DLS

DIVISION OF LOCAL SERVICES
MA DEPARTMENT OF REVENUE

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2019 Municipal Law Seminar
WORKSHOP C
Wearing Multiple Hats, Separation of Municipal Duties and Regionalization Issues

DISCUSSION SUMMARY

(Prepared For Informational and Training Purposes Only)

Informal Summary

This informal summary of the discussion presented at Workshop C is provided for educational and training purposes only. It does not constitute legal advice or represent Department of Revenue opinion or policy, except to the extent it reflects statements contained in a public written statement of the Department of Revenue (Informational Guideline Release or Local Finance Opinion). This workshop includes issues that may involve the Conflict of Interest law under G.L. c. 268A over which the Mass. State Ethics Commission has jurisdiction; please consult with that entity for legal advice regarding that statute.

1. Anytown is a small town with a single-member elected board of assessors. The single assessor in Anytown, who has been doing a great job for the last 20 years, is about to retire. Anytown is finding it difficult to attract qualified people to run for election as his replacement. To make the position more attractive, the board of selectmen would like to appoint an assistant assessor. Can the selectboard do that? G.L. c. 41, § 25A. Opinion letter 2002-529

   No – Section 25A requires that the board of assessors appoint an assistant assessor.

2. A board of assessors has just appointed one of its members to the position of assistant assessor when that position became vacant. As an elected assessor the member receives a stipend of $5,000 set and appropriated by the town at its annual town meeting under G.L. c. 41, § 108. The assistant assessor's salary is appropriated in the personal services line of the board's annual budget, which is used to pay the assistant and the part-time assessor's clerk pursuant to amounts established in a collective bargaining agreement. Currently that amount is $85,000 for the assistant. Is the

appointment permitted under the municipal finance law? The conflict of interest law? Assuming the appointment is permitted, may the assessor/assistant receive the $85,000 salary provided in the collective bargaining agreement for the assistant as well as the $5,000 stipend as assessor? G.L. c. 41, § 4A; G.L. c. 268A, § 20, 21A; Opinions 2002-529 & 95-550; EC-COI-93-18

Municipal Finance Law - Under G.L. c. 41, § 4A, which applies only to towns, the board of assessors may appoint one of its members to a position under its authority for a one-year term if authorized by annual town meeting to do so. The annual salary of such appointee must also be "fixed" by annual town meeting vote at a specified amount. Generally, this would be done by a separate vote similar to that usually taken to fix the annual salaries of elected officials. G.L. c. 41 § 108.

Under state ethics laws, there are several sections that apply. Section 20 of the conflict of interest laws (chapter 268A) generally limits employees from holding multiple positions within the same municipality. It does not apply if the population is 3500 or less in a town, the multiple positions are both appointed positions and the selectboard approves the exemption. These exemptions do not apply here as the assessor is elected. Section 20 also makes a distinction for employees designated by the municipality as "special municipal employees" – generally unpaid or non-full-time positions where the person is allowed to have other employment during "normal working hours" or earns compensation for not more than 800 hours in the previous year. Special municipal employees still must follow disclosure requirements. So, here -- it may be allowable if the board of assessors member has been designated as a special municipal employee and obtains approval from the selectboard. In any event, the appointee should request an opinion from the Ethics Commission or the city solicitor or town counsel under G.L. c. 268A, § 22 whether s/he can accept the second position.

Section 21A of the conflict of interest laws also applies. It prohibits a board from appointing one of its members to a position under its supervision. It does not apply to a town board if the appointment is first approved by an annual town meeting.

So – there are several requirements and they are often not easy to navigate. If you're the employee who'll be holding multiple positions, the best practice would be to contact the ethics commission directly for an opinion from them. See Ethics Commission Opinion - COI-93-18

If holding both positions is allowable and all the procedures have been followed, then both salaries can be taken.

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3. How does a town combine its elected treasurer position with its elected collector position into one position and make it an appointed position? G.L. c. 41, § 1B

G.L. c. 41, § 1B provides the mechanism for a town in this case. It allows changing an elected board or office under G.L. c. 41:1, except board of selectmen and school committee, to an appointed board or office. It requires a majority vote of an annual or special town meeting and acceptance by the voters at an annual town election. It specifically allows combination of the elected positions of town treasurer and collector of taxes into a single combined appointed position. If passed, incumbents continue to hold their offices and perform the duties until the expiration of their terms or until vacating the offices. If an elected officer is elected at the same election where voters vote to make the position appointed, then that person holds office until the appointment of the appointed person is made. There is no requirement that the appointed persons be citizens of the town. Note that the ethics laws that prohibit the holding of multiple town offices discussed in the previous question will not apply to a combined collector-treasurer position because it is a single position.

Note also that there are two separate statutes that establish the procedure for changing elected assessors to appointed assessors in a town that were in effect before G.L. c. 41, § 1B was enacted and the legislature did not repeal them. They are G.L. c. 41, §§ 21 and 25. Section 21 requires a town meeting vote and an election and the appointees do not have to be citizens of the town. Section 25 requires a town meeting vote but not an election, but the appointees must be suitable citizens of the town.

4. The town of Dana is adjacent to Anytown and is larger and has a three-member appointed board of assessors. Additionally, the Dana assessing board has an appointed full-time assistant assessor under G.L. c. 41, § 25A to assist them with their assessing duties. At a recent county assessing meeting, the assessors from both towns were seated at the same table and, over a lunch of chicken and rice, discussed the challenge that Anytown is facing in finding a suitable person to be its assessor. Fortunately, one of the assessors had recently attended a DLS training about regionalization of assessing offices and suggested that the two towns look into doing this. G.L. c. 41, § 30B. DLS Handout Inter-Municipal Assessing Agreements.

- Is regionalization of assessing positions and duties allowed?
  Yes – G.L. c. 41, § 30B establishes a mechanism to do this.

- What are the options for regionalizing assessing offices under G.L c. 41, § 30B?
  There are several options as follows:

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  - **Where the parties wish to share administrative duties only, each assessing board will be retained and perform their statutory assessing duties – grant exemptions, abatements, approve values, submit tax recap, issue commitments - and the parties will share administrative duties.**

  - **If the purpose of the agreement is to share assessing board duties, there are several ways to do that –**
    - **One existing assessing board can perform board of assessor duties for both towns**
    - **The towns can agree that the assessing board authority of both towns be vested in a single person**
    - **The towns can agree to create a new regional board of assessors.**

- What happens to the existing boards of assessors in each town?
  It depends upon what the city/town wishes to do. When assessing board authority is vested in a single person, one existing board or a regional board is created, the local board(s) not retaining authority relinquish it during the term of the agreement.

- What are some other considerations?
  Page 2 of the DLS handout lists the required terms for joint assessing agreements, including that it be not more than 25 years; include provisions on amendment/termination/withdrawal procedures; specify division, consolidation or merger of duties – who is going to do what; who is in charge of any employees; where and how records will be maintained and auditing of accounts.

  Financing – Who is going to pay for what? Options – One town can buy services from the other for a specific price or one town is host and performs all services for both towns and funds it through its operating budget (reimbursements are general fund revenue to the host community). If a regional assessing board is established, the members are assessed their share of costs according to the agreement and appropriate their assessments in their annual budget.

- What is the process for approving a regional assessing agreement?
  In a city, the city council and mayor need to approve the agreement and, in a town, approval is by the board of selectmen. In both cases, the agreement must be approved by DOR. It can be submitted to the DLS Bureau of Local Assessment.

- Why can't a municipality simply enter into an inter-municipal agreement under G.L. c. 40, § 4A – that way, DOR approval is not required?

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Because a general rule of statutory construction requires that when there are two laws that apply to a situation, the more specific one will take precedence over the other. Here, the joint assessing agreement law is more specific and so it applies.

- Have any communities followed this process?

  Yes – The towns of Williamstown and New Ashford. In that case, the Williamstown board of assessors assumed the duties of the New Ashford Board and the Williamstown assistant assessor provided administrative services to the Williamstown board for both towns.

5. As the fiscal year is closing, the town accountant receives a request from the school department to pay to several employees who are retiring a check in the amount of $15,000. The only notation on the request was “sick leave buy-back.” The accountant contacted the school department and asked for a copy of the contract and provision showing entitlement to the payment and substantiation that the individual had the remaining sick leave accrued and unused to his credit. When the board of selectmen heard that the accountant had requested this information and was withholding payment until he received the requested documentation, the board adopted a policy that the town accountant not request any information from the school department and process its requests expeditiously. Is the board of selectmen’s policy legally enforceable? What if the policy were to be approved by town meeting in the form of a bylaw? G.L. c. 41, §§ 52, 56 – 57. Home Rule Amendment, Article 89, Mass. Constitution.

   No – the policy is not legally enforceable and neither would it be if it were approved by town meeting as a bylaw. 1st – G.L. c. 41, § 57 requires that the town accountant have custody of all contracts. So the accountant should have already been provided with a copy of whatever contract provides for any sick leave buy-back.

   2nd – The town accountant is required by c. 41, § 56 to receive from all boards, committees, heads of departments, all bills, drafts, orders and pay rolls chargeable to the respective appropriations of which the board, committee, department head has expenditure authority. Those persons are required to have reviewed the bills before sending them to the accountant to determine whether the goods and materials were delivered and that services were actually rendered to or for the town. Once the bills get to the town accountant, “the town accountant shall examine all such bills, drafts, orders and pay rolls, and, if found correct and approved as herein provided, shall draw a warrant upon the treasury for the payment of the same, and the treasurer shall pay no money from the treasury except upon such warrant approved by the selectmen. If there is a failure to elect or a vacancy occurs in the office of selectman, the remaining selectman or selectmen, together with the town clerk, may approve such warrant.

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The town accountant may disallow and refuse to approve for payment, in whole or in part, any claim as fraudulent, unlawful or excessive, and in such case he shall file with the town treasurer a written statement of the reasons for such refusal. The treasurer shall not pay any claim or bill so disallowed by the town accountant. So far as apt this section shall apply to cities."

The town accountant's duty is statutory and separate and independent from the that of the board of selectmen. The separate duties of each office function as checks and balances to ensure bills are properly paid and the municipality's finances are secure. A board of selectmen's policy and even a town by-law cannot invalidate or supersede the general law regarding the accounting officer's authority. Under the Home Rule Amendment to the state constitution, a city or town may not enact an ordinance or by-law which conflicts with a general law. Here the general laws require that the town accountant review bills to make sure they are not "fraudulent, unlawful or excessive."

6. Must a town have a town accountant? G.L. c. 41, §§ 1 and 55.

No, but if it does not, it must have a town auditor under G.L. c. 41, § 1. Therefore, a town must have either an auditor or an accountant.

Under G.L. c. 41, § 1, every town shall "except when other provision is made by law or charter, choose by ballot from its registered voters the following town officers for the following terms of office: … one or more auditors for the term of one or more years, except where such office is abolished as provided in section fifty-five."

G.L. c. 41, § 55 states - "Any town may authorize the selectmen to appoint a town accountant, who shall perform the duties and possess the powers of town auditors as defined in sections fifty to fifty-three, inclusive. In towns so authorizing the appointment of a town accountant the office of town auditor may, if the town so vote, be abolished. In towns which have accepted chapter thirty-one or corresponding provisions of earlier laws, the appointment of the town accountant shall be subject to the civil service rules. The town accountant shall be sworn to the faithful performance of his duties, shall hold no other town office involving the receipt or disbursement of money, shall hold office for three years and until a successor is qualified; provided, however, that at the discretion of the appointing authority, a person may be appointed to the position of town accountant for a term of not more than five years and until a successor is qualified. The town clerk, if he holds no other office involving the receipt or disbursement of money, may be appointed to the position of town accountant." (Emphasis added.)

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7. May a town contract with a firm to provide accounting services? If so, does it still have to have a person designated as town auditor or accountant? G.L. c. 41, § 55 (town accountant) and § 107 (auditor). G.L. c. 41, § 15.

Yes and yes. A town may contract with a firm to provide accounting services; however, as stated above, the general laws require a town have a town auditor or, if the town has adopted c. 41, § 55, a town accountant. Additionally, the general laws require that these officers take an oath of office administered by the town clerk under c. 41, § 15. The oath swears the person to the faithful performance of the duties of his/her office. Those duties include approval/signing of warrants under G.L. c. 41, §§ 52 and 56 and signing page 3 of the tax recap.

8. The appointed town treasurer has resigned and the selectboard wants to appoint the town accountant to temporarily perform the treasurer's duties as the town accountant is very good with figures. Is this acceptable? G.L. c. 41, §§ 40, 55; G.L. c. 268A, § 20

No – Although the selectmen may appoint a temporary treasurer under G.L. c. 41, § 40 until another is appointed and qualified, section 55 states that the town accountant shall hold no other town office involving the receipt or disbursement of money. This prohibition was intended to reduce the risk to town funds. It require the duties and authority of the accountant who approves payments of town funds be separate from the duties and authority of the treasurer who issues the payments. If the same person were to perform both functions, there would be no check or balance to ensure proper disbursement of town funds. Note – c. 41, § 55 also prohibits a town accountant from performing tax collector or town collector duties, such as the acceptance of tax payments.

c. 268A, § 20 of the conflict of interest laws also generally limits employees from holding multiple positions within the same municipality. It does not apply if the population is 3500 or less in a town and the multiple positions are both appointed positions and the select-board approves the exemption. Section 20 also makes a distinction for employees designated by the municipality as "special municipal employees" – generally unpaid or non-full-time positions where the person is allowed to have other employment during "normal working hours" or earns compensation for not more than 800 hours in the previous year. Special municipal employees still must follow disclosure requirements. But, regardless of the exceptions under § 20 of the conflict of interest laws, c. 41, § 55 of the municipal finance laws prohibits it and there is no exception from that.

9. Can my town contract with a single consultant for both accounting services and treasurer services?

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Although there is no statute of which we are aware that directly prohibits such an arrangement, for the reasons described in the previous answer, we believe that accounting services should be separated from treasurer services in the context of contracted services. This is to ensure there are adequate checks and balances to preserve the integrity of town funds. If one employee of a firm would be performing accounting services and a different employee of the same firm performing treasurer services, the two employees still serve the same employer who, presumably, can direct their actions.

10. The tax collector is on an extended leave of absence. May the selectmen appoint one of the assessors as temporary collector. The assessors have a pretty good idea of what the collector does as his job also relates to taxes. G.L. c. 41, § 24.

    No. G.L. c. 41, § 24 states: "In no city or town, including Boston, shall an assessor hold the office of collector of taxes or deputy collector of taxes, whether said deputy is appointed under the provisions of section thirty-seven of this chapter or section ninety-two of chapter sixty."

11. The town of Waterbury's full-time assistant assessor is an appointed constable in the same town, who collects fees for service of court papers to private residents of the town. Does the state's conflict of interest law, G.L. c. 268A, and any other law permit serving in both positions? G.L. c. 41, §§ 39 and 91A, G.L. c. 268A, § 20, SEC Opinion COI-86-10

    It depends. An assistant assessor, is considered an "employee" under the conflict of interest law. G.L. c. 268A, § 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by the same municipality.

    Each fact situation must be viewed in in light of the purpose of the conflict of interest law. One of the underlying policies of section 20 is to prevent municipal employees from using their positions to obtain contractual benefits or additional appointments from the municipality and to avoid any public perception that municipal employees have an "inside track" on such opportunities.

    The State Ethics Commission has provided guidance on section 20, excerpted as follows:

    Section 20 of G.L. c. 268A, the conflict of interest law, generally prohibits a municipal employee (paid or unpaid, appointed or elected, full-time or part-time) from having a financial interest, directly or indirectly, in a contract made by an agency of the municipality in which he serves. However, the section also provides numerous exemptions from this prohibition.

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Who must get an exemption?

There are three types of municipal employees who must qualify for an exemption.

First, any current municipal employee who wants to add another municipal position that is appointed and compensated must qualify for an exemption. Similarly, if the municipal employee wishes to have a financial interest in a municipal contract that does not involve another municipal position, she must also qualify for an exemption.

Second, if a prospective municipal employee already has a financial interest in a contract with his municipality, he must qualify for an exemption when he begins to serve as a municipal employee.

Third, if a current appointed and compensated municipal employee wants to add an unpaid municipal position or an elected municipal position (whether paid or unpaid), she will need to qualify for an exemption. However, unlike the first two types of municipal employees described above, she needs to qualify for an exemption that will allow her to continue to be paid in her current municipal position while also serving in her appointed/unpaid or elected position.

Who does not need an exemption?
Section 20 does not prohibit anyone from holding a number of unpaid positions. Section 20 does not prohibit anyone from holding more than one popularly elected position, even if one or more of those elected positions is paid.

Special Municipal Employees
The Legislature created 'special municipal employee' status to allow municipalities to engage individuals who, otherwise, might not be able to serve because of their private activities in their municipalities or because they already are municipal, or special municipal, employees in another capacity in their municipality.

The mayor and members of the boards of aldermen, city council or selectmen in a town with a population of over 10,000 persons may not be special municipal employees;

Selectmen in a town with a population of fewer than 10,000 persons are automatically special municipal employees;

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For all other positions, the city council, board of aldermen, town council or board of selectmen may classify municipal positions as special if: all employees who hold equivalent positions or serve on the same board are designated special municipal employees; AND the employees are unpaid; or are permitted personal and private employment during normal working hours; or do not earn compensation for more than 800 hours during the preceding 365 days.

Special municipal employee status narrows, but does not eliminate, the scope of the restrictions on a special municipal employee's conduct.

Exemptions

The Legislature recognized that the needs of different municipalities may differ. The following exemptions allow a great deal of local control in order to allow municipalities to meet their individual needs.

A municipal employee who is not a special municipal employee may have a financial interest in a contract with his municipality if: the municipal employee is not employed by and does not participate in or have responsibility for the activities of the contracting agency or an agency which regulates the activities of that agency; if the contract is made after public notice or competitive bidding; and if the municipal employee files with the clerk a disclosure of his and/or his family's interest. In addition, if the contract is for personal services, additional requirements must be met; a municipal employee seeking a contract for personal services should seek advice from the Ethics Commission

A special municipal employee may have a financial interest if she "does not participate in or have official responsibility for any of the activities of the contracting agency" and she files with the clerk of the city or town a disclosure of her interest and her immediate family's interest.

A special municipal employee who either participates in or has official responsibility for any of the activities of the contracting agency must not only file the same disclosure as described in § 20(c) but also obtain the approval of the "city council or board of aldermen, if there is no city council, board of selectmen or the district prudential committee" for an exemption.

As the general prohibition and the § 20(b) exemption indicate, it is much more difficult for municipal employees to qualify for exemptions. However, there are specific exemptions for types of positions or financial interests that are available to both municipal and special municipal employees. These include: a municipal employee who receives benefits in connection with the rental, improvement, or rehabilitation of his residence; a municipal employee who adds a part-time, call

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or volunteer job with police, fire, rescue or ambulance departments; a municipal employee who is eligible for a local housing authority subsidy; and a municipal employee who owns housing in which tenants receive a local housing authority subsidy.

There are also exemptions for municipal employees to retain their municipal jobs and to also serve as elected selectmen and town or city councilors. Similarly, there is an exemption for an employee of a housing authority who is elected to an office other than mayor.

Finally, § 20 does not prohibit an employee in a town having a population of less than three thousand five hundred persons from holding more than one appointed position with that town, provided that the board of selectmen approves the exemption of his interest from this section. This exemption does not allow an elected municipal official to be appointed to additional positions in which he would have a financial interest in a contract.

In the case of EC-COI-86-10, decided on May 20, 1988, a copy of which is located at page 44 of the Workshop C materials, the State Ethics Commission held that the constable's acceptance of fees results in an additional contract under section 20 between the Assistant Assessor and the town and, unless an exception applies, is generally prohibited.

Constables are appointed by the board of selectmen and are considered "town officers." G.L. c. 41, §§ 1 and 91A. Constables have a broad array of statutory powers, including under G.L. c. 41, § 39, which provides that if no one is elected or appointed as tax collector, or if the appointee refuses to serve, constables will serve as tax collectors in the town. (G.L. c. 41, § 24 would prevent an assessor from collecting taxes, but this prohibition does not apply to an assistant assessor.) Constables also have certain powers of arrest, including for violation of election laws, breaches of peace and health law violations.

As indicated above, there is an exception to the prohibition against Section 20 multiple office holding in the case of a contract for personal services which may apply here:

(1) the services will be provided outside the normal working hours of the municipal employee;
(2) the services are not required as part of the municipal employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year;
(3) the head of the contracting agency makes and files with the clerk of the city or town a written certification that no employee of that agency is available to perform those services as part of their regular duties; and

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(4) the city council, board of selectmen or board of aldermen approve the exemption of his interest from this section.

So, in this case, as long as the assistant assessor complies with the conditions contained in the above exception, then he or she may serve as a constable. However, we always advise that the affected employee seek an opinion from the State Ethics Commission to ensure compliance with state ethics laws.

12. An appointed assistant assessor in the town of Chilbridge is considering running in the next town election for a seat on the board of assessors. Can she hold both positions? G.L. c. 268A, § 20; G.L. 268A, § 21A; Opinion 1997-536

Answer: Do any municipal finance laws apply to the situation? G.L. c. 41, § 4A permits a board of assessors to appoint one of their members to a position under its authority for a one-year term, if town meeting authorizes such appointment and fixes the salaries. However, the statute does not address the issue of a person who is already employed by the board and then runs for election to the office of assessor.

Section 21A of c. 268A is similar to c. 41, § 4A. It states: Except as hereinafter provided, no member of a municipal 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 provisions of this section shall not apply to a member of a town commission or board, if such appointment or election has first been approved at an annual town meeting of the town.

So, section 21A also does not apply to the situation here where the person is already employed by the board and <u>then</u> runs for election to that board.

However, if the person is elected and then comes up for re-appointment, we believe that the provisions of G.L. c. 41, § 4A and G.L. c. 268A, § 21A would apply at the time of the appointment and that town meeting approval of the appointment would be necessary. Again, on the application of the state ethics laws, the employee should request an opinion from the State Ethics Commission.

With respect to G.L. c. 268A, § 20, that section does not prohibit anyone from holding a number of unpaid positions. Therefore, she may choose to volunteer for one of the positions, but she may not be compensated for both positions, unless the town has a population of less than three thousand five hundred residents. The employment situation is also complicated by the fact that assistant

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assessor would report directly to the full board of assessors, which may require her to recuse herself in matters involving employees of the board of assessors. That is why it is important to consult with the State Ethics Commission for guidance.

13. The town of Scarborough, Massachusetts at its last local election did not vote in favor of a proposed Proposition 2 ½ override. The town is now left with a shortfall that must be resolved through employee layoffs. The board of selectmen is considering consolidating departments and creating one or more combined clerk position(s) whose job descriptions will be to provide services to more than one department. The board is faced with laying off two of the following clerks from the following positions: the town clerk's clerk, the assessors' clerk, the treasurer's clerk and the collector's clerk. May an assessor's clerk who abates bills work in the collector and treasurer's office? May the treasurer's clerk and collector's clerk work in the assessors' office? Conflicts? G.L. c. 41, s. 24; G.L. c. 268A, § 20; E-Mail 2009-518

    As far as the municipal finance laws are concerned, G.L. c. 41, § 24 prohibits an assessor from serving as a collector or deputy collector, but we know of no similar prohibition relating to assessors' and collectors' clerical staff. Assessor clerks can't abate tax bills; they may assemble the relevant documentation and make recommendations, but legally, only the assessors can actually abate a tax. So there is not a municipal finance law that prohibits a clerk from providing services to more than one department, including the assessors', collector's and treasurer's offices.

    Section 20 of chapter 268A also will not apply because the employee will not be holding two or more separate positions; s/he will be holding a single position that provides service to more than one department. Again, however, it is recommended that the employee obtain legal advice from the State Ethics Commission.

14. The town accountant of the town of Portlandale asks for advice on whether she may take a paid position as school business manager for the school department. The hours for performing both positions would not conflict. May she serve in both roles? G.L. c. 41, § 55; G.L. c. 71, § 37M; G.L. c. 268A, § 20; Opinion 2000-327

    The easiest course of action would be for the town and the school committee to adopt G.L. c. 71, § 37M to combine the two positions. Section 37M permits consolidation of the financial functions of the schools and the town. This would be similar to combining the treasurer position with the collector position into a single treasurer-collector position. If the positions are combined into a single position, then the provisions of c. 268A, § 20 will not apply. However, G.L. c. 41, § 55 prohibits the town accountant from taking another position involving the

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receipt or disbursement of money. So, as discussed in opinion 2000-327, the question is whether the school position would involve the receipt or disbursement of funds. If so, the positions cannot be combined, nor can the town accountant take the school position. G.L. c. 41, § 55 was intended to maintain the separation of duties of the accountant who oversees the management of the funds and other positions that actually handle funds.

If the positions are not combined into a single position, then G.L. c. 268A, § 20 would apply. The next question is whether there is an exception under § 20.

As previously discussed, G.L. c. 268A, §20 provides an exception for "a municipal employee who is not employed by the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice, through a competitive process and if the municipal employee files with the town clerk a statement making full disclosure of the interest."

Also, G.L. c. 268A, § 20 would not prohibit an employee in a town having a population of less than three thousand five hundred persons from holding more than one appointed position with said town, provided that the board of selectmen approves the exemption of the town accountant's interest from this section. As previously stated, the employee should request an opinion from the State Ethics Commission.

15. The town of Camberville's three-member board of assessors has a pending abatement application. One board member is the son-in-law of the abatement applicant, while another board member is also the son-in-law of the applicant. May all members vote on the application? G.L. c. 268A, s. 19; Opinion 1999-108; SEC Advisory – Rule of Necessity

First, G.L. c. 268A, § 19 prohibits a municipal employee from participating in a matter in which s/he or immediate family has a financial interest. Immediate family includes the employee and spouse, their parents, children, brothers and sisters. Immediate family therefore includes mothers and fathers-in law, so the law applies.

However, there is what's called a "rule of necessity" issued by the State Ethics Commission. It is in the workshop materials at page 50.

In some cases, where more than one board member has a conflict, a board cannot act because, after the members with the conflicts recuse themselves, the board does not have a quorum. A quorum is generally a majority of the board members.

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In some circumstances, the board may be able to invoke the rule of necessity to permit the participation of the disqualified members to allow the board to act. The rule is not a law written or passed by the legislature, it is a common law concept developed in court decisions. The rule may only be used as a last resort. The rule should only be invoked upon prior written advice by municipal counsel because improper invocation of the rule could result in a conflict of interest.

The rule of necessity works in the following way:

1. It can only be used if a board is unable to act on a matter because it lacks the number of members required to take a valid official vote, solely because members are disqualified by the conflict law from acting.

Example: A five-member board has a meeting and all members are present. Three of the five members have conflicts. Three members are the quorum necessary for a decision. The two members without conflicts do not make a quorum. The board cannot act. The rule of necessity may permit all members to participate.

Example: A five-member board has a meeting and four members are present (one member is sick at home). Two of the four present members have conflicts. A quorum is three. The one member who is sick at home does not have a conflict. The rule of necessity may not be used because the lack of quorum of the board is not because of conflict; it is because one member of the board is sick and absent.

Example: A five-member board has a meeting and all members are present. One member has a conflict and is disqualified. The vote is a two to two tie. The rule of necessity may not be used to break the tie. In general, a tie vote defeats the issue being voted on. Stated differently, a tie vote will maintain the status quo.

Example: All five members of a five-member board are present. A quorum is three. However, one agenda item requires four votes, rather than the usual simple majority, for an affirmative decision. Two of the board members have conflicts. Although a quorum is available, the required four votes needed for this particular matter cannot be obtained without the participation of one or both of the members who have conflicts. The rule of necessity may be invoked and all five members may participate.

2. The rule of necessity should be invoked by one or more of the otherwise disqualified members, upon advice from town or city counsel or the State Ethics Commission.

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3. If it is proper for the rule of necessity to be used, it should be clearly indicated in the minutes of the meeting that the board was unable to obtain a quorum due to disqualification of members and, as a last resort, that all those disqualified may now participate under the authority of the rule of necessity. Each disqualified member who wishes to participate under the rule of necessity must first disclose publicly the facts that created the conflict.

Note: Invoking the rule of necessity does not require previously disqualified members to participate; it merely permits their participation.

4. The rule of necessity may only be used as a last resort. Every effort must be made to find another board capable under the law of acting in place of the board that could not obtain a quorum.

16. The town accountant of the town of Sweetwater receives an extra stipend of $3,000 to administer the town's retirement board. Last year, the retirement board, on which the town accountant is an ex-officio member, created and funded the new position of executive director of the retirement board, at a salary of $12,000. Before the vote establishing the new position, the board discussed appointing the town accountant to the position. The town accountant participated in the discussion and the vote to create the new position. The board then voted, with the town accountant abstaining, to appoint the town accountant to the position of executive director. The town accountant served as both the paid town accountant and paid retirement board executive director for three years before he retired. Was the holding of both positions in compliance with ethics rules? Any other violations? G.L. c. 268A, § 20; SEC Disposition Agreement, October 13, 2006

Answer: The workshop materials include, at page 55, a Disposition Agreement rendered by the State Ethics Commission involving a former town employee which is relevant. In that case, the SEC determined that the employee was a municipal employee who held two contracts with the town. Making matters worse for him was that he participated in the decision to create the new position after the board discussed appointing him to the position, a matter in which he then had a financial interest as prospective employment under section 19 of c. 268A. His abstaining from the appointment vote after he voted to create the new position was not enough. He then received compensation for two separate positions (making an additional $9,000 per year). He took no steps to invoke any of the exceptions to G.L. c. 268A, § 20. The employee knew that he had two contracts with the town and had a financial interest. The two separate jobs were held simultaneously and during the course of regular business hours. The SEC fined the employee $5,000 as a civil penalty for repeated violations, plus he was forced to pay the SEC the sum of $20,000 as a civil forfeiture of the compensation that he received in violation of section 20.

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This matter is a cautionary example of the penalties that an employee faces when he or she violates the conflict of interest law.

17. Two families, members of which served in numerous paid and volunteer positions with the town of Muenster, population 298, resign from their town positions and retire to Florida. The loss of the two families leaves several unfilled positions in the town, preventing quorums in the board of assessors, the zoning board of appeals and other boards, as well as vacancies in the office of town treasurer. The only potential qualified replacements already serve in paid town positions. What issues must the board of selectmen consider in replacing the unfilled positions? G.L. c. 41, § 24; G.L. c. 41, § 55; G.L. c. 268A, § 20; SEC Advisory, Rule of Necessity

    Answer: We mention the population of 298 to invoke the section 20 provision that provides "This section shall not prohibit an employee in a Town having a population of less than 3,500 from holding more than one appointed position with the Town, provided that the Board of Selectmen approves of the exemption of his interest from Section 20."

    Also, the State Ethics Commission regulations provide that persons are not prohibited from sitting on multiple volunteer positions, assuming that these are unpaid positions.

    With respect to the town treasurer position, the town treasurer may serve as a paid position, and may serve in voluntary capacities or another paid non-conflicting position with approval of the board of selectmen. The other position may not be full-time and can be done in non-conflicting work hours.

18. A city council member of Surf City is the finalist for a financial management position with the Surf City Housing Authority. The member contends that the housing authority is not a Surf City municipal agency because it is funded by the Commonwealth of Massachusetts. May she take the position? G.L. c. 121B, § 7; G.L. c. 268A, §§ 20, 23; SEC Decision and Order, June 25, 1987

    Answer: In the State Ethics Commission Decision dated June 25, 1987 in the workshop materials, at page 56, the SEC decided that the employee, a city councilor, was in violation of Section 20, in that he also worked as a maintenance worker for the housing authority. The city council member/housing authority employee continued in both paid positions for over three years. He never disclosed his interest to the city clerk.

    The city's attorney had rendered an incorrect opinion that the dual service was appropriate as the housing authority was not a municipal agency. So, the opinion

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incorrectly stated that the councilor did not hold two contracts with the same municipality.

The SEC, however, rendered a contrary opinion that the city council member did in fact hold two positions within the municipality and that the councilor must resign one of the positions within thirty days. The commission noted that because the employee had relied upon a municipal attorney decision (although incorrect), it allowed him merely to resign within thirty days and no fine was levied.

However, despite the SEC directive, the employee refused to resign. The employee based his position on the fact that the housing authority was not a municipal entity, in that it received its funding from the commonwealth, pursuant to G.L. c. 121B, § 1. The SEC responded by referring to G.L. c. 121B, § 7 which states that housing authorities are municipal agencies for the purposes of the State Ethics Law.

Because the elected councilor had not sought the appropriate exemptions before taking the second position and he failed to resign when ordered by the SEC, the SEC then issued him a civil fine.

19. The Selectboard of the town of Oakbury, a three-member body, is seeking to save money in the administration of the town's assessment functions, and to have a policy role in assessment decisions. The board of assessors is charged with performing statutory assessing functions – assessing and apportioning the value of real and personal property, granting exemptions and abatements, issuing commitments for the collection of taxes, appointing an assistant assessor and other pertinent duties. The members of the selectboard were successful in obtaining approval from town meeting and the voters, under G.L. c. 41, § 21, to change the mode of selection of its board of assessors from elected positions to appointed positions. The members of the selectboard voted to appoint two of its own members to the three-member board of assessors and voted to appoint a resident of the town to serve as the remaining member of the board of assessors. The selectboard also voted to contract with a private firm to provide assessing services. What is the status of the town's assessment functions? G.L. c. 41, §§ 4A & 21; G.L. c. 41, § 25A; G.L. c. 268A, § 21A

Answer: As we discussed in previous questions, while the town can vote to make its elected board of assessors appointed under G.L. c. 41, § 21, a board may only appoint one of its members to another town office or position with town meeting approval under the municipal finance laws. G.L. c. 41, § 4A. As a result, the selectboard cannot its members to be members of the assessing board without town meeting approval.

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Additionally, G.L. c. 268A, § 21A of the state ethics laws also appears to apply. G.L. c. 268A, § 21A states:

> **Except as hereinafter provided, no member of a municipal 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 provisions of this section shall not apply to a member of a town commission or board, if such appointment or election has first been approved at an annual town meeting of the town.**

With respect to the town's contracting with a private firm to provide assessing services, absent a charter provision to the contrary, only the board of assessors can perform statutory assessing functions assigned to the board of assessors – assessing and apportioning the value of real and personal property, granting exemptions and abatements, issuing commitments for the collection of taxes, appointing an assistant assessor, and other pertinent duties. Therefore, the private contractor cannot perform these functions as they are reserved to the board of assessors. A private contractor, however, may provide other assessing services to the town and the assessors. Additionally, the board of assessors may choose to appoint an assistant assessor under G.L. c. 41, § 25A, who would be required to take an assessor's oath of office under 41, § 19 that s/he will perform fair and impartial valuations.

20. The towns of Ripton and Chebeague are each facing retirements of long-term town administrators. The selectboards of each town have been meeting together monthly on ways by which the two towns may effect efficiencies through the joint purchase of goods and services to be shared by the towns, in accordance with an inter-municipal agreement, pursuant to G.L. c. 40, § 4A. Seeing an opportunity to share their first employee, the towns decided to amend their inter-municipal agreement to allow the joint hiring of a chief administrative officer to handle the duties previously assigned to their individual town administrators. The towns were able to attract talented candidates for the position of chief administrative officer, as the salary for one chief administrative officer was higher than the salary for the two individual town administrator positions, and the rural nature of the region allowed for lower housing costs than the nearby urban region. The new chief administrative officer utilized her previous experience and education to facilitate efficient government administration in each town. Based upon the success of the sharing of the services of the chief administrative officer, the selectboards of both towns now wish to explore sharing other town functions. The selectboards have formed a regional dispatch group and requested the chief administrative officer to research the development of shared police

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dispatch and fire alarm monitoring services. What are the issues involved in the chief administrative officer's research of coordination of police dispatch and alarm monitoring services? G.L. c. 268A, § 17; SEC Opinion, Ashburnham, March 2, 2012; St. 2016, c. 304

Answer: This situation is discussed in the State Ethics Commission's opinion of March 2, 2012, relative to the towns of Ashby and Ashburnham's sharing of a town administrator. (Page 60 of the workshop materials.) As stated in that opinion, G.L. c. 268A, § 17 prohibits a municipal employee from acting as an agent for anyone other than her employing town, in any matter in which the town is a party or has a direct and substantial interest. Contacting or communicating with municipal employees on behalf of some other entity is considered to be acting as an agent. The chief administrative officer may not serve as Ripton's agent in matters in which Chebeague has an interest, such as serving on the regional dispatch group. To allow the chief administrative officers to do so, the towns must contact their legislators to obtain a home rule petition authorizing an exemption to G.L. c. 268A, § 17, as the towns of Lee and Lenox did. Their special act is in the workshop materials at page 32 – St. 2016, c. 304.

21. The city of Croninville's Department of Public Works ("DPW") operates a municipal landfill. It utilizes large DPW motor vehicles, such as dump trucks, graders and backhoes on occasion to service the municipal landfill. The neighboring town of Huntsville is facing imminent closure of its landfill due to capacity issues. The mayor of the City of Croninville, sensing an opportunity to share costs of its landfill operation, offered to enter into a joint agreement with the town of Huntsville to share and operate its landfill. The two municipalities decided to formalize their shared operation of the landfill by entering into a joint powers agreement, pursuant to G.L. c. 40, § 4A½. The Joint Powers Act, authorizing joint powers agreements, was created by the Municipal Modernization Act, St. 2016, c. 218, § 20. The Joint Powers Act allows two or more units of local government to jointly perform municipal services through the creation of a new regional entity. Here, the two municipalities entered into the joint powers agreement, with approval of the city council and the selectboard, and agreed to create a new regional entity to operate the landfill and, among other things, to contribute several large motor vehicles to the operation from their respective DPW fleets. Both municipalities realized significant cost savings in their landfill operations budgets. Prior to the end of the first year of operations of the joint powers agreement, a rogue tornado ripped through both municipalities, causing extensive damage to both municipalities from fallen buildings and trees. The mayor and the selectboard, in responding to their respective emergencies, ordered the board of directors of the landfill created under the joint powers agreement to release the landfill's heavy equipment vehicles to respond to emergency cleanup operations in both municipalities. The board of directors refused to honor the municipalities' requests, stating that emergency cleanup would significantly damage the vehicles

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transferred by the joint powers agreement to the regional landfill operation. What recourse do the two municipalities have relative to their request for the equipment? G.L. c. 40, § 4A½

Answer: The answer is that the municipalities have no recourse to force the regional entity to comply with their demand to use the landfill equipment. Pursuant to G.L. c. 40, § 4A½, once the municipalities have entered into a joint powers agreement, a separate body politic is created to administer the function for which the joint powers agreement is created. G.L. c. 40, § 4A½(d). The responsibilities relative to the shared service is spelled out in the joint powers agreement. The entity created under the agreement is governed by a board of directors, which shall have final authority about decisions relative to the operation of the agreement. If the agreement does not provide for the sharing of the vehicles with another entity, and the board of directors refuses to release the vehicles to assist in emergency cleanup, that is the prerogative of the board of directors.

22. The towns of Belgium, Allandale and Bishop obtained special legislation some time ago to create the Apple Valley Regional Fire District ("District"). It is a district as described in G.L. c. 40, § 1A. The district is governed by a prudential committee. The prudential committee is now proposing to invite a new community, the town of Koty, to enter into a shared services agreement with the district. Due to a long-standing high school rivalry, the town of Allandale strongly objects to the district's offer to the town of Koty to enter into a shared services agreement with the district. Allandale is now requesting that the selectboards of Belgium, Allandale and Bishop vote on whether Koty should be allowed to enter into a shared services agreement with the district. How may Koty enter into an agreement with the district? Can the district sign an inter-municipal agreement ("IMA") absent an enabling vote from each district member's selectboard? G.L. c. 40, § 1A; G.L. c. 40, § 4A

Answer: The answer is yes. Once the three towns voted to establish the district by special act, the prudential committee of the district assumes governing authority over the district's affairs. In addition, the purpose of the formation of the district, that of providing fire protection, is an authorized purpose for a district, in accordance with G.L. c. 40, § 1A. To determine whether Koty may enter into an IMA with the district, Koty should review the definition of a "governmental unit" authorized by G.L. c. 40, § 4A to enter into an IMA. G.L. c. 40, § 4A provides that a party to an IMA may include "…a district as defined in [G.L. c. 40, § 1A]." G.L. c. 40, 4A would, thus, allow Koty to enter into an IMA with the district. Pursuant to G.L. c. 40, s. 4A, in order for Koty enter into an IMA, that town's selectboard may, on behalf of the town, execute a contract with the district to perform jointly an authorized governmental function. The three towns that are members of the district do not have authority to impede the actions of the district. The example also illustrates irrelevant impediments that may hinder the formation of shared municipal services.

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23. The towns of Blake and Hartville are in discussions relative to entering into a joint services agreement to hire specially-trained personnel to monitor compliance by licensed medical and recreational marijuana providers to assure they are in compliance with their host community agreements and other provisions governing the operations of their facilities. The towns each utilize the services of Attorney Willard Scott as their respective town counsel. How may the towns enter into such an agreement? May the two towns utilize Attorney Scott to provide legal services relative to the agreement? G.L. c. 40, § 4A; G.L. c. 40, § 4A½; G.L. c. 268A, § 17; G.L. c. 268A, § 20

Answer: In order to enter into such an arrangement, the towns may enter into an inter-municipal agreement (IMA), pursuant to G.L. c. 40, § 4A; establish a joint powers agreement, in accordance with G.L. c. 40, § 4A½; or seek special legislation. With respect to the towns' ability to utilize Attorney Scott, Attorney Scott may not participate in the negotiations between the towns, as that would present a conflict, in accordance with G.L. c. 268A, § 17, similar to the conflicts described in Question 20, which prompted the State Ethics Commission's opinion of March 2, 2012, relative to the towns of Ashby and Ashburnham's sharing of a town administrator. As stated in that opinion, G.L. c. 268A, § 17 prohibits a municipal employee from acting as an agent for anyone other than her employing town, in any matter in which the town is a party or has a direct and substantial interest. Therefore, absent special legislation (and, presumably, an opinion of the Board of Bar Overseers, which governs legal conflicts for lawyers) authorizing Attorney Scott to participate in the shared services agreement, the two towns would have to hire special counsel to negotiate the terms and conditions relative to such an agreement.

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