RULINGS

Advisory Opinions

Enforcement Actions

for Calendar Year 2000

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission
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Boston, Massachusetts 02108
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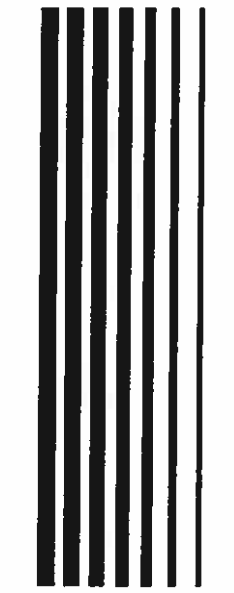

MASSACHUSETTS

The Massachusetts State Ethics Commission

Included in this publication are:

- **State Ethics Commission Formal Advisory Opinions issued in 2000.** Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-00-(number)*.

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 2000.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 2000 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.

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

State Ethics Commission

Advisory Opinions

2000

Summaries of Advisory Opinions i

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Summaries of Advisory Opinions
Calendar Year 2000

EC-COI-00-1 - M.G.L. c. 166, §32A, a local option statute that permits a wiring inspector to perform electrical work in his municipality does not expressly or impliedly repeal G.L. c. 268A, §20 as applied to wiring inspectors. Therefore, a wiring inspector is prohibited from being compensated for electrical work he performs for his own municipality, unless he satisfies one of the §20 exemptions.

EC-COI-00-2 - A town retirement board is a municipal agency within the meaning of the conflict of interest law and, as such, individuals who perform services for or hold offices, positions, employment or membership in or on the board are municipal employees within the meaning of that law.

EC-COI-00-3 - The Allston-Brighton Community Development Corporation is not a state, county or municipal agency for purposes of the conflict of interest law because it was created by private citizens without governmental involvement; it does not perform essentallly governmental functions; a majority of its funding is from private sources; and no governmental agency controls or supervises its Board of Directors. This opinions clarifies *EC-COI-85-66* and *85-77*.

CONFLICT OF INTEREST OPINION
EC-COI-00-1

FACTS:

You are the wiring inspector for the Town ("Town"). You also have your own electrical contracting business. You want to perform electrical work, including trouble shooting, repairs, and installation, for Town agencies for compensation.

The Board of Selectmen of the Town voted to adopt St. 1981, c. 809, codified at G.L. c. 166, §32A, entitled "Inspector of wires working as electrician; inspection by assistant inspector":

> In a city, town or district which accepts this section, a licensed electrician who is appointed inspector of wires may practice for hire or engage in the business for which licensed under the applicable provisions of chapter one hundred and forty-one while serving as such inspector; provided, however, that within the area over which he has jurisdiction as wiring inspector he shall not exercise any of his powers and duties as such inspector, including those of enforcement officer of the state electrical code, over wiring or electrical work done by himself, his employer, employee or one employed with him. Any such city, town or district may in the manner provided in the preceding section appoint an assistant inspector of wires who shall exercise the duties of inspector of wires, including those of enforcement officer of the state electrical code, over work so done. Said assistant inspector may act in absence or disability of the local inspector and for his services shall receive like compensation as the city, town or district shall determine.

QUESTION:

General Laws c. 268A, §20, applicable to all municipal employees, including a wiring inspector such as yourself, prohibits such employees from having a financial interest in a contract with the same municipality. General Laws c. 166, §32A, a local option statute, permits a wiring inspector, in a town that adopts this statute, to practice for hire or engage in electrical work within his own municipality. Does the Town's adoption of the provisions of the later-enacted G.L. c. 166, §32A effectively repeal the §20 prohibition to allow you to be compensated for electrical work that you perform for Town agencies?

ANSWER:

No, G.L. c. 166, §32A does not expressly or impliedly repeal G.L. c. 268A, §20 as applied to wiring inspectors. Therefore, you are prohibited from being compensated for electrical work you perform for Town agencies, unless you satisfy one of the §20 exemptions.

DISCUSSION:

We begin with the plain language of the two relevant statutes, G.L. c. 268A, §20,[1] and c. 166, §32A. G.L. c. 268A, §1(n). and G.L. c. 166, §32A. *Plymouth County Retirement Association v. Commissioner of Public Employee Retirement*, 410 Mass. 307, 309 (1991). G.L. c. 268A, §20, which was enacted in 1962, states, in relevant part, that "[a] municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished," unless he qualifies for one of the enumerated exemptions to the broad prohibition. *See* G.L. c. 268A, §§20(a) - (h), *et seq.* Under a plain reading of the statutory language, a municipal employee, such as a wiring inspector, may not contract with a town agency to provide electrical services unless he qualifies for one of the §20 exemptions.

G.L. c. 166, §32A, which was enacted in 1981, states that, in a town which accepts the statute, a wiring inspector "may practice for hire or engage in the business for which licensed . . . while serving as such inspector," so long as certain conditions are met. Because this statute does not restrict or qualify the quoted language, a potential conflict exists between this statute and §20 as applied to a wiring inspector performing electrical work for compensation for a town agency in a town that adopts G.L. c. 166, §32A. General Laws c. 268A, §20 prohibits such work absent an exemption, whereas G.L. c. 166, §32A does not appear to forbid such work.

In resolving this potential conflict, we are guided by a longstanding principle of statutory interpretation that "[a] statute is not to be deemed to repeal or supercede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." *Colt v. Fradkin*, 361 Mass. 447, 449-450 (1972), quoting *Cohen v. Price*, 273 Mass. 303, 309 (1930); *LaBranche v. A.J. Lane & Co.*, 404 Mass. 725, 728-729 (1989) ("Implied repeal of a statute is not favored"). With this principle in mind, we examine whether G.L. c. 166, §32A contains express words or a clear implication that it does supercede G.L. c. 268A, §20.

First, G.L. c. 166, §32A contains no express language curtailing or superceding the application of G.L. c. 268A, although two of the five versions of the bill that eventually became the statute did provide such language. *See* 1981 Senate Doc. No. 903 ("Notwithstanding any provision of law to the contrary"); 1981 Senate Doc. No. 941 ("Notwithstanding any general or special law to the contrary"). The Legislature is presumed to have been aware of G.L. c. 268A, §20 when enacting G.L. c. 166, §32A, as §20 was enacted prior to G.L. c. 166, §32A. Had the Legislature intended G.L. c. 166, §32A to super-

cede §20, it could have expressly said so. *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 586 (1981). *See, e.g.*, G.L. c. 111, §26G (a septic system installer who is appointed or elected to the board of health may perform septic system installation work in his own municipality "notwithstanding the provisions of [G.L. c. 268A, §17]"). The absence of such language in G.L. c. 166, §32A is some indication of a Legislative intent not to repeal G.L. c. 268A, §20 as to wiring inspectors. *See Police Department of Boston v. Fedorchuk*, 48 Mass. App. Ct. 543, 546-547 (2000).

In the absence of express words, we will find implied repeal only if a clear implication exists that G.L. c. 166, §32A supercedes G.L. c. 268A, §20. *Rennert v. Board of Trustees of State Colleges*, 363 Mass. 740, 743 (1973). In determining whether the Legislature clearly implied that one statute should supercede another, the court considers the legislative intent, history and purpose of statutes with "unsettled or overlapping borders." *Commonwealth v. Houston*, 430 Mass. 616, 620-625 (2000) (construing potential conflict between application of rape shield statute and statute governing admissibility of prior convictions); *City of Everett v. City of Revere*, 344 Mass. 585, 588-589 (1962).

To make this determination, we begin with an examination of the purpose of G.L. c. 268A, §20. Section 20 has a broad prophylactic purpose. It seeks "to prevent municipal employees from using their positions to obtain contractual benefits or additional appointments from the municipality and to avoid any public perception that municipal employees have an 'inside track' on such opportunities." *See EC-COI-99-2; 86-10; 89-32; 95-2* (where the Commission stated that §7, the state counterpart to §20, "seeks to avoid the perception and the actuality of a state employee's enjoying an 'inside track' on state contracts or employment"); W. G. Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U. Law R. 299, 368, 374 (1965); *Quinn v. State Ethics Commission*, 401 Mass. 210, 214 (1987).

Turning to G.L. c. 166, §32A, it appears that the statute was enacted in response to the promulgation, in 1980, of a regulation which imposed a flat prohibition on a wiring inspector's practicing electrical work in the same area over which he had jurisdiction.[2] Apparently the regulation created difficulty for small communities seeking to recruit wiring inspectors.[3]

General Laws c. 166, §32A contains no words or provisions relating to a wiring inspector's holding a second position with the same town, performing electrical work for, or providing electrical equipment or apparatus to, town agencies. Neither does the statute address the potential for a wiring inspector to have an inside track in obtaining contracts with town agencies. Thus, the statute does not address the core purpose of §20 - the prevention of actual and apparent insider track influence.

Resolving the potential conflict between G.L. c. 166, §32A and G.L. c. 268A, §20 by applying §32A in place of §20 would "impliedly repeal [ ] a portion of the [Commission's] power" to enforce §20 as to that group of municipal employees who serve as wiring inspectors in towns that adopt the provisions of G.L. c. 166, §32A. *Registrar of Motor Vehicles*, 382 Mass. at 585. Because G.L. c. 166, §32A does not contain express words or a clear implication to repeal G.L. c. 268A, §20 as applied to wiring inspectors, we do not conclude that G.L. c. 166, §32A supercedes or limits the application of G.L. c. 268A, §20. *Commonwealth v. Hayes*, 372 Mass. 505, 511 (1977) ("[i]n the absence of express statutory directive, it seems prudent to avoid a doctrine of implied repeal which might ultimately deprive [the statute] of vitality").

Moreover, when the Legislature has intended to create a narrow exemption to the prohibitions in G.L. c. 268A, §20, it has done so within §20. *See* G.L. c. 268A, §§20(a) - (h) *et seq.* Although the Legislature has revisited §20 numerous times, it has not chosen to provide an exemption for wiring inspectors performing electrical work for town agencies.[4]

The prudent and plausible course is for the Commission to interpret the two statutes harmoniously so they may be enforced simultaneously.[5] *Houston*, 430 Mass. at 631 (Cowin, J., concurring) ("the more plausible course is to construe the legislative will as intending that the policies embraced in both statutes be enforced"); *City of Everett v. City of Revere*, 344 Mass. 585, 589 (1962) (same); *Green v. Wyman-Gordon Company*, 422 Mass. 551, 554 (1996) (same); 1A C.Sands, Sutherland Statutory Construction §23.10 (5th ed. 1993) ("Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its *consistent* operation with previous legislation") (emphasis in original). Accordingly, the "comprehensive nature of [G.L. c. 268A] must prevail over any limitations which might be read into [G.L. c. 166, §32A]." *Boston Housing Authority v. Labor Relations Commission*, 398 Mass. 715, 719 (1986).

Here, although the two statutes overlap, they can coexist. *Police Department of Boston*, 48 Mass. App. Ct. at 547; *McGrath v. Mishara*, 386 Mass. 74, 83 (1982), citing *Dodd v. Commercial Union Insurance Co.*, 373 Mass. 72, 75-78 (1977) ("[t]he mere fact that these statutes contain some overlapping prohibitions and remedies does not establish a legislative intent to preclude their concurrent application"). Importantly, our interpretation will not render G.L. c. 166, §32A a "near nullity," since its provisions will remain fully in effect.[6] *Green*, 422 Mass. at 557; *City of Everett*, 344 Mass. at 589.

We conclude, in a manner which reconciles and gives reasonable effect to both statutes, that in a city or town which adopts the provisions of G.L. c. 166, §32A, a

wiring inspector may perform and be compensated for such work, provided that he complies with G.L. c. 268A, § 20. *See St. Germaine v. Pendergast*, 411 Mass. 615, 626 (1992); *G.J.T., Inc. v. Boston Licensing Board*, 397 Mass. 285, 293 (1986). Based on this conclusion, you must qualify for one of the §20 exemptions in order to perform electrical work for a Town agency.

Because you are a special municipal employee, two exemptions are available to you. If you do not, as wiring inspector, participate[7] in or have official responsibility[8] for any of the activities of the Town agency for which you perform electrical work, you simply have to file a disclosure with the Town Clerk.[9] If you do participate in or have official responsibility for any of the activities of the Town agency for which you perform electrical work, you must, in addition, receive the Board of Selectmen's approval.[10]

DATE AUTHORIZED: May 22, 2000

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[1]Section 20 of G.L. c. 268A applies to you as a municipal employee. G.L. c. 268A, The Board of Selectmen have classified the wiring inspector's position as that of special municipal employee.

[2]The Board of State Examiners of Electricians regulation provides: "Restriction for Licensed Electricians: Any person licensed by the Commonwealth of Massachusetts, Board of State Examiners of Electricians in accordance with the provisions of M.G.L. c. 141 as a master electrician, journeyman electrician, or both, who functions as an Inspector of Wires, Wiring Inspector, Assistant Wiring Inspector or Deputy, either full-time, part-time or temporary, appointed pursuant to the provisions of M.G.L. c. 166, §32, as amended, shall not practice for hire, or engage in the business during the time that person holds such an appointment within the area over which such person is the authority enforcing the Massachusetts Electrical Code [ ]." 237 CMR, §4.08 (effective January 30, 1980). Five related bills were filed with the General Court to repeal or modify the effect of the regulation. *See* 1981 Senate Doc. Nos. 903, 938, 941, 942 and House Doc. No. 1840. The recommended draft of the Committee on Local Affairs, 1981 House Doc. No. 6720, was adopted by both legislative branches and enacted in unchanged form as a local acceptance bill.

[3]Letters from Selectmen and State Senators to the Committee on Local Affairs questioned the regulation's breadth, saying: "It has become increasingly difficult for small communities to find appropriate and qualified individuals for . . . [t]he position of Wire Inspector . . . . Certain regulations governing Wire Inspectors have substantially reduced the numbers of candidates for that office in every small town"; "This new regulation . . . presents an unreasonable hardship on small communities throughout the Commonwealth. Electricians who formerly accepted the responsibilities of this position did so in many instances on a part-time basis, reserving the right to make a decent living engaging in private practice. Now unable to practice in the towns in which they act as Inspector, it is no longer feasible or profitable in many cases for electricians to assist communities in this role"; "Due to the nature of business in small towns, it is difficult for wiring and plumbing inspectors not to engage in business within the community as the majority of their customers are located within the immediate area."

[4]*Contrast* G.L. c. 268A, §20(f), which provides an exemption "to a municipal employee if the contract is for personal services in a part-time, call or volunteer capacity with the police, fire, rescue or ambulance department of a fire district, town or any city with a population of less than thirty-five thousand inhabitants; provided, however, that the head of the contracting agency makes and files with the clerk of the city, district or town a written certification that no employee of said agency is available to perform such services as part of his regular duties, and the city council, board of selectmen, board of aldermen or district prudential committee approve the exemption of his interest from this section . . . ."

[5]If the Legislative intent is to allow wiring inspectors in towns that adopt G.L. c. 166, §32A to provide services not only to private clients but also to town agencies, it can amend the statute to expressly say so. *See, e.g.*, G.L. c. 111, §23G.

[6]In comparison, the relationship between G.L. c. 166, §32A and G.L. c. 268A, §17, which generally prohibits a municipal employee, from receiving compensation from, or acting as agent or attorney for, 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, provides an example of a later enacted statute's clear implication that it supercedes another statute. In *EC-COI-87-42*, the Commission considered whether G.L. c. 166, §32A provided, in essence, a statutory exemption to §17, thus allowing wiring inspectors to perform electrical work in the same town for non-municipal parties. Although G.L. c. 166, §32A is silent as to G.L. c. 268A, the Commission concluded that the Legislature intended to supercede §17 because the statute was enacted for the very purpose of allowing wiring inspectors to perform electrical work in their own towns. *Id.* Had the Commission concluded otherwise, G.L. c. 166, §32A would have been rendered a nullity. Moreover, G.L. c. 166, §32A addressed the very purpose of §17, divided loyalty, by requiring the town to appoint an assistant inspector to inspect the wiring inspector's work.

[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]"Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

[9]Section 20(c) applies "to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract."

[10]Section 20(d) applies "to a special municipal employee who files with the clerk of the city, town or district a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the city council or board of aldermen, if there is no city council, board of selectmen or the district prudential committee, approve the exemption of his interest from this section."

CONFLICT OF INTEREST OPINION
EC-COI-00-2

FACTS:

You are legal counsel to the Town of ABC ("Town") Retirement Board ("Board"). You ask: Is the Board a "municipal agency" and are individuals who hold positions on or perform services for the Board "municipal employees" within the meaning and subject to the restrictions of G.L. c. 268A, the conflict of interest law?[1]

Chapter 32 of the General Laws (Law) establishes a uniform framework and comprehensive statutory scheme providing for retirement systems and pension rights and benefits for public employees in the Commonwealth. The Law governs the creation, structure, administration, operation and supervision of such retirement systems. The regulations, 840 CMR 1.00 (Regulations), promulgated by the Public Employee Retirement Administration Commission (PERAC) or its predecessor pursuant to G.L. c. 32, §21 and G.L. c. 7, §50, further elaborate on the Law.

PERAC has "general responsibility for the efficient administration of the public employee retirement system." G.L. c. 7, §50. PERAC also has broad-ranging oversight, guidance, monitoring and regulatory responsibilities over the 106 public employee retirement boards and systems operating pursuant to the Law in the Commonwealth.

The Law authorizes municipalities, through the local option process, to establish retirement systems and boards. G.L. c. 32, §28. Once having accepted the Law establishing a retirement system for its employees, a municipality may not revoke its action. G.L. c. 4, §§4A and 4B. Generally, the Law prescribes that all persons whose regular compensation is paid by a municipality and who are "regularly employed in the service of" any such municipality, other than public school teachers (who are members of the state Teachers' Retirement System), are "members in service" of the retirement system pertaining to their municipalities. G.L. c. 32, §§1 ("employee") and 3. The retirement system's "legal obligations . . . consist of liabilities for a spectrum of retirement and similar benefits including benefits upon retirement of members for superannuation or for ordinary or accidental disability, as well as benefits in the form of termination allowances in certain cases of resignation of members, failure of reelection or reappointment, removal, or discharge [and death benefits for members' survivors]." *Opinion of the Justices*, 364 Mass. 847, 852-53 (1963).

The Town Retirement System ("Retirement System") has three sources of funding. First, through payroll deductions, in-service members contribute a statutorily prescribed percentage of their pay to their retirement system's annuity savings fund. Second, through annual appropriations sufficient to amortize past unfunded liabilities and satisfy future liabilities based on actuarially projected liabilities prepared by PERAC, the System's governmental units contribute amounts sufficient to satisfy the legal obligations of the system's pension fund, special military service fund and expense fund, from which "all expenses of administration of the system" are paid. G.L. c. 32, §22(1), (3), (4) and (5). Third, investment income augments the System's funds.

More than 60 years ago, the Town accepted the provisions of the Law establishing the Retirement System for its employees.[2] The Board, established pursuant to §20(4)(b) of the Law, has five members: the Town Accountant, serving ex officio; an appointee of the Town Board of Selectmen[3] ("Selectmen"); two members "elected by the members in or retired from service of such [retirement] system from among their number in such manner and for such term, not exceeding three years, as . . . [the Selectmen] shall determine"; and a fifth member (who may not be a Town employee, retiree or official) chosen by the other four for a 3-year term. GL. c. 32, §20(4)(b). As provided by the Law, the Board members are not compensated because Town Meeting has not accepted the local option provision permitting Board members to be paid $3,000 annual stipends. G.L. c. 32, §§20(4)(d) and 20(6).

Among its general powers and duties, the Board is authorized to promulgate by-laws, rules, regulations and investment guidelines consistent with the Law and Regulations and subject to PERAC's approval; retain investment and money managers and consultants to assist in investing funds; process death and retirement benefits and refunds and conduct related hearings; and employ personnel to run the system's day-to-day operations. The Law and Regulations prescribe detailed requirements for membership in the Retirement System, members' contributions, benefit eligibility and most other aspects of members' rights and obligations and the Systems' operations, including funding and accounting methods, prohibited investments and reporting and auditing requirements.[4]

As permitted by the Law, the Board currently employs, supervises and directs one full-time employee. The Board determines her job responsibilities, salary and vacation time; she is not covered by any Town collective bargaining agreement. The Board pays her compensation out of its expense fund, which is funded by appropriations from the Town. At the Town's expense, the Board's employee receives all benefits that the Town's employees receive: she is a member of the Retirement System and is covered by the Town's group health insurance plan and the Town's workers' compensation insurance. She is also a member of the Town employees' credit union and participates in the Town's deferred compensation plan. There is no municipal by-law or contract between the Town and the Board that governs the Board's employee's benefits.

The Law provides that the city solicitor or town counsel, if any, of the municipality shall be its retirement board's legal adviser "except in such cases as the board deems [it] necessary" to employ other counsel. G.L. c. 32, §20(4)(f). The Board has retained its own legal counsel. The Law requires the municipal treasurer to act as treasurer-custodian of the Retirement System's funds. G.L. c. 32, §23(2). As permitted by the Board pursuant to the Law, the Town Treasurer receives $1,500 per year, payable from the expense fund, for his services as custodian of the System's funds. G.L. c. 32, §20(4)(g). The Town Treasurer also reconciles all of the System's bank accounts and, at the Board's direction, disburses funds. The Town Accountant oversees the accounting functions of the System and, as authorized by Town Meeting through the local option process, receives $3,000 per year (instead of $1,500) payable from the expense fund, for his "services rendered in the active administration of the system." G.L. c. 32, §§20(4)(d) and 20(4)(d½). The Board does not employ its own auditor. Rather, the Town's auditors audit the System annually. The Board engages its own actuary to determine and report to PERAC how much the Town must appropriate for the System each year, and PERAC verifies this amount.

The Law provides that retirement board members and others who handle the system's funds are "fiduciaries"[2/] and subject to fiduciary standards. G.L. c. 32, §§1 & 23(3). The Regulations include separate provisions establishing a code of ethics and standards of conduct for fiduciaries, 840 CMR 17.02-17.03, which specifically provide that "[e]very fiduciary shall know and comply with all applicable provisions of M.G.L. c. 268A governing the conduct of public officials and employees and shall conform to the standards of conduct prescribed by M.G.L. c. 268A, §23." 840 CMR 17.03.

The Law includes many local option provisions whereby the Town, through Town Meeting, G.L. c. 4,§ 4, may choose to accept various procedures, rights, benefits and obligations, in addition to those already mandated by the Law. Town Meeting has accepted at least 10 of those local option provisions, including one providing that the Town will indemnify Board members and one permitting the Board to grant cost of living adjustments (COLA's). G.L. c. 32, §§20A and 103.

The Board has its own federal taxpayer identification number and "errors and omissions" insurance coverage and purchases its own supplies. The Board occupies an office, rent-free in Town Hall.

QUESTION

Is the Board a municipal agency within the meaning of G.L. c. 268A, the conflict of interest law?

ANSWER

The Board is a municipal agency within the meaning of the conflict of interest law and, as such, individuals who perform services for or hold offices, positions, employment or membership in or on the Board are municipal employees within the meaning of that law.

DISCUSSION

There are only three definitional categories for public agencies under the conflict of interest law: state, county and municipal agencies. The Law does not explicitly characterize retirement boards as "public" by contrast with many entity-creating or -authorizing statutes.[6/] While separate statutes provide that the State Employees' Retirement Board and Teachers' Retirement Board, both created pursuant to the Law, are to be "in" or "within" specified state agencies,[7/] the Law does not expressly "place" municipal retirement boards "in" or "within" any other public agency or private entity.[8/] As the Law was first enacted in the mid-1940's,[9/] it could not have addressed the character of municipal retirement boards for purposes of statutory schemes enacted years later, such as the conflict of interest law, the public records law, G.L. c. 66, and the open meeting law. G.L. c. 39, §§23A *et seq.*

We recognize that, for other purposes, courts have considered retirement boards established under the Law, not as "municipal departments," but as independent of the municipalities whose employees they serve. *See Everett Retirement Board v. Board of Assessors of Everett*, 19 Mass. App. Ct. 305, 308 (1985) (expense fund component of city retirement system budget certified by retirement board for payment by the city was not subject to municipal control under any provisions of Municipal Finance Law and that retirement board "is independent of the host municipality"); *O'Connor v. Bristol* County, 329 Mass. 741, 494 (1953); *Stone v. Treasurer of Malden*, 309 Mass. 300, 302 (1941). *See also In the Matter of the City of Brockton, et al.*, 19 MLC 1139 (1992) (where Massachusetts Labor Relations Commission decided that, for purposes of collective bargaining under G.L. c. 150E, city's retirement board, not city, is "public employer" because board has total fiscal and administrative autonomy).

That municipal retirement boards created pursuant to the Law are fiscally and administratively autonomous for purposes of certain statutory schemes does not, however, control whether the Retirement Board is a "municipal agency"[10/] within the meaning of the conflict of interest law, whose broad prophylactic purposes are distinct and different. The conflict of interest law was "enacted as part of 'comprehensive legislation . . . [to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain." *McMann v. State Ethics Commission*, 32 Mass. App.

Ct. 421, 427 (1992), *citing Everett Town Taxi, Inc. v. Everett*, 366 Mass. 534, 536 (1974), *quoting* Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 18.

When determining whether a body such as the Board is a public agency within the meaning of the conflict of interest law, the Commission has used a multi-factor analysis, which the Supreme Judicial Court has recognized as appropriate. *MBTA v. State Ethics Commission*, 414 Mass. 582, 588 (1993) (concluding that the Massachusetts Bay Transportation Authority Retirement Board (MBTA) is not a "state agency" within the meaning of G.L. c. 268A, §1(p)). Those factors are:

> (1) the means by which the entity was created (*e.g.*, legislative, administrative or other governmental action);
>
> (2) the entity's performance of some essentially governmental function;
>
> (3) whether the entity receives or expends public funds; and
>
> (4) the extent of control and supervision of the entity exercised by government officials or agencies.

Also, as suggested in *MBTA*, we take into consideration the extent to which there are significant private interests involved in the entity under review or whether the state or its political subdivisions have the powers and interests of an owner. *MBTA*, 414 Mass. at 588-589. *See also EC-COI-95-10; 95-1; 94-7.*

As to these factors, we have said that "[n]o one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances." *EC-COI-92-13*. When reviewing and balancing the factors, we are also mindful of the prophylactic purposes of the conflict of interest law.

We now apply these factors and considerations to the facts of this case.

(1) Was there a statutory, regulatory, administrative or other governmental impetus for the Board's creation?

The Town chose irrevocably to establish, for the benefit of the Town's employees, the Retirement System and Board, as prescribed by a comprehensive statutory and regulatory scheme, vesting the Board with its powers and duties. The Law and Regulations generally prescribe detailed System membership eligibility criteria; creditable service qualifications; requirements and formulas for determining benefits; the various retirement payment options; hearing and appeal rights; composition, powers and duties of retirement boards, including financial and other reporting; oversight and review by PERAC, as discussed above; methods of financing and appropriating and accounting for, holding, managing and investing funds. *See* G.L. c. 32, §§1-28; 840 CMR 1.00 *et seq.*

The Law prescribes the composition of the membership of the 5-member Board, including, the Town Accountant and the Selectmen's appointee, who presumably (because the Law specifies no term), serves at the pleasure of the Selectmen. Two of the three remaining positions could be filled by current Town employees.

By contrast, it was of critical significance to the *MBTA* court, when concluding that the MBTA Retirement Board was not public, that the Board and the MBTA retirement system were established and evolved through negotiated collective bargaining processes, rather than pursuant to a statute, regulation or executive order. The court found "[n]otably absent from the creation of the [MBTA retirement] board is any action of the Commonwealth" and could not "discern any legislative underpinning, even indirect, for the creation of the board." *MBTA*, 414 Mass. at 589-590 (emphasis added).

In this case, we find abundant evidence that the Retirement System and Board have significant "legislative underpinnings" and that there was and remains a strong and direct governmental impetus at the municipal level for the creation and maintenance of the System and the Board.

(2) Does the Board perform some essentially governmental function?

Rather than being contractually negotiated undertakings, the establishment and maintenance of the Retirement System and the continued provision of retirement benefits administered by the Board were undertaken irrevocably as obligations by and of the Town when the Town decided to assure its employees of retirement and pension benefits and rights. We consider the Retirement System's provision of retirement benefits as mandated by the Law to constitute the performance of an essential governmental function. This conclusion is consistent with our precedent, in which we have found "governmental functions where those functions were contemplated by either state or federal legislation." *See, e.g., EC-COI-82-25* (regional school district provides educational services mandated by law); *92-26* (nonprofit collaborative assisting school committees in their "traditional governmental function"); (private industry councils implement federal Job Training and Partnership Act); *89-20* (regional employment boards implement federal Job Training Partnership Act). *Compare EC-COI-88-19* (private company's provision of public and educational cable television access pursuant to a contract between city and cable company not essentially governmental function).

We also consider it significant that the Retire-

ment System's retirement contributions and eventual benefits are in lieu of those provided by the Social Security System. Public employees of the Commonwealth and its political subdivisions who are covered by a public employer's retirement plan are not required to participate in or contribute to the Social Security System[11] retirement program because the Commonwealth has chosen not to enter into so-called "Section 218 agreements"[12] between the state and the Commissioner of the Social Security Administration whereby the state's public employees are made subject to and have the benefit of the Social Security System's retirement program. By contrast, most employees of private employers are required to participate in and contribute to the Social Security System even if their private employers have their own pension plans.

Thus, Town employees are not required to pay so-called FICA taxes[13] and do not, as such, have any rights to receive retirement benefits under the Social Security System, "a comprehensive contributory insurance plan," conceived and designed in large part "to protect workers and their dependents from the risk of loss of income due to the insured's old age, death, or disability." 70A Am Jur 2d, Social Security and Medicare, §14 (citations omitted). In short, the Retirement System assures retirement benefits as a de facto substitute for those otherwise mandated by the Social Security System.

Furthermore, we consider it significant that, if the Board had not chosen to engage your law firm as its legal adviser, the Law would assign that function to Town Counsel.[14] If such legal services are provided by salaried employees of the municipality (town counsel or city solicitor), it is PERAC's view that the Law does not permit them to receive extra compensation for such services to a retirement board.[15] This suggests that the Legislature and PERAC consider it an appropriate, if not necessary, part of town counsel's responsibilities to provide legal services to the municipal retirement board.

When determining that the MBTA Retirement Board did not perform an essential governmental function, the court in *MBTA* wrote:

> Clearly, these functions, which are fiducial in nature and performed most often by private entities, are not "essentially governmental" functions. The fact that the Commonwealth may perform these functions for the benefit of certain State employees does not transform the nature of these functions to governmental.

MBTA, 414 Mass. at 590.

That statement followed from the court's characterization of all aspects of MBTA's retirement program as a contractual (not a statutory) creation, which is clearly distinguishable from the Town Retirement System, a statutory creation. We also note that the court did not address whether the MBTA's retirement program substituted for or supplemented benefits under the Social Security System. In fact, the MBTA's employees contribute to both the Social Security System (through payroll deductions of FICA taxes) and the MBTA's retirement program.

(3) Does the Board receive or expend public funds?

Through its annual appropriations based on actuarially projected liabilities, the Town provides funding for the Retirement System's pension fund, special military service fund and expense fund, including all of the System's administrative expenses (such as those for the Board's full-time employee and professional services from its actuary, your law firm and other consultants and financial advisers). If the System has a shortfall, the Town must appropriate funds to cover it. Furthermore, the Town may not reduce the funds the Board requires and certifies. *See Everett Retirement Board, infra.* Additional funding is provided by members' payroll-deduction contributions (5%-9%) and investment income.

The Town's obligations to provide public funding are mandated by the Law and Regulations; they are not contractually based.

As further indication that the Town funds or supports the Board's operations, we note that the Board's sole employee (i) is a member of the System, (ii) receives (at the Town's expense) all benefits that Town employees receive, *e.g.*, group health insurance and workers' compensation coverage, (iii) is a member of the Town employees' credit union and (iv) participates in the Town's deferred compensation program.[16] In addition, the Board occupies office space in Town Hall rent-free; although not required by the Law, the Town auditor audits the System; and, as authorized, but not required, by the Law, the Town has chosen to indemnify the Board members for expenses and damages arising from the performance of their official duties.[17]

Again, *MBTA* is distinguishable because the MBTA's obligation to make the payments is a contractually determined form of employee compensation that, once paid, becomes private in nature due to the "significant private interests of the pension fund members and their beneficiaries."

(4) To what the extent do government officials or agencies control and supervise the Board?

The Town does not control or supervise the 5-member Board because, among other reasons, the Town Accountant and the Selectmen's appointee[18] do not constitute a majority of the Board and because, as fiduciaries, the Board members "owe their primary loyalty to the members and beneficiaries" of the Retirement System and "cannot be controlled in the traditional sense by any

outside body." *MBTA*, 414 Mass. at 592; G.L. c. 32, §23(3) and 840 CMR 1.01, 1.02.

On the other hand, the Law appears to give the Selectmen the discretion to establish the terms for the two elected Board members at less than three years and to have their appointee to the Board serve at their pleasure. Through the Town Accountant, the Town Treasurer, who serves as treasurer-custodian (under the direction of the Board) of the Retirement System's funds, and the Town auditor, Town officials play significant roles in the System. Also, PERAC has significant oversight and engages in periodic, as well as mandatory review, of the Board's and System's operations and certain of its determinations, *e.g.*, grants of benefits and power to discipline Board member, constitute governmental control.[19/]

We also consider it significant that the Board has authority to undertake certain significant activities only if Town Meeting accepts the Law's local option provisions. Town Meeting has approved at least 10 of such local option provisions, including those authorizing (i) the Board's granting of COLA's to retirees and their beneficiaries; (ii) the Town Accountant's receipt of $3,000 per year (instead of the maximum $1,500 per year otherwise prescribed by the Law); and (iii) the Town's indemnification of the Board members for damages and expenses incurred while acting within the scope of their official duties (which the Law would not otherwise require). By contrast, Town Meeting has not accepted the local option provisions that would (i) authorize the Board to increase from $1,500 (permitted by the Law) up to $3,000 the compensation of the Town Treasurer for serving as custodian of the Retirement System's funds or (ii) authorize the Board members to receive a stipend of up to $3,000 (rather than no compensation, as the Law otherwise provides).[20/] *See* G.L. c. 32, §§20(4)(h) and 20(6). In short, the Town and Town officials continue to decide significant aspects of the Board's operations.

Finally, as to the additional consideration, following the reasoning in *MBTA*, we find that the private interests of the Retirement System's members and their beneficiaries is significant and that the Town does not have the powers and interests of an owner. We do not, however, find this consideration controlling.

Beyond the factors applied above, we consider it significant that PERAC (and its predecessor agency), the very agency charged with oversight of the public employee retirement system in the Commonwealth,[21/] promulgated a Regulation that provides that "every fiduciary [including Board members] shall know and comply with all applicable provisions of M.G.L. c. 268A governing the conduct of public officials and employees and shall conform to the standards of conduct prescribed by M.G.L. 268A, §23." 840 CMR 17.03. All such Regulations are subject to the approval of the General Court with whom they must be filed, and, if the General Court takes "no final action" within 45 days of such filing, the Regulations are deemed approved. G.L. c. 7, §50(a). Thus, it must be presumed that the General Court reviewed and approved the Regulations requiring Board members to comply with the conflict of interest law. The Commission should not disturb that determination absent compelling circumstances, which are not present here.

Balancing the factors applied above in light of the totality of the circumstances and the purposes of the conflict of interest law, we find that the Board is a municipal agency. Consequently, individuals who perform services for or hold offices, positions, employment or membership in or on the Board are municipal employees for purposes of the conflict of interest law.

DATE AUTHORIZED: June 21, 2000

[1/] You and, with your permission, personnel of the Public Employee Retirement Administration Commision have provided us with relevant information.

[2/] *See* G.L. c. 32, §§28(1) and (2).

[3/] The appointed member has no statutorily prescribed term.

[4/] *See* G.L. c. 32, §§ 3, 4-5, 6-9, 12-13, 20(4), 20(5), 21(1), (3) and (5), 22 & 23(2); 840 CMR 4.00, 5.00, 10.00, 16.00, 18.00, 21.00, 25.00 and 26.00.

[5/] "A fiduciary . . . shall discharge his duties for the exclusive purpose of providing benefits to members and their beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and by diversifying the investments of the system so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so." G.L. c. 32, §23(3) and 840 CMR 1.01.

[6/] For example, water and sewer commissions established by local option are "independent public instrumentalit[ies]" performing "an essential governmental function" and are municipal agencies for purposes of the conflict of interest law, G.L. c. 40N, §4, as are fire districts and housing and redevelopment authorities. G.L. c. 48, §90 and c. 121B, §7, respectively.

[7/] The State Employees' Retirement Board serves "in" the Department of the State Treasurer. G.L. c. 10, §18. Established by G.L. c. 15, §16, the Teachers' Retirement Board is "within" the Executive Office for Administration and Finance. G.L. c. 7, §4G. *See* 1989 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 110 (1988).

[8/] The Law does provide that "[t]he contributory retirement system established in any city or town" pursuant to the Law shall include the name of the municipality and that "[e]ach such city or town system shall be managed by a retirement board which shall have the general powers and duties set forth in" G.L. c. 32, §20(5) (emphasis added).

[9/] With the enactment of St. 1945, c. 658, §1, the Legislature attempted to collect in one chapter the various statutes regulating a variety of public employee retirement systems. 18 Randall & Franklin, Mass.

Pract. § 381 (4th ed. 1993) (citations omitted).

[10/] "'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)

[11/] Although, when first enacted in 1935, the Social Security Act (now 42 U.S.C. §301 *et seq.)* prohibited participation by states and localities, the Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, 104 Stat. 1388, "required coverage of all state and local government employees not covered by a public employer's retirement plan providing benefits comparable to Social Security." "The Cost Impact of Mandating Social Security for State and Local Governments," Report prepared by The Segal Company, a consulting firm specializing in actuarial, compensation and benefit matters (May 1999).

[12/] *See* 42 U.S.C. §418, originally enacted as §218 of the Social Security Act.

[13/] The Social Security Act's related taxing provisions, formerly incorporated into the Act, are now codified in the Federal Insurance Contributions Act (FICA), 26 U.S.C. §3101, and the Federal Unemployment Tax Act, 26 U.S.C. §3301.

[14/] By comparison, in *MBTA*, the court observed that "[t]he [retirement] board has always been advised and represented by privately retained counsel."

[15/] *See* March 12, 1997 and June 16, 1997 opinion letters of John J. McGlynn and Robert F. Stalnaker, PERAC's former and current Executive Directors, respectively, relating to the Stoneham Retirement Board, and January 28, 1999 opinion letter of Joseph I. Martin, PERAC's current Deputy Executive Director, to the Methuen Retirement Board.

[16/] By comparison, in *MBTA*, the court observed that the MBTA Retirement Board's employees "do not participate in the State retirement system are not covered by the Commonwealth's group insurance" and "are ineligible for the Commonwealth's deferred compensation program and are not public employees for workers' compensation purposes."

[17/] By comparison, in *MBTA*, the court observed that "[j]udgments against the board are not the obligations of the MBTA or the Commonwealth and the MBTA does not guarantee the obligations of the fund." *MBTA*, 414 Mass. at 586.

[18/] In *MBTA*, the court found that the MBTA's three appointees do not control the 7-member MBTA Retirement Board.

[19/] Among its responsibilities, PERAC promulgates rules and Regulations pertaining to retirement boards' accounting, record-keeping, investments, expenditures, payments and granting benefits; at least every three years, reviews each system's entire operation and performs an actuarial evaluation of each system; conducts tri-annual audits and valuations of each system; provides actuarial services, training and assistance to retirement boards that choose to use its services; reviews retirement boards' grants of retirement and death benefits; and may discipline retirement boards. G.L. c. 7, §49, 50; G.L. c. 32, §§21 and 22; 840 CMR 1.00. *See also* 18 Randall & Franklin Mass. Pract. §§381, 384 (4th ed. 1993).

[20/] According to Town records, earlier this year the Board proposed a warrant article that would have authorized Board members to receive $3,000 annual stipends, but withdrew it after the Town Finance Committee indicated, consistent with its position with respect to other Town boards, that it would not support the Board members' receipt of stipends.

[21/] By comparison, in *MBTA*, the court observed that the MBTA Retirement Board has always been treated as private by state regulators.

CONFLICT OF INTEREST OPINION
EC-COI-00-3

FACTS:

You are employed full-time as an attorney for the City of Boston (City) Public Facilities Department (Department). You also serve on the Board of Directors of the Allston-Brighton Community Development Corporation (ABCDC). You seek advice that raises the question: Is the ABCDC a state, county or municipal agency within the meaning of G.L. c. 268A, the conflict of interest law?

The ABCDC was created in 1980 pursuant to G.L. c. 180 by individual community activists. It operates in the City's Allston-Brighton neighborhood and conforms with the description of a community development corporation contained in G.L. c. 40F, §1 (40F/CDC Standards). As such, it is eligible to receive for qualifying projects financing from the Massachusetts Community Development Finance Corporation (State CDFC) pursuant to G.L. c. 40F, §4, and loans and grants from Massachusetts Department of Housing and Community Development (DHCD) for certain of its programs.

The ABCDC's purposes are set forth in its Articles of Organization (Articles) and are summarized in the notes to its 1998 and 1999 financial statements as follows:

> The Agency's purpose is to improve the economic and social conditions in the Allston-Brighton neighborhood of Boston, Massachusetts. The Agency's activities include housing development, job creation, revitalization of declining commercial areas and resident involvement in development issues, and enhancement of cultural diversity in the community.

The ABCDC's primary focus has been to provide housing and, more recently, to promote economic development in the Allston-Brighton neighborhood.

The ABCDC's By-Laws, as amended (By-Laws), provide that anyone who is at least 18 years of age and who lives or has a place of business or employment in the Allston-Brighton neighborhood may be a mem-

ber. Members must pay annual dues. The ABCDC currently has approximately 300 members, most of whom reside in the Allston-Brighton neighborhood. of Directors is to consist of up to 22 persons, 18 of whom are to be elected by the ABCDC's members and up to four of whom may be appointed by housing developments with which the ABCDC is affiliated. By-Laws § 4.03. The Board currently has 18 elected members and one member appointed by a nonprofit, joint tenants' council of the ABCDC's two nonprofit housing developments, described below. The ABCDC's officers - president, vice president, treasurer and clerk - are to be elected by the Board from among its members. By-Laws § 6.01. The Board hires and oversees the Executive Director, who hires the staff. The ABCDC has 12 full-time and 3 part-time employees.

The ABCDC's initiatives are consistent with the Articles. The Board formulates most of them. State and City authorities may sometimes propose initiatives for the ABCDC's consideration, but they do not control or dictate its undertakings, operations or agenda.

The ABCDC has been involved in developing more than 350 affordable housing units. It retains equity interests in and/or some degree of control over five housing developments (327 units).

For each of three of those housing developments, the ABCDC created a separate for-profit subsidiary, which is the general partner of a limited partnership whose limited partners are private investors. The ABCDC owns a majority interest in its for-profit subsidiaries. Each of the three limited partnerships owns its respective housing development.

The ABCDC negotiated with private property owners to acquire the other two housing developments for rehabilitation as affordable housing. The ABCDC established two nonprofit corporations, Commonwealth Housing, Inc. (Commonwealth Housing) and Glenville Housing, Inc., each of which assumed the debt for, took title to and is now operating one of the developments. Each entity has a 6-member board of directors, three of whom are appointed by the ABCDC's Board of Directors[1] and three of whom are appointed by the respective tenant councils. Commonwealth Housing and Glenville Housing pay the ABCDC annual fees of $25,000 and $20,000, respectively, to oversee the management of their developments.

The ABCDC and its subsidiaries and affiliates receive much of their funding under contracts and through grants and loans that are available on a competitive basis to entities other than community development corporations. Approximately 60% or more of the ABCDC's general operating revenues for the past four years were derived from private sources. That percentage is expected to be approximately the same for 2000.

Less than 10% of ABCDC's projected general operating revenues for the year 2000 are expected to be derived from or flow through City agencies. Approximately 30% of the ABCDC's general operating revenues for 2000 are expected to be derived from state and federal sources. The only benefit that the ABCDC currently receives from or through the State CDFC is a $1000 annual fee for serving as a "sponsor" for a State CDFC loan to a small business enterprise in a neighboring community.[2]

The Articles provide that, upon the ABCDC's dissolution or winding up, "any disposition made of the assets of the Corporation shall be such as is calculated to carry out the purposes for which the Corporations is formed." Articles, Provision (n).

QUESTION:

Is the ABCDC a state, county or municipal agency[3] within the meaning of G.L. c. 268A, the conflict of interest law?

ANSWER:

The ABCDC is not a state, county or municipal agency for purposes of the conflict of interest law because it was created by private citizens without governmental involvement; it does not perform essentially governmental functions; a majority of its funding is from private sources; and no governmental agency controls or supervises its Board of Directors.

DISCUSSION:

When determining whether an entity, including a nonprofit corporation such as the ABCDC, is a governmental[4] agency within the meaning of the conflict of interest law, the Commission uses a multi-factor analysis, which the Supreme Judicial Court has recognized as appropriate. *MBTA v. State Ethics Commission*, 414 Mass. 582, 588 (1993). Those factors are:

> (1) the means by which the entity was created (*e.g.*, legislative, administrative or other governmental action);
>
> (2) the entity's performance of some essentially governmental function;
>
> (3) whether the entity receives or expends public funds; and
>
> (4) the extent of control and supervision of the entity exercised by governmental officials or agencies.

Also, as suggested in *MBTA*, we take into consideration

the extent to which there are significant private interests involved in the entity under review or whether the state or its political subdivisions have the powers and interests of an owner. *MBTA*, 414 Mass. at 588-589. *See also EC-COI-95-10; 95-1; 94-7.*

As to these factors, we have said that "[n]o one factor is dispositive; rather the Commission will balance all of the factors based on the totality of the circumstances." *EC-COI-92-13.* As we recently said, "[w]hen reviewing and balancing the factors, we are also mindful of the prophylactic purposes of the conflict of interest law." *EC-COI-00-2.*

We now apply these factors and considerations to this case.

(1) Impetus for Creation

No statute, rule, regulation, order, ordinance or other law required the ABCDC to be created. The ABCDC was created in 1980 by private citizens. It does not appear that any governmental body was involved in its creation. *See EC-COI-95-10* (despite governmental officials' participation in and funding of organization and initial operations, entity created pursuant to contract that is to become a "viable, independent entity after three years" not governmentally created). *Compare* the following opinions, each concluding that the subject entity was governmentally created, *EC-COI-90-3; 89-24; 84-147* (confirmed by *89-1*); *84-66* (all involving non-profit corporations established by state agencies); *00-02* (strong and direct governmental impetus for creation of retirement board established by town meeting pursuant to a comprehensive statutory scheme); and *88-24* (municipal officials in a municipal agency created a non-profit corporation to further the agency's statutory purpose).

The ABCDC was established pursuant to G.L. c. 180, a comprehensive statutory scheme governing all Massachusetts nonprofit or "charitable" corporations, which does not automatically render any such corporation a governmental agency. The mere fact that the ABCDC conforms with the 40F/CDC Standards[8] does not mean that a governmental impetus existed for its creation. The 40F/CDC Standards are simply minimum eligibility requirements with which a particular community development corporation must conform, if it chooses, in order to qualify for financing for a particular project from the State CDFC and for eligibility for certain of DHCD's programs.[8][11] *See* G.L. c. 40F, §§1 and 4 and n. 6 below. *See, e.g., EC-COI-92-1* (nonprofit community action agency established by private citizens and complying with federal and state statutes prescribing minimum standards for funding and contract eligibility not governmentally created); *94-7* (nonprofit corporation satisfying state agency's qualification and eligibility criteria for state home care contracts was not governmentally created). *Contrast* G.L. c. 121C (statutory scheme for economic development and industrial corporation, permitting a city council or town meeting to create one such "public body politic and corporate" for certain municipalities in designated areas of "substantial unemployment").

(2) Essentially Governmental Function

We do not consider the provision of affordable housing or promotion of economic development to be "uniquely within the bailiwick of government." *EC-COI-95-10.* Indeed, the ABCDC's primary activities, providing affordable housing and promoting economic development, are frequently performed by private entities, both "nonprofits" and "for-profits," often with federal and other governmental loans, grants, subsidies and tax and other incentives.[9] We recognize that many of the ABCDC's purposes and undertakings involving the provision of affordable housing and promotion of economic development are public in nature and have significant public benefits, but that alone does not render them "essentially governmental functions."[9] *Compare* EC-COI-*95-10*, n. 11 (police, fire services, municipal infrastructure (water, sewer, drainage, streets) and public school education are essential governmental services).

We also find it significant that even in G.L. c. 40F, the Legislature did not characterize a community development corporation that qualifies for State CDFC financing as performing an essentially governmental function. Rather, G.L. c. 40F describes a community development corporation quite differently from the State CDFC, which provides financing to certain community development corporations. A community development corporation is a "quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes." G.L. c. 40F, §1 (emphasis added). In contrast, the State CDFC, which is authorized to provide financing to such community development corporations, is a "body politic and corporate" and a "public instrumentality" created by G.L. c. 40F, §2 to perform "an essential governmental function" (emphasis added).

(3) Whether the Entity Receives or Expends Public Funds

Approximately 60% or more the ABCDC's funding in recent years has been derived from private sources, and only approximately 10% or less is derived from City sources. The balance is derived from state and federal sources.

(4) Extent of Governmental Control and Supervision

Neither the City nor any other governmental agency plays any role in constituting the ABCDC's Board of Directors or appointing its officers, none of whom are required by the By-Laws to be governmental employees.[10] The Board hires the Executive Director who hires

the staff, now 15 people. While ABCDC personnel undoubtedly meet with and report to various federal, state and City agencies and employees with respect to contracts, loans, grants, acquisitions and projects in which the governmental agencies are interested or involved, those governmental employees do not control or direct the ABCDC's operations, except to the extent that contractual obligations and undertakings or permitting/approval requirements apply.

The Board formulates most of the ABCDC's initiatives. While state and City authorities may sometimes propose initiatives for the ABCDC's consideration, they cannot control or dictate its undertakings, operations or agenda. Further evidencing the ABCDC's control of its own operations are its establishment of and relationships with its for-profit and nonprofit subsidiaries and affiliates.

(5) Additional Consideration

Finally, as to the additional consideration in the Commission's jurisdictional analysis, we note that the Articles provide that, upon the ABCDC's dissolution or winding up, "any disposition made of the assets of the Corporation shall be such as is calculated to carry out the purposes for which the Corporations is formed." This provision does not require or suggest that the ABCDC's assets be transferred to the state or any governmental agency. It does not appear that state or any other governmental agencies have the "powers and interests of an owner" any more than they would over other nonprofit corporations formed under G.L. c. 180.

After weighing the various factors and considering the totality of the circumstances, we conclude that the ABCDC is not a state, county or municipal agency within the meaning of G.L. c. 268A.[11/]

In reaching our conclusion, we clarify our holding in *EC-COI-85-66*.[12/] In that opinion, the Commission determined, without extensive review under our multi-factor analysis, that the subject community development corporation was a municipal agency. That conclusion appears to have rested, in large part, on the fact that the subject community development corporation conformed with the 40F/CDC Standards, rather than on an examination of the actual manner in which the community development corporation was established, funded, operated and controlled vis-a-vis governmental and private influences.

We now clarify that, when considering whether a community development corporation is a state, county or municipal agency within the meaning of G.L. c. 268A, we will review it, just as we do all other entities, by applying our multi-factor analysis. We will not consider a community development corporation to be a state, county or municipal agency for purposes of the conflict of interest law simply because it may conform with the 40F/CDC Standards, which may give it "threshold" eligibility for certain governmental or public financing, grant and other programs and contracts.

DATE AUTHORIZED: August 23, 2000

[1/]The ABCDC's Board of Directors appointed you to serve on Commonwealth Housing's board of directors.

[2/]It also receives a $45,000 Community Enterprise Economic Development (CEED) grant from DHCD and approximately $10,000 indirectly from the Massachusetts Office of Business Development.

[3/]*See* G.L. c. 268A, §§1(p), (c) and (f).

[4/]Except where otherwise expressly stated, as used here and elsewhere in this opinion, where the context admits, the words "government" and "governmental" shall connote Massachusetts state, county or municipal government.

[5/]The CDFC regulations describe a community development corporation that may be eligible for CDFC financing as a "quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes" whose by-laws provide:

> (1) it is organized to operate within a specified geographic area coincident with existing political boundaries;
>
> (2) that membership in the corporation shall be open to all residents of said area who are eighteen years or older;
>
> (3) that at least a majority of its board of directors shall be elected by the full membership with each member having an equal vote;
>
> (4) that the by-laws of the Community Development Corporation shall provide that any other directors be either appointees of elected state or local government officials or appointees of other nonprofit organizations having as a purpose the promotion of development in the designated geographic area;
>
> (5) that said elections shall be held annually for at least one-third of the members of the board of directors so that each elected director shall serve for a term of at least three years;
>
> (6) that the designated geographic area shall be consistent with some existing, or combination of existing, political district, provided that the aggregate population of such geographic area shall not exceed one hundred and fifteen thousand people based on the most recent federal census.

G.L. 40F, §1.

[6/]Some DHCD financing programs for which community development corporations are eligible do incorporate or adopt the 40F/CDC Standards. *See* 760 CMR 18.00 and 24.00 and 946 CMR 3.00. Others do not. *See* 760 CMR 19.02, 23.02. *See also* DHCD's CEED program created in 1978 through a state budget line item, to assist in revitalizing neighborhoods, for which DHCD has promulgated no regulations, but whose application form describes "eligibility criteria" for community development corporation that are not identical to and are more general than the 40F/CDC Standards.

[7/]We note that, according to the Massachusetts Association of Community Development Corporations (MACDC), a private organization with 65 current members, there are some community development corporations in the Commonwealth that do not conform with all of the 40F/CDC Standards.

[8/]Government housing authorities as well as private property owners may provide affordable rental housing. *See EC-COI-96-4* (describing several types of rental housing subsidy programs available to governmental and nongoernmental entities). Economic development and industrial corporations, created by municipalities pursuant to G.L. c. 121C, as well as chambers of commerce and private businesses promote economic development. *See, e.g., EC-COI-95-10* (downtown partnership whose purposes include revitalizing business, is not governmental agency).

[9/]We note that the ABCDC currently receives only $1000 per year from the State CDFC for serving as a "sponsor" of a loan to a small business enterprise in neighboring community. Even if we were to consider the ABCDC to be performing an essentially governmental function with respect to any future projects financed with State CDFC monies, that would not mean that the ABCDC's overall purposes and functions are essentially governmental.

[10/]We note that the 40F/CDC Standards include alternative methods for selecting members of the community development corporation's board of directors, other than those elected by the membership. Any "other" members may be appointed by (i) elected state or local officials or (ii) other nonprofit organizations with similar purposes. The ABCDC chose not to require governmental officials to play a role in selecting the four members of its Board of Directors who may be appointed, evidencing an intent not to be subject to governmental control.

[11/]Given our conclusion, G.L. c. 268A, §§ 17, 19 and 23 may be implicated as a result of your working for the Department and serving on the boards of directors of the ABCDC and Commonwealth Housing. We will provide you separate advice about those issues.

We note that our conclusion might differ if, in the future, for example, the ABCDC's funding from the State CDFC and DHCD for specific projects were to become a significant component of the ABCDC's budget (which the modest $1000 is not) and there were significant governmental control over the ABCDC. If the facts change in any material way, please contact us for further advice.

[12/]This discussion also applies to *EC-COI-85-77*, which, without further analysis, rested on the earlier opinion.

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In the Matter of Alan Alves - The Commission cited Freetown Police Lieutenant Alan Alves after finding reasonable cause to believe Alves violated G.L. c. 268A, §23, the standards of conduct section of the state's conflict of interest law, by intermixing his public and private dealings concerning the purchase of a boat that was the subject of a police investigation. Section 23(b)(3) of G.L. c. 268A, the state's conflict of interest 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. According to a Public Enforcement Letter, Alves purchased a 24 foot Bayline boat from Dennis Oliveira in 1996. The previous year, Oliveira had sold the boat to a buyer for $6,000, half due at the time of sale and the balance within 30 days. After the buyer failed to pay the balance, Oliveira filed a police report alleging that the boat was stolen. Alves recovered the boat, which was returned to Oliveira. Oliveira subsequently sold the boat to Alves for $3,000. Alves then filed a police report on the incident that stated that Oliveira "wished not to pursue charges against [the] buyer, if possible, and . . . the boat has now been sold." Alves did not disclose to his appointing authority that he had purchased the boat prior to submitting the report. He could have avoided violating §23(b)(3) by disclosing the relevant facts in writing to his appointing authority prior to his taking any official action concerning the boat. "By acting officially in a matter involving the boat transaction/theft while negotiating a deal to purchase and/or just having purchased the boat [which was the subject of your investigation], you created an appearance of a conflict," the Letter states. Issuance of a Public Enforcement Letter does not require the subject to pay a fine or admit to violating the law, but the subject must waive his right to a hearing on the matter and consent to publication of the Enforcement Letter.

In the Matter of Robert S. McKinnon - The Commission issued a Disposition Agreement in which Robert S. McKinnon, a current member of and former advisor to the Board of State Examiners of Plumbers and Gasfitters, admitted violating the conflict law. The nine member Board reviews and approves plumbing products for use in the Commonwealth, promulgates the state Plumbing and Gasfitting Code and grants variances to the Code. McKinnon paid a civil penalty of $3,000. According to the Disposition Agreement, since 1992, McKinnon has worked privately for Stop & Shop Supermarket Company inspecting plumbing in new Stop & Shop stores under construction. He earned between $500 and $1,000 per month. In 1997, Stop & Shop requested Board approval for a test installation of a vacuum drainage system in Braintree. McKinnon acted as Stop & Shop's agent by presenting Stop & Shop's proposal to install the system in a letter dated April 28, 1997 to the Board. The conflict law, G.L. c. 268A, § 4, prohibits a state employee from acting as agent for anyone other than the Commonwealth in connection with any particular matter in which the Commonwealth is a party or has a direct and substantial interest. On six occasions, as a Board member or Board advisor, McKinnon participated in discussions, motions, votes and other matters in which Stop & Shop had a financial interest, including the proposed vacuum drainage system in Stop & Shop's Braintree and Norwood stores and plumbing requirements for a mezzanine in Stop & Shop's Pittsfield store. G.L. c. 268A, § 6 prohibits a state employee from participating in a particular matter in which, to his knowledge, a business organization in which he is serving as an employee has a financial interest.

In the Matter of J. Nicholas Sullivan
In the Matter of Ronald J. D'Arcangelo - The Commission issued two Disposition Agreements in which former Newburyport District Court Chief of Probation Ronald J. D'Arcangelo and District Court Clerk Magistrate J. Nicholas Sullivan admitted violating the conflict law. D'Arcangelo admitted using his position to seek "consideration" on traffic tickets from Sullivan for D'Arcangelo's family and friends on nine occasions. Sullivan admitted creating the appearance of a conflict by accepting D'Arcangelo's requests and subsequently issuing findings that resulted in acquittal in each instance where "consideration" was sought. D'Arcangelo and Sullivan each paid a civil penalty of $3,000. According to the Disposition Agreements, D'Arcangelo used post-it notes to Sullivan requesting "consideration" on motor vehicle citation documents involving D'Arcangelo's family and friends. By asking for "consideration," D'Arcangelo was seeking that the cases receive preferential treatment rather than be judged on their merits. On each occasion, Sullivan issued findings of "not responsible," the statutory terminology for acquittal in such cases. D'Arcangelo admitted that he violated G.L. c. 268A, §23(b)(2) by using his position to request "consideration" from fellow court employee Sullivan. Section 23(b)(2) of the conflict law prohibits a state employee from using his position to obtain for himself or others an unwarranted privilege. Sullivan admitted that he violated G.L. c. 268A, §23(b)(3) by accepting D'Arcangelo's requests for "consideration" and subsequently issuing findings of "not responsible." 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 states that a reasonable person with knowledge of all the relevant circumstances could conclude that D'Arcangelo could improperly influence Sullivan or that the drivers involved could unduly enjoy Sullivan's favor in the performance of his official duties as clerk magistrate.

In the Matter of Robert Churchill - The Commission issued a Disposition Agreement in which Randolph Police Lieutenant Robert Churchill admitted violating G.L. c. 268A, §23(b)(3) by acting as a police prosecutor in resolving a criminal charge against fellow police officer William Batson's son. Churchill paid a civil penalty of $500. According to the Disposition Agreement, both Churchill and Batson have been Randolph police officers since 1977. Since 1992 when Batson became a detective, Churchill supervised Batson. In April 1996, following a police investigation, Batson's seventeen-year-old son and two-fifteen-year old juveniles admitted spray-painting graffiti on several buildings in Randolph including racist graffiti in letters large enough to be readable from an adjoining playground on a Randolph Highway Department garage as well as at two other locations. Churchill, acting as police prosecutor, agreed to resolve Batson's criminal case in District Court with diversion and dismissal under G.L. c. 276A, and court costs in the amount of ten days of community service. "The diversion and dismissal resolution was a lenient and desirable resolution of the case for Batson's son because it would leave him without a criminal record and would not require him to admit to having done the graffiti or to pay restitution," the agreement states. In June 1996, having received a referral of the matter from the Norfolk County District Attorney, the Attorney General moved to vacate the diversion and dismissal and a new summons issued against Batson's son. In October 1996, Batson's son admitted in District Court to sufficient facts for a finding of guilty and the matter was continued without a finding for one year, with ten days of community service (deemed served), $50 in court costs, letters of apology to the victims and $1,633 in restitution. Churchill admitted that he violated G.L. c. 268A, §23(b)(3) by acting in a manner which would cause a reasonable person to conclude that Batson and Batson's son could unduly enjoy Churchill'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. According to the Agreement, Churchill could have avoided the violation by making a written disclosure of the relevant facts to selectmen, who would then have had the opportunity to decide whether they wanted Churchill to handle the case or to refer the matter to the District Attorney or the Attorney General. This Disposition Agreement resolved an adjudicatory proceeding that had been commenced by the Enforcement Division against Churchill.

In the Matter of Richard Goodhue - Randolph Planning Board member Richard Goodhue was fined $750 by the Commission for violating G.L. c. 268A, §19 of the conflict law by participating in matters in which he had a financial interest. This Disposition Agreement resolved an adjudicatory proceeding that had been commenced by the Enforcement Division against Goodhue in September 1999. According to the Disposition Agreement, Goodhue violated G.L. c. 268A, §19 by participating in Planning Board matters concerning Autumn Woods, a 42-lot residential subdivision being developed by West Point Development Co., Inc., at a time when Goodhue had a financial interest in performing masonry work for West Point elsewhere in Randolph and had reason to foresee that he would perform such work at Autumn Woods. West Point is a real estate development company operated by Michael Kmito and his father Louis J. Kmito. Between March 1996 and July 1996, Goodhue participated in a Planning Board public hearing and other matters regarding West Point's proposed Autumn Woods subdivision through board discussions and actions including voting to accept and signing the approval of the subdivision plan. From the mid-1980s until late 1996, Goodhue, a self-employed mason, performed masonry work for Louis and Michael Kmito as well as for West Point. From 1993 to late 1996, West Point's practice was to hire Goodhue whenever it needed a mason. Between September 1993 and January 1997, West Point paid Goodhue a total of $32,330.25. During and soon after the time Goodhue participated in the Planning Board's review and approval of the Autumn Woods subdivision, West Point paid Goodhue $4,320 for projects other than Autumn Woods and $15,935 for masonry work at Autumn Woods. According to the Disposition Agreement, "Goodhue had reason to foresee, at the time he participated in the Planning Board's review and approval of the Autumn Woods subdivision, that the construction of the subdivision would require masonry work and that West Point would continue its well-established practice of hiring him to do its masonry work." Section 19 prohibits a municipal official from officially participating in matters in which he has a financial interest.

In the Matter of Janis Montalbano - The Commission cited Narragansett Regional School Committee member Janis Montalbano for approving payment warrants in which her husband and son had financial interests. According to a Public Enforcement Letter, between July 1996 and May 1998, Montalbano signed ten payment warrants, that authorized a total of four payments to Montalbano Electric, a company owned by Montalbano's husband, Charles, and eight payments to MESD, Inc., a dealership that sells and services computers, which is owned by her son, William. The payments totaled $1,549 to Montalbano Electric and $7,044 to MESD, Inc. 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 to her knowledge an "immediate family" member has a financial interest. According to the Public Enforcement Letter, Montalbano stated that she never looked at the bills or warrants she signed and was only approving the total amount of the warrant. Nevertheless, the Commission emphasized in the Public Enforcement Letter that it will enforce the law where a public official is willfully blind to whether the

action in which she participates will affect the financial interests of family members. Thus, although Montalbano "closed [her] eyes" to the facts that would have informed her of the conflicts, she was charged with the knowledge she would have had if she had read the names listed in the warrants.

In the Matter of Michael A. Tetreault - The Commission authorized a Disposition Agreement resolving charges that Mendon Board of Health member Michael A. Tetreault violated the conflict of interest law by serving on the Board of Health and performing private septic system work pursuant to permits issued by his own board. The Commission fined Tetreault $15,000. In the Agreement, Tetreault admitted that he had received a letter from the Ethics Commission in 1993 stating that installing septic systems while serving on the Board of Health appeared to violate the conflict law. Nevertheless, between 1996 and 1999, Tetreault's company installed or repaired at least forty septic systems for private parties in Mendon. Tetreault's company received a profit of $2,000 to $3,000 per job, and Tetreault was compensated for his work by his company. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the town in relation to 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. Tetreault could have performed such work if Mendon had voted to accept G.L. c. 111, §26G, which permits a board of health member to perform private septic work within his own town without violating G.L. c. 268A, §17. In 1994, however, Mendon town meeting voted **not** to accept the provisions of this statute. Tetreault's fine is the largest fine paid by a municipal official during the Commission's 21 year history. The Commission imposed such a large fine because: (1) Tetreault and his company received a significant amount of financial gain from his violations; (2) Tetreault received his compensation in connection with particular matters handled by his own board; (3) the Commission warned Tetreault in writing in 1993 not to do this work, but Tetreault continued to do so anyway; and (4) the town also expressed its view that BOH members should not perform septic work in town.

In the Matter of Phillip Nelson- Randolph Landscape Review Board member Phillip Nelson was fined $1,750 for violating the state's conflict of interest law, G.L. c. 268A, by representing his private company before the Landscape Review Board. According to a Disposition Agreement, Nelson violated G.L. c. 268A, §17(c) by representing Nelson Landscaping and Garden Center, Inc. before the Landscape Review Board regarding two landscaping projects. Nelson, as a Landscape Review Board member, unilaterally approved the Honey Dew Donuts project at 106 Mazzeo Drive in November, 1996 with the understanding that the landscaping plans would be submitted later. In October, 1997, he submitted an estimate for landscaping work at the Honey Dew site, subsequently did the work and was paid $3,600 by Honey Dew Donuts. A Landscape Review Board member questioned why the work was done prior to the board's review and approval of the plans. Nelson then presented to the Landscape Review Board a landscaping sketch depicting the work that had been done, and he explained why the work was done by his company without the approval. Nelson also represented Nelson Landscaping and Garden Center, Inc. before the Landscape Review Board regarding a Jamp Realty project for renovations and site improvements at Shaw's Supermarket. Jamp Realty received a building permit in June, 1997 which did not require Landscape Review Board approval because the project involved only interior building renovations. Nelson, after discussion by the Landscape Review Board, was directed to and did approach Jamp Realty and suggested planters in the parking lot. Jamp Realty subsequently decided to incorporate landscaping into its plans for the project. In November 1998, Nelson billed Jamp Realty $4,345 for the landscape work he had done. Also in November 1998, Nelson submitted a landscape plan to the Landscopae Review Board and appeared before the board on behalf of Nelson Landscaping and Garden Center, Inc. He reported that the work had already been done and that six trees, not twelve as had been proposed in the original design, were planted because of changes in the location of the traffic islands. 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.

In the Matter of Patricia A. Doyle - The Commission fined Weymouth Park Commissioner Patricia A. Doyle $500 for violating the state's conflict of interest law by participating in the town's decision to reclassify her brother's park ranger position to park superintendent. In a Disposition Agreement, Doyle admitted that she violated G.L. c. 268A, §19 by discussing and voting on the proposed reclassification of her brother's position. According to the agreement, "the intent behind the reclassification was to promote [Doyle's brother] from park ranger to park superintendent" at a higher salary. Doyle did not view her brother as having a financial interest in this matter because no reclassification or raise could occur unless and until the personnel board acted on the reclassification. The Commission ruled, however, that Doyle's brother had a reasonably foreseeable financial interest in the reclassification process even though the Park Commission's recommendation was not the final determinative step. 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 Jane M. Swift - The Commission issued a Disposition Agreement in which Lieutenant Governor Jane M. Swift admitted twice violating G.L. c. 268A, the conflict of interest law, by receiving free babysitting services from two subordinates. Swift paid a civil penalty totaling $1,250. The Commission also released a letter to Swift discussing her use of a helicopter to travel from Boston to her home in North Adams in November, 1999. According to the Disposition Agreement, Swift admitted violating G.L. c. 268A, §23(b)(3) first by receiving approximately 45 hours of babysitting services in 1999 from Sarah Dohoney and second by receiving approximately 40 hours of babysitting services in 1999 from Susan Saliba. Dohoney was Swift's special assistant and Saliba was Swift's scheduler until February 1999 when she obtained jobs, with Swift's recommendation, first at Massport in February 1999 and then in August 1999 at the International Trade Office. The Agreement states that Swift "knowingly acted in a manner that would lead a reasonable person with knowledge of the relevant facts to conclude that [Dohoney and Saliba] could unduly enjoy Swift's favor in the performance of Swift's 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. Swift could have avoided violating §23(b)(3) by disclosing publicly the relevant facts. Swift, however, made no such disclosure. In a letter to Swift, Acting Executive Director Stephen P. Fauteux stated that the Commission had determined that there was no reasonable cause to determine that Swift's use of the state helicopter was an unwarranted privilege "where the [State Police] had reasonably determined that it was necessary for security reasons." The Commission based its decision, in part, on testimony under oath by the officer in charge of the Massachusetts State Police Executive Protection Unit. The officer testified that he decided that helicopter use should be implemented despite the fact that Swift had previously rejected this recommendation.

In the Matter of Ernest Nugent - The Commission fined Worthington Highway Superintendent Ernest Nugent $1,000 for violating the state's conflict of interest law by participating in the town's $10,000 purchase of a used wood chipper from Nugent's brother, Albert Nugent, who had previously rented the wood chipper to the town. In a Disposition Agreement, Nugent admitted that he violated G.L. c. 268A, §19 by requesting that the town purchase a used wood chipper, by recommending specifications for the wood chipper to be purchased which matched the specifications of the wood chipper Albert was renting to the town, by stating his opinion that Albert's wood chipper worked well and by personally seeking bids from Albert. When Nugent took these actions, he knew Albert had been renting the wood chipper to the town and was interested in selling it to the town. Section 19 of the conflict law generally prohibits a municipal employee from officially participating in matters in which an "immediate family" member has a financial interest. In 1996, the Commission's Enforcement Division advised Nugent that his involvement in the rental of the wood chipper from Albert would violate §19 of the conflict law unless he disclosed to selectmen the nature and circumstances of the wood chipper rental and Albert's financial interest in the rental and received from selectmen a written determination which would exempt Nugent from §19. Otherwise, Nugent was advised to abstain. Although selectmen were aware that Albert was Nugent's brother and had been renting his wood chipper to the town, Nugent did not seek or obtain the required exemption.

In the Matter of Arthur R. Smith, Jr. - The Commission dismissed the matter involving former Wilmington Water and Sewer Commission Chairman Arthur R. Smith, Jr. who was charged in 1995 with repeatedly violating G.L. c. 268A, the state conflict of interest law between 1989 and 1992. According to an order, the Commission unanimously voted to dismiss the matter, concluding that Smith "does not have 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' nor does he appear to have a 'rational as well as a factual understanding of the proceeding against him.'" Smith was charged with violating the conflict law by using his position to obtain Water Department contracts for Designer Comfort Systems, a company owned by Smith, his son and daughter, and by using his position to steer Water Department electrical work to former Wilmington Building and Wiring Inspector James Russo, who inspected Smith's private construction projects, and to Russo's brother-in-law, John Fitzgerald. Allegedly, Designer Comfort Systems obtained contracts valued at more than $10,000 in 1990 and 1991. Between 1989 and 1992, Russo and Fitzgerald allegedly obtained contracts worth more than $14,000. Russo was also charged with violating the conflict law but those charges were dropped after Russo died in 1996.

In the Matter of Edward J. Clancy - The Commission admonished State Senator Edward J. Clancy (D.-Lynn) for attempting to improperly influence the chairman and vice-chairman of the Board of Registration of Chiropractors through an *ex parte* communication in a pending adjudicatory proceeding. In a Public Enforcement Letter, the Commission found reasonable cause to believe Clancy violated Section 23(b)(2) of G.L. c. 268A, the state's conflict of interest law, by meeting with two members of the Board and speaking on behalf of a constituent, a chiropractor, who was then the subject of an adjudicatory proceeding before the Board. Section 23(b)(2) prohibits a state official from using his position to obtain for himself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. The Public Enforcement Letter states that while service to constituents to resolve difficulties in dealing with state agencies is a legitimate activity of legislators, "not every service to a constituent is lawful." Clancy

used his official position to obtain a meeting with the Board members in the State House to which the Board prosecutor was not invited and at which the prosecutor was not present. By then asking the Board members at this meeting to "show mercy and not justice," Clancy made an *ex parte* communication to the decision-makers of the adjudicatory proceeding. The *ex parte* communication was of substantial value to the chiropractor given that the chiropractor's professional license was at stake. The rules governing administrative adjudicatory proceedings prohibit communication by or on behalf of one party of a proceeding without the knowledge and presence of the other party. Thus, Clancy's *ex parte* communication with the Board members was an unwarranted privilege of substantial value which was not properly available to similarly situated person. Issuance of a Public Enforcement Letter does not require the subject to pay a fine or admit to violating the law, but the subject must waive his right to a hearing on the matter and consent to publication of the Letter. By the terms of the Letter, Clancy does not admit to the facts or legal conclusions stated in the Letter.

In the Matter of David Carignan - The Commission fined Falmouth Health Agent David Carignan $1,000 for violating the state's conflict of interest law. According to a Disposition Agreement, Carignan used his position as a health agent to cause a private corporation, Duco Associates, Inc., to pay $2,500, which it did not owe, to town-licensed septic system installer Carl F. Cavossa, Jr. In 1996, Cavossa installed a septic system at a house under construction in Falmouth. The builder did not pay Cavossa. Duco held the first mortgage on the house and took ownership of the house by foreclosure in 1997. Duco then hired a different contractor to complete the house. In order to sell the completed house, Duco needed an occupancy certificate from the Falmouth Building Department, which in turn required the Board of Health's sign-off, by Carignan, on the building permit card. Carignan's practice was to sign the building permit card only after he had received an "as-built card" showing the location of the septic system as installed. Duco offered Cavossa $500 for the as-built card. Cavossa refused, saying he wanted to be paid the entire amount owed to him by the original builder before he would provide the card. Duco then paid another licensed septic system installer $150 to prepare a substitute as-built card. Carignan refused to accept the substitute as-built card, saying he would only accept the as-built card from Cavossa. He also did not inform Duco representatives of any alternative ways that they could get approval of the as-built card such as providing a card from the engineering firm that designed the septic system or appealing to the Board of Health. Carignan then contacted Cavossa who affirmed that he would only provide the as-built card to Duco if he were paid the entire amount. Carignan took no further action to obtain the as-built card from Cavossa. When Duco's attorney contacted the health agent, Carignan said words to the effect that it was unfair and immoral that Cavossa had not been paid for his work. The attorney explained that Cavossa was not owed payment from Duco but from the original builder upon whom Duco foreclosed. Based on conversations with Carignan, Duco representatives understood that Carignan would not sign the building permit card unless Duco paid Cavossa to provide the as-built card. Without Carignan's signature on the building permit card, Duco could not get the occupancy certificate or sell the now-completed house. Finally, Duco negotiated with Cavossa to provide the as-built card in return for $2,500. In the Agreement, Carignan admitted that he violated G.L. c. 268A, §23(b)(2) by using his position to compel Duco to pay Cavossa $2,500 that Duco did not owe to Cavossa. He further admitted violating GL. c. §268A, 23(b)(3) by creating an appearance that Cavossa could unduly enjoy Carignan's favor. Section 23(b)(2) prohibits a municipal employee from using his position to secure for another person an unwarranted privilege of substantial value that is not available to similarly situated individuals. 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.

Alan Alves
c/o Patrick Matthews, Esquire
56 North Main Street, Suite 303
Fall River, MA 02720

PUBLIC ENFORCEMENT LETTER

Dear Mr. Alves:

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 purchasing a boat you previously recovered in your capacity as a police officer. Based on the staff's inquiry (discussed below), the Commission voted on January 19, 2000, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23(b)(3).

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You are a Freetown police lieutenant and police prosecutor.

2. In 1995, Dennis Oliveira ("Oliveira") decided to sell his 24 foot Bayliner boat to a buyer ("Buyer")[1] for $6,000. Buyer paid Oliveira $3,000 and agreed to pay the balance within 30 days. Oliveira allowed Buyer to take the boat; Oliveira kept the title.[2]

3. Oliveira tried a number of times to collect the outstanding $3,000 but Buyer never paid Oliveria. Subsequently, Buyer took the boat from the marina and disappeared. Oliveria went to the district court to file a complaint about the boat. The court clerk directed Oliveria to talk with you. [You were the police prosecutor so the clerk knew that you could handle the complaint.] Oliveria explained that the boat was worth about $12,000 but that he had sold it to a Buyer for $6,000. You told Oliveria to come to the police station and file a report with the police that the boat was stolen. Oliveria came to the police station on January 18, 1996, and filed a report.

4. When Oliveira described the boat, you remembered having seen it at the Fall River Marina. The boat was no longer there, but you were able to use the marina's records to track it to New Bedford. On April 22, 1996, you found the boat in New Bedford and notified the Freetown police. You tried to contact Oliveira to tell him that the boat had been recovered but Oliveria was out of town.

5. You went to file an application for an arrest warrant for Buyer with the court for larceny by false pretenses. You discovered, however, that there already were unrelated outstanding warrants against Buyer so you decided to pick Buyer up on the other warrants and question him before filing a warrant application on the boat. Simultaneously, however, Buyer was picked up for unrelated matters and was at the courthouse holding cell.

6. On May 8, 1996, you questioned Buyer at the courthouse holding cell about the boat. Buyer said it was all a misunderstanding. Buyer asked for a chance to speak with Oliveira to work the matter out. Buyer and Oliveria came to an agreement where Buyer returned the boat to Oliveria.

7. According to you, after Buyer gave the boat back, Oliveira indicated that he wanted to sell the boat. Oliveria asked if you knew of anyone interested in purchasing the boat. Oliveria said he received $3000 from Buyer and would sell the boat as long as he got the other $3,000. When you found out you could get the boat for just $3,000, you became interested. After inspecting the boat, you contacted Oliveria and said you would buy the boat for $3,000.

8. Oliveira denied that you used your police officer position or coerced him in any way to sell you the boat for $3,000.

9. Your police report on the incident, dated June 13, 1996, states:

> ... On 4/22/96 I drove by that location and observed the boat in question on blocks just down the street. The MS numbers had been changed to a bogus set. At this time I contacted the next wrecker in line (Big Wheels) who had Baylink Boat Transport move the boat to their property in Freetown where it was stored.
>
> I contacted Mr. Oliveira (the owner) and advised him of same. The following day Buyer was picked up in Fall River for OUI and was arraigned on his various other charges. At the courthouse I mirandised Mr. Buyer and questioned him regarding the boat. He explained to me it was a misunderstanding and if I would give him the

opportunity to straighten out the matter with Mr. Oliveira before he was officially charged. A couple days later Mr. Oliveira informed me that he wished not to pursue charges against Buyer, if possible, *and that the boat has now been sold* [italics added]. No charges against Buyer regarding the boat are being sought at this time.[3/]

10. You admit you purchased the boat prior to submitting your report.

11. You did not disclose to your appointing authority that you purchased the boat prior to submitting your report.

II. Discussion

As a police lieutenant, 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 §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 his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record.

There is reasonable cause to believe that you violated §23(b)(3) by intermixing your public and private dealings concerning the boat. By acting officially in a matter involving the Oliveira/Buyer boat transaction/theft while negotiating a deal to purchase and/or just having bought the boat from Oliveira, you created an appearance of conflict. A reasonable person would conclude that by entering into a business transaction with a complainant concerning the very property which is the subject of an unresolved (open) criminal complaint you could be improperly or unduly influenced in the performance of your official duties or that you were likely to act or fail to act officially because of that undue influence.[5/] Here, your taking or failing to take official action on Oliveira's criminal complaint also had the potential to influence Buyer regarding any action Buyer might want to take against Oliveira.[6/] Alternatively, you could have taken steps which could adversely affect Oliveira.[7/]

You acted officially in this matter on one occasion shortly after you bought the boat. Thus, in your June 13, 1996 police report you stated that you have decided not to pursue the larceny charges where the boat has been recovered and the owner is satisfied. You also stated, "The boat has now been sold."

The filing of this report was your official notification to your superiors of your decision not to further pursue this matter criminally. That was an important step in the process. To take that step shortly after you had purchased the very property that was the subject of the larceny complaint in question cannot help but create a significant appearance problem. One has to be concerned that you may have had a bias created by your own self-interest in the purchase, e.g., that if you pursued the matter criminally, Buyer might defend by trying to prove he owned the boat; or that such action might prompt Buyer to be more aggressive in asserting civil claims he would have against Oliveira which, in turn, could affect the price for which Oliveira would be willing to sell the boat. Moreover, the appearance problem is exacerbated by your misleading-by-omission statement, the "boat has now been sold." By so acting, there is reasonable cause to believe that you would cause a reasonable person to conclude that you were improperly influenced in the performance of your official duties in violation of §23(b)(3).

The Commission wants to make it clear that an investigating and/or prosecuting police officer should not become involved in any significant private transaction or relationship with key parties in a case he is investigating and/or prosecuting without first making an appropriate written disclosure to his appointing authority.

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 10, 2000

[1/]It is unnecessary to identify "Buyer" for the purposes of this educational letter.

[2/]Buyer claimed he spent an additional $2,700 on the boat trying to make it sea worthy although Oliveira disputes Buyer's claim.

[3/]The police department has the discretion to pursue larceny charges even if the private party decides not to press charges.

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

[5/]For example, you could have decided to press larceny charges against Buyer even though he and Oliveira had reached a private resolution. Moreover, where Buyer was already in jail and unable to make bail on other charges, he was particularly vulnerable to your authority as a police officer.

[6/]Buyer could have contended that he was the owner of the boat (although he had not completed paying for it), and, consequently, could not have stolen his own boat. Consequently, he might have sought to prevent Oliveira from selling the boat to you or he may have brought a claim against Oliveira to recover the $3,000 he had paid for the boat and/or the purported $2,700 costs in repairs. Such claims, in turn, likely would have affected your transaction with Oliveira.

[7/]For example, you could have concluded that Buyer was the rightful owner (albeit in arrears with regard to payment of the full purchase price) and that police intervention to assist Oliveira was not warranted.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 601**

IN THE MATTER
OF
ROBERT S. MCKINNON

DISPOSITION AGREEMENT

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

On November 18, 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 McKinnon. The Commission has concluded the inquiry and, on February 23, 2000, found reasonable cause to believe that McKinnon violated G.L. c. 268A.

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

1. McKinnon is a member of the Board of State Examiners of Plumbers and Gasfitters ("the Board").[1/] Among its other functions, the nine member Board reviews and approves plumbing products for use in the Commonwealth, promulgates the state Plumbing and Gasfitting Code ("the Code") and grants variances to the Code. McKinnon's Board position is unpaid.[2/]

2. Since 1992, McKinnon has worked privately for the Stop & Shop Supermarket Company ("Stop & Shop"). In his private work for Stop & Shop, McKinnon inspects the plumbing in the floors of new Stop & Shop stores under construction in Massachusetts prior to the concrete being poured.[3/] Stop & Shop pays McKinnon $40 per hour for this work. During the period here relevant, McKinnon earned between $500 to $1,000 per month working privately for Stop & Shop.[4/]

3. In 1994, Stop & Shop was building a Stop & Shop superstore in Pittsfield.[5/] A dispute arose between Stop & Shop and the Pittsfield plumbing inspector as to whether two toilet rooms were required on the store's 1,400 square foot mezzanine level. The Pittsfield inspector contended that the mezzanine level was a separate floor requiring its own toilet facilities under the Code.

4. At a Board meeting on August 3, 1994, while he was an unpaid appointed advisor to the Board, McKinnon requested clarification by the Board of the term "mezzanine" as used in the Code. McKinnon argued at the meeting that, for Code purposes, the mezzanine at Stop & Shop's Pittsfield store was not a separate floor requiring its own facilities but rather part of the floor below it.[6/] The Board then voted that it did not agree with the Pittsfield inspector's view. As a result, Stop & Shop was not required to install the two toilet rooms on the mezzanine level of the Pittsfield store.[7/]

5. At a Board meeting on September 6, 1995, the Board discussed certain proposed amendments to the Code, including a proposed new definition of mezzanine which limited such areas to 1,200 square feet, with the result that mezzanine levels over 1,200 feet (such as the 1,400 square foot mezzanine at the Pittsfield Super Stop & Shop superstore) would be considered separate floors requiring two toilet rooms. McKinnon, as a Board member, argued against the mezzanine-related amendment.[8/] On March 6, 1996, McKinnon participated in a unanimous Board vote not to approve the proposed mezzanine-related amendment, together with a variety of other proposed amendments.

6. In 1997, Stop & Shop decided to incorporate a vacuum drainage system for the food storage cases in its new stores.[9/] While vacuum drainage systems were

then allowed under the Code, Stop & Shop wanted to use a system with PVC (polyvinyl chloride) piping instead of the copper piping required by the Code, partly because the PVC was less expensive to purchase and install.

7. In early 1997, McKinnon assisted Stop & Shop in gaining the Board's approval of the temporary installation of a vacuum drainage system for food storage cases at its Braintree warehouse for testing and evaluation. In a letter to the Board, dated April 28, 1997, McKinnon wrote, "I have been asked by Stop & Shop Supermarkets to present to you a proposal to install a vacuum system in accordance with 248 CMR section 2.24 in an existing warehouse in Braintree, MA for testing and evaluation." Stop & Shop's proposal included the request to be allowed to use PVC piping (instead of copper piping).

8. At its May 7, 1997, meeting, the Board discussed Stop & Shop's proposal. McKinnon participated in the Board's discussion as a Board member and argued in favor of Stop & Shop's proposal. McKinnon, however, abstained from the Board's vote to allow the proposed vacuum drainage system installation with PVC piping. There was no opposition to Stop & Shop's proposal.

9. Subsequent to the Board's May 7, 1997 approval, Stop & Shop tested and evaluated vacuum drainage systems from two competing manufacturers: Envirovac and Jet-Vac.

10. In late 1997, Envirovac petitioned the Board for approval of the components of its vacuum drainage system for use in Massachusetts. Envirovac's petition included the request that the Board approve the use of PVC piping in the vacuum drainage system. At a December 3, 1997 Board meeting, McKinnon moved that the Board provisionally approve for a one year period the Envirovac vacuum drainage system components with a limited use of PVC piping.[10] McKinnon, however, abstained from the Board's vote on his motion.

11. On January 30, 1998, town of Norwood Plumbing and Gas Inspector Jim Capaldo ("Capaldo") wrote a letter to a plumber working for Stop & Shop concerning a proposed vacuum drainage system installation using PVC piping at a Stop & Shop facility in Norwood. Capaldo's letter questioned whether the Norwood facility was a Board-approved test site for the vacuum drainage system and whether the Board had approved the components and installation of the system. Capaldo advised Stop & Shop's plumber that he should start proceedings to obtain a variance from the Board for the vacuum drainage system. A copy of Capaldo's letter was sent to the Board and its executive secretary, Louis J. Visco ("Visco").

12. At the Board's February 4, 1998 meeting, McKinnon read Capaldo's letter to the Board. Thereafter, McKinnon prepared a response letter to Capaldo at Visco's request. The McKinnon-drafted letter, dated February 5, 1998, approved by the Board and signed by Visco, responded point-by-point to the questions raised by Capaldo and advised, "Please understand this system has been approved and no variance is required nor shall one be issued."

13. As a Board member and as an advisor to the Board, McKinnon is, and was at all times here relevant, a state employee.[11] Because he is uncompensated as a Board member and was uncompensated as a Board advisor, McKinnon is and was further a "special state employee."[12]

14. Section 4(c) of G.L. c. 268A, in relevant part, prohibits a state employee from acting as agent for anyone other than the commonwealth or a state agency in connection with a particular matter[13] in which the commonwealth or state agency is a party or has a direct and substantial interest.[14]

15. Stop & Shop's early 1997 request for Board approval of its proposed installation of the vacuum drainage system with PVC piping for testing and evaluation was a particular matter in which the commonwealth was a party or had a direct and substantial interest, and was a subject of McKinnon's official responsibility as a Board member.[15]

16. McKinnon acted as Stop & Shop's agent in connection with the vacuum drainage system particular matter by presenting Stop & Shop's proposal to install the system in his April 28, 1997 letter to the Board.

17. Thus in April 1997, McKinnon acted as agent for someone other than the commonwealth or a state agency in connection with a particular matter which was within his official responsibility as a state official and in which the commonwealth was a party or had a direct and substantial interest. In so acting, McKinnon violated G.L. c. 268A, §4.[16]

18. Except as the section otherwise permits, G.L. c. 268A, §6[17] prohibits a state employee from participating as such in a particular matter in which to his knowledge, a business organization in which he is serving as an employee has a financial interest.[18]

19. At the times here relevant, McKinnon was a Stop & Shop employee within the meaning of G.L. c. 268A, §6.[19]

20. Each of the above-described plumbing issues that came before the Board in the years 1994 through 1998 were particular matters. Stop & Shop had a financial interest in each of these particular matters.

21. In August 1994 as a board advisor, and in September 1995, March 1996, May and December 1997

and February 1998 as a Board member, McKinnon participated[20] in each of the above-described particular matters of interest to Stop & Shop by, as set forth above, at various Board meetings involving himself personally and substantially in Board discussions, in one case voting, in one case making a motion for Board action and in another case drafting a letter for the Board's executive secretary concerning the matters. Each time he so participated as a Board advisor or as a Board member, McKinnon knew that, Stop & Shop, his private employer, had a financial interest in the particular matter at issue.

22. Therefore, by participating as a Board member as described above, McKinnon participated as a state employee in particular matters in which to his knowledge his private employer had a financial interest. Each time he did so, McKinnon violated G.L. c. 268A, §6.[21]

23. McKinnon fully cooperated with the Commission's investigation of this matter.

24. The Commission is aware of no evidence that McKinnon knew at the time of his above-described actions concerning Stop & Shop that his actions violated G.L. c. 268A.[22]

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

(1) that McKinnon pay to the Commission the sum of three thousand dollars ($3,000.00) as a civil penalty for violating G.L. c. 268A, §4 and §6; and

(2) that McKinnon 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: February 29, 2000

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[1]McKinnon was appointed to the Board by the Secretary of Public Safety in September 1994. McKinnon previously served as a Board member from June 1989 to May 1992, and was an unpaid appointed advisor to the Board from May 1992 to September 1994.

[2]Until his July 1, 1998 retirement, McKinnon's primary employment was as the plumbing and gas inspector for the town of Dedham.

[3]Stop & Shop has three or four such inspectors working in various regions in New England. McKinnon is one of two Stop & Shop inspectors assigned to Massachusetts.

[4]During the relevant period, McKinnon's work for Stop & Shop constituted nearly all of his privately compensated work. Stop & Shop's payments to McKinnon were reported for tax purposes on federal 1099-MISC forms as "non-employee compensation."

[5]McKinnon did not do inspections for Stop & Shop at the Pittsfield store.

[6]According to McKinnon, in making these arguments, he acted in his capacity as a Board advisor and not on behalf of Stop & Shop, and based his arguments on his understanding of the requirements of the Massachusetts Building Code ("Building Code"). Also according to McKinnon, he was not influenced in his arguments by the fact that the mezzanine issue came up in connection with Stop & Shop and he was not trying to help the company in making the arguments.

[7]The Board's decision allowed Stop & Shop to avoid delay and several thousand dollars in added construction costs at the Pittsfield store. In addition, had the Board agreed with the Pittsfield inspector, the Pittsfield store might have become a precedent for requiring Stop & Shop to install two toilet rooms in the mezzanines of all its subsequently constructed superstores in Massachusetts. In McKinnon's view, requiring the two toilets on the mezzanine level would have put the Board in conflict with the Building Code and would not have been a valid precedent. It is unnecessary, however, for the purposes of this agreement to determine whether McKinnon is correct. Valid or not, a Board decision to require Stop & Shop to put two toilet rooms on the mezzanine level of the Pittsfield store would have cost Stop & Shop time and expense to either comply with or to seek to reverse or overturn.

[8]Again according to McKinnon, he based his arguments solely on his understanding of the requirements of the Building Code.

[9]The vacuum drainage system, in which the pipes are suspended from the ceiling, reduces the need for underground plumbing. The vacuum system thus gives Stop & Shop more flexibility in locating and relocating food storage cases and substantially reduces the cost of moving the cases.

[10]McKinnon moved to approve the Envirovac components with PVC piping to be used to above the refrigerated cases being drained, at which point the piping would be required to transition from PVC to copper.

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

[12]A "special state employee" is a state employee: "(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permit personal or private employment during normal working hours, provided that disclosure of such classification or permission filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred

and sixty-five days. For this purpose compensation by the day shall be considered as the equivalent to compensation for seven hours per day. A special state employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation." *G.L. c. 268A, §1(o).*

[13/] "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).*

[14/] A special state employee is subject to G.L. c. 268A, §4(c) "only in relation to a particular matter (a) in which has at anytime participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves no more than sixty days during any period of three hundred and sixty five consecutive days."

[15/] McKinnon also participated in the particular matter as a Board member on May 7, 1997, as set forth above in paragraph number 8.

[16/] The Commission is not aware of any evidence that McKinnon received any compensation from Stop & Shop for acting as its agent before the Board or in relation to any of the above-described matters concerning Stop & Shop before the Board.

[17/] None of the §6 exemptions apply in this case.

[18/] "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.*

[19/] At the times here relevant, McKinnon did not consider himself to be a Stop & Shop employee, but rather thought of himself as a consultant or independent contractor. For G.L. c. 268A purposes, however, the term "employee" includes consultants and independent contractors where, as in this case, a significant portion of the subject's annual compensation from all of his private consulting or independent contracting generally is derived from, or a significant portion of the subject's time is spent on, the consultant or independent contractor relationship in question. *See, e.g., In re Burgess*, 1992, SEC 570, 573.

[20/] "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).*

[21/] McKinnon demonstrated some awareness of and sensitivity to the conflict of interest law by abstaining from Board votes on matters of interest to Stop & Shop on May 7 and December 3, 1997. McKinnon's abstention from the Board's votes was, however, insufficient to avoid his violation of §6 where he participated in the Board's discussion and made the motion (in one case) leading to the Board's vote.

[22] Ignorance of the law is not a defense to a violation of the conflict of interest law. *In re Doyle*, 1980 SEC 11, 13; see also *Scola v. Scola*, 318 Mass. 1, 7 (1945).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 602**

IN THE MATTER OF RONALD J. D'ARCANGELO

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Ronald J. D'Arcangelo ("D'Arcangelo") 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 January 19, 2000, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by D'Arcangelo. The Commission concluded that inquiry, and on February 23, 2000, found reasonable cause to believe that D'Arcangelo violated G.L. c. 268A, §23(b)(2).

The Commission and D'Arcangelo now agree to the following findings of fact and conclusions of law:

1. From 1994 until 1999, D'Arcangelo served as the Newburyport District Court chief of probation.[1/2/] As such, he was a state employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. When a driver is cited for a motor vehicle violation in Newburyport, the driver may pay the ticket or request a hearing in the Newburyport District Court.

3. Newburyport District Court Clerk Magistrate J. Nicholas Sullivan ("Sullivan") presides over such disputed civil motor vehicle citation hearings.[3]

4. D'Arcangelo and Sullivan know each other through their official positions as court employees and are friendly.

5. Between 1993 and 1998, D'Arcangelo wrote nine requests to Sullivan for "consideration"[4/] on post-it notes he attached to the court's copies of the motor vehicle citation documents before the file went to Sullivan for a magistrate's hearing.

6. On each such occasion where D'Arcangelo requested consideration, the motorist involved was either a relative or a friend of D'Arcangelo's.

7. On each of the nine occasions indicated above, Sullivan observed D'Arcangelo's notes when the citations came before him for disposition. Sullivan subsequently issued nine findings of "not responsible."[5]

8. Each citation had potential penalties between $35 and $100.

9. Section 23(b)(2) of G.L. c. 268A prohibits a state 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.

10. D'Arcangelo requested "consideration" from fellow court employee Sullivan on motor vehicle citations involving D'Arcangelo's family and friends. But for his position as a court officer, D'Arcangelo would not have had access to these such court files and Sullivan. Therefore, D'Arcangelo knew or had reason to know that he was using his official position to request such consideration.

11. D'Arcangelo's consideration requests were for resolutions not based on the merits but rather on his family or friendship relationships with the motorists. Therefore, D'Arcangelo was attempting to use his official position to obtain an unwarranted privilege.

12. The potential penalties associated with the traffic citations described above were between $35 and $100. An adverse finding would cause the motorists to incur accompanying insurance premium surcharges. Therefore, the privilege of avoiding such costs was of substantial value.[6]

13. The privilege of a dismissal based on "consideration" was not properly available to similarly situated individuals facing similar penalties.

14. Thus, by using his official position as the Newburyport District Court chief of probation in an attempt to secure for his family and friends the unwarranted privilege of favorable dispositions of their motor vehicle citations based on "consideration," D'Arcangelo 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 D'Arcangelo:

(1) that D'Arcangelo pay to the Commission the sum of three thousand ($3,000.00) as a civil penalty for the violation of G.L. c. 268A, §23(b)(2); and

(2) that D'Arcangelo 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: February 29, 2000

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[1] On January 29, 1999, Chief Justice of the District Court Department Samuel E. Zoll put D'Arcangelo on administrative leave because of the allegations that are addressed in this Disposition Agreement.

[2] As the Newburyport District Court chief of probation, D'Arcangelo was responsible for overseeing all probation matters under Newbury District Court's jurisdiction.

[3] Sullivan has been the clerk magistrate since 1981.

[4] By asking for "consideration," it is clear that D'Arcangelo was seeking that the case receive preferential treatment rather than be judged on its merits.

[5] "Not responsible" is the statutory terminology for acquittal in such cases.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 603**

IN THE MATTER
OF
J. NICHOLAS SULLIVAN

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and J. Nicholas Sullivan ("Sullivan") 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 January 19, 2000, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law by Sullivan. The Commission concluded

that inquiry, and on February 23, 2000, found reasonable cause to believe that Sullivan violated G.L. c. 268A, §23(b)(3).

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

1. From 1981 until 1999, Sullivan served as the Newburyport District Court clerk magistrate.[1/] As such, he was a state employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. When a driver is cited for a motor vehicle violation in Newburyport, the driver may pay the ticket or request a hearing in the Newburyport District Court.

3. As the clerk magistrate, Sullivan presides over such disputed civil motor vehicle citation hearings.

4. Ronald D'Arcangelo ("D'Arcangelo") served as the Newburyport District Court chief of probation since 1994.[2/3/]

5. D'Arcangelo and Sullivan know each other through their official positions as court employees and are friendly.

6. Between 1993 and 1998, D'Arcangelo wrote nine requests to Sullivan for "consideration"[4/] on post-it notes he attached to the court's copies of the motor vehicle citation documents before the file went to Sullivan for a magistrate's hearing.

7. On each such occasion where D'Arcangelo requested consideration, the motorist involved was either a relative or a friend of D'Arcangelo's.

8. On each of the nine occasions indicated above, Sullivan observed D'Arcangelo's notes when the citations came before him for disposition and issued findings of "not responsible" in each case.[5/]

9. Each citation had potential penalties between $35 and $100 plus accompanying insurance premium surcharges.

10. Sullivan maintains that although he looked at the "consideration" notes, they had no impact on his resolution of those cases.

11. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a state 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.

12. By accepting a series of requests for "consideration" from D'Arcangelo, a fellow court employee, and then subsequently issuing findings of "not responsible" in every case where consideration had been so requested, Sullivan knowingly acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that D'Arcangelo could improperly influence Sullivan or that the drivers involved could unduly enjoy Sullivan's favor in the performance of his official duties as clerk magistrate. In so doing, Sullivan violated §23(b)(3).[6/]

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 Sullivan:

(1) that Sullivan pay to the Commission the sum of three thousand dollars ($3,000.00) as a civil penalty for the violation of G.L. c. 268A, §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 proceeding to which the Commission is or may be a party.

DATE: February 29, 2000

[1/]On January 29, 1999, Chief Justice of the District Court Department Samuel E. Zoll put Sullivan on administrative leave because of the allegations that are addressed in this Disposition Agreement.

[2/]As the Newburyport District Court chief of probation, D'Arcangelo was responsible for overseeing all probation matters under Newbury District Court's jurisdiction.

[3/]On January 29, 1999, Chief Justice of the District Court Department Samuel E. Zoll put D'Arcangelo on administrative leave because of the allegations that are addressed in this Disposition Agreement.

[4/]By asking for "consideration," it is clear that D'Arcangelo was seeking that the case receive preferential treatment rather than be judged on its merits.

[5/]"Not responsible" is the statutory terminology for "acquittal" in such cases.

[6/]Sullivan had two options when he received such a request from a fellow court employee. He should have either told D'Arcangelo that such a request was inappropriate and he would not consider it, or he should have disclosed what is in effect an *ex parte* communication on the record and to the Chief Justice of the Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 584

IN THE MATTER
OF
ROBERT CHURCHILL

DISPOSITION AGREEMENT

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

On November 20, 1997, 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 Churchill. The Commission concluded the inquiry and, on April 22, 1999, found reasonable cause to believe that Churchill violated G.L. c. 268A.

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

1. Churchill is, and was at all times here relevant, a lieutenant serving with the town of Randolph Police Department ("Police Department"). As such, Churchill is, and was at the times here relevant, a municipal employee as that term is defined in G.L. c. 268A, §1.

2. Churchill has been a Randolph police officer since 1977 and a lieutenant since 1992. Churchill's position is full-time and salaried. Churchill's appointing authority is the Randolph board of selectmen ("Board of Selectmen") and his supervisor is the Randolph police chief.

3. In 1996, Churchill supervised the Police Department's detectives unit and police prosecutors.

4. Randolph police prosecutors handle criminal cases for the Police Department at the Quincy District Court ("District Court"). Until late 1996, there was one police prosecutor, Detective William Batson ("Batson"). Batson has been a Randolph police officer since 1977 and a police prosecutor since 1992.

5. In addition to his supervisory responsibilities, Churchill is an experienced police prosecutor. Until October 1996, when a second police prosecutor was hired, Churchill filled in for Batson as police prosecutor whenever Batson was absent due to illness, vacation or any other reason.

6. During the late hours of April 17 and/or the early hours of April 18, 1996, Batson's seventeen-year-old son and two fifteen-year-old juveniles spray-painted graffiti on several buildings in Randolph. On one building, a Randolph Highway Department ("Highway Department") garage, Batson's son spray-painted racist graffiti in letters large enough to be readable from an adjoining playground. At the other locations, including a warehouse at 61 Pleasant Street and a dumpster at another site, Batson's son spray-painted various other graffiti. In addition to the graffiti personally done by Batson's son, the two juveniles with him also spray-painted graffiti at the same locations.

7. The graffiti done at the Highway Department was reported to the Police Department by a Highway Department employee on April 18, 1996. The Police Department investigated and, by April 24, 1996, Batson's son and the two juveniles were identified by the police as the graffiti perpetrators.

8. On or about April 24, 1996, Batson's son was interviewed at the police station by the sergeant heading the investigation. Before he was questioned, Batson's son was told that he had been identified as a graffiti perpetrator. Confronted with this fact, Batson's son admitted to involvement in the April 17-18, 1996 graffiti, including that he personally spray-painted racist graffiti on the Highway Department garage. Thereafter, Batson's son identified graffiti done by himself and others at several Randolph locations, including 61 Pleasant Street.

9. Between April 24 and 28, 1996, the sergeant wrote a report of the investigation of the April 17-18, 1996 graffiti, which report became part of the Police Department's case folder on Batson's son's case. The report specifically described the racist graffiti Batson's son admitted to spray-painting on the Highway Department building and identified two other locations where he spray-painted graffiti which is not described.

10. As a result of the Police Department's investigation, Batson's son was summonsed to appear at the Quincy District Court to be arraigned on April 30, 1996.

11. As chief of the detectives unit, Churchill was informed of Batson's son'scase while it was under investigation. Sometime prior to Batson's son's scheduled arraignment, Churchill read the police report on the case. From the report and other sources, Churchill was aware of the acts of graffiti committed by Batson's son, including the racist graffiti, prior to the scheduled arraignment.

12. On or before April 30, 1996, Churchill com-

pleted and signed as complainant an "Application for Complaint" form charging Batson's son with two violations of G.L. c. 266, §126B ("tagging property").[1] This would have normally been done by Batson as the police prosecutor. Given, however, that Batson could not prosecute his son's case, Churchill took over the duties of police prosecutor on the case. On the complaint application form, Churchill identified the "Town of Randolph" and "Russo Products" as victims and stated that each had suffered property damage over $250. At the time, Russo Products was a tenant at 61 Pleasant Street.

13. Batson accompanied his son to the District Court on April 30, 1996. Sometime prior to the scheduled arraignment, Batson and Churchill discussed Batson's son's case and Churchill agreed to resolve the case with diversion and dismissal under G.L. c. 276A, and court costs in the amount of ten days of community service. In agreeing to this disposition of the case, Churchill exercised the power to settle criminal cases of the police prosecutor, in which capacity he was then acting. The diversion and dismissal resolution was a lenient and desirable resolution of the case for Batson's son because it would leave him without a criminal record and would not require him to admit to having done the graffiti or to pay restitution.[2]

14. During the morning of April 30, 1996, Churchill and Batson's son, accompanied by Batson, appeared before an assistant clerk-magistrate in the arraignment session. Churchill told the assistant clerk-magistrate that the case was being diverted and dismissed. The assistant clerk-magistrate entered the agreed-to resolution, and the matter was referred to the Probation Office. Due to the diversion and dismissal, Batson's son was not arraigned. Based upon his experience, Churchill knew going into the arraignment session that in diversion cases an assistant clerk-magistrate generally enters the disposition agreed to between the police prosecutor and the defendant.

15. Churchill did not disclose to his appointing authority, the Board of Selectmen, that he was going to act as police prosecutor in a matter involving the son of a police officer with whom he had worked for nearly twenty years, nor did Churchill disclose to his appointing authority the terms on which he would resolve the case. Churchill also made no disclosure concerning this matter to his own supervisor, the police chief.

16. On or about May 2, 1996, the Norfolk County District Attorney ("District Attorney") first learned of the diversion and dismissal of Batson's son's case. Perceiving possible conflicts of interest in the handling of the case, and sensitive to the District Attorney's office's close working relationship with the Police Department, the District Attorney referred the matter to the Attorney General on May 3, 1996.

17. On June 6, 1996, the Attorney General moved to vacate the April 30, 1996 diversion and dismissal. The District Court subsequently vacated the diversion and dismissal, and a new summons issued against Batson's son. On October 16, 1996, Batson's son admitted in District Court to sufficient facts for a finding of guilty and the matter was continued without a finding for one year, with eighty hours (ten days) of community service (deemed served), $50 in court costs, letters of apology to the victims and $1,633 in restitution to the owner of 61 Pleasant Street.

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

19. By acting as a police prosecutor in resolving a criminal charge against a fellow police officer's son, Churchill, knowingly or with reason to know, acted in a manner which would cause a reasonable person, having knowledge of all the relevant circumstances, to conclude that Batson and Batson's son could unduly enjoy Churchill's favor in the performance of his official duties. In so acting, Churchill violated G.L. c. 268A, §23(b)(3). This appearance problem was exacerbated by the facts that Churchill had served with Batson as fellow officers for nearly twenty years and that the diversion and dismissal with community service but no restitution was the most lenient resolution possible short of an outright dismissal.[3]

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

(1) that Churchill pay the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268A, §23(b)(3); and

(2) that Churchill 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 13, 2000

[1/]"Tagging" is the criminal act of placing graffiti on public or private property in violation of G.L. c. 266, §126B.

[2/]Graffiti "taggers" are normally required to make their victims whole through restitution which entails either repairing the damaged property or paying for its repair. According to Churchill, he decided not to seek restitution as to the damage to town property because the town would benefit from the community service. Also, according to Churchill, he decided not to seek restitution regarding the privately owned building at 61 Pleasant Street because he understood that the graffiti in question had been painted on the rear wall of the building (which building he knew was located in an industrial area with the rear wall next to railroad tracks), and he knew the wall already had a considerable amount of graffiti on it, and that Batson's son had done only a small portion of this new graffiti. Consequently, according to Churchill, he did not believe that Batson's son should be required to pay restitution.

[3/]Churchill could have avoided violating §23(b)(3) by making a written disclosure of the relevant facts to his appointing authority (the selectmen) before participating in Batson's son's case. Had Churchill made such a timely disclosure, the selectmen would then have had the opportunity to decide whether they wanted Churchill to handle the case or to refer the matter to the District Attorney or the Attorney General.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 596**

IN THE MATTER OF RICHARD GOODHUE

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Richard Goodhue ("Goodhue") 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 23, 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 Goodhue. The Commission has concluded the inquiry and, on June 23, 1999, found reasonable cause to believe that Goodhue violated G.L. c. 268A.

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

1. Goodhue is a member of the Randolph Planning Board ("Planning Board"). Goodhue was first elected to this part-time, unpaid municipal position in 1992. As a Planning Board member, Goodhue is a municipal employee as defined in G.L. c. 268A, §1. As such, Goodhue is subject to the provisions of the conflict of interest law, G.L. c. 268A.

2. The Planning Board has jurisdiction over subdivisions in Randolph. In that connection, the Planning Board reviews subdivision plans, holds public hearings and grants or denies approval for subdivisions.

3. Goodhue is privately self-employed as a mason.

4. West Point Development Co., Inc. ("West Point") is a real estate development company. West Point is operated by Michael Kmito and his father Louis J. Kmito ("the Kmitos"). Since its 1993 incorporation, West Point has developed two residential subdivisions and completed a few smaller projects in Randolph.

5. From the mid-1980s until late 1996, Goodhue did masonry work for Louis J. Kmito, Michael Kmito and (after 1992) West Point. In the 1980s and in the early 1990s, Goodhue did masonry work at the Marie Way subdivision in Randolph then under development by a corpo-

ration fifty percent owned by Louis J. Kmito. In September 1992, Goodhue received $2,600 from Michael Kmito for masonry work. Between September 1993 and January 1997, West Point paid Goodhue a total of $32,330.25 for masonry work.[1]

6. From 1993 until late 1996, West Point's practice was to hire Goodhue whenever it needed a mason.[2] Goodhue's work for West Point consisted of building fireplaces, chimneys, brick walkways, brick steps and catch basins. All of Goodhue's work for West Point was done in Randolph.

7. In 1996, West Point sought Planning Board approval for a 42-lot residential subdivision in Randolph called Autumn Woods. Autumn Woods was West Point's second Randolph residential subdivision.

8. On March 4, 1996, Goodhue was present at a Planning Board public hearing at which the proposed Autumn Woods subdivision was presented. No votes were taken. At the Planning Board's May 13, 1996 meeting, Goodhue moved and voted to accept the definitive plan of the Autumn Woods subdivision. The vote was unanimous.[3] On July 15, 1996, the Planning Board, including Goodhue, signed the Planning Board's approval of the Autumn Woods subdivision plan.

9. During the months that the Autumn Wood's subdivision was before the Planning Board for review and approval, Goodhue did masonry work for West Point at the corporation's other projects in Randolph. For this masonry work, West Point paid Goodhue $360.00 on July 12, 1996, $3,000.00 on August 13, 1996 and $960.00 on September 17, 1996.

10. Given his building trade experience and long course of private dealings with the Kmitos and West Point, Goodhue had reason to foresee, at the time he participated in the Planning Board's review and approval of the Autumn Woods subdivision, that the construction of the subdivision would require masonry work and that West Point would continue its well-established practice of hiring him to do its masonry work.[4] Thus, at the time of his official actions as a Planning Board member concerning Autumn Woods, Goodhue knew that he was likely to do masonry work at the subdivision if the Planning Board approved its development by West Point.[5]

11. Shortly after West Point began construction of the Autumn Woods subdivision in August 1996, Goodhue was hired to do masonry work at the subdivision. Between August 1996 and December 1996, Goodhue constructed three chimneys and fireplaces, and several brick walkways, brick steps and catch basins at Autumn Woods. For this masonry work, Goodhue billed West Point and was paid a total of $15,935.25 between October 1996 and January 1997.

12. In or about December 1996, Goodhue and the Kmitos had a disagreement and acrimonious falling out. After December 1996, Goodhue did no further masonry work for West Point or the Kmitos.

13. General Laws chapter 268A, §19, in relevant part, prohibits a municipal employee from participating[6] as such in a particular matter[7] in which the employee has to his knowledge a financial interest.[8]

14. The Planning Board's review and approval of the Autumn Woods subdivision was a particular matter. Goodhue participated in this particular matter as a Planning Board member by discussing and voting on the subdivision and signing the definitive subdivision plans. At the time of this official participation, Goodhue had to his knowledge a reasonably foreseeable financial interest [9] in the Autumn Woods particular matter in that Goodhue knew that he was likely to do masonry work at the approved subdivision.[10]

15. Accordingly, when Goodhue participated in the Planning Board's review and approval of Autumn Woods, Goodhue participated as a Planning Board member in a particular matter in which to his knowledge he had a financial interest. By so doing, Goodhue violated §19.

16. Goodhue self-reported the facts which led to the Commission's preliminary inquiry into this matter and he fully cooperated with the Commission's investigation. Furthermore, the Commission is aware of no evidence to indicate that Goodhue in his conduct as described above took any actions which were against the town's interest. Nor is the Commission aware of any evidence that any of Goodhue's above-described official actions were influenced by his dealings or relationship with the Kmitos or West Point.

17. According to Goodhue, when he participated as described above, he had no knowledge that his actions would violate the conflict of interest law.[11]

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

(1) that Goodhue pay the Commission the sum of seven hundred and fifty dollars ($750.00) as a civil penalty for violating G.L. c. 268A, §19; and

(2) that Goodhue 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 pro-

ceeding to which the Commission is or may be a party.

DATE: March 4, 2000

[1/] All payments to Goodhue stated in this Agreement are gross payments which generally include Goodhue's expenses as well as his profit. West Point paid Goodhue a total of $12,075 between September 1993 and May 1995, and a total of $20,255.25 between May 1996 and January 1997. Most of these amounts were for work at West Point's two Randolph subdivisions, Spring Hill Estates and Autumn Woods.

[2/] As is common among builders, West Point's practice is to repeatedly rehire building trade subcontractors, like Goodhue, whose work is satisfactory.

[3/] The Commission is not aware of any evidence of any controversy or contention concerning the May vote.

[4/] Goodhue was aware at the time that in the ordinary course of events the construction of a 42-lot residential subdivision would require some masonry work.

[5/] The Commission is not aware of any evidence that Goodhue's official actions concerning the Kmitos or West Point were in fact affected or influenced by this knowledge.

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

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

[8/] While there are exceptions to the general prohibition of §19, they do not apply in this case.

[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, 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.*

[10/] As set forth above, the Commission is not aware of any evidence that this knowledge in fact influenced or affected Goodhue's official actions.

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

Janis Montalbano
c/o C. Deborah Phillips, Esq.
Nickless & Phillips
495 Main Street
Fitchburg, MA 01420

PUBLIC ENFORCEMENT LETTER

Dear Ms. Montalbano:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you, as a member of the school committee for the Narragansett Regional School District, violated the state conflict of interest law, General Laws c. 268A, by approving payment warrants in which companies owned by your husband and son had financial interests. Based on the staff's inquiry (discussed below), the Commission voted on March 29, 2000, 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. During the time relevant, you were a member of the school committee for the Narragansett Regional School District ("the District").[1/] There are eight school committee members.

2. Your son William owns a company known as MESD, Inc., a dealership that sells and services computers. Your husband Charles owns Montalbano Electric. Both entities received contracts for goods and services from schools within the District,[2/] and both submitted invoices to the school committee for payment over the years. In fact, your husband has done work for the school department for about fifteen years.

3. Each month, after the school department received invoices from various vendors, the superintendent reviewed and approved the purchase orders, with the in-

voices attached, thereby authorizing the school department treasurer to process payment for that item or service. The treasurer also received verification from the teacher or principal that the items or services had been received.

4. The treasurer then prepared the warrant for the school committee to review and approve that month. Each warrant was a computer printout listing the vendors and the payments due. The school committee members then reviewed the warrant and approved the payments therein by signing at the bottom. The school committee members did not review each individual bill presented for payment. The invoices themselves were not attached to the warrants, but they were available in the superintendent's office for review. Usually, one school committee member reviewed the invoices on behalf of the committee.

5. As a member of the school committee, you signed warrants authorizing payments to your husband's and son's companies on various occasions between May 1, 1996, and May 11, 1998.[3] The warrants listed all vendors in alphabetical order and the payments due for that period. The following chart describes the payments approved for your family's companies:

Warrant Date	Company	Amount
7/15/96	Montalbano Electric	$460.00
12/17/96	MESD	$827.70
1/21/97	MESD	$508.46
2/11/97	Montalbano Electric	$429.00[4]
3/18/97	MESD	$963.35
5/12/97	MESD	$1,062.78
" "	Montalbano Electric	$560.00
6/17/97	MESD	$1,500.00
2/10/98	MESD	$450.00
3/17/98	MESD	$1,225.00
5/11/98	MESD	$506.25
" "	Montalbano Electric	$100.00

The total for MESD is $7,043.54, and the total for Montalbano Electric is $1,549.00.

6. You provided the following information: You have been very careful to avoid participating in any contract discussions or other matters concerning your son's or husband's businesses, but you could not say if you signed warrants to which your husband's and/or son's invoices may have been attached. You never looked at the warrants or the bills. It is possible that you signed warrants reflecting payment for bills from your husband's and son's companies. If you signed such warrants, then you were just approving the total amount. The school committee members never reviewed individual bills on the warrant. Certainly, you never discussed any of your husband's or son's bills that were submitted for payment.

You admitted that you knew that your husband and son were doing work for the schools, and thus could have known that they would have to be paid, but you did not realize at the time that you signed the warrants that your family members' businesses were listed therein for payment.

II. Discussion

As a member of the school committee for the Narragansett Regional School District, you are a municipal employee as that term is defined in G.L. c. 268A, §1(g). As such, you are subject to the conflict of interest law G.L. c. 268A generally and, in particular, to the following sections of that statute.

Section 19[5] prohibits a municipal employee from participating[6] in particular matters[7] in which she or, among others, 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. You should be aware that 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.

Each decision by the school committee for the Narragansett Regional School District to sign the warrant authorizing payments to vendors — including companies owned by your husband or son — was a particular matter. Your husband and/or son had financial interests in those particular matters as their companies were among the vendors on the warrant list. You participated in those particular matters as a member of the school committee by signing the warrants to signify approval of the payments. This participation was personal and substantial because the school committee's approval was necessary to authorize the vendor payments. *See EC-COI-98-5* (school committee member would violate §19 if she approved warrants authorizing payments to a company in which she served as director); *EC-COI-87-32*. When you so participated, you knew that your husband and/or son were doing or had done work for the school department, and you knew that the school committee authorized such vendor payments by signing the warrants. Therefore, you violated §19.

In addressing your conduct publicly, the Commission wants to emphasize the following point. Section 19 requires that you have "knowledge" that the particular matter is one in which your family member has a financial interest. In this case, you knew that your husband

and son were doing work for the schools and that they would eventually seek payment as vendors. You knew that sooner or later the school committee would review warrants listing the names of your husband's and/or son's companies as vendors, and that your signing of those warrants would authorize payment to them as vendors. Yet, you consciously chose to sign the warrants without reading them or reviewing the relevant invoices to ascertain whether your husband's and/or son's companies were included among the vendors listed in the warrants. Even accepting your contention that you had no actual knowledge that their companies' invoices were among those being approved when you signed particular warrants, your conduct demonstrated *willful blindness* to the conflicts.

"If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with 'knowledge' of what he would have seen had he looked. *Demoulas v. Demoulas*, 428 Mass. 555, 577 (1998) (quoting *West's Case*, 313 Mass. 146, 151 (1943)). "Proof of actual knowledge is frequently shown where one is in possession of information of such weight and reliability that men commonly act upon it as true. Absolute certainty is not required." *West's Case*, 313 Mass. at 150. Where one has sufficient information to know a fact, then one cannot avoid the consequences of knowledge by remaining in willful ignorance. *Id.* at 150-51. *See also Van Christo Advertising, Inc. v. M/A-COM/LCS*, 426 Mass. 410, 416-17 (1998) (claim of willful ignorance will not be excused if information would have been known had person simply not consciously disregarded it).

The evidence indicates that you, in effect, "closed your eyes" to the facts that would have informed you of the conflicts. You knew that your husband and son had done work for the school department which meant that their companies' names would end up on one or more warrants. Yet, knowing that, you chose not to read the warrants when you signed them. Under such circumstances, the Commission will apply the doctrine of willful blindness and charge you with the knowledge that you would have had if you had read the names listed in the warrants. Therefore, the Commission deems that you had knowledge of your family members' financial interests and, consequently, there is reasonable cause to believe that you violated §19.[10/]

The Commission is not unsympathetic to the fact that school committee members are called upon to review and approve a significant volume of paperwork while, at the same time, addressing various agenda items. This can result in a board member's failing to notice that a family member's name or company is listed in the vendor warrant presented for authorization. You could have avoided this problem by alerting the school committee staff who prepared the vendor warrants that any warrant which included payments to your family members' companies should not have been presented to you for signature. There appear to have been enough board members available to authorize such warrants in your absence. In making this suggestion, of course, the Commission does not mean to discount the importance of board members' personally reviewing the documents that they sign.

III. Disposition

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

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than imposing a fine, because there has been no Commission precedent directly addressing willful blindness in regard to the §19 knowledge element. Therefore, the Commission perceives the need to educate more than to punish in this area.

DATE: April 11, 2000

[1/] You were a member of the school committee for about 12 years. You left the board in May 1998.

[2/] The principal at each school within the District acts as the contracting officer for that school and chooses the vendors.

[3/] The Commission decided not to review warrants signed before May 1, 1996.

[4/] The warrant is difficult to read, but the figure appears to be $429.

[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 conduct would also lead a reasonable person to conclude that your family members could unduly enjoy your favor in the performance of your official duties, in violation of §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 his or her favor in the performance of official duties, or that he or 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 his appointing authority (or if he does not have an appointing authority, files a written disclosure with the town clerk) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority or town clerk (for elected employees) must maintain that written disclosure as a public record. You made no disclosures to dispel the appearance of impropriety. You should note, however, that a §23(b)(3) disclosure will not excuse a §19 violation. The two sections of the law are distinct and carry their own particular provisions for excusing violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 604**

IN THE MATTER OF MICHAEL A. TETREAULT

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Michael A. Tetreault ("Tetreault") 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 21, 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 Tetreault. The Commission has concluded its inquiry and, on December 15, 1999, found reasonable cause to believe that Tetreault violated G.L. c. 268A.

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

1. Tetreault was, during the time relevant, a member of the board of health in Mendon. As such, Tetreault was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The board of health is responsible for issuing disposal system construction permits on behalf of the town to individuals who desire to install or repair septic systems.

3. Prior to 1993, Tetreault worked as a private contractor installing and repairing septic systems in Mendon for private parties. Tetreault performed his work as the principal employee of Tetreault, Inc.

4. In September 1993, Tetreault received a letter from the Ethics Commission informing him that he appeared to have violated the conflict of interest law, G.L. c. 268A, §17,[1/] by serving on the board of health and performing private septic system work pursuant to permits issued by the town. The Commission advised Tetreault to resign from the board or refrain from performing private septic system work in Mendon. The Commission also informed Tetreault that the town could vote to accept the provisions of G.L. c. 111, §26G, which statute permits a board of health member to perform private septic system work within his or her own town without violating G.L. c. 268A, §17.[2/]

5. In 1994, Mendon town meeting voted not to accept the provisions of G.L. c. 111, §26G. Tetreault was aware of this vote.

6. Nevertheless, despite the prior warning from the Ethics Commission that Tetreault appeared to have violated G.L. c. 268A, and despite the town's vote not to accept the provisions of G.L. c. 111, §26G, Tetreault continued to perform private septic system work in Mendon as the principal employee of Tetreault, Inc. Between 1996 and 1999, Tetreault, Inc. installed, replaced or repaired at least forty (40) septic systems for private parties in Mendon. Tetreault, Inc. was compensated by the homeowner or developer for each such job. Tetreault, Inc. received a profit of $2,000 to $3,000 per job, with a total

profit of about $100,000 earned over the course of three years. As the principal employee of Tetreault, Inc., Tetreault received compensation for his work.

7. Tetreault did not apply for any of the septic system permits himself, nor did he sign the permits as a member of the board of health.

8. For each of the forty septic system jobs, the health agent for the town of Mendon performed two inspections, a preliminary and a final. Tetreault was present at these inspections about 30% of the time and responded to the health agent's questions or concerns on approximately ten of those occasions.

9. Any action by the health agent was potentially appealable to the board of health, although no appeals were ever entered or heard by the board during the time relevant.

10. Section 17(a) prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation 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. Section 17(c) prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.[1/]

11. The board of health's decisions to issue septic system permits were particular matters[4/] in which the town was a party and had direct and substantial interests. In particular, the permits authorized activities which could significantly affect the public health and safety.

12. Between 1996 and 1999, Tetreault, Inc. performed at least forty (40) septic system installations and/or repairs pursuant to permits issued by the town. Tetreault, Inc. received compensation from its clients for the private septic system work. As the principal employee of Tetreault, Inc., Tetreault performed the work and received compensation therefor.

13. Because the septic system permits were issued by the town and authorized activities which could significantly affect the public health and safety, Tetreault's septic system work and compensation were in relation to matters in which the town was a party and had direct and substantial interests.

14. Accordingly, by receiving compensation from private parties in relation to particular matters in which the town was a party and had direct and substantial interests, Tetreault violated §17(a).

15. As described above, each inspection involved a determination by the town's health agent. Therefore, each inspection was a particular matter in which the town was a party and had direct and substantial interests.

16. Tetreault, on behalf of his clients and/or on behalf of his corporation, Tetreault, Inc., interacted with the health agent on about ten of those inspections.

17. Accordingly, by acting as agent for his private clients and/or his corporation in connection with those inspections, particular matters in which the town was a party and had direct and substantial interests, Tetreault violated §17(c).

18. According to Tetreault, he mistakenly believed that so long as he did not personally apply for or sign the septic system permits, he could perform septic system work in Mendon without violating the provisions of G.L. c. 268A. The 1993 letter from the Commission to Tetreault, however, clearly stated that Tetreault could not perform such work. In addition, Tetreault knew in 1994 that the town did not accept the provisions of G.L. c. 111, §26G, which acceptance he knew would have specifically authorized him to perform such work.

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

(1) that Tetreault pay to the Commission the sum of fifteen thousand dollars ($15,000) as a civil penalty for violating §17(a) and (c);[5] and

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

DATE: April 26, 2000

[1/]Except as otherwise permitted, §17 prohibits a municipal employee from receiving compensation from or acting as agent for anyone other than the town in relation to any particular matter in which the town is a party or has a direct and substantial interest.

[2/]Section 26G of G.L. c. 111 provides in pertinent part:

In any city, town or district which accepts the provisions of this

section notwithstanding the provisions of section seventeen of chapter two hundred and sixty-eight A, a septic system installer who is appointed or elected to the board of health may engage or work at the business of septic system installation within the area over which the board of health has jurisdiction while serving as a board member; provided, however, that neither the board of health member nor the board shall inspect a septic system installation done by said board of health member, or said member's partner, employer, employee or co-employee. The inspections of work so done shall be performed either by the board of health of another city, town or district or by a special assistant health agent who is appointed solely for the purpose of performing such inspections by the mayor of a city, the board of selectmen of a town or the governing board of a district.

[3/]Section 17 was amended in May 1998 to allow a municipal employee to apply on behalf of anyone for, *inter alia*, a septic system permit, or to receive compensation in relation to such permit, unless the employee is employed by or provides services to the permit-granting agency or an agency that regulates the activities of the permit-granting agency. Where Tetreault's own board issued the relevant permits and Tetreault provided services to the permit-granting agency, he may not take advantage of this provision.

[4/]"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).

[5/]The large penalty imposed here is warranted for the following reasons. First, Tetreault performed work pursuant to permits issued by his own department, and the health agent inspecting his work was an agent of Tetreault's own department. Second, Tetreault had been previously, explicitly and in writing put on notice by the Ethics Commission that such conduct would violate §17, a warning which was underscored by the town's vote not to adopt G.L. c. 111, §26G. Finally, Tetreault profited substantially from his knowing violation of the law.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 605**

IN THE MATTER
OF
PHILLIP S. NELSON

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Phillip Nelson, ("Nelson") 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 Nelson. The Commission has concluded its inquiry and, on March 22, 2000, found reasonable cause to believe that Nelson violated G.L. c. 268A.

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

1. Nelson was, during the time relevant, a member of the Randolph Landscape Review Board ("LRB").[1/]

2. The five-member LRB was established by town meeting in 1972 to advise the planning board and zoning board of appeals on landscape matters in connection with any business, industrial or multi-family developments.

The LRB's procedures contemplate the following process: Site plans are referred to the LRB by the planning board, zoning board or building inspector, and the LRB has fourteen days to report back to the referring entity. The LRB meets once a month and reviews about two or three plans each meeting. Receiving two copies of the plans, the LRB reviews the size and type of landscaping as well as the materials to be used to insure that the landscaping is appropriate and consistent with the surrounding area. The LRB meets with the applicant to reach agreement on modifications the LRB recommends; once agreement is reached, the LRB and applicant sign the two plans; the LRB maintains one copy and forwards the other to the Building Commissioner; the LRB approves the issuance of the permit; the LRB chairman signs the Building Permit Application Sign-On Sheet;[2/] when the work is completed, the LRB (or a majority of the LRB) does a site inspection, followed by the LRB Chairman's signing the Building Department Certificate of Occupancy Sign-Off Sheet.

3. Although the LRB procedures appear to have contemplated a fairly formal process, the actual practice was much less rigorous. One member of the LRB would generally sign the Sign-On Sheet, but that did not necessarily mean that the LRB had reviewed the plans. Sometimes there were plans that contemplated no landscaping; sometimes it was obvious that the plans would eventually require landscaping, but the landscaping plan had not yet been drafted because it would be provided later. Moreover, once the landscaping was actually done, one or more of the LRB members would inspect the site and then, assuming the "as built" was satisfactory, one of the members would sign the Sign-Off Sheet. The board would not necessarily meet to accomplish these tasks.

4. Nelson owns and operates Nelson Landscaping and Garden Center, Inc. in Randolph, a company which

has operated for almost forty years.

Honey Dew Donuts

5. On November 14, 1996, Nelson as an LRB member unilaterally signed the Sign-On Sheet (signifying approval by the LRB to the issuance of the building permit) for the Honey Dew Donuts project at 106 Mazzeo Drive with the understanding that the landscaping plans would be submitted later.

6. On October 19, 1997, Nelson submitted a $3,600 estimate for proposed landscaping work at the Honey Dew site and did the work shortly thereafter. Almost immediately, an LRB member raised an issue as to why the work was done prior to LRB review and approval.

7. On October 28, 1997, Nelson presented a landscaping sketch to the LRB depicting the work Nelson Landscaping, Inc. had done at the Honey Dew site and represented that the work had been done properly. He also explained why he did the work without first obtaining approval. (His explanation was that the work needed to be done immediately so that the developer could open up for business.) The LRB voted 2-2 on approving the plan with Nelson abstaining. The plan, therefore, was not approved. Nelson was admonished to follow proper procedure, i.e., submit the landscaping plan *before* doing the work.

8. On November 25, 1997, the LRB again voted on the Honey Dew matter. The vote was 2-0 with Nelson abstaining. Nelson did not make any presentation at that time.

9. On December 9, 1997, LRB member Karl Wells "signed off" on the Sign-Off Sheet permit for Honey Dew Donuts on behalf of the LRB. According to Wells, he did not conduct a formal inspection because the LRB did not have an approved plan to compare to the completed landscaping. He agreed to sign-off on the matter so as not to hold up the occupancy permit and because he relied on Nelson's earlier representation that the work had been done properly.

10. Honey Dew paid Nelson Landscaping the $3,600 in March 1998.

Jamp Realty - Shaw's Supermarket

11. On June 2, 1997, Jamp Realty submitted a building permit application for certain renovations and site improvements in or around the Shaw's Supermarket. There was no LRB approval required because there was no landscaping contemplated on the building plan at that time. (The project involved interior building renovations.)

12. Sometime shortly thereafter, the Building Department issued the building permit.

13. On July 28, 1997, the LRB met and discussed the fact that no landscape plan had been submitted for the project, and that Nelson would contact the owner of the plaza and suggest planters in the parking lot. (Nelson later did so.)

14. On February 24, 1998, the LRB reviewed the project plans. No landscaping was noted.

15. At some uncertain point thereafter, Jamp Realty decided to incorporate landscaping into its plans for the project.

16. In or about November 1998, Nelson did the contemplated landscaping work, which he then billed Jamp Realty for $4,345.

17. In or about November 1998, Nelson submitted a landscape plan for the landscape work to the LRB.

18. On November 24, 1998, the LRB reviewed the landscaping plan. They found no problems with the work. Nelson appeared on behalf of Nelson Landscaping and Garden Center, Inc. and advised the board on the work that had already been done. He abstained as an LRB member. Nelson explained to the board that although the original plan called for twelve trees on six islands plus certain other plantings, the work involved planting six trees on six islands. Nelson explained that the change was necessary because the parking lot islands could not go in as planned.

19. It is unclear if the work was ever inspected by the LRB. The occupancy certificate issued, although the Sign-Off Sheet was not signed by the LRB.[3/]

20. In January and February, 1999, Jamp Realty paid Nelson Landscaping and Garden Center, Inc. for the above work.

21. 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[4/] in which the municipality is a party or has a direct and substantial interest. Section 17 applies less restrictively to special municipal employees. Special municipal employees are prohibited from acting as agent for or receiving compensation from a private party if they have participated[5/] in or have official responsibility[6/] for the particular matter in question.[7/]

22. At all times relevant, Nelson was a member of the LRB. As such he was a municipal employee as that term is defined in G.L. c. 268A, §1. Furthermore, at all times relevant Nelson's position was designated as a

special municipal employee position for G.L. c. 268A purposes.

23. The decisions by the LRB regarding the Honey Dew and Jamp Realty projects on October 28, 1997, and November 24, 1998, respectively, were particular matters.

24. The town had a direct and substantial interest in these particular matters because they were an integral part of the process by which the building permits issued and because the town bylaws required this input.

25. Nelson represented Nelson Landscaping and Garden Center, Inc. at these meetings. Thus, he acted as an agent for someone other than the town in connection with particular matters in which the town had a direct and substantial interest. By doing so, Nelson violated §17(c).

26. Nelson incorrectly believed that it was permissible to represent private clients before the LRB provided that as an LRB member he abstained from voting, discussing or acting on any matter in which a client had an interest. His understanding was incorrect.

27. Nelson cooperated fully with the Commission's investigation.

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

(1) that Nelson pay to the Commission the sum of one thousand seven hundred and fifty dollars ($1750) as a civil penalty for violating G.L. c. 268A, §17(c);[8/]

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

DATE: July 13, 2000

[1/]Nelson was appointed to the LRB in 1989 and served on the board until it was abolished in November 1999, when its duties were transferred to the Design Board.

[2/]The Building Permit Application Sign-On Sheet is a document which accompanies the plans and contemplates a signature from each department with an interest in the matter. The signature signifies that the signer's department has no objection to the permit issuing.

[3/]According to Nelson, this was because the particular sign-off simply "fell through the cracks."

[4/]"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).

[5/]"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.

[6/]"Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either excercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

[7/]Section 17 would also apply in this context if the particular matter were pending before the special municipal employee's agency, and if the special municipal employee served on more than sixty days during any period of 365 consecutive days.

[8/]It should be noted that §17 is not limited to just appearances before a board or its employees. Section 17(a) prohibited Nelson from being paid for doing the landscaping work in the field because it was in relation to an LRB approval of the plans and eventual inspection and approval of what was done. Thus, Nelson's receiving compensation from Honey Dew and Jamp Realty for the actual landscaping work violated §17(a), and would have done so even if he had never appeared before the LRB regarding that work. No separate penalty is imposed for that conduct, however. See *In re Martin*, 1999 SEC 931 (public enforcement letter for work done in relation to permits even though no appearances before board.)

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 606

IN THE MATTER
OF
PATRICIA A. DOYLE

DISPOSITION AGREEMENT

The State Ethics Commission ("the Commission") and Patricia A. Doyle ("Doyle") 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 May 12, 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 Doyle. The Commission has concluded its inquiry and, on December 15, 1999, found reasonable cause to believe that Doyle violated G.L. c. 268A.

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

1. Doyle was, during the time relevant, an elected member of the Weymouth Park Commission. As such, Doyle was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Park Commission is responsible for overseeing the Parks and Recreation Department ("the Parks Department") for the town of Weymouth. The Park Commission has the authority to hire and fire all Parks Department employees. The Park Commission also has the authority to recommend salaries and personnel changes for the Parks Department staff.

3. In 1998, Doyle's brother Mike ("Mike") was the park ranger for the Parks Department; he worked at the town-owned Great Esker Park and was then at the top step of his pay scale, with an annual salary of about $36,000. The Park Commission had appointed Mike to his position about ten years earlier.

4. In January 1998, the Park Commission began discussing a number of personnel issues regarding the Parks Department staff. Among their concerns were expanding Mike's duties and increasing his compensation. Ultimately, the Park Commission decided to recommend to the town that two new positions be created. One new position was recreation coordinator. The other position was essentially a reclassification of Mike's park ranger position, to be called park superintendent. The park superintendent position was intended to incorporate Mike's duties as park ranger and utilize Mike's other abilities, while appropriately compensating him therefor. Thus, the intent behind the reclassification was to promote Mike from park ranger to park superintendent.

5. Doyle spoke at the January 13, 1998 meeting of the Park Commission when the Commission began discussing these personnel changes. Doyle emphasized that they would need to justify their presentation before the personnel board and appropriation committee, because the Park Commission did not make very good presentations to the town boards and, as a result, did not always get what it wanted.

6. At its January 19, 1998 meeting, the Park Commission, including Doyle, again discussed the personnel changes. Doyle stated that she supported the new recreation coordinator position; she also supported informational talks first, so that they could convince the personnel board to agree to the positions requested. There was further discussion on presentation strategy. The chair felt that the recreation coordinator position was more saleable to the town than the park superintendent position; he was also in favor of combining the park ranger and park superintendent into one position, setting it at Level 12.

7. At the meeting, Doyle then moved to create the position entitled "park superintendent" which would include the duties of park ranger, with the pay scale set at Level 12. The motion passed unanimously. Another commissioner then moved to establish the position of full-time "Recreation Coordinator," also Level 12. Before voting on the motion, the Commission discussed reclassification "which would allow the Board to hire from within." The motion passed unanimously.

8. On January 27, 1998, the Park Commission reviewed draft job descriptions for the coordinator and superintendent positions. The Commission (including Doyle) voted unanimously to approve the job descriptions.

9. On March 17, 1998, the personnel board met with members of the Park Commission (including Doyle) to discuss the Park Commission's request to reclassify the park ranger to park superintendent and recommend an additional full-time position of coordinator. The board suggested that the Park Commission include funding for the staff changes in the budget in anticipation of the special Town Meeting that summer or fall, and then create the new position and reclassification in conjunction with the new personnel plan.

10. In or about November 1998, Town Meeting approved funding for the Parks Department staff changes. After filling the new recreation coordinator position, the town through its personnel board reclassified the park ranger position as park superintendent, with a salary of $39,000. The Park Commission, with Doyle abstaining, promoted Mike into the reclassified position. Consequently, Mike received a significant raise and advanced to the first step on a new pay scale.

11. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which, to her knowledge, an immediate family member has a financial interest.

12. The town's decision to reclassify Mike's park ranger position as park superintendent in late 1998 or early 1999 was a particular matter.[1]

13. Doyle participated[2] in that particular matter as a member of the Park Commission in early 1998 by recommending that the town implement the reclassification. Specifically, Doyle discussed the proposed reclassification on January 13 and 19, 1998, made the motion on the park superintendent position on January 19, 1998, and

voted in favor of the motion on January 19, 1998.

14. As Doyle's brother, Mike is a member of Doyle's immediate family.[3/]

15. Mike had a financial interest[4/] in the particular matter because the new park superintendent position was essentially a reclassification of his park ranger position. If Mike were promoted to fill the park superintendent position, he would immediately receive a raise in salary and advance to a new pay scale.

16. At the time of her participation, Doyle knew that the park superintendent position was designed to reclassify Mike's park ranger position and increase his duties and compensation. Thus, Doyle knew that Mike had a financial interest in the particular matter in which she participated.

17. According to Doyle, however, when she so participated she did not view her brother as having a financial interest in the Park Commission's actions because no reclassification or raise could occur unless and until the personnel board reclassified the position and town meeting approved the funding. Moreover, Doyle was not thinking of her brother's interests when she so acted, but was concerned about doing what was best for the town. Nevertheless, Doyle's brother had a reasonably foreseeable financial interest in the Park Commission's actions, even at this early stage and even though the Park Commission's recommendation of the personnel changes was not the final determinative step in the reclassification process.

18. Accordingly, by participating in the particular matter concerning the reclassification of her brother Mike's position, in which Mike had a financial interest, Doyle violated §19.

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

(1) that Doyle pay to the Commission the sum of five hundred dollars ($500) as a civil penalty for violating §19; and

(2) that Doyle 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 24, 2000

[1/] "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).

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

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

[4/] "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. *EC-COI-84-96.*

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 608**

IN THE MATTER OF JANE M. SWIFT

DISPOSITION AGREEMENT

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

On April 14, 2000, 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 Swift. The Commission has concluded its inquiry and, on August 23, 2000, found reasonable cause to believe that Swift twice violated G.L. c. 268A, §23(b)(3).

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

1. Swift was elected lieutenant governor of the Commonwealth of Massachusetts in November 1998 and

took office in January 1999. As such, Swift was, at all times relevant, a state employee as that term is defined in G.L. c. 268A, §1(q).

2. Swift and her husband have a daughter who was born in October 1998.

3. Sarah Dohoney became Swift's special assistant in January 1999. As special assistant to Swift, Dohoney was responsible for administrative duties in the lieutenant governor's office and working on special projects. Swift was Dohoney's day-to-day supervisor and ultimately responsible for evaluating Dohoney's job performance as special assistant.

4. Dohoney first became acquainted with Swift through a friendship between their families. Dohoney was a volunteer on Swift's previous campaigns and served as deputy finance director on Swift's 1998 campaign for lieutenant governor. Swift and Dohoney each testified that they have had a close relationship.

5. Susan Saliba began working on Swift's lieutenant governor campaign as Swift's scheduler in spring 1998. Between November 1998, and February 1999, Saliba served on Swift's transition team (a state position); her job was to maintain Swift's schedule and to aid Swift in establishing her lieutenant governor's office. In that position Saliba was subject to Swift's direction. According to both Swift and Saliba, they are close friends.

6. In February 1999, Saliba left Swift's office to work at Massport in the International Trade Office. In August 1999, Saliba obtained a job at the Massachusetts Trade Office ("the MTO") as an international trade representative.

7. Based on her review of Saliba's work, Swift recommended Saliba to the governor's chief secretary for both positions. According to Swift these recommendations had some weight in Saliba obtaining those positions.

8. In 1999, Dohoney and Saliba each babysat Swift's daughter at Swift's apartment in Boston's North End and, after September 1999, at Swift's apartment in Northbridge, about ten miles southeast of Worcester.

9. Dohoney babysat Swift's daughter at least 10 times for a total of approximately 45 hours. According to Dohoney's testimony, her providing this babysitting was entirely voluntary. She was motivated by her affection for Swift and the baby. Dohoney declined to be paid and never was paid for this babysitting. According to Dohoney's testimony, the first time she babysat in the North End, Swift's husband offered to pay her, but Dohoney declined the offer. Swift testified that she gave Dohoney two or three inexpensive gifts to show her appreciation for the babysitting.

10. Saliba babysat Swift's daughter at least 10 times for a total of approximately 40 hours.

11. According to Saliba's testimony, her providing this babysitting was entirely voluntary. She was motivated by her close friendship with Swift and affection for the baby. Swift's husband offered to pay her the first few times she babysat, but she made it clear that she did not want to be paid and never was paid for such babysitting.

12. When Dohoney and Saliba babysat, babysitting rates ranged from $5 to $10 or more per hour.

13. Section 23(b)(3) in relevant part prohibits a state official from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This section further provides that it shall be unreasonable to so conclude if the official has disclosed in a public manner the facts which would otherwise lead to such a conclusion.

14. By receiving significant babysitting services from Dohoney while serving as Dohoney's supervisor, Swift knowingly acted in a manner that would lead a reasonable person with knowledge of the relevant facts to conclude that Dohoney could unduly enjoy Swift's favor in the performance of Swift's duties.

15. Accordingly, Swift violated §23(b)(3) of the conflict of interest law by receiving babysitting services from Dohoney as described above.

16. By receiving significant babysitting services from Saliba while serving as Saliba's supervisor and while providing job recommendations for Saliba to obtain positions within state agencies, Swift knowingly acted in a manner that would lead a reasonable person with knowledge of the relevant facts to conclude that Saliba could unduly enjoy Swift's favor in the performance of her official duties.

17. Accordingly, Swift violated §23(b)(3) of the conflict of interest law by receiving babysitting services from Saliba as described above.[1/2/]

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

(1) that Swift pay $500 as a civil penalty for the §23(b)(3) violation regarding Dohoney's

babysitting;

(2) that Swift pay $750 as a civil penalty for the §23(b)(3) violation regarding Saliba's babysitting; and

(3) that Swift 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 20, 2000

[1/]The foregoing appearance problems were exacerbated by the fact that the babysitting was provided free. And, friendship is not a defense to an appearance problem. As the Commission has repeatedly said in the past, the existence of such a friendship only adds to the concern that the subordinate will not be treated objectively in the workplace environment. In short, such friendships increase rather than diminish the appearance concern. *In re Keverian*, 1990 SEC 460, 463.

[2/]Swift did not make the written disclosures contemplated by §23(b)(3) that would have avoided these appearance problems.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 609**

IN THE MATTER
OF
ERNEST NUGENT
DISPOSITION AGREEMENT

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

On September 15, 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 Nugent. The Commission has concluded its inquiry and, on May 22, 2000, found reasonable cause to believe that Nugent violated G.L. c. 268A.

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

1. Nugent is the Worthington highway superintendent, a position to which he was appointed by the Worthington board of selectmen in 1994. Nugent's municipal position is full-time and salaried.

2. As highway superintendent, Nugent manages the Worthington Highway Department ("the Highway Department"). The principal function of the Highway Department is the maintenance of town roads in Worthington.

3. The Highway Department uses a woodchipper to dispose of trees and tree branches that fall on or otherwise interfere with roads in Worthington. For several years starting in 1994, the Highway Department rented a woodchipper from Nugent's brother Albert Nugent ("Albert") at a cost of $150 per day. The selectmen awarded Albert the rental contract based on his submitting the lowest bid, and directed the Highway Department to rent the chipper from Albert. Nugent, as highway superintendent, determined on a day-to-day basis when the woodchipper was needed and rented it from Albert pursuant to the board of selectmen's direction. On average, the Highway Department rented Albert's woodchipper about thirty days per year.

4. In 1996, the Commission's Enforcement Division, having learned of Nugent's involvement in the rental of the woodchipper from Albert, wrote two letters to Nugent (on July 25th and September 3rd) advising him of how the conflict of interest law might apply to his situation. The July 25, 1996 letter advised Nugent in relevant part,

> In the future, if any matter comes before you which involves the interest of your immediate family members, you should either completely abstain from any participation in the matter, or, if you deem it essential for you to participate, you should first obtain [a written exemption]. Failure to comply with the law can result in civil prosecution by the Commission which is empowered to impose a fine of up to $2,000 for each violation of the conflict of interest law.

The September 3, 1996 letter further advised Nugent that if he wished to participate in a matter in which his immediate family member had a financial interest,

> you must first advise your appointing authority of the nature and circumstances of the particular matter and make full disclosure of the financial interests. Your appointing authority may make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services the municipality may expect from you. Such disclosure and any written authorization must be filed with the town clerk.

5. One of Nugent's duties as Highway Superintendent each year is to prepare and submit to the town finance committee and selectmen an annual budget request for the Highway Department.

6. Sometime prior to 1998, Nugent decided to recommend that the Highway Department should buy a woodchipper rather than continue to rent. Also sometime prior to 1998, Albert expressed to Nugent an interest in selling his woodchipper to the town.

7. On March 3, 1998, Nugent appeared before the selectmen and finance committee, meeting jointly, and presented the Highway Department budget request for fiscal year 1999. The budget, which Nugent had prepared, included a request for $10,000 to purchase a used woodchipper.

8. On March 3, 1998, the selectmen and finance committee decided to fund the purchase of a used woodchipper, as requested by Nugent, using funds from the Rolland North Cemetery Fund. This funding was consented to by the cemetery commissioner, who was present at the March 3, 1998 meeting, and required the approval of the town meeting.

9. In May 1998, the Worthington town meeting voted to appropriate $10,000 from the Rolland North Cemetery Fund to purchase a used woodchipper.

10. Following the May 1998 town meeting, Worthington Selectman and Chief Procurement Officer Ryan Neuhauser ("Neuhauser") took charge of preparing an invitation to bid for the town's purchase of a used woodchipper. At Neuhauser's request, Nugent provided Neuhauser with input on the specifications of the woodchipper to be included in the invitation to bid. In response to Neuhauser's inquiry, Nugent told Neuhauser that the town should purchase a woodchipper like the one rented from Albert, and that Albert's woodchipper worked well. Nugent further told Neuhauser, in substance, that the invitation to bid should specify that the woodchipper should have a six-cylinder, gasoline-powered engine and be self-feeding, towable and able to handle logs up to twelve inches in diameter. After Neuhauser had drafted the invitation to bid, Nugent read it and confirmed that its specifications for the woodchipper met the Highway Department's needs.

11. The invitation to bid was made public by Chief Procurement Officer Neuhauser on June 3, 1998. The invitation specified, in relevant part, that the town was seeking a woodchipper which was "self contained, 12 [inch] self-feeding, towable with road legal lighting ... 1987 model year or newer with 1500 hours or less on the hour meter" and "powered by a six cylinder gasoline-fueled engine."

12. After the invitation to bid was made public, Nugent spoke with his brother Albert, a heavy equipment dealer (Morbark of New England) and two other individuals and informed each of the woodchipper invitation to bid.

13. Subsequently, Albert submitted a sealed bid offering to sell the town for $10,000 a "1989 'Eager Beaver' woodchipper with 1200 hours on the meter, 6 cylinder gas engine, 12 [inch] self-feeding, towable with legal road lighting." The equipment dealer also submitted a sealed bid offering to sell the town six different woodchippers, ranging in price from $2,000 to $19,500, none of which met the specifications of the invitation to bid. No other bids were submitted.

14. The two sealed bids were opened at a board of selectmen's meeting on June 30, 1998, and taken under advisement. Nugent did not participate in the bid-opening. At a board of selectmen's meeting on July 7, 1998, Neuhauser recommended that the town purchase the woodchipper from Albert for $10,000. Nugent did not participate in the recommendation to accept Albert's bid. The selectmen voted unanimously to approve the purchase of the woodchipper from Albert.

15. Section 19 of G.L. c. 268A, except as permitted by paragraph (b) of that section, prohibits a municipal employee from participating as such in any particular matter in which to his knowledge a member of his immediate family has a financial interest.

16. As highway superintendent, Nugent was at all times here relevant a municipal employee as that term is defined in G.L. c. 268A, §1(g).

17. Nugent's brother Albert is a member of Nugent's immediate family as defined in G.L. c. 268A, §1(e).

18. Worthington's decision to purchase a used woodchipper, as described in the June 3, 1998 invitation to bid, was a particular matter (hereinafter "the particular matter").[1]

19. Albert had a financial interest[2] in the particular matter given that Albert had been renting his woodchipper to the town for several years. In addition, Albert had an expressed interest in selling his woodchipper to the town.

20. Nugent participated[3] in the particular matter as highway superintendent by requesting that the town purchase a used woodchipper and by recommending the purchase for up to $10,000 of a used woodchipper with a 12-inch capacity, a six-cylinder gasoline-powered engine and a self-feeding capability. In addition, Nugent participated in the particular matter as highway superintendent, by reviewing the invitation to bid specifications, stating

his opinion that the woodchipper rented from Albert worked well, and personally seeking bids from Albert and a heavy equipment dealer.

21. When Nugent participated in the particular matter, Nugent knew that his brother Albert had a financial interest in the particular matter as Nugent knew that his brother was currently renting his woodchipper to the town. In addition, Nugent knew that Albert was interested in selling his woodchipper to the town. Accordingly, Nugent participated as highway superintendent in a particular matter in which to his knowledge a member of his immediate family had a financial interest. In so doing, Nugent violated §19.

22. As set forth above in paragraph 4, in 1996 the Commission's Enforcement Division informed Nugent that his participation in a matter affecting the financial interest of a member of his immediate family would violate §19 and advised him to abstain from participating in any such matter, unless he first obtained a §19(b)(1) exemption. Section 19(b)(1) provides that a municipal employee participating in a particular matter in which a family member has to his knowledge a financial interest does not violate §19 if the municipal employee first advises his appointing authority of the nature and circumstances of the particular matter and makes full disclosure of the financial interest and receives in advance a written determination by the appointing authority that the interest is not so substantial as to be deemed likely to affect the integrity of the services the municipality may expect from the employee.

23. At the time Nugent participated in the particular matter as described above, Nugent's appointing authority was aware that Albert was Nugent's brother and had been renting his woodchipper to the town. The selectmen were thus aware that Nugent was participating as highway superintendent in a particular matter in which a member of his immediate family had a financial interest. Nugent did not, however, seek and obtain a §19(b)(1) exemption from the selectmen, prior to participating as highway superintendent in the particular matter. Thus, Nugent's participation in that matter was not exempted from §19.[4/]

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

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

(2) that Nugent 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 27, 2000

[1/]"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).

[2/]"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*.

[3/]"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).

[4/]The formal disclosure and written determination requirements of the §19(b)(1) exemption are not mere technicalities. They protect the public interest from potentially serious harm. As the Commission has stated, "The steps of the disclosure and procedure ... are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision." *In re Hanlon*, 1986 SEC 253, 255. Accordingly, the Commission requires strict compliance with the provisions of §19(b)(1) of anyone seeking to be thereby exempted from the prohibitions of §19. See *In re Ling*, 1990 SEC 456, 458-459.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 522

IN THE MATTER
OF
ARTHUR R. SMITH, JR.

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

Raymond R. Couture
Counsel for Respondent

Commissioners: Wagner, Ch,, Rapacki, Moore and Cassidy
Presiding Officer: Edward D. Rapacki, Esq.

AMENDED ORDER ON RESPONDENT"S ASSENTED-TO MOTION TO DISMISS

We treat Respondent's Assented-To Motion to Dismiss the above-captioned matter as one for summary decision pursuant to 930 C.M.R. § 1.01(6)(f) because Respondent has presented materials outside the pleadings. Upon review and consideration of Respondent's Motion and accompanying documentation, which was unmet by countervailing materials, we hereby conclude that Respondent does not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," nor does he appear to have a "rational as well as a factual understanding of the proceeding against him." 362 U.S. 402 ( ). Accordingly, we **allow** Respondent's motion.

DATE: October 31, 2000

Senator Edward J. Clancy
c/o Haskell A. Kassler, Esq.
Casner & Edwards, LLP
One Federal Street
Boston, MA 02110

PUBLIC ENFORCEMENT LETTER

Dear Senator Clancy:

As you know, the State Ethics Commission has conducted a preliminary inquiry concerning whether you violated the state conflict of interest law, G.L. c. 268A, by, in July 1998, as state senator, improperly meeting with the chairman and vice chairman of the state Board of Registration of Chiropractors ("the Board") and seeking to influence the outcome of an adjudicatory proceeding then pending before the Board concerning one of your constituents, a chiropractor. Based upon the preliminary inquiry, the Commission voted on May 22, 2000, to find that there is reasonable cause to believe that you violated G.L. c. 268A, §23(b)(2).

The Commission has determined that the public interest would be best served by sending you this public enforcement letter bringing to your attention, and to the attention of your colleagues and the public at large, the facts revealed by the preliminary inquiry and explaining the application of the law to those facts. The Commission expects that this letter will ensure your understanding of and future compliance with the conflict of interest law. The Commission and you have agreed that there will be no formal action against you in this matter, and you have chosen not to exercise your right to a hearing before the Commission. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below.

I. Facts

1. You are a state senator representing the First Essex District. You have been a state senator since 1995 and were previously a state representative for the Tenth Essex District for two terms. You are also an attorney and have been a sole practitioner in Lynn for over twenty years.

2. The Board is responsible for licensing chiropractors, regulating their professional conduct, and taking disciplinary action against those chiropractors who fail to meet the regulatory standards. Board disciplinary action sometimes includes an adjudicatory proceeding to determine whether to suspend or revoke a chiropractor's license to practice. The Board meets periodically in Boston.

3. In September 1997, the Board, by an Order to Show Cause, initiated an adjudicatory proceeding against a Swampscott chiropractor for alleged violations of Board regulations. In October 1997, the chiropractor filed an Answer to the Order to Show Cause denying its allegations. In May 1998, the Board issued an Amended Order to Show Cause against the chiropractor. On June 3, 1998, the prosecution moved for summary decision against the chiropractor. On June 12, 1998, the chiropractor filed his opposition to the motion for summary decision and moved for oral argument on the motion and opposition. The Board scheduled the hearing on the motion and opposition for July 29, 1998.

4. In 1998, the Board's chairman was Edward J. Barowsky and the Board's vice-chairman was Joseph Boyle. Chairman Barowsky and Vice Chairman Boyle

were to participate in any Board decision in the adjudicatory proceeding concerning the chiropractor.

5. Your senatorial district includes Swampscott. In late May or early June 1998, a Swampscott businessman, whom you have known as a fellow Lynn YMCA member for many years, told you about the chiropractor's situation. The businessman, who told you he was good friends with the chiropractor's parents, asked you if there was anything you could do. You agreed to look into the situation. Subsequently, on June 2, 1998, the businessman sent you a copy of the Board's Order to Show Cause concerning the chiropractor, together with a copy of the chiropractor's resume and a handwritten note stating in relevant part,

> I realize this is short notice; however the Chiropractic board is having a prelimenary [sic] meeting on [sic] 2:30 6/3/98 Wednesday regarding this matter. [The chiropractor] is scheduled for adjudicatory hearing before the board on Friday June 5, at 9:00 a.m. ...[1/] [The chiropractor's] attorney is trying to resolve this matter prior to a hearing. Any effort on your part (i.e. telephone call or letter to the board & members involved) will deeply be appreciated by [the chiropractor] & myself.

6. You testified that, within two days of your first learning of the chiropractor's situation, he telephoned you at your Lynn law office.[2/] The chiropractor told you in detail about his problem before the Board. In short, the chiropractor told you that he had worked for another chiropractor who was under criminal investigation for Medicare fraud or some other fraudulent activity involving overbilling accounts, and that the chiropractor's signature stamp had been used in this activity. As a result, the chiropractor had been brought in front of the Board and was facing possible suspension or revocation of his license. You spoke with the chiropractor by telephone on more than one occasion and you, as you put it, "came to the conclusion that [the chiropractor] was a sincere upright kid... [who] had just started out and got himself into a bad situation."[3/]

7. After your initial telephone conversation with the chiropractor, you asked one of your Senate office staffers to find out what the Board "was all about." You also had one of your Senate staff members look in the state agency directory and obtain the names and addresses of the Board's members. In addition, on June 23, 1998, the chiropractor faxed you a list of the Board's eight members' names and addresses.

8. You decided that you wanted to discuss the chiropractor's case with Board Chairman Barowsky and Vice Chairman Boyle in order to attempt to save the chiropractor's professional career by convincing Boyle and Barowsky that the chiropractor deserved the Board's leniency in the pending adjudicatory proceeding. At the time, you did not know either Boyle or Barowsky. Because both Barowsky and Boyle had addresses in the Springfield area, you decided to ask state Senator Linda Melconian, whose senatorial district includes that area, if she knew them and, if she did, to ask her to introduce you to Barowsky and Boyle so that you would not have to make "cold calls" to them.

9. On or about June 25, 1998, you spoke with Melconian at the State House and, after confirming that she knew Boyle and Barowsky, you told her you needed to talk with Boyle and Barowsky and wanted to meet with them. You did not tell Melconian why you wanted to speak with Boyle and Barowsky, except to say that a constituent matter was involved.

10. Melconian offered to set up a meeting between you and Barowsky and Boyle. She also offered her Senate office conference room for the meeting. According to Melconian, it is her normal practice to set up such meetings for her Senate colleagues.

11. In late June 1998, Barowsky and Boyle each received a telephone call from either Melconian or an aide to Melconian requesting that they meet with Melconian and you (referred to as "Senator Clancy"). The subject matter of the meeting was neither inquired about nor identified. Barowsky and Boyle testified that they assumed the meeting would relate generally to chiropractors and insurance issues. According to their testimony, had Boyle and Barowsky known that the purpose of the meeting was to discuss an adjudicatory proceeding pending before the Board, they would have declined to meet with you. Boyle and Barowsky were each told that the other had also been invited to the meeting. Both Boyle and Barowsky agreed to the meeting, which was arranged for noon on July 9, 1998, to fall immediately after a scheduled Board meeting for which they would be in Boston.

12. On July 9, 1998, you met Boyle and Barowsky in the reception area of Melconian's Senate office suite, and introduced yourself as "Senator Clancy." Neither Boyle nor Barowsky were familiar with you. You, Boyle and Barowsky engaged in "small talk" for a few minutes while waiting for Melconian. There was no discussion concerning the chiropractor at this time.

13. Melconian soon entered the reception area and asked you, Boyle and Barowsky to come into the conference room of her office suite. Melconian thanked Boyle and Barowsky for coming, introduced you as a "good friend" of hers, and indicated that you wanted to talk to them. Melconian then left the conference room and did not return.

14. After Melconian's departure, Boyle asked, "What can we do for you, Senator?" You then made what you called your "pitch," the substance of which was the following:

You told Boyle and Barowsky that the chiropractor and his family were constituents of yours and that you were anxious to have the opportunity "to put a human face on" the chiropractor's problem with the Board. You indicated how exemplary the chiropractor's background was and stated that the chiropractor's parents had made a huge financial sacrifice to get him through school, and that the chiropractor still had a large amount of student loans to repay. You stated that the chiropractor was naive and that his employer was a "bad guy" who had clearly taken advantage of him. Finally, you said that you hoped that the chiropractor's professional life would not be ruined, and you asked Barowsky and Boyle to "show mercy and not justice" and to "please not crucify" the chiropractor.

15. According to Boyle and Barowsky, they cut you off before you had finished speaking on behalf of the chiropractor and expressed to you that they could not discuss the chiropractor's matter with you because it was pending before the Board. The meeting then terminated.

16. You testified that neither Boyle nor Barowsky cut off your "pitch" and that you were able to say all that you had planned to say.[4]

17. On July 29, 1998, the chiropractor's matter came before the Board for oral argument on summary judgment. At the hearing, Barowsky and Boyle read aloud written disclosures they had made to the governor (their appointing authority) on July 28, 1998, concerning their meeting with you. Thereupon, the chiropractor's attorney sought their recusal. After consulting with legal counsel, Boyle and Barowsky did not recuse themselves. The chiropractor's matter was ultimately resolved by a consent agreement in 1999. The Commission is not aware of any evidence that your "pitch" to Boyle and Barowsky had any effect upon the outcome of the chiropractor's case.

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

II. Discussion

Legislators are often called upon by their constituents to assist them in their dealings with state agencies. Service to constituents to resolve difficulties in dealing with state agencies is, in general, a legitimate and time-honored activity of legislators. But not every service to a constituent is lawful. In this matter, the Commission has found that there is reasonable cause to believe that your above-described "constituent service" for the chiropractor, your "pitch" to the Board on his behalf, violated the conflict of interest law.

As a state senator, you are a state employee. As such, you are subject to the conflict of interest law, G.L. c. 268A. Your above-described actions on behalf of the chiropractor appear to have violated §23 of G.L. c. 268A, the "code of conduct" section of the conflict of interest law.

Section 23(b)(2) prohibits a state employee, including a legislator, from knowingly or with reason to know using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals.[5]

As set forth in detail above, you used your official position to secure a private meeting with two of the future decision-makers in the chiropractor's case in order to attempt to influence their actions in the pending adjudicatory proceeding in a manner favorable to the chiropractor. Thus, as a state senator, you obtained a meeting with Boyle and Barowsky through your Senate colleague Melconian. In addition, the meeting with Boyle and Barowsky was set up with you as "Senator Clancy." Finally, you met with Boyle and Barowsky and made your "pitch" to them for the chiropractor as a state senator.

In meeting privately with Boyle and Barowsky and attempting to influence the outcome of the adjudicatory proceeding, you went beyond assistance that you could properly have provided to your constituent; for example, testifying at the adjudicatory proceeding as a character witness or providing the chiropractor with a written character reference for submission to the Board as part of the defense case. Instead, your private "pitch" to Boyle and Barowsky on the chiropractor's behalf was an improper *ex parte* communication concerning a pending adjudicatory proceeding. That is, while you spoke for the chiropractor, the prosecuting counsel was neither present nor invited to attend to advocate for the prosecution.

As an attorney, you are aware that it is fundamental to due process that an adjudicatory proceeding be decided based upon evidence that is offered and made part of the record of the proceeding in the presence of the parties to the proceeding (or their representatives), and that *ex parte* communications concerning a pending adjudicatory proceeding are prohibited. Thus, the Standard Adjudicatory Rules of Practice and Procedure, which the Board (like many state agencies) follows, prohibit Board members from receiving any *ex parte* communication concerning a Board adjudicatory proceeding. 801 CMR §1.03(6)(a), formerly 801 CMR §1.03(10) (revised 12/25/98). Accordingly, Boyle and Barowsky would not have met with you had they known your purpose was to make a "pitch" in order to influence the outcome of the adjudicatory proceeding. Nor would they have listened to your *ex parte* "pitch" on the chiropractor's behalf had they known it was coming. Neither could they nor any other Board member have properly met privately with or listened privately to any other person wishing to make an

ex parte "pitch" in order to influence the outcome of any adjudicatory proceeding pending before the Board. Thus, your "pitch" for the chiropractor, at an *ex parte* meeting with Boyle and Barowsky which you obtained through the use of your position as a state senator, was an unwarranted privilege which was not properly available to similarly-situated persons.

Given that the chiropractor's professional license was at stake in the adjudicatory proceeding before the Board, your effort to influence the outcome of the proceeding was of substantial value for the chiropractor. *See In re Burke*, 1985 SEC 248, 251 (access to executives to make an insurance sales pitch was of substantial value because it makes sales more likely). It is likely that, were such meetings not prohibited, almost every adjudicatory proceeding subject would seek an *ex parte* meeting with the decision-makers to argue the subject's position on the merits of the case in the hopes of influencing the outcome in the subject's favor. Thus, by making your "pitch" for the chiropractor at an *ex parte* meeting with Boyle and Barowsky, you secured for the chiropractor an unwarranted privilege of substantial value.[6/]

Accordingly, there is substantial evidence to warrant the conclusion that you, knowingly or with reason to know, used your position as a state senator to secure for the chiropractor an unwarranted privilege of substantial value which was not properly available to similarly-situated persons. Thus, there is reasonable cause to believe that you violated §23(b)(2)[7/]

III. Disposition

Your attempt to influence the Board in the pending adjudicatory proceeding concerning the chiropractor through an *ex parte* communication posed a substantial threat to the Board's ability to fairly and impartially resolve that case, in short to do justice in the case. Had your "pitch" succeeded, the adjudicatory process would have been subverted. Rather than being decided on the merits of the evidence presented by both prosecution and defense in a public proceeding, the case would have been decided based upon the persuasiveness of an *ex parte* plea of a high ranking public official. This was only averted by the conscientiousness of Barowsky and Boyle.

Therefore, the facts warrant a public resolution. The Commission decided to resolve this case with a public enforcement letter, however, rather than imposing a fine, because there may be some good faith confusion as to where the line is drawn between properly zealous advocacy on behalf of a constituent and improper communications when it comes to administrative agency adjudicatory proceedings. The Commission has not previously addressed how §23 applies to a legislator's efforts to assist a constituent with a state agency adjudicatory proceeding. Section 23's application to such constituent services should now be clear.

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

DATE: November 14, 2000

[1/]The June 1998 proceedings were later rescheduled.

[2/]In your dealings with both the businessman and the chiropractor you were acting in your capacity as a state senator, and not as a private attorney. You were not compensated by either the businessman or the chiropractor for your efforts to help the chiropractor with the Board. You testified that you considered your efforts on behalf of the chiropractor to be consistent with your role as a legislator.

[3/]You testified that, as of June 1998 you were familiar with the chiropractor's family's name, but had never met the chiropractor or his parents. You did not meet the chiropractor in person until some time in late 1998.

[4/]You testified that your version of the meeting is supported by your daily planner, which has an entry for the meeting marked with a check mark. According to you, the check mark means that the meeting was routine and that had you been cut off or badly received there would be no check mark but instead a verbal notation such as "ouch".

[5/]Although under some circumstances §4 of G.L. c. 268A permits legislators to appear in matters before state boards or agencies, it does not permit them, in appearing before such agencies, to violate §23(b)(2).

[6/]This is true, even in the absence of any evidence that your "pitch" in any way actually helped the chiropractor, because the unwarranted privilege of making an *ex parte* argument on behalf of the chiropractor was itself of substantial value regardless of its ineffectiveness.

[7/]It should be noted that even if circumstances had fully prevented you from making your "pitch" on behalf of the chiropractor at the meeting with Boyle and Barowsky, it would still be concluded that there was reasonable cause to believe that you violated §23(b)(2). This is because §23(b)(2) applies to attempts to use one's official position to secure an unwarranted privilege as well as to actual use. Thus, your use of your official position to obtain the meeting with the Board meeting was sufficient, given your intent to thereby attempt to influence the outcome of the chiropractor's case, to place you in apparent violation of §23(b)(2).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 610

IN THE MATTER
OF
DAVID CARIGNAN

DISPOSITION AGREEMENT

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

On September 23, 1998, the Commission initiated, pursuant to G.L. c. 268A, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Carignan. The Commission has concluded its inquiry and, on August 23, 2000, found reasonable cause to believe that Carignan violated G.L. c. 268A, §23.

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

1. Carignan is, and was at all times here relevant, the Falmouth health agent. Carignan was appointed to this full-time, salaried position by the Falmouth Board of Health ("Board of Health") in 1982.

2. In June 1997, Duco Associates, Inc. ("Duco"), foreclosed on a property (including land and an unfinished house) located at 10 Brantwood Road, Falmouth, as to which Duco was the first mortgagee. Duco hired a contractor, Margaret Fitzgibbon, who completed the house. A buyer for the house was found and a closing was scheduled for September 26, 1997.

3. Because 10 Brantwood Road was a newly constructed house, a certificate of occupancy and compliance ("occupancy certificate") issued by the Falmouth Building Department ("Building Department") was required to proceed with the closing. An occupancy certificate for a new house is normally issued by the Building Department after several municipal departments, including the Board of Health, sign their approval on the building permit card.

4. One of Carignan's duties as health agent is to sign, or to authorize an assistant to sign, building permit cards on behalf of the Board of Health. Carignan's practice is not to sign, or authorize the signing of, the building permit card until he has received an "as-built card" showing the location of the septic system as installed.[1] According to Carignan, his practice is to require that the as-built card be prepared by the installer of the septic system based upon Carignan's understanding of Title 5, the state code of regulations dealing with septic systems.[2] Carignan has, however, discretion as health agent to deviate from this practice in appropriate circumstances. For example, Carignan can (and indeed must under Title 5) accept an as-built card from the septic system designer in place of one from the installer.

5. The septic system at 10 Brantwood Road, designed by the Falmouth engineering firm Ferreira Associates, was installed by Falmouth excavation contractor and town-licensed septic system installer Carl F. Cavossa, Jr., pursuant to a March 30, 1995 Board of Health permit. The system was inspected and approved in compliance with Title 5 by the Board of Health on July 1, 1996, nearly one year prior to Duco's taking the property by foreclosure.

6. At the time of the foreclosure, Cavossa had not been paid for his installation of the septic system at 10 Brantwood Road. The builder upon whom Duco foreclosed owed Cavossa several thousand dollars for the work. Duco, in taking the property by foreclosure, did not legally owe Cavossa anything for his work at 10 Brantwood Road.

7. As of September 1997, no as-built card had been filed with the Board of Health for the 10 Brantwood Road septic system. Duco's contractor, Fitzgibbon, attempted to obtain the as-built card from Cavossa. Fitzgibbon offered Cavossa $500 for the card. Cavossa refused Fitzgibbon's offer and told Fitzgibbon that he wanted to be paid what he had lost on the 10 Brantwood Road septic system installation before he would provide the as-built card.

8. Because of Cavossa's refusal to provide the as-built card, Fitzgibbon paid another licensed septic system installer $150 to go to 10 Brantwood Road, locate the septic system components with the aid of the original design plans, and prepare a substitute as-built card.

9. On September 23, 1997, Fitzgibbon took the substitute as-built card for the 10 Brantwood Road septic system to the Board of Health's office. Carignan, however, refused to accept the substitute as-built card. Fitzgibbon then told Carignan that she previously had submitted a substitute as-built card for another new house in Falmouth to the Board of Health under similar circumstances and the card was accepted. Carignan responded that the earlier substitute as-built card had been accepted in error and that he would only accept an as-built card for the 10 Brantwood Road septic system prepared by the system installer, Cavossa. Fitzgibbon then told Carignan that she had offered Cavossa $500 for the card and Cavossa had refused to provide it. Carignan responded by telling Fitzgibbon that the Board of Health would not sign the building permit card unless he was provided with

an as-built card from Cavossa.

10. According to Carignan, after talking with Fitzgibbon he telephoned Cavossa and asked for the as-built card for 10 Brantwood Road. Cavossa told Carignan that he would not provide the card because he had not been paid for his work at 10 Brantwood Road. Carignan took no further action to obtain the as-built card from Cavossa.

11. Fitzgibbon reported her conversation with Carignan to Duco's attorney, Stuart N. Cole. On September 24, 1997, Cole telephoned Carignan and asked him why the Board of Health had not signed the building permit card for 10 Brantwood Road so that the occupancy certificate could be issued by the Building Department. Carignan responded by stating his position that an as-built card from the original installer, Cavossa, must be provided to the Board of Health before the Board would sign off on the issuance of the occupancy permit. Carignan and Cole then discussed the fact that Cavossa had not been paid for his work at 10 Brantwood Road and was refusing to provide the as-built card unless he were paid. Carignan stated words to the effect that it was unfair and immoral that Cavossa had not been paid for his work. Cole attempted to explain to Carignan that Cavossa was not owed payment for his work by Duco, but by the builder upon whom Duco had foreclosed. The conversation then ended and Cole informed Fitzgibbon of the conversation's substance.

12. Based upon their respective conversations with Carignan, Fitzgibbon and Cole reasonably understood (a) that Carignan believed that Duco should compensate Cavossa for his work at 10 Brantwood Road, and (b) that the Board of Health would not sign off on the issuance of the occupancy permit unless Duco paid Cavossa to provide the as-built card to the Board.[3/]

13. As a result of the above-described conversations between Carignan and Fitzgibbon and Cole, Cole contacted Cavossa and subsequently negotiated with Cavossa and Cavossa's attorney to have Cavossa provide the as-built card in return for Duco's payment of $2,500, plus Duco's general release of Cavossa from all liability.

14. On September 26, 1997, Duco paid Cavossa $2,500 and provided him with the general release. Cavossa then delivered the as-built card for 10 Brantwood Road to the Board of Health. Carignan thereupon signed or authorized an assistant to sign the 10 Brantwood Road building permit card on behalf of the Board of Health. The Building Department then issued the occupancy certificate for 10 Brantwood Road.

15. Apart from telephoning Cavossa, Carignan did not take any action as health agent to assist Duco and its representatives, Fitzgibbon and Cole, in satisfying Carignan's requirement that a septic system as-built card for 10 Brantwood Road be submitted to the Board of Health before the Board would sign the building permit card. First, Carignan did not offer Fitzgibbon or Cole any way of obtaining the Board of Health's building permit card sign-off other than obtaining and submitting an as-built card from Cavossa. Carignan did not, for example, inform Fitzgibbon that he could, in his discretion as health agent, accept an as-built card from the engineering firm that had designed the 10 Brantwood Road septic system.[4/] Second, Carignan did not inform Fitzgibbon or Cole that Duco could appeal Carignan's actions to the Board of Health.[5/] Finally, Carignan did not bring to bear any official pressure on Cavossa, as a town-licensed septic system installer, to submit the as-built card to the Board of Health.[6/]

16. As Falmouth health agent, Carignan is a municipal employee as defined in G.L. c. 268A, §1. As such, Carignan is subject to the provisions of the conflict of interest law, G.L. c. 268A.

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

18. Carignan's above-described actions and failures to act as health agent, under the then-existing circumstances, caused and compelled Duco to pay Cavossa money for the 10 Brantwood Road as-built card that it did not owe. Under the circumstances, and regardless of his motive in acting and failing to act as he did, Carignan had reason to know that his conduct as health agent would force Duco to pay Cavossa money that it did not owe in order to obtain the as-built card from Cavossa that Carignan insisted the Board of Health receive before it would sign off on the building permit for the issuance of the occupancy permit for 10 Brantwood Road.

19. Carignan's above-described conduct as health agent in effect secured for Cavossa a special advantage in Cavossa's dealings with Duco concerning the amount that Duco would have to pay Cavossa for the as-built card. This advantage was a privilege within the meaning of G.L. c. 268A, §23(b)(2) and was of substantial value in that it was the leverage that helped Cavossa obtain from Duco $2,000 more for the as-built card than originally offered by Fitzgibbon. The advantage was further unwarranted and not properly available to similarly situated persons because a private citizen, like Cavossa, does not have any right or other lawful claim to Carignan's help as health agent in obtaining payment from any other private citizen, particularly under circumstances where no payment is legally owed.

20. Therefore, Carignan, as health agent, by his above-described conduct, effectively and with reason to know, used his official position to secure for Cavossa an unwarranted privilege of substantial value which was not properly available to similarly situated individuals. In so doing, Carignan violated G.L. c. 268A, §23(b)(2).[7]

21. 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, with knowledge of the relevant circumstances, to conclude that any person can improperly influence 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 a result of kinship, rank, position or undue influence of any person or party. Section 23(b)(3) further provides that the section is not violated if the employee "has disclosed in writing to his appointing authority ... the facts which would otherwise lead to such a conclusion."

22. Carignan, by his above-described actions and omissions as health agent, which caused and compelled Duco to pay Cavossa $2,500 that it did not owe, acted, with reason to know, in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that Cavossa could unduly enjoy Carignan's favor in the performance of his official duties. In so doing, Carignan violated G.L. c. 268A, §23(b)(3).[8]

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

(1) that Carignan pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A; and

2) that Carignan 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 27, 2000

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[1]The as-built cards required and accepted by Carignan are typically three by five inch index cards with, on one side, a diagram of the septic system with distances shown to the house foundation and, on the other side, the property address, the names of the installer and the town inspector, the permit number, the lot number, the septic tank and leaching sizes, the ground water level, the number of bedrooms, whether there is a disposal, whether there is town water or a private well, and the date the system was installed. The as-built cards are not signed.

[2]Title 5 in fact contains no requirement for the installer's submission of an as-built card. Title 5 instead requires that the installer and designer each "certify in writing on a form approved by the Department that the system has been constructed in compliance with [Title 5], the approved design plans and all local requirements, and that any changes to the design plans have been reflected on *as-built plans* which have been submitted to the approving authority *by the Designer* prior to the issuance of a Certificate of Compliance" (emphasis added). 310 CMR 15.021(3). According to Carignan, he requires the as-built card from the installer based upon Title 5's requirement that the septic system installer make the certification set forth above. The as-built cards required and accepted by Carignan do not, however, contain any certification language and, as stated above, are not signed.

[3]According to Carignan, he did not intend his statements to be so understood. The Commission makes no finding as to Carignan's actual motives, as no such finding is required for the resolution of this matter.

[4]As set forth in footnote 1 above, Title 5, to the degree it requires a septic system "as-built," requires "as-built plans" submitted by the system designer.

[5]According to Carignan, although he would normally have informed Cole and Carignan of Duco's right to appeal his action to the Board of Health, he did not do so because his conversations with them were heated and adversarial.

[6]As the local licensing and permitting authority for septic system installers (including Cavossa) and septic system installations, respectively, the Board of Health has the power to require installers to comply with Title 5 and local regulations, including the certification requirement of 310 CMR §15.021(3) (which under Carignan's practice was met by the installer's submission of the as-built card) under threat of possible sanctions including the loss of license or the denial of further permits to install septic systems. Thus, Carignan, as health agent, was in a position to compel Cavossa to provide the Board of Health with the as-built card for 10 Brantwood Road. According to Carignan, however, he did not see it as part of his role as health agent to in any way pressure Cavossa to provide the as-built card.

[7]This is true even if Carignan did not intend to help Cavossa because Carignan had reason to know that, under the circumstances, his actions and omissions as health agent would have the effect of helping Cavossa.

[8]Carignan did not make the disclosure to his appointing authority required to avoid a violation of G.L. c. 268A, §23(b)(3).

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