STATE ETHICS COMMISSION

Advisory Opinions

Enforcement Actions

for Calendar Year 2004

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Included in this publication are:

•**State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 2004.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 2004 SEC (page number).

Note: Enforcement Actions regarding violations of G.L. c. 268B, the financial disclosure law, are not always included in the *Rulings* publications.

•**State Ethics Commission Formal Advisory Opinions issued in 2004**. Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-04-(number)*.

•**State Ethics Commission Advisories issued in 2004**. Cite Conflict of Interest Advisories as follows: *EC-ADV-04-(number)*.

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

State Ethics Commission

Advisory Opinions

2004

Summaries of Advisory Opinions
Calendar Year 2004

EC-COI-04-1 - Section 15A of G.L. c. 268A does not prohibit the Dukes County Commission from appointing one of its members to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority board of directors. The board of directors is not "under the supervision"of the commissioners.

EC-COI-04-2 - A state college professor may assign to his students textbooks he has written and receive royalties or other financial benefits from the students' purchase of the textbooks provided he first receives a written determination from his appointing authority pursuant to G.L. c. 268A, § 6.

EC-COI-04-3 - A housing authority employee who has responsibility for administering only the rental programs in the housing authority may qualify for the G. L. c. 268A, § 20(g) exemption in order to purchase a housing unit under the housing authority's home ownership programs.

EC-COI-04-4 - Otherwise qualified municipal employees may participate in a senior citizen property tax work-off abatement program established pursuant to [by] G.L. .c. 59, § 5K as long as they are able to secure an exemption to § 20 of G.L. c. 268A. Every participant in an abatement program will be considered a municipal employee for the purposes of G.L. c. 268A during the time they participate in the abatement program and must comply with the restrictions of G.L. c. 268A. Abatement program participants are eligible to be designated as special municipal employees.

CONFLICT OF INTEREST OPINION
EC-COI-04-1

QUESTION

May the Dukes County Commission appoint one of its members to the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority ("the Authority") board of directors where section 15A of the conflict of interest law, G.L. c. 268A, provides that a county commissioner is not eligible for appointment to any position under the supervision of the county commission?

ANSWER

Yes, the Dukes County Commission may so appoint one of its members. As the County Commissioners' role is limited to appointing someone to and for cause removing that person from the position, we conclude that the Authority board of directors position is not "under the supervision" of the commissioners.

FACTS

You are a Dukes County Commissioner. The commissioners are elected and, although authorized a salary by statute[1/] , have voted to forgo any compensation. The commissioners appoint and can remove for cause one of the members of the Authority's board of directors.[2/] The commissioners have no other power over their appointee or over the Authority.

The Authority is a body corporate and a public instrumentality.[3/] It consists of five persons to be appointed as follows: one resident of the town of Nantucket by the selectmen thereof; one resident of the county of Dukes County by the county commissioners thereof[4/]; one resident of the town of Falmouth by the selectmen thereof; and one resident of the town of Barnstable by the town council thereof; and one resident of the city of New Bedford by the mayor thereof with the approval of the city council. Members serve without compensation.[5/]

The Authority's mandate is to operate a ferry, and in that connection, to issue bonds. Each year the Authority must report to the Governor and to the General Court.[6/] The state auditor will audit the Authority yearly.[7/] *Id.* There is no requirement that the Authority make any reports to the County Commissioners. If the Authority has a year-end deficiency, it must report that to the state treasurer. The state then assesses that deficiency on the Towns of Falmouth, New Bedford and Nantucket and on Dukes County.[8/]

We have previously determined that the Authority is a state agency for conflict of interest law purposes.[9/]

DISCUSSION

Section 15A of G.L. c. 268A provides :

> No member of a county commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.

The phrase "under the supervision of" is not defined in G.L. c. 268A nor does it appear among the terms and phrases defined in G.L. c. 4. We therefore look to "the common and approved usage of the language."[10/] We apply common experience and common sense in interpreting such words as they appear in the conflict of interest law.[11/]

"Supervision" is "the act of managing, directing or overseeing persons or projects "[12/] or "[t]he act, process or occupation of supervising: direction, inspection, and critical evaluation: oversight."[13/] Further, "supervise" means "To coordinate, direct, and inspect continuously and at first hand the accomplishment of; oversee with the powers of direction and decision the implementation of one's own and another's intentions."[14/]

The Supreme Judicial Court has defined "supervision" as follows: "'Supervision' is the act of one who supervises and to supervise is to oversee, to have oversight of, to superintend the execution of or performance of (a thing), for the movements or work of (a person); to inspect with authority; to inspect and direct the work of others."[15/] By virtue of its plain dictionary meaning and judicial interpretations "supervision" appears to require a degree of ongoing oversight and direction that is not present in this case. The Commission's own precedents are consistent with this position.

In *EC-COI-92-30* the issue was whether for purposes of G.L. c. 268A, § 21A (the municipal counterpart to §15A) the city clerk was "under the supervision" of the city council such that a councilor could not be appointed city clerk without his first resigning and waiting 30 days. The city charter made clear that the city clerk acted as the city council's clerk and was to perform such duties as are assigned by city council. As noted in the opinion, "The relationship … includes detailed direction and oversight of activities amounting to an agency relationship, and at least here, the power to discharge." Given those oversight responsibilities, the Commission concluded that the city clerk position was "under the supervision" of the council.

In *EC-COI-84-147* a state college had incorporated a holding company to assist with certain college functions. The state college's board of trustees wanted to appoint two of its own members to the holding company's board of directors. The Commission found that the non-profit holding company's activities were not subject to the direct management and regulation by the college's board and therefore, § 8A (the state counterpart to §15A) did not restrict the board from appointing its own members to the holding company board. The Commission noted in that opinion:

> The threshold for finding "supervision" for Section 8A purposes is higher than for finding the factor of "exercisable government control" in establishing jurisdiction under Chapter 268A. The fact that company board members are selected by, and serve at the pleasure of the University Board establishes a sufficient nexus between the University and the company to bring the latter under the umbrella of the term state agency within the meaning of Chapter 268A. … That selection power does not, however, constitute "supervision" under Section 8A.

EC-COI-90-3 applied *84-147's* analysis to a similar situation where a college's trustees appointed two members of a college's fund-raising foundation's board of directors. Again because there was no direct management or control of these positions by the trustees, the Commission concluded they were not "under the supervision" of the trustees for §8A purposes.[16/]

It might be argued that implicit in the power to remove is a responsibility to perform a certain minimal degree of ongoing assessment of job performance that could be construed, in effect, as "supervision." We disagree. While the enabling statutes of various state authorities can be cited as offering examples of the appointing person also having the power to remove, usually for cause,[17/] there is no implication that the appointing person has the power to " coordinate, direct, and inspect continuously and at first hand" the authority's activities. Indeed that very point appears to have been addressed in *EC-COI-84-147*.

We note that under G.L. c. 159 App. §1-13 the Authority reports annually to the Governor and the General Court and its books are annually audited by the state auditor. There is no reporting requirement to the county commissioners. Also G.L. c. 159 App. §1-14 creates a finance advisory board, which has the power to review the Authority's annual budget. The county commissioners have no such power.[18/]

In sum, where the County Commissioners' role is limited to the appointment and potential removal of one Authority board member, and where they do not otherwise direct, oversee or inspect the Authority's work, we conclude that the Authority's board of directors position is not "under the supervision" of the commissioners. Therefore, the Dukes County Commissioners may appoint one of their own members to the Authority's board of directors. [19/]

DATE AUTHORIZED: February 19, 2004

[1/] G.L. c. 34, §5.

[2/] G.L. c. 159 App. § 1-3.

[3/] G.L. c. 159 App. § 1-3.

[4/] The Authority's enabling legislation does not require that a Dukes County commissioner serve on the Authority's board.

[5/] G.L. c. 159 App § 1-3.

[6/] G.L. c. 159 App § 1-13.

[7/] *Id*.

[8/] G.L. c. 159 App § 1-9.

[9/] *EC-COI-89-29; 86-23.*

[10/] G.L. c. 4, § 6 (Third). *See McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

[11/] *EC-COI-98-02.*

[12/] *Black's Law Dictionary* (7th Ed. 1999).

[13/] *Webster's Third New International Dictionary* (1993).

[14/] *Id*.

[15/] *Fluet v. McCabe*, 299 Mass. 173, 179 (1938). In *Fluet* the Court ruled that even though the city council had, by ordinance, "full supervision" for repair of public buildings, a department head could contractually obligate the city for certain building repairs. *See also Department of Community Affairs v. Massachusetts State College Building Authority*, 378 Mass. 418,430 (1979). The Court there also cited to *Webster's New Int'l Dictionary* 2533 (2nd Ed. 1959).

[16/] *See also EC-COI-84-25* (executive director position of foundation not an "office or position under the supervision of the … Board" because the "Foundation is independent from the Board with respect to its finances, operational control, and organization." Id. at p. 2.)

[17/] *See, e.g.* G L. c. 91 App. §1-2 (governor appoints and removes members of Massachusetts Port Authority).

[18/] Under G.L.c. 159, § 1-9 the County Commissioners are required to collect from the county's towns any Authority year-end deficiency paid by the state and assessed on the county by the state. The County Commissioners, however, have no discretion in this regard to deal with the Authority. They simply act as a collection agent for the state.

[19/] That person would be subject to a number of conflict of interest law issues that would arise from his dual status as a state and county

employee. See, e.g., G.L. c. 268A, §§ 4, 6, 11 and 23. Because those issues are not material to the question presented in your opinion request, and because they do not raise any novel concerns that would warrant a formal opinion, we do not address them in this opinion.

CONFLICT OF INTEREST OPINION EC-COI-04-2

QUESTION

May a state college professor assign to his students textbooks he has written and receive royalties or other financial benefits from the students' purchase of the textbooks?[1/]

ANSWER

Yes, provided he first receives a written determination from his appointing authority pursuant to G.L. c. 268A, § 6 allowing him to assign his own textbooks to his students.

FACTS

You are a professor at a state college and a state employee. The vice-president for academic affairs/ provost appoints you to your position.

You have written certain textbooks that you wish to assign students to use in your college course. These textbooks have been both commercially published and self-published. You would either sell the textbooks to your students directly or have your students order the textbooks through the college bookstore.

A private management company runs the college bookstore under a contract with the college. The college bookstore is required to stock all required and recommended textbooks for each course offered at the college. You provide the name of the book(s) selected for your course to the bookstore, which orders the book(s) directly from the publisher. On your commercially published books, you are paid a royalty by the publisher for each sale of your book per your contract with the publisher. The bookstore returns all unsold books to the publisher.

The college administration does not participate in the decision as to what textbook should be used for a course; rather, under the collective bargaining agreement, the professor has the freedom to choose what materials are used for his class.

DISCUSSION

As a professor in the state college system, you are a special state employee.[2/] Section 6 of c. 268A, in part, prohibits a state employee, including a special state employee, absent a disclosure and appointing authority determination, from participating[3/] in any particular matter[4/] in which he or any business organization in which he is serving as an officer, director, trustee, partner or employee, has, to his knowledge, a financial interest. As the Commission has recognized, this section "embodies what has been described as "the most obvious of all conflict-of-interest principles—namely, that a public official does not act in his official capacity with respect to matters in which he has a private stake."[5/]

Section 6 encompasses any financial interest without regard to the size of said interest or whether the financial interest is positive or negative.[6/] The financial interest, however, must be direct and immediate or reasonably foreseeable.[7/] Financial interests that are remote, speculative or not sufficiently identifiable do not raise an issue under § 6.[8/]

The choice of the textbooks to be used in one's classes is a particular matter. Obviously, when you decide what books to use, you personally and substantially participate in that particular matter. Further, when you decide to assign textbooks you have written you know that you have a reasonably foreseeable financial interest in your decision as you will either receive royalties from the sale or be paid directly by your students. The Commission has previously held that a public school teacher would have violated § 19 (the municipal counterpart of § 6) had she participated in the school department's selection of a textbook she had written where she would receive royalties from the sales.[9/] Therefore, you may not, as a state college professor, assign textbooks you have written to your students unless you first receive a written determination from your appointing authority as discussed below.

Section 6 provides that: "Any state employee whose duties would otherwise require him to participate in a particular matter in which he has a financial interest shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest. The appointing official shall thereupon either

(1) assign the particular matter to another employee, or
(2) assume responsibility for the particular matter, or
(3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in

the particular matter."[10/]

The Commission has advised public officials that:

> the requirement that the disclosure and authorization be in writing serves at least two purposes. First, it establishes a record of both the disclosure and subsequent determination of the appointing authority, a record that, among other things, protects the interest of the [public] employee if allegations of impropriety should arise. Second, it forces both the [public] employee and the appointing authority to consider carefully the nature of the conflict of interest and the options available for dealing with that conflict....These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure-particularly that the determination be in writing . . .are designed to prevent an appointing authority from making an uniformed, ill-advised or badly motivated decision.[11/]

In order for you to assign textbooks that you have written and from whose sale you will financially benefit, you must first fully disclose and receive a written determination from your appointing authority (the vice-president for academic affairs/provost) consistent with the statutory language of § 6 indicating that you may participate because your financial interest in the textbook selection decision is not so substantial as to affect the integrity of your service to the Commonwealth. Your disclosure must include a description of the decision that you are going to make concerning your textbooks and the amount of the royalties you will receive from the proposed sales or, for self-published works, the price you will charge your students to purchase the textbook(s). The conflict of interest law grants the appointing authority the discretion to review the disclosure and to give a written determination. Copies of this disclosure and the appointing authority's written determination should be forwarded to the Commission.

We note that public colleges from other jurisdictions have been faced with similar situations involving the sale of required course materials to students. While educational institutions wish to encourage the authorship of instructional materials, conflict of interest issues arise particularly where teachers financially profit from the required sale of such materials to their students. To avoid even the appearance that a teacher is exploiting his students for personal financial gain, some public institutions have implemented various protocols to address potential conflicts, misuse of office and impairment of independent judgment. For example, the University of Connecticut established a review system whereby a board of independent individuals (typically faculty members), not subordinate to the teacher, evaluate, in advance, a teacher's request to utilize his own materials in his class. When the board completes the review, agrees with the recommended educational materials, and makes a determination report filed with the chancellor's office, then the teacher may retain any profits made from the sale of materials he authored. If the teacher directs any financial gain to a student scholarship fund, no review is required. The Commission is available to assist should your state college be interested in adopting such a conflict of interest protocol.

In closing, we recognize that the state college professors' collective bargaining agreement gives professors freedom to select the materials they will use in their classes. We emphasize that G.L. c. 268A, § 6 does not prohibit a state college professor from selecting his own or any other textbook. What § 6 requires, prior to such selection, when one's financial interest will be affected by the decision, is a full disclosure and a review by one's appointing authority in order to protect the integrity of government decision-making.[12/]

DATE AUTHORIZED: March 31, 2004

[1/] Although this opinion focuses on textbooks, the same principles apply to other instructional materials selected by a state college professor to be used as part of a course where the professor financially benefits from the sale to the students. Such materials would include but not be limited to copied resources and computer discs.

[2/] In 1983, the Board of Higher Education certified that professors in the state college system were, by the terms and conditions of their employment, permitted personal or private employment during normal working hours, thus making state college professors special state employees. G.L. c. 268A, § 1(o)(2)(a). Under this portion of § 1, "[s]pecial state employee", a state employee: . . . who is not an elected official and occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment . . ."

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

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

[5/]*In re Craven*, 1980 SEC 17, 21 (citing W.G. Buss, "The Massachusetts Conflict-of-Interest Statute: An Analysis," 45 B.U.L. Rev. 299, 353 (1965).

[6/]See, e.g., EC-COI-91-14.

[7/]See, e.g., EC-COI-89-19; 87-16.

[8/]See, e.g., EC-COI-92-12; 90-14; 89-33; 89-5.

[9/]*EC-COI-88-10.*

[10/]"Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the Commission for a period of six years." G.L. c. 268A, § 6.

[11/]*In re Ling,* 1990 SEC 456 at 459. See EC-COI-92-3.

[12/]While G.L. c. 268A, § 7 prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency, such as the contract between the private bookstore and the state college, writing and research are clearly contemplated as part of the state college professor's primary employment arrangement with the college. As stated in the collective bargaining agreement, "Academic freedom is the right of scholars in institutions of higher education freely to study, discuss, investigate, teach, exhibit, and publish." Therefore, any royalties received will not be considered an additional financial interest, other than one's financial interest in one's employment arrangement. *EC-COI-88-10* (municipal school teacher may receive royalties from sale of books to his school district). As the Commission indicated in *EC-COI-88-10*:

> Our willingness to defer to the School Committee rests on the fact that the preparation of written materials for educational purposes is an endeavor which is traditionally undertaken by teachers and which often is relevant to the evaluation of teacher performance. Thus, while under normal circumstances receipt of royalties could not reasonably be characterized as additional compensation contemplated by the employment contract, this important component of a teacher's professional activity is deserving, in the Commission's view, of particularly consideration in interpreting the terms of the collective bargaining agreement and the requirements of G.L. c. 268A, § 20 (the municipal counterpart of § 7). *EC-COI-88-10* at n.2.

CONFLICT OF INTEREST OPINION
EC-COI-04-3

QUESTION

May you, an employee of a housing authority who has responsibility for administering housing authority rental programs, have a financial interest in a contract to purchase a housing unit from the housing authority without violating G. L. c. 268A, § 20?

ANSWER

Yes. Section 20 of G. L. c. 268A does not prohibit you from having this financial interest in a contract with your own municipal agency because you qualify for the exemption under § 20(g) as a result of the limited nature of your responsibilities for the Authority.

FACTS

You are a full-time employee of a Housing Authority (Authority), where you have been working for approximately seven years. You [work under the supervision of the Authority's Housing Opportunities Coordinator and] are responsible for receiving and processing [all] applications for public rental housing. All of your Authority duties involve rental housing.

You work with families and/or individuals who are seeking public rental housing. You select them from the Authority's waiting list, review their applications, send correspondence to them about housing units, and review financial information to ensure that it is current and that they meet program eligibility requirements. In addition, you interview people on the waiting list and show them housing units. Subsequently, you prepare the lease and calculate the rent.

You also perform similar tasks with respect to applicants for the Section 8 Voucher Program (Section 8), except that you do not prepare the lease because Section 8 subsidizes private rental housing.

Finally, you review applications for people wanting to get on a waiting list for rental housing. You determine where the family or individual should be placed on the appropriate waiting list. If an applicant does not qualify for public rental housing, then you would notify the applicant and hold a conference, if the applicant so desired, to discuss eligibility.

You entered into a Purchase and Sale Agreement with the Authority (Contract) to purchase land and improvements to be developed as a housing unit (Unit).

By way of background, the Authority received a $15 million grant to demolish and develop a site in the City. The site is part of a larger undertaking consisting of the redevelopment of the site and the surrounding neighborhood (collectively, the "Project"). As part of the Project, the Authority is constructing homeownership units on the site, rental units on the site, additional rental units on scattered sites within the neighborhood, and additional homeownership units on scattered locations in the neighborhood. The Project targets low and moderate income residents.

The Unit is part of the homeownership units that the Authority is developing on the site, through a contract with a developer. A multitude of funding sources is being used to develop these units and make them affordable to first-time homebuyers. The funding sources are: the United States Department of Housing and Urban Development through HOPE (Homeownership and

Opportunity for People Everywhere) VI funds; the Commonwealth's HOME[1] monies and the Affordable Housing Trust Fund through the Department of Housing and Community Development (DHCD); and Affordable Housing Program Funds made available through the Federal Home Loan Bank.

The Contract includes the following entitled documents, "City Housing Authority Rider (Units)" and a "Deed Rider (Single-Family)(Resale/Recapture) (Master Rider for DHCD, HHA and AHT)" (collectively, Riders). The Riders will be part of the deed from the Authority to you. The purchase price is $108,000.

The Riders include, among other restrictions, a resale price restriction, a right of first refusal for the Authority to purchase the property, and requirements to repay the Authority certain amounts of money if the property is sold or transferred within ten years.[2] In addition, the deed will be subject to "easements, restrictions and reservations of record, including, without limitation: (i) that certain Amended and Restated Master Declaration of Covenants, Conditions and Restrictions, executed by [the Authority] as Declarant," recorded with the Registry of Deeds. The Contract also contains a non-recourse provision, limiting the Authority's liability, that expressly survives termination of the Contract and remains in full force and effect after delivery of the deed to you.

With respect to the Unit, the Master Rider includes the following background in its recitals. DHCD provided financing to the Authority in connection with the acquisition of the property and the construction of the dwelling and to reduce the purchase price by that amount. The Authority provided financial assistance as part of the Authority's acquisition of the underlying real estate and construction of the dwelling. Finally, DHCD, under the Affordable Housing Trust Fund Statute, G. L. c. 121D, (administered by the Massachusetts Housing Finance Agency), has provided financing to the Authority for acquisition and construction, also to reduce the unit's purchase price in the same amount. These amounts are referred to collectively as the "Assistance Amount" and this Rider states that as a result of the Assistance Amount, the Authority is conveying the Unit to you at a consideration that may be less than the fair market value.[3]

In order to be eligible to enter into the Contract, you completed the "Pre Application First Time Homebuyer Program Housing Authority" which required you to provide a typical array of credit-related documents, such as bank account statements and payroll stubs. You also completed the Authority's "Borrowers Assistance Program Application," which required you to provide similar documentation including federal income tax returns and a credit report. (We will refer collectively to both of these programs as the "Programs"). You state that you will receive funds for closing costs under the Borrowers Assistance Program (BAP).

The Authority provided a letter to the City's Office for Community Development (OCD) dated November 7, 2003, stating that you had applied for assistance under the BAP. The letter states:

> Upon review of the BAP application it was found, that except for being employed by the Authority, that you would be eligible to receive assistance under the program. Based on this fact the Authority is requesting an exemption for this application based on the conflict of interest rule. Enclosed with this letter please find a copy of the Notice of Disclosure that has been posted at the office of the Authority . . . . I am requesting that this copy be posted at an appropriate place in your offices or City Hall.

According to the Notice of Disclosure, you applied for down payment and closing cost assistance under the BAP with the Authority. The Notice of Disclosure also states that the Authority administers the BAP under contract with the OCD (BAP Contract). The OCD administers HOME funds from the United States Department of Housing and Urban Development and BAP is an activity using HOME funds. This Disclosure also states that if you were not an Authority employee, you would be entitled, without disclosure, to apply for and receive BAP funds.

The City Solicitor issued the following opinion (Opinion) on your behalf:

> The [City's] Office of Community Development (OCD) has requested an opinion from this office relative to allowing an employee to take advantage of the Buyer Assistance Program (BAP).[4] Your role within the office does not have any involvement or authority in the selection process or in the granting of CDBG funds [Community Development Block Grant].[5] In my opinion there would be no conflict of interest in allowing you to participate in the buyer assistance program.
>
> OCD has stated that were you not an employee you would be an eligible candidate for this program.
>
> Finally, as the sale of any property using BAP funds will be publicly disclosed at a public meeting, your situation falls within the exceptions to the Conflict of Interest rules set forth in 24 CFR 570.611, and does not violate any state or local laws in doing so.

The Opinion does not mention G. L. c. 268A, § 20 and does not indicate whether the City Solicitor considered the application of § 20 to your circumstances.[6]

The City Solicitor did not forward the Opinion to the Ethics Commission for review.

The Code of Federal Regulations, 24 CFR 570.611 (Regulation) cited in the Opinion, imposes conflict of interest restrictions on employees of agencies, such as the Authority, that receive Community Development Block Grants (CDBG) under the federal Department of Housing and Urban Development (HUD). The Regulation states that no such employees who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part, or who are in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefits from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to the CDBG-assisted activity, or with respect to the proceeds of the CDBG-assisted activity . . . during their tenure or for one year thereafter.[7]

The Regulation, however, also contains a provision by which HUD may grant an exception on a "case-by-case basis" if several requirements are met. There are two threshold requirements. The first is a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made.[8] The Notice of Disclosure the Authority posted was intended to comply with that requirement. The second threshold requirement is HUD's receipt of "an opinion of the recipient's attorney that the interest for which the exception is sought would not violate State or local law."[9] The Regulation also lists several factors to be considered when granting an exception, including "whether the affected person has withdrawn from his or her functions or responsibilities, or the decision making process with respect to the specific assisted activity in question."[10]

It is our understanding that through your work on the Authority you have no role in the Programs or in any of the Authority's activities related to the sale of the homeownership units on the site. As described above, you are responsible for administering rental programs for the Authority and are not involved in the Authority's home ownership programs. You do not, as a Tenant Services Advisor, have any supervisory role over personnel who administer the Authority's homeownership programs.

You contacted the Ethics Commission. The Legal Division of the Ethics Commission issued an informal advisory letter informing you that G. L. c. 268A, § 20 would prohibit you from closing on the purchase of the unit because you did not qualify for any of the § 20 exemptions. As a result, you have asked for a formal opinion from the Commission.

DISCUSSION

For purposes of the conflict of interest law, you are a municipal employee.[11] Under G. L. c. 268A, § 20, a municipal employee may not have "a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city . . . , in which the city . . . is an interested party of which he has knowledge or has reason to know."[12] Thus, the law prohibits a municipal employee from having, in addition to her municipal employee position, a financial interest in another contract with her municipality, unless she qualifies for an exemption.[13] The Authority is a municipal agency of the City for purposes of the conflict of interest law.[14] The Contract is a contract made by the Authority. As the purchaser of the Unit under the Contract, you have a financial interest in a contract made by a municipal agency of the City, in addition to your position as an Authority employee. Moreover, if you close on the purchase of the Unit,[15] you will continue to have a financial interest in a contract with the Authority as a result of the contractual obligations under the Riders. The Unit deed and its accompanying Riders form a contract that binds you as a Unit owner for at least 30 years.[16] In addition, the BAP is administered under a contract between the Authority and the City's OCD (BAP Contract). Because funds pursuant to that contract will offset your closing costs, you also have a financial interest in the BAP Contract. However, as discussed further below, the BAP Contract is part of the Authority's housing subsidy programs,[17] just as the Contract you entered into to purchase the Unit from the Authority is part of a housing subsidy program.

As we have often reminded municipal employees, "this section is intended to prevent a municipal employee from influencing the awarding of contracts by any municipal agency in a way which might be beneficial to the employee" and it is intended "to avoid the perception" of having an "inside track."[18] These concerns are amplified when a municipal employee enters into an additional contract with her own municipal agency.

There is only one potentially applicable exemption to consider. Under G. L. c. 268A, § 20(g), the general § 20 prohibition "shall not apply . . . to a municipal employee who has applied in the usual course and is otherwise eligible for a housing subsidy program administered by a local housing authority, *unless* the employee is employed by the local housing authority in a capacity in which he has responsibility for the administration of such subsidy programs."[19]

"Housing subsidy program"

The first issue is whether the Programs are "housing subsidy program[s]." The phrase "housing subsidy program," is not defined in G. L. c. 268A. Accordingly, we look to commonly accepted meanings.[20]

The word "subsidy" is commonly defined as "a grant of funds or property from a government (as of the state or a municipal corporation) to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public."[21] For example, under G. L. c. 40B, "low or moderate income housing" is defined as "any housing *subsidized* by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute."[22]

The statute enumerating the powers of a local housing authority, G. L. c. 121B, § 26, uses "housing subsidy program" in § 26(m), which empowers a housing authority to develop low and moderate income housing "undertaken or assisted pursuant to federal legislation" and to finance loans for construction or rehabilitation of such housing.[23]

Further, the Massachusetts Housing Partnership Fund was created to provide programs to: produce housing for low and moderate income households; "broaden opportunities for homeownership for low and moderate income persons and families;" and reclaim abandoned property for housing use.[24] These programs may include contracts, grants, loans for writing down the cost of homeownership, or front-end costs associated with reclaiming abandoned property.[25]

Here, funds from the Authority, DHCD, the Affordable Housing Trust Fund, and CDBG subsidize the Programs by offsetting construction and acquisition costs, lowering the price at which your unit would otherwise be sold in the City housing market, and providing funds (under the BAP Contract) for your closing costs. Considering the commonly understood meaning of "housing subsidy program" as that phrase appears in the various contexts described above, we conclude that the Legislature intended the phrase to include not only rental subsidies but also other housing subsidy programs such as programs involving home ownership. The Programs are, therefore, housing subsidy programs contemplated by the § 20(g) exemption.[26] [27]

"Applied and otherwise eligible"

The next issue is whether you have "applied in the usual course and [are] otherwise eligible for a housing subsidy program administered by" the Authority. Based on the information you have provided, we conclude that you have "applied in the usual course and [are] otherwise eligible" for the Program.[28]

"Responsibility for the administration of such subsidy programs"

The decisive issue is whether you are "employed by the local housing authority in a capacity in which [you have] responsibility for the administration of such subsidy programs." Thus, we must consider whether the phrase "such subsidy programs" in § 20(g) refers to the words "a housing subsidy program administered by a local housing authority" or to that phrase plus the immediately preceding phrase "who has applied in the usual course and is otherwise eligible for." Thus, we ask whether the Legislature meant to disqualify a housing authority employee who has responsibility for administering *any* housing subsidy program or only an employee who has responsibility for administering the specific housing subsidy program to which he has "applied in the usual course and is otherwise eligible."

We begin this part of our analysis by considering some rules of statutory construction. "[T]he general rule of statutory as well as grammatical construction [is] that a modifying clause refers to the last antecedent unless there is something in the subject matter or in the expression of the dominant purpose that requires a different interpretation. But this is only a rule of construction to ascertain the legislative intent, and is not to be adopted to thwart such an intent if it clearly appears from an examination of the entire statute."[29] "Such" means "of this or that kind," "that or those; having just been mentioned."[30] For the following reasons, we conclude that the phrase "such subsidy programs" refers back to the subsidy programs for which you are eligible and to which you applied.

A plain reading of the language of the exemption leads one to conclude that the Legislature intended to treat housing authority employees who have responsibility for administering housing subsidy programs differently from, not only other municipal employees of the same municipality, but also other employees within the same housing authority. The Legislature intended to allow municipal employees, except those involved in management with the greatest inside power and influence, to have access to housing programs. This exception evidences a weighing of conflict of interest concerns against policies that support affordable housing. By using the word "such" the Legislature narrowed the focus. If it had intended to prohibit someone who had no responsibility for the administration of the very program to which she had applied, and was otherwise eligible, it would have been clearer to use the word "any." Thus, the last clause would have stated, "he has responsibility for the administration of *any* subsidy programs."

In *EC-COI-92-31*, the Commission concluded, after analyzing language in § 20(h) similar to language in § 20(g),[31] that a housing authority's "leased housing inspector" did not have responsibility for administering the leased housing subsidy program. As an inspector, he inspected apartments in the leased housing rental assistance program on an annual basis to ensure building and sanitary code compliance. The Commission stated:

We recognize that you do in fact play a role in the subsidy program. Nevertheless, we believe that the exemption was not designed to exclude all employees who have very limited participation in the authority's subsidy programs. Rather, we conclude that a housing authority employee would have to be in a position to make or influence determinations regarding an individual's receipt of a rental subsidy in order to have responsibility for the program.

The Commission also commented in *EC-COI-92-31* that in 1985 it proposed a bill that "set forth an exemption allowing a municipal employee to receive housing assistance payments on behalf of an eligible tenant, provided that the municipal employee did not participate in or have official responsibility for the activities of the local housing authority. This exemption, which would have effectively barred most housing authority employees from renting property to subsidy recipients, was not enacted by the Legislature." Instead, in 1987, the Legislature enacted § 20(h). This "appears to expand the availability of the exemption because only those housing authority employees who have 'responsibility for the administration' of *the* subsidy program are now restricted from receiving subsidized rental payments."[32/] Thus, the Commission concluded in *EC-COI-92-31* that there are "only . . . relatively narrow circumstances" in which the exemption is not applicable.[33/]

Considering that background, there is an implication that the Commission, at that time, believed that § 20(h) would be available to any municipal employee except those housing authority employees who administer the very program to which they applied. Thus the phrase "such subsidy programs" in § 20(h) was interpreted to refer not to *all* subsidy programs but only to the subsidy programs that the employee administers.[34/]

On these particular facts, there is a distinction between the housing subsidy programs you administer and the programs to which you applied for your personal benefit. There is a clear distinction between homeownership and leasing. Your work in administering the rental subsidies is unrelated to the homeownership subsidy programs to which you applied.

We also find support from the federal Regulation, which addresses similar conflict of interest issues under federal law and provides exceptions to the general prohibition. One of the factors to be considered for an exception under the Regulation is "whether the . . . person has withdrawn from his or her functions or responsibilities, or the decision making process with respect to the *specific activity* in question."[35/] In your particular circumstances, you are not part of the decision-making process for any aspects of the Authority's homeownership programs.

Accordingly, we interpret the phrase "such subsidy programs" in § 20(g) to refer to the entire prior phrase: "to a municipal employee who has applied in the usual course and is otherwise eligible for a housing subsidy program administered by a local housing authority," rather than to all housing subsidy programs administered in different parts of the authority.

CONCLUSION

Applying our interpretation to your circumstances, we conclude that you do not have responsibility for the administration of the homeownership housing subsidy programs to which you have applied and are otherwise eligible. Your responsibility includes only rental housing subsidy programs.

Under G. L. c. 268A, § 20(g), you are not prohibited from having a financial interest in the Contract and the BAP Contract. As a result, you may close on the purchase of Unit, and own and occupy the unit.[36/]

DATE AUTHORIZED: May 12, 2004

[1/] "HOME" is not an acronym. "HOME" is defined in the DHCD 2003 Program Book as a "federal low income housing production, rehabilitation, rental assistance and homeownership program."

[2/] The Rider for the Units requires: (1) the maximum resale price shall be the lesser of the Grantee's (your) purchase price as adjusted for inflation based on the change in the Consumer Price Index during your ownership or the fair market value of the property; (2) you shall maintain the property as your primary residence and shall not lease or abandon the property. During your ownership, you must certify to the Authority in writing on an annual basis that you have maintained the property as your primary residence; (3) except for liens incurred as result of your financing the purchase, you shall not allow any mortgages or other liens without the Authority's prior written consent; (4) you shall provide the Authority a right of first refusal to purchase the property if you intend to sell or transfer it. If you sell or transfer the property within a ten (10) year period you must : (a) pay the Authority the lesser of $71,907.00 (which is the difference between the development cost of the property and the original sale price to you) reduced at a rate of 10% per year **or** 50% of the Net Proceeds. "Net Proceeds is defined as the resale price minus: (1) the amount needed to discharge your acquisition mortgage and any other liens; (2) your down payment for the property; (3) the amount of your acquisition and resale closing costs, including commissions; (4) the amount of principal payments made by you on your primary mortgage on the property; and (5) the cost of any documented capital improvements made by you to the property and approved by the Authority at the time of resale.

[3/] This Rider states, "In consideration of the granting of such financial assistance, DHCD, [Authority] and AHTF have required that Grantor impose a deed restriction on Grantee and any successor owner of the Property . . . providing for recapture of some or all of the financial subsidy and resale to an eligible family in certain circumstances." This Rider also includes a Right of Refusal/Recapture provision that obligates you to notify DHCD, [Authority], and AHTF in writing if you wish to sell the property at any time within thirty (30) years.

[4] It is our understanding that the phrase "Buyer Assistance Program" was meant to be "Borrowers Assistance Program," as the Authority had described it above.

[5] It is our understanding that the funds you will receive under the BAP are derived from federal CDBG funds.

[6] In addition, Fleet Bank pre-approved you "for the purchase of a single family home with a sales price of $110,000." You received a final mortgage loan commitment from Fleet. You state that you met all the income requirements the Authority has imposed and complied with the same application and qualifications processes any member of the public must follow. This loan from Fleet is not part of any Authority program.

[7] 24 CFR 570.611(b).

[8] 24 CFR 570.611(d)(1)(i).

[9] 24 CFR 570.611(d)(1)(ii).

[10] 24 CFR 570.611(d)(1)(iv).

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

[12] G. L. c. 268A, § 20(a).

[13] *See e.g., EC-COI-83-83* (this section contemplates an additional contract over and above the employee's original contract of employment).

[14] G. L. c. 121B, § 7 ("For the purposes of chapter two hundred and sixty-eight A . . . , each housing and redevelopment authority shall be considered a municipal agency . . . ."); "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).

[15] *See e.g., Commonwealth v. Nugent* , ___ Mass. App. Ct. ___ (No. 02-P-1095, April 30, 2004) (defendant conceded at trial and on appeal that the purchase of a parcel from a municipality created a financial interest in a contract for purposes of G. L. c. 268A, § 20).

[16] *See* note 3 *supra.*

[17] *See e.g., EC-COI-95-9*. In addition, the grant to you of funds from the BAP Contract for closing costs is also a contract, which is part of the Programs.

[18] *EC-COI-99-2; See also Quinn v. State Ethics Commission,* 401 Mass. 210, 214, 221 (1987).

[19] Emphasis added.

[20] *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 392 Mass. 811, 813 (1984); *EC-COI-03-2.*

[21] *Webster's Third New International Dictionary (1993).*

[22] G. L. c. 40B, § 20 (emphasis added). *See also* 760 CMR 20.05 ("HOP Developments shall include a mix of HOP Units and Market Units in a manner that is appropriate to ensure the economic and programmatic feasibility of the particular project. However, at least 25% of the total number of units available shall be HOP Units (30% if the development involves a comprehensive permit). In order to ensure the long term affordability of HOP units, their re-sale shall be governed by Re-sale Controls which shall usually be contained in the deed or a rider to the deed of the HOP Unit. All HOP Units shall be counted as **subsidized** for the purpose of demonstrating compliance with the requirements of M.G.L. c. 40B.") (emphasis added).

[23] G. L. c. 121B, § 26, as amended by St. 1984, c. 233, § 36.

[24] St. 1985, c. 405, § 35.

[25] Id. Pursuant to St. 1985, c. 405, § 35, implementing regulations, (760 CMR 20.00 et. seq. for the Homeownership Opportunities Program (HOP)), were promulgated. "The primary goal of HOP is to encourage communities to identify their housing needs and take specific steps to develop the types of housing that are appropriate to meet those needs. HOP, therefore, has been designed to give priority consideration to applications that are submitted as collaborative efforts between communities and proposed developers." 760 CMR 20.04.

[26] *See e.g., Green v. Wyman-Gordon, Co.*, 422 Mass. 551, 554 (1996) (statutes should be construed to be consistent with one another, assuming that the legislature was aware of existing statutes when enacting subsequent ones).

[27] If "housing subsidy program" did not include the Programs, then you would **not** qualify for § 20(g) and you would be prohibited from continuing to have a financial interest in the Contract.

[28] Nothing that has been made available for our consideration suggests that the Authority deviated from the normal application processes to provide you any unwarranted advantage in qualifying for the Program or that you, as an Authority employee, participated in the process. *See* G. L. c. 268A, §§ 23, 19.

[29] *Selectmen of Topsfield v. State Racing Commission,* 324 Mass. 309, 312 (1949) (citations omitted). "According to those rules of construction a proviso or an exception is also presumed to be confined to the last antecedent." *Young's Court, Inc. v. Outdoor Advertising Board*, 4 Mass. App. Ct. 130, 133 (1976).

[30] *Black's Law Dictionary* (7th ed.); *In re West*, 313 Mass. 146, 149 (1943) (in the phrase, "the employment of any minor, known to be such," the clause "known to be such" modifies the word "minor.")

[31] "to a municipal employee who is the owner of residential rental property and rents such property to a tenant receiving *a rental subsidy administered by a local housing authority*, unless such employee is *employed by such local housing authority in a capacity in which he has responsibility for the administration of such subsidy programs*." G. L. c. 268A, § 20(h).

[32] Emphasis added.

[33] Given that the Legislature considered and rejected the Commission 's proposal in 1985 that ultimately led to the enactment of § 20(h), we may also infer that the Legislature was aware of the Commission's § 20(h) proposal, which would have made the exemption available to fewer municipal employees, when considering the enactment of § 20(g) under St. 1985, c. 415.

[34] By using the plural, the Legislature contemplated that there may be more than one "housing subsidy program" administered by local housing authorities. In your circumstances, there are more than one "program" to which you applied, the BAP and the First Time Homebuyer Program, which support home ownership instead of

leasing. The facts of the Project show that there are more than one housing subsidy program the Authority administers, not only the programs (to which you applied for homeownership) but also pro grams for rental units. We note that housing authorities administer other housing subsidy programs, and, as discussed above, the Legislature was aware of the existence of different types of housing subsidy programs when § 20(g) was enacted. *See e.g., EC-COI-96-4* (Massachusetts Rental Voucher Program, which replaced the "Chapter 707 Program," Section 8 Rental Certificate Program and Rental Voucher Program under federal HUD regulation); *EC-COI-92-35* (Section 8 and Chapter 707 programs); *EC-COI-92-31* (a municipal housing authority's leased housing subsidy program).

[35]/ 24 CFR 570.611(d)(2)(iv) (emphasis added).

[36]/ You must continue to comply with G. L. c. 268A, §§ 19 and 23 if you are ever in a position as an Authority employee to participate in a particular matter, or use your official position, to affect your continuing interests in your Unit through the various contractual provisions to which you are subject as the Unit owner.

CONFLICT OF INTEREST OPINION
EC-COI-04-4

INTRODUCTION

You are the Tax Collector-Treasurer in the Town of Groton ("Town"). The Town has accepted the provisions of General Laws chapter 59, § 5K[1]/ pursuant to which it established a Senior Citizen Property Tax Work-Off Abatement Program ("Abatement Program"). Pursuant to the Abatement Program, an individual over the age of sixty (60) may volunteer to work a number of hours in various Town departments in return for which he will receive an abatement on his real estate tax bill. You supervise the Assistant Tax Collector-Treasurer who is the administrator of the Town's Abatement Program. You have asked whether Town employees may participate in the Abatement Program.

QUESTIONS

1. May Town employees participate in the Abatement Program if they are otherwise qualified?

2. Is an individual who participates in the Abatement Program considered a municipal employee for purposes of the conflict of interest law?

ANSWERS

1. Otherwise qualified Town employees may participate in the Abatement Program as long as they are able to secure an exemption to § 20 of G.L. c. 268A. With limited exceptions, full-time Town employees will be eligible for a § 20(b) exemption. Special municipal employees in Town will be eligible for either the § 20(c) or § 20(d) exemption depending on which Town agency employs them.

2. Every participant in the Abatement Program whether or not they are already a Town employee will be considered a municipal employee for purposes of the conflict of interest law during the time they participate in the Abatement Program. All Abatement Program participants must comply with the restrictions of the conflict of interest law applicable to municipal employees. Finally, Abatement Program participants are eligible to be designated as special municipal employees by their Board of Selectmen, Town Council or City Council.

FACTS

A. The Statute

In G.L. c. 59, § 5K,[2]/ the Legislature enacted a local option statute that allows the board of selectmen, town council or the mayor with the approval of the city council, to establish a program to allow persons over the age of sixty (60) to volunteer to provide services to the municipality in exchange for a reduction in their real estate tax bills. Participants in such programs may earn a maximum reduction of $750 per tax year, based on a rate per hour of service that cannot exceed the Commonwealth's minimum wage.[3]/ The reduction under the program is in addition to any exemption or abatement to which the person is otherwise entitled.[4]/

The municipality is responsible for maintaining a record of each taxpayer participating in the program including, but not limited to, the number of hours of service and the total amount by which the real property tax has been reduced.[5]/ The municipality is also responsible for providing a copy of that record to the assessor to ensure that the actual tax bill reflects the reduced rate as well as to the taxpayer.[6]/ A municipality accepting § 5K shall have the power to create local rules and procedures for implementing § 5K in any way consistent with the intent of that section.[7]/

B. The Town's Abatement Program

At the Town Meeting on October 16, 2000, the Town voted to accept G.L. c. 59, § 5K to allow the Town to establish an Abatement Program with abatements to begin in fiscal year 2002. The Assistant Tax Collector-Treasurer is the administrator of the Abatement Program.

In order to participate in the Town's Abatement Program, volunteers must meet two criteria. First, they must be sixty (60) years of age by July 1st of the fiscal year in which the abatement would be granted. Second, they must own and reside in the domicile to which the abatement will be applied.

The rate of volunteer compensation is $6.75 an hour. The maximum number of hours that may be worked by any volunteer is 74.07 for a total work abatement credit of $500 per year.[8/] The hours must be worked between January 1 and December 1. The Abatement Program is limited to forty (40) people on a first come, first served basis.[9/]

A volunteer must fill out a Work Credit Program Abatement Application ("Application") and submit it to the Assessors Office. The Assessors Office date stamps and logs the Application upon receipt. It then reviews the Application and either approves or rejects it. An Application is rejected only if the individual does not meet the age requirement or does not own and live in the property that is the subject of the real estate tax bill.

The Assessors Office gives the Tax Collector-Treasurer's Office a copy of the Application and approval form. The Tax Collector-Treasurer's Office makes a file for the volunteer and sends out a Volunteer Questionnaire form to be completed and returned. The Volunteer Questionnaire provides the information necessary to match the volunteers with the jobs that best fit their preferences and abilities.

Participating Town Department Heads fill out a Departmental Job Request Form for each task. Based on the information provided by the Department Head and the volunteers, the Assistant Tax Collector-Treasurer tentatively matches volunteers with jobs.[10/] The type of work that a volunteer may do includes the following: covering and shelving books; answering telephones; filing; clerical work; copying; organizing; alphabetizing census forms; parking attendant at the beach; raking; sorting recyclables; grounds cleaning; maintenance; mailing; data entry; repairs; carpentry; and painting.

The Assistant Tax Collector-Treasurer then contacts the Department Head to discuss the prospective match. The Department Heads do not generally interview candidates and are not responsible for matching volunteers, although they may request a different volunteer better suited to their needs. Once the volunteer and the Department have been matched, the Assistant Tax Collector-Treasurer contacts the volunteer with the details about reporting to work.

Time sheets are completed for the hours that are worked by the volunteers. The hours are recorded daily by the volunteer and initialed by the supervisor. Completed time sheets must be signed by the Department Head and the volunteer. Time sheets must be turned into the Tax Collector-Treasurer's office when ten (10) days have been worked or when the job is finished, whichever is sooner.

The Tax Collector-Treasurer's Office keeps a running total of all volunteers and their hours worked. After all time sheets have been recorded, the Tax Collector-Treasurer's Office submits a Work Completion Report to the Assessors Office. The Assessors then process the abatement equivalent to the number of hours worked by $6.75.

DISCUSSION

A. Town Employees Participating in the Abatement Program

Section 20 of G.L. c. 268A, the conflict of interest law, prohibits a municipal employee[11/] from having a "financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party." Any individual participating in the Abatement Program, including a Town employee, has an obvious financial interest under § 20 in their participation because the amount of their tax liability to the Town is reduced based on the number of hours they work. In order to determine whether Town employees may participate in the Abatement Program, it is necessary to determine whether the work-for-tax abatement exchange under the Abatement Program constitutes a "contract" for purposes of § 20.

"A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended."[12/] The term includes any type of arrangement between two or more parties under which one party undertakes certain obligations in consideration of the promises made by the other party.[13/]

The Commission, as well as the courts, "have given the term 'contract' a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value."[14/] The elements of a contract are offer and acceptance, consideration and mutual assent to essential terms.[15/] Consideration is "[t]he cause, motive, price, or impelling influence which induces a . . . party to enter into a contract."[16/] The requirement of consideration is satisfied if there is either a benefit to the promisor or a detriment to the promisee.[17/]

Based on these facts, we conclude that the work-for-tax abatement exchange under the Abatement Program is a contract for purposes of § 20. There is an offer and acceptance. The Town makes an offer to qualified residents to work in return for a reduction in their property tax bills. A resident may accept the offer by submitting an Application and working in the Abatement Program. The element of consideration is also present. In exchange for providing services to a Town department or agency, a participant receives something of value, a reduction in the amount owed on his property tax bill that corresponds to the number of hours worked multiplied by

the hourly rate for such work. As such, there is a benefit to the participant, a reduction in his property tax bill, and a cost to the Town, a reduction in the property tax revenue that it would otherwise receive.

Further, we do not consider the Abatement Program to be the type of government benefit program that we have said does not constitute a contract. In the Commission's prior opinions that reviewed state benefit programs and discussed whether there was a contract for purposes of § 7, the state employee counterpart to § 20, the Commission found that cash grant public assistance program benefits as then existing[18/] that were administered by state or federal government agencies were not contracts.[19/] The Commission relied on the fact that none of the program benefits at issue were supported by consideration and each was made available pursuant to statutorily defined criteria and eligibility guidelines.[20/]

A recipient of the benefit programs reviewed by the Commission received only what they qualified for by statute. In other words, a recipient was not required to work or otherwise provide any bargained-for exchange in order to receive the benefit to which they were entitled. In that situation, there was no consideration and, therefore, no contract. Although the Abatement Program is similar in one way to such programs because it does involve statutorily defined eligibility guidelines, it is markedly different in that it is supported by consideration in the form of work in return for the benefit received. The benefit of the abatement is not available simply to those who qualify, but rather only those who qualify and who actually provide services to the Town. There is also an additional bargained-for exchange because the amount of the reduction in a participant's property tax bill is based on the number of hours that a participant works.

Having determined that the work-for-tax abatement exchange under the Abatement Program is a contract, any qualified Town employee who wants to participate, must secure an exemption to § 20.

1. Exemption Available to Full Time Municipal Employees and Certain Part-Time Municipal Employees

In general, full-time employees of the Town who do not work for the Tax Collector-Treasurer's Office or an agency that regulates the activities of the Tax Collector-Treasurer's Office, may rely upon an exemption under § 20(b) to participate in the Abatement Program provided that they satisfy all of the requirements of that exemption. This exemption is also available to part-time municipal employees whose positions have not been designated as special municipal employee positions.[21/] In each instance, the Town employee must be able to satisfy all of the requirements of the § 20(b) exemption as follows.

As a Town employee, he must not participate[22/] in or have official responsibility[23/] for any of the activities of the contracting agency for the Abatement Program. Based on the facts presented, we conclude that the contracting agency in Town for purposes of the Abatement Program is the Tax Collector-Treasurer's Office.[24/] The Town employee may not be employed by the Tax Collector-Treasurer's Office. In addition, the Town agency for which the employee works must not regulate[25/] the activities of the Tax Collector-Treasurer's Office. The Abatement Program must be publicly advertised.[26/] The Town employee must file a written disclosure with the Town Clerk describing his interest in the Abatement Program.

In addition, because a Town employee participating in the Abatement Program will be providing personal services to a Town department, he must comply with the following additional restrictions. The services for the Abatement Program must be provided outside of his normal working hours as a Town employee. The services may not be required as part of his regular municipal duties. He may not be compensated for his work in the Abatement Program for more than 500 hours during a calendar year. The head of the contracting agency, the Tax Collector-Treasurer's Office, must make and file with the Town Clerk a written certification that no current employee of the Town department in which the participant is working is available to perform the work as part of their regular duties.[27/] Finally, the Board of Selectmen must approve the § 20(b) exemption.

Any full-time Town employee or part-time employee whose position has not been designated as a special municipal employee position, who satisfies all of the requirements for a § 20(b) exemption, may participate in the Abatement Program at the same time that he is holding a job with the Town. If he fails to satisfy any of these requirements, he may not participate.[28/]

For example, a full-time employee of the Town's Public Library may participate in the Abatement Program using the § 20(b) exemption. In addition, a part-time assistant in the Town Clerk's office or a School Committee member whose positions have not been designated as a special municipal employee positions, may participate using the § 20(b) exemption.

2. Exemptions Available to Special Municipal Employees

Two exemptions are available for special municipal employees. A special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency, in this instance, the Tax Collector-Treasurer's Office, may use the § 20(c) exemption. Section 20(c) provides that § 20 does not apply 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 city or town clerk, a full disclosure of his interests in the contract. A special municipal employee in Town who wants to participate in the Abatement Program and who qualifies for the § 20(c) exemption, must file a written disclosure of his financial interest in the Abatement Program with the Town Clerk. He may then participate in the Abatement Program. For example, if the members of the Town's Board of Health have been designated as special municipal employees by the Board of Selectmen, they may participate in the Abatement Program by using the § 20(c) exemption because they do not participate in or have official responsibility for any of the activities of the Tax Collector-Treasurer's Office, the contracting agency.

In contrast, a special municipal employee in Town who participates in or has official responsibility for any of the activities of the Tax Collector-Treasurer's Office, must obtain a § 20(d) exemption. That exemption requires the special municipal employee to file a written disclosure of his interest in the Abatement Program with the Town Clerk. In addition, the Board of Selectmen must approve the exemption. If he does not obtain the Board's approval, he may not participate in the Abatement Program. For example, a part-time employee in the Tax Collector-Treasurer's Office whose position has been designated as a special municipal employee position, may participate in the Abatement Program only by using the § 20(d) exemption.

If an employee who holds more than one position or office in Town also wants to participate in the Abatement Program, he needs to secure an exemption to § 20 to cover each of his positions. We suggest that an employee in this situation contact the Commission for further advice on how to comply with § 20 before participating in the Abatement Program.

B. Non-Town Employees Participating in the Abatement Program

You have inquired only whether Town employees may participate in the Abatement Program. We note, however, that every participant in the Abatement Program, including those who do not hold a Town position or office, will be considered a municipal employee for purposes of the conflict of interest law during the time that they participate in the Abatement Program.[29/]

The conflict of interest law defines the term municipal employee broadly. It provides in relevant part that a municipal employee is any "person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis."[30/] A participant in the Abatement Program will be providing services to, and on behalf of, a Town department or agency. As such, every participant in the Abatement Program will be considered a municipal employee for purposes of G.L. c. 268A. This includes Town employees who participate as well as Town residents who do not already hold a Town position or office. Because of the limited hours that participants may work, the Abatement Program participant positions are eligible to be designated as special municipal employee positions by the Board of Selectmen.[31/]

Our conclusion that all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A is consistent with the purpose of the statute. The purpose of G.L. c. 268A "'was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.'"[32/] To effectuate this purpose, the Legislature adopted a broad definition of municipal employee that includes not only the traditional employment relationship, such as a "contract of hire." The definition also includes individuals who perform services for or hold an office or position in a municipal agency who serve without compensation or who serve on a part-time or intermittent basis. The plain meaning of the definition of municipal employee in the conflict of interest law includes individuals who participate in the Abatement Program.

Further, § 5K of G.L. c. 59 provides that participants in the Abatement Program will be public employees for certain purposes. The statute provides that any participant in an Abatement Program while providing such services shall be considered a public employee for purposes of G.L. c. 258, the Tort Claims Act.[33/] As such, the Town is liable for damages for injuries to third parties and for indemnification of participants to the same extent as it is in the case of injuries caused by regular municipal employees.

We note that G.L. c. 59, § 5K also provides that

> [i]n no instance shall the amount by which a person's property tax liability is reduced in exchange for the provision of services be considered income, wages or employment for the purposes of taxation as provided in chapter 62, for the purposes of withholding taxes as provided in chapter 62B, for the purposes of unemployment compensation as provided in chapter 151, for the purposes of workers' compensation as provided in chapter 152 or any other applicable provisions of the General Laws.

However, this language reflects different purposes than G.L. c. 268A.

In each of these instances, § 5K provides that

participants will not be Town employees for certain taxation and insurance purposes that are part of the traditional employment relationship. These provisions, in effect, preserve the benefit of the bargain for both parties. Participants in an Abatement Program will not lose the benefit of their bargain of a reduction of their property taxes with a rise in other taxes on the amount of that reduction. In addition, the Town limits its financial exposure if the participants were considered municipal employees for the purposes of workers' compensation.

Finally, § 5K is silent as to whether participants will be considered municipal employees for purposes of the conflict of interest law. In light of this silence combined with the explicit statutory language in the definition of "municipal employee" in G.L. c. 268A, we will consider Abatement Program Participants to be municipal employees for purposes of the conflict of interest law.

CONCLUSION

Town employees may participate in the Abatement Program as long as they can comply with § 20(b), (c) or (d) of G.L. c. 268A as applicable. In addition, all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A and they will be subject to the restrictions of that statute applicable to municipal employees.[34/] However, the Town may reduce some of the restrictions on Abatement Program participants under G.L. c. 268A by designating them as special municipal employees.[35/]

DATE AUTHORIZED: June 15, 2004

[1/] Section 5K allows a municipality accepting its provisions to "establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person over the age of 60 on his tax bills . . . . "

[2/] G.L. c. 59, § 5K was added by Chapter 127, § 59 of the Acts and Resolves of 1999.

[3/] *Id.* § 5K.

[4/] *Id. See, e.g.,* G.L. c. 59, §§ 5 & 5C.

[5/] *Id.* § 5K.

[6/] *Id.*

[7/] *Id.*

[8/] In the case of multiple owners of a parcel, all owners may earn an abatement as long as the total abatement per parcel does not exceed $500 per year.

[9/] Preference is given to individuals who have never participated in the Abatement Program before.

[10/] If a Department Head has already discussed a particular job with a volunteer, he is required to include that information on the Job Request Form.

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

[12/] 17 *C.J.S. Contracts § 2 (1999) (footnote omitted). See Restatement (Second) of Contracts § 1(1981)* ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

[13/] *EC-COI-95-07*.

[14/] *EC-COI-92-35; Quinn v. State Ethics Commission*, 401 Mass. 210, 215-16 (1987). *See EC-COI-89-14* (agreement need not be formalized in writing to be a contract for G.L. c. 268A, § 7 purposes); *EC-COI-81-64* (state grant is a contract).

[15/] *17 C.J.S. Contracts § 2 (1999).*

[16/] *Black's Law Dictionary 306* (6th ed. 1990).

[17/] *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280, 286 (1974); *Fall River Housing Joint Tenants Council, Inc. v. Fall River Housing Authority*, 15 Mass. App. 992, 993 (1983).

[18/] *EC-COI-92-35* (Aid to Families with Dependent Children; Emergency Aid to the Elderly, Disabled and Children; Supplemental Security Income)
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[19/] *Id.*

[20/] *Id.*

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

compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be 'municipal employees' and shall be subject to all the provisions of [G.L. c. 268A] with respect thereto without exception." G.L. c. 268A, § 1(n).

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

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

[24/] We note that the contracting agency for a similar program in another municipality may be different. If so, full-time employees of the Tax Collector-Treasurer's Offices or those part-time positions that have not been designated as special municipal employees in those municipalities may be able to participate in an abatement program if they can otherwise comply with the requirements of § 20(b).

[25/] *See EC-COI-03-02* (discussing meaning of term regulate).

[26/] The § 20(b) requirement that the contract be made after public notice may be satisfied by advertisement in a newspaper of general circulation or multiple public postings in such places as the Town Hall, Senior Center and Town website. *See EC-COI-95-07; 87-24.*

[27/] As Tax Collector-Treasurer, you may make the certification based on information provided by the Town's Department Heads.

[28/] We note that in a municipality with a population of less than 3,500, a full-time appointed municipal employee may participate in an abatement program using the "small town exemption" in § 20. The small town exemption provides that in municipalities having a population of less than 3,500, a municipal employee may hold more than one appointed position with the town provided that the board of selectmen approves the exemption. This exemption does not apply, however, if a municipal employee holds an elected position and one or more appointed positions.

[29/] A Town resident who is not a Town employee and does not have a financial interest in another contract with the Town does not need an exemption under § 20 of G.L. c. 268A in order to participate in the Abatement Program. However, if he wants to take on another municipal employee position or contract with the Town while participating in the Abatement Program, he will need to comply with § 20.

[30/] G.L. c. 268A, § 1(g). The term municipal employee does not include elected members of a town meeting and members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. *Id.*

[31/] *Id.* § 1(n).

[32/] *Scaccia v. State Ethics Commission*, 431 Mass. 351, 359 (2000) *quoting Selectmen of Avon v. Linder*, 352 Mass. 581, 583 (1967).

[33/] G.L. c. 59, § 5K.

[34/] *See* G.L. c. 268A, §§ 2, 3, 8, 17, 18, 19, 20, 21A and 23. Anyone interested in participating in the Abatement Program may seek further advice from Town Counsel or the Commission as to the application of these other provisions of the conflict of interest law.

[35/] *See, e.g.*, G.L. c. 268A, § 17.

COMMISSION ADVISORY 04-01

FREE TICKETS AND SPECIAL ACCESS TO EVENT TICKETS

with

APPENDIX: Frequent Questions and Answers

INTRODUCTION

This advisory addresses the application of the conflict of interest law (Chapter 268A of the Massachusetts General Laws) to public officials/employees who accept free tickets or special or preferential access to purchase tickets to sporting, theatrical, musical and/or other events.

THE LAW

Public officials/employees are generally free to purchase tickets for sporting, theatrical, musical and/or other events at face value. Conflict of interest concerns are raised, however, where public officials or employees are, because of their appointed or elected positions, given free or discounted tickets or provided special access to purchase tickets even if at face value to events for which the same access is not available to the general public. The same concerns would apply to a public official who is allowed free entry to an event or invited to attend an event without a ticket where the event would otherwise require a ticket costing $50 or more. Section 23(b)(2) of G.L. c. 268A prohibits a public official/employee from knowingly or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

A. Free or Discounted Tickets

A free ticket or a discounted ticket that is not available to the general public is a special benefit or a privilege. Unless such a free or discounted ticket is authorized, e.g. by law, regulation, ordinance or other legitimate rule, it would generally be unwarranted because there is no reasonable justification for a public official/employee to obtain such a privilege. The courts and the Commission have concluded that items with a value of $50 or more are of substantial value. Therefore, if the

value of the free ticket or the value of any discount that is offered is $50 or more, a public official or employee who accepts the ticket risks violating § 23(b)(2) of the conflict of interest law.

The conflict of interest law is implicated whether or not a public official/employee initially solicits a free or discounted ticket. The fact that the public official/employee obtains the ticket to attend the event or otherwise takes advantage of the ticket and he knows, or has reason to know, that it was given to him because of his public position, constitutes a "use of position" for § 23(b)(2) purposes.

The Commission recognizes one important, although narrow, exception to the general rule. A public official/employee may accept a free ticket valued at $50 or more, where he/she is performing a legitimate, public ceremonial purpose at the event or his/her attendance at the event is consistent with the public official/employee's office or official responsibilities.

For example, a public official/employee may accept a free ticket if he/she were throwing out the first ball at a baseball game, making a speech at the event or performing some other similar public, ceremonial function. As the Commonwealth's chief executive officer, the governor or his designee could attend such an event without purchasing a ticket if invited as the Commonwealth's representative. Similarly, the mayor or other chief executive officer of a municipality or his designee could attend such event without purchasing a ticket if invited to represent the host municipality.

B. Special or Preferential Access to Purchase Tickets

Special access to purchase tickets not available to the general public is also a special benefit or privilege. Such access to tickets may similarly be unwarranted. Even though there may not be a readily assigned value to such access, the Commission has found that certain privileges of no immediately ascertainable dollar or monetary value may also be of substantial value.

In determining whether special access provided to a public official/employee to purchase a ticket or tickets to an event is an "unwarranted privilege or exemption of substantial value," the Commission will look at the totality of the circumstances. The fundamental question, in each case, is whether a reasonable person wishing to attend the event would pay $50 or more over face value to purchase the ticket or tickets that the public official is being provided the opportunity to purchase at face value. In addressing this question, the Commission will examine a variety of factors including, but not limited to, the following:

- *Demand* - there is a demand for the tickets that increases their value beyond the face value; the event is generally recognized as a highly desirable major event or considered a unique opportunity or providing for a limited engagement.

- *Ticket Availability* - the ticket is not available to the general public, the event is sold out or only limited, less-desirable seats remain available.

- *Alternative Sources to Purchasing Tickets* - the price at which the general public may purchase a ticket is more than $50 over the face value as indicated by prices posted by ticket agencies or on-line auction services.

- *Multiple Ticket Availability* - the cost of purchasing the total number of tickets is $50 or more over the face value on the tickets as measured above.

- *Access* - the avoidance of a cumbersome or time consuming ticket distribution process such as first-come, first serve or waiting in line.

For example, conflict of interest concerns would be raised if tickets to a major sporting event such as the Ryder Cup, the Superbowl or a World Series game were offered to public officials/employees to purchase at face value. Such tickets are limited in number and not readily available to the general public for purchase at face value. Other examples of special events that may raise conflict of interest concerns are tickets to major concerts and/or theatrical events.

As with the receipt of free tickets, it is not necessary that a public official/employee initially solicit the opportunity to purchase the tickets. It may be sufficient if he accepts the special access to the tickets offered as a result of his official position.

CONCLUSION

The Commission believes that the public's confidence in government is undermined when public officials and employees are offered and take advantage of free tickets or special access. The conflict of interest law's requirement that public officials and employees be treated similarly to the general public protects the public's right to expect that government officials and employees will not exploit their public positions for their private gain or advantage.

It is important to keep in mind that this advisory is general in nature and the examples in the advisory are representative and not all-inclusive. Public officials and employees are encouraged to seek specific legal advice about the application of the conflict law to the purchase of tickets when offered free tickets or special access to purchase tickets by contacting the State Ethics

Commission at 617-727-0060 before purchasing the tickets.

ISSUED: January 15, 2004

APPENDIX: Frequent Questions and Answers

Q1. (*Friend's Extra Ticket*) I am a public employee. A close, personal friend has an extra ticket to a major sporting event. May I accept a ticket from him?

A. Yes, if he is offering the ticket to you because of your friendship and not to influence or thank you for an official act or because of your position as a public employee. If your friend's motive may be a mixed one, e.g. partly friendship and partly in thanks for an official act that you performed, you should not accept the gift without seeking further advice from the Commission.

Q2. (*Determining Motivation*) How does the Commission determine whether the motivation for my friend offering a ticket is our friendship or my position as a public employee?

A. The Commission considers such factors as how long you have known each other and whether your friendship was established prior to your becoming a public official. In addition, the Commission may consider whether you exchange gifts on holidays or to recognize other significant events, visit each other's homes or socialize regularly. In each case, the Commission will look at the totality of the circumstances surrounding a gift to determine whether the motivation was friendship.

Q3. (*Gift to Colleague*) I am a public official and have a ticket valued at $50, for which I paid full value. I would like to give the ticket to another public official who is a colleague. May I give my colleague the ticket?

A. A ticket or other gift from one public official to another raises questions similar to those raised if a private party gives the ticket to the public official. You may give the ticket to your colleague if it is being given because of your personal relationship and not to influence or thank you for an official act or because of your colleague's position. If your motive for giving the ticket is mixed, e.g. partly friendship and partly as thanks for help with official work, you should not offer the gift without seeking further advice from the Commission.

Q4. (*Ceremonial Exception*) I am a public official. The owner of a major theatre has invited me to join him in his front row box seat for the opening of a major musical show. Although we are friendly and have met at a few events, we do not socialize and are not personal friends. The theatre will occasionally have matters pending before my department but does not have anything pending at this time. The box seat is valued at $150. May I attend the opening?

A. No, unless you pay for the value of the box seat or your attendance at the event serves a qualified, ceremonial function or is consistent with your official responsibilities as discussed in Commission Advisory No. 04-1. Although you and the owner are on friendly terms, you relationship is primarily professional. Your acceptance of a free box seat therefore would be an unwarranted privilege of substantial value.

Q5. (*Chance Meeting Invitation*) I am a well-known public official and am attending a major sporting event. At a chance meeting at the event, the stadium's owner invites me to join him in his booth. I visit for 15-20 minutes. Tickets for seats in similar booths can cost as much as $250 per game. May I visit the owner in his booth?

A. Yes. A short visit to a booth under these circumstances is not an unwarranted privilege of substantial value. On the other hand, spending the entire game in the box would be of substantial value and prohibited unless you pay for the value of the seat in the booth.

Q6. (*Dispelling Appearance of Conflict*) I am a public employee. A professional acquaintance, who has a matter pending in my office, has offered me a ticket valued at $45 to a charitable event. May I accept the ticket?

A. No unless you first make a public, written disclosure to your appointing authority that completely and accurately describes your relationship and the nature of the matter pending at your office. Checking with your appointing authority before accepting the ticket is important since your appointing authority may have established stricter standards than those imposed by the conflict of interest law.

APPENDIX added: May 26, 2004

COMMISSION ADVISORY NO. 04-02

GIFTS AND GRATUITIES

This advisory[1/] addresses the application of the conflict of interest law (Chapter 268A of the Massachusetts General Laws) to public employees[2/] who are offered gifts or gratuities of substantial value in connection with their work or because of the position that the employee holds. The conflict of interest law contains three provisions that prohibit or significantly limit a public employee's ability to accept gifts or gratuities under these circumstances.

First, the gifts and gratuities provision prohibits public employees seeking or accepting anything of

substantial value for or because of their official acts or any act within their official responsibility.[3] Next, public employees are prohibited from using or attempting to use their position to obtain for themselves or others unwarranted privileges of substantial value that are not properly available to similarly situated individuals.[4] Finally, even if a gift or gratuity is not of substantial value or does not fall within the first two prohibitions, the conflict of interest law will, in many situations, require public employees to disclose to their appointing authority the gift and their relationship with the giver.[5] Public employees who are offered or accept a gift or gratuity must ensure that they comply with all provisions of the law, which are discussed in Part I: The Gift and Gratuities Provision, Part II: Unwarranted Privileges; and Part III: Appearances and Disclosures. Part IV discusses gifts that comply with Chapter 268A and Part V discusses gifts from legislative agents under G. L. c. 268B.

The simplest and best rule that public employees can follow to further the public's trust and to ensure compliance with the conflict of interest law is to decline an offer of a gift or gratuity that is made in connection with their work or their position. If public employees believe that the acceptance of a gift is appropriate they should first seek advice from agency or municipal counsel or the State Ethics Commission.

I. The Gifts and Gratuities Provision (§ 3)

For purposes of the gratuity provision, whenever a public employee is offered anything from a private party, he must first ask himself two questions: (1) whether the thing being offered is of "substantial value" and, if so, (2) whether it is being offered for or because of any official act **or** act within his official responsibility that he performed or will perform.

(A) Substantial Value

The Ethics Commission and the Supreme Judicial Court have interpreted the term "substantial value" to mean anything with a value of $50 or more.[6] Calculating the value may be done in any of several ways. For example, the legally recognized retail value may apply. Sometimes, the giver's cost for the item is deemed a more accurate assessment of substantial value. For example, the giver's cost may be considered to determine the value per person by dividing the total cost by the number of recipients. In addition, individual gifts that are less than substantial value may be combined to determine if something of substantial value has been offered. For example, a gift of two tickets, each valued at $35, to a public employee and her spouse would be deemed a gift of substantial value to the public employee. A discount valued at $50 or more off goods or services that the official purchases would be of substantial value. Finally, the ability to purchase a scarce ticket at its nominal value may also be of substantial value if most individuals may obtain the ticket only by paying a premium of substantial value.[7]

- Example *(Face Value)*: If the face value of a sporting event ticket to the public were $50 or more, the ticket would be of substantial value.

- Example *(Premium Value)*: A giver purchased a ticket with a face value of $30 but paid a premium cost of $100. The cost of the ticket would be of substantial value.

- Example *(Cost Per Person)*: A lobbyist picks up the tab for dinner for ten people. The total cost is $750, including tax and tips.[8] Each individual attending the dinner would be deemed to have received a $75 dinner, which would be of substantial value.

- Example *(Aggregate Value)*: A series of five free passes, each worth $10, given to a single public employee will be of substantial value because the combined value of the series is $50. Similarly, a consistent pattern of free meals from one source to a single public employee over a period of time would be of substantial value if the combined value of the free meals is worth $50 or more.

- Example *(Discount)*: Public employees have been invited to attend an event at a discounted rate. If the public at large were invited to attend at $100 per person and the public employees were invited to attend at $50 per person, then the public employees would have been offered something of substantial value.

- Example *(Scarce Tickets)*: Public employees have been offered scarce tickets to a sporting event or a concert and the giver has offered the tickets at their face value. These same tickets, however, are not available to the public, by any means, unless the public were to pay a premium price of $50 or more above the face value. The public employees who paid only the face value would be deemed to have received something of substantial value.[9]

(B) For or Because of Official Acts or Acts Within Official Responsibility

The Legislature provided specific guidance by defining the following terms in the conflict of interest law. "Official act" is any decision or action in a particular matter or in the enactment of legislation.[10] "Particular matter" is "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-."[11] Finally, "official responsibility" is "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."[12]

Whenever public employees are offered anything from a private party, they must ask whether there is a link between the gift and an official act or act within their official responsibility. The Commission determines whether a link is established by reviewing all the circumstances. Such circumstances may include, for example, the identities or relationship of the giver and the recipient, the giver's and recipient's expressed intents, the timing of the gift, whether the recipient has acted or will act on matters affecting the giver, and the effect of the gift on the recipient's acts. In addition, the Commission will consider whether the gift is repeated, planned or targeted, whether it is a business expense, whether there is personal friendship or reciprocity between the giver and the recipient, the nature, amount and quality of the gift, and the location of the entertainment and the sophistication of the parties.[13]

Because the prohibition applies to acts "performed or to be performed," a reward of substantial value for a past act may violate the law just as does a gift of substantial value in anticipation of a future act.

- Example: A private individual deals officially with a public employee and invites him out to supper to discuss the standard that the public employee should use to evaluate his proposal against his competitor's proposals, all of which are under the public employee's review. The bill amounts to $50 or more per person and the private individual picks up the tab. The private party and the public employee do not have a significant social relationship outside of work and they have not developed a pattern of picking up each other's tabs on any type of alternating basis.

- Example: A private party has concluded a meeting in the public employee's office during which they discussed an upcoming permit application. A week later, the public employee is invited to play golf at the private party's club. The cost to the private party is $50 or more and the private party offers to pick up the cost. The two individuals do not socialize and have not played golf together until now. The permit application is still pending.

- Example: A business association's representatives regularly meet at the State House with legislators who specialize in association issues. A couple of weeks after a significant association bill has been approved by the Legislature, and news reports indicate that the Governor will sign it, association representatives offer the bill's sponsors tickets to a concert. The face value of each ticket is $50 or more.

In each of the above examples, the facts suggest that there is a link or nexus between the private party's gift and an official act or act within the public employee's official responsibility. Therefore, the public employee should either decline the invitation or offer to pay his share of the tab or the cost of the ticket paid by the giver to comply with the conflict of interest law's gratuity provision.

II. Unwarranted Privileges (§ 23(b)(2))

Whenever a public employee accepts a gift of substantial value given not for or because of a specific official act but because of his position, the conflict of interest law's provision prohibiting the use of position to secure unwarranted privileges is implicated. This is because a public employee may not "knowingly, or with reason to know . . . use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals."[14]

- Example: A city councilor calls a theater in the city, identifies himself as a Councilor, and asks for free tickets worth at least $50.[15]

- Example: Members of the planning board, conservation commission, zoning board of appeal, and the board of health accept a gift certificates worth $50 from a developer for "all their hard work over the last year."

- Example: A superintendent accepts from the school system's maintenance staff free landscaping and painting services for his house.

- Example: The municipality's public safety personnel accept discounts worth 10% off the price of any used car from a local dealer who offers such a discount only to public safety officials in his town.[16]

In each of the above examples, the public employee has used his position by accepting a gift given primarily because of his position. Under such circumstances, the gifts are privileges of substantial value. They are unwarranted because there is no reasonable justification or officially authorized basis such as a law, rule, ordinance or by-law for the gifts, and they are not properly available to similarly situated individuals. As in the case of a gratuity, the public employee should decline or pay for the gift. [17]

III. Appearances and Disclosures (§ 23(b)(3))

Whenever a public employee is offered or receives anything of value, even if not of substantial value, the conflict of interest law is still implicated. This provision,

§ 23(b)(3), which involves so-called "appearances" of conflicts of interests, prohibits a public employee from acting "in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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." This provision considers all the circumstances, including such factors as the type and value of the gift, substance and significance of the matter before the public employee, and the personal relationship between the donor and the recipient. For example, a "reasonable person"[18/] could conclude that the public employee would be "improperly influenced" by the giver, or that the giver would "unduly enjoy [the public employee's] favor," or that the public employee would "act or fail to act" as a result of such undue influence, when the public employee is in a position to take official action on matters involving the giver or of interest to the giver.[19/]

The conflict of interest law provides, however, that "it shall be unreasonable to so conclude" if the public employee discloses *in writing* "the facts which would otherwise lead to such a conclusion" prior to acting on the matter of interest to the giver. Appointed public employees must make such a disclosure in writing and give it to their appointing authority. Elected officials must make the disclosure "public in nature," meaning there must be a public record of the disclosure. Elected municipal officials may file such a disclosure with the public employee who keeps public records, such as a municipal clerk. Elected state officials may file such disclosure with the Ethics Commission.

The disclosure should be made *before* the public employee acts on the matter of interest to the giver.[20/] The intent of this restriction is to let the official's appointing authority and/or the public know in advance, and, by "giving it the light of day treatment" in advance, cause the public employee and his appointing authority, if any, to recognize the issue and deal with it appropriately.

- Example: A public employee and his old friend meet to discuss a public issue of interest to his friend's business client. The two friends regularly get together socially, and regularly cover the tab for each other. Now that the friend offers to pick up the tab, as he would usually do when it was "his turn," the public employee is concerned about what to do. A reasonable person could conclude that the public employee might be influenced by his private friendship and/or the generosity of his friend.

- Example: A private individual has a permit application pending with a public employee and invites the employee out to lunch to discuss the application. The bill is likely to be about $40 per person and the private individual has offered to pick up the tab. The private party and the public employee do not have a social relationship outside of work and have never before had lunch together.

- Example: A private individual who seeks to become a vendor for public contracts offers the public employee in charge of contracting free use of a vacation home on Cape Cod. The public employee politely declines the offer.

Each of the above examples creates an appearance of a conflict of interest. To eliminate such an appearance, the public employee must disclose *in writing* the relevant facts of his relationship with these individuals *before* accepting the private individual's offer, or acting on the pending matter.

IV. Gifts that Comply with Chapter 268A

There are several contexts in which accepting a gift, even if of substantial value, will not violate the conflict of interest law.[21/]

- Example: Gifts from family, and from long-time friends, with whom the public employee customarily exchanges gifts, generally will not violate chapter 268A. Gifts from old friends for events such as birthdays or weddings are not prohibited. These gifts do not violate the conflict of interest law because they are personal and not linked to specific official acts or given because of an individual's public position.

- Example: Retirement gifts generally do not violate the conflict of interest law.[22/] Co-workers might offer group gifts in honor of one's retirement. Retirement gifts may also be accepted from private parties. Such gifts generally do not violate the conflict of interest law because they are, if of reasonable value, warranted provided that there is no link between the giver and a specific official act. Although "honoring Secretary X for 35 years of public service" is not linked to any specific act, "honoring Secretary X for his handling state project Y" suggests a link to a specific act.

- Example: Gifts to a public agency, for the agency's use, do not violate chapter 268A. For example, a gift of personal computers for use in a school's computer laboratory does not violate the conflict of interest law because the gift is for public, rather than private use. The agency, however, must have the legal authority to accept the gifts for its use. The conflict of interest law, alone, does not answer that question.

- Example: Holiday gifts such as fruit baskets may be accepted if accepted on behalf of a public employee's agency and shared with all agency employees and/or

the public, if applicable, thereby making them available for public rather than private use.

V. Gifts from Legislative Agents (G. L. c. 268B)[23]

In addition to the above restrictions, G. L. c. 268B, § 6 prohibits certain "public employees" and "public officials," and members of their immediate family from soliciting or accepting from any "legislative agent,"[24] (commonly known as lobbyists), gifts[25] with an aggregate value of $100 or more in a calendar year. "Public employee," is anyone who holds "a major policymaking position in a [state or county] governmental body."[26] "Public official" means anyone holding a "position for which one is nominated at a state primary or chosen at a state election."[27] As a result, this requirement does not apply to elected or appointed municipal employees or office holders.

Section 5(g)(5) of G.L. c. 268B requires individuals who must file SFI's to disclose the identity of the donor and the value of any gifts aggregating more than $100 in a calendar year if the source of those gifts "is a person having a direct interest in legislation, legislative action, or a matter before a governmental body; or if . . . the source of [the] gift(s) is a person having a direct interest in a matter before the governmental body by which the recipient is employed."

For county and state employees who meet the G. L. c. 268B definitions of "public employee" or "public official," this disclosure is a requirement that is separate and distinct from G. L. c. 268A, §§ 3(a) and 23(b)(2) and 23(b)(3).[28]

VI. Conclusion

The conflict of interest law was enacted to promote the public's confidence and trust in the Commonwealth's public employees. The receipt of gifts and gratuities, particularly when of substantial value, negates the trust that the public is entitled to place in public employees that public, not private, interests are furthered when the employee performs his duties. Such gifts and gratuities also raises concerns that the public employee is, in effect, receiving compensation and benefits over and above what the taxpayer has authorized. For these reasons, the conflict of interest law substantially regulates gifts and gratuities offered to or accepted by public employees.

This advisory is general in nature. The examples in the advisory are representative and not all-inclusive. Public employees are encouraged to seek specific legal advice about the application of the conflict law to gifts and gratuities by contacting the State Ethics Commission at 617-727-0060.

Approved: May 12, 2004

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[1] The Commission issues Advisories periodically to interpret various provisions of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public employees should contact their state, county, or municipal counsel (as applicable) or the Legal Division of the State Ethics Commission at (617) 727-0060. Copies of all Advisories are available from the Commission office or online at www.mass.gov/ethics.

[2] The term "public employee" in this advisory, except as otherwise noted, refers to state, county or municipal employees who are "performing services for or holding an office, position, employment, or membership in [state, county, or municipal] agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." See G.L. c. 268A, §§1(d), (g) and (q). The term "public employee" also includes anyone who is a special state employee, special county employee, or special municipal employee, as defined in G. L. c. 268A, §§ 1(m), (n), and (o).

[3] G.L. c. 268A, § 3(b).

[4] G.L. c. 268A, § 23(b)2.

[5] G.L.c. 268A, § 23(b)(3).

[6] *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). G. L. c. 268A does not define the term "substantial value."

[7] These examples are not meant to be all-inclusive.

[8] *Life Insurance Association of Massachusetts* at 1003.

[9] See Advisory 04-01, *Free Tickets and Special Access to Event Tickets* for additional information.

[10] G.L. c. 268A, § 1(n).

[11] G.L. c. 268A, § 1(k).

[12] G.L. c. 268A, § 1(i).

[13] *In re: Life Insurance Association of Massachusetts*, Docket No. 528, May 12, 2003.

[14] G.L. c. 268A, § 23(b)(2).

[15] Depending upon the circumstances of the city councilor's official business with the theater, his conduct could also implicate G. L. c. 268A, § 3(b).

[16] By contrast, an industry wide discount available to a broad category of public safety personnel in the Commonwealth would not violate the law. *See e.g., EC-COI-95-5*.

[17] See Advisory 04-01, *Free Tickets and Special Access to Event Tickets* for additional information.

[18] The "reasonable person" standard focuses on the perceptions of citizens in the community, not the perceptions of the players in the situation. *In re Hebert*, 1996 SEC 800, Docket No. 499.

[19/] G.L. c. 268A, § 23(b)(3).

[20/] The Commission appreciates that there may be circumstances that would require the public official to act first, then disclose to his appointing authority the relevant facts. For example, a police officer may have to first arrest someone who is endangering the public before he has time to disclose, in writing, to his chief of police that the person he arrested is a friend or relative or someone who, last week, offered him a discount simply because he is a police officer.

[21/] These examples are not the only types of gifts that would not violate the conflict of interest law.

[22/] Certain public employees must also comply with the testimonial dinner law, G.L.c. 268, § 9A.

[23/] G.L. c. 3, § 43 also regulates items that legislative agents may provide to public employees and generally prohibits legislative agents from offering or giving gifts, as defined in G. L. c. 268B, § 1, of any kind or nature, and from paying for meals or beverages.

[24/] "Legislative agent" means any person who, for compensation, does any act to promote, oppose or influence legislation. G.L. c. 268B, § 1(k).

[25/] "Gift means a payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received; 'gift' shall not include a political contribution reported as required by law, a commercially reasonable loan made in the ordinary course of business, anything of value received by inheritance, or a gift received from a member of the reporting person's immediate family or from a relative within the third degree of consanguinity of the reporting person or of the reporting person's spouse or from the spouse of any such relative." G.L. c. 268B, § 1(g).

[26/] G.L. c. 268B, § 1(o).

[27/] G.L. c. 268B, § 1(q), (p). These definitions specifically exclude members of the United States Congress and the office of regional district school committee member elected district-wide.

[28/]G.L. c. 268B, § 5(g)(5) requires individuals who must file SFI's to disclose the identity of the donor and the value of any gifts aggregating more than $100 in a calendar year if the source of those gifts "is a person having a direct interest in legislation, legislative action, or a matter before a governmental body; or if . . . the source of [the] gift(s) is a person having a direct interest in a matter before the governmental body by which the recipient is employed."

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In the Matter of Stephen V. Shiraka - The Massachusetts State Ethics Commission fined Old Rochester Regional School District Manager of Facilities and Grounds Stephen V. Shiraka $1,000 for advising the Mattapoisett School Building Committee on its supervision of Turner Construction Company (Turner) while he was being paid privately by Turner. According to a Disposition Agreement, Shiraka was responsible for supervising all new construction projects in the school district, which consists of Marion, Mattapoisett and Rochester. In December 2000, Mattapoisett retained Turner to serve as project manager on the modernization and expansion of its two elementary schools. Shiraka attended weekly progress meetings, performed site visits and advised School District and Mattapoisett officials on Turner's management of the project. Between October 2001 and January 2002, Shiraka was paid more than $1,100 by Turner for reviewing documents in connection with Turner projects in other school districts. In summer 2002, Turner hired Shiraka to serve as a paid consultant on the renovation of the Dennis-Yarmouth Regional High School construction project. Shiraka was paid a retainer of $3,000 per month. In spring 2003, when the Commission began to review this matter, Shiraka and Turner suspended the consulting arrangement. By advising Mattapoisett on its supervision of Turner while being paid privately by Turner, Shiraka violated §23(b)(3). Shiraka could have avoided violating §23(b)(3) of the conflict law by making an advance written disclosure to his appointing authority of the facts that would otherwise lead to such a conclusion. While Shiraka orally apprised his supervisors and other public officials of his work for Turner, Shiraka did not file a written disclosure.

In the Matter of Thomas Chilik - The Massachusetts State Ethics Commission fined Greenfield Montague Transportation Area (GMTA) General Manager Thomas Chilik $2,000 for his involvement in various personnel matters affecting a GMTA employee, Kathleen Williams, whom he was dating at the time and later married. According to a Disposition Agreement, Chilik's responsibilities included participating in personnel matters affecting his subordinate GMTA employees. Chilik and Williams began dating exclusively in 1999 and were married on June 9, 2003. While they were dating, Chilik reviewed and approved Williams' pay increases, authorized her to attend out-of-state conferences that he also attended and promoted her in 1999 from administrative assistant to GMTA office manager. In addition, he was her day-to-day supervisor. The GMTA trustees were aware of Chilik's involvement in personnel matters affecting Williams and considered them appropriate. They were not aware, however, of the personal relationship between Chilik and Williams until they were notified in 2003 about Chilik and Williams' wedding plans. At that point, the trustees put appropriate safeguards into place to ensure Chilik's compliance with the conflict of interest law. By his involvement in personnel matters affecting Williams, Chilik violated §23(b)(3). Chilik could have avoided violating §23(b)(3) by making an advance written disclosure of their relationship to his appointing authority, the GMTA trustees.

In the Matter of Thomas Haluch - The Massachusetts State Ethics Commission fined Ludlow Department of Public Works (DPW) Commission Chairman Thomas Haluch $3,500 for using his position to settle a private dispute with the Massachusetts Municipal Wholesale Electric Company (MMWEC). According to a , in June 2002 MMWEC began construction of a $10 million 5.6-mile long gas pipeline in Ludlow that ran through approximately 45 public and private properties including Haluch's. The DPW issued permits to MMWEC for the pipeline and was responsible for general oversight of the pipeline. MMWEC negotiated with private property owners for access to their properties in order to lay the pipe. Haluch has a working farm in Ludlow that was impacted by the pipeline and MMWEC paid Haluch for the use of his property to lay the pipe, with the understanding that MMWEC restore Haluch's property to its original condition. After MMWEC installed the pipeline, it began restoring Haluch's property. Haluch was dissatisfied with the restoration work performed by MMWEC and offered to do the restoration work himself in exchange for a certain payment from MMWEC. Haluch's offer was several thousand dollars more than MMWEC's, which was based on a preliminary field evaluation. During several discussions about the restoration with MMWEC, Haluch referred to his DPW position and stated that he wielded power and influence in the town, that he would make sure the pipeline's bonds were not released, and that he could shut down the pipeline. MMWEC officials decided to give Haluch the payment he requested to resolve the matter. By invoking his official position as DPW Commissioner and threatening to use that position to take various actions including shutting down the pipeline, Haluch violated §23(b)(2).

In the Matter of Paul Pathiakis - The Commission found that former Upton Technology Committee member Paul Pathiakis violated M.G.L. c. 268A, the state's conflict law. Pathiakis was ordered to pay a total civil penalty of $4,000. According to aDecision and Order, the Commission found that Pathiakis violated §19 by participating as a Technology Committee member in awarding a contract, in which he was a subcontractor, to provide computer services to the town and §20 by having a financial interest in a contract with the town. The Commission imposed the maximum fine of $2,000 for each violation. While the conflict of interest law provides exemptions that could have allowed Pathiakis to arrange for the contract and to receive compensation for the work he did, the Commission found that Pathiakis did not take

the necessary steps to receive the proper exemptions from the Board of Selectmen.

In the Matter of Thomas Collett - The Commission fined Hardwick Board of Health member Thomas Collett $1,000 for using his position to attempt to influence The Alliance for the Homeless to use the services of his private water testing company, Tri-S Water Service. According to a Disposition Agreement, in 2002, The Alliance for the Homeless, a non-profit organization, began renting property in Hardwick with the intent of running a camp for children in summer 2003. The Board of Health regulates the water system of the camp. In September 2002, Collett drove to the camp in a town truck, identified himself as a Board of Health member to the camp's director and presented a proposed contract to provide the camp with water services at a monthly rate of $866. Collett also pointed to a water pipe that, in his view, needed to be replaced and quoted a price of approximately $8,000 to replace it. Collett subsequently submitted a vendor application to the Alliance Board of Directors. In November 2002, Collett was notified that the Alliance would not be retaining Tri-S's services. By invoking his official position as a BOH member in an attempt to influence the Alliance to hire Tri-S Water Service, Collett violated §23(b)(2).

In the Matter of Paul Coelho - The Commission fined former Norfolk Building Commissioner Paul Coelho, a Plainville resident, $3,000 for violating M.G.L. c. 268A, the conflict of interest law. According to a Disposition Agreement, Coelho violated § 19 of the law by participating as building commissioner in connection with matters in which Intoccia Construction, Inc. of Foxboro had a financial interest. At the time of his participation, Coelho had an arrangement to work for Intoccia Construction after he left town employment. Coelho also violated §18 of the law by acting as an agent for Intoccia Construction after he left town employment in connection with matters in which he participated as a building commissioner.

In the Matter of Donald G. McPherson - Stow Planning Board member Donald G. McPherson was fined $2,000 for violating the state's conflict of interest law by advocating for a bylaw to create an overlay district for senior housing. McPherson knew the bylaw would make property he was trying to sell more valuable to potential buyers. McPherson owns 125 acres of industrially zoned land in Stow. After an informal town group known as the Housing Coalition submitted a proposed bylaw to create affordable housing for seniors, McPherson filed a disclosure with the town clerk in fall 2001 stating that he would not participate in the Board's action on the bylaw. According to the Disposition Agreement,"notwithstanding his disclosure," McPherson advocated in favor of the bylaw at the December 6, 2001 and January 15, 2002 Planning Board meetings. Town Meeting approved the bylaw in June 2002. By significantly involving himself as a Board member in the discussion regarding the bylaw at a time when he had a financial interest in the bylaw decision, McPherson violated § 19.

In the Matter of Eileen Campanini - Bridgewater Zoning Board of Appeals (ZBA) member Eileen Campanini paid a $2,000 civil penalty to resolve allegations that she violated §19 of the state's conflict of interest law when she participated in a ZBA vote upholding the issuance of a building permit that would likely affect her ability to sell property she owned. According to a Disposition Agreement, Campanini sought an"approval not required" endorsement from the Planning Board in 1998 so that she could divide property she owned. The Planning Board endorsed her plan but the building inspector told Campanini she needed a frontage variance from the ZBA. In November 2000, the ZBA denied her variance application and Campanini was unable to divide her property. Campanini was not a member of the ZBA at that time. In June 2002, Campanini participated in a ZBA vote regarding a property in which the ZBA concluded that it was not necessary for the property owner to seek a frontage variance because the Planning Board approved the plan with an"approval not required" endorsement. After the building inspector issued a permit, abutters appealed to the ZBA. In January 2003, Campanini participated in a ZBA vote upholding the issuance of the building permit for that property. At the time of the January 2003 meeting, Campanini knew that the outcome of the matter would likely affect the status of a building permit for her own property because, in November 2002, Campanini and a local developer were parties to a purchase and sale agreement in which the developer would pay Campanini $150,000 for the property provided he could get a building permit to construct a single family home. Campanini's vote to uphold the permit for the other property made it likely that a building permit would issue for her property, clearing the way for the sale.

In the Matter of Walter R. McGrath - The Commission fined Braintree Electric Light Department (BELD) General Manager Walter R. McGrath $2,000 for violating the state's conflict of interest law by failing to disclose friendships with and entertainment provided by employees of Power Line Models (PLM), a corporation that provided consulting, design and engineering services to BELD. According to the , PLM had a variety of BELD projects on which it was working. As BELD's general manager, McGrath had authority over the employment and retention of consultants, including PLM. McGrath and two of PLM's principals have been friends for over 30 years. In 1999, McGrath attended Major League Baseball's All-Star Game at the invitation of one of these friends at PLM. PLM paid for the $150 ticket. On two occasions in 2000, McGrath played golf with PLM employees at the invitation of one of these friends at PLM. The friend was reimbursed a total of $178 by PLM for McGrath's greens fees. By taking official actions of interest to PLM when he was a

long-time friend of two of its principals, McGrath created the appearance of a conflict of interest in violation of §23(b)(3). These appearance concerns were exacerbated by McGrath's receipt of a ticket to the Major League Baseball All-Star game and two rounds of golf, since they were paid for by PLM. McGrath could have avoided violating §23(b)(3) by making an advance written disclosure to his appointing authority of his friendship and his acceptance of entertainment.

In the Matter of Stephen Rapoza
In the Matter of James Romano - The Commission found that the cases against Berkley Board of Health members Steven Rapoza and James Romano were not proved by a preponderance of the evidence. The Commission ordered both matters dismissed. In January 2004, the Enforcement Division alleged in separate Orders to Show Cause that Rapoza and Romano each violated G.L. c. 268A , §§ 3(b) and 23(b)(2), the state's conflict of interest law, by receiving $100 cash each from a contractor in connection with their signing a certificate of compliance for a septic system.

In the Matter of Robert F. Ford - The Commission fined former Foxboro Police Officer Robert F. Ford $5,000 for improperly receiving direct school department payments for police work. By using his position to negotiate and receive these payments, Ford violated G.L. c. 268A, the state's conflict of interest law. According to a Disposition Agreement, Ford, whose police officer duties were primarily to act as the school resource officer, violated § 23(b)(2) of the conflict law by receiving $15,900 in direct school department payments between fall 2000 and June 2002 for police work. For the same time period, he was paid approximately $22,000 in overtime by the police department. The Foxboro Police Department policy requires all payments to police officers for acting as police officers be made by the police department. While Ford was aware of this policy, in fall 2000 he worked out an arrangement to receive payments directly from the school department. The arrangement was not known to or approved by the police department. The arrangement continued until June 2002, when the police chief became aware of and terminated the arrangement. The Agreement notes that being paid by both the police department and the school department for overtime raises concerns about possible"double-dipping," which were investigated by the Foxboro Police Department. The investigation ended when Ford resigned his position.

In the Matter of Kathy Barrasso - The Commission fined former Dennis Housing Authority (DHA) Executive Director Kathy Barrasso $6,000 for using her position to provide salary advances to herself and other DHA employees, and allowing employees to use sick and vacation time they had not accrued. According to a Disposition Agreement, Barrasso, who served as executive director between 1985 and 2002, violated § 23(b)(2) of the conflict law by:

- Depositing 28 of her own paychecks, on several of which she had altered the dates, into her checking account before she had actually earned them
- Altering the dates and distributing paychecks to subordinates when they requested to receive their paychecks before they had earned them
- Allowing a person who had been friendly with Barrasso's husband and who worked for the DHA between July and December 2001, to commence his DHA employment with 6.25 vacation days and 6.25 sick days, and allowing him to be paid for a total of 54.25 sick and vacation days he had not earned at a cost of over $6,000 to the DHA
- Allowing five other DHA employees to take almost 60 days of unearned vacation or sick time at a total cost of $6,450 to the DHA

In the Matter of Matthew St. Germain - The Massachusetts State Ethics Commission issued a disposition agreement concluding public proceedings against Berkley contractor Matthew St. Germain. St. Germain paid a $2,000 civil penalty for violating the state's conflict of interest law, G.L. c. 268A, § 3(a), by offering money to two Berkley Board of Health (BOH) members to obtain a certificate of compliance for a septic system. According to a Disposition Agreement, on Saturday, January 22, 2000, St. Germain met BOH members James Romano and Steven Rapoza to obtain a certificate of compliance for a septic system at 142 Bryant Street. St. Germain offered $100 cash to each of them for signing the certificate. BOH regulations do not call for any payment for the execution of a certificate of compliance.

In the Matter of Thomas E. Burnett - The Commission fined Whitman Board of Public Works Chairman Thomas E. Burnett $2,000 for violating the state's conflict of interest law, G.L. c. 268A, § 23(b)(2), by having a town mechanic make a tailgate for Burnett's truck at a discounted price using DPW resources. Burnett also paid $350 to Whitman as part of the settlement. Burnett failed to address whether the mechanic could use any DPW resources; the mechanic's understanding under these circumstances was that he could. The mechanic took approximately 10 hours, eight of which were on town time, to make the tailgate. He did all the work at the DPW garage using town equipment and welding supplies. The value of the town time and supplies was approximately $350. Burnett and the mechanic did not discuss payment until after the work was completed. Burnett paid the mechanic $100 for the work. The mechanic's charge for this work would ordinarily have been $300. Burnett also asked the mechanic to attach a hitch, which he supplied, and repair a wire cage on Burnett's flatbed trailer. The mechanic did the work at the DPW garage on his own time. Each job took an hour or two. Burnett did not pay anything for this work.

In the Matter of Hugh Joseph Morley - The Commission fined Braintree Electric Light Department (BELD) Electrical Engineering Manager Hugh Joseph Morley $3,000 for violating § 23(b)(2) of G.L. c. 268A, the conflict of interest law by receiving free golf and baseball tickets provided by employees of Power Line Models (PLM), a corporation that provided consulting, design and engineering services to BELD, services Morley supervised as a BELD manager. Morley worked for PLM in 1996 before he began working at BELD in 1997. At BELD, he was responsible for overseeing PLM projects. He recommended that PLM be hired for additional projects; supervised PLM's performance on those projects; and reviewed and recommended for approval PLM's invoices. Between 1998 and 2001 PLM did approximately $267,000 in business with BELD. Morley supervised 80 percent of that business. During that time, PLM provided Morley with four tickets, each with a face value of $30, to Boston Red Sox games at Fenway Park on five occasions. Thus Morley received $600 worth of tickets. Morley was offered and accepted the tickets in what were referred to as "calibration calls" in which the PLM principal would telephone Morley to make certain that Morley was satisfied with PLM's work and offer him the tickets. Morley also received two rounds of golf totaling $116 from PLM. The afternoon golf outings followed a morning business meeting in PLM's offices. By accepting tickets and golf that were given to him because of his official position, Morley violated § 23(b)(2).

In the Matter of Harold Cole - The Commission issued a Disposition Agreement concluding public proceedings against former Randolph Department of Public Works (DPW) Water Division employee Harold Cole. Cole paid a $15,000 fine for violating the state's conflict of interest law, G.L. c. 268A, by receiving pay for hours he had not worked. The Commission received $5,000 as a civil penalty; the remaining $10,000 was reimbursed to the Town of Randolph for unearned payments Cole was not entitled to receive. Many of Cole's weekly paychecks included payment of $50 or more for hours that he did not work. Cole earned approximately $20 per hour. By repeatedly receiving unearned payments of $50 or more for hours he did not work, Cole violated § 23(b)(2).

In the Matter of Steven Silva - The Commission fined Department of Corrections employee Steven Silva $1,000 for violating the state's conflict of interest law by using his position as Superintendent of Operations at MCI-Cedar Junction to have a subordinate come to Silva's house to cut his hair. By using state resources and a state employee for an at-home haircut for himself, Silva violated §23(b)(2).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO.696

IN THE MATTER
OF
STEPHEN V. SHIRAKA

DISPOSITION AGREEMENT

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

On August 14, 2003, 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 Shiraka. The Commission has concluded its inquiry and, on October 7, 2003, found reasonable cause to believe that Shiraka violated G.L. c. 268A, § 23(b)(3).

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

Findings of Fact

1. Since June 2000, Shiraka has served as the Manager of Facilities and Grounds for the Old Rochester Regional School District (the "School District"). The School District serves three towns: Marion, Mattapoisett and Rochester. Shiraka reports to the School District's Associate Superintendent for Finance and Planning.

2. While Shiraka is employed by the School District, which operates the regional middle school and high school, his responsibilities extend to the Marion, Mattapoisett and Rochester elementary schools. Shiraka's job responsibilities include acting as supervisor on all new construction projects as representative of the School District and the town School Committees.

3. In December 2000, Mattapoisett, through its school building committee, retained Turner Construction Company ("Turner") to serve as project manager on the modernization and expansion of its two elementary schools. Shiraka attended–together with Turner representatives, the architect, and school building committee members–weekly progress meetings, and performed site visits with this group as well. He also advised School District and Mattapoisett officials on Turner's management of the modernization and expansion.

4. Between October 2001 and January 2002, Shiraka, acting in his private capacity, logged 44.25 hours reviewing documents for Turner in connection with two Turner projects in other school districts. He was paid $25 per hour, and so was paid more than $1,100 for his document review. At the same time he was reviewing these documents for Turner, Shiraka was advising School District and Mattapoisett officials on Turner's management of the modernization and expansion.

5. According to Shiraka, prior to performing the document reviews for Turner, he had orally apprised the School District's superintendent of his work, and she approved the arrangement. He did not file a written disclosure. The superintendent does not recall discussing the matter with Shiraka, but stated that she would not have had a problem with it if she had known.

6. In summer 2002, the Dennis-Yarmouth Regional School District was seeking a project manager to oversee the renovation of its high school. Turner bid for and won the Dennis-Yarmouth contract, and retained Shiraka as a part-time Turner consultant on the project on retainer for $3,000 per month. Shiraka continued to work full-time for the Old Rochester Regional School District.

7. Shiraka began his work as a consultant for Turner in November 2002, earning $3,000 per month. Turner paid Shiraka $18,000 for his first six months of work.

8. Shiraka's immediate School District supervisor, the School District superintendent, and the Mattapoisett building committee chair all informally approved of Shiraka's work for Turner. Shiraka did not file a written disclosure, and the approvals were not in writing.

9. In spring 2003, when the Commission began to review this matter, Shiraka and Turner suspended the consulting arrangement.

Conclusions of Law

10. G.L. c. 268A, § 23(b)(3) prohibits a municipal employee from, knowingly or with reason to know, acting in a manner that would cause a reasonable person having 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 the result of kinship, rank, position or undue influence of any party or person. A municipal employee can avoid a violation of §23(b)(3) by making an advance written disclosure to his appointing authority of the facts that would lead a reasonable person to conclude that he could be unduly influenced.

11. By advising Mattapoisett on its supervision of Turner while being paid privately by Turner to review documents and later while serving as a paid consultant for Turner on another district's construction project, Shiraka acted in a manner that would cause a reasonable person to believe that Turner could unduly enjoy his favor in the performance of his official duties. Shiraka filed no written disclosures.

12. The law's provision for advance written disclosure to dispel the appearance of a conflict of interest is not a technical requirement. Such a written disclosure is a public record; it avoids later disputes over whether an arrangement was disclosed, and more important subjects the arrangement to public review. That public review usually leads to a heightened review of the arrangement by those officials charged with overseeing the public employee's performance.

13. Despite Shiraka's good faith effort to secure his superiors' approval of his consulting work, because of the failure to file a written disclosure neither Shiraka's arrangement with Turner nor his appointing authority's awareness of that arrangement was open to public scrutiny. Given the nature of Shiraka's relationship with Turner, it would be very difficult for a member of the public to discover the relationship, absent a written disclosure.[1/]

Resolution

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

(1) that Shiraka pay to the Commission the sum of $1,000.00 as a civil penalty for violating G.L. c. 268A, § 23(b)(3); and

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

DATE: January 5, 2004

[1/] While a public employee's supervisors should appreciate the need for a written disclosure in cases such as this, ultimately it is the employee's responsibility to comply with the law.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 700

IN THE MATTER
OF
THOMAS CHILIK

DISPOSITION AGREEMENT

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

On November 12, 2003, 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 Chilik. The Commission has concluded its inquiry and, on February 11, 2004, found reasonable cause to believe that Chilik violated G.L. c. 268A, § 23(b)(3).

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

Findings of Fact

1. The Greenfield Montague Transportation Area ("GMTA") is a state agency providing bus services. Since 1980, Chilik has served as the general manager of the GMTA. As such, he is a state employee as that term is defined in G.L. c. 268A, § 1.

2. A four-member board of trustees oversees the GMTA. Chilik reports to this board.

3. Chilik's job responsibilities as general manager include participating in personnel matters affecting subordinate GMTA employees.

4. Kathleen Williams ("Williams") has been a GMTA employee since 1995.

5. In 1999, Chilik and Williams began dating exclusively. On June 9, 2003, they were married.

6. During the time they were dating, Chilik participated as general manager in personnel matters affecting Williams including reviewing and approving her pay increases, authorizing her to attend out-of-state conferences (which he also attended), and promoting her in 1999 from administrative assistant to GMTA office manager. In addition, he was her day-to-day supervisor.

7. The GMTA trustees were aware of Chilik's participation in personnel matters affecting Williams and deemed such actions appropriate. The GMTA trustees, however, were not aware of Chilik's personal relationship with Williams.

8. Chilik did not file a written disclosure regarding this personal relationship until late spring/early summer 2003, when Chilik and Williams notified the GMTA trustees of their wedding plans. At that point, the GMTA put appropriate safeguards into place to ensure Chilik's compliance with the conflict of interest law.

Conclusions of Law

G.L. c. 268A, § 23(b)(3) prohibits a public employee from, knowingly or with reason to know, acting in a manner that would cause a reasonable person having 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 the result of kinship, rank, position or undue influence of any party or person. A public employee can avoid a violation of § 23(b)(3) by making an advance written disclosure to his appointing authority of the facts that would lead a reasonable person to conclude that he could be unduly influenced.

9. By participating as general manager in personnel decisions involving a subordinate he was dating, Chilik acted in a manner that would cause a reasonable person to believe that Williams could unduly enjoy his favor in the performance of his official duties. By so acting, Chilik violated § 23(b)(3).

10. Before so participating, Chilik should have disclosed in writing to his appointing authority that he was dating Williams. Alternatively, he should have abstained as general manager from participating in any personnel matters involving Williams. Section 23(b)(3)'s requirement of advance written disclosure prior to participation is not a technical requirement. Even where actions regarding personnel matters affecting a subordinate that a supervisor is dating are appropriate, the disclosure lets the appointing authority (and the public) know the relevant facts and provides the appointing authority the opportunity to fully scrutinize the actions knowing all of the relevant circumstances and put into place appropriate safeguards to protect the public interest under the circumstances.

Resolution

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

(1) that Chilik pay to the Commission the sum of $2,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(3); and

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

DATE: March 4, 2004

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 701

IN THE MATTER
OF
THOMAS HALUCH

DISPOSITION AGREEMENT

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

On November 12, 2003, 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 Haluch. The Commission has concluded its inquiry and, on February 11, 2004 found reasonable cause to believe that Haluch violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Haluch is the Ludlow Department of Public Works ("DPW") Commission Chairman.

2. The Massachusetts Municipal Wholesale Electric Company ("MMWEC"), a non-profit public corporation, is a state agency for purposes of G.L. c.

268A. In June 2002, MMWEC began construction of a $10 million gas pipeline in Ludlow. The 5.6-mile long pipeline ran through approximately 45-50 public and private properties and ten public roadways.

3. The DPW issued 10 permits to MMWEC with regard to the pipeline as it intersected public ways. With regard to construction through private ways, plans were submitted to the DPW for review. The DPW was also responsible for the general oversight of the pipeline, including reconstruction of public ways, coordinating with other utilities, ensuring proper cover of the road surface of the pipeline in order to maintain the integrity of the road surface and ensuring proper depth of the pipeline.

4. Much of this MMWEC oversight work was done by the DPW director and the highway supervisor, both of whom are appointed by and report to the DPW Commissioners.

5. MMWEC negotiated with each private property owner for access to their properties in order to lay the pipe. Haluch has a working farm in Ludlow that was impacted by the pipeline. MMWEC paid Haluch for the use of his property to lay the pipe, with the understanding that MMWEC restore Haluch's property to its original condition.

6. After MMWEC installed the pipeline, it began restoring Haluch's property. Haluch was dissatisfied with the restoration work performed by MMWEC and the length of time it was taking to complete the work, which he asserted, interfered with his farm operation.

7. Haluch brought his concerns to MMWEC officials and offered to do the restoration work himself in exchange for a certain payment. The MMWEC officials informed Haluch what they believed the restoration costs should be based on a preliminary field evaluation. Haluch and MMWEC were several thousand dollars apart.

8. During several discussions about restoration with MMWEC officials, Haluch made statements referring to his DPW chairman position. He also stated that he wielded a lot of power and influence in the town, that he would make sure the pipeline's bonds were not released, and that he could shut down the pipeline.

9. Unresolved disputes between MMWEC and private property owners over restoration usually results in litigation. Consequently, resolutions of such matters can take years.

10. MMWEC officials promptly gave Haluch the payment he was seeking to resolve the matter.

11. Haluch's position as DPW chairman and the above statements played a significant role in causing MMWEC to expedite settlement.[1/]

12. Haluch never took any action inimical to MMWEC.

Conclusions of Law

13. Section 23(b)(2) prohibits a public employee from knowingly or with reason to know using or attempting to use his position to obtain for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

14. As the DPW Commission chairman, Haluch is a municipal employee as that term is defined in G.L. c. 268A, § 1.

15. Haluch knew or had reason to know he was using his DPW position to gain advantage in his private dealings with MMWEC when during several private discussions with MMWEC, he referred to himself as the DPW chairman and repeatedly made threatening statements that indicated he could use that position to adversely affect MMWEC's interests. This was particularly so where at the time he made such statements, the DPW was actively involved in the oversight of the MMWEC pipeline.

16. Haluch's use of his DPW position in his negotiations with MMWEC secured for him a substantially valuable privilege in that it caused MMWEC to quickly settle the dispute on terms favorable to Haluch allowing Haluch to receive his money immediately (instead of potentially waiting for years) and without incurring legal costs.

17. This privilege was unwarranted and not properly available to similarly situated persons because public employees may not threaten to use their official position or powers to obtain an advantage for themselves in a private dispute.

18. Therefore, by knowingly or with reason to know repeatedly using his position as DPW chairman to secure for himself an unwarranted privilege of substantial value not properly available to similarly situated individuals, Haluch violated §23(b)(2).

Resolution

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

(1) that Haluch pay to the Commission the sum of $3,500 as a civil penalty for his repeated

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

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

DATE: March 11, 2004

[1/]Where the settlement was reached before the parties had the opportunity to fully assess the outstanding restoration costs, it is unclear whether the settlement amount was reasonable. Furthermore, where the incident occurred more than a year and a half ago and substantial restoration work has since occurred, it is unlikely that an accurate assessment of the restoration costs could be determined at this time.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 673

IN THE MATTER
OF
PAUL PATHIAKIS

Appearances: Wayne Barnett, Esq.
Counsel for Petitioner

Kathleen Hill, Esq.
Counsel for Respondent

Commissioners: Wagner, Ch.,[1/] Roach, Dolan, Todd, Daher, Ch.,[2/] Maclin[3/]

Presiding Officer:Commissioner Elizabeth J. Dolan

DECISION AND ORDER

I. Procedural History

On February 4, 2003, the Petitioner issued an Order to Show Cause (OTSC) in this matter against the Respondent (Pathiakis). The OTSC alleged that Pathiakis, as an Upton (Town) Technology Committee (UTC) member, violated § 19 of G.L. c. 268A by participating in a decision to select a computer vendor when he had a financial interest in the decision. The OTSC further alleged that Pathiakis violated § 20 of G.L. c. 268A by having a financial interest in a contract between the UTC and TWM Systems.

Pathiakis filed an Answer on February 24, 2003, generally denying all of the allegations and asserting sixteen affirmative defenses.

Beginning in March 2003, the parties engaged in discovery. A pre-hearing conference was held on April 29, 2003. Also on April 29, Pathiakis filed a Motion seeking leave to amend his Answer to include two additional defenses.

On June 4, 2003, the Presiding Officer held a hearing on the Petitioner's Motion to Strike Affirmative Defenses and to narrow the scope of the proceedings. Following oral arguments by the parties, the Presiding Officer entered an Order striking some defenses and allowing others. Pathiakis had voluntarily agreed to withdraw one of the defenses proposed in the amended Answer and the Presiding Officer denied Pathiakis' Motion to Amend his Answer to add the other defense.

An adjudicatory hearing was held on portions of June 19, 20 and 23 and August 12, 2003. The parties presented closing arguments to the Presiding Officer on August 12, 2003. After Petitioner's opening statement, after the close of Petitioner's case, and at the close of all of the evidence, Pathiakis moved for a Dismissal. The Presiding Officer denied the motion each time.

The Commission began deliberations in this matter on August 14, 2003.

II. Findings Of Fact

1. Paul Pathiakis was a member of the Upton Technology Committee between spring 2001 and February 2002. The Selectmen voted to appoint Pathiakis to the UTC on February 27, 2001. The Board of Selectmen appoints all members of the UTC.

2. After being appointed by the Selectmen to the UTC and prior to March 21, 2001, Pathiakis took an oath of office before the Town Clerk.

3. The UTC has a budget funded by tax revenues and appropriated by Town Meeting.

4. The duties of the UTC include providing technical direction to the Town, researching available information technology, and advising the Town about how to fill the Town's technology needs.

5. The Selectmen had requested that the UTC establish a computer system in the Town Hall that would connect all of the Town offices to a local location where

each office could send e-mail and back up data in the event of a system failure. The project was intended to update the computer systems in Town Hall. The UTC discussed this request for a number of years prior to November 2001.

6. The Board of Selectmen wanted Town Departments to review department computer purchases with the UTC so that the various departments would have the same equipment.

7. In May 2001, for the FY 2002 fiscal year, the Town Meeting, voted to allocate $11,200 in tax revenues to the UTC for Internet access, hardware and software and miscellaneous expenses.

8. At all times relevant, Joan Shanahan was the designated Selectman liaison to the UTC.

9. As Selectman liaison to the UTC, Ms. Shanahan did not have the authority to take action on behalf of the Board of Selectmen. If an issue arose, Shanahan was required to refer the matter to the Board of Selectmen.[4/]

10. Ms. Shanahan advised Pathiakis, in the fall of 2001, that he could not be a contractor or work with a contractor to the Town while he served on the UTC.[5/]

11. Selectman Shanahan knew, in December 2001, that Pathiakis was thinking about contracting with TWM Systems to do the server work.[6/]

12. Pathiakis holds a Bachelor of Science degree in Computer Science. Pathiakis has been employed at various times since 1988 in the computer industry, holding such positions as software engineer and UNIX systems administrator.

13. In November – December 2001 the UTC vendors were Memory Plus, Mendon Computer Outlet, and TWM Systems.

14. On November 14, 2001 the UTC, with Pathiakis participating, voted to award TWM Systems a contract to provide the Town with file server hardware. TWM Systems purchased piece parts and put the components in the computer but did not do an operating system configuration before it left TWM Systems.

15. In reaching its decision to obtain a new operating system for the Town, the UTC wanted, among other things, to have file sharing so everyone working in Town Hall could share information, to reduce other costs, to improve system security and to increase speed of network access.

16. The Town planned to use a UNIX operating system that was downloadable and free of charge for its file server software.

17. At the time of the hardware purchase, Tom McGovern, the TWM Systems representative, informed the town that TWM Systems could not provide the configuration services for the file server.[7/]

18. In December 2001, the UTC was attempting to configure the file server to the selected operating system.

19. Pathiakis was present at the December 5, 2001 UTC meeting.

20. At its December 5, 2001 meeting, the UTC discussed hiring a vendor to configure the server. Pathiakis participated in this discussion.[8/]

21. In December 2001 Pathiakis was unemployed. He suggested to the UTC that he would research and contract with a third party. He suggested to the UTC "that if we couldn't find anyone qualified or at a reasonable price, if they wanted to, I would contract the work and get EVERYTHING (server configuration, client configuration and a whole lot more) in 70-100 hours of work at a highly reduced rate."[9/]

22. At the December 5, 2001 UTC meeting, the Committee decided that Pathiakis should create a scope of work for configuration of the server, seek quotes and confirmation whether one of the three vendors was capable of doing the work. In the event that none of the three vendors could provide the service, Pathiakiswas to request if one of the vendors would allow him to subcontract with the vendor to perform the services.[10/]

23. The UTC knew that if Pathiakis did the work that the Town costs would be decreased.

24. As directed by the UTC, Pathiakis contacted three vendors: Memory Plus of Westborough, MA; Mendon Computer Outlet of Mendon, MA; TWM Systems of Hopedale, MA.

25. Pathiakis asked each of the vendors if it could provide the required work, what the hourly rate would be, and what would be the number of hours required to do the work.

26. Memory Plus advised Pathiakis that the server work would entail approximately 200 hours and would be costly. Mendon Computer Outlet advised Pathiakis it did not offer the requested services.

27. On December 10, 2001, by e-mail, Pathiakis sent TWM Systems a request for a quote for services to configure the server. This request described the services

sought by the Town. In this request Pathiakis identified himself as a member of the UTC.

28. Pathiakis was the first UTC contact TWM Systems had about configuration of the file server.

29. Tom McGovern was the representative of TWM Systems, which was his spouse's company.

30. TWM Systems installs new computers, repairs computers, and provides services to small businesses that own computers.

31. TWM Systems gives its municipal clients discounts to help keep the municipal tax rates down.

32. After receiving a request to quote on the configuration of the software for the server, Tom McGovern asked Pathiakis for details about the scope of the work and the amount of time.

33. On December 12, 2001 Pathiakis sent an additional e-mail to TWM Systems identifying himself as a UTC member, detailing the specific tasks the Town required, and estimating that the program services should not exceed 70 hours.

34. On December 12, 2001, Pathiakis sent an e-mail to the UTC indicating that another vendor was unable to provide the requested services.

35. Tom McGovern informed Pathiakis that TWM Systems was unable to provide the full scope of services. McGovern advised Pathiakis that no other computer company in the immediate area could likely fulfill the tasks. McGovern provided Pathiakis with a verbal estimate that the work would cost between $120 - $200 per hour to obtain the services of a specialist from Framingham or Boston.[11/]

36. On December 12, 2001 Pathiakis advised Tom McGovern that he had the expertise to do the Town server configuration and that he had been laid off from his job. Pathiakis suggested to McGovern that he be considered for the job as a contractor through TWM Systems. McGovern informed Pathiakis that he should "clear" the idea with the UTC and the Selectmen's Office.

37. McGovern requested that Pathiakis obtain permission to do a subcontract. He was concerned about a conflict of interest if TWM Systems hired a member of the UTC to work on the Town contract. Subsequent to this conversation Pathiakis informed McGovern that he had permission to subcontract. Tom McGovern would not have hired Pathiakis unless Pathiakis had obtained permission.[12/]

38. Pathiakis proposed to Tom McGovern that TWM Systems charge the Town $65/hour and that TWM Systems take $5/hour for administrative expenses. He proposed charging $60/hour for his time.

39. TWM Systems provided Pathiakis, as the UTC representative, with a quotation for its services.

40. TWM Systems charged the Town $65 per hour. TWM Systems paid $60 per hour to Pathiakis.

41. TWM Systems provided a discount to the Town for the work configuring the file server.

42. Pathiakis, as the UTC representative, informed McGovern that the UTC had retained TWM Systems. Pathiakis, on behalf of the UTC, approved TWM Systems quote for services to configure the server.[13/]

43. Pathiakis entered an oral contract with TWM Systems for configuration of the Town's server.

44. On December 15, 2001, Tom McGovern, on behalf of TWM Systems, sent an e-mail requesting that Pathiakis report to work at TWM Systems on December 17, 2001 to discuss the Town project, submit some paperwork and meet his assistant. According to the e-mail, Pathiakis would be provided with work orders for tracking the billings and tasks. From these work orders TWM Systems would create a bill to send to the Town and "cut a check" for Pathiakis.

45. In a response to the December 15, 2001 McGovern e-mail, Pathiakis indicated he wanted to begin work December 17, 2001 and complete all of the work the week of December 17, 2001.

46. Pathiakis began work on the server for TWM Systems prior to December 19, 2001.[14/]

47. On Tuesday December 18, 2001, Pathiakis, in an e-mail, provided Tom McGovern with a progress update of work completed (as initially described on the task list he submitted to McGovern on December 12, 2001), and his plan for continued work on Wednesday December 19, 2001 and Thursday December 20, 2001.

48. At the December 19, 2001 UTC meeting, Pathiakis reported that he had located TWM Systems as the vendor to configure the server. He informed the UTC that TWM Systems had agreed to allow him to subcontract the work; he had completed a rough configuration; and he hoped to have the work completed by the end of 2001.

49. Paul Pathiakis informed the UTC that TWM Systems was the sole bid.

50. On December 19, 2001 the UTC voted to

hire TWM Systems to program the Town server for the network and Internet connections. Paul Pathiakis abstained from the vote.

51. On December 22, 2001, Pathiakis sent an e-mail to the UTC and to Tom McGovern. Pathiakis provided an update concerning the tasks completed and the remaining work.

52. On December 28, 2001, Pathiakis requested that the UTC pay TWM Systems for the contractor. He indicated that the bill would likely be $4,420, which was 68 hours at $65/hour. He noted that this was a discount as the usual rate was $80/hour. Pathiakis was "the contractor" described in the e-mail.

53. Pathiakis prepared a TWM Systems work order that identified the customer as the Upton Technology Committee and the technician as himself. The total on the work order was $4,550. All of the tasks itemized in the work order, with hours and billing rates, were included in a billing invoice submitted to the UTC. The billing invoice, dated January 4, 2002, totaled $4,550.

54. On December 29, 2001, Pathiakis provided the UTC with another progress report.

55. On December 30, 2001, Pathiakis sent Tom McGovern an e-mail, advising McGovern that the work for the Town was complete except for documentation.

56. Pathiakis admits that he contracted to the Town through TWM Systems and accomplished the configuration of the server and was paid for the services.[15/]

57. Pathiakis worked 70 hours on the Town contract.

58. Pathiakis' work for TWM Systems included training a TWM Systems employee in the installation of the operating system.

59. When the UTC received a bill, William Young, an UTC member, would prepare an UTC expense voucher. The UTC committee members would sign the voucher. Young would give the voucher to the Town accountant who would place it on a warrant for the Selectmen. The Selectmen would approve the warrant one or two weeks after the UTC approved the voucher. After the Selectmen approved the warrant, the Town accountant would pay the bill by Town check.

60. After receiving the TWM Systems invoice dated January 4, 2002, the UTC, on January 8, 2002, signed a voucher for 70 hours at $65 per hour, totaling $4,550 to configure the server. This amount was within the quote received from TWM Systems.

61. The Town paid TWM Systems $4,550 on January 18, 2003. Payment for the configuration came from the UTC budget.

62. At the January 8, 2002 meeting, the UTC approved the configuration and implementation of the unit file sharing facilities and a contract with TWM Systems for twenty hours of additional contracting work to complete the configuration at a cost of $1,300. Pathiakis abstained from the vote.

63. TWM Systems submitted a billing invoice dated January 10, 2002 to the UTC in the amount of $1,300 for creating infrastructure for file sharing. Pathiakis performed the work for TWM Systems.

64. TWM System's policy was to receive payment from the client prior to paying its subcontractors.

65. TWM Systems issued three checks to Paul Pathiakis: No. 6673 dated January 31, 2002 for $4,000, No. 6852 dated April 5, 2002 for $200; and No. 6866 dated April 18, 2002 for $1,000.

66. As of May 12, 2002 Pathiakis had received $5,200 from TWM Systems for work on the Town server.

67. Pathiakis, on behalf of the UTC, gave a quarterly committee update to the Board of Selectmen on January 8, 2002. The update included the server configuration and the new computer installation.

68. At the January 8, 2002 meeting, Pathiakis informed the Selectmen that the server had been configured and functioning for the last fourteen days and was almost complete.

69. At the January 8, 2002 Selectmen's meeting, Pathiakis informed the Selectmen that, while he was a member of the UTC, he also was the contractor with TWM Systems.[16/]

70. When questioned by the Selectmen about the need to award a contract for the server configuration to a third party, Pathiakis answered that the UTC members did not have the expertise to do the work themselves.[17/]

71. At the January 8, 2002 meeting the Selectmen expressed concerns about conflict of interest and directed Pathiakis to seek information about conflict of interest and to check with the Town Clerk about filing a disclosure form.[18/]

72. The Board of Selectmen thanked Pathiakis for his work on the server.

73. After January 8, 2002, the Town Clerk

provided Pathiakis with a conflict of interest brochure containing the telephone number of the Ethics Commission. She recommended that he call the Ethics Commission. At Pathiakis' request, the Town Clerk gave him a disclosure form.

74. The UTC met with the Board of Selectmen on February 6, 2002. At that time Pathiakis reported that the server was installed and working well.

75. At the February 6, 2002 meeting, Pathiakis admitted that he had not filed any disclosure form about conflict of interest. Pathiakis admitted that he had not looked at the conflict of interest law prior to January 5, 2002.[19/]

76. Paul Pathiakis filed a disclosure, dated February 8, 2002, under G. L. c. 268A § 23, disclosing "freelance contractor doing network and systems administration."

77. At the February 13, 2002 meeting the UTC agreed to pay TWM Systems $1,300 for the additional programming work on the server that had been authorized January 8, 2002. Pathiakis abstained from this vote.

78. Pathiakis resigned from the UTC on February 13, 2002.

79. The Board of Selectmen did not, in writing, authorize Pathiakis to participate in the selection of the vendor to configure the Town's server.

80. The Board of Selectmen did not, in writing, grant Pathiakis an exemption under the conflict of interest law to have a financial interest in a Town contract.

81. Selectman Shanahan did not advise Pathiakis that the Selectmen ever approved his subcontract.[20/]

82. Pathiakis did not discuss, with Tom McGovern, the return of any of the monies to the Town.

83. William Young was not aware that any UTC members were designated special municipal employees.

III. Decision

A. Respondent's Motion for a Directed Verdict

After the Petitioner's opening statement, at the close of the Petitioner's case, and at the close of all of the evidence, Pathiakis moved for a directed verdict on the grounds that the Petitioner failed to plead the elements of the alleged violations and failed to prove the violations. The Presiding Officer denied the Motion each time. Since our Rules of Practice and Procedure, 930 CMR *et.seq*., make no provision for a directed verdict, we will treat the Respondent's Motion as a Motion to Dismiss under 930 CMR 1.01(6)(d).[21/] For the reasons discussed below, we agree with the Presiding Officer that the Respondent is not entitled to a dismissal.

Pathiakis argues that the Petitioner did not plead the elements of the alleged violations with sufficient particularity so that he had sufficient notice of the violations in order to prepare a defense. After reviewing the OTSC and the entire proceedings of this case, we conclude that the Respondent's argument is without merit. The Respondent was provided with sufficient notice and a full opportunity to defend.

The Supreme Judicial Court has summarized the law concerning the adequacy of notice to be given in adjudicatory proceedings as follows:

> A state administrative agency conducting an adjudicatory proceeding is required to give all parties 'reasonable notice' that is sufficient 'to afford them reasonable opportunity to prepare and present evidence and argument.' 'Due process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case.' While the State statute and constitutional principles require an agency to be reasonable and to comply with standards of 'natural justice and fair play,' administrative hearings need not comport with any particular form. As long as an agency gives adequate notice of the grounds for the hearing, it is not required to turn over all the evidence it will introduce to support those grounds. (citations omitted)[22/]

The OTSC provided the citation to the relevant statutory sections charged as well as a paraphrase of the statutory language. The OTSC identified the factual basis for each of the elements of the charges, including a time frame. For example, in the G.L. c. 268A, § 19 charge, in separate numbered paragraphs, the Petitioner identifies facts alleging that Pathiakis was a municipal employee, what he did to participate, what the particular matter was, and what his financial interest in the matter was. Similarly, in the G.L. c. 268A, § 20 charge, the Petitioner further identifies the relevant contract and the facts describing Pathiakis' financial interest in the contract. The OTSC also put the Respondent on notice that penalties may attach if a violation were found.

Furthermore, during the preliminary inquiry and before the OTSC even issued, Pathiakis, represented by the same counsel, gave a deposition at the Commission. He had knowledge, from the questions asked, of the

events being investigated. Subsequently, he obtained discovery from the Petitioner. He obtained a witness list prior to the hearing. Furthermore, if he was unable to understand the charges, he could have moved for a More Definite Statement, pursuant to 930 CMR 1.01(6)(b). He did not do so.

He was represented by counsel throughout these proceedings. His counsel has been an active participant at the hearing. Both parties were given several months to prepare for the adjudicatory hearing. Pathiakis' counsel was able to admit evidence, present witnesses and cross-examine the Petitioner's witnesses. She was given opportunities to make opening and closing statements. It is clear from her written submissions that she was aware of all of the elements of the charges against her client.

In conclusion, we find that Pathiakis received adequate notice of each of the charges. Further, he was afforded and utilized all of the rights offered to a party in an adjudicatory hearing.[23/]

Pathiakis further attacks the OTSC by asserting that the Petitioner has the burden to plead and prove a negation of every exemption in G.L. c. 268A, §§ 19 and 20. We disagree. Consistent with the legislative history of G.L. c. 268A and the relevant judicial rules of pleading, the burden of proof of an exemption rests with the Respondent claiming the exemption.[24/] In a prior Commission Decision and Order concerning § 19, *In re Cellucci*, 1988 SEC 346, the Commission confronted the same argument. The Commission determined that a written determination from one's appointing authority under § 19(b)(1) was an exemption to be proven by the Respondent, stating

> were we to assign the burden of proof of the exemption to the petitioner, such an allocation would be plainly inconsistent with an expressed intent of the original framers of G.L. c. 268A. In its Final Report, the Special Commission of Code of Ethics explained that the format they had chosen for the statute 'was deliberately designed in order to avoid the necessity of indictment and proof which must carry the burden of negating all such possible exceptions and exemptions' and declared that '[I]t was the judgment of the [Special] Commission that the burden of proof of an exception or exemption should be on the public official who claims it.'[25/]

Therefore, the Petitioner was not required to plead or prove the non-applicability of an exemption from the requirements § 19 or § 20. Rather, the burden of proof rests with the Respondent claiming an exemption.

The Respondent also argues that this case should be dismissed because the Petitioner has not proven the violations by a preponderance of the evidence. As we discuss below, we find that the Petitioner has proven the violations by a preponderance of the evidence. In conclusion, the Commission re-affirms the denial of the Directed Verdict Motion.

B. Substantive Violations

1. Jurisdiction

As a preliminary jurisdictional matter, we must decide whether Pathiakis, during the relevant time frame, was a municipal employee subject to G.L. c. 268A. The Respondent admits that he was a member of the UTC during the relevant time frame, but denies that he was a "municipal employee" subject to the conflict of interest law.

G.L. c. 268A, § 1(g) defines "municipal employee" as

> a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (l) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

"Municipal agency" is defined as

> any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.[26/]

The Commission generally considers the following factors in determining whether a particular entity, such as the UTC, is a public instrumentality for purposes of G.L. c. 268A:

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

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

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

(d) the extent of control and supervision exercised by governmental officials or agencies over the entity.[27/]

In response to an opinion of the Supreme Judicial

Court, MBTA Retirement Board v. State Ethics Commission, 414 Mass. 582 (1993), the Commission has also considered whether, in light of the preceding factors, "there are any private interests involved, or whether the states or political subdivisions have the powers and interests of an owner."

Applying these factors, we conclude that the UTC is a municipal agency as defined by G.L. c. 268A. We find, by a preponderance of the evidence, that the UTC was created by vote of the Upton Town Meeting as a standing committee of the Town. All of the members are appointed by the Board of Selectmen and provide quarterly reports to the Selectmen. The UTC is charged with managing the Town's technology needs. Thus, its sole purpose is to serve municipal government. It operates as a formal permanent committee of the Town, rather than as an ad hoc body. It is funded by tax revenues and has the authority to expend those revenues. The Town Meeting approves the UTC yearly budget. There are no private interests involved.

Further, we find, by a preponderance of the evidence, that Pathiakis, as an UTC member, was "performing services" for and "holding membership" in a municipal agency. He was appointed to and took an oath of office when he became a member of the UTC. He was an active member. The definition of "municipal employee" has been broadly defined in the statute. One does not have to be compensated or a full-time employee in order to fall within the definition.

The Respondent argues, as an affirmative defense, that, if the Commission finds that he was a municipal employee, then he was a "special municipal employee." "Special municipal employee" is defined as

> a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall by considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.[28/]

Pathiakis has not proven, by a preponderance of the evidence, that he and the other members of the UTC, during the relevant time frame, had been designated "special municipal employees" by the Board of Selectmen.[29/] There is no evidence that the Board of Selectmen voted to designate members of the UTC as special municipal employees, as required by G.L. c. 268A, § 1(n). One member of the UTC indicated that he was not aware that the UTC had ever been so designated. There is no evidence that Selectman Shanahan unilaterally designated the UTC as special municipal employees. She had no power to do so. Although there was evidence that certain other positions and boards in Town government had been designated, at various times, as special municipal employees, this evidence is irrelevant on the issue of whether *the UTC* was so designated.

In conclusion we find that the Petitioner has proven, by a preponderance of the evidence, that Pathiakis was a municipal employee subject to the provisions of G.L. c. 268A during the relevant time period. We find that Pathiakis has not proven that he was a "special municipal employee."

2. Section 19

G.L. c. 268A, § 19 is violated if "a municipal employee. . . 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." As the Commission has recognized, this section "embodies what has been described as 'the most obvious of all conflict-of-interest principles'—namely, that a public official does not act in his official capacity with respect to matters in which he has a private stake.'"[30/]

Thus, the Petitioner must prove, by a preponderance of the evidence, that: Pathiakis (a) was a municipal employee; (b) participated as such an employee; (c) in a particular matter; (d) in which he had a financial interest; and (e) that he had knowledge of the financial interest. As discussed above, the Petitioner has proven that Pathiakis is a municipal employee. Following is a discussion of each of the other elements of § 19.

First, the term "participate" is defined as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."[31/] The Supreme Judicial Court has indicated that this definition includes more than merely rendering a vote on a matter.[32/] According to the Court, "to participate in the formulation of a matter for vote is to participate in the matter."[33/]

G.L. c. 268A requires that the participation be "personal and substantial." Not all participation rises to this level. When interpreting the modifying terms "personal and substantial" the Commission has been guided by the interpretations of the federal Office of Government Ethics, as the Legislature, in promulgating G.L. c. 268A, adopted portions of the federal conflict of interest statute. The federal statute also contains the term "personal and substantial."[34/]

By regulation, 5 C.F.R. § 2637.201, the Office of Government Ethics has described and clarified the phrase "personal and substantial participation" stating:

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

For example, the Commission has concluded that if one discusses or makes recommendations on the merits of a matter one will be deemed to have participated personally and substantially in a matter.[35/] Moreover, one may participate in a particular matter by supervising or overseeing others.[36/]

In comparison, if a public employee merely provides information to the decision-makers, without providing any substantive recommendation, or the employee's actions are peripheral to the merits of the decision process, the employee's actions will not be considered to be personal and substantial participation.[37/]

Under § 19, the municipal employee's participation needs to be in a "particular matter." "Particular matter" is defined as "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property."[38/]

Under § 19, a municipal employee is required to abstain if he has a financial interest in the particular matter in which he is to participate. The term "financial interest" is not defined in G.L. c. 268A.[39/] The Commission, in longstanding rulings, has stated that this section encompasses any financial interest without regard to the size of said interest. The financial interest, however, must be direct and immediate or reasonably foreseeable.[40/] Financial interests which are remote, speculative or not sufficiently identifiable do not require disqualification under G.L. c. 268A.[41/]

Finally, the municipal employee who participates in a particular matter must have knowledge of his financial interest in the matter. "Knowledge" has been defined as "the fact or condition of knowing something with a considerable degree of familiarity gained through experience of or contact or association with the thing; the fact or condition of being cognizant, conscious or aware of something." [42/] "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." [43/]

Applying these legal principles to the facts, we find that the Petitioner has proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 19. First, the Petitioner has alleged, in the OTSC, that the UTC's selection of a vendor was a particular matter. We agree that the UTC decision/determination to retain TWM Systems is a particular matter.

We find, by a preponderance of the evidence, that Pathiakis personally and substantially participated in the decision to select TWM Systems. Although Pathiakis, as an UTC member, abstained from the relevant votes, he was otherwise an active participant. He admitted that he participated in the initial discussions to hire a vendor to configure the server. In one email, he admits that it was his suggestion to the UTC that he subcontract to perform the work if he could get compensated for his efforts. He was instructed, by the UTC to prepare a request for quotes, obtain quotes, evaluate the quotes,

and negotiate a deal. He has admitted that he did each of these actions. At the time that he prepared the quotes, he knew that if he found the quotes unacceptable, he could offer his services to the contractor.

As an UTC member, he sought an agreement with Tom McGovern to permit him to contract to TWM Systems and to do the work for the Town. He suggested the price that Tom McGovern should quote the Town. In an e-mail to Tom McGovern, Pathiakis, on behalf of the UTC, accepted this quote. He presented the quote to the UTC at its December 19, 2001 meeting, reviewed his efforts to obtain a vendor, informed the UTC that TWM Systems was the only quote, and reviewed the work he had performed to date on the computer server for TWM Systems. All of these actions were substantive, not incidental or peripheral, and constituted personal and substantial participation.

Additionally, at the time he so participated, he knew he had a financial interest in the proposed contract. He had suggested, at the December 5, 2001 UTC meeting, that he could do the work if compensated. He knew that the rest of the UTC members had accepted his suggestion before he formulated a request for quotes. He had a financial interest when he formulated the request for quotes because if no vendor could do the work, he was going to seek a subcontract for himself. If a vendor could do the work, then he lost the opportunity for employment. Either situation would affect his financial interest.[44/]

Further, by the time that the UTC decided to retain TWM Systems, Pathiakis had negotiated his own compensation with McGovern to submit to the UTC as a quote. At the time he presented the proposal to the UTC he had started the work and knew TWM Systems had agreed to compensate him.

Section 19 contains an exemption procedure in § 19(b)(1).[45/] Section 19(b)(1) states:

> It shall not be a violation of this section if the municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee

The Commission has instructed public officials that:

> the requirement that the disclosure and authorization be in writing serves at least two purposes. First, it establishes a record of both the disclosure and subsequent determination of the appointing authority, a record which, among other things, protects the interest of the [public] employee if allegations of impropriety should arise. Second, it forces both the [public] employee and the appointing authority to consider carefully the nature of the conflict of interest and the options available for dealing with that conflict....These provisions are more than mere technicalities. They protect the public interest from potentially serious harm. The steps of the disclosure and exemption procedure-particularly that the determination be in writing...are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision.[46/]

Pathiakis asserts, in an affirmative defense, that he complied with the conflict of interest law when he made a disclosure in February 2002 under G.L. c. 268A, § 23. He further asserts that one member of the Board of Selectmen, Ms. Shanahan, approved the actions of the UTC and Pathiakis.

Pathiakis' purported disclosure under G.L. c. 268A, § 23, a statutory section neither pled nor applicable in this case, is inadequate and does not comply with § 19(b)(1). The disclosure should have been completed prior to Pathiakis' seeking quotes for the server work, not after the work was complete. Section 19 places a duty on a municipal employee to advise his appointing authority of the nature and circumstances of the particular matter and to make a "full disclosure" of the financial interest. We have reviewed Pathiakis' disclosure and find that it fails to disclose the fact that he received compensation for performing the server work and fails to disclose the details of the compensation arrangement. Additionally, the disclosure does not contain information regarding what the work entailed, for whom he was doing the work, and the details and time frame of the work performed in December 2001/January 2002.

Finally, Pathiakis could not file a disclosure and then take action until his appointing authority had given a written determination that the conflict was not so substantial as to affect the integrity of his services to the Town. Pathiakis has not proven, by a preponderance of the evidence, that he received a written determination prior to his participation in the vendor selection. There is no evidence that a written determination was ever done.

The evidence indicates that Selectman Shanahan knew that Pathiakis was going to perform this work. But, Pathiakis' appointing authority was the Board of Selectmen, not Shanahan. Therefore, even if Shanahan consented to Pathiakis' performance of the work, this consent was inadequate, as a matter of law. Moreover, the evidence demonstrates that Shanahan did not have the authority to bind the entire Board of Selectmen, and

she had advised Pathiakis that she thought he could *not* perform the work while he remained on the UTC.

Notwithstanding his representation to Tom McGovern that he had permission to subcontract the work, the evidence does not support a finding that Pathiakis had the permission of the Board of Selectmen. It appears that he only had the permission of his fellow UTC members.

In conclusion, we find, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 19, by participating in the decision to select TWM Systems to configure the server. Further, we find that Pathiakis has not proven, by a preponderance of the evidence, that he obtained a written determination from his appointing authority, pursuant to § 19(b)(1), that would have permitted him to participate in the matter.

3. Section 20

G.L. c. 268A, § 20 states, "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 by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both."

As articulated by William Buss, one of the commentators on the Massachusetts conflict of interest law:

> [S]ection 7 (state counterpart to § 20) announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as though they have influence. Therefore, because a state employee, in some circumstances, might use his position to see that contracts are awarded, not just to his own company but to companies with which his company does business, it is assumed by the statute that such circumstances always exist unless an exemption can be shown to be applicable.[47/]

Thus, to find a violation under § 20, the Petitioner does not need to prove and the Commission does not need to find actual inside influence. Nor is the amount of the financial interest significant in finding a violation. The Commission needs to find that the Petitioner proved, by a preponderance of the evidence, that: (a) Pathiakis was a municipal employee; (b) who had a direct or indirect financial interest of which he had knowledge or reason to know; (c) in a contract made by a municipal agency; (d) in which the Town is an interested party.

The Commission has stated that "for purposes of G.L. c. 268A, the term'contract' refers not only to a formal, written document setting forth the terms of two or more parties' agreements, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties, under which each undertakes certain obligations in consideration for promises made by the other, constitutes a contract."[48/] Similar to the facts in the case before us, the Commission has previously found that public employees have indirect financial interests in public contracts, for purposes of § 20, when they subcontract to an entity that has a public contract.[49/]

We find that the Petitioner has proven that there was a contract between TWM Systems and the UTC. TWM Systems provided a quote to perform services over 70 hours to configure the new server at a rate of $65/ hour. First Pathiakis, and subsequently the UTC, accepted the quote. The work was completed and the UTC paid TWM Systems' invoiced bill. Clearly the Town, as the direct beneficiary of the work, was an interested party. The UTC, as a Town agency, was also a party.

Further, the Petitioner has proven that Pathiakis had an indirect financial interest in the contract and that he knew or had reason to know of the financial interest. He admitted that he performed the computer server work. He admitted that he received compensation from TWM Systems for the work. Pathiakis established the billing rate used by TWM Systems. Almost the entire billing rate was Pathiakis' compensation for doing the work. TWM Systems retained only $5/hour as an administrative overhead fee. Pathiakis prepared the work hours documents from which the billing invoices were prepared. Shortly after TWM Systems received payment from the Town, it paid Pathiakis. Tom McGovern testified credibly that his policy was to bill his client and, after receiving payment, pay any subcontractors. But for the administrative costs, TWM Systems was almost a "pass through" of the funds between the Town and Pathiakis. Pathiakis completed the work and received partial payment prior to resigning from the UTC.

Pathiakis asserts, as an affirmative defense, that he filed a disclosure and resigned from the UTC, thus, alleviating any § 20 violation. There is no exemption in § 20 that would permit a municipal employee to contract with his own agency. The only available exemption under § 20 is § 20(d), which permits a special municipal employee to have a financial interest in a contract with his own agency. Section 20(d) requires a special municipal

employee to file a full disclosure with the Town Clerk and obtain approval of an exemption from the Selectmen. As discussed above, Pathiakis has not proven, by a preponderance of the evidence, that he had been designated a special municipal employee, had made a full disclosure in a timely fashion, and had obtained an exemption from the Selectmen.

Section 20 also states that "This section shall not apply: to a municipal employee who in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or disposes of the interest." Pathiakis asserts that he complied with this section when he resigned from the UTC in February 2002. However, under this exemption he is not required to resign, he is required to dispose of the financial interest. He has not returned, to the Town, any of the monies he received. Also, by the time he resigned, he had entered his contract with TWM Systems, had received partial payment, and had completed the work.

In conclusion, the Commission finds that the Petitioner has proven a violation of § 20 and that Pathiakis has not proven that he was entitled to or complied with an exemption from § 20.

IV. Conclusion

The Petitioner has proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 19 when he participated, as an UTC member, in the decision to select a computer vendor while he had an agreement with the vendor to be compensated to do the computer work. The Petitioner has also proven, by a preponderance of the evidence, that Pathiakis violated G.L. c. 268A, § 20 by knowingly or with reason to know having an indirect financial interest in the TWM Systems/ UTC contract while he remained a municipal employee.

V. Order

Having concluded that the Respondent violated G.L. c. 268A, § 19 and § 20 and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **orders** Paul Pathiakis to pay a civil penalty of **$ 2000** for the violation of G.L. c. 268A, § 19 and a civil penalty of **$ 2000** for the violation of G.L. c. 268A, § 20, resulting in an aggregate total civil penalty of **$ 4000**.

DATE AUTHORIZED: March 31, 2004
DATE ISSUED: April 12, 2004

1/ Chairman Wagner participated in the preliminary deliberation of this matter, but his term expired during the pendency of these proceedings, prior to a Commission decision, and he is not a signatory to this Decision and Order.

2/ Chairman Daher's term began during the pendency of these deliberations. He has reviewed the relevant portions of the record of the proceedings, including the transcript and the parties' memoranda. He has participated in the deliberations of this matter and is a signatory to the Decision and Order.

3/ Commission Maclin's term began during the pendency of these proceedings. He has reviewed the relevant portions of the record of the proceedings, including the transcript and the parties' memoranda. He has participated in the deliberations of this matter and is a signatory to the Decision and Order.

4/ The Presiding Officer found Ms. Shanahan's testimony on this point to be credible.

5/ The Presiding Officer found Ms. Shanahan's testimony on this point to be credible. Her testimony was also consistent with statements she made during a joint videotaped UTC/Board of Selectman Meeting on February 6, 2002. The videotape of this meeting was admitted into evidence without objection.

6/ Although Ms. Shanahan's testimony about the state of her knowledge was evasive, the Presiding Officer credits her statements, made under cross-examination. Shanahan testified "I stated I knew back in December. I did. That he said he was going to contract. I did not know whether he did or not."

7/ The Presiding Officer found Mr. McGovern's testimony on this point to be credible.

8/ We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakis admitted to the Selectmen that he participated in the December 5, 2001 discussions to find a vendor to configure the server.

9/ We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakis admitted that he suggested he could do the computer server work if no vendor was available to do the work. We also credit an email between Pathiakis and Bill Huang, Minutes of the December 5, 2001 UTC meeting, and Pathiakis' Answers to Interrogatories.

10/ We credit the videotape of the February 6, 2002 Selectman's meeting. At that meeting Pathiakis admitted that he suggested he could do the computer server work if no vendor was available to do the work. We also credit an email between Pathiakis and Bill Huang, Minutes of the December 5, 2001 UTC meeting, and Pathiakis' Answers to Interrogatories.

11/ The Presiding Officer found Tom McGovern's testimony on this point to be credible.

12/ The Presiding Officer found Tom McGovern's testimony credible.

13/ In a December 15, 2001 e-mail to Tom McGovern, Pathiakis wrote "everything looks and sounds good. Please send the quote. I'll ok it."

14/ We credit a portion of Pathiakis' sworn deposition testimony, admitted into evidence, where he testified "the December 19th comes and Dave Anderson, Darryl, Bill Young, myself are in attendance and we go over and basically say you know how's things going. I'm like well the vendor that I found was TWM. They've agreed to allow me to subcontract. I've done the rough and I'm gonna go forward with

the full configuration and try and get it done by the end of the year . . .” The Presiding Officer also found Tom McGovern credible on this point. We also credit an email from Pathiakis to Tom McGovern on December 18, 2001, describing his work progress on the server.

[15/] We credit e-mails Pathiakis sent to Bill Huang and Joan Shanahan, as well as Pathiakis' sworn deposition testimony. We also credit Pathiakis' statements at a videotaped Board of Selectmen meeting on January 8, 2002. The videotape was admitted into evidence without objection.

[16/] We credit the videotape of the January 8, 2002 Selectmen's meeting.

[17/] We credit the videotape of the January 8, 2002 Selectmen's meeting.

[18/] We credit the videotape of the January 8, 2002 Selectmen's meeting.

[19/] We credit statements made by Pathiakis in response to questions by the Board of Selectmen at the videotaped February 6, 2002 Selectmen's meeting.

[20/] We credit Pathiakis' sworn deposition testimony: “Q: Did Joan ever tell you that the selectmen-the board of selectmen had approved of your subcontract? A: No. I don't believe she ever did.”

[21/] 930 CMR 1.01(6)(d) states: “the Respondent may move to dismiss for failure of the Petitioner to prosecute or to comply with 930 CMR *et.seq*. or with any order of the Commission or Presiding Officer. Upon completion by the Petitioner of the presentation of evidence, the Respondent may move to dismiss on the grounds that, upon the facts and/or the law, the Petitioner has not sustained its case . . .”

[22/] Strasnick v. Board of Registration in Pharmacy, 408 Mass. 654, 660-661 (1990); see also Vaspourakan, Ltd. v. Alcoholic Beverages Control Commission , 401 Mass. 347, 353-354 (1987); LaPointe v. License Board of Worcester, 389 Mass. 454, 458 (1983).

[23/] According to G.L. c. 268B, § 4(f), “All parties shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, to submit evidence, and to be represented by counsel.”

[24/] *In re Cellucci*, 1988 SEC 346.

[25/] *In re Cellucci*, at 349.

[26/] G.L. c. 268A, § 1(f).

[27/] *See EC-COI-95-10; 94-7; 89-24.*

[28/] G.L. c. 268A, § 1(n).

[29/] The Respondent has the burden of proving an affirmative defense. The Petitioner is not required to plead, as part of its case, that the UTC were not “special municipal employees.”

[30/] *In re Craven*, 1980 SEC 17, 21 (citing W.G. Buss, “The Massachusetts Conflict-of-Interest Statute: An Analysis,” 45 B.U.L. Rev. 299, 353 (1965).

[31/] G.L. c. 268A, § 1(j).

[32/] Graham v. McGrail, 370 Mass. 133, 138 (1976).

[33/] Id., see also *EC-COI-98-3; In re Geary,* 1987 SEC 305, 306-07 (participation need not be influential or determinative of result).

[34/] *EC-COI-98-3.*

[35/] *See EC-COI-89-2* (discussion of the merits of a particular matter); *87-19* (participation includes any discussion, recommendation, vote, investigation); *85-*75 (participation includes reviewing and making recommendations to others); 79-*74* (participation found where employee discussed with decision-makers factors that were central considerations of the final evaluation of a contract even if employee did not participate in selection, final review, approval and execution of contract); *In re Craven*, 1980 SEC 17, *aff'd*, Craven v. State Ethics Commission, 390 Mass 101, 202 (1983) (state representative participated by using position to exert pressure on agency to award contract).

[36/] *See EC-COI-93-16; 87-27; 89-7.*

[37/] *See e.g., EC-COI-85-48* (forwarding claim to appropriate staff for review and determination); *82-138; 82-82* (providing peripheral information in the decision-making process); *EC-COI-81-159* (initial suggestions regarding division's operational needs not related to ultimate decision to contract).

[38/] G.L. c. 268A, § 1(k).

[39/] See, Graham v. McGrail, 370 Mass. 133, 138 (1976)(statute deficient for not defining term financial interest).

[40/] *See, e.g., EC-COI-92-12; 90-14; 89-33; 89-5.*

[41/] *See, e.g., EC-COI-89-19*; *87-16.*

[42/] Webster's Third New International Dictionary, unabridged.

[43/] West's Case, 313 Mass. 146,150 (1943).

[44/] It was likely that Pathiakis would be able to obtain an employment opportunity for himself. At the December 5, 2001 meeting the Board was not certain it could afford or find an outside vendor. Moreover, Tom McGovern testified credibly that he had indicated sometime in November, when the UTC purchased the hardware, that TWM Systems could not configure the new server.

[45/] There are two additional exemptions in § 19, neither of which is relevant to these proceedings.

[46/] *In re Deirdre Ling, 1990 SEC 456, 458-459.*

[47/] Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 373-374 (1965); *see also*, *EC-COI-82-109.*

[48/] *EC-COI-87-14*; see Quinn v. State Ethics Commission, 401 Mass. 210, 216 (contract a bargained-for exchange of offer, acceptance, and consideration).

[49/] See P.E.L. 98-2 (subcontract to provide services to general contractor on school renovation project); *EC-COI-90-17* (subcontract to provide printing services to a client to help client provide work under state contract); *In re McMann*, 1988 SEC 379 (respondent arranged for a straw company to provide goods to school and then pay him from proceeds).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 702

IN THE MATTER
OF
THOMAS COLLETT

DISPOSITION AGREEMENT

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

On December 16, 2003, 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 Collett. The Commission has concluded its inquiry and, on March 31, 2004, found reasonable cause to believe that Collett violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Collett is an elected member of the Hardwick Board of Health ("BOH").

2. Collett is a Certified Licensed Water Operator and he operates Tri-S Water Service ("Tri-S"), a private water testing company.

3. The Alliance for the Homeless ("the Alliance") is a non-profit organization. In 2002, the Alliance began renting a property in Hardwick with the intent of running a camp for children in summer 2003, (the "Camp").

4. A summer camp cannot operate in Hardwick without first obtaining a permit from the BOH.

5. A public well was located on the Camp's property. According to the Department of Environmental Protection ("DEP"), camps must submit certain water quality reports to the DEP on a monthly basis. If a camp fails to submit the reports, or if the reports indicate unacceptable levels of water contaminants, the DEP posts notices on the site and informs the local BOH, which could revoke the camp's permit. In the event that a public water system fails to meet the DEP's standards, the owner of the property must comply with various DEP testing and possibly disinfecting procedures.

6. In September 2002, Collett drove to the Camp in a town truck. Collett identified himself to the Camp's director (the "Director") as a BOH member. Collett told the Director about the public water system. Collett explained that he had contracted with the campground's prior tenants to provide them with water services. Collett presented the Director with a proposed contract for Tri-S's services with a monthly rate of $866. The contract required Tri-S to conduct various surveys and keep certain records, in addition to performing facility inspections as needed. Collett also pointed to a water pipe that, in his view, needed to be replaced. He quoted a price of approximately $8,000 to replace the pipe.

7. The Director gave Collett a copy of Alliance's vendor application form, which Collett filled out. By letter dated November 10, 2002, the Alliance Board of Directors notified Collett that the Alliance would not be retaining Tri-S's services.

8. At the time of Collett's solicitation, the Alliance had not yet applied to the BOH for a summer camp permit but intended to apply in the near future.

9. The Alliance applied to the BOH for the permit on March 30, 2003.

Conclusions of Law

10. Section 23(b)(2) prohibits a public employee from knowingly or with reason to know using or attempting to use his position to obtain for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

11. As a Hardwick BOH member, Collett is a municipal employee as that term is defined in G.L. c. 268A, § 1.

12. Collett knew or had reason to know he was using or attempting to use his BOH position to influence Alliance to use the services of his private water testing company, Tri-S. This is because (1) when he made the solicitation he invoked his official position by introducing himself as a BOH member and driving to the camp in a town truck; and (2) did so to someone who was subject to his official authority. Alliance was required to obtain a permit from the BOH in order to operate their summer camp, and any non-compliance by the Camp regarding water standards would be reported to BOH, which could revoke the Camp's permit.

13. The privilege was securing for himself and/or his company business from Alliance.

14. The privilege would have been unwarranted because Collett would have obtained any such business by using the influence and power of his BOH position.

15. The privilege was of substantial value as the value of the business was more than $50.

16. This unwarranted privilege was not otherwise properly available to similarly situated people because public officials may not use their public positions to obtain private business.

17. Therefore, by knowingly or with reason to know using his position as a BOH member in an attempt to secure for himself and/or his company an unwarranted privilege of substantial value not properly available to similarly situated individuals, Collett violated §23(b)(2).

Resolution

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

(1) that Collett pay to the Commission the sum of $1,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2);

(2) that Collett and/or Tri-S will not contract for or otherwise provide private water services to Hardwick properties while Collett is on the BOH; [1/] and

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

DATE: April 14, 2004

[1/] The fact that Collett in his private capacity received compensation from Tri-S for water inspections for property in Hardwick raises concerns under § 17 as the BOH may have a direct and substantial interest in such matters. Section 17(a) prohibits a municipal employee, other than as provided by law for the proper discharge of official duties, from requesting or receiving compensation from anyone other than the same municipality in relation to a particular matter in which that municipality 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 for anyone other than the same municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

Where Collett has agreed not to have Tri-S provide private water services to Hardwick properties in the future while he is on the BOH, the Commission has decided as part of this settlement not to pursue these § 17 issues.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 697

IN THE MATTER
OF
PAUL COELHO

DISPOSITION AGREEMENT

The State Ethics Commission and Paul Coelho 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 May 21, 2003, 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 Coelho. The Commission has concluded its inquiry and, on August 14, 2003, found reasonable cause to believe that Coelho violated G.L. c. 268A.

The Commission and Coelho now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. Coelho was hired as Norfolk's part-time local building inspector in July 1, 1999. On February 1, 2001, he became Norfolk's full-time building commissioner From February 2001 until July 2, 2001, Coelho was the Norfolk building commissioner. As such, Coelho was a municipal employee as that term is defined in G.L. c. 268A, § 1, and subject to the provisions of the conflict-of-interest law, G.L. c. 268A.

2. As the building commissioner, Coelho was responsible for enforcing the building codes and zoning and planning regulations.

3. Intoccia Construction, Inc. is a construction company doing business in Massachusetts. In 2000-2001, Intoccia Construction had a large subdivision development under construction in Norfolk called Christina Estates.

4. As building commissioner, Coelho participated in permitting matters concerning Christina Estates.

5. In spring 2001, Coelho began looking for new employment. In-mid June, Coelho and Intoccia Construction President Michael Intoccia reached an agreement where Coelho would begin work for Intoccia Construction after he left town employment. Immediately

thereafter, on June 18, 2001, Coelho submitted his resignation, effective July 2, 2001.

6. After Coelho accepted an employment offer to work for Intoccia Construction, he continued participating as building commissioner in permitting matters affecting Christina Estates. Specifically, on June 25, 2001, Coelho as building commissioner conducted a rough inspection and on June 27, 2001, an insulation inspection, both of which were required before the occupancy permit could issue to Christina Estates.

7. On July 3, 2001, Coelho began work for Intoccia Construction as project foreman for Christina Estates. For approximately five months, Coelho was involved as Intoccia Construction's foreman in matters in which he had participated as Norfolk Building Commissioner. Coelho's involvement included contacting the town to schedule several inspections concerning outstanding permits he had issued as building commissioner and representing Intoccia Construction during those inspections. Coelho received compensation from Intoccia Construction for these acts.

8. Coleho knew that this compensation was for services in connection with particular matters in which he had participated as building commissioner.

9. When Intoccia Construction learned that Coelho's work on the Christina Estates raised conflict of interest concerns, Coelho was immediately transferred to another construction project outside of Norfolk.

Conclusions of Law

10. Section 19 of G.L. c. 268A prohibits a municipal employee from participating[1/] as such an employee in a particular matter[2/] in which, to his knowledge, a business organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.[3/]

11. The determinations made during the described in paragraph 6 above were particular matters.

12. Coelho, as building commissioner, participated in these particular matters.

13. Intoccia Construction was an organization with which Coelho had an arrangement concerning prospective employment.

14. Coelho had knowledge that as the developer of the property, Intoccia Construction had a financial interest in these determinations.

15. Accordingly, by so participating in these particular matters, Coelho violated § 19.

16. Section 18(a) of G.L. c. 268A prohibits a former municipal employee from knowingly acting as agent for or receiving compensation[4/] from anyone other than the same municipality in connection with any particular matter in which the municipality is a party or has a direct and substantial interest, and in which matter he participated as a municipal employee.

17. Coelho became a former municipal employee when he left his position as building commissioner on July 2, 2001.

18. The decisions to issue building permits as described in paragraph 7 above concerning the Christina Estates were particular matters.

19. Coelho participated as building commissioner/building inspector in issuing those permits during 2000-2001.

20. Where the town decides whether and under what conditions to issue building permits, the town is a party to and has a direct and substantial interest in those decisions.

21. For the five months that Coelho served as project foreman, he was responsible for ensuring that the work was in compliance with outstanding permits he had issued as building commissioner/inspector. Intoccia Construction paid Coelho for his services. By knowingly receiving compensation for such services, Coelho received compensation from someone other than the town in relation to particular matters in which the town was a party and/or had a direct and substantial interest, and in which matters Coelho had participated as a municipal employee. Therefore, Coelho violated §18(a) by this conduct.

22. As part of his duties as foreman, Coelho, on Intoccia Construction's behalf, contacted the town to schedule several inspections concerning outstanding permits he had issued as building commissioner/inspector and represented Intoccia Construction during those inspections. By doing so, Coelho knowingly acted as agent for someone other than the town in relation to particular matters in which the town was a party and/or had a direct and substantial interest, and in which matters Coelho had participated as a municipal employee. Coelho by engaging in these acts of agency also violated §18(a) by this conduct.

Resolution

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

(1) that Coelho pay to the Commission the sum of $3,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 18(a); and

(2) that Coelho 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 30, 2004

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

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

3/ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. *See Graham v. McGrail*, 370 Mass. 133 (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*.

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 704

IN THE MATTER
OF
DONALD G. McPHERSON

DISPOSITION AGREEMENT

The State Ethics Commission and Donald McPherson 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 May 21, 2003, 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 McPherson. The Commission has concluded its inquiry and, on December 16, 2003, found reasonable cause to believe that McPherson violated G.L. c. 268A, § 19.

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

Findings of Fact

1. McPherson was during the time relevant a Town of Stow Planning Board (Board) member. As such, McPherson was a municipal employee as that term is defined in G.L. c. 268A, § 1.

2. At all relevant times, McPherson was the 95% owner of Minuteman Realty Corp. (MRC). In turn, at all relevant times, MRC owned 125 acres of industrially-zoned land in Stow. McPherson first put this 125-acre parcel up for sale in 1997. At all relevant times McPherson was trying to sell this parcel.

3. Sometime during the early fall 2001 an informal town group know as the Housing Coalition submitted a proposed bylaw (Bylaw) to the Board. The Bylaw would create an overlay district for senior housing. The Bylaw's purpose was to create affordable housing for seniors. (McPherson was not a Housing Coalition member.)

4. The role of the Board was to review the Bylaw draft language, make any changes the Board believed were appropriate, and then decide whether to recommend it to town meeting for approval.

5. On October 30, 2001, McPherson filed a disclosure with the town clerk stating that he owned 125 acres in the proposed age-restricted housing district, and because his involvement in this matter could create the appearance of conflict of interest, he would not participate in the Board's action on the Bylaw.

6. Notwithstanding his disclosure, McPherson involved himself in the Board's consideration of the Bylaw as follows:

On December 6, 2001, the Board met to discuss the Bylaw. McPherson advocated in favor of the Bylaw by (a) noting that developments contemplated under the Bylaw would have no impact on roads and schools; (b) explaining that the Housing Coalition had talked to several developers who had proposed business uses in the industrial zone and found them not to be economically

feasible; (c) commenting that senior housing developments were not a good fit in existing residential neighborhoods because access would be difficult; and (d) responding to a question about the compatibility of residential developments in industrial areas by saying that the 25-acre minimum lot size and setback requirements would satisfy any compatibility issues.

On January 15, 2002, the Board met to further consider the Bylaw. McPherson as a Board member again supported the Bylaw. He stated, "This is our industry of the future from a tax perspective;" and "a density bonus makes sense for age restricted housing." McPherson also suggested that a public information meeting be held to discuss the Bylaw.

7. On April 23, 2002, the Board, with McPherson absent, voted to recommend the Bylaw to town meeting.

8. The Bylaw was rejected during the May 13-15, 2002 town meeting.

9. On June 4, 2002, the Board, with McPherson abstaining, again voted to recommend the Bylaw to town meeting. [1/]

10. On June 6, 2002, town meeting approved the Bylaw.

11. At all relevant times McPherson knew the Bylaw would make his 125-acre parcel more valuable to potential buyers because they would have more development options.

Conclusions of Law

12. Section 19 of G.L. c. 268A prohibits a municipal employee from participating[2/] as such an employee in a particular matter[3/] in which, to his knowledge, he or an immediate family member[4/] has a financial interest.[5/]

13. The decision by the Board to recommend that the Bylaw be adopted was a particular matter.

14. McPherson participated personally and substantially in that matter by significantly involving himself as a Board member in the discussion regarding the Bylaw at the December 6, 2001 and January 15, 2002 meetings.

15. At the time of those meetings, McPherson had a financial interest in the Bylaw decision in that the Bylaw would make the land within the overlay district more valuable because a potential buyer of the land would have more development options. Consequently, McPherson knew he had a financial interest in the Bylaw when he so participated at the December 6, 2001 and January 15, 2002 meetings.

16. Therefore, McPherson violated § 19 by participating in the Board's decision to recommend the adoption of the Bylaw.

Resolution

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

(1) that McPherson pay to the Commission the sum of $2000 as a civil penalty for violating G.L. c. 268A, § 19; and

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

DATE: May 24, 2004

[1/] McPherson also abstained regarding this issue at the February 26, April 9, April 19, May 20, May 31 and June 4, 2002 Planning Board meetings.

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

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

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

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 705

IN THE MATTER
OF
EILEEN CAMPANINI

DISPOSITION AGREEMENT

The State Ethics Commission and Eileen Campanini 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 November 13, 2003, 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 and c. 268B, by Campanini. The Commission has concluded its inquiry and, on February 19, 2004, found reasonable cause to believe that Campanini violated G.L. c. 268A, § 19.

The Commission and Campanini now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. Campanini has been a member of the Bridgewater Zoning Board of Appeals ("Zoning Board") since 2002.

2. Campanini owns a 1.34 acre parcel of property on Pleasant Street in Bridgewater (the "Pleasant Street Property"). The Pleasant Street Property has on it the remains of an existing outbuilding.

3. In 1998, Campanini applied to the Bridgewater Planning Board for an "approval not required" endorsement, which would allow her to subdivide the Pleasant Street Property from adjacent property with a single-family home on it without having to satisfy the requirements under G.L. c. 41, §§ 81K et seq., the subdivision control law. On January 4, 1999, the Planning Board endorsed Campanini's plan, holding that under G.L. c. 41, § 81L[1/] it was not a subdivision.

4. Following the Planning Board's endorsement, the building inspector told Campanini that he would not grant her a building permit for the Pleasant Street Property until she had secured a frontage variance from the Zoning Board, since the frontage for the Pleasant Street Property was inadequate.

5. On June 26, 2000, Campanini petitioned the Zoning Board for a frontage variance for the Pleasant Street Property. Her signed variance petition states that the Planning Board endorsed the subdivision of her property under § 81L.

6. On November 8, 2000, the Zoning Board, which did not then include Campanini, denied her variance application. As a result, Campanini could not develop the Pleasant Street Property.

7. In June 2002, an individual owning property located at 206 Bedford Street in Bridgewater (the "Bedford Street Property Owner") received an endorsement from the Planning Board that his subdivided property, like Campanini's, did not constitute a subdivision under § 81L.

8. As in Campanini's case, the building inspector advised the Bedford Street Property Owner that he needed to obtain a frontage variance from the Zoning Board in order to get a building permit.

9. In June 2002, the Bedford Street Property Owner petitioned the Zoning Board for a variance for his property.

10. On August 7, 2002, Campanini and her fellow board members voted 3-0 to allow the Bedford Street Property Owner to withdraw his variance application without prejudice. The board decided that because the Bedford Street Property Owner's property had been endorsed by the Planning Board under § 81L, it was not necessary for the Bedford Street Property Owner to seek a variance from the Zoning Board.

11. The building inspector issued a building permit to the Bedford Street Property Owner on September 17, 2002, which, on November 22, 2002, the Bedford Street Property Owner's abutters appealed to the Zoning Board.

12. On or about November 26, 2002, a local developer applied to the building inspector for a building permit to construct a single family dwelling on Campanini's Pleasant Street Property. The developer and Campanini were parties to a purchase and sale agreement for the Pleasant Street Property under which the developer would purchase the Pleasant Street Property for $150,000, provided he could get a building permit.

13. After the developer's submission of the building permit application, the building inspector, the developer and Campanini met to discuss the application. At the meeting, the building inspector informed the developer and Campanini that he would not issue a building permit for the Pleasant Street Property until the appeals related to the Bedford Street Property had been completed.

14. On January 23, 2003, the Zoning Board considered the Bedford Street Property abutters' appeal. Campanini and her fellow Zoning Board members voted 3-0 to uphold the issuance of the building permit for the Bedford Street Property, holding that "the Planning Board made the decision to endorse under § 81L and it is not [within] the purview of the Zoning Appeals Board."

15. At the time of the January 2003 meeting Campanini knew that the outcome of the Bedford Street Property matter would likely affect the status of the building permit application for her own property.

16. The Zoning Board's January 2003 decision to uphold the issuance of a building permit for the Bedford Street Property was appealed to the courts. The court appeal of that matter continues. The building inspector never issued the building permit for Campanini's property, and her purchase and sale agreement has expired.

17. Campanini cooperated fully in the Commission's investigation of this matter.

Conclusions of Law

18. Section 19 of G.L. c. 268A prohibits a municipal employee from participating[2/] as such an employee in a particular matter[3/] in which, to her knowledge, she has a financial interest.[4/]

19. As a Zoning Board member, Campanini was during the relevant time period a municipal employee as that term is defined in G.L. c. 268A, § 1.

20. The Zoning Board's January 23, 2003 vote to uphold the issuance of a building permit for the Bedford Street Property was a particular matter.

21. By voting on that particular matter, Campanini participated as a municipal employee in the particular matter.

22. Campanini had a financial interest in the Zoning Board's January 23, 2003 vote on the Bedford Street Property. Campanini's Purchase and Sale Agreement conditioned the sale of the Pleasant Street Property on the issuance of a building permit. It was the Zoning Board's denial of a variance for the Pleasant Street Property in November 2000 that blocked Campanini from obtaining a building permit and developing the lot. The January 2003 vote affirming that a building permit could issue for a property endorsed by the Planning Board under § 81L without the need for the property owner to obtain any variances from the Zoning Board would make it likely that a building permit would issue for the Pleasant Street Property, clearing the way for Campanini's sale of that property.

23. Campanini knew of her financial interest in the Bedford Street Property matter when she participated in the January 23, 2003 vote described above.

24. Accordingly, by participating in the January 23, 2003 vote affirming the issuance of a building permit for the Bedford Street Property, Campanini violated § 19.[5/]

Resolution

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

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

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

DATE: May 25, 2004

[1/]The final clause of § 81L states that "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

[2/]The final clause of § 81L states that "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

[3/]The final clause of § 81L states that "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

[4/]The final clause of § 81L states that "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

[5/]The final clause of § 81L states that "the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 708

IN THE MATTER
OF
WALTER R. MCGRATH

DISPOSITION AGREEMENT

The State Ethics Commission and Walter R. McGrath 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 December 18, 2002, 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 McGrath. The Commission has concluded its inquiry and, on February 19, 2004, found reasonable cause to believe that McGrath violated G.L. c. 268A.

The Commission and McGrath now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. At all times relevant, McGrath was the General Manager at Braintree Electric Light Department (BELD). As such, McGrath was a municipal employee within the meaning of G.L. c. 268A.

2. Under G.L. 164, § 56, McGrath, as BELD's General Manager, had full charge of the operation and management of the plant. As such, he had ultimate authority over BELD's employment and retention of consultants.

3. Power Line Models (PLM) is a corporation that provides consulting, design and engineering services to the electric power industry. PLM had a variety of BELD projects on which it was working in 1999 and 2000. In 1999 PLM billed BELD $61,000 for work performed, and in 2000 PLM billed BELD $104,000.

4. McGrath and two of PLM's principals have been friends since they met 30 years ago as employees of New England Electric Systems. Over the course of their 30-year friendships, McGrath has sometimes hosted these friends at golf outings, dinner, and sporting events.

5. In 1999, McGrath was invited by one of these friends at PLM to attend Major League Baseball's All-Star Game, played that year at Fenway Park. The ticket had a face value of $150, and was paid for by PLM.

6. In August and October 2000, one of McGrath's friends at PLM invited him to play golf with PLM employees. The per person costs for these outings were $96 and $82, respectively. The friend was reimbursed by PLM for the cost of the outings.

7. During 1999 and 2000, McGrath on occasion acted officially on matters of interest to PLM.

Conclusions of Law

McGrath's failure to disclose his friendships with PLM principals and entertainment provided by those principals at PLM expense

8. Section 23(b)(3) of G.L. c. 268A prohibits a public employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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. The section further provides that it shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion. The appointing authority must maintain that written disclosure as a public record.

9. By on occasion taking official actions of interest to PLM when he was a long-time friend of two of its principals, McGrath knew or had reason to know that he was acting in a manner that would cause a reasonable person knowing all of the facts to conclude that PLM could unduly enjoy his favor in the performance of his official duties. These appearance concerns are exacerbated by McGrath's receipt of a ticket, paid for by PLM, to the Major League Baseball All-Star game in 1999, and PLM's payment for two rounds of golf for McGrath in 2000. McGrath made no disclosure to his appointing authority of his friendships with these two PLM principals, or his acceptance of this entertainment. Thus, McGrath violated § 23(b)(3).[1/]

10. The law's provision for advance written disclosure to dispel the appearance of a conflict of interest is not a technical requirement. It causes the public employee to pause and reflect upon the appearance issue and decide whether to abstain or, notwithstanding the appearance issue, to participate after making a timely written disclosure. Importantly, if the public employee chooses to participate, the written notice gives the appointing authority the opportunity to consider the

appearance issues raised and to take appropriate action.

Resolution

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

(1) that McGrath pay to the Commission the sum of $2,000[2/] as a civil penalty for violating G.L. c. 268A, § 23(b)(3); and

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

DATE: June 17, 2004

[1/]McGrath's acceptance of entertainment also raises issues under §§ 3 and 23(b)(2) of the conflict-of-interest law. Section 3 bars a public employee from receiving gifts for or because of official acts or acts within the employee's official responsibility performed or to be performed by the public employee. A § 3 violation requires proof of a nexus between the gift and the official act. In this case there is insufficient evidence of any such nexus between any gift and any official act performed or to be performed by McGrath to warrant further proceedings. Section 23(b)(2) bars public employees from using their official position to secure for themselves unwarranted privileges or exemptions of substantial value unavailable to similarly situated individuals. In view of the evidence of McGrath's 30-year friendship with the two PLM principals and the reciprocal exchange of gifts between McGrath and these individuals, there is also insufficient evidence that the gifts were given to McGrath because of his position to warrant further proceedings. The Commission is troubled that the gifts were treated as business expenses for PLM. While this fact may not in all cases be determinative, it will be carefully scrutinized whenever professional activities and business expenses become interwoven with private entertainment, even if arguably under the guise of good will or friendship, because it erodes the public's confidence in government. For this reason, the Commission recently promulgated two Commission Advisories, 04-01 and 04-02, which advise public employees not to accept anything of value when offered by friends with whom they also conduct business unless they first contact the Commission.

[2/]In setting the amount of the civil penalty in this case, the Commission considered, among many factors, (i) McGrath's long-standing friendships with PLM principals, (ii) the number of occasions and value of the entertainment PLM provided to McGrath, (iii) McGrath's status as BELD's General Manager, a position from which he set the tone for the organization, and (iv) administrative action taken by BELD adverse to McGrath.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSIONADJUDICATORY
DOCKET NOS. 698 and 699

IN THE MATTERS
OF
STEVEN RAPOZA AND JAMES ROMANO

Appearances: Wayne Barnett, Esq.
Counsel for Petitioner

William Brown, Esq.
Counsel for Respondent

Commissioners: Daher, Ch., Roach,
Todd, Maclin

Presiding Officer: Commissioner Tracey Maclin

DECISION AND ORDER

I. Procedural History

On January 27, 2004, the Petitioner issued Orders to Show Cause commencing *In the Matter of Steven Rapoza*, Docket No. 698, and *In the Matter of James Romano*, Docket No. 699, and alleging that Respondents Rapoza and Romano had each violated the conflict of interest law, G. L. c. 268A, §§ 3(b) and 23(b)(2), by accepting, receiving and securing $100 each from Matthew St. Germain in connection with their execution as Town of Berkley Board of Health members of a certificate of compliance for a septic system that St. Germain had installed. Respondents filed Answers denying the alleged violations. The proceedings in these matters were consolidated pursuant to the Rules of Practice and Procedure, 930 CMR § 1.01(6)(g).

A hearing was held in the consolidated matters on May 11, 2004, before the Presiding Officer, Commissioner M. Tracey Maclin, pursuant to 930 CMR § 1.01(9). At the hearing, the Parties made opening and closing statements, and introduced evidence through witnesses and exhibits. St. Germain and both Respondents testified. The Parties subsequently filed briefs, pursuant to 930 CMR § 1.01(9)(k).

The Commission (Commissioner Elizabeth J. Dolan abstaining) reviewed the Orders to Show Cause (as amended), the Answers, the hearing transcript, the hearing exhibits, the Parties' stipulations and the Parties' briefs, and, pursuant to 930 CMR § 1.01(9)(m), on June 15, 2004, met in executive session, deliberated concerning these matters and voted to make this Decision and Order.

II. Law

Section 3(b) of G. L. c. 268A, in relevant part, prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly seeking, accepting or receiving anything of substantial value for himself for or because of any official act or act within his official responsibility performed or to be performed by him.

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

Anything with a value of $50 or more is of substantial value for the purposes of §§ 3 and 23. *See LIAM v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000); *see also Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976).

In adjudicatory proceedings before the Commission, the burden of proof is on Petitioner, which must prove its case by a preponderance of the evidence. 930 CMR § 1.01(9)(m)(2). The weight to be attached to any evidence in the record rests within the sound discretion of the Commission. 930 CMR § 1.01(9)(l)(3).

III. Decision

Based upon its weighing of the evidence in the record in these matters, the Commission concludes that Petitioner did not prove its cases against Respondents by a preponderance of the evidence. More specifically, Petitioner did not prove by a preponderance of the evidence that Respondents each accepted, received or secured $100 from St. Germain in violation of G. L. c. 268A, §§ 3(b) and 23(b)(2), as alleged in the Orders to Show Cause.

IV. Order

Because Petitioner did not meet its burden of proving its cases by the preponderance of the evidence, the Commission hereby ORDERS that *In the Matter of Steven Rapoza*, Docket No. 698, and *In the Matter of James Romano*, Docket No. 699, are DISMISSED.

DATE AUTHORIZED: June 15, 2004
DATE ISSUED: June 21, 2004

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 710

IN THE MATTER
OF
ROBERT F. FORD

DISPOSITION AGREEMENT

The State Ethics Commission and Robert F. Ford 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 June 18, 2003, 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 Ford. The Commission has concluded its inquiry and, on March 31, 2004, found reasonable cause to believe that Ford violated G.L. c. 268A,§23.

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

Findings of Fact

1. Ford was during the time relevant a Town of Foxboro police officer. As such, Ford was an employee of a municipal agency as that term is defined in G.L. c. 268A,§1.

2. From 1997 through 2002, Ford's police officer duties were primarily to act as the school resource officer ("SRO"). As such he was responsible for dealing with all police issues that involved the Foxboro schools. This typically involved his working a 7:30 a.m. to 3:30 p.m. shift during the five school days each week. In addition, he would sometimes be called upon to put in extra time after his shift to deal with various police/school issues such as meeting with a student's parents.

3. Police officers in Foxboro are paid pursuant to a union contract. The contract contemplates straight time for the first 40 hours, and overtime pay for any time beyond those hours.

4. The Foxboro Police Department has a policy that all payments to police officers for acting as police officers must be made by the police department. This policy applies to work done for private parties as well as other town departments. In these circumstances the private party or town department must request the assignment of an officer, the department approves the

assignment, the department pays the officer, and then the department obtains reimbursement for the officer from the requestor. Ford was aware of this policy.

5. From 1997 until fall 2000, Ford received his base police officer pay, supplemented by time and a half overtime as authorized by and paid by the police department. For this time period, Ford received no money from the school department.

6. In the fall 2000 Ford worked out an arrangement with the school department by which he would receive payments for a significant portion of his overtime work directly from the school department. Pursuant to this arrangement, Ford, as a police officer, billed the school department on 15 occasions for SRO overtime. This arrangement was not known to or approved by the police department. It was inconsistent with the above-stated policy that all such payments be billed through and paid by the police department. The arrangement continued until June 2002, when the police chief became aware of and terminated the arrangement.

7. While having this direct payment arrangement with the school department, Ford also received a significant amount of overtime paid directly by the police department.

8. In total, Ford received $15,900 in direct school department payments between fall 2000 and June 2002 for overtime work. For the same time period, however, Ford was also paid approximately $22,000 in overtime by the police department.

Conclusions of Law

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

10. Ford's receipt of compensation directly from the school department was an unwarranted privilege or exemption not otherwise properly available to similarly situated people because these payments were received without the knowledge or approval of the police department and they violated the department's policy prohibiting direct payments to a police officer by anyone other than the police department.

11. This privilege or exemption was of substantial value because it enabled Ford to earn significantly more pay.

12. Ford, as a police officer, negotiated this direct payment arrangement. Moreover, the school department paid him based on his oral representations as to the hours he worked as a police officer. Therefore, he knowingly or with reason to know used his official position to secure this unwarranted privilege or exemption of receiving payments directly from the school department.

13. Thus, by so acting, Ford knowingly or with reason to know used his police officer position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of§23(b)(2).[1/]

Resolution

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

(1) that Ford pay to the Commission the sum of $5,000[2/] as a civil penalty for repeatedly violating G.L. c. 268A,§23(b)(2); and

(2) that Ford 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 9, 2004

[1/] That Ford was being paid in 2000-2002 by both the police department and the school department for SRO work raises concerns about possible "double-dipping." Those concerns were investigated by the town. The investigation ended when Ford resigned his position in a settlement with the town. The Commission has chosen to defer to the town's handling of the double-dipping issue. Clearly, however, those concerns would have been avoided if Ford had followed standard procedure and had all his SRO work paid by the police department. The police department could have sought reimbursement from the school department for some or all of Ford's SRO overtime.

[2/] That Ford was being paid in 2000-2002 by both the police department and the school department for SRO work raises concerns about possible "double-dipping." Those concerns were investigated by the town. The investigation ended when Ford resigned his position in a settlement with the town. The Commission has chosen to defer to the town's handling of the double-dipping issue. Clearly, however, those concerns would have been avoided if Ford had followed standard procedure and had all his SRO work paid by the police department. The police department could have sought reimbursement from the school department for some or all of Ford's SRO overtime.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 712

IN THE MATTER
OF
KATHY BARRASSO

DISPOSITION AGREEMENT

The State Ethics Commission and Kathy Barrasso 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 October 7, 2003, 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 Barrasso. On December 16, 2003, the Commission amended the preliminary inquiry to include additional allegations. The Commission has concluded its inquiry and, on August 3, 2004, found reasonable cause to believe that Barrasso violated G.L. c. 268A.

The Commission and Barrasso now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. From December 1985 until October 15, 2002, Barrasso was the Dennis Housing Authority ("the DHA") executive director, appointed by the DHA Board of Directors to manage a staff of about seven people. When Barrasso resigned from the DHA in October 2002, Barrasso's annual salary was $61,464.

Salary Advances

2. As the executive director, Barrasso was responsible for distributing the weekly paychecks to her staff every Wednesday.

3. As a matter of convenience, the DHA Board members would prepare and sign the paychecks up to six weeks in advance, then leave the completed checks in Barrasso's office for Barrasso to distribute at the appropriate time each week. Paychecks were to be distributed on Wednesdays for the work performed the previous Monday through Friday.

4. Throughout her tenure as executive director, Barrasso would frequently take her own paycheck, alter its date and deposit it into her bank account days or weeks before she had actually earned it. Between July 1, 2001 and October 15, 2002, Barrasso altered (or directed someone to alter for her) 28 of her own paychecks. At the time, Barrasso's weekly net income was about $740. For example, all five of Barrasso's July 2002 checks were altered to the corresponding June dates; thus, a July 31, 2002 check was altered to reflect a nonexistent June 31, 2002 date. In some cases, two or more checks were altered to reflect the same date, or dates only a few days apart. In addition, Barrasso took and deposited 21 checks ahead of time without altering them.

5. When subordinates asked to receive their paychecks early, Barrasso would alter their checks and distribute them ahead of when they were due.

6. Barrasso and her subordinates eventually performed the work for which they received the advance payments.

7. At no time was the DHA Board aware of Barrasso's conduct regarding the paychecks, and at no time did the DHA Board approve these salary advances.

Sick and Vacation Time

8. On July 23, 2001, Greg Shorey, who had been friendly with Barrasso's husband, began working at the DHA. According to the DHA policy, Shorey was not eligible for any vacation days until his six-month probationary period ended on January 23, 2002. In addition, Shorey was not eligible for any sick days until September 2001, at which time he would begin to accrue only 1.25 sick days per month.

9. At his prior job working for another town's housing authority, Shorey had accrued and not used 6.25 days of vacation and 6.25 days of sick time.

10. Contrary to DHA policy and without the knowledge or approval of the DHA Board, Barrasso allowed Shorey to commence his DHA employment with 6.25 days of vacation and 6.25 days of sick time.

11. Shorey took one sick day in July 2001. Shorey was completely absent from work beginning in mid-October 2001 and throughout the entire month of November 2001. Shorey ended the month of December 2001—and his tenure at the DHA—by taking 11 consecutive vacation days.

12. Shorey continued to receive his regular paychecks during his extended absences without any deductions for or indications of leave taken.

13. By the time Shorey was terminated from the DHA in December 2001—prior to the end of his six-month probationary period—he had taken a total of 36.25 vacation days and 18 sick days. Thus, Shorey left the

DHA having taken over 50 sick or vacation days to which he was not entitled, at a cost of over $6,000 to the DHA.

14. Contrary to DHA policy and without the knowledge or approval of the DHA Board, Barrasso allowed Shorey to be paid for the sick and vacation days that he had not earned.

15. Contrary to DHA policy and without the knowledge or approval of the DHA Board, Barrasso also allowed five other DHA employees to take almost 60 days of unearned vacation or sick time between July 2001 and December 2002, at a total cost of $6,450 to the DHA.

Conclusions of Law

16. As the DHA executive director, Barrasso was an appointed municipal employee within the meaning of G.L. c. 268A.

17. G.L. c. 268A, § 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using her official position to secure for herself or others unwarranted privileges or exemptions which are of substantial value and not properly available to similarly situated individuals.

Salary Advances

18. As noted above, Barrasso gave herself and her employees salary advances by distributing the payroll checks significantly in advance of when they were due.

19. The salary advances were unwarranted privileges or exemptions not properly available to similarly situated individuals because the premature payments were special benefits not authorized or approved by the DHA Board.

20. These privileges or exemptions were of substantial value.

21. By, as DHA executive director, accessing the checks, altering their dates and dispersing them ahead of time, Barrasso used her official position to secure these unwarranted privileges or exemptions for herself and her staff.

22. Thus, by authorizing her own and her employees' salary advances without the knowledge or approval of the DHA Board, Barrasso knowingly or with reason to know used her position as DHA executive director to secure unwarranted privileges or exemptions of substantial value that were not properly available to similarly situated individuals in violation of § 23(b)(2).

Sick and Vacation Time

23. As noted above, Barrasso allowed Shorey and five other DHA employees to use sick and vacation time which they had not properly earned or accrued.

24. The sick and vacation time that Barrasso allowed Shorey and the other DHA employees to use were unwarranted privileges or exemptions not properly available to similarly situated individuals because they afforded the DHA employees the special benefit of getting paid for sick or vacation time to which they were not entitled under the DHA policy.

25. In addition, the DHA Board was not aware and had not approved of this use of sick and vacation time.

26. These privileges or exemptions were of substantial value.

27. By, as DHA executive director, allowing her employees to use sick and vacation time to which they were not entitled, Barrasso used her official position to secure these unwarranted privileges or exemptions for Shorey and the other five DHA employees.

28. Thus, by allowing her employees to use sick and vacation time to which they were not entitled under the DHA policy, and without the knowledge or approval of the DHA Board, Barrasso knowingly or with reason to know used her position as DHA executive director to secure for her subordinates unwarranted privileges or exemptions of substantial value that were not properly available to similarly situated individuals in violation of § 23(b)(2).[1/]

Resolution

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

(1) that Barrasso pay to the Commission the sum of $6, 000 as a civil penalty for repeatedly violating G.L. c. 268A as noted above; and

(2) that Barrasso 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, 2004

[1/]The Commission notes that the Office of the State Auditor conducted a thorough audit of the DHA and concluded that during the time relevant, the DHA did not maintain adequate management controls over its payroll expenditures. Among other things, the Auditor recommended that the DHA use payroll software to manage and control the accrued sick and vacation time, and cease its practice of preparing and signing payroll checks in advance.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 687

IN THE MATTER
OF
MATTHEW ST. GERMAIN

DISPOSITION AGREEMENT

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

On July 25, 2002, 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 St. Germain. The Commission concluded its inquiry and, on June 18, 2003, found reasonable cause to believe that St. Germain violated G.L. c. 268A, §§ 2 and 3. An Order to Show Cause issued on August 27, 2003.

The Commission and St. Germain now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. St. Germain is a septic system installer who does work in Berkley and other southeastern Massachusetts communities.

2. St. Germain installed a septic system at 142 Bryant Street in Berkley in or about August 1999. That system was inspected and approved by the Board of Health.

3. On Saturday, January 22, 2000, St. Germain met two members of Berkley's Board of Health, James Romano and Steven Rapoza, to obtain the Certificate of Compliance for the septic system at 142 Bryant Street. (Two Board of Health members' signatures were required for the certificate to be valid.)

4. At the meeting, Romano and Rapoza executed the certificate of compliance.

5. After they had executed the certificate of compliance, St. Germain offered $100 cash to each board of health member to sign the certificate of compliance on a Saturday.

6. Berkley's Board of Health regulations do not call for any payment for the execution of a certificate of compliance. The original permit fee covers the issuance of the certificate of compliance.

Conclusions of Law

7. General Laws chapter 268A, § 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving or offering anything of substantial value to any public employee for or because of any official act performed or to be performed by such employee.

8. The two Berkley Board of Health members who signed the certificate of compliance were public employees.

9. The signature of each to the Certificate of Compliance, required for the certificate to be legally valid, was an official act.

10. By offering $100 to each of the two Board of Health members substantially, or in large part, as a gratuity for their execution of the Certificate of Compliance, St. Germain gave something of substantial value to public employees for or because of official acts performed by them. The payment was not otherwise provided by law for the proper discharge of official duties, and therefore St. Germain violated G.L. c. 268A, § 3(a) as to the offering of each gift.

Resolution

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

(1) that St. Germain pay to the Commission the sum of $2,000.00 as a civil penalty for violating G.L. c. 268A, § 3(a); and

(2) that he 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 29, 2004

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 713

IN THE MATTER
OF
THOMAS E. BURNETT

DISPOSITION AGREEMENT

The State Ethics Commission and Thomas E. Burnett ("Burnett") 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 October 7, 2003, 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 Burnett. The Commission has concluded its inquiry and, on August 3, 2004, found reasonable cause to believe that Burnett violated G.L. c. 268A, §23.

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

Findings of Fact

1. During the time relevant Burnett was a member of the Whitman Board of Public Works ("the Board"). He became its chairman on June 11, 2002. As such, Burnett was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. The Board oversees the Whitman Department of Public Works. The Board has a significant role in determining the terms and conditions of employment for DPW employees. For example, as to mechanics, the Board participates in their hiring and in determining whether performance has been satisfactory during the initial three-month probationary period. The Board can also discharge a mechanic for cause.

3. In early August 2002, Burnett asked a DPW mechanic whether he did work on the side and when he received an affirmative response, whether he would build and install a tailgate on Burnett's personal dump truck. The mechanic agreed to do the work. Shortly thereafter, Burnett brought a heavy piece of sheet metal to the DPW garage, which was to be used to make the tailgate.

4. When Burnett asked the mechanic to make the tailgate and when he left the sheet metal, Burnett failed to address whether the mechanic could use any DPW resources in connection with the work. Burnett knew that the necessary welding equipment and supplies were readily available at the DPW garage. He did not know or make any inquiry as to whether the mechanic could do the welding at home. It was the mechanic's understanding that under these circumstances he could use DPW resources to make the tailgate.

5. The mechanic made the tailgate over the course of several days in early August. It took the mechanic approximately 10 hours, eight of which were on town time, two on his personal time. He did all the work at the DPW garage using town equipment and welding supplies. The value of this town time and supplies was approximately $350.

6. During this time, Burnett repeatedly called the mechanic's home and spoke either to the mechanic or the mechanic's wife asking when the tailgate would be finished.

7. In or about late August 2002, Burnett met the mechanic at the DPW garage and they, along with another DPW employee, installed the tailgate onto Burnett's truck. This took about 20 minutes and was done on DPW time.

8. Burnett and the mechanic did not discuss payment until after the work was completed. Ordinarily the mechanic would have expected to discuss and agree upon a price *before* commencing the work.

9. Burnett had reason to know that the mechanic would and did make the tailgate using the DPW garage, time, and supplies. This is because (1) Burnett brought the truck and sheet metal to the mechanic at the DPW garage, (2) Burnett was a member of and chair of the DPW Board, and as such had considerable power over the mechanic; and (3) Burnett failed to state that DPW resources should not be used.

10. DPW policy prohibits the use of the DPW garage, time or materials for personal vehicle repairs.

11. On August 30, 2002, Burnett paid the

mechanic $100 for the work. The mechanic's charge for this work would have ordinarily been $300 for a private customer.

12. Burnett had reason to know that a fair price for making the tailgate was substantially in excess of $100.

13. In or about September 2002, Burnett asked the mechanic to attach a hitch to and repair a wire cage on Burnett's flatbed trailer. Burnett supplied the hitch. The mechanic did the work at the DPW shop on his own time. Each job took an hour or two. The mechanic would have ordinarily charged $100 for both of these jobs combined. Burnett, however, was not asked to pay and did not pay anything for this work.

14. Burnett had reason to know that but for Burnett's official position, the mechanic would not have given him the above-described discounted or free services.

Conclusions of Law

15. 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 others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

Discounted services

16. Obtaining a town mechanic's free or discounted services on one's private vehicle is a special benefit or privilege. Thus, obtaining the tailgate from the mechanic for $100 when he would have ordinarily charged $300, and the hitch and welding repair work for free when he would have charged $100, were privileges.

17. Each of these privileges was of substantial value in that they were worth $50 or more.[1/]

18. These were unwarranted privileges because there was no justification for Burnett receiving discounted or free services from a subordinate.

19. The mechanic gave Burnett these discounted and free services because Burnett was a member of and chair of the governing board of the mechanic's employer. In other words, by soliciting the mechanic to perform these services, Burnett used his power as a Board member and chair to secure these discounted or free services.

20. These privileges were not lawfully available to similarly situated individuals.

21. Therefore, by knowingly or with reason to know using his official Board chair position to secure discounts from a subordinate worth $300 in total, Burnett violated § 23(b)(2).

Misuse of Public Resources

22. Having one's personal vehicle repaired using public resources is an unwarranted privilege.

23. Where the DPW mechanic put approximately eight hours of town DPW time into the project and used the DPW garage, equipment and welding supplies to do this private work, all valued in total at approximately $350, the unwarranted privilege of using public resources for a private purpose was of substantial value.

24. These privileges were not properly available to similarly situated individuals.

25. As noted above, Burnett knew or had reason to know that the mechanic would infer that he could use DPW resources in making the tailgate where (1) Burnett had brought his truck and the tailgate materials to the DPW garage, (2) the welding equipment and supplies were there, (3) the work was for a Board member and chair, and (4) Burnett failed to tell the mechanic not to use DPW resources for this purpose. In other words Burnett had an obligation to make certain that under these circumstances the mechanic understood that this work was to be done without using any public resources. Burnett did not do that. In effect, Burnett used his public position as a commissioner to induce the mechanic to apply these public resources for Burnett's private benefit. By so acting, Burnett used his official position.

26. Therefore, by using his official position as the Board chair to have his private vehicle repaired using public resources, Burnett knowingly or with reason to know used his Board position to obtain unwarranted privileges of substantial value not properly available to other similarly situated individuals in violation of §23(b)(2).

Resolution

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

(1) that Burnett pay to the Commission the sum of $2,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2);

(2) that Burnett pay to the Town of Whitman $350, which represents the value of the town's public resources he obtained in so violating the law; and

(3) that Burnett waive all rights to contest the

findings of fact, conclusions of law and terms and conditions contained in this Agreement or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: September 30, 2004

[1/]Anything with a value of $50 or more is of substantial value. *LIAM vs. State Ethics Commission*, 431 Mass. 1002 (2002).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 714

IN THE MATTER
OF
HUGH JOSEPH MORLEY

DISPOSITION AGREEMENT

The State Ethics Commission and Hugh Joseph Morley 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 December 18, 2002, 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 and c. 268B, by Morley. The Commission has concluded its inquiry and, on February 19, 2004, found reasonable cause to believe that Morley violated G.L. c. 268A, § 23(b)(2).

The Commission and Morley now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. Morley has worked as the Electrical Engineering Manager at Braintree Electric Light Department (BELD) from January 1997 to the present.

2. BELD is a municipal agency of the Town of Braintree. As an employee of a municipal agency Morley is a municipal employee within the meaning of G.L. c. 268A.

3. At all relevant times, as Electrical Engineering Manager, Morley has been responsible for recommending what engineering projects should be undertaken by BELD and who should be hired to do them. He has also been responsible for determining that those so hired perform satisfactorily and, in conjunction with other signatories, approving those vendors' invoices.

4. Power Line Models (PLM) is a corporation that provides consulting, design and engineering services to the electric power industry.

5. Between March 1996 and September 1996, Morley was employed by PLM as an engineer. During that time he shared office space with three other PLM engineers, one of whom was a principal (the "Principal") in the company.

6. At all times relevant, PLM has had four Red Sox season tickets for every other game, which it uses for business purposes in dealing with clients and which it makes available to its own employees.

7. Upon going to work for BELD, Morley assumed responsibility for a number of ongoing projects PLM had with BELD, including determining the satisfactory performance of the work and reviewing and recommending for approval PLM's invoices. He also recommended that PLM be hired, and PLM was hired, for a number of additional projects. Morley supervised PLM's performance under those projects and reviewed the invoices generated in connection with those projects. In so doing, Morley had frequent dealings in his BELD official capacity with the PLM Principal who was his supervisor while Morley worked for PLM.

8. Between 1998 and 2001 PLM did approximately $267,000 in business with BELD. Morley supervised approximately 80% of that business.

9. In the four years between August 1998 and August 2001, PLM provided Morley with four tickets to Boston Red Sox games at Fenway Park on each of five occasions. The four tickets had a face value of $120. Thus Morley and his guests received roughly $600 worth of entertainment at PLM's expense over these four years.

10. Morley received these tickets in the following manner: The PLM principal who was responsible for PLM's projects at BELD would occasionally telephone Morley as BELD's Engineering Manager to make certain that Morley was satisfied with PLM's work. They would refer to these as "calibration" calls.

11. In three of the five incidents where Morley received four Red Sox tickets from PLM, he was offered and accepted the tickets in one of these calibration calls. It is more likely than not that the same protocol was

followed as to the other two instances of ticket receipt as well.

12. In June 1999 and again in May 2000, Morley and BELD's Electric Operations Manager played golf with PLM employees, one of whom was the above-described principal. The per-person costs of these outings were $63 and $53, respectively and PLM paid these expenses. On each occasion the principal called Morley and suggested that he (the principal), Morley, BELD's Electric Operations manager, and the PLM engineer who was doing the project work, get together at PLM's offices for a morning business meeting, and then they all played a round of golf that afternoon. Morley and BELD's Electric Operations manager accepted the offers and so played.

Conclusions of Law

Morley's receipt of unwarranted privileges

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

14. Free tickets and golf are privileges.

15. When such privileges are obtained by a public employee because of his public position, they are unwarranted unless such receipt is properly authorized by law, regulation or otherwise. Morley's receipt of free tickets and golf from PLM was unauthorized.

16. When a public employee obtains tickets and golf and he knows, or has reason to know, that those gratuities were given to him because of his public position, that employee uses his position.

17. Morley knew or had reason to know that his receipt of tickets and golf from PLM were given to him substantially or in large part because of his public position in light of: (i) his senior management role and extensive responsibilities from PLM significant contracts with BELD; and (ii) the offer of these tickets or golf arising in the context of a telephone call in which a PLM principal was either ascertaining the degree of Morley's satisfaction with PLM's perfomance (the "callibration calls") or setting up a meeting to review with Morley and another BELD senior manager, PLM's BELD projects. Accordingly, by receiving tickets to baseball games and free golf from PLM, Morley knew or had reason to know that he was using his official position to obtain unwarranted privileges.[1/]

18. The unwarranted privileges were of substantial value and, under the above-described circumstances, were not properly available to similarly situated individuals.

19. Therefore, based on the above circumstances, Morley knew or had reason to know that he was using his official position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals. By doing so, Morley violated G.L. c. 268A, § 23(b)(2).

Resolution

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

(1) that Morley pay to the Commission the sum of $3,000[2/] as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2); and

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

DATE: October 5, 2004

[1/] By way of defense, Morley testified it was his understanding that he received these tickets primarily as a PLM alumnus and not because he was a BELD official. Nevertheless, as stated above, given the fact that these tickets were offered in "calibration calls," Morley had reason to know that his position as the engineering manager was a substantial factor in his receiving the tickets.

[2/] In setting the amount of the civil penalty in this case, the Commission considered, among many factors (i) the number and value of gratuities Morley received, (ii) his status as a BELD senior manager, and (iii) the previous relationship Morley had with PLM.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 707

IN THE MATTER
OF
HAROLD COLE

DISPOSITION AGREEMENT

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

On February 19, 2004, 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 Cole. The Commission has concluded its inquiry and, on May 12, 2004, found reasonable cause to believe that Cole violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. From 1998 until his retirement in December 2003, Cole was a Randolph Department of Public Works ("DPW") Water Division employee.

2. As a DPW employee, Cole was responsible for reading water meters in the field and reporting back to DPW headquarters. Cole made approximately $20 per hour.

3. DPW employees work a 7:00 AM to 3:30 PM schedule. They are allowed two 15-minute breaks (one in the morning and one in the afternoon) and a half-hour lunch. DPW employees are not allowed to work on a flextime schedule.

4. During the two years prior to his retirement, while working for the DPW, Cole took long unauthorized breaks at home while on municipal time.

5. Many of Cole's weekly paychecks included payments of $50 or more for work not done. Cole acknowledges that he received approximately $10,000 from the town for hours he did not work during the two years prior to his retirement.[1/]

6. During this period, the DPW was shorthanded due to budget cuts and layoffs.

Conclusions of Law

7. Section 23(b)(2) prohibits public employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

8. As a DPW employee, Cole was a municipal employee pursuant to G.L. c. 268A, § 1.

9. The receipt of each payment from the town for hours Cole did not work for the DPW and for which he was not entitled to be paid was an unwarranted privilege.

10. Each payment that included $50 or more for work not done was of substantial value.[2/]

11. Cole knowingly used his DPW position when he secured these payments.

12. Thus, by repeatedly receiving unearned payments of $50 or more (totaling approximately $10,000), Cole knowingly used his DPW position to obtain unwarranted privileges of substantial value not properly available to other similarly situated individuals in violation of § 23(b)(2).

Resolution

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

(1) that Cole pay to the Commission the sum of $5,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2);

(2) that Cole reimburse the Town of Randolph the sum of $10,000 for unearned payments that he was not entitled to receive; and

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

DATE: November 8, 2004

[1/] Given the lack of documentation, it is impossible to determine exactly how much money Cole received to which he was not entitled.

[2/] Anything worth $50 or more is of substantial value. *In re LIAM*, 2003 SEC 1114.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 716

IN THE MATTER
OF
STEVEN SILVA

DISPOSITION AGREEMENT

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

On May 12, 2004, 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 Silva. The Commission has concluded its inquiry and, on November 4, 2004, found reasonable cause to believe that Silva violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. During the time relevant, Silva was the Department of Corrections ("the DOC") MCI-Cedar Junction Superintendent of Operations. As such, he was the second highest-ranking employee at Cedar Junction. Cedar Junction has a hierarchical chain of command.

2. On March 19, 2004, Silva was out of work and recovering from surgery at home. (Silva lives in Bellingham, which is approximately 15 miles away from the prison.) Silva called Lieutenant Raymond Turcotte, who was working his shift in the Departmental Disciplinary Unit at the prison. Silva told Turcotte that he had a wedding the next day and did not have time to get his hair cut. Silva asked Turcotte to come to his (Silva's) house and cut his hair. Turcotte had approximately two hours left on his shift. Turcotte agreed to cut Silva's hair.

3. Silva told Turcotte that he would take care of Turcotte's time and that he should not punch out. Silva planned on using off-the-records "comp" time that he said he owed Turcotte. There was no documentation of this off-the-records "comp" time nor did the DOC superintendent or any policy manual authorize any such practice.

4. Silva then called Shift Commander Thomas Borroni and told him that he had a wedding the next day and asked Borroni if there was enough staff on duty to have Turcotte relieved from his assigned position to come to Silva's house to cut his hair. Borroni told Silva there was enough coverage to allow Turcotte to leave early. Silva told Borroni not to charge Turcotte for the time because he owed him (Turcotte) time.

5. Once another lieutenant relieved him, Turcotte, following Silva's instructions, signed out a pair of hair clippers from the tool crib at the prison, left the facility and drove to Silva's home.

6. The standard procedure for leaving early was for a prison employee to fill out paperwork in the morning stating what type of time he intended to use (for example, vacation time or personal time). The shift commander then reviewed the requests for that day and granted them by seniority if staffing was sufficient. Turcotte did not fill out the standard paperwork for early release and was not charged any time for the two hours of his shift he did not serve. His compensation for this time was approximately $85.

7. Silva, as second in command and as part of his official duties, was regularly involved in various personnel and assignment decisions involving both Turcotte and Borroni.

8. Silva and Turcotte have been close friends for many years. Turcotte has cut Silva's hair for several years.

9. Borroni has a friendly work relationship with Silva. According to a DOC investigator, "Borroni stated that he felt that there was an implied order in the manner that Deputy Superintendent Silva spoke."

10. As a result of this incident, Silva was demoted to sergeant.

Conclusions of Law

11. Section 23(b)(2) prohibits public employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

12. As the then DOC MCI-Cedar Junction Superintendent of Operations, Silva was a state employee pursuant to G.L. c. 268A, § 1.

13. By as deputy superintendent requesting a captain to have a lieutenant excused from his prison duties, Silva used his official position. Where Silva was a superior officer above the captain, lieutenant and others and had the ability to take action concerning their employment, Silva knew or had reason to know that he was using his

official position and that his request would likely be viewed as an implied order.

14. An at-home haircut upon request is a privilege.

15. It was unwarranted as Turcotte did the haircut on state time; either without taking any time or using undocumented "comp" time that only Silva maintained and without going through the standard operating procedures.

16. The privilege was of substantial value because: the cost of an at-home hair cut on demand is worth at least $50. In addition, the two hours of compensation (approximately $85) the state paid to the lieutenant while he was cutting Silva's hair exceeded $50.

17. This privilege was not properly available to similarly situated individuals.

18. Thus, by requesting that a subordinate be excused without being charged any time so that the subordinate could give him a haircut, Silva violated G.L. c. 268A, §23(b)(2).

19. This conduct is particularly troubling in light of the senior level of the subject, his using another's "off-the-books" comp time for his personal benefit and his requesting that a correctional officer leave a maximum security institution before his shift ended for the purpose of providing him, Silva, with a hair cut.

Resolution

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

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

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

DATE: December 21, 2004

State Ethics Commission
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