude that, in any event, such an interpretation is inconsistent with the legislative policy behind the 60-day limit.

We are aware of our obligation to construe statutory exemptions narrowly. *See Department of Environmental Quality Engineering v. Town of Hingham,* 15 Mass. App. Ct. 409, 412 (1983). We also are obliged to construe the 60-day provision according to its plain meaning. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 392 Mass. 811, 813 (1984); *O'Brien v. Director of DES,* 393 Mass. 482, 487-88 (1984). We may resort to the legislative history only where the language used is ambiguous. *Treasurer & Receiver Gen. v. John Hancock Mut. Life Ins. Co.,* 388 Mass. 410, 423 (1983)

We conclude that the 60-day provision is ambiguous. This ambiguity derives from the use of the word "any" which is a general word. It can mean "every," "all," "one" of any number, "either," or even "each" depending on the context. *See* Webster's Third New International Dictionary. Here the context does little to illuminate the appropriate construction. Relying solely on the plain language, "any period of [365] consecutive days" could mean any "one" such period, or it could require an examination of "each" given period of 365 days. Thus, we look to the statute's legislative history as a further aid in construction.

We conclude that an interpretation which requires an examination of the given period of 365 consecutive days surrounding the activity that triggers § 4 best comports with the legislature's intent. Of paramount importance to the legislature was its desire to craft a statute that would not needlessly interfere with ability to attract "trained and expert personnel" which it described as "one of [government's] most pressing problems. 1962 House Doc. No. 3650, p. 18. Interpreting the 60-day provision, once triggered, to apply for the duration of a multi-year contract even where in later years actual service under the contract has fallen below the 60-day limit, does little to prevent actual divided loyalty or influence peddling. To the contrary, such an interpretation could well apply the more restrictive conflict provisions even when the employee's ability to exploit his position for private gain is at its lowest ebb. Such an interpretation also would greatly harm the Commonwealth's ability to attract and retain qualified, part-time professionals.

Indeed, it was this potential negative consequence that was central to the Special Commission's decision to adopt the 60-day requirement. *Id.* at p. 13 ("Here again, the decision was made that a person with highly specialized or technical knowledge might be forced to refrain from undertaking a specific assignment for a state agency if it meant that he would be unable to deal with that agency in any other matter during the period of his employment or for a period thereafter.")

Our decision to reject the more restrictive construction also is consistent with the interpretation given to the counterpart federal language in 18 U.S.C., §§ 203 and 205 as originally enacted. In interpreting the 60-day limit, the federal Office of Government Ethics said:

> The 60-day standard affecting a special Government employee's private activities before his agency is a standard of actual . . . service . . . Thus, although once having been in effect, the statutory bar may be lifted later by reason of an intervening period of nonservice. In other words, as a matter of law the bar may fluctuate in its effect during the course of a special Government employee's relationship with his agency.

5 CFR § 735 Appendix C (2)(f) (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).*

Based on the foregoing, we conclude that the appropriate 365-day period to examine is the one immediately surrounding X's and Y's July 1998 involvement in the Project. X and Y did not perform services on more than 60 days during that period. Therefore, we conclude that they are not prohibited by § 4 from receiving compensation or acting as the Corporation's agent with regard to the Project.

DATE AUTHORIZED: November 17, 1999

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[1] Except where indicated, this opinion is based on facts and documents supplied by X and Y through their counsel. We have not undertaken an independent investigation of the facts. As with any opinion, this opinion is valid only to the extent that the facts provided are accurate and complete.

[2] Footnotes 2 and 3 have been deleted pursuant to G.L. c. 268B, § 3(g).

[3] "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.

[4] St. 1977, c. 245, approved June 1, 1977, amended § 1(q) by adding the following:

> No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.

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

> . . .
>
> (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." G.L. c. 268A, § 1(o)(2)(a)

[6] We note that §1(o)(2)(a) requires disclosure "prior to" commencement of the private employment. We allow X and Y to make their disclosure "late" solely because of their and ABC's apparent mutual mistake concerning their status under the law.

[7] "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).

[8] *See also* 1962 U.S. Code Cong. and Adm. News, p. 3855:

> At this date it is no longer open to question that many, if not most, of the departments and agencies find it necessary for the optimum performance of their tasks to make use of the skill, talent, and experience of leaders in the sciences, business, and the professions whose regular work is conducted in private spheres. Today's Government requires the part-time services of thousands of such persons to deal with problems of increasing complexity and scope. It can scarcely be questioned that a satisfactory means must be found of facilitating the employment of these individuals by the departments and agencies, as needed, without relaxing basic ethical standards or permitting actual conflicts of interest.

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