STATE ETHICS COMMISSION

Advisory Opinions

Enforcement Actions

for Calendar Year 2002

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Included in this publication are:

•**State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 2002.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 2002 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 2002**. Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-02-(number)*.

•**State Ethics Commission Advisories issued in 2002**. Cite Conflict of Interest Advisories as follows: *EC-ADV-02-(number)*.

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

State Ethics Commission

Advisory Opinions

2002

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Summaries of Advisory Opinions
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EC-COI-02-1 - Section 18 of G.L. c. 268A prohibits a retail real estate broker who served on a town task force from receiving compensation from, or acting as agent for, the developer of a town site to assist it in complying with the restrictions imposed by the town, including finding buyers or renters of retail space at the site, because his compensation would be in connection with the same matter in which he participated as a municipal employee and which remains of direct and substantial interest to the town.

EC-COI-02-2 Section 19 of G.L. 268A does not prohibit a member of a town board who is a director of a private organization from participating in a particular matter in which the private organization does not intend to expend any financial resources as a result of the board decision; in contrast, if, as a result of a board decision, the private organization will expend its financial resources to oppose the project approved by the board, then the private organization has a financial interest and the board member who is a director of the private organization may not participate.

EC-COI-02-3 - The conflict of interest law generally does not prohibit municipal clerks who are also justices of the peace from solemnizing marriages during their municipal work day on municipal premises, and collecting solemnization fees authorized under G.L. c. 262, § 35, as long as their municipal duties are not adversely affected.

CONFLICT OF INTEREST OPINION
EC-COI-02-1

INTRODUCTION:

You are a real estate broker. You served on a Town (Town) task force and participated in the process leading to the Town's selection of the developer for a location in the Town (Site) and the imposition of restrictions on the Site's development. The developer and the Town entered into a purchase and sale agreement (P&S), incorporating the restrictions that remains open because the transaction between the developer and the Town has not yet closed.

QUESTION:

May you receive private compensation from, or act as agent for, the developer to assist it in complying with the development restrictions, including finding initial buyers or renters of retail space at the Site, when you participated as a municipal employee in the process that led to the selection of the developer and the imposition of the restrictions?

ANSWER:

No. Section 18 of G.L. c. 268A will prohibit you from receiving compensation from, or acting as agent for, the developer to assist it in complying with the restrictions imposed by the Town, including finding initial buyers or renters of retail space at the Site, because your compensation would be in connection with the same matter in which you participated as a municipal employee and which remains of direct and substantial interest to the Town.

FACTS:

At all relevant times, you have been a Town resident and a professional real estate broker. You have worked full time as a broker at a company specializing in the brokerage of real estate for retail use.

For many years, the Town has been concerned about the use of a now-closed landfill site in Town. Your involvement in this matter began when you served on the Town's Advisory Committee (Advisory Committee), which was composed of individuals the Town Manager appointed. The Advisory Committee was created to help review the work of consultants hired by the Town concerning the Site and to consider the Site's marketability and potential use.

Among other things, the Advisory Committee reviewed and made recommendations for revisions to the Town's Request for Proposals (RFP), which the Town's professional staff prepared and the Town Manager issued. The Advisory Committee also reviewed a due diligence report about various matters such as drainage, compaction and bearing capacity, which the Town's consultant engineers prepared. Finally, the Advisory Committee interviewed both of the developers who had responded to the RFP, Developer X and Developer Y. The Town Manager recommended that both responses be rejected and the Town's Board of Selectmen (Selectmen) so voted. As a result, the process "went back to the drawing board."

In starting over, the Selectmen created a new advisory group, the Task Force (Task Force), which replaced the Advisory Committee. Most of the Task Force's members had, like you, been members of the Advisory Committee. The Task Force was established to advise the Town Manager and the Selectmen about offering the Site again to potential developers. First, the Task Force reviewed and approved an RFP for a real estate agent to market the Site. The Town Manager issued the RFP, which elicited two applicants, Applicant A and Applicant B. The Task Force interviewed both applicants and recommended Applicant A, which was awarded the contract.[1/]

Applicant A revised the due diligence report, which had been previously reviewed by the Advisory Committee, to make it more "user-friendly" to potential developers and solicited responses to a new RFP for the development of the Site. As with the earlier RFP, the Task Force reviewed and commented upon the new RFP and on the revised due diligence report. Applicant A completed, then issued an "Offering Package *And* Request for Proposals." Ten developers responded to the new RFP.

The RFP includes a description of "Project Objectives" stating that the Site has "tremendous potential for uses such as office, research and development, biotechnology, hotel, or mixed use development, including retail components." The RFP describes the "General Acquisition and Development Terms." That section of the RFP expressly states that the selected developer and the Town will enter into an acquisition agreement. Further, the section states, "[t]he Town understands that there may be some changes in the development plans as they are refined in detail, but the Town expects that the development actually undertaken on this site by the selected developer will be *substantially the concept presented by the developer in the proposal submitted in response to this Request for Proposal*.[2/] The Town . . . "is prepared to be an active partner with the selected developer in this project and will seek to work to achieve mutual goals regarding this site." Throughout the RFP, it appears that the Town has emphasized the potential development of the Site for various commercial uses, rather than as land to be kept vacant. Indeed, the RFP states, "[t]he Town will not accept any proposal whose purpose is merely to hold the site vacant or underutilized for purposes of land speculation."[3/]

In the RFP's "Bidding Information" section, there are specific and detailed requirements about the developer's qualifications. In addition, any proposal "will contain a full description of the proposed development and management concept, including: type or types of proposed use or uses; . . . nature of the development concept, including number and heights of buildings, total aggregate developed square footage, total square footage in each building, footprint and floorplate sizes, mixture of uses by building or among buildings, parking supply and arrangement, open space and other amenity features; together with a schematic site plan." In addition, the proposal must contain "an explanation as to the Proponent's view of the market demand and absorption rates for the proposed development." Other conditions include the Town's reserving the right not to select a proposal for any reason that is in the best interest of the Town. Under the "Evaluation Criteria" section, the Town specified that it will consider goals such as maximizing the tax income from the site and maximizing the "employment of the site consistent with the demographic characteristics of the Town."

The Task Force offered ten applicants an opportunity to present their proposals and to respond to questions before an open meeting. Developer X's proposal proposed a mixed-use development consisting of a hotel; restaurant; store; cinema and an office building.[4/] The proposal states that Developer X has studied the information provided in the RFP and agrees to all the terms and conditions contained therein. The proposal contains a Conceptual Site Plan. This Conceptual Site Plan is attached to the P&S subsequently entered into between Developer X and the Town. The proposal also contains a Project Schedule that is based on information contained in the RFP. Finally, in the Benefits of the Proposed Development Plan section of its proposal Developer X states that "[w]e recognize the significance of the parcel to the residents of the Town . . . and have attempted to give form to their objectives and goals." As a member of the Task Force, you reviewed Developer X's proposal.

Based upon the proposals and the interviews, the Task Force recommended three candidates to the Selectmen and ranked them in the following order: (1) Developer AA; (2) Developer BB; and (3) Developer X. You supported the recommendation of these three, but ranked all three candidates equally. The Selectmen's liaison to the Task Force insisted on adding a fourth candidate, Developer CC. The Selectmen interviewed all four candidates. The members of the Task Force were present during these interviews, which were conducted in public session, but did not take part in the interviews. The Selectmen voted to approve the same three candidates that the Task Force had recommended and voted to rank them in the same order.

Negotiations with the first two candidates were unsuccessful, thus, the Selectmen negotiated and executed a P&S with Developer X. The P&S specifies a closing date for Developer X to purchase the property on [deleted], or thirty days after all required permits for the Site's development have been issued and all appeals of the permits have been completed.

Among the conditions in the P&S are the following obligations on Developer X's part: it shall develop [the Site for mixed commercial/retail use].

The P&S explicitly states that, "Developer X ... acknowledges that the Town has selected it as developer of the Premises based in part on its proposed use of the Premises, and that the initial use of the Premises shall be substantially as set forth in the development scheme presented to the Town's Board of Selectmen and described [in an exhibit attached to and made a part of the P&S]." The exhibit included in the P&S, is "Developer X's Initial Development Proposal" and depicts the overall layout, including parking areas, cinema, office, retail, restaurant, and hotel.

You last acted as a member of the Task Force on the night of the Selectmen's vote in November 1998, when you sat in the audience with your fellow Task Force members. You did not attend any meetings or do anything as a member of the Task Force thereafter. You did not, however, formally submit your resignation from the Task Force until June 2000.

In June 2000, Developer X initially called you to ask if you, in your capacity as a real estate broker, would assist it in finding businesses to which Developer X could sell or rent retail space on the Site.[5/] Specifically, the scope of services would involve marketing space for a hotel, a restaurant and miscellaneous other retail uses. Developer X solicited you because of your general professional expertise and your specific knowledge about the Site. You would like to be able to represent Developer X in finding prospective buyers and/or tenants for the Site. You note that your work for Developer X would not require you to solicit the Town as a buyer or tenant, nor will you have any reason to lobby the Selectmen, the Town Manager or any other Town officials on Developer X's behalf. All of your work would be aimed at soliciting private parties to purchase and/or lease retail space at the Site from Developer X.[6/]

DISCUSSION:

As a former member of the Advisory Committee and the Task Force, you are a former municipal employee[7/] for purposes of the conflict-of-interest law. Section 18 of G.L. c. 268A prohibits a former municipal employee from "knowingly act[ing] as agent[8/] or attorney for or receiv[ing] compensation,[9/] directly or indirectly from anyone other than the same . . . town in connection

with any particular matter[10] in which the . . . town is a party or has a direct and substantial interest and in which he participated[11] as a municipal employee while so employed . . . ."

In describing the purposes behind the restrictions governing former state, county or municipal employees, the Commission has emphasized that the undivided loyalty due from a public employee while serving continues with respect to some matters after they leave public service. Moreover, the restrictions on former employees help to prevent present employees "from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward [their] own personal future interest."[12] One of the purposes "is to bar . . . former employees, *not* from benefiting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of *continuing concern* to their former government employer."[13]

We begin our analysis by identifying the relevant particular matter. You argue that the relevant particular matter is the P&S alone and that you did not participate in negotiating the P&S. We conclude, as discussed below, that the RFP and the P&S together compose a particular matter for § 18 purposes.[14] Thus, we conclude that your actions on the Task Force constituted participation in the P&S.[15]

The P&S is the contract between the Town and Developer X and is the consummation of the development scheme contained in Developer X's proposal in response to the RFP. The types of retail uses contemplated and described in general conceptual terms in the RFP are described in specific detail in the P&S. The RFP required Developer X to submit a proposal specifying the "type or types of proposed use or uses; [and] nature of the development concept together with a schematic site plan." An Exhibit to the P&S depicts such a schematic site plan. The P&S sets forth the specific detail of the schematic plan contained in the proposal. For example, the P&S provides for development of an office building and a retail facility. The P&S does not depart from the development concepts contained in the RFP and Developer X's proposal, but, rather, provides the specific details and requirements necessary to implement those concepts.

In short, the contract between Developer X and the Town includes not only the P&S document but also the proposal Developer X submitted in response to the RFP. In selecting Developer X, the Town relied on Developer X's detailed proposal, much of which is incorporated in the P&S. The basic terms of the Site's development were established by the RFP. Based upon our review of the RFP and P&S, we cannot differentiate the RFP as being a particular matter separate and distinct from the P&S.[16] Accordingly, we conclude that the RFP and the P&S are part of the same particular matter, i.e. the same contract, for purposes of § 18.

Here, you participated, in your former capacity as a member of the Advisory Committee and the Task Force, in the process that led to the Town's selection of Developer X as the Site's developer and the imposition of the development restrictions. You reviewed and made recommendations for revisions to the original RFP; you interviewed the developers, including Developer X, who responded to the RFP; you reviewed the development proposals; you reviewed the due diligence report concerning the Site; you reviewed and commented on the revised due diligence report and the new RFP for the use of the Site; you participated in an open meeting, heard proposals from and interviewed developers, including Developer X, who responded to the new RFP. Based on your review of the proposals and the interviews, you recommended Developer X to the Selectmen. Most significantly, you reviewed and approved Developer X's specific proposal for the Site that forms the basis of the P&S. Thus, because you participated in the process, reviewed Developer X's proposal, interviewed Developer X and recommended it to the Selectmen as the developer, you participated, personally and substantially, in the P&S.[17] It is not necessary for one to be the final or ultimate decision-maker to have participated personally and substantially in the decision.[18]

Next, we consider whether your compensation from Developer X would be "in connection with" the particular matter in which you participated as a municipal employee. For the following reasons, we conclude that it would be.

Our analysis begins with the plain meaning of the statutory language.[19] The word "connect" commonly means "[t]o join, fasten, or link together."[20] The Commission's analysis has varied in previous opinions in determining whether a former public employee's present work for private compensation is "in connection with" a particular matter in which he participated as a public employee. The relevant language must be interpreted in light of the purpose of the statute, while recognizing that the legislature did not intend to foreclose entirely the former public employee's private employment in the very area of his greatest expertise.[21] The Commission has determined that an "analysis of factors showing whether the employee's proposed private work is closely enough connected to the matter in which he participated to bar him from acting as agent or attorney or receiving compensation" is in accord with the statutory language.[22]

In determining whether one's compensated private work is specifically linked to the relevant particular matter, the Commission has reviewed various factors such as "whether the private work on the new particular matter is 'integrally related' to the government matter because they involve 'the same parties, the same litigation, the

same issues or the same controversy.'"[23] For example, the later stage of the same environmental review process culminating in an environmental impact report involves the same controversy.[24] In contrast, if the issues have changed substantially, the Commission has viewed the new matter as not specifically connected to the matter in which the employee participated.[25]

Additionally, the Commission examines the effect the proposed private work for the non-state party would have on the particular matter in which the former employee participated. "This factor seeks to guard against potential abuse of past factual knowledge, confidential information, and personal associations in the context of the particular matter."[26]

It remains for us to apply this analysis to your circumstances. As a municipal employee, you reviewed and approved a development scheme for the Site, whose concepts were incorporated in the P&S. One of the concepts was that the Site was to have a retail component. Thus, Developer X seeks to privately compensate you to assist it in complying with that component by finding retail tenants for the Site.

Thus, you now seek to be privately compensated by Developer X, in essence, to implement the same development scheme that you approved and participated in as a municipal employee. Further, the Town is a party to the P&S and has a continuing interest in the development of the Site, at least until the deal closes. Based on these circumstances, your work for Developer X would be, for purposes of § 18, "in connection with" the same particular matter in which you participated as a municipal employee. You may not receive compensation under such circumstances because a municipal employee may not privately profit from a matter in which he participated. In this particular matter you owe undivided loyalty to the Town. While we are mindful that there is no evidence that you intended to create a future private opportunity for yourself, the conflict law is designed to have a prophylactic effect by prohibiting even the appearance of dual loyalties to one's municipality and to one's future private business interests.[27]

Further, you would be performing such private services for Developer X during the time before the transaction between the Town and Developer X closes. Although it does not appear that you would be paid to undermine or take advantage of a weakness in the particular matter in which you participated, your work could affect Developer X's ability to close the transaction because its ability to find tenants and/or buyers could change the economics of the deal. Thus, you could be placed in a situation of conflicting loyalties to the Town and to Developer X, your private client. For example, if Developer X were unable to locate retail tenants and/or buyers it could abandon the deal.

Accordingly, based on all of the circumstances, we conclude that, § 18 of G.L. c. 268A will prohibit you from receiving compensation from, or acting as agent for, Developer X to assist it in finding initial buyers or renters of retail space at the Site, because your compensation would be in connection with the particular matter in which you participated as a municipal employee and which remains of direct and substantial interest to the Town.[28]

DATE AUTHORIZED: January 31, 2002

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[1] You emphasize that neither the Task Force nor its predecessor, the Advisory Committee, had the authority to bind the Town to any contracts.

[2] Emphasis added.

[3] The RFP includes detailed information about the commercial market in the area near the Site.

[4] You have provided a copy of Developer X's proposal for our review.

[5] You do not recall whether Developer X approached you before or after you formally submitted your resignation from the Task Force.

[6] You also note that your knowledge of the Site, although acquired through your work on both the Advisory Committee and the Task Force, stems from publicly available information. According to you, any other real estate broker could obtain the same level of knowledge of relevant information by reading the due diligence materials the Town's consultant produced and by reviewing the minutes of the meetings of the Task Force and the Selectmen, all of which are public records. You would not use any confidential information you may have acquired through any of your former positions with the Town.

[7] "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). We conclude that the Advisory Committee and the Task Force are "municipal agencies" as defined and interpreted under the conflict-of-interest law because of the role they played as an instrumentality serving the Town. *See e.g., EC-COI-95-3*.

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

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

[10] "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).

[11/]"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).

[12/]*EC-COI-99-1* (Discussing § 5, the state counterpart to § 18).

[13/]*EC-COI-92-17* (emphasis added); *see also EC-COI-99-1; EC-COI-93-16; EC-COI-95-11. In re Wharton*, 1984 SEC 182, 185.

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

[15/]*See EC-COI-99-1*(state employee who had participated in the RFP process to find qualified vendors for a state blanket contract also had participated in the resulting contract, for purposes of § 5, the state counterpart to § 18).

[16/]*EC-COI-99-1. See also EC-COI-93-16* (former state employee who had participated in creating RFP could not receive compensation from a private entity in connection with the contracts his former state agency awarded to that same entity pursuant to the RFP).

[17/]*See EC-COI-93-16* ("the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs."). *Contrast EC-COI-82-82* (former state employee not barred under § 5(a) where he had no role in formulating RFP, he attended informational meetings that were not part of the selection process, and he dissociated himself from any participation in the selection process).

[18]*EC-COI-98-3*.

[19/]*Int'l Organization of Masters, ect. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) ("The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.").

[20/]*Webster's Third New International Dictionary* (1993). *See also Black's Law Dictionary* (Fifth Ed.) ("[t]o establish a bond or relation between.").

[21/]*EC-COI-92-17. See also EC-COI-81-34* (quoting Jordan, *Ethical issues Arising from Present and Past Government Service, in ABA, Professional Responsibility: A Guide for Attorneys* 196 [1978]).

[22/] *EC-COI-92-17*.

[23/] *EC-COI-92-17*.

[24/] *EC-COI-89-7. See also EC-COI-81-45* ("[A] follow-up ruling involving the same set of operative facts, . . . a fresh phase of an earlier proceeding, or . . . a subsequent renewal in what is essentially a continuing controversy should each constitute the same ['particular']matter as the earlier situation.").

[25/]*See e.g. EC-COI-89-34, n.5* (different legislative proposal); *EC-COI-85-74* (different buildings using changed plans); *EC-COI-83-80* (new alternatives, studied independently, for construction project).

[26/]*EC-COI-92-17*.

[27/]Public employees and appointing authorities should be mindful that serving, or appointing one to serve, in a public capacity, even for no compensation, may have significant consequences on an individual's private business interests. Prior to accepting or making an appointment to a committee, such as the Task Force, the appointing authority and the appointee should consider the practical implications of the appointment and the nature of the committee's work on the appointee's private business interests. If one is interested in subsequently performing private work on a project, one should not serve on such a committee.

[28/]You may be able to receive private compensation from Developer X after the transaction between Developer X and the Town closes, depending on whether the Town continues to have an enforceable interest in the development restrictions on the Site. For example, if the Town no longer has an enforceable interest in the development restrictions, you may be able to receive private compensation from Developer X to assist it in finding secondary buyers or renters of retail space at the Site.

CONFLICT OF INTEREST OPINION EC-COI-02-2

INTRODUCTION:

You are a member of a regional planning agency ("Agency").[1/] The Agency consists of both appointed and elected members. Although you were initially appointed to the Agency, you are currently an elected member.

During your tenure as a member of the Agency, you also were previously an uncompensated member of the Board of Directors of a non-profit organization ("Organization"). You resigned from the Organization's Board in order to avoid any potential conflicts of interest while your request for a legal opinion from the Commission was pending. You have remained a member of the Organization, but would like to resume a position on its Board.

QUESTION:

If you resume a position on the Organization's Board, may you participate as an Agency member in particular matters before the Agency concerning a particular property (a proposed development), where the Organization has expended money to advocate a particular policy position (opposing the development), but where the Organization will hold no interest in the subject property, does not own any abutting property, and may engage in fundraising efforts to solicit charitable contributions to assist another entity to purchase the property?

ANSWER:

If you resume a position on the Organization's Board, then, as a member of the Agency, you may not participate in any particular matters in which the Organization has a financial interest. Thus, the answer depends on whether, under the circumstances, the Organization has a financial interest in the particular matter before the Agency. Accordingly, if at the time that the particular matter is pending before the Agency, the Organization does not intend to expend any financial resources as a result of the Agency's decision, no financial interest will be present and you may participate. If the only expenditure by the Organization is for advocacy of a policy view during the public process prior to decision, there is no financial interest. In contrast, if at the time the particular matter is pending before the Agency, you know or, after reasonably inquiry, discover that as a result of the Agency's decision, the Organization intends to expend its financial resources to continue its opposition to the project or has made an offer to engage in fundraising efforts on behalf of a purchaser for the property, you may not participate because the Organization will be deemed to have a financial interest. Finally, if at the time the particular matter is pending before the Agency, after making a reasonable inquiry as to the intentions of the Organization, you learn that the Organization is truly undecided about its future course of action, you may participate.

FACTS:

The Agency

The Agency was created by Legislative Act. The purpose of the Agency is "to further protect the health, safety, and general welfare of [regional] residents and visitors by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of [the region] . . . by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies."[2/]

One of the Agency's statutory responsibilities is to develop criteria and standards to determine when a development project will be considered a special development project and to review and approve all applications for special development projects.[3/] Generally, special development projects ("SDP") are the types of developments "which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues significant to more than one municipality of the [region]."[4/]

In connection with proposals to develop property, the Agency is required to review all applications for development permits for SDPs, to hold a public hearing, and to make certain findings.[5/] These findings include whether the probable benefits of the project outweigh the probable detriments, whether the proposed development will substantially or unreasonably interfere with the achievement of the objectives of the general plan of a municipality, and whether the proposed development is consistent with any municipal regulations.[6/] Absent approval by the Agency, a municipality may not grant a development permit for an SDP.[7/] The Agency may also specify conditions to be met by the developer in order to minimize any economic, social or environmental damage.[8/] After an SDP is approved by the Agency, it is subject to further approvals by other entities, including local boards.

The Organization

The Organization was established as a non-profit, tax-exempt organization. It is dedicated to protecting the environment of the region through land preservation and conservation by education and advocacy. The Organization works with landowners, other environmental organizations, and public officials to conserve land, monitor growth and development, promote environmental awareness, encourage public participation, and advocate on behalf of the natural resources of the region.

The Organization receives money in various ways to support its advocacy work and general program implementation. First, each member makes an annual contribution. Second, it relies on funds donated to it by the public who oppose a development or who want to reimburse the Organization for a successful conservation advocacy program. The Organization does not use paid fundraisers. Instead, the Board members or its paid staff engage in fundraising as part of their normal job responsibilities.

The Organization frequently advocates for the purchase of land or of a conservation restriction by a governmental or non-profit entity. In connection with its land preservation program, the Organization raises funds as part of a financing package[9/] to assist others in making a purchase. Although its Articles of Organization allow it to purchase land or conservation easements, the Organization generally does not do so because its primary role is to advocate for land preservation.

The Developer

A developer ("Developer") submitted an SDP to the Agency seeking approval for a proposed development ("Project"). The Organization advocated denial of the application on policy grounds, and that instead, the regional land bank or another conservation entity purchase the property in order to prevent its development and preserve it as open public space. As part of its opposition and advocacy efforts, the Organization also expressed a willingness to engage in fundraising on behalf of another non-profit organization or governmental entity for its

purchase of the property as public conservation land, if such an opportunity were to present itself in the future.[10/]

In connection with its opposition to the Developer's application, the Organization expended money for expert consultants, attorneys fees, and related costs. It also submitted opposition testimony to the Agency relating to the proposed Project.[11/] For the approximately eight month period after the SDP was filed, the Organization expended funds for consultants, attorneys fees, and related costs in opposing the Developer's proposal. The funding for its opposition came from the general, unrestricted funds of the Organization. There was no segregated special fund for the Project, although the Organization separately tracked expenses as well as contributions earmarked for the opposition.[12/]

You submitted a written disclosure to your appointing authority relating to your Board membership on the Organization. Thereafter, the Agency rejected the SDP. The Agency voted a second time[13/] and again, it rejected the SDP.[14/]

The Developer then initiated a statutory appeal in Superior Court. Pursuant to an order of remand, the Developer filed a revised plan containing a number of significant changes. The Agency has treated this SDP as a new submission.

In connection with the new SDP, the Organization retained the services of an expert who reviewed the materials submitted by the applicant and offered testimony at the public hearing. The Organization also retained the services of a law firm, and through the firm, retained a consultant and an expert. It expended funds on consulting services relating to the new SDP.

Several hearings were held on the new SDP. The public testimony record was closed, with the Agency's deliberation and action currently pending. No public input is received during deliberation.

If the application is approved, the Organization will evaluate what action it would take, including taking no action. It will consider the conditions in the approval as well as the applicant's actions. For example, if the Agency approves the SDP with conditions that the applicant deems too severe, the applicant may appeal the Agency's decision. The Organization may then seek to participate as a party in the appeal or as an *amicus*.

You state that, at this time, the Organization has no plans to participate in fundraising. If an appropriate conservation purchaser, such as the municipality, a land trust or a state agency, were to request assistance from the Organization in fundraising for the purchase of the property, the Organization's Board would consider the request. The Organization will take no affirmative steps to make an offer to help with fundraising in the absence of a request by an appropriate entity seeking to purchase the property. Only if a legitimate plan for conserving the land were presented and a request was made to the Organization's Board to assist (for example, by coordinating a private fundraising component to the financing package) would the Organization even consider providing assistance or fundraising. The Organization's Board has not made any effort to find a buyer for the property since the filing of the new SDP.

DISCUSSION:

For the purposes of the conflict of interest law, G.L. c. 268A, the Agency is a municipal agency.[15/] As a member of the Agency, you are a municipal employee[16/] within G.L. c. 268A and, as such, you are subject to its provisions. In particular, for the purposes of this discussion, you are subject to §§ 19 and 23 of the statute.

Section 19

Section 19(a) provides in pertinent part that a municipal employee may not participate[17/] in a particular matter[18/] in which to his knowledge, a business organization in which he is serving as a director has a financial interest. "The objective of [§ 19] is to eliminate in advance the pressure that otherwise might be brought to bear on public employees when faced with situations where there are competing public and private considerations."[19/] The essence of § 19 is its assurance to the public that a public employee's official judgments and actions "will not be clouded by potentially competing private [financial] interests."[20/]

As a non-profit organization, the Organization is a business organization within the meaning of § 19 and as a Board member, you would be a director of the organization.[21/] The new SDP submitted by the Developer is a particular matter. Your activities as an Agency member, such as reviewing the SDP, conducting hearings and engaging in deliberations, would constitute participation in that particular matter. However, the prohibition on participation under § 19 arises only if there is a financial interest in the particular matter.[22/] Accordingly, the relevant inquiry is whether the Organization has a financial interest in the Project related particular matters before the Agency such as the new SDP.

The conflict of interest law does not define the term financial interest. Courts have identified the lack of a definition as a deficiency in the statute.[23/] The Commission has been charged with the responsibility for interpreting the term and giving it a workable meaning.[24/]

Despite the absence of a definition, the Commission has a long-standing practice of interpreting the phrase as meaning a financial interest of any size,[25/] either positive or negative,[26/] as long as it is direct and immediate or reasonably foreseeable.[27/] The term

financial interest, however, does not include financial interests that are "remote, speculative, or not sufficiently identifiable."[28/]

In construing § 19, the Commission determines in the first instance if the interest at issue can be quantified in monetary terms.[29/] If so, the Commission then applies a reasonable foreseeability test[30/] on a case by case basis.[31/] If such a financial interest is reasonably foreseeable, then § 19 will prohibit participation.

Applying these principles to your situation, you may participate in the new SDP if at the time you participate, the Organization does not intend to spend any additional financial resources in relation to the Project, whatever decision the Agency makes.[32/] In such case, a reasonably foreseeable financial interest is absent because the Agency's decision will have no affect, either positive or negative, on the financial resources of the Organization.

An argument could be made that the Organization has a financial interest in the Developer's matter due solely to its past expenditures in opposition to the development and regardless of its intent concerning future opposition activities. That is, because the Agency approval of the development would render those Organization expenditures a waste, the Organization has a financial interest in the Agency's vote. The Commission, however, declines to read the term "financial interest" so broadly. This is particularly true where it appears that the Organization's prior expenditures on the Developer's matter were in support of the presentation of the Organization's position on issues of public policy during the Agency's hearing process on the Project and not in defense or advancement of the Organization's or its members' private property interests.[33/]

In contrast, under § 19, you may not participate if at the time the matter is pending, the Organization intends, if the SDP is approved, to expend additional financial resources in an effort to continue its opposition to the Project. For example, the Organization may intend to continue its opposition efforts by spending money to mount an appeal of the decision as either a party or as an *amicus*, or to continue the fight before other local boards.[34/] In addition, the Organization may intend to spend money in connection with fundraising efforts to assist a prospective purchaser[35/] of the property.[36/] In each of these circumstances, if the SDP is approved, then the Organization would expend its financial resources. Therefore, the Agency's decision would have a reasonably foreseeable effect on the financial interests of the Organization. Your knowledge of these reasonably foreseeable expenditures by the Organization would subject you, as an Agency member participating in the consideration of the SDP, to precisely the kind of pressure of competing public and private interests that § 19 was intended to eliminate. Accordingly, under such circumstances, you would be required under § 19 to abstain from participating as an Agency member in the Developer's SDP.[37/]

Finally, in the event the Organization is, at the time when the Developer's SDP comes before the Agency, undecided about its future course of action should the Agency approve the SDP, § 19 will not bar your participation in that matter as an Agency member. This indecision and lack of intent to further oppose the Project must be *bona fide*.

As an Agency member subject to c. 268A, you have a duty to make reasonable inquiry into the intentions of the Organization.[38/] Failure to make such inquiry constitutes willful blindness. "If a person confronted with a state of facts closes his eyes in order that he may not see that which would be visible and therefore known to him if he looked, he is chargeable with "knowledge" of what he would have seen had he looked."[39/]

Accordingly, in determining the intent of the Organization regarding any future efforts and expenditures in opposition to the Project or any other SDP, you may not simply rely on the absence of the Organization's formal vote or a plan of action concerning its continued opposition to the Project and expenditures in support of that opposition. Instead, you must make a reasonable effort to determine whether there is actual agreement or disagreement among the persons controlling the Organization (*e.g.*, the Organization's directors) regarding whether the Organization is more likely than not to continue to oppose the Project if the SDP is approved. In order to satisfy your duty of reasonable inquiry, you must review and consider all factors relevant to the Organization's intentions, including its past history in connection with opposing similar projects. If you have made such a reasonable inquiry into the intentions of the Organization, however, and have determined that it is truly undecided about its future course of action, § 19 would not bar your participation as an Agency member in the Developer's matter.

In reaching its conclusions, the Commission has considered and rejected each of the arguments you have made to support your contention that neither you nor the Organization has a financial interest in the SDP submitted by the Developer. Your principal argument is that the Organization's promise to assist in fundraising for any entity interested in purchasing the property for conservation purposes does not constitute a direct financial interest in the Developer's proposal.[40/]

Your arguments, however, do not address the financial interest that the Organization may have in the Project or other SDP as a result of anticipated future monetary or in kind expenditures to continue its opposition

to the new SDP should it be approved by the Agency or in any event, to locate and/or assist a purchaser. Contrary to your argument, if the Organization is likely to have future expenditures, then the Organization will either receive a benefit or be harmed financially as a result of the approval or disapproval of the SDP. The benefit will come in the form of saving funds should the Agency deny the application. The harm will come in having to spend money to continue opposing the Project either before other local boards or in connection with a court challenge to the Agency's decision or locating and/or assisting a purchaser.

Section 23

Section 23(b)(3) provides in relevant part that a municipal employee may not act 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 position or undue influence of any party or person. The provision "is concerned with the appearance of a conflict of interest as viewed by the reasonable person, not whether the [municipal employee] actually gave preferential treatment" and is focused on the perceptions of the community's citizens.[41/]

In order to dispel the appearance of a conflict, § 23(b)(3) requires that a public official make a full disclosure of all the relevant facts in a manner that is public in nature. This disclosure, which is a public record, serves to let the public know the relevant facts.

As applied to your situation, if the Organization does not have a financial interest under § 19 as set forth above because it does not intend to expend any additional financial resources to continue its opposition efforts or to assist a purchaser or is truly undecided about its future course of action, you will nonetheless have an appearance of a conflict because the Organization has spent money on the particular matter. Accordingly, you must make a § 23(b)(3) disclosure detailing in full all of the relevant circumstances prior to taking action as an Agency member concerning the matter.

Your disclosure of the relevant circumstances must be full and complete and must include a description of all relevant expenditures and activities of the Organization relating to the matter of which you have knowledge. Any such expenditures and activities must be described in detail and itemized by category and amount. In addition, your disclosure should include a description of the Organization's past history of advocacy and/or opposition relating to the same or similar types of developments.

Your disclosure should be filed with the Agency's Executive Director and with the clerk for the municipality that referred the application to the Agency. You should also make a verbal disclosure for inclusion in the meeting minutes prior to taking any official action.

Section 23 requires you to base any decisions on the merits, using objective standards and following all requisite procedures. If you are unable to judge the matter impartially, you should abstain.

In conclusion, if you become an Organization Board member and if the Organization has a financial interest in the new SDP or any other matter pending before the Agency as described above, as an Agency member, you will be prohibited from participating. You may participate only if, after reasonable inquiry, you know of no financial interest or the Organization is truly undecided regarding future expenditures as a result of the Agency's decision. Finally, if there is no financial interest, but the Organization has advocated a policy position to the Agency, you must file a full § 23(b)(3) disclosure.[42/]

DATE AUTHORIZED: January 31, 2002

[1/] You also serve as the Agency's Hearing Officer and head a Subcommittee.

[2/] Legislative Act.

[3/] *Id*.

[4/] *Id*.

[5/] *Id*.

[6/] *Id*.

[7/] *Id*.

[8/] *Id*.

[9/] The financing packages can include funds from individuals, local, state and federal governmental entities, as well as public and private foundations.

[10/] For the purposes of this opinion, you have asked the Commission to assume that the Organization will not own the property or hold a conservation easement or any other interest in the Developer's property. In addition, you have asked the Commission to assume that you and your family members do not have a personal financial interest in the Developer's property.

[11/] The Organization routinely submits SDP testimony as part of its land conservation and advocacy mission, sometimes with the assistance of legal and technical experts, some of whom are paid and some of whom are volunteers.

[12/] The Organization spent far in excess of the earmarked donations in connection with its opposition to various proposals, including the Project.

[13/]You and another Agency member did not participate in the second vote citing possible conflicts of interest.

[14/]In light of the Agency's rejection of the original SDP, the Organization did not engage in any fundraising efforts to purchase the Developer's property. The Organization's Board took no formal action to pursue any fundraising because there was never an opportunity to purchase the property. The Organization's Board and staff did not make any effort to find a buyer for the property. No purchaser of the property was ever identified.

[15/]A municipal agency is "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). The Agency is a regional municipal entity and, as such, its members are municipal employees of each member municipality for purposes of the conflict of interest law. *EC-COI-99-5; 92-26*.

[16/]A 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." G.L. c. 268A, § 1(g).

[17/]Participate is defined as "participate in agency action or in a particular matter personally and substantially as a . . . municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G.L. c. 268A, § 1(j). Participation also includes "formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters." *EC-COI-97-3; EC-COI-92-30.*

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

[19/]*EC-COI-84-98* (citing Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 301 (1965)).

[20/]*EC-COI-86-13*.

[21/]*EC-COI-88-4*.

[22/]*EC-COI-84-98* (§ 19(a) triggered by existence of any financial interest).

[23/]*Graham v. McGrail,*370 Mass. 133, 138 (1976)*; Moskow v. Boston Redevelopment Authority*, 349 Mass. 553, 567 (1965), *cert. denied,*382 U.S. 983 (1966).

[24/]*EC-COI-84-98.*

[25/]*Id.*(term not limited to financial interests that are significant or substantial);
EC-COI-89-33.

[26/]*EC-COI-89-33.*

[27/]*EC-COI-97-3; 96-2; 92-4; 90-2; 89-33; 89-19; 87-16; 84-98.*

[28/]*EC-COI-90-02; 89-19; 87-16.*The Commission's interpretation of § 19 is similar to that given to its federal analog, 18 U.S.C. § 208.*See EC-COI-98-1* (Ethics Commission looks to federal statute for guidance). Under § 208(a), a federal employee is prohibited from personally and substantially participating "if the particular matter will have a direct and predictable effect" on the organization's financial interest, which effect exists "if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest." 5 C.F.R. § 2635.402(a), (b)(1)(i) (2001). "[I]f the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to the matter," there is no direct and predictable effect. *Id.*§ 2635.402(b)(1)(i). "A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest." *Id*. § 2635.402(b)(1)(ii).*See 83 OGE 1*(January 7, 1983).

[29/]*EC-COI-89-33.*

[30/]*EC-COI-90-14.*

[31/]*EC-COI-89-33*.

[32/]This includes the situation where the Organization has spent all the money that it intends to spend in connection with its advocacy efforts before the Agency. The intent to not expend any further financial resources may arise from a decision by the Organization to that effect or an inability to do so because of lack of funds.

[33/]It should be noted, however, that were the Organization to have or establish a pattern or practice of continuing to make expenditures in opposition to a proposed project after its approval by the Agency whenever it had taken a position in opposition to the project before the Agency, the Commission would conclude that the Organization has a reasonably foreseeable financial interest in the project for § 19 purposes.

[34/]In this situation, expenditures may be made for, among other things, retaining consultants and attorneys or preparing written materials and reports.

[35/]A reasonably foreseeable financial interest would be present if the Organization will spend money to locate a potential purchaser or to assist a purchaser, if such assistance would require the Organization to spend money in its fundraising efforts for items such as postage, photocopying, written distribution of appeals for money, as well as the time of its paid staff members.

[36/]You state that the Organization has no plans to participate in fundraising for the purchase of the Developer's property. The Organization's Board would consider fundraising if and only if a legitimate plan for conserving the land was presented by an appropriate conservation purchaser and a request was made to the Organization's Board for fundraising assistance.

[37/]"Ordinarily, the wise course for one who is disqualified from all participation in a matter is to leave the room."
*Graham v. McGrail*370 Mass. 133, 138 (1976).

[38/]*In re Montalbano,* 2000 SEC 969 (§ 19 applicable to public official who "closed her eyes" to the facts that would have informed her of the conflicts).

[39/]*Demoulas v. Demoulas*, 428 Mass. 555, 577 (1998) (citing *West's Case*,313 Mass. 146, 151 (1943) (quoting *Zdunek v. Thomas*, 215 Mass. 11, 15 (1934))).

[40/] You also make two additional arguments. First, you argue that the interest of the Organization is shared with the general public and therefore, is not a financial interest within the meaning of § 19. Section 19(b)(3) provides that no violation will occur if the particular matter involves a determination of general policy. The exemption set forth in § 19(b)(3) requires that the shared interest must be one of either the municipal employee or the members of his immediate family, not one shared by a business organization in which he is a director. Moreover, the interest involves the expenditure of financial resources by the Organization which is not shared by the public. Your other argument alleging restrictions on free speech prohibited by Amendment Article 76 of the Massachusetts Constitution and the First Amendment is equally unavailing. This argument was previously rejected by the Supreme Judicial Court. *Zora v. State Ethics Commission,* 415 Mass. 640, 651(1993) ("The State conflict of interest law restricts conduct, not speech or expression. . . . . Any incidental limitation of First Amendment freedoms is clearly justified by the Commonwealth's substantial interest in regulating the conduct of public officials.").

[41/] *In re Hebert,* 1996 SEC 800.

[42/] You have previously been advised informally by the Commission's Legal Division about your ability as an Agency member to participate in the new SDP while you are a member of the Organization and that payment of your annual membership dues alone is not considered to be a financial interest within § 19. The Commission understands that you filed a § 23(b)(3) disclosure as advised by the Legal Division.

CONFLICT OF INTEREST OPINION
EC-COI-02-03

QUESTION:

The City Clerks' Association asks whether the conflict of interest law will prohibit municipal clerks who are also justices of the peace under G. L. c. 207, § 38 from accepting the statutory fee of $75, provided by G. L. c. 262, § 35, as amended by St. 2002, c. 164, for solemnizing marriages during their municipal work day on municipal premises.

ANSWER:

No, because the General Laws authorize municipal clerks who have also been appointed justices of the peace to collect the statutory fee and solemnize marriages during municipal time on municipal premises.

FACTS:

To become a justice of the peace, one makes application to the governor.[1/] General Law Chapter 207, § 38 states, "A marriage may be solemnized in any place in the commonwealth by . . . a justice of the peace if he is also a clerk or assistant clerk of a city or town." For over a century, municipal clerks who have also been appointed justices of the peace have been expressly authorized to solemnize marriages.[2/] In addition, the governor also has the authority to designate a justice of the peace, who is not otherwise a municipal clerk, in each town to solemnize marriages.[3/]

Justices of the peace have long been authorized under the General Laws to collect fees for solemnizing marriages.[4/] For almost two centuries prior to 1975: "The fee for lawfully solemnizing and certifying a marriage [was] one dollar and twenty-five cents."[5/]

Pursuant to St. 1975, c. 464, § 3, the following language replaced the above-quoted language in G. L. c. 262, § 35: "The fee for lawfully solemnizing and certifying a marriage shall not exceed twenty-five dollars if performed in the justice of the peace's home community or thirty-five dollars if performed in a contiguous community; provided, however that no additional charge shall be made for travel in connection with such solemnizing notwithstanding any law to the contrary."

Apart from changes in the amount of fees and the description of geographic location within the Commonwealth where the fees apply,[6/] the next major change in § 35 was implemented by St. 1989, c. 711, "An Act Relative to Justices of the Peace," which *added* the following:

> Nor shall any additional charge be made by a justice of the peace, for providing flowers, for providing music, for providing a photographer, for providing a location where the marriage ceremony takes place, or for providing an unofficial certificate of marriage. Additional charges are allowable for prenuptial counseling conferences, rehearsals, and other other [sic][7/]

special requests by the couples [sic][8/] whose marriage is being solemnized; provided, however, that the amount of these additional charges must be disclosed in writing to the couple whose marriage is being solemnized at least forty-eight hours prior to the rendering of these services. The total fee for lawfully solemnizing and certifying a marriage shall not exceed the fee limit fixed for solemnizing and certifying a marriage in a justice of the peace's home community where a municipal employee who is also a justice of the peace solemnizes a marriage in a municipal building at a time when said building is regularly open for business.

> Most recently, G. L. c. 262, § 35 was amended to increase the fees for a marriage performed in the justice of the peace's home community from $45 to $75, and from $60 to $125 for a marriage performed outside his home community.[9/]

Throughout the Commonwealth, municipal clerks who have also been appointed justices of the peace solemnize marriages during their normal workday, on

municipal premises. Based on their understanding of G. L. c. 262, § 35, and an Ethics Commission Fact Sheet discussed below, they personally collect the statutory fees for marriages they solemnize.

On May 24, 1989, the staff of the Ethics Commission issued a Commission Fact Sheet, entitled, "Town & City Clerks – Justices of the Peace" (Fact Sheet).[10/] The entire text of the Fact Sheet was distributed in "The Public Recorder," a publication of the Massachusetts Town Clerks' Association in 1989.[11/] The Fact Sheet discussed only the application of G. L. c. 268A, § 23(b)(2) to town and city clerks who are also justices of the peace. As discussed further below, the Fact Sheet concluded that the simultaneous receipt of a municipal salary and a solemnization fee for a marriage conducted in the municipal clerks' home community does not violate § 23(b)(2) because the statutory fee, at that time, was $35, which is not "of substantial value." The Fact Sheet stated, "JP/Clerks may personally accept marriage solemnization fees for ceremonies performed at municipal facilities during normal working hours."

Because the most recent change in the statutory fee for a marriage in a clerk's home community has increased the amount to $75,[12/] the City Clerks' Association now asks whether § 23(b)(2) will prohibit municipal clerks from receiving the fee.

DISCUSSION

The question of a municipal clerk's[13/] receipt of the statutory fees for solemnizing marriages raises issues under G. L. c. 268A, § 23. Under this section, a municipal clerk may not "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/] As we said in *EC-COI-92-23*, we have "interpreted this provision as prohibiting public employees from obtaining a special advantage of substantial value, not authorized by law *or by their official duties*, by virtue of their public positions."[15/]

There is no question that a municipal clerk/justice of the peace uses his municipal clerk position when he solemnizes a marriage during his normal work schedule on municipal premises. While he is being paid to perform his municipal duties during the normal work schedule, he is also being paid, from a private source, the statutory fee to solemnize a marriage.

However, in considering potential issues involving § 23, the advice in the Fact Sheet turned on the conclusion that the statutory fee of $35.00 per marriage was not "of substantial value." We need to reexamine that advice because it predated not only St. 1989, c. 711 but also the Commission's subsequent interpretations of § 23(b)(2). In *EC-COI-92-23*, we concluded, with respect to municipal clerks' arranging to make telephone calls of election results to the News Election Service in return for the Service's making payments to the Town Clerks' Association, that because there was no legal authority for the clerks to use "their unique immediate access to election results to secure . . . financial benefits for their private Association," § 23(b)(2) prohibited them from so doing. We commented, however, that "payments explicitly authorized by regulation would . . . comply with § 23(b)(2), because they would not be 'unwarranted.'" Similarly, in *EC-COI-92-38*, we noted that a solicitation by a state agency did not violate § 23(b)(2) because it was authorized by statute, and thus a reasonable extension of the state employees' official duties.[16/]

As always, our analysis begins with the plain meaning of the relevant law or laws.[17/] First, G. L. c. 207, § 38 specifies that "a justice of the peace **if** he is also a clerk or assistant clerk"[18/] has the authority to solemnize a marriage. This evidences a legislative acknowledgement that the same individual is in a position to solemnize a marriage, provided he is a justice of the peace. And, as noted at the outset, municipal clerks who are also justices of the peace have long had the authority to solemnize marriages for a fee.

Next, the plain meaning of G. L. c. 262, § 35, and its antecedent statutes, allow justices of the peace to keep the specific fees authorized therein for solemnizing marriages. As is clear from entire text of § 35, a justice of the peace is entitled to the fees for solemnizing a marriage but not entitled to additional charges for travel, for providing flowers, music, a photographer, a location, or providing an *unofficial* marriage certificate. He may, however, accept additional charges for "rendering . . . services" including "prenuptial counseling conferences, rehearsals, and other special requests by the couple" provided that he discloses these additional charges in writing to the couple at least forty-eight hours prior to providing the services.

Although municipal clerks/justices of the peace have long solemnized marriages during municipal time and on municipal premises, the language in the controlling statutes did not explicitly refer to such a use of municipal time or municipal resources until the enactment of St. 1989, c. 711, § 5. Under this Act, the Legislature further acknowledged not only the long-standing authority that justices of the peace are entitled to certain fees but also the fact that municipal clerks who are justices of the peace commonly solemnize marriages during their municipal work day, on municipal premises. This is reflected in the last phrase of the section, which sets the fee limit "for solemnizing and certifying a marriage in a justice of the peace's home community where a municipal employee who is also a justice of the peace solemnizes a marriage *in* a municipal building *at a time when said building is regularly open for business*."[19/] In this same context,

the Legislature also provided restrictions on additional charges available to the justices of the peace.

In interpreting the meaning of this statutory change, we may consider the purpose of the legislation,[20] in that "the purpose and not the letter of the statute controls,"[21] and the "fair import" of the statute.[22] We also consider that the enactment of this language occurred after the enactment of G. L. c. 268A. Courts ordinarily construe statutes to be consistent with one another, assuming that the Legislature was aware of existing statutes when enacting subsequent ones.[23] "Thus, we attempt to interpret statutes addressing the same subject matter harmoniously."[24] However, when two statutes cover the same subject matter, the more recent statute prevails and, if there is a conflict between the new and prior statutes, the new provision will control.[25]

Given the long standing and widespread practice of municipal clerks/justices of the peace receiving private funds to solemnize marriages, and the express acknowledgment that such was occurring "in a municipal building" during regular business hours, the Legislature must have appreciated the potential for a conflict of interest. The Legislature was aware of the potential for abuse of a justice of the peace's authority because it also added restrictions on imposing certain additional charges. Although G. L. c. 262, § 35 could have been written more explicitly regarding the use of municipal time and resources, we have not concluded that statutes must include express reference to G. L. c. 268A in order to modify the application of the conflict law.[26]

CONCLUSION

Accordingly, we conclude that the statutory authorization under G. L. c. 207, § 38 and c. 262, § 35 makes the receipt of the solemnization fee for a marriage performed on municipal premises during the municipal clerk's normal business hours **not** an "unwarranted privilege of substantial value." It follows that the statutory *amount* of that privilege makes no difference because the Legislature also authorized it. We conclude, therefore, that the municipal clerks' receipt of the increased statutory fee of $75, though "of substantial value" for purposes of the conflict of interest law, will not violate § 23(b)(2).[27]

In contrast, while we believe that G. L. c. 207, § 38 and c. 262, § 35 accommodate couples by allowing them to be married at a town or city clerk's office by the same official who issues their marriage certificates, we do not interpret these statutes to extend such an accommodation outside the clerks' offices in a way that conflicts with their municipal duties. In addition, notwithstanding the legal authority we have identified that supports the receipt of solemnization fees during municipal time, such a privilege could become unwarranted under § 23(b)(2) if a clerk/justice of the peace were to use municipal time and resources to solemnize marriages such that it adversely affected the municipal clerk's ability to fulfill his official duties and responsibilities.

Finally, we note that § 23(e) expressly allows municipalities to impose additional restrictions on the conduct of their municipal employees and officials.[28] Given that municipal clerks may be appointed or elected, serve full or part time, receive salaries from their municipalities or receive statutory fees,[29] it is reasonable for municipalities to control the allocation of municipal clerks' time during the normal work schedule to ensure that their solemnization of marriages, in their capacities as justices of the peace, does not interfere with the performance of their duties as municipal clerks.

DATE: September 5, 2002.

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[1] Const. Pt. 2, c. 2, § 1, Art. 9; Op. Atty. Gen., January 7, 1965, pp. 173-174; Op. Atty. Gen., September 14, 1927. *See also* G. L. c. 222, § 1: "Justices of the peace and notaries public shall be appointed, and their commissions shall be issued, for the commonwealth, and they shall have jurisdiction throughout the commonwealth when acting under the sole authority of such a commission."

The Governor's "Guidelines for Appointment As Justice of the Peace" state: "The Governor will appoint city, town, and court clerks and their assistants as justices of the peace. This appointment is necessary to empower these individuals to perform marriages. However, no special designation to marry is needed by these individuals, since one who holds any on of the above offices and is also a justice of the peace may solemnize marriages. (MGL Ch. 207, s. 38)"

[2] *See* St. 1899, c. 387, § 1: "No justice of the peace shall solemnize a marriage in this Commonwealth unless he also holds one of the following offices: City or town clerk or assistant city or town clerk; city registrar or assistant city registrar; clerk of a court or assistant clerk of a court; or unless he shall have been specially designated by the governor as hereinafter provided. Section 2. The governor may, at his discretion, designate justices of the peace who may solemnize marriages in the city or town in which they severally reside." *See also* G. L. c. 207, § 39: "The governor may in his discretion designate a justice of the peace in each town and such further number; not exceeding one for every five thousand inhabitants of a city or town, as he considers expedient, to solemnize marriages, and may for cause at any time revoke such designation. The state secretary, upon payment of twenty-five dollars to him by a justice of the peace so designated, who is also a clerk or assistant clerk of a city or town or upon the payment of fifty dollars by any other such justice, shall issue to him a certificate of such designation"

[3] G. L. c. 207, § 39.

[4] *See e g,* St. 1795, c. 41: "To every Minister or Justice of the Peace who shall lawfully solemnize a marriage & certify the same, One Dollar & twenty five Cents." G.S. 1860, c. 157, § 10: "For lawfully solemnizing and certifying a marriage by a minister or justice of the peace, one dollar and twenty-five cents." R.L. 1902, c. 204, § 26: "The fee for lawfully solemnizing and certifying a marriage shall be one dollar and twenty-five cents."

[5] See e.g., G. L. c. 262, § 35 (prior to St. 1975, c. 464, § 3).

[6/] *See* St. 1981, c. 521, § 2; St. 1983, c. 159.

[7/] The second word "other" does not appear in the Official Edition of the General Laws.

[8/] St. 1992, c. 286, § 263 changed the word "couples" to "couple."

[9/] St. 2002, c. 164, approved July 12, 2002.

[10/] On May 14, 1998, the Fact Sheet was withdrawn from the Commission's list of publications because it was considered outdated. We also note that the Commission's staff has received, until this request, few inquiries about the guidance in the Fact Sheet.

[11/] Although the date on the Fact Sheet is May, the Public Recorder date is March 1989.

[12/] The new fees will become effective as of October 10, 2002.

[13/] "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).

[14/] G. L. c. 268A, § 23(b)(2).

[15/] Emphasis added.

[16/] *EC-COI-92-38,* n. 2.

[17/] *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 392 Mass. 811, 813 (1984) ("The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.")

[18/] Emphasis added.

[19/] Emphasis added.

[20/] Nothing in the legislative records concerning the house bill, House No. 2882, 1989, which underlies St. 1989, c. 711, and the materials provided to the Senate and Governor further illuminates the purpose.

[21/] *Walsh v. Ogorzalek,* 372 Mass. 271, 274 (1977).

[22/] *Thatcher v. Secretary of Commonwealth,* 250 Mass. 181, 191 (1924).

[23/] *Green v. Wyman-Gordon, Co.,* 422 Mass. 551, 554 (1996).

[24/] Id. *See also Eastern Racing Association v. Assessors of Revere,* 300 Mass. 578, 581 (1938).

[25/] *Sutherland Statutory Construction,* § 51: 02, pp. 193-194 (6th Ed.).

[26/] *See EC-COI-92-4* (the Commission advised, for example, that a regulation which would authorize private compensation under § 4(a) might state that "community colleges . . . as necessary to carry out and discharge their official duties, may appoint volunteer . . . personnel . . . provided, however, that such volunteer personnel may receive compensation from their private employer . . . ."). *Compare Edgartown v. State Ethics Commission,* 391 Mass. 83, 87-88, n. 5 (1984) (discusses what might meet the "provided by law" requirement of § 17(a)).

In addition, we acknowledge that for at least 13 years, the Clerks' Association and its members have relied on advice in the Fact Sheet that effectively said the use of municipal time and resources to solemnize marriages did not raise any issues under the conflict law except whether the fee received was of substantial value for purposes of § 23(b)(2).

[27/] Section 3, in general, prohibits a public official from receiving anything of substantial value "for or because of any official act or act within his official responsibility" unless "provided by law for the proper discharge of official duty." Section 17 prohibits a municipal official from receiving compensation from anyone other than his municipality "in relation to any particular matter in which the [municipality] is a party or has a direct and substantial interest" unless "provided by law for the proper discharge of official duties." The receipt of private funds by a municipal clerk raises issues under both §§ 3 and 17. However, here, we conclude that the receipt of fees does not implicate § 3 for municipal clerks and that the receipt of the fees by municipal clerks is authorized by law or regulation for purposes of § 17. The Legislature has set statutory fees and specifically has set statutory fees for municipal clerks who are also justices of the peace. G. L. c. 262, § 35; G. L. c. 207, § 38.

[28/] *See e.g., EC-COI-96-1.*

[29/] According to the Clerks' Association, the compensation arrangements for municipal clerks vary depending upon the size of the municipality and whether it is a city or town form of government. Under G. L. c. 262, § 34, which enumerates a wide variety of fees municipal clerks may charge for providing copies or recording various types of certificates, in some municipalities the clerks are entitled to the fees, while in others, the fees go to municipal accounts. For example, until St. 2002, c. 157, the following appeared in G. L. c. 41, § 19: "In towns under one thousand inhabitants no person appointed as assistant clerk shall receive any salary for services as such from the town, but his compensation, if any, for such services shall be paid by the clerk, to whom all fees received by the assistant shall be paid."

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State Ethics Commission

Enforcement Actions

2002

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Summaries of Enforcement Actions
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In the Matter of Ruthanne Bossi - The Commission fined former Billerica Building Inspector Ruthanne Bossi $10,000 for violating the state's conflict of interest law by reviewing and approving permit applications submitted by her brother, George Allen, a Billerica developer. In a Disposition Agreement, Bossi admitted violating M.G.L. c. 268A, §19 by reviewing 14 single-family house construction permit applications and 14 as-built plans filed by Allen. As building inspector, Bossi was responsible for reviewing building permit applications to ensure compliance with zoning, flood plain and historic district requirements and reviewing as-built plans for zoning compliance. The Ethics Commission notified Bossi in 1991 and again in 1992 that the conflict law would prohibit her from participating in matters involving Allen. Bossi subsequently developed a scheme in which she no longer signed her initials indicating approval but instead marked the application or plan with a "squiggle." The squiggle signified to her subordinates that she had reviewed and approved the application or plan. Bossi determined that there were no zoning, flood plain or historic district issues as to seven applications; she determined that one application involved a "grandfathered" undersized lot and that for one application a foundation permit only should issue. For the remaining five applications, Bossi determinated that variances were needed. The amount of the fine reflects the fact that Bossi was twice notified by the Ethics Commission that she should not participate in matters involving her brother yet continued to be involved and did so by using a "squiggle" rather than her initials to secretly indicate her approval. Bossi was suspended in December 1998 and was terminated by the town in September 1999.

In the Matter of Francis Callahan - The Commission fined Ayer Commissioner of Trust Funds Francis Callahan $2,000 for violating G.L. c. 268A, the state's conflict of interest law, by investing $90,000 of the trust funds' money with New England Securities, the licensed broker/dealer of securities for his employer, New England Financial. The Ayer Commission of Trust Funds is responsible for investing the town's scholarship trust funds. According to the Disposition Agreement, in August 1999, Callahan and his colleagues, on Callahan's advice, ordered that $90,000 of the funds' money, the total of which was approximately $320,000, be invested in the New England Securities Growth and Income Fund, a mutual fund offered by New England Securities. After selectmen raised concerns regarding the investment, the Ayer Commission of Trust Funds, with Callahan abstaining, voted in January 2000 to shift half the value of that investment to a more conservative money market fund. In February 2000, Callahan's $1,800 commission was reinvested in the mutual fund. When he recommended the investment in the Growth and Income Fund, Callahan acted as an agent for his employer New England Financial. By participating in the decisions to purchase an investment for which he received a $1,800 commission and which his employer marketed, Callahan participated in matters in which he and his employer had a financial interest.

In the Matter of James Mazareas - The Commission issued a Decision and Order concluding that Lynn School Superintendent James Mazareas violated the conflict law by making personnel decisions about his wife. The Commission ordered Mazareas to pay a civil penalty totalling $2,500. During two days of public hearings in 2001, Mazareas denied all charges that recommending the transfer of his wife onto the city payroll, appointing her to a transition team and appointing her to facilitate a curriculum workshop violated the conflict law. In the Decision, however, the Commission found that Mazareas violated the conflict law in each instance. Mazareas was ordered to pay a $1,000 penalty for violating §19 by appointing his wife to serve on the transition team when he became superintendent and to pay a $1,000 penalty for violating the same section of the law by appointing her to facilitate a summer curriculum workshop. Mazareas'wife Jean earned $600 for her work on the transition team and $8,915.25 as a curriculum workshop facilitator, a total of $9,515.25. Mazareas was also ordered to pay a $500 penalty for violating §23(b)(3) by recommending that his wife be transferred from a federally funded position to a comparable staff position on the city payroll under his direct supervision after becoming involved in a dispute with his wife's supervisor. The Decision notes that there is evidence of Jean's expertise and prior involvement that supports her appointments. Notwithstanding this evidence, the Commission concluded that Mazareas also violated §23(b)(3) by his actions involving personnel decisions about his wife. The Commission declined however to impose additional fines where the violations were based on the same facts as §19 violations.

In the Matter of Stephen Powers - The Commission fined Chelsea City Councilor Stephen Powers $1,000 for violating the state's conflict of interest law by seeking to establish short-term parking spaces outside S&L Subs, a sub shop co-owned by his wife. In a Disposition Agreement, Powers admitted that he violated G.L. c. 268A, §19 by participating in the effort to establish two 10-minute parking spaces at the intersection of Eastern Avenue and Cabot Street where his wife's sub shop is located. At a June 1999 City Council meeting, Powers proposed establishing the two spaces and the Council approved his motion without objection. Most of the sub shop's sales are take-out and short-term parking spaces help to generate revenues. The Agreement notes that no action was taken by Powers or any other city employee to establish the spaces once Powers' motion was approved.

In the Matter of John K. Martin - MassHighway civil engineer John K. Martin of Watertown admitted violating the conflict law by doing engineering work for Adesta Communications involving state permits to lay fiber optic cable on state property. Martin agreed to pay a total of

$8,500 consisting of a civil penalty of $5,000 and a civil forfeiture of $3,500. According to a Disposition Agreement, Martin is a registered civil/structural engineer who performed private engineering work reviewing and affixing his engineer's stamp to construction drawings that were submitted to the MBTA, MassHighway and other public entities as part of Adesta's applications for right-of-way access to lay fiber optic cable. In August 1999, MassHighway learned of Martin's work for Adesta and questioned whether it was a conflict of interest. Martin received advice from the Ethics Commission that he was prohibited from reviewing construction plans that would be submitted to his own or another state agency, from affixing his professional engineer stamp to such plans, or from being compensated for such work. In summer 1999, MassHighway suspended Martin for three days for stamping drawings that had been submitted to MassHighway. After September 1999, Martin continued to review drawings he knew were to be submitted to MassHighway but arranged for other engineers to stamp those drawings. Martin split the fee from Adesta with those engineers. Martin continued to put his stamp on drawings that Adesta submitted to the MBTA. Between March 12, 1999 and June 7, 2000, Martin received a total of $8,520 from Adesta for 16 sets of drawings submitted to state agencies. Seven of those drawings were submitted after the Ethics Commission told Martin that his private work for Adesta would violate the conflict law. Martin was terminated from his MassHighway position in April 2001.

In the Matter of Brian Pedro - The Commission fined Brian Pedro, a press secretary for the Massachusetts Bay Transit Authority, $2,000 for violating G.L. c. 268B, the state's financial disclosure law, by failing to file his Statement of Financial Interests for calendar year 2000. This marked the first time in the Commission's 23-year history that a public employee has been fined the maximum penalty for failing to file a financial disclosure form. Pedro, a state employee since 1996, was identified as a designated employee in a major policy making position by the MBTA for the first time in early 2001. Nearly nine months after the original filing deadline of May 1, 2001 passed, the Ethics Commission issued a Decision and Order ordering Pedro to pay the penalty and file his SFI. According to the Decision and Order, Pedro had been notified on a number of occasions that he was required to file, including being served a Formal Notice of Lateness by the Suffolk County Sheriff's Department on June 1, 2001. Pedro failed to respond in each instance. Pedro complied with the Decision and Order on Monday, February 25 after senior officials at the MBTA learned of the Decision and Order. General Manager Michael Mulhern suspended Pedro from his job with the MBTA until the conclusion of an internal investigation. The financial disclosure law provides that no public employee shall be allowed to continue in his duties or to receive compensation from public funds unless he has filed a statement of financial interests with the Commission as required.

In the Matter of Raymund Rogers - The Commission found reasonable cause to believe that West Bridgewater Police Lieutenant Raymund Rogers violated the code of conduct section of M.G.L. c. 268A, the state's conflict of interest law, by asking a subordinate to provide private transportation for Rogers' family members. The Commission concluded its review with the issuance of a Public Enforcement Letter. According to the letter, Rogers asked a subordinate police employee to perform personal errands involving private transportation for family members on several occasions over an 18-month period. These errands were performed on town time, using an unmarked police vehicle and took about 15 to 20 minutes each, for a distance of a few miles round trip. The letter states, "in the absence of a private family, business or social relationship with the subordinate, some history of reciprocity, or some other countervailing factor, it seems reasonable to infer that your subordinate did these personal favors for you because you, as his supervisor, asked him to." The letter also emphasized the personal errands were of substantial value, were performed "on the public payroll and [with] the use of public vehicles" and were not justified by an emergency or otherwise authorized by a town ordinance or policy. There was, therefore, reasonable cause to believe that Rogers violated §23(b)(2). Because Rogers intermingled his public and private dealings with a subordinate and, according to the letter, did not "make the relevant disclosure that would have kept the appearance problem from arising" there was reasonable cause to believe that Rogers violated §23(b)(3).

In the Matter of Omer H. Recore, Jr. - The Commission fined Milford Police Sgt. Omer H. Recore, Jr. $1,000 for violating the state's conflict of interest law by preparing a police report for a motor vehicle accident involving his wife. In a Disposition Agreement, Recore admitted that he violated G.L. c. 268A, §19 by preparing an official police report on December 6, 2000 for an automobile accident that took place on the previous day and involved his wife Elaine Recore. The description of the accident in Recore's report contains several mitigating factors concerning the degree of Elaine's fault for the accident and did not indicate that Elaine was Recore's wife. Elaine's insurer determined that she was at fault for the accident and assessed a surcharge. Elaine's appeal of the finding of fault is pending with Division of Insurance. In 2002, the Milford Police Department assigned another officer to investigate the accident and to file a superseding report. The Agreement notes that the superseding report corroborates the report filed by Recore.

In the Matter of Ross A. Atstupenas - Blackstone Police Chief Ross A. Atstupenas admitted violating the conflict law by requesting that a subordinate officer change a $75 speeding ticket issued to the brother of a fellow police officer to a warning. Atstupenas paid a civil penalty of $1,000. According to a Disposition Agreement, Officer Bradley Briggs issued a $75 speeding ticket to Steven Mowry, the brother of fellow police officer Wayne

Mowry, on December 2, 2000. The same day Atstupenas sent Briggs an e-mail stating, "If at all possible could you change [the speeding citation] to a warning and notify Officer Mowry to let his brother know that it was changed to a written warning." The message was signed "Chief." Officer Briggs complied with Atstupenas' request. Atstupenas admitted that he violated G.L. c. 268A, §§23(b)(2) and 23(b)(3) by seeking to change the ticket to a warning.

In the Matter of Michael Jovanovic - The Commission issued a Decision and Order concluding that Quincy resident Michael Jovanovic violated the state's conflict law by offering a bribe to a Department of Medical Assistance employee who was about to deny Jovanovic's application for financial assistance for his brother who was in a nursing home. The Commission ordered Jovanovic to pay the maximum civil penalty of $2,000. According to the Decision and Order, Jovanovic's brother Zarko entered the Elihu White Nursing home in January 2000 and incurred a bill of more than $40,000. Jovanovic had power of attorney for Zarko. Around the time Zarko entered the nursing home, Jovanovic transferred approximately $200,000 from a joint account he held with Zarko to accounts in only Jovanovic's name. Most of these funds, $140,000, came from the sale of Zarko's home in 1997. In March 2000, the nursing home began attempting to collect from Jovanovic an amount owed on a bill for Zarko's stay. In July 2000, Jovanovic applied on behalf of Zarko to the DMA for financial assistance. Under the MassHealth regulations, Zarko's eligibility would be determined partly by the amount of money he had within the three years prior to his application and generally any assets exceeding $2,000 would have to be used before Zarko would be eligible for state financial assistance. During summer 2000, Virginia M. Alger, a DMA eligibility worker assigned to Zarko's application, sought to acquire from Jovanovic all of the information concerning Zarko's financial status that was necessary to process his application. On September 12, 2000, Alger met with Jovanovic. At that meeting, Jovanovic did not provide all of the information needed and provided Alger with information about additional assets that had not previously been disclosed. After Alger explained that she was likely to deny the application and that Jovanovic could start the application process anew or appeal the denial, Jovanovic said, "No appeal." Alger explained that she could not process the application and Jovanovic again said, "No appeal." He then gave Alger a sealed envelope, stating, "This is for you. You have done more for me than my lawyer has done." Alger handled the half-inch thick envelope and returned it to Jovanovic saying that she could not accept gifts, especially money. Jovanovic returned the envelope to her, responding, "This is not money." Alger tore open a corner of the envelope and saw a $50 dollar bill. She gave the envelope back to Jovanovic, saying, "It is money. I cannot accept this." Alger ended the meeting and reported what had happened to her supervisor. The Commission found that Jovanovic's offer of cash in an envelope violated both §§2(a) and 3(a) of G.L. c. 268A, the conflict of interest law.

In the Matter of Marge Schumm - The Commission fined Norton Housing Authority Executive Director Marge Schumm $2,000 for violating the state's conflict of interest law by participating in the hiring of her daughter's boyfriend as a maintenance mechanic. In a Disposition Agreement, Schumm admitted that she violated G.L. c. 268A, §23(b)(3) by delegating the hiring process to the maintenance foreman, reviewing the applications, informally discussing them with the foreman and advocating that her daughter's boyfriend be hired. Approximately 17 applicants sought the full-time job, which had a starting salary of $14.61 per hour. Schumm's daughter's boyfriend was hired in January 2001. According to the Disposition Agreement, Schumm's disclosure that she stayed out of the process because she knew a couple of the applicants was "inaccurate and misleading" because Schumm failed to disclose her daughter's relationship with th successful applicant and her involvement in the hiring process.

In the Matter of Marie Gosselin – The Commission found reasonable cause to believe Lawrence City Councilor Marie Gosselin violated the code of conduct section of M.G.L. c. 268A, the state's conflict of interest law, by asking the Department of Public Works to remove construction debris from her rental property instead of paying a private contractor to do so. The Commission concluded its review with the issuance of a Public Enforcement Letter. According to the letter, Gosselin repeatedly asked employees at the DPW to remove construction debris left by a contractor doing work on a two-family rental property she owns. During Gosselin's first call, DPW staff informed Gosselin that it was the property owner's responsibility to dispose of construction debris. Under limited circumstances, none of which applied to Gosselin's situation, the DPW would dispose of such debris. After Gosselin persisted in three subsequent phone calls to the DPW foreman and superintendent to have the debris removed, the DPW removed the debris. After Gosselin was questioned about the matter by the media and the Ethics Commission, she paid $262.50 to the DPW for its services in removing the debris. The letter states that high-ranking officials "must take care in requesting government services for themselves from the government employees they regulate to ensure that they do no explicitly or implicitly use their official position to obtain preferential treatment."

In the Matter of Leon Halle – New Bedford Building Department Project Manager Leon Halle admitted violating the state's conflict of interest law and paid a fine of $2,000 and a civil forfeiture of $350. According to a Disposition Agreement, Halle violated G.L. c. 268A, §17(a) by receiving compensation from a private developer in relation to plans that were submitted as part of the developer's building permit applications. Halle, in

his private capacity as an engineer, prepared as-built foundation plans for properties located at 967 and 961 Kensington Street for a New Bedford developer in 1999 and 2000. Halle was paid $175 for each plan. Prior to preparing the plans, the Ethics Commission advised Halle that he could not receive compensation for work that would be submitted to the city.

In the Matter of Michael Dormady – The Ethics Commission ordered the dismissal of this matter.

In the Matter of Robert Hanna – Brimfield Highway Surveyor Robert Hanna admitted violating the conflict law by his actions in attempting to award Brimfield's 2002 winter sand contract to Hitchcock Contracting of Charlton, a company that had failed to submit a bid. Hanna paid a civil penalty of $2,000. According to a Disposition Agreement, Hanna and the town procurement officer were present at the bid opening for the 2002 winter sand contract in May 2001. A bid from Lorusso Corporation, in the amount of $9.95 per cubic yard, was the only one submitted. Hanna believed Lorusso Corporation's price was high. He subsequently travelled to Hitchcock Contracting of Charlton, which was the successful bidder for the 2001 winter sand contract but did not submit a bid for the 2002 contract, and obtained a bid for the 2002 contract. Hanna returned to Town Hall and told the procurement officer he had spoken with a Hitchcock Contracting employee who told him she taped the bid to the door of the police station, which was located in the basement of town hall and had its own entrance. Envelope in hand, he said to the procurement officer, "I found this taped to the door of the police station. What should we do about it?" The procurement officer refused to accept Hitchcock Contracting's bid because the bid opening had been completed. Hanna did not object but stated that the LoRusso Corporation bid was too high. Hanna admitted that he violated G.L. c. 268A, §23(b)(2) by using his position to attempt to circumvent the bidding process and by misrepresenting the facts surrounding Hitchcock Contracting's bid to the procurement officer. The town put the 2002 winter sand contract out to bid after it deemed that Lorusso Corporation's bid was high compared to recent years. A third company was the low bidder in the rebidding and was awarded the contract.

In the Matter of Thomas Lussier – Massachusetts Teachers Retirement Board Executive Director Thomas Lussier admitted violating G.L. c. 268A, the state's conflict of interest law, and agreed to pay a $5,000 civil penalty to resolve allegations that he improperly used a MTRB corporate credit card for personal purchases. In a Disposition Agreement, Lussier admitted that his use of the MTRB credit card to charge more than $3,000 in personal purchases over a five-year period from 1997 to early 2001 violated §23(b)(2) of the conflict law. According to the Disposition Agreement, Lussier asserted that legitimate business expenses for which he was entitled to, but did not seek, reimbursement would offset his personal purchases and that he intented to make a complete reconciliation. "The amount of the unreimbursed business expenses, however, was significantly less than the charged personal expenses. . ." the Agreement states. Lussier reimbursed the MTRB $3,012.77 for personal expenses plus $504.50 in interest for a total of $3,517.27 after the media reported on the matter. He reimbursed an additional $114.62 following an investigation by the State Auditor. The MTRB has eliminated agency corporate credit cards.

In the Matter of Diane Wong – Former MBTA Assistant General Manager for Organizational Diversity Diane Wong admitted violating the conflict of interest law by awarding Praxis Consultants & Trainers, a company in which her son-in-law was one of three principals, contracts totalling $40,000. Wong paid a civil penalty of $5,000. According to a Disposition Agreement, Wong unilaterally decided to hire Praxis and one other company out of a field of 50 firms seeking contracts to provide diversity training to MBTA employees. Praxis executed three contracts with the MBTA, one in May 1998 for $10,000, another in September 1998 for $10,000 and a third in late 2000 for $20,000. Praxis provided training under the first two contracts but the final contract was canceled by the MBTA and payment was withheld. Wong admitted that her actions violated G.L. c. 268A, §§23(b)(2) and 23(b)(3).

In the Matter of Robert Comiskey – The Commission fined former Dover Ambulance Squad Administrator Robert Comiskey $5,000 for certifying that he, his wife and his son attended emergency medical technician (EMT) training sessions they did not attend. Comiskey also reimbursed the Town of Dover $854.39, the amount of compensation Comiskey and his family received for training sessions they did not attend. According to the Disposition Agreement, Comiskey was responsible for approving and submitting attendance rosters to the state Office of Emergency Management Services (OEMS) as proof that Dover EMTs attended training sessions. EMTs must attend 28 hours of training every two years to maintain certification and are paid an hourly wage for attendance. Comiskey, his wife and son were paid an hourly wage of approximately $14 for attending six to eight three-hour training sessions each year. Between 1996 and 2001, however, Comiskey, his wife and his son did not attend some training sessions for which they received attendance credit and compensation. Comiskey surrendered his EMT license and resigned as Ambulance Squad Administrator in June 2001 after an investigation was conducted by OEMS.

In the Matter of June Lemire - Southbridge Housing Authority ("SHA") Executive Director June Lemire admitted violating the conflict law by recommending that her boyfriend, George DiBonaventura, be hired as part-

time clerk of the works for a SHA renovations project. Lemire paid a civil penalty of $500. According to the Disposition Agreement, the architect for the renovation project contacted Lemire for a reference concerning Di Bonaventura, who worked for the SHA as a full-time maintenance supervisor from 1983 until his retirement in late 1999. Lemire spoke favorably about DiBonaventura and recommended that he be hired but did not disclose to the architect that he was her boyfriend. Lemire also did not disclose to her appointing authority, the SHA, that she recommended to the architect that DiBonaventura be hired. Lemire admitted that she violated G.L. c. 268A, §23(b)(3) by recommending her boyfriend to the architect.

In the Matter of James Foster – Former Milton School Department administrator of building and grounds James Foster entered into a disposition agreement with the State Ethics Commission to resolve allegations made by the Commission in May 2001 that he used a school department account to purchase auto parts for his or his family's personal vehicles. As part of the disposition agreement, he paid a $2,000 civil penalty. Foster admitted that he violated G.L. c. 268A, §23(b)(2) by using his position to misappropriate public moneys for personal use. According to the Disposition Agreement, Foster had access and authority to use an account at Johnson Motor Parts of Quincy to purchase auto parts for school department vehicles. Between October 1996 and October 1998, Foster used the account to charge $1,097.90 of auto parts for several cars owned by himself or his family including a Dodge Caravan, a Buick Riviera, a Chrysler New Yorker, a Ford Explorer and a Pontiac Firebird. Prior to entering the Disposition Agreement, Foster also reimbursed the town for the auto parts he charged to the town account.

In the Matter of Michael J. D'Amico – The Commission fined former Quincy City Councilor Michael J. D'Amico $1,250 for violating the state's conflict of interest law. In a Disposition Agreement, D'Amico admitted that he violated G.L. c. 268A, §19 by submitting a letter on city council stationery to the Quincy Zoning Board of Appeals (ZBA) requesting that Lappen Auto Supply Company (Lappen), which abuts D'Amico's property at 57-59 Penn Street, install landscaping, retaining walls and fences. According to the Disposition Agreement, Lappen was seeking a variance from the ZBA to construct a new warehouse that would link two buildings already sited on its property. In his letter, D'Amico recommended that the ZBA require Lappen to meet six conditions in order to get the variance to construct the warehouse. While the ZBA did not require all six conditions as recommended by D'Amico, Lappen was required to submit a reasonable landscape plan to the building inspector for review and approval. Lappen subsequently paid $6,700 for landscaping work at D'Amico's property. Lappen also provided similar landscaping to a second abutter's property.

In the Matter of James J. Hartnett, Jr. – Retired State Personnel Administrator James J. Hartnett, Jr. admitted violating G.L. c. 268A, the state's conflict of interest law, and agreed to pay a $4,000 civil penalty to resolve allegations that he improperly received meals, entertainment and gifts from National Association of Government Employees (NAGE) president Kenneth T. Lyons. Hartnett's duties as Personnel Administrator included meeting with union leaders to address union issues such as collective bargaining contract negotiations, benefits and grievances. In a Disposition Agreement, Hartnett admitted that his receipt of lunches at Anthony's Pier 4, food and entertainment at holiday parties and the gift of a Seiko watch violated §§23(b)(2) and 23(b)(3) of the conflict law. Hartnett also admitted that his failure to disclose the items he received from Lyons in his statements of financial interests (SFI) for the years 1997 through 2000 violated §7 of G.L. c. 268B, the state's financial disclosure law. Hartnett 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. Hartnett made no such disclosure. According to the Disposition Agreement, Hartnett had lunch meetings with Lyons approximately 20 times at Anthony's Pier 4. Lyons always paid for those lunches, which had an average per person cost of $50, through a NAGE account. The Executive Office of Administration and Finance code of conduct prohibited Hartnett from accepting meals from persons with whom he had contact in the performance of his official duties. Hartnett and his wife also attended several Fourth of July and Christmas parties hosted by Lyons and paid for by NAGE. The cost of these parties was more than $50 per person. Shortly after Hartnett became Personnel Administrator, Lyons gave him a Seiko watch with a NAGE emblem on its face. NAGE paid $229 for the watch. The Commission also issued a Public Education Letter citing Hartnett for seeking employment help from Lyons for a daughter's close friend. At one of the lunches at Anthony's Pier 4, Hartnett told Lyons that a close friend one of his daughters was interested in becoming a police officer. Lyons offered to contact a Boston University vice president to find out if there were any openings. Boston University police were represented by a NAGE-affiliated union. At a subsequent lunch at Anthony's Pier 4 hosted by Lyons, Hartnett and the Boston University vice president discussed the young man's prospects and Hartnett provided a copy of his resume. Several months later, Boston University offered the young man a police dispatcher job, which he declined. The Commission concluded that there was reasonable cause to believe that Hartnett violated §§23(b)(3) and 23(b)(2) of the conflict law by soliciting and accepting help from Lyons to get his daughter's boyfriend a job as a police officer.

In the Matter of Robert G. Renna – Robert G. Renna, former program director of the Lexington-Arlington-Burlington-Bedford-Belmont Collaborative

(LABBB), paid a $4,000 civil penalty to resolve allegations that he violated the conflict of interest law by using LABBB resources and funds to operate Northeast Reality Therapy Associates (NERTA), a private business association formed by Renna, two of his LABBB subordinates and a LABBB consulting psychologist. NERTA provided training in reality therapy, a counseling and classroom management technique for instructors of students with developmental challenges. In a Disposition Agreement, Renna admitted violating M.G.L. c. 268A, §19 by making payments totalng $10,350 to NERTA for members of the LABBB staff to attend NERTA-sponsored reality therapy conferences, training and programs. He also admitted violating §§19 and 23(b)(2) by using LABBB funds to pay NERTA instructors and a speaker more than $13,000. By using LABBB funds to pay the instructors and speaker, "Renna saved NERTA a substantial sum of money that NERTA would otherwise have had to pay," according to the Disposition Agreement. Finally, Renna admitted violating § 19 by using LABBB funds to make payments totaling over $8,000 to his personal American Express account for expenses attributable to out-of-state conferences and seminars. By deciding to make payments to NERTA, to NERTA instructors and to his American Express account, Renna participated in matters in which he and a business organization of which he was an owner and employee had financial interests. By using LABBB funds to pay instructors when NERTA should have made those payments, Renna used his position to obtain unwarranted privileges. The Massachusetts State Ethics Commission,s Enforcement Division initiated public proceedings against Renna in April 2001. The Disposition Agreement, which was approved by the Commission, concluded these proceedings. Earlier this year, Renna, a resident of Waltham, reimbursed LABBB $9,000 and resigned from his position.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 652

IN THE MATTER
OF
RUTHANNE BOSSI

DISPOSITION AGREEMENT

The State Ethics Commission and Ruthanne Bossi 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 18, 2000, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Bossi. The Commission has concluded its inquiry and, on October 16, 2001, found reasonable cause to believe that Bossi violated G.L. c. 268A, §§19 and 23(b)(2). The Commission and Bossi now agree to the following findings of fact and conclusions of law:

Introduction

1. Bossi was during the time relevant, the Town of Billerica inspector of buildings. As such, she was a municipal employee as that term is defined in G.L. c. 268A, §1. In her position as inspector of buildings, Bossi was in charge of running the building department.

2. As a matter of general practice, Bossi as inspector of buildings reviewed all building permit applications to ensure that the file was complete before any action was taken. Her review included ensuring compliance with zoning, flood plain and historic district requirements. Essentially, the zoning review involved checking for proper lot size, frontage, and setbacks, and making so-called "grandfathering determinations," which involved deciding whether a non-conforming lot was buildable because it had previously appeared on an approved plan subject to a prior, more lenient zoning ordinance.

3. After Bossi completed a permit application review, she would either sign off with her initials indicating her approval, send it back because the paperwork was incomplete, note for the inspector to obtain additional information prior to issuing the permit, or deny the application because of a zoning problem that would require a variance. If Bossi approved the application, she would pass the file to one of the building department inspectors for building code compliance review and to issue a foundation permit. After the foundation was completed, the builder would submit an as-built plan, called a certified building plan, certifying the location of the foundation. Bossi would review that plan for zoning compliance, and assuming no zoning issue was found, would initial the plan and pass the file back to the inspectors to issue the structural building permit.

4. Bossi was suspended as inspector of buildings on December 7, 1998, because of allegations of misconduct in office. She was terminated by the town on September 3, 1999.

Participating in her Brother's
Building Department Matters

Findings of Fact

5. Bossi's brother George Allen has been a developer in Billerica since the late 1970s.

6. By letter dated March 1, 1991, the State Ethics Commission wrote Bossi notifying her that §19 of the conflict of interest law, G.L. c. 268A, would prohibit her from participating as a building department official in building department matters involving her brother George. And by letter dated July 1, 1992, the Commission, at Bossi's request provided Bossi with a more detailed explanation of how §19 would apply to her involvement in a matter affecting property on which her brother held a mortgage.

7. Notwithstanding these letters from the Commission, Bossi continued to follow her practice as described above even when the matters involved her brother. After receiving these letters, however, Bossi did make one change in her practice when her brother's matters were involved. Rather than signing her initials indicating her approval, she would mark the application or plan in a corner with a squiggle. Her subordinate inspectors understood that the squiggle signified that Bossi had reviewed and approved the application or plan as the case may be

8. Between 1995 and December 1998[1/] when she was suspended, Bossi did the following as inspector of buildings regarding her brother's matters:

- reviewed 14 single-family house construction permit applications filed by her brother. These reviews involved her checking that the application was complete, and that:

  (a) as to eight of those applications, determining that there were no zoning, flood plain or historic district issues, and then indicating with a squiggle that she had completed that review to her satisfaction, and all that remained was for an inspector to review the application for building code compliance;

  (b) as to one application, determining that there were no zoning, flood plain or historic district issues and that the lot was a "grandfathered" un-

dersized lot;

(c) as to one application, determining that there were no zoning, flood plain or historic district issues, and that a foundation permit only should issue; and

(d) as to the remaining five applications, made determinations that variances were needed.

• reviewed and approved 14 as-built plans involving her brother.

9. The Commission is not aware of any evidence that Bossi in reviewing and approving the matters described above caused a permit to issue to her brother which he was not otherwise entitled to receive.

Conclusions of Law

10. Except as otherwise permitted, §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, an immediate family member[4/] has a financial interest. None of the exceptions applies.

11. The various decisions Bossi made in reviewing her bother's applications and plans were each particular matters.

12. She participated in those particular matters as the inspector of buildings by personally making those decisions.

13. Bossi's brother was an immediate family member.

14 Her brother had a financial interest in each of the foregoing particular matters.

15. At the time of her participation in each particular matter, Bossi knew that her brother had a financial interest in the matter.

16. Accordingly, each time Bossi participated in the above-described particular matters, she violated §19.

Resolution

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

(1) that Bossi pay to the Commission the sum of $10,000 as a civil penalty for violating G.L. c. 268A, §19;[5/] and

(2) that Bossi 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: January 3, 2002

[1/]Because of its statute of repose, the Commission is limited to actions that took place within the past six years. See 930 CMR 1.02(10).

[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/]The size of the fine reflects, among other factors, that Bossi was notified by the Commission not to participate in matters involving her brother and she continued to be involved and did so by using a non-identifying mark rather than her initials as described above.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 653

IN THE MATTER
OF
FRANCIS P. CALLAHAN

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Francis P. Callahan 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 13, 2000, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Callahan. The Commission has concluded its

inquiry and, on September 12, 2001, found reasonable cause to believe that Callahan violated G.L. c. 268A, §§17 and 19.

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

Findings of Fact

1. Callahan is one of three Ayer Commissioners of Trust Funds. He is also employed by New England Financial as a financial representative.

2. The Ayer Commissioners of Trust Funds are responsible for investing the town's 14 scholarship trust funds, and awarding scholarships from those funds. As of Summer 1999, the funds overseen by the Commission totaled approximately $320,000.

3. At the August 20, 1999 meeting of the Commission of Trust Funds, Callahan volunteered to explore how the Commission could achieve a higher rate of return on its investments. (The minutes of the August 20 meeting state that "Mr. Callahan will meet with the treasurer to provide guidance on the reinvestment of" a $100,000 certificate of deposit. No formal vote was taken.) At the time, certificates of deposit – the investment vehicle usually employed by the Commission – were returning approximately five percent per annum. Most securities were earning a much higher return.

4. Four days later, the town treasurer transmitted materials to each of the three commissioners, including Callahan. Those materials included a copy of §19 of the conflict of interest law, which bars municipal employees from participating in particular matters in which they and/or their employers have a financial interest.

5. At some time after the August 20, 1999 meeting, but before August 30, 1999, Callahan advised his colleagues on the Trust Funds Commission that the New England Securities Growth and Income Fund would be an appropriate investment vehicle for the Commission. On August 30, 1999, Callahan and the other two commissioners co-signed a letter to the town treasurer instructing him to deposit $90,000 of the trust funds' money in the New England Securities Growth and Income Fund. The treasurer did so.

6. The New England Securities Growth and Income Fund is one of the mutual funds offered by New England Securities, the licensed broker/dealer of securities for Callahan's employer, New England Financial. The Trust Funds Commission's New England Securities account application names Callahan as the representative for New England Securities.

7. The up-front charge for the investment levied by Callahan's employer was 5.75 percent of the total value of the investment, or $5,175. Of this amount, $1,800 was paid to Callahan as a commission on the sale.

8. In or about late November 1999, the Ayer Board of Selectmen raised concerns regarding the investment. On or about December 16, 1999, at a meeting of the Trust Funds Commissioners, Callahan recommended to his fellow commissioners that they "cancel the investment in question…and start over." His fellow commissioners declined Callahan's invitation, instead affirming their initial investment in a December 18, 1999 letter to the town treasurer. (Callahan was not a signatory to the letter.)

9. On January 15, 2000, the Trust Funds Commission, with Callahan abstaining, voted to shift approximately half of the value of that investment to a New England Securities money market fund, a more conservative investment vehicle. The minutes of the January 15, 2000 meeting also note that "Mr. Callahan advised that he will donate his commission." On or about February 8, 2000, Callahan's $1,800 commission was reinvested in the mutual fund.

Conclusions of Law

Chapter 268A, §17

10. Section 17(a) of G.L. c. 268A prohibits a municipal employee from, except as otherwise provided for by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation from anyone other than their city, town or municipal agency in relation to a particular matter in which the same city or town is a party or has a direct and substantial interest.

11. Section 17(c) of G.L. c. 268A prohibits a municipal employee from, inter alia, acting as an agent for anyone in connection with any particular matter in which the municipality is a party or has a direct and substantial interest, except as otherwise provided for by law for the proper discharge of official duties.

12. As a Trust Funds Commissioner, Callahan was, in August 1999, a municipal employee as that term is defined in G.L. c. 268A, §1.

13. The decision to invest funds in the New England Securities Growth and Income Fund was a particular matter.

14. The Trust Funds Commission had a direct and substantial interest in the matter; it was entrusted with protecting the trust funds' corpus, and the number of scholarships that it could award hinged in large part on the value of the funds.

15. Callahan received an $1,800 commission from his employer for the town's investment in the New

England Securities Growth and Income fund. (He later returned the Commission.)

16. Callahan's receipt of this compensation was not authorized by law for the performance of his official duties

17. By receiving compensation from his employer in relation to a particular matter in which the Trust Funds Commission had a direct and substantial interest, Callahan violated §17(a).[1/]

18. At the time he recommended the investment as a board member, Callahan was also acting as an agent for his employer regarding the investment. Indeed, Callahan was, in effect, acting in a dual capacity when he made the recommendation. He was both a private agent and a public employee.

19. Callahan's actions as his employer's agent were not authorized by law for the performance of his official duties.

20. By acting as agent for his employer in relation to a particular matter in which the Trust Funds Commission had a direct and substantial interest, Callahan violated §17(c).

Chapter 268A, §19

21. Section 19 of G.L. c. 268A prohibits municipal employees from participating in their official capacity in particular matters in which, to their knowledge, they or their employer have a financial interest.

22. As already noted, Callahan was a municipal employee and the decision to invest funds in the New England Securities Growth and Income Fund was a particular matter.

23. By advising the Trust Funds Commission to make that investment, and then joining with his fellow commissioners to execute a letter to the town treasurer directing him to make the investment, Callahan participated, in his official capacity, in this particular matter.

24. Callahan and his employer, New England Financial, each had a financial interest in the particular matter. Callahan's employer earned $5,175 in the transaction, of which $1,800 was paid to Callahan as a commission.

25. Callahan knew of these financial interests when he recommended the investment and signed the letter to the treasurer directing him to make the investment.

26. Therefore, by participating in two decisions leading to the purchase by the Trust Funds Commission of an investment vehicle marketed by his employer, which in turn led to his collection of an $1,800 commission, and his employer's receipt of a fee, Callahan participated in a particular matter in which, to his knowledge, he and his employer had a financial interest, thereby violating §19.

Resolution

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

(1) that Callahan pay to the Commission the sum of $2,000.00 as a civil penalty for violating G.L. c. 268A, §17 and §19; and

(2) that Callahan 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: January 10, 2002

[1/] Callahan's receipt of a commission derived from town funds under a contract between his employer and the town also violated §20. That section bars municipal employees from having a financial interest in municipal contracts. The Commission, in its discretion, elected to impose a penalty only for Callahan's §17 and §19 violations.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 654

IN THE MATTER
OF
STEPHEN POWERS

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Stephen Powers 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 8, 2001, 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 Powers. The Commission has concluded its inquiry and, on November 13, 2001, found reasonable cause to believe that Powers violated G.L. c. 268A, §19.

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

Findings of Fact

1. Powers is a Chelsea City Councilor, a position he has held since 1984.

2. At the June 14, 1999, city council meeting, Powers introduced a measure to establish two 10-minute parking spaces at the intersection of Eastern Avenue and Cabot Street. The motion carried without objection.

3. Powers's wife is a co-owner of S&L Subs, a sub shop located at the corner of Eastern Avenue and Cabot Street. Most of S&L Subs' customers order their food for take-out.

4. Short-term parking spaces provide customers easy access to business establishments, which helps those establishments to generate revenues. It is not unusual for Chelsea businesses that do a significant amount of take-out business to have short-term parking spaces outside their establishments.

5. Although Powers's motion carried without objection, no short-term parking spaces were ever established outside S&L Subs. Neither Powers nor the City Council as a whole ever pursued the matter with either the City Manager or the Traffic and Parking Commission.

Conclusions of Law

6. Section 19 of G.L. c. 268A prohibits municipal employees from participating in their official capacity in particular matters in which, to their knowledge, they or an immediate family member have a financial interest.

7. As a city councilor, Powers was, in June 1999, a municipal employee as that term is defined in G.L. c. 268A, §1.

8. The effort to establish short-term parking spaces outside S&L Subs was a particular matter.

9. By making the motion at the city council to establish the short-term parking spaces, Powers was participating, in his official capacity, in this particular matter.

10. Powers's wife is an immediate family member as that term is defined in G.L. c. 268A, §1.

11. Powers's wife had a financial interest in the effort to establish short-term parking spaces outside her business, because those parking spaces would make it easier for prospective customers to access the sub shop, thus increasing her revenue base. Absent two short-term spaces outside the business, customers might be unable to locate parking, and might therefore elect not to patronize the business.

12. Powers knew of his wife's financial interest in the parking spaces when he made the motion to establish them.

13. Therefore, by offering the motion to establish short-term parking spaces outside of his wife's business, Powers participated in a particular matter in which his immediate family member had a financial interest, thereby violating §19.

Resolution

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

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

(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:February 20, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 655

IN THE MATTER
OF
JOHN K. MARTIN

DISPOSITION AGREEMENT

The State Ethics Commission and John K. Martin 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 January 17, 2001 the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Martin. The Commission has concluded its inquiry and, on October 16, 2001, found reasonable cause to believe that Martin violated G.L. c. 268A, §4.

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

Statement of Facts

1. Martin was during the time relevant a Massachusetts Highway Department civil engineer. As such, Martin was a state employee as that term is defined in G.L. c. 268A, §1.

2. In addition to his MassHighway employment, Martin is a registered civil/structural engineer and does engineering work for private parties for compensation. As a registered civil engineer, Martin is authorized to affix his signature and professional engineer's stamp to a drawing, which attests to Martin's having reviewed and certified the drawing as accurate.

3. MFS Network Technologies, Inc., known as Adesta Communications since early 2000, is a national telecommunications company that was installing a fiber optic cable network in Massachusetts during the time relevant.

4. In order for MFS/Adesta to lay fiber optic cable along a Massachusetts state highway right-of-way, the company had to pay for and obtain a permit from MassHighway for the particular location. In order for MFS/Adesta to lay fiber optic cable along any railroad or subway right-of-way, the company had to pay for and obtain a permit from the Massachusetts Bay Transportation Authority. Thereafter, the state had a right to and did inspect the installation sites pursuant to those permits. At no time did MFS/Adesta have a contractual relationship with the state agencies.

5. On February 26, 1999, Martin and MFS executed a 30-day consulting contract for Martin to perform private engineering work in relation to construction drawings that were to be submitted to the MBTA in conjunction with MFS's applications for right-of-way access. Martin was to review drawings drawn by MFS's vendor, suggest changes if any, and affix his engineer's stamp to the finished drawings. Martin was to be paid $60 per hour for this work, and the contract was to renew automatically every 30 days unless either party gave notice to terminate.

6. Subsequently, Martin's private engineering work for MFS began to include his reviewing and stamping construction drawings to be submitted to MassHighway and other public entities.

7. Between March 12 and July 28, 1999, Martin billed MFS a total of $5,020 for reviewing and stamping nine sets of drawings that Martin knew were to be submitted to either the MBTA or MassHighway.

8. In late July 1999, MassHighway discovered that Martin's professional engineer stamp was on some fiber-optic cable drawings that had been submitted to it, and alerted Martin to a possible conflict of interest. Martin's counsel and MassHighway's counsel agreed that Martin's counsel would write to the Ethics Commission's Legal Division to inquire whether such conduct was a violation of the conflict-of-interest law. Martin and his counsel's position at that time was that this conduct was not a conflict of interest because MFS did not contract or do business with MassHighway but, rather, MFS merely sought permits for siting the fiber-optic cable. Therefore, according to Martin and his counsel, the state did not have a direct and substantial interest in the matter because fiber-optic cables had no relationship to highways, traffic signals or areas of concern to MassHighway.

9. In August 1999, the Ethics Commission's Legal Division issued an opinion stating that Martin was prohibited from receiving compensation from a private company for reviewing construction plans that would be submitted to his state employer or any other state agency in relation to permits requiring state approval. The opinion also stated that Martin was prohibited from putting his professional engineer stamp on construction plans that would be submitted to his state employer or any other state agency in relation to permits requiring state approval. The opinion noted that it was intended solely to provide guidance for Martin's prospective conduct, not to address Martin's prior conduct.

10. Subsequently, in late August and early September 1999, MassHighway suspended Martin for three days for stamping drawings that had been submitted to

MassHighway in June 1999.

11. After September 1999, Martin arranged for other professional engineers to stamp drawings that he knew were to be submitted to MassHighway. Martin invoiced MFS/Adesta $500 for any such jobs and split the fee with the engineers who stamped the drawings.

12. On September 17 and October 6, 1999, Martin billed MFS a total of $1,000 for his reviewing and stamping two sets of drawings that were submitted to MassHighway. After MassHighway rejected those drawings for containing Martin's stamp, the drawings were resubmitted with another engineer's stamp on them.

13. On October 20, 1999 and May 22, 2000, Martin billed MFS/Adesta a total of $1,000 for reviewing two sets of drawings that Martin knew were to be submitted to MassHighway. These drawings were submitted in the first instance under another engineer's stamp, and Martin split the fees with the other engineer.

14. In addition, Martin continued to put his own stamp on drawings that he knew were to be submitted to the MBTA. This occurred on three occasions in 2000, with Martin billing MFS/Adesta a total of $1,500 for his work. According to Martin, he believed that the MBTA was not a state agency but a political subdivision of the Commonwealth with which he could contract. According to G.L. c. 268A, §1(p), any division of the Commonwealth, including any independent state authority, is a state agency.

15. Between March 12, 1999 and June 7, 2000, Martin received a total of $8,520 in compensation from MFS/Adesta in connection with reviewing and/or stamping drawings that were to be submitted to MassHighway or the MBTA. This was work that Martin did for MFS/Adesta on his own time and not on his state time as a MassHighway employee.

16. Martin was terminated from his MassHighway position in April 2001.

Section 4(a)

17. Section 4(a) of G.L. c. 268A prohibits a state employee, except as otherwise provided for by law for the proper discharge of official duties, from directly or indirectly receiving or requesting compensation[1/] from anyone other than the state in relation to a particular matter[2/] in which the state is a party or has a direct and substantial interest.

18. The decisions regarding the review and approval of applications for permits to lay fiber optic cable on state property were particular matters.

19. The state was a party to and had a direct and substantial interest in those particular matters because the state, as the property owner, has a need to know where fiber optic cables are laid on its structures, and to control the number, weight and placement of such cables. Moreover, the state had a right to and did inspect the installation sites.

20. Martin's work reviewing and stamping construction drawings for MFS/Adesta was in relation to those particular matters.

21. From March 1999 through June 2000, Martin received a total of $8,520 in compensation from MFS/Adesta, a private party, for his work in relation to those particular matters.

22. There was no law authorizing Martin to accept this private compensation for the proper discharge of his official duties.

23. Accordingly, by receiving the private compensation as described above for his work in relation to 16 sets of drawings, Martin received compensation from someone other than the state in relation to particular matters in which the state was a party and/or had a direct and substantial interest. By doing so, Martin violated §4(a) on each of those 16 occasions.

Section 4(c)

24. Section 4(c) of G.L. c. 268A prohibits a state employee, except as otherwise than in the proper discharge of his official duties, from acting as agent for anyone other than the state in connection with a particular matter in which the state is a party or has a direct and substantial interest.

25. By stamping drawings that Martin knew would be submitted to a state agency, Martin acted as an agent for MFS/Adesta, a private party.

26. This stamping was in connection with the above-mentioned particular matters: the decisions regarding the review and approval of applications for permits to lay fiber optic cable on state property.

27. The state was a party to and/or had a direct and substantial interest in those particular matters.

28. In addition, Martin was not acting in the proper discharge of his official duties when he stamped drawings that were to be submitted to a state agency.

29. Accordingly, by stamping drawings for MFS/Adesta on 14 occasions in connection with the foregoing particular matters, Martin acted as an agent for someone other than the state in connection with a particular matter in which the state was a party and/or had a direct and substantial interest. By doing so, Martin violated §4(c) on each of the 14 occasions.

30. The Commission is not aware of any evidence to indicate that, at the time relevant, Martin worked within MassHighway's permitting office or had contact, directly or indirectly, with persons employed at MassHighway's or the MBTA's permit-issuing offices regarding the above-mentioned drawings.

31. The Commission is particularly concerned by Martin's continuing to violate §4 even after July 1999, when his agency raised the conflict of interest issue with him, and especially after August 1999, when he received a warning and a legal opinion advising him that he could not receive compensation or perform the above-described private engineering work. Indeed, Martin continued to accept compensation in connection with such engineering work even after he had been suspended for three days for related conduct. Martin violated §4(a) a total of seven times after August 1999, receiving a total of $3,500, and violated §4(c) a total of five times after August 1999.

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

(1) that Martin pay to the Commission the sum of $5,000 as a civil penalty for violating G.L. c. 268A, §4(a) and (c);

(2) that Martin pay to the Commission the sum of $3,500 as a civil forfeiture of the compensation that he received for reviewing and stamping drawings submitted to the MBTA and MassHighway in violation of §4(a); and

(3) that Martin 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: February 21, 2002

[1/] "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).

[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).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 607

IN THE MATTER OF JAMES MAZAREAS

Appearances:	**Karen Beth Gray, Esq.** **Counsel for Petitioner**
	John C. McBride, Esq. **Counsel for Respondent**
Commissioners:	**Wagner, Ch., Cassidy, Roach and Dolan**
Presiding Officer:	**Commissioner R. Michael Cassidy, Esq.**

DECISION AND ORDER

I. Procedural History

On September 13, 2000, Petitioner initiated these proceedings by issuing an Order To Show Cause (OTSC) under the Commission's Rules of Practice and Procedure.[1/] The OTSC alleged that Respondent, James Mazareas (Mazareas) in his capacity as Superintendent of Schools for the City of Lynn, violated G. L. c. 268A, § 19 by appointing his wife, Jean Mazareas (Jean) to two positions in which she had financial interests. One position was on a transition team (Team), which the City's School Committee allegedly authorized to develop a reorganization plan for the new Superintendent. Jean allegedly received $600 compensation for her work on the Team. The other position was to facilitate a summer curriculum workshop (Workshop). Based on the hourly rate set by a union contract, Jean allegedly received a total of approximately $8,918.25 for her services on the Workshop. The OTSC also alleged that Mazareas violated G. L. c. 268A, § 23(b)(3) by making the same two appointments.

Finally, the OTSC alleged that Mazareas violated G. L. c. 268A, § 23(b)(3) by participating in a decision to transfer Jean from a federally funded position within the School Department to a similar position on the City's payroll (Transfer).

On October 10, 2000, Mazareas filed an Answer to the OTSC. A Pre-hearing conference was held on January 23, 2001. On April 6, 2001, the parties submitted joint Stipulations of Fact (Stipulation). On June 15, 2001, the parties also stipulated that Mazareas was the "appointing authority" for the Workshop.

An evidentiary hearing was held on May 4 and August 22, 2001. After the conclusion of the evidentiary portion of the hearing, the parties submitted legal briefs on October 19, 2001. The parties presented closing

arguments before the full Commission on December 19, 2001.[2/] Deliberations began in executive session on December 19, 2001.[3/]

In rendering this Decision and Order, each undersigned member of the Commission has considered only the testimony, evidence in the public record, including the hearing transcript, and arguments of the parties.[4/]

II. Findings of Fact

1. As of early 1998, Mazareas was employed as the Associate School Superintendent for the City of Lynn.

2. The Associate Superintendent is appointed by the School Committee upon recommendation of the Superintendent.

3. As of early 1998, Jean, his spouse, was employed by the Lynn School Department as a staff development specialist and her salary and benefits were federally funded.

The Transfer

4. Mazareas became involved in a grievance with Jean's supervisor, Jaye Warry (Warry), in January 1998. The grievance evolved into a dispute between Warry and Mazareas that continued through at least May 20, 1998, when Mazareas requested that the Superintendent, James T. Leonard (Leonard), take disciplinary action against Warry for filing a false complaint against Mazareas.

5. Jean believed that the above circumstances were not "the most comfortable situation" and Mazareas felt that the whole situation caused stress to him and to Jean.[5/]

6. In or about March 1998, Mazareas recommended to Superintendent Leonard that Jean be transferred from her federally funded position to a comparable staff position in the School Department on the City payroll. One of the reasons Mazareas recommended the transfer was that Warry would no longer supervise Jean.

7. In her new position on the City payroll, Jean reported to, and was supervised by, Mazareas.

8. Mazareas did not file a written disclosure with his appointing authority concerning his involvement in transferring Jean from her federally funded position to the comparable staff position on the City's payroll.

The Team

9. The School Committee of the City of Lynn elected Mazareas Superintendent on May 20, 1998 and authorized him to assume the position of Superintendent as of June 6, 1998.

10. In or about May 1998, the School Committee authorized Mazareas to create a transition team to develop a reorganization plan (Team).

11. The Team consisted of six people, Jan Birchenough, Alan Benson, Paula Fee, Tom Iarrobino (Iarrobino), Jean Mazareas and Anita Rassias. Mazareas asked Iarrobino, who is the secretary to the School Committee and the public information officer for all the public schools in the City, to serve on the Team to be its liaison to the School Committee and to keep the Committee informed about the progress and efforts of the Team.

12. Mazareas created the Team[6/] to continue the work of the Internal Planning Committee, which was identifying the educational and fiscal needs of the public schools at the time that Leonard's administration as Superintendent was concluding. Dr. Lusiano "Lee" Orlandi, who was a consultant to the public schools, created the Internal Planning Committee in the fall of 1997.

13. Mazareas appointed Jean to the Team, effective June 8, 1998.[7/]

14. At the time Mazareas made the decision to appoint Jean to the Team, he knew she would have a financial interest in being a member of the Team.[8/]

15. Each member of the Team received a weekly stipend of $200 in addition to his or her regular salary. On June 23, 1998, Mazareas authorized the members of the Team to be paid the weekly stipends. The stipends were effective as of June 8, 1998. Jean received her stipend towards the end of the school year.

16. Jean received a total of $600 in compensation for her work on the Team.

17. Mazareas did not file a written disclosure with his appointing authority concerning his appointing Jean to the Team. There is no evidence that his appointing authority made any written determination about his appointing Jean to the Team.

The Workshop

18. Prior to the summer of 1998, Mazareas made the decision to appoint Jean to facilitate a curriculum workshop (Workshop).[9/] The goal of the Workshop was to align the math, science, and English language arts curricula with the Massachusetts Curriculum Frameworks and the MCAS and to accomplish this goal before the opening of the school year 1998-1999.

19. Mazareas, as Superintendent, was the "appointing authority" for the Workshop.[10/]

20. At the time Mazareas made the decision to appoint Jean to facilitate the Workshop, he knew that she would receive compensation for her Workshop duties in addition to her yearly compensation as a program development specialist.[11/]

21. Pursuant to the terms of her union contract, which provided extra pay for work during the summer, Jean received a total of approximately $8,918.25 for her services on the Workshop.

22. On or about July 8, 1998, Mazareas stated the following in a letter to the School Committee:

> Please be advised that in accordance with Chapter 71, Section 67, of the Massachusetts General Laws,[12/] Jean Mazareas is working part-time during the summer in her position as Program Specialist in charge of Staff Development.
>
> The work that she will perform had been organized and determined prior to my appointment as Superintendent of Schools.

23. On or about July 9, 1998, Mazareas told Upton that Jean was not to be paid until Mazareas resolved the issue with the School Committee and he directed Upton not to pay her until after July 28, 1998.

24. Jean's pay for the Workshop was delayed approximately three weeks, but she was paid in August 1998.

25. Mazareas did not file a written disclosure with his appointing authority before his decision to appoint Jean to the Workshop and did not receive a written determination from his appointing authority about his decision to appoint Jean.

III. Decision

To prove a violation of G. L. c. 268A, § 19, the Petitioner must prove the following elements:

(1) a municipal employee;[13/]

(2) participated;[14/]

(3) in a particular matter;[15/]

(4) in which, to his knowledge,[16/] a member of his immediate family;[17/]

(5) had a financial interest.

At all relevant times, Mazareas, in his capacity as Associate Superintendent or as Superintendent was a "municipal employee" defined in the conflict of interest law. As such, he was required to comply with G. L. c. 268A, § 19.[18/] There is no question that Jean was a member of his "immediate family," as defined in the conflict law.

Decisions to appoint Jean to the Team and to facilitate the Workshop were "particular matters" as defined in G. L. c. 268A.

The Team

The issues are whether Mazareas participated in the particular matters and whether Jean had a financial interest in the particular matters. First, the evidence demonstrates that Mazareas participated in the decision to appoint Jean to the Team. The conflict law, in pertinent part, defines "participate" as "participate in agency action or in a particular matter personally and substantially . . . through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." "Appoint" is defined as "to fix by a decree, order, command, resolve, decision or mutual agreement" or "to assign, designate, or set apart by authority."[19/] Mazareas approved assigning Jean to the Team. Mazareas admitted that he appointed people to the Team. The School Business Administrator agreed that Mazareas appointed Jean to the Team. The parties stipulated that he appointed her to the Team.[20/]

Notwithstanding this evidence, Mazareas argues that he did not appoint Jean to the Team but, rather, she continued in her School Department duties as a Team member without any action on his part.[21/] In light of the contrary evidence, we do not find credible Mazareas' or Jean's testimony that her work on the Team was only a continuation of her work on the Internal Planning Committee which did not involve Mazareas' appointing her to the Team. Moreover, the Team was different from the Internal Planning Committee. Unlike the Committee, which was in existence to serve the prior Superintendent, the Team was created to assist the new Superintendent, Mazareas. The Team was paid, while the Internal Planning Committee was not. Accordingly, we find that Petitioner has proved, by a preponderance of the evidence, that Mazareas appointed Jean to the Team. As a result, he participated in the particular matter of the decision to appoint her.

The next issue is whether, "to his knowledge," Jean had a financial interest in his decision to appoint her to the Transition Team when he appointed her. Under the Commission's precedent, the financial interest for the purposes of § 19 may be of any size and may be either positive or negative so long as it is direct and immediate *or* reasonably foreseeable.[22/] Financial interests that are "remote, speculative, or not sufficiently identifiable do

not require disqualification."[23]

Mazareas admitted that at the time he appointed members to the Team, he knew Jean would have a financial interest in being on the Team. Team members were paid and Mazareas participated in the decisions to pay them, both through verbally asking the School Committee to allow him to give the Team school funds and by signing the payroll for the Team. Given his testimony combined with the evidence about Jean's compensation for her work on the Team, we find that Petitioner has proved, by a preponderance of the evidence, that Mazareas knew that Jean had a reasonably foreseeable financial interest in his decision to appoint her to the Team.

Accordingly, we conclude that Petitioner has proved, by a preponderance of the evidence, that Mazareas violated G. L. c. 268A, § 19 by appointing Jean to the Team.

The Workshop

Again, the first issue is whether Mazareas participated in the decision to appoint Jean to the Workshop. Mazareas stipulated to being the "appointing authority" for the Workshop so he was in a position to "personally and substantially" approve or recommend the decision to appoint her.

Mazareas admitted that he invited people to be part of the Workshop. Exhibit 19A, which is the April 8, 1998 memorandum from Mazareas to "Selected Secondary Personnel," states, "The purpose of this meeting is to give the invited potential workshop participants an overview of the work that must be done . . . ." The memorandum also indicates that a copy of the memo was sent to Jean. Exhibit 19B also refers to "invited participants." Stephen Upton, the School Business Administrator, testified credibly that Mazareas appointed people to the Workshop.[24] The Stipulation states that Mazareas appointed Jean. In light of this evidence, we do not find credible Mazareas' or Jean's contrary testimony that her work on the Workshop was only a continuation of her duties under her contract and did not involve Mazareas' participation in the decision to approve her being in the Workshop.

Mazareas knew that Jean had a financial interest in the decision to be appointed to the Workshop. He knew, at the time of appointment, that people would be paid to be in the Workshop because their employment agreements required additional compensation for this work. More specifically, Jean's contract required additional compensation for summer work. Mazareas admitted that it was his understanding that they would be paid. Accordingly, we find that Petitioner has proved, by a preponderance of the evidence, that Mazareas violated § 19 by participating in the decision to appoint Jean to the Workshop.

As noted above, § 19(b)(1) states that "it shall not be a violation . . . if the municipal employee *first* advises" his appointing authority "and receives *in advance* a written determination made"[25] by his appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of the municipal employee's services which the municipality may expect from him. For the following reasons, we conclude that Mazareas failed to avail himself of this exemption.[26]

First, the letter Mazareas wrote to the School Committee, dated July 8, 1998, was presented to the School Committee *after* he participated in the relevant particular matters. Next, the letter does not completely disclose his participation. Although the letter says that "the work" had been organized/determined *prior* to his precise appointment as Superintendent,[27] the letter does not disclose his involvement in organizing or determining the work when he was the Associate Superintendent and his role in appointing Jean to the Workshop or the Team. Finally, there is no evidence that he received a written determination back from the School Committee. Accordingly, we find that July 8, 1998 letter to the School Committee does not constitute a disclosure and determination under § 19(b)(1).

Section 23(b)(3)

To prove a violation of G. L. c. 268A, § 23(b)(3), Petitioner must prove the following elements:

(1) a municipal employee;

(2) who, knowingly, or with reason to know, acted in a manner;

(3) which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude;

(4) 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.[28]

The Transfer

Mazareas recommended transferring his wife from her federally funded position to a position on the City's payroll. The issue is whether Petitioner has demonstrated, by a preponderance of the evidence, that Mazareas knew or had reason to know that he was acting "in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that [Jean] . . . unduly enjoy[ed] his favor in the performance of his official duties, or that he [was] likely

to act or fail to act as a result of kinship."

In upholding the Commission's interpretation of § 23(b)(3), the Supreme Judicial Court concluded:

> We have . . . noted that the purpose of the statute 'was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.' . . . The commission has stated that '[s]ection 23(b)(3) is concerned with the appearance of a conflict of interest as viewed by the reasonable person,' not *whether preferential treatment was given*. . . . The commission has chosen to interpret this statute as a prophylactic measure, and the language of the statute accords with its interpretation.[29/]

The Commission's precedent has concluded that "acting in a manner" refers to the taking of official action as a public employee.[30/] "The Commission . . . evaluate[s] whether the public employee is poised to act in his official capacity and whether, due to his private relationship or interest, an appearance arises that the integrity of the public official's action might be undermined by the relationship or interest."[31/]

The fact that Mazareas knew that he was recommending transferring his wife shows that he was aware of kinship when he acted.[32/] The additional fact that he was involved in a dispute with his wife's supervisor in the federally funded position also shows that there were other circumstances, upon which a reasonable person could conclude, which could have affected his decision to transfer Jean. Both Mazareas and Jean testified that they were uncomfortable about his working relationship with her supervisor, that the situation caused stress to him and to Jean, and that these circumstances motivated her transfer. Under these circumstances, a reasonable person could conclude that he acted (on the recommendation to transfer) as a result of kinship or that Jean unduly enjoyed his favor in Mazareas' performance of that official duty.

A written disclosure of "the facts which would otherwise lead to such a conclusion" makes it unreasonable to so conclude that the public official was acting "in a manner . . . ." But, such a disclosure must be made "in writing to his appointing authority . . ." in advance of the action.[33/] Here, there is no evidence that Mazareas provided a written disclosure to the School Committee, his appointing authority,[34/] prior to recommending to the Superintendent that Jean be transferred. The only written disclosure in the record is his March 23, 1998 memorandum, after Mazareas first recommended that Jean be transferred, to the then Superintendent, James T. Leonard. The memorandum said that Leonard had orally approved the transfer in early March and recommended to Leonard that the transfer should be made immediately. Moreover, the parties have stipulated that Mazareas did not provide a § 23(b)(3) disclosure.

Accordingly, we conclude that the Petitioner has proved, by a preponderance of the evidence, that Mazareas violated § 23(b)(3) with respect to the Transfer.

The Appointments to the Team and the Workshop

We have said that the same conduct may be deemed to violate both §§ 19 and 23(b)(3).[35/] We have also consistently advised governmental officials that they should file a § 23(b)(3) disclosure to avoid violating § 23(b)(3) when acting on matters of interest (but not of financial interest under § 19) to immediate family members.[36/]

Although there is evidence that Jean's area of expertise and prior involvement in the Internal Planning Committee supported Mazareas' decision to appoint her to the Team and the Workshop, a reasonable person under these circumstances must also consider facts that Jean was Mazareas' wife and the financial interest she had in each decision.

Because the language of § 23(b)(3) includes the phrase "having knowledge of the relevant circumstances," our analysis must be fact specific and the conclusion limited to the facts. Here, the determination is whether, having knowledge of the relevant facts about the Team and Workshop, including Jean's financial interests in the work for both, and Jean's pre-existing responsibilities and qualifications, a reasonable person could conclude that Mazareas knowingly or with reason to know was likely to act or fail to act as a result of kinship by appointing his wife to these paid positions.

Again, § 23(b)(3) is concerned about a conflict of interest "'as viewed by the reasonable person,' not whether preferential treatment was given."[37/] We conclude that the facts of kinship coupled with Jean's financial interest in both appointments are sufficient together to prove that Mazareas knowingly or with reason to know "act[ed] in a manner which would cause a reasonable person . . . to conclude that . . . [he was] likely to act . . . as a result of kinship . . . ."

Although the parties have stipulated that Mazareas did not file a disclosure under § 23(b)(3) with respect to his appointing Jean to the Team and to the Workshop, there is the issue of whether the July 8, 1998 letter from Mazareas to the School Committee constitutes a § 23(b)(3) disclosure. As discussed above with respect to § 19, the letter was presented to the School Committee **after** he made both appointments. Moreover, the letter disclosed facts about only the Workshop. As noted above, the purpose of the § 23(b)(3) disclosure is to give the appointing authority an opportunity "to review the situation and take whatever steps he may deem to be appropriate

to protect the public interest."

Thus, we conclude that Mazareas has not proved, by a preponderance of the evidence, that the July 8, 1998 letter constituted a disclosure for purposes of § 23(b)(3).[38/] Accordingly, we conclude that Petitioner has proved, by a preponderance of the evidence, that Mazareas violated § 23(b)(3) by appointing Jean to the Team and by appointing her to the Workshop.[39/]

IV. Conclusion

In conclusion, Petitioner has proved by a preponderance of the evidence that James Mazareas violated G. L. c. 268A, § 19 on two occasions by participating in a decisions in which his wife had financial interests: the decision to appoint Jean to the Team and the decision to appoint her to the Workshop. The Petitioner has also proved by a preponderance of the evidence that James Mazareas violated § 23(b)(3) on three occasions: by officially acting with respect to the appointments to the Team and the Workshop, and his recommendation about the Transfer.

V. Order

Pursuant to the authority granted it by G. L. c. 268B, § 4(j), the Commission may impose a civil penalty of up to $2,000 for each violation of G. L. c. 268A. We consider mitigating and exacerbating factors in determining civil penalties.[40/] Here, Mazareas disclosed in writing to the School Committee, albeit after the fact, that Jean was on the Workshop and he took steps to forestall her payments for the Workshop. We also note that the evidence does not suggest that Jean was not qualified to serve on the Team or the Workshop. We also consider, however, that Jean received approximately $9,518.25 additional compensation as a result of her services on the Team and the Workshop and that the conflict law provided a clear way for him to have obtained approval, in advance, from his appointing authority.

Considering these circumstances, we order James Mazareas to pay $2.500.00 (two thousand, five hundred dollars) to the State Ethics Commission within thirty days of his receipt of this Decision and Order. This civil penalty consists of $1,000 for each violation of G. L. c. 268A, § 19 by his participating in the decision to appoint Jean to the Team and the decision to appoint her to the Workshop. We decline to impose a civil penalty in these circumstances for the violations of § 23(b)(3) where the violations are based on the same facts. Finally, we impose a $500 civil penalty for his violation of § 23(b)(3) with respect to the Transfer.

DATE: January 31, 2002

[1/] 930 CMR §§ 1.01(1)(a) *et seq.*

[2/] 930 CMR § 1.01(9)(e)(5).

[3/] G. L. c. 268B, § 4(i); 930 CMR § 1.01(9)(m)(1).

[4/] Counsel for Petitioner was not involved in any way in the Commission's deliberations.

[5/] The Presiding Officer found both Jean's and Mazareas' testimony on these points to be credible.

[6/] Iarrobino, whose testimony the Presiding Officer found credible, testified that Mazareas put together the Team. In addition, Mazareas stated in the Stipulation and in his Answer to the OTSC that the School Committee authorized him to create the Team.

[7/] Stephen Upton, School Business Administrator for the Lynn Public Schools, whom the Presiding Officer found credible, testified that Mazareas appointed Jean to the Team. Although Mazareas denied that he decided who would be on the Team, he conceded at the hearing, after referring to his prior sworn deposition, that he testified in his deposition that he"picked [Team members] individually." He also adopted his deposition testimony about "Jean being on the committee, and . . . that she was on the committee for two or three weeks."

[8/] Mazareas admitted this fact in his testimony during the hearing. [Q. . . . So you admit that you were the one who determined compensation, and you knew that your wife was a member of this transition team would have a financial in this matter - - interest in this matter; is that true? A. (No verbal response.) Q. If you could just respond verbally? A. Yes, yes.] He also admitted that he made the decision about what stipend the Team members would receive and that members of the Transition Team were not paid until he verbally asked the School Committee to allow him to give the Team school funds.

[9/] Exhibit 18A is a memorandum dated April 8, 1998 from Mazareas to Selected Secondary Personnel, including Jean, about a meeting for invited Summer Workshop participants. Mazareas also signed Exhibit 20A, dated June 2, 1998, which describes the Workshop and includes Jean along with others in a list describing the estimated time and pay for the participants in the Workshop. Stephen Upton, the School Business Administrator, testified that Mazareas "approved the listing of people [to serve on the Workshop] as a general course of business."

[10/] The parties so stipulated.

[11/] He admitted in his testimony that it was his understanding when "he started this process" that Jean would be compensated for the Workshop.

[12/] "A school district shall [not] (i) employ a member of the immediate family of a superintendent . . . unless written notice is given to the school committee of the proposal to employ or assign such person at least two weeks in advance of such person's employment or assignment. As used in this section, 'immediate family' shall have the meaning assigned by subsection (e) of section one of chapter two hundred and sixty-eight A." G. L. c. 71, § 67.

[13/] "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).

[14/]"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).

[15/]"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, ..." G. L. c. 268A, § 1(k).

[16/]The term "knowledge" is not defined in c. 268A. "Knowledge" has been defined as "an awareness or understanding of a fact or circumstance." *Black's Law Dictionary, Seventh Edition.* Also defined as, "the fact or condition of possessing within mental grasp through instruction, study, research, or experience one or more truths, facts, principles, or other objects of perception." *Webster's Third New International Dictionary*, 1993.

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

[18/]"Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge . . . his immediate family . . . has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

> (b) It shall not be a violation of this section (1) 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." G. L. c. 268A, § 19.

[19/]Webster's Third New International Dictionary, 1993.

[20/]In the Stipulation, Mazareas stipulated, through his attorney, that he appointed Jean to the Team and to the Workshop. During the evidentiary hearing on May 4, 2001, counsel for Mazareas attempted, for the first and only time, to retract the stipulations about those appointments. Instead, Mazareas further stipulated to being the "appointing authority" for only the Workshop. Other evidence, as noted above, demonstrated that Mazareas appointed Jean to the Team. Moreover, counsel for Mazareas did not, either in his brief or during closing argument, continue to pursue the validity of the Stipulation. Considering the circumstances the parties described during the hearing about how they entered into the Stipulation, we decided to weigh the Stipulation in light of all supporting and contrary evidence, rather than give the Stipulation preclusive effect as to contrary evidence. *See Letherbee Mortgage Company, Inc. v. Cohen*, 37 Mass. App. Ct. 913, 916-17 (1994) *and compare Crittenton Hastings House of the Florence Crittenton League v. Board of Appeal of Boston*, 25 Mass. App. Ct. 704, 713 (1988).

[21/]Without citing to the record, Respondent states in his brief, "In June 1998, Dr. Mazareas' wife, Jean, was selected to become a member of the transition team because of her expertise in staff development." If this were true, it would seem to undercut his argument that her being a member of the Team was a continuation of her work on the Internal Planning Committee.

[22/]*EC-COI-84-96; EC-COI-84-98*("Where there is knowledge of the existence of private interests, and where it is obvious or reasonably foreseeable that one's private interests will be affected by one's official actions, then the provisions of § 19 are applicable."). *See also In re Khambaty*, 1987 SEC 318; *In re Geary*, 1987 SEC 305; *In re Cellucci*, 1988 SEC 346; *In re Cassidy*, 1988 SEC 371; *In re McMann*, 1988 SEC 379.

[23/]*Graham v. McGrail*, 370 Mass. 133, 139 (1976) ("The Legislature in § 19(b) recognized that it might be proper to exempt some remote and inconsequential financial interests."); *EC-COI-89-19.*

[24/]*See* note 9 *supra*.

[25/]Emphasis added.

[26/]The burden of proving whether Mazareas complied with the requirements of the § 19(b)(1) disclosure and written determination rests with Mazareas. *See In re Hebert*, 1996 SEC 800, 811-812 *and* authorities cited therein.

[27/]The School Committee elected him Superintendent on May 20, 1998 and authorized him to assume the position as of June 6, 1998.

[28/]Section 23(b)(3) of G. L. c. 268A provides, in pertinent part:

> No current . . . employee of a . . . municipal agency shall knowingly, or with reason to know: . . . act 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. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority . . . the facts which would otherwise lead to such a conclusion.

[29/]*Scaccia v. State Ethics Commission*, 431 Mass. 351, 359 (2000) (emphasis added; citations omitted).

[30/]*In re Flanagan*,1996 SEC 757, 763.

[31/]*Id. See also In re Hebert*, 1996 SEC, 800, 810 (§ 23(b)(3) applies where a public employee does, or may perform, actions in his official capacity which will affect a party with whom he has a significant private relationship).

[32/]*See* note 31, *supra*.

[33/]*In re Hebert*, 1996 SEC 800, 811 ("The disclosure serves to let the public know the relevant facts and permits the appointing authority to review the situation and take whatever steps he may deem to be appropriate to protect the public interest.")

[34/]Associate superintendents are appointed by the School Committee upon the recommendation of the superintendent.

[35/]*PEL 97-2* (concludes that decision to approve changes to teacher eligibility list when daughter had a financial interest in that particular matter "also suggests a violation of § 23(b)(3)" because a reasonable person, knowing the relevant circumstances, could conclude that the subject participated to benefit her daughter and that she could be unduly influenced in the performance of official duties. "Thus, there is *reasonable cause* to believe that you violated § 23(b)(3)."). *See also EC-COI-93-17* (a selectman, who is also a teacher in his town, is prohibited under § 19 from participating in the appointment of the town manager because it will determine whether the town manager

continues in on-going union negotiations about the teacher's contract and, to the extent § 19 does not prohibit his participation, he will be required to file a written disclosure under § 23(b)(3)).

[36/] *See e.g., EC-COI-96-2.*

[37/] *See* note 29 *supra.*

[38/] *See In re Hebert,* 1996 SEC 800, 811-812.

[39/] We note that G. L. c. 268A, § 23(d) provides, "Any activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section." Mazareas did not seek nor obtain an exemption under § 19(b)(1) for his participation in the decision to appoint Jean to the Team or for his participation in the decision to appoint Jean to the Workshop. Obtaining such an exemption under § 19(b)(1) would have also constituted a § 23(b)(3) disclosure for the same set of relevant facts. This statutory relationship further supports our conclusion that a § 23(b)(3) violation may occur under the same facts as a § 19 violation.

[40/] *See e.g., In re Khambaty* 1987 SEC 318 (no fine imposed, Respondent's actions were adverse to his wife, "relatively minor violation"); *In re McMann* 1988 SEC 379 ($10,000 fine; School Committee member violated §§ 20 and 19 by selling more than $12,000 worth of doughnuts to school and voting to approve improper payments); *In re Griffin* 1988 SEC 383 ($500 fine for § 13 violation (county analog to § 19) for voting to approve fund transfer request that included a salary increase for his son); *In re Cellucci* 1988 SEC 346 ($1000 fine; although Commission acknowledged that the maximum could have been $6000 for three violations, Respondent's legitimate motives for participating mitigated his desire to protect his family).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 641

IN THE MATTER
OF
BRIAN PEDRO

Appearances: **Karen Beth Gray, Esq.**
Counsel for Petitioner

Commissioners: **Wagner, Ch., Cassidy, Roach, Dolan**

Presiding Officer: **Commissioner Christine M. Roach, Esq.**

RULING ON PETITIONER'S MOTION FOR A SUMMARY DECISION

I. Background

This matter arises from the alleged failure of Respondent Brian Pedro ("Pedro"), the Press Secretary for the Massachusetts Bay Transportation Authority, to file his Statement of Financial Interests ("SFI") for calendar year 2000 in accordance with G.L. c. 268B and 930 CMR 2.00.

Pedro was required to file his SFI by May 1, 2001 and failed to do so. On May 4, 2001, the Commission sent a Formal Notice of Lateness ("Formal Notice") to Pedro, which was returned by the Post Office marked "unclaimed." On June 1, 2001, the Suffolk County Sheriff's Department served a Formal Notice on Pedro. This Formal Notice advised Pedro that his SFI had not been filed and was, therefore, delinquent and further, that failure to file such an SFI within ten (10) days would result in civil penalties. Therefore, Pedro's SFI was required to be filed by June 11, 2001. Pedro failed to file his SFI by June 11, 2001.

On June 12 and June 25, 2001, the Commission sent Pedro warning letters advising Pedro that an SFI had not been filed and was, therefore, delinquent and further, that failure to file such an SFI would result in civil penalties. Pedro failed to file his SFI in response to these warning letters. On August 8, 2001, the Commission found reasonable cause to believe that Pedro violated G.L. c. 268B, § 5(g), and by majority vote authorized the initiation of adjudicatory proceedings. Petitioner filed an Order to Show Cause ("OTSC") on October 16, 2001.

When Pedro failed to answer the OTSC, or respond in any way to the adjudicatory proceeding, Petitioner filed a Motion for a Summary Decision dated November 13, 2001. On December 5, 2001, the Hearing Officer, Commissioner Christine Roach, issued an Order requiring Pedro to show cause why a summary decision should not be entered against him by filing his Answer by December 17, 2001. Pedro did not file an Answer by that date. At its meeting on December 19, 2001, the Commission considered and deliberated upon, Petitioner's Motion for a Summary Decision. To date, Pedro has not filed his SFI for calendar year 2000.

II. Decision

In deciding a summary decision motion where a respondent has failed to respond to allegations set forth in an OTSC, the Commission may find a respondent has violated the law and weigh the seriousness[1/] of that violation in determining the appropriate penalty.[2/]

The Commission concludes that Pedro has violated G.L. c. 268B, § 5 by failing to file his SFI. Accordingly, where Pedro has failed to formally answer, or otherwise respond to these adjudicatory proceedings, pursuant to G.L. c 268B, § 4(j)(3), the Commission may impose a maximum civil penalty of $2,000 for each violation of c. 268B. The Commission has previously imposed civil penalties for violations stemming from a respondent's lack of response

to the Commission's adjudicatory proceedings.[3/] The penalty for non-filing of an SFI, as established by the Commission, is $2,000.[4/]

III. Order

The Petitioner's Motion for a Summary Decision is **GRANTED**. Pursuant to the authority granted it by G.L. c. 268B, § 4(j), the Commission **ORDERS** Respondent Brian Pedro to:

1. File an SFI for calendar year 2000 within seven (7) days of receipt of this Ruling; and

2. Pay a civil penalty of Two Thousand Dollars ($2,000) to the Commission within thirty (30) days of receipt of this Ruling for violating G.L. c. 268B, § 5 for failing to file an SFI.

IV. Notice of Right to Appeal

Respondent is notified of his right to appeal this Ruling pursuant to G.L. c. 268B, § 4(k) by filing a petition in Superior Court within thirty (30) days of the issuance of this decision.

DATE: January 18, 2002

[1/] *See Opinion of the Justices to the Senate*, 375 Mass 795, 807 (1978) (the filing of financial interest statements by public officials, employees and candidates rationally related to the achievement of the legitimate goal of assuring the people of impartiality and honesty of public officials).

[2/] *See In the Matter of Thomas H. Nolan, 1989 SEC 361.*

[3/] *See Nolan*, 1989 SEC 361 ($2,000 penalty imposed with summary decision order based on respondent's failure to answer adjudicatory proceedings).

[4/] The Commission has established the following schedule of penalties for SFIs filed more than ten (10) days after receipt of a Formal Notice:

1-10 days delinquent:	$ 50
11-20 days delinquent:	$ 100
21-30 days delinquent:	$ 200
31 days or more delinquent:	$ 500
Non-filing:	$2,000

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 656

IN THE MATTER
OF
OMER H. RECORE, JR.

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Omer H. Recore, Jr. 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 September 12, 2001, 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 Recore. The Commission has concluded its inquiry and, on December 19, 2001, found reasonable cause to believe that Recore violated G.L. c. 268A, §§19 and 23(b)(3).

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

Findings of Fact

1. Recore has been a member of the Milford police force for 28 years. He was promoted to sergeant in 1986.

2. On the morning of December 5, 2000, Recore's wife, Elaine Recore, was involved in a motor vehicle accident at the intersection of Haven Street and Purchase Street in Milford. She and the other driver exchanged information. After the accident, Elaine Recore contacted her insurer, who advised that she have a police report prepared.

3. The afternoon of December 5, 2000, Elaine Recore told her husband that she had been in an accident, and that the insurance company had advised her to have a police report prepared. When each driver involved in the accident realized that they did not have enough information to complete their accident report, each contacted the other. Sergeant Recore told both operators that he would assist them in getting the information they needed, prepare the police report, and supply each of them with a copy.

4. On December 6, 2000, Sergeant Recore prepared an official police report for the accident involving his wife. The description of the accident in Sergeant Recore's report, based on information from his wife and

the other operator, contains mitigating factors concerning the degree of Ms. Recore's fault for the accident. The report notes (i) that traffic was heavy, (ii) that his wife's view was obscured by a school bus, (iii) that his wife checked left and checked right before attempting to execute the turn onto Purchase Street, (iv) that a car (which was not involved in the collision) was approaching from the south at a high rate of speed, and (v) that it was believed that neither his wife nor the driver of the other car involved in the accident was speeding.

5. Sergeant Recore wrote the report based on the account of the accident he had received from his wife and the other operator on December 5, 2000. Sergeant Recore nowhere in the report indicates his relation to Elaine Recore.

6. On December 11, 2000, Sergeant Recore amended the report to include the estimates of the cost of repairs to both vehicles. At the suggestion of a superior officer, Sergeant Recore also noted in the report that it was prepared the day after the accident. That superior officer told Sergeant Recore that preparing accident reports for accidents involving family members was "probably not a suggested practice."

7. Elaine Recore's insurer determined that she was at fault for the accident, and assessed a surcharge, to be in effect for six years, totaling approximately $1,350 over those six years. Elaine Recore has appealed the finding of fault to the Division of Insurance, where her appeal is pending.

8. The Milford Police Department in 2002 assigned another officer to investigate Ms. Recore's accident, and to file a report with the Registry of Motor Vehicles superseding Sergeant Recore's report. The text of that report corroborates in all material respects the report prepared by Sergeant Recore.

Conclusions of Law

9. Section 19 of G.L. c. 268A prohibits municipal employees from participating personally and substantially in their official capacity in particular matters in which, to their knowledge, they or their immediate family members have a financial interest.

10. Recore was and is a municipal employee, as that term is defined in G.L. c. 268A, §1.

11. Elaine Recore is a member of Recore's immediate family, as that term is defined in G.L. c. 268A, §1.

12. The preparation of a police report regarding a motor vehicle accident for submission to the Registry of Motor Vehicles is a particular matter.

13. Sergeant Recore participated personally and substantially in that particular matter by drafting the initial official police report.

14. Elaine Recore had a financial interest in the preparation of the police report. The preparation of the report was required by her insurer in order to process her claim. Moreover, but for the pending submission of a new report by the Milford police department, the report would likely have been introduced into evidence in Ms. Recore's appeal of the surcharge approximating $1,350 levied by her insurer. Ms. Recore has a financial interest in the outcome of that appeal.

15. Recore knew of these financial interests when he prepared the original and amended police reports.

16. Therefore, by drafting the police report regarding his wife's automobile accident, Recore participated personally and substantially in a particular matter in which, to his knowledge, his wife had a financial interest, thereby violating §19.

Resolution

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

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

(2) that Recore 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 20, 2002

Lt. Raymund Rogers
99 West Center Street
West Bridgewater, Massachusetts 02379-1798

PUBLIC ENFORCEMENT LETTER

Dear Lieutenant Rogers:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by asking a subordinate to provide private transportation for your family members. Based on the staff's inquiry (discussed below), the Commission voted on January 31, 2002, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23(b)(2) and §23(b)(3).

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

I. Discussion

You are a West Bridgewater police lieutenant and second-in-command in the department. In your official capacity, you participate in hiring recommendations and salary increases concerning subordinate employees; you serve as the overall supervisor and direct supervisor on weekend shifts; and you assign shifts to subordinate officers and participate in disciplinary matters.

On several occasions over a period of approximately a year and a half, you asked a subordinate police employee to perform several personal errands involving private transportation for your family members. The requests took place at the police station during normal working hours. These errands were performed on town time, using an unmarked police vehicle. Each errand took about 15 to 20 minutes for a distance of a few miles round trip. You did not order the subordinate to perform these errands, nor did you expressly invoke your lieutenant position when making the requests. The subordinate did not feel forced to perform the errands, but he acknowledged that the requests came from you as his supervisor, and therefore, he complied. You did not have any private family, business or social relationship with this employee or history of doing favors for each other that would provide a personal reason for him doing these favors for you. You did not disclose to your appointing authority that you were making these requests prior to making them.

As a police lieutenant, you are a municipal employee as that term is defined in G.L. c. 268A, §1(g). As such, you are subject to the conflict of interest law G.L. c. 268A[1/] generally and, in particular for the purposes of this discussion, to §23 of that statute.

Section 23 is the "code of conduct" section of the conflict-of-interest law. Section 23(b)(2) prohibits any municipal employee from knowingly, or with reason to know, using or attempting to use his official position to secure for anyone an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, with knowledge of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence. This subsection's purpose is to deal with appearances of impropriety and, in particular, appearances that public officials have given people preferential treatment. Section 23(b)(3) goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record.

There is reasonable cause to believe that you violated §23(b)(2) by asking your subordinate to perform several personal errands for you. Where you were the supervisor and had the ability to and did take action concerning the terms and conditions of your subordinate's employment (such as shift determinations), your requests for private errands constituted a use of your position. In the absence of a private family, business or social relationship with the subordinate, some history of reciprocity, or some other countervailing factor, it seems reasonable to infer that your subordinate did these personal favors for you because you, as his supervisor, asked him to. Your ability to ask for personal favors under these circumstances was a special advantage or privilege. There was no justification for such request, such as an emergency either at the police department or in your personal family situation. Nor, as just noted, was there anything about your private relationship or history with the subordinate that would justify such requests. Therefore, asking for such favors under these circumstances was an unwarranted privilege.

Having a subordinate provide private

transportation services for a supervisor's family members is of significant value (i.e., not de minimis), both monetarily (exceeding $50 in taxicab costs) and intangibly, as it provided you with an on-call private transportation service for your family. There is no town ordinance or other policy that would make these types of private favors properly available to others in your type of situation.

In addition, there is reasonable cause to believe that you violated §23(b)(2) by asking your subordinate to perform personal errands for you on municipal time using public resources. The Commission has consistently held that the use of public resources of substantial value ($50 or more) for a private purpose not authorized by law amounts to the use of one's official position to secure an unwarranted privilege. These resources include a public employee's time on the public payroll and the use of public vehicles.

There is also reasonable cause to believe that you violated §23(b)(3) by intermingling your public and private dealings with a subordinate. By asking for private favors from a subordinate while supervising that subordinate, you acted in a manner which would cause a reasonable person knowing these facts to conclude that the subordinate might unduly enjoy your favor in the performance of your official duties as his supervisor. Therefore, there is reasonable cause to believe that you violated §23(b)(3). Moreover, you did not make the relevant disclosure that would have kept the appearance problem from arising.

II. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter rather than imposing a fine because it believes the public interest would best be served by doing so. The Commission wants to make clear that public employees in supervisory positions must be mindful that even occasional requests to subordinates for personal favors, even if there is no explicit invocation of the superior's position or intent to coerce, nevertheless may violate the conflict of interest law because of the highly exploitable supervisor/subordinate relationship.

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

This matter is now closed.

DATE: March 21, 2002

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

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 657

IN THE MATTER
OF
ROSS A. ATSTUPENAS

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Ross A. Atstupenas 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 October 16, 2001, 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 Atstupenas. The Commission has concluded its inquiry and, on December 19, 2001, found reasonable cause to believe that Atstupenas violated G.L. c. 268A, §§23(b)(2) and 23(b)(3).

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

Findings of Fact

1. Atstupenas has been a member of the Blackstone police force for more than 20 years. He was promoted to chief in 2000.

2. On the morning of December 2, 2000, patrol officer Bradley Briggs issued a $75 speeding ticket to Steven Mowry, who was traveling 47 miles per hour in a 30 mile per hour zone.

3. Steven Mowry, unbeknownst to Officer Briggs at the time, is the brother of Blackstone police officer Wayne Mowry.

4. When Chief Atstupenas arrived at the police station on December 2, the dispatcher informed him that Officer Briggs had issued a citation to Officer Mowry's brother. After hearing that Briggs had ticketed a Blackstone police officer's brother, Atstupenas sent Briggs an e-mail, which read: "Officer Briggs: It was brought to my attention…that you issued Off. Mowry's brother a citation for speeding. If at all possible could you change it to a warning and notify Officer Mowry to let his brother know that it was changed to a written warning. If there was a problem then let me know. Thanks. Chief."

5. When Officer Briggs arrived for his shift late

in the evening on December 2, he read the chief's e-mail and in response to the chief's request changed Steven Mowry's speeding ticket to a written warning.

6. As of December 2, 2000, Officer Briggs had been on the Blackstone police force for less than a year. As an officer with less than one year of service, he could be dismissed by the Board of Selectmen with or without cause.

Conclusions of Law

7. Section 23(b)(2) of G.L. c. 268A prohibits municipal employees from using or attempting to use their official position to secure for themselves or others unwarranted privileges of substantial value not properly available to similarly situated individuals.

8. Atstupenas was and is a municipal employee, as that term is defined in G.L. c. 268A, §1.

9. By, as chief, transmitting an e-mail to a subordinate officer requesting that he change a speeding ticket to a written warning, Chief Atstupenas used his official position.

10. Changing a speeding ticket to a written warning for no other reason than that the speeder was the brother of a fellow police officer is an unwarranted privilege, not properly available to similarly situated individuals.

11. Because the speeding ticket was in excess of $50, it was an unwarranted privilege of substantial value. In addition, the speeder will likely avoid insurance surcharges of approximately $100 per year for six years as a result of the change.

12. Therefore, by requesting that his subordinate officer change the ticket that he had issued to Steven Mowry to a written warning, Chief Atstupenas used his position to secure for Steven Mowry an unwarranted privilege of substantial value, thereby violating §23(b)(2).

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

14. By requesting that that his subordinate officer change the ticket that he had issued to Steven Mowry to a written warning, Atstupenas knowingly or with reason to know, acted in a manner which would cause a reasonable person, having knowledge of all the relevant circumstances, to conclude that Steven Mowry, and other family members of police officers, could unduly enjoy the Chief's favor in the performance of his official duties. In so acting, Atstupenas violated G.L. c. 268A, §23(b)(3).

Resolution

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

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

(2) that Atstupenas 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 26, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 625

IN THE MATTER OF MICHAEL JOVANOVIC

Appearances:	**Karen Beth Gray, Esq.** **Counsel for Petitioner**
	Paul R. Collier, III, Esq. **Counsel for Respondent**
Commissioners:	**Wagner, Ch., Cassidy, Roach and Dolan**
Presiding Officer:	**Commissioner R. Michael Cassidy, Esq.**

DECISION AND ORDER

I. Procedural History

On May 30, 2001, Petitioner initiated these proceedings by issuing an Order to Show Cause (Order)

under the Commission's Rules of Practice and Procedure.[1/] The Order alleged that Respondent, Michael Jovanovic (Jovanovic) violated G. L. c. 268A, §2(a) by corruptly offering money to a Department of Medical Assistance (DMA) financial assistance social worker in an attempt to influence her actions concerning Jovanovic's brother's application for DMA financial assistance during a meeting in or about September 2000. The Order also alleged that Jovanovic violated G. L. c. 268A, §3(a), under the same facts, by offering more than $50 to the same DMA financial assistance social worker for or because of her official acts concerning Jovanovic's brother's application for DMA financial assistance in or about September 2000.

On July 3, 2001, Jovanovic filed an Answer to the Order. A Pre-hearing conference was held on August 29, 2001. On November 14, 2001, the parties submitted joint Stipulations of Fact and Law. An evidentiary hearing was held on November 27, 2001. After the conclusion of the evidentiary portion of the hearing, the parties submitted legal briefs on February 12, 2002. The parties presented closing arguments before the full Commission on February 27, 2002.[2/] Deliberations began in executive session on February 27, 2002.[3/]

In rendering this Decision and Order, each undersigned member of the Commission has considered only the testimony, evidence in the public record, including the hearing transcript, and arguments of the parties.[4/]

II. Findings of Fact

1. Jovanovic is a private citizen residing in Quincy. He is 81 years of age and grew up in Yugoslavia. Jovanovic has resided in the United States for over fifty years. He testified, under oath during the hearing, that he has degrees from four American colleges, including having worked on masters and doctoral degrees; that he is qualified to teach five foreign languages; has a real estate license; and that he has run for election to the school committee and for mayor of Quincy.[5/]

2. In 1997, Jovanovic's brother, Zarko Jovanovic (Zarko) sold his home for $140,000 and moved in with Jovanovic.

3. The assets from the sale of Zarko's home were put into a joint account in the names of Zarko and Jovanovic (Joint Account).

4. The monies in the Joint Account were Zarko's only assets.

5. On January 4, 2000, following a severe decline in his health, Zarko entered the Elihu White Nursing Home.

6. Zarko stayed at the Elihu White Nursing Home from January 4, 2000 through October 15, 2000.

7. On or about January 2000, Jovanovic took the bulk of the money from the Joint Account (approximately $200,000) and put it into accounts in only Jovanovic's name.

8. Jovanovic was liable for Zarko's bills for the Elihu White Nursing Home.[6/]

9. In the spring of 2000, Jovanovic obtained a power of attorney for Zarko.

10. Jovanovic filed the power of attorney with the Massachusetts Department of Medical Assistance (DMA).

11. The DMA is a state agency[7/] and its workers are state employees.[8/]

12. In March 2000, the Elihu White Nursing Home began attempting to collect from Jovanovic an amount owed on a bill for Zarko's stay.

13. The bills for Zarko's stay were accruing at approximately $175 to $185 per day.

14. On July 12, 2000, Jovanovic applied on behalf of Zarko to the DMA for financial assistance.

15. Under the MassHealth regulations, an applicant's eligibility is partly determined by the amount of money he has or has had within the three years prior to his application.[9/] To be eligible, an applicant's assets generally may not exceed $2,000.[10/] As a result, for example, if Zarko had $140,000 in his possession within that three-year period, the regulations would require that he use most of those funds before he would become eligible for MassHealth benefits.

16. On July 12, 2000, Virginia M. Alger (Alger), an eligibility worker for DMA, sent Jovanovic a MassHealth Information Request form, which requested items required for her to process the application.

17. The Information Request form stated that the required items must be sent to DMA by August 10, 2000 and the form stated that the applicant's assets may not exceed $2,000.

18. Alger has approximately 35 years of experience at DMA and has processed thousands of applications.

19. As the DMA eligibility worker assigned to Zarko's application, Alger had the authority to approve or deny his application.

20. On August 14, 2000, Alger sent Jovanovic a Notice of Denial for MassHealth because the application

was missing required information about health insurance, tax returns, bank accounts, burial plan, real estate, vehicle transfers, general income and asset limitation.[11/]

21. Later that same day, August 14, 2000, Alger received information about the application from Attorney Michael Loring, who was then representing Jovanovic.

22. Although Alger had denied the application, after receiving additional information from Attorney Loring, she sent another MassHealth Information Request form to Jovanovic on August 14, 2000. Alger, in her words, "re-app'd [the application] because of the information that [she] received from Attorney Loring." As a result, Jovanovic had another opportunity to provide the required information, and this latest Information Request form stated that the information must be sent by September 12, 2000.

23. Either in late August or early September, but sometime after Alger sent the August 14, 2000 Information Request form, Alger first met with Jovanovic at his request. He informed her during that meeting that his lawyer would provide missing verifications but Jovanovic did not provide her any documents nor offer her anything else during that meeting.[12/]

24. As of September 2000, Zarko's outstanding bill at Elihu White was approximately $40,000.

25. On September 12, 2000, Alger met again with Jovanovic at DMA offices.[13/]

26. During the September 12th meeting (Meeting), Alger and Jovanovic discussed Zarko's case. Only Alger and Jovanovic were present in the specific area in which the Meeting took place, which was an office space or "cubicle" created by dividers that did not reach the ceiling but were approximately eight (8) feet in height.

27. Holly Hampe (Hampe), a friend of Jovanovic, drove him to the Meeting.

28. During some of the Meeting, Hampe sat outside of the office cubicle in which Alger and Jovanovic met.

29. At least twice during the Meeting, Hampe walked away from the cubicle: once to pick up a magazine from a table a few feet away from the cubicle (she estimated approximately 8 feet) and a second time to make a telephone call several feet away from the cubicle (she estimated approximately 12 feet).[14/]

30. During the Meeting, Alger explained that DMA did not have everything it needed to process the application. Jovanovic provided her new information about several bank accounts, some of which had been closed, but Alger was unsure about the current status of some of the accounts. She also, during the Meeting, first learned about the existence of another property.

31. After Alger explained that more information was needed to process the application, Jovanovic asked Alger for more time to obtain the required information.[15/]

32. Alger next informed Jovanovic that there was a strong possibility that she would have to issue a denial because, notwithstanding that Jovanovic and his lawyers had been trying to get information, she did not have everything DMA required.[16/]

33. Alger also explained that, after her denial, Jovanovic would have to fill out another application and start the process again. But she also said that he had the right of appeal, which, she explained, would be an informal process.

34. After Alger explained that there was a strong possibility that she would deny the application, Jovanovic next said, "No appeal." Hampe overheard Jovanovic say that he did not want to appeal, that he wanted everything in then so there would be no need for an appeal.

35. Alger again said that she did not have everything needed to process the application and, Jovanovic said, for the second time, "No appeal."[17/]

36. Next, Jovanovic pulled out a sealed, regular business-sized envelope from his suit jacket and passed it across the table to Alger. As he passed her the envelope, he said, "This is for you. You have done more for me than my lawyer has done."[18/]

37. Alger handled the envelope and ascertained that is was approximately one-half to three quarters of an inch in thickness, Alger gave the envelope back to Jovanovic and said that she could not accept gifts, especially money. Jovanovic responded, "This is not money." But Jovanovic admitted that he probably had $100 in the envelope that day.

38. Because Alger was curious about what was in the envelope, she took the envelope and tore open a corner of it.

39. The envelope contained money, at least $50. After tearing open a corner of the envelope, Alger saw a five and a zero in the corner of a bill where the denomination appears. Alger believed that the envelope's contents were of equal consistency and felt like an envelope one would take to a bank to make a deposit.

40. Jovanovic offered to pay Alger during the Meeting.[19/]

41. After giving the envelope back to Jovanovic, Alger told him, "It is money. I cannot accept this." Alger

then got up and left the cubicle and Jovanovic followed her out of the cubicle.

42. Alger perceived that Jovanovic offered her a bribe because she had given him an unfavorable response. She did not perceive that he was offering her a reward because she could not imagine any reason why he would thank her.[20/]

43. Alger was upset. Immediately after the Meeting, Alger went to her supervisor, Cheryl Titus (Titus), and reported what happened during the Meeting.

44. Titus observed that Alger was upset[21/] by what she reported had happened during the Meeting.

45. Titus reported what Alger told her to Titus' supervisor and the matter was reported to DMA's legal division.

46. On September 15, 2000, Alger sent to Jovanovic a Final Notice of Denial for MassHealth. The Final Notice states that although Jovanovic submitted one or more verifications on August 14, 2001, he did not submit additional necessary verifications within 30 calendar days of August 14, 2001.

49. Sometime after October 15, 2000, Jovanovic paid the Elihu White Nursing Home approximately $43,000 for Zarko's stay. The money came from funds which had been held in the Joint Account until approximately January 2000.

Credibility

In addition to the credibility determinations made above, we believe that the following observations must be emphasized because most of Petitioner's allegations turn on the credibility of Alger's and Jovanovic's testimony. With respect to what happened during the Meeting, we find Alger's testimony to be credible for the following reasons. First, very soon after the Meeting concluded, Alger reported the events to Titus, her supervisor. Titus, in turn, testified consistently about what Alger had told her. Next, given the length of Alger's tenure with the DMA, and the fact that Alger has handled thousands of these types of applications, we do not believe that Alger would forget, nor have any motive to fabricate, what occurred. We believe that what occurred during the Meeting was quite unusual in Alger's experience because both Titus and Alger testified that Alger was upset and that Alger testified credibly that something like this had never happened to her in her entire career.

Further, Hampe's testimony about what she was able to hear take place during the Meeting while she sat next to the cubicle, corroborates Alger's version of the events. Hampe admitted that she did not hear everything, because she was away from the cubicle during part of the Meeting.

In general, we find Jovanovic's testimony not to be credible on the most important facts. Although he denied saying to Alger, "No appeal," Alger's testimony on this point is clear and is supported by Hampe's testimony (who is Jovanovic's friend). In addition, he claimed that the subject of an appeal never arose during the Meeting. But, in his deposition testimony, which he adopted during the hearing, he said that he did not want another appeal.

Finally, there is no indication on the DMA forms or in the process Titus and Alger described that the DMA required an application fee. Based on Jovanovic's education and experiences in this country, we do not believe that he would have been confused, based on the DMA information before him, about whether he needed to pay an application fee. Application fees, as such, are typically required at the beginning of the application process, not at the end. Moreover, although Jovanovic testified that the reason he thought he needed to pay an application fee was because he had done so on other matters before other state agencies, he admitted that he had never given other public officials something extra for their official services.

III. Decision

Section 2(a)

To prove a violation of G. L. c. 268A, §2(a), the Petitioner must prove the following elements, by a preponderance of the evidence:

(1) Jovanovic, directly or indirectly, *corruptly* gave, *offered* or promised;

(2) anything of value;

(3) to any state employee;

(4) with intent;

(5) to influence any official act[22/] or any act within the official responsibility[23/] of such employee or to do or omit to do any act in violation of his lawful duty.[24/]

At all relevant times, Alger was a state employee, as defined under the conflict law. There is no dispute that something of value was at hand during the Meeting because the parties have stipulated that there was money in an envelope which was placed on the table between Alger and Jovanovic.

The next issue is whether Jovanovic gave, offered or promised the money to Alger. Although Jovanovic denied, under oath during the hearing, that he passed the envelope to Alger, he admitted to asking her how much

he owed. As we discussed above, we believe Alger's testimony that Jovanovic passed her the envelope and that he said that it was for her. The evidence does not contradict Alger's testimony that something of value was offered to her.[25] Although Jovanovic testified that he regularly carried $100 or more in an open envelope in his jacket pocket, we cannot ignore that the most credible evidence supports the conclusion that Jovanovic offered Alger money, regardless of whether *he* believed that the envelope was sealed or open. In light of Alger's and Titus' consistent testimony, and Jovanovic's inconsistent testimony, we do not believe his explanation that his open envelope containing money inadvertently fell out with the papers he brought to the Meeting.

Further, Petitioner must also prove that there was an "official act" or "any act within [Alger's] official responsibility" or that there was an act, or the failure to do an act, in violation of her lawful duty, that Jovanovic intended to influence. Both Alger and Jovanovic's testimony concur that he wanted more time to obtain information for the application. The fact that she allowed him more time after the August 14, 2000 denial by, that same day, allowing the application to be "re-app'd" demonstrates that her allowing more time was an act within her official responsibility. Although his statements "no appeal" could equally support an inference that he was asking for approval, we conclude that stronger evidence supports the inference that he wanted more time to provide information at Alger's level, rather than have his application move to another stage, appeal, and have the appeal stage consider the application as it was.

Finally, we consider whether Jovanovic "corruptly" offered money "with intent to influence any official act or any act within the official responsibility of" Alger or "to do or omit to do any act in violation of" her "lawful duty." The Supreme Judicial Court has said, that "bribery requires proof of 'corrupt intent'. . . . Bribery also typically involves a quid pro quo, in which the giver *corruptly* intends to influence an official act through a 'gift', and that gift motivates an official to perform an official act. In effect, what is contemplated is an exchange, involving a two-way nexus." [26]

"Corrupt" has been defined as "of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements."[27] "Bribe" is defined as "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct esp. of a person in a position of trust (as a public official)."[28] We observe that in reported decisions involving criminal violations, the facts reported generally describe completed bribes, rather than offers that were declined.[29] We also observe that intent may be formed very shortly before the offer is made; it need not be formed, for example, days or hours prior to the offer. What the Supreme Judicial Court has said, in interpreting §3, is equally applicable to §2. "We recognize that direct evidence regarding either the intent to influence a specific act or that an official was influenced in the undertaking of a specific act is difficult to obtain. In these circumstances, therefore, the trier of fact can do no more than ascribe an intent [to influence or be influenced] on the basis of the circumstances surrounding 'the gift.'"[30]

The key point is whether Jovanovic had the intent to influence any official act or any act within Alger's official responsibility, or to influence her to do or omit to do an act in violation of her lawful duty. By its nature, the offering of money to influence an official's act, when there is no lawful basis for making an offer of money, is corrupt. The DMA application process does not involve application fees of any type. The DMA forms provided to Jovanovic do not call for an application fee. Moreover, Alger never asked Jovanovic to pay any type of application fee. We emphasize the sequence of events during the Meeting to demonstrate Jovanovic's intent.

First, after Alger told him that she would not approve the application, he said, "No appeal," twice, *then handed* her a *sealed* envelope containing money. Jovanovic then said, "This is for you. You have done more for me than my lawyer has done." Alger declined to accept the envelope. Jovanovic then said, "It's not money."[31] Because we believe that Alger's testimony accurately reflects the events, we conclude that Jovanovic offered her something to exert influence on her. It is not reasonable to conclude that one would offer something of value as thanks for an undesired official result. Even if Jovanovic went to the Meeting genuinely believing that Alger had official discretion to allow additional extensions because she had done so before, he would still have had *corrupt* intent by offering her money to obtain more time after she refused to allow additional time.

Next, what Jovanovic asked Alger to do, or not do, also supports our inference about his intent. Both Alger and Jovanovic's testimony agree that he wanted more time to provide the required information. Jovanovic did not want the application to proceed to the appeal stage of the process. All the testimony concurs that during the Meeting, he wanted more time and asked for more time.

Finally, Jovanovic had a significant economic incentive to obtain MassHealth coverage for Zarko. He was being billed for Zarko's costs at the Elihu White Nursing Home. Jovanovic was legally obligated to pay those costs after having taken sole possession of the funds that were in the Joint Account.[32]

From all of these circumstances, we conclude, that Petitioner has proved, by a preponderance of the evidence, that Jovanovic had corrupt intent when he offered Alger money during the Meeting. Considering the circumstances, the credibility of Petitioner's witnesses, the corroborating evidence, and the lack of credibility in

Jovanovic's testimony, we find that the Petitioner has proved, by a preponderance of the evidence, all the elements of §2(a).

Section 3(a)

To prove a violation of §3(a), the Petitioner must prove the following elements by a preponderance of the evidence:

(1) Jovanovic, directly or indirectly, gave, *offered* or promised:

(2) anything of substantial value;

(3) to a state employee;

(4) for or because of any official act;

(5) performed or to be performed by such an employee.

The Supreme Judicial Court has held that "it is necessary to establish a link between a gratuity and an official act."[33/] In general, "a gratuity in violation of [§3] . . . can either be provided to an official as a reward for past action, to influence an official regarding a present action, or to induce an official to undertake a future action."[34/] "There must be proof of linkage to a particular official act, not merely the fact that the official was in a position to take some undefined or generalized action."[35/]

We begin with the issue of whether the gift or gratuity was of substantial value.[36/] The evidence about how much money Jovanovic typically carried and how much he believed he had in the envelope on September 12, 2000 supports Alger's testimony that she saw a bill with "5" in the corner, after having ripped open the corner of the envelope. In addition, her testimony regarding the thickness of the envelope supports the inference that there was more money in the envelope than a single $50 bill. Based on this evidence, we conclude that the Petitioner has proved, by a preponderance of the evidence, that the envelope contained something of substantial value.[37/]

Further, the same evidence that proves that there was an offer for purposes of §2(a), also proves, by a preponderance of the evidence, that, for purposes of §3(a), Jovanovic made an offer to Alger.

We next consider whether the offer of substantial value was "for or because of any official act" Alger performed or would perform. Again, the timing of the events during the Meeting and the circumstances surrounding the Meeting must be considered to determine whether there is evidence of a link, as *Scaccia* requires. The relevant official acts are: (1) the services she performed in helping him complete the application and/or (2) allowing him additional time. Jovanovic admitted that he offered her a reward for her official acts in reviewing the application and helping him complete the application. As described above regarding §2, the evidence also proves that the offer of the money was for or because of his desire that Alger allow more time.

Although he testified that he was not sure what her official duties were and that she may have done something extraordinary, as if to suggest that he was not offering anything for an "official act," his testimony does not contradict Alger's testimony about his wanting to thank her for doing more than his lawyer had done. Notably, his deposition testimony is less equivocal— "I was willing to give her a reward for what she did . . . I was anxious that all documents are there and that application was complete and somebody who works there is going to help me." Again, as we emphasized above in analyzing §2(a), given his education, time and experience in this country, we do not find his testimony about thinking he needed to pay an application fee to be credible. Moreover, nothing in the forms he completed that are exhibits to the record indicates that DMA imposes application fees.

Jovanovic admitted to wanting to thank her for doing more than his lawyer had done, while denying, during the hearing, that he offered her a gift to obtain more time. There is a preponderance of evidence, by his own words, that he offered her something of substantial value as a reward for her official acts. Accordingly, he has admitted to violating §3, under the criteria set forth in *Scaccia*. In addition, considering the circumstances involving Jovanovic's desire to obtain more time to complete the application, there is a preponderance of evidence that he offered money of substantial value for or because of her official act to allow him additional time.

IV. Conclusion

In conclusion, Petitioner has proved, by a preponderance of the evidence, that Michael Jovanovic violated G. L. c. 268A, §2(a) by corruptly offering, something of value to a state employee with intent to influence the state employee's official actions regarding an application for DMA benefits. In addition, Petitioner has also proved, by a preponderance of the evidence, that Michael Jovanovic violated G. L. c. 268A, §3(a), by offering the same state employee something of substantial value for or because of official acts performed or to be performed by her.

We conclude that, in these circumstances, the same conduct violated both §§2(a) and 3(a). The differences between the two violations are that the §2 violation required evidence of Jovanovic's corrupt intent and did not require evidence of substantial value, while the §3 violation was proved by including evidence of substantial value but did not require evidence of corrupt intent.[38/] In general, a private party's offering money to influence the official actions of a public employee is

egregious conduct under either §§2(a) or 3(a). The Legislature created §§2 and 3 to prevent both private parties and public employees from considering that bribes or private rewards for, or because of, an official act have any role in governmental decision-making.

V. Order

Pursuant to the authority granted it by G. L. c. 268B, §4(j), the Commission may impose a civil penalty of up to $2,000 for each violation of G. L. c. 268A. In determining a penalty, we consider mitigating and exacerbating factors. We note that Jovanovic's brief makes much of the circumstances surrounding Zarko's declining health and the hardship Jovanovic endured as his primary care giver. We also consider that Jovanovic's offer was not accepted and the record does not indicate that his having made the offer affected DMA's final decision about Zarko's application. Finally, there is no evidence that Jovanovic made other offers on other occasions to Alger or any other DMA official.

We have not, however, found Jovanovic's explanation that he offered to pay an application fee to be credible. Similarly, his alternative explanation that he offered to reward Alger, though an admission of liability for purposes of §3(a), strikes us as an expedient excuse, which he likely developed after it became clear that his denying the existence of any type of offer of money to Alger would not be found credible. Jovanovic is exceptionally well-educated and has resided in the United States for a long time. His experience in this country and conduct during the hearing do not suggest that he was unable to understand American English or that he failed to understand what was appropriate conduct in his dealings with the DMA.

Considering all of these circumstances, we order Michael Jovanovic to pay a civil penalty in the amount of $2,000 (two thousand dollars) to the State Ethics Commission within thirty (30) days of his receipt of this Decision and Order. This civil penalty applies equally to his violation of §2(a) or §3(a) because his conduct was sufficiently egregious to warrant the maximum civil penalty under either section. As such, even if his conduct were deemed to violate §3(a) only, we would impose the same $2,000 civil penalty.

DATE: March 19, 2002

[1/] 930 CMR §§ 1.01(1)(a) *et seq.*

[2/] 930 CMR § 1.01(9)(e)(5).

[2/] G. L. c. 268B, § 4(i); 930 CMR § .01(9)(m)(1).

[3/] Counsel for Petitioner was not involved in any way in the Commission's deliberations.

[5/] We do not find, and Jovanovic's counsel has not argued, that Jovanovic has difficulty understanding American English.

[6/] Jovanovic admitted during the hearing that he was liable for Zarko's Elihu White Nursing Home bill. The Executive Director of Nursing Home understood that Jovanovic was the responsible party, from whom the Nursing Home would seeking payment of a bill if other benefits such as Medicare or Medicaid were exhausted.

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

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

[9/] *See also* 130 CMR §§ 520.019(B) *and* (G)(1).

[10/] *See also* 130 CMR § 520.003.

[11/] At the top of the form appears "Notice of Denial for MassHealth." It was addressed to Zarko Jovanovic c/o Michael Jovanovic.

[12/] We note that both Alger's and Jovanovic's testimony during the hearing concur on these points.

[13/] On the morning of September 12, 2000, Jovanovic called Alger to ask to meet with her, stating that he had some things that were pertinent to the application or to eligibility.

[14/] Although Hampe could hear Alger and Jovanovic while she sat next to the cubicle, she did not hear what Alger and Jovanovic said while she made the telephone call. During the Meeting, Hampe did not see Alger and Jovanovic inside the cubicle and did not see what was happening in the cubicle.

[15/] We note that Alger's, Jovanovic's, and Hempe's testimonies concur on this point.

[16/] We note that Alger's, Jovanovic's and Hempe's testimonies concur on this point.

[17/] Although Jovanovic denied during the hearing that he said the words,"no appeal," and, notably, denied that the subject of an appeal ever arose during the Meeting, we do not find his testimony credible on this point because Alger consistently testified that he said those words; immediately after the Meeting Alger reported this account to her supervisor; and, notably, Jovanovic's friend, Hampe, heard him say that he did not want to appeal. Moreover, Jovanovic's version contradicted his deposition testimony, admitted into evidence, in which he said, "I said I would like all the documents to be in now. I don't want another appeal."

[18/] Jovanovic denied, under oath during the hearing, that he passed a *sealed* envelope to Alger. Instead, he explained that he regularly carries money in an unsealed envelope and that the unsealed envelope came out on the table as he pulled documents out of his pocket. His testimony was consistent about his carrying money in an envelope,

though his testimony was vague and somewhat inconsistent with his prior deposition testimony about how much money he typically carries in an envelope.

Alger, testified consistently about her handling a sealed envelope and having torn open a corner of envelope to ascertain its contents. She reported this information to her supervisor, immediately after the incident, who also testified consistently about these facts. If the envelope that Alger handled had been open, we do not believe that Alger would have been mistaken about whether the envelope was sealed. Common sense dictates that an unsealed envelope in which one regularly carries money would readily appear to be open, rather than sealed, upon handling. Moreover, Alger's testimony, as described below, consistently said that she tore open a corner. Accordingly, we find Alger's testimony about the envelope being sealed to be more credible than Jovanovic's. We also note that the parties agreed in their joint Stipulation that "a white envelope from a pocket of Jovanovic's suit jacket was placed on the table."

[19/]Jovanovic admitted that he asked her how much he owed. Jovanovic admitted that he asked her "what application fee she wanted, and also a reward for something doing extra out of her ordinary work."

> "Q. And you said that you were trying to give her a reward because she had done something nice to you and you said that —A. I thought that she did extraordinary. I was not sure whether this was a part of her job, but she corrected me and she said this is her job. As I said, I thought I might need something for having done extra for me that she does not do for others."

Jovanovic testified "because Virginia Alger helped me more than my lawyer did, she was exceptionally nice. She was exceptionally thorough, more than the average American officials that I have met since I arrived to this country 50 years ago. And so, I felt I should respond. I should respond if I need application fees, I respond for a special card that the lawyer did not show till the end of that day. And I ask her, How much do I owe you? She says, Sir, you don't owe anything. This is my job." He testified that he told her she did more for him that his lawyer had done.

In his deposition, Jovanovic testified: "I was willing to give her reward for what she did and my question — direct question was 'How much do I owe you?' and she said that I don't owe her anything. Q. You said you were willing to give her a reward. What is it that she did for you that would entitle her to extra compensation — to money? A. I already was denied on one occasion because of the lack of documentation and also because of the documentation was not complete. I was anxious that all documents are there and that application was complete and somebody who works there is going to help me. The lawyer did not do it."

[20/]Alger testified, "The only thing that I can tell you is: Was it a bribe? I can't use that word strongly. I can only say that I was taking a negative action against the case. Also, at that point, there were going to be months that were going to be forfeited because we could only go back three months from the date of the next application. Was he thanking me for doing something unjust to him or something against his will? Was he thanking me because — you know, he didn't want to got to appeal? I don't know. That, you would have to ask Michael. But I can't imagine that he would be thanking me for anything at that point."

During the hearing, Jovanovic adopted his deposition testimony, during which he was asked what he wanted to have happen on the day of the Meeting. He answered: "If it were not there. If all the documentation were not there I might be denied. Oh, and I would have the right to appeal. I said I would like all of the documentation to be in now, I don't want another appeal. Now, from this letter, this no appeal or not — if she misunderstood that I wanted positive solution on the problem and did not care about appeal. I did not want another appeal because I wanted all documentation and all application to done as it should be. There was a delay. I wanted things done."

In addition, Hampe overheard Jovanovic say to Alger during the Meeting that the Elihu White nursing home was asking him to pay it and she heard Jovanovic state that he needed the application to go through.

[21/]Titus noticed that Alger's face was white and that she was shaken.

[22/]"Official act, any decision or action in a particular matter . . . ." G. L. c. 268A, § 1(h).

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

[24/]In pertinent part, § 2(a) states: "Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any state . . . employee . . . or who offers or promises any such employee . . . to give anything of value to any other person or entity, with intent: (1) to influence any official act or any act within the official responsibility of such employee . . . or (3) to induce such an employee . . . to do or omit to do any act in violation of his lawful duty . . . shall be punished by a fine . . . ."

[25/]Jovanovic also admitted that he was willing to give her a reward for what she did.

[26/]*Scaccia v. State Ethics Commission*, 431 Mass. 351, 356 (2000). *See also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-405 (1999) ("The distinguishing feature of each crime is its intent element. Bribery requires an intent to influence an official act . . . while illegal gratuity requires only that the gratuity be given or accepted for or because of an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give . . . something in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act . . . or for a past act.").

We note that an offer that is accepted, completes the two-way exchange, but an offer to give a bribe also violates §2, because it *contemplates* an exchange.

[27/]*Websters Third New International Dictionary* (1993).

[28/]*Id*.

[29/]*See e.g.*, *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 367 ("I understand in politics that if you have something and I want that something, I have to pay for that something. Why should I make money and you people who gave that certain thing, not make anything on the deal?" [He] repeated the terms of the deal he had proposed the day before, stating again that he could guarantee the votes of his brother Robert and of Dutney . . . . [He] left the meeting and proceeded to his brother Robert's apartment, where he gave Robert $500 . . . ."); *Commonwealth v. Tobin*, 392 Mass. 304 (1984) (direct evidence of "kick backs"); *Commonwealth v. Hurley*, 311 Mass. 78, 79-80 (1942) (defendant had applied to obtain the city contract to provide insurance, sent telegrams to city officials that communicated offer; admitted that he sent telegrams but offered an alternative explanation and, two

months later, denied knowing anything about the telegrams; court held that jury could find defendant was anxious to get the contract, sent the telegrams to officials who made up majority of selection committee, jury could consider defendant's evasive and equivocal conduct and his admittedly false explanation of the purposes of the telegrams). *Commonwealth v. Shaheen*, 15 Mass. App. Ct. 302, 304 (1983) (defendant's agent asked public official, "Can you be of any aid to me in regards to . . . this fine?" Agent later paid official.); *Commonwealth v. Favulli*, 352 Mass. 95 (1967) (clear understanding among the parties and money was exchanged).

30/ *Scaccia* at 357.

31/ His statement, "it's not money," is not a reasonable response to her refusal of his offer when there is no doubt that the envelope contained money. We infer, therefore, that the only reasonable purpose for Jovanovic to make that statement was that he was attempting to extricate himself from his corrupt offer after he learned that Alger would not accept.

32/ Robert Nolan was the executive director of Elihu White and testified that Jovanvic ws the responsible party for Zarko. (Transcript p. 86).

33/ *Scaccia* at 355.

34/ *Id.* at 356.

35/ *Id*.

36/ Anything worth $50 is of "substantial value" for purposes of §3. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

37/ 431 Mass. 1002, 1003.

38/ *See e.g. Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 376 (1976) (citing to *U.S. v. Brewster* , 506 F. 2d 62, 67-74 (D.C.Cir 1974), which considered the federal counterparts, 18 U.S.C. § § 201 (c)(1) and 201(g)) ("If the jury wished to reject the evidence of corrupt intent, they could properly find a violation of . . . § 3(b)." *Dutney* at 369); *Commonwealth v. Burke*, 20 Mass. App. Ct. 489, 508-509 (1985) *and compare Salemme v. Commonwealth,* 370 Mass. 421, 423 (1976) ("It is clear that both offenses arose out of a single transaction. That alone is not determinative, however, for a single act may be an offense against two statutes. If each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt . . . from prosecution and punishment under the other." But "if one offense charged is a lesser included offense within the other offense charged, punishment for both is precluded.").

Marie Gosselin
4 East Gilbert Street
Lawrence, Massachusetts 01843

PUBLIC ENFORCEMENT LETTER

Dear Ms. Gosselin:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by asking the Department of Public Works to remove construction debris from your rental property instead of paying a private contractor to do so. Based on the staff's inquiry (discussed below), the Commission voted on March 19, 2002, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23(b)(2).

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

I. Facts

You are a Lawrence city councilor. The city council is a nine-person board. In your official capacity you participate in decisions involving the city budget including the DPW budget. In addition, as a city councilor, with five other councilors, you can vote to remove senior DPW personnel from their positions.

The DPW's trash collection policy is to not pick up construction debris from private property. It is the individual property owner's responsibility to dispose of such material. Exceptions to the DPW policy are made only in very limited circumstances involving: 1) the elderly; 2) potential safety hazards; and 3) unknown ownership of the debris.

In February 2001, you hired a contractor to perform work on a two-family rental property you own in Lawrence. The contractor left a significant amount of construction debris. The material was left for curb-side removal by Lawrence's trash hauler, Browning Ferris Industries ("BFI"), however, it was not picked up.

Shortly thereafter, you telephoned a DPW foreman and told him that BFI had missed a stop at your rental property and asked if the DPW could come pick up the material. The DPW foreman told you he would come by the residence and take a look at the material. After speaking with you, the DPW foreman said he telephoned BFI and gave it the address of your property. A BFI employee subsequently informed the DPW foreman that BFI did not remove the material because it was construction debris. The DPW foreman drove to your property and saw sheetrock and other construction material at the curbside along with some windows and a door on the porch of the residence. The DPW foreman telephoned you and told you the DPW would not remove the material because it was construction debris. He also told you that BFI would not remove the material, either.

You called the DPW foreman again a few days later. You stated, "That stuff is still here." The DPW foreman replied, "Marie, I can't pick it up." You then said, "I've got a couple windows and a door. Can I put them out?" The DPW foreman told you he would send a crew out to pick up the windows and the door. The DPW foreman sent a two-person crew in a pickup truck to the property on city time. When the crew arrived at the residence, one of the workers radioed back to DPW headquarters and said to the DPW foreman, "Have you seen the pile that's here?" The DPW foreman replied to the worker, "Take the windows and door and leave the rest." The crew spent a total of 45 minutes to an hour on the job.

You called the DPW foreman a third time stating, "The stuff is still there." The DPW foreman replied, "I picked up what you told me, the windows and door." The DPW foreman told you the remaining material was construction debris and the DPW was not going to pick it up. You replied "O.K." and the conversation ended. According to the DPW foreman, that was the last phone call he received from you in regard to the debris.

About a week after your third call to the DPW foreman, the DPW superintendent received an anonymous phone call complaining about the debris. Thereafter, you called the DPW superintendent and said, "I can't get anyone to come out and pick up this trash. Would you please help me out? It's covered with snow." The DPW superintendent drove out to the property and, amidst the debris, saw pieces of broken glass sticking out of the snow. Because there is a school a few blocks from the property, he viewed the situation as a public safety hazard and ordered a crew to go to the property and remove the debris.

After this matter was reported in the newspapers and you became the subject of an Ethics Commission investigation, you requested a bill from the DPW for its services. You were billed a total of $262.50 for the use of two laborers and a truck for an hour and a half; and for two loads of waste disposal. You paid this bill.

The DPW employees you contacted were aware of your city councilor position when you were requesting the removal of your construction debris. You have indicated that it was not your intention to use your city councilor position in order to have the DPW employees comply with your requests.

II. Discussion

As a city councilor, you are a municipal employee as that term is defined in G.L. c. 268A, §1(g). As such, you are subject to the conflict of interest law G.L. c. 268A generally and, in particular for the purposes of this discussion, to §23 of that statute. A copy of G.L. c. 268A is attached for your information.

Section 23(b)(2) prohibits a municipal employee from knowingly, or with reason to know, using or attempting to use her official position to secure for herself or anyone else an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

The facts stated above are sufficient to establish reasonable cause to believe that you violated §23(b)(2) by continuing to ask the DPW to remove construction debris from your rental property once you were informed it was against DPW policy to do so. Although you did not explicitly invoke your city councilor position, your repeated telephone calls to the DPW after being informed that it did not take construction debris, constituted a " knowingly or with reason to know" use or attempted use of your councilor position to request the debris pick up. It was not necessary for you to explicitly identify yourself as a public official.[1/] You had reason to know that your conduct would be interpreted by the staff as an implicit invocation of your official position. This was particularly true where (a) you persisted in asking that the debris be picked up notwithstanding the DPW staff telling you that their policy prohibited them from doing what you were requesting; and (b) as a city councilor you had the power to affect the DPW budget and had removal authority (exercisable together with at least five other councilors) of senior DPW personnel.

The disposal of the construction debris was valued by the DPW at $262.50. Therefore, its removal was of substantial value. Given that the DPW's policy is not to pick up such materials, and that your request did not satisfy any of the exceptions to that policy, the removal was an unwarranted privilege. As the average citizen does not have the benefit of the DPW removing construction debris by request, the removal was not properly available to similarly situated individuals. Therefore, because you made several telephone calls to the DPW requesting removal of construction debris after you had been informed that such removal was against DPW policy, there is reasonable cause to believe you violated §23(b)(2).

The Commission is not stating that a high-ranking public official cannot request government services that are properly available to the general public from someone she regulates. Rather, such a public official must be careful that she follows the same rules as everyone else (i.e., the general public). If established or existing policy bars the provision of the services to the general public, the public official must accept that policy and/or follow an appropriate appellate procedure. For example, you might have asked the DPW at the next council meeting to explain its garbage collection policy, and, as a councilor publicly seek to have that policy amended. A public official should not persist in her requests for services after a subordinate declines the request based on clear policy.

II. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter rather than imposing a fine because it believes the public interest would best be served by doing so. The Commission wants to make clear that high-ranking public officials must take care in requesting government services for themselves from the government employees they regulate to ensure that they do not explicitly or implicitly use their official position to obtain preferential treatment.

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

This matter is now closed.

DATE: April 22, 2002

[1] *See Groener v. Oregon Government Ethics Commission*, 59 Or. App. 459 (1982) (In finding a senator "used" his position, the court said, "It is not necessary for a public official to identify expressly the public office he holds when attempting to influence someone, so long as that someone knows it.")

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 658

IN THE MATTER
OF
MARGE SCHUMM

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Marge Schumm 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 13, 2001, 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 Schumm. The Commission has concluded its inquiry and, on February 27, 2002, found reasonable cause to believe that Schumm violated G.L. c. 268A, §23(b)(3).

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

Findings of Fact

1. Schumm is the Norton Housing Authority ("NHA") Executive Director.

2. In December 2000, the NHA advertised for a full-time maintenance mechanic. The starting salary was $14.61 per hour (approximately $30,000 per year). The NHA received approximately 17 applications. One of the applicants was Schumm's daughter's boyfriend.

3. Schumm delegated the hiring process to her subordinate, the maintenance foreman. Schumm, however, reviewed the applications, informally discussed them with the foreman, and advocated that her daughter's boyfriend be hired.

4. At the NHA January 16, 2001 meeting, board members voted 4-0 to appoint Schumm's daughter's boyfriend as the maintenance mechanic. Schumm failed to disclose her daughter's relationship with the successful applicant and her involvement in the hiring process to the Board, her appointing authority. Schumm only stated in her one-page Executive Director's Report that was distributed to board members at that meeting, "I stayed out of the process because I know a couple of the applicants." Board members learned at some point after the appointment that the successful applicant was Schumm's daughter's boyfriend.

Conclusions of Law

5. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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 disclosing in writing to her appointing authority the facts which would otherwise lead to such a conclusion.

6. By delegating the hiring process to her subordinate, reviewing the applications, informally discussing them with the foreman, and advocating that her daughter's boyfriend be hired, Schumm acted in a manner which would cause a reasonable person knowing these facts to conclude that her daughter's boyfriend could unduly enjoy her favor in the performance of her official duties. Therefore, Schumm violated §23(b)(3). Schumm did not make a written disclosure in accordance with §23(b)(3) as she did not disclose in writing to her appointing authority the nature of her relationship with the applicant (i.e., her daughter's boyfriend) or her involvement in the application process prior to her involvement in the matter. Moreover, her disclosure was inaccurate and misleading in stating, "I stayed out of the process."

Resolution

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

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

(2) that she 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 29, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET 659

IN THE MATTER
OF
LEON HALLE

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Leon Halle 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 19, 2001, 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 Halle. The Commission has concluded its inquiry and, on April 19, 2002, found reasonable cause to believe that Halle violated G.L. c. 268A, §17.

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

Findings of Fact

1. Leon Halle has served as a project manager in the New Bedford Building Department since October 1999. Prior to October 1999, Halle worked for the New Bedford Department of Public Works.

2. Halle also surveyed land in his private capacity as an engineer.

3. In or about May 1999, Halle, acting in his private capacity for a New Bedford developer, prepared an as-built foundation plan for 967 Kensington Street. The as-built is dated May 15, 1999.

4. In or about December 2000, Halle prepared for the same New Bedford developer an as-built foundation plan for 961 Kensington Street. That as-built is dated December 9, 2000.

5. Both drawings were submitted to the New Bedford Building Department as part of the developer's building permit applications.

6. Neither Halle's name nor his stamp appears on either of the as-builts submitted to the building department

7. Halle was paid $175 for each survey, totaling $350.

8. Prior to preparing the two as-builts, Halle had received advice from the Commission regarding the restrictions imposed on his private activities under §17. He was advised in an October 26, 1989 opinion rendered by the Commission that "§17(a) would prohibit [his] receipt of compensation from a private client for the preparation of plans which will be submitted to the Town planning board." He was further warned in a December 2, 1998 letter from the Commission that "if [he] were to do any surveying work which was used to support an application or otherwise was used in relation to a particular matter before a town board, [he] would be receiving compensation in relation to a particular matter in which the town has a direct and substantial interest, thereby putting [him] in violation of §17."

Conclusions of Law

9. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in relation to a particular matter in which the municipality has a direct and substantial interest.

10. As a New Bedford building department project manager, Halle is a municipal employee.

11. The decision to issue a building permit is a particular matter in which a municipality has a direct and substantial interest.

12. Halle prepared two as-built foundation plans knowing that they would be included in permit applications, and that building permits would not be issued unless and until those as-builts were filed with the city. Accordingly, his preparation of the two as-builts was in relation to the building permit decisions.

13. Halle received, in total, $350 for preparing the two as-builts.

14. Therefore, by receiving compensation from a developer for preparing drawings to be submitted to the City of New Bedford, specifically the department in which he worked, Halle violated §17(a) on two occasions.

Resolution

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

(1) that Halle pay to the Commission the sum of $2,000.00 as a civil penalty for violating G.L. c. 268A, §17(a);

(2) that Halle pay to the Commission the sum of $350 as a civil forfeiture of the compensation that he received for preparing drawings submitted to the City of New Bedford in violation of §17(a); 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 23, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 475

IN THE MATTER
OF
MICHAEL DORMADY

ORDER

On April 17, 2002, this matter came before the Hearing Commissioner to consider a **Joint Motion to Dismiss.** The Hearing Commissioner referred the matter to the full Commission for deliberation on May 30, 2002.

In support of the referenced Motion the parties assert that the allegations pending against the Respondent have been addressed by an action filed in the Superior Court and the termination of the Respondent as a police officer with the Duxbury Police Department, as well as the understanding that the Respondent will not seek future employment as a police officer in the Commonwealth of Massachusetts. The Commission noted the elapsed time since the alleged wrongful acts, restitution, and the subsequent death of the victim.

Wherefore, the Commission hereby allows the **Joint Motion to Dismiss** and orders that a **Dismissal** be entered.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 660

IN THE MATTER
OF
ROBERT HANNA

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Robert Hanna 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 January 31, 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 Hanna. The Commission has concluded its inquiry and, on May 30, 2002, found reasonable cause to believe that Hanna violated G.L. c. 268A, §23(b)(2).

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

Findings of Fact

1. Hanna is the Highway Surveyor in the town of Brimfield.

2. In spring 2001, the town 2002 winter sand contract was put out to bid. All bids were to be submitted to the Board of Selectmen's office at town hall by 10 a.m. on May 30, 2001. (The sand contract is bid on by price per cubic yard of sand. The ultimate value of the contract depends on the severity of the winter and the demand for sand. The preceding four winter contracts were worth an average of $17,000 per year.)

3. On May 30, 2001, after the 10 a.m. deadline had passed, the bids were opened. Hanna and the town procurement officer were present for the bid opening. The town received one bid for the winter sand contract, from Lorusso Corporation, in the amount of $9.95 per cubic yard. Hanna believed that Lorusso Corporation's bid was high. The successful bidder for the town 2001 winter sand contract, Hitchcock Contracting, did not submit a bid.

4. Hanna left the selectmen's office after the bid opening was completed and drove to the offices of Hitchcock Contracting in Charlton. Hanna is familiar with the owner of Hitchcock Contracting as Hitchcock Contracting was awarded the winter sand contract for the town for the years 1999, 2000 and 2001. At Hitchcock Contracting's offices, Hanna obtained a bid in an envelope for the 2002 winter sand contract and returned to town hall.

5. Hanna approached the procurement officer and told her he had spoken with a Hitchcock Contracting employee who had told him that she had taped the bid to the door of the police station. The police station is located in the basement of town hall and has its own entrance. With Hitchcock Contracting's envelope bid in hand, Hanna said to the procurement officer, "I found this taped to the door of the police station. What should we do about it?" The procurement officer indicated that the town could not accept Hitchcock Contracting's bid because the bid opening had been completed. Hanna did not object. He stated that the Lorusso Corporation bid was too high. Hanna left the procurement officer's office with the unopened Hitchcock Contracting's bid in hand.

6. Ultimately, the town put the 2002 winter sand contract out to bid again because it deemed the original bid by the lone bidder, Lorusso Corporation, to be high in comparison to bids from recent years. A third company was the low bidder in the re-bidding and was awarded the winter sand contract.

7. Hanna admits that his statement to the procurement officer that Hitchcock's bid was taped to the police station door was false. Hanna, however, asserts he went to Hitchcock Contracting to ask why it had not submitted a bid, as Hitchcock had submitted a bid for the five previous years. Hanna believed Lorusso Corporation's bid was too high and, thus, not in the town's best interests. Notwithstanding Hanna's assertions, his attempted efforts to circumvent the bidding process and his misrepresentation to the procurement officer were not justified. The appropriate action would have been to publicly request that the contract be re-bid.

Statement of Law

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

9. By attending the bid opening on town time and in his highway surveyor capacity, using knowledge of other contractors' bids, contacting Hitchcock Contracting, traveling to its place of business, obtaining a bid, misrepresenting how the bid was received, and then attempting to submit the bid on Hitchcock Contracting's behalf, Hanna used or attempted to use his highway surveyor position.

10. The attempted late submission of Hitchcock Contracting's bid was an unwarranted privilege as it was

offered after the deadline and/or it was an unwarranted exemption as it deviated from and was an attempt to circumvent the proper bidding procedure.

11. Where the sand contract is potentially worth tens of thousands of dollars (depending on winter weather conditions), the ability to forego the proper bidding procedures is of substantial value.

12. The potential ability of Hitchcock Contracting to submit a bid for the sand contract after the stated deadline was not properly available to any other companies.

13. Thus, by using his official position as the highway surveyor in attempting to secure for Hitchcock Contracting an unwarranted privilege (having its bid for the sand contract considered after the deadline) and/or exemption (circumventing the proper bidding procedure), Hanna violated G.L. c. 268A, §23(b)(2).

Resolution

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

(1) that Hanna pay to the Commission the sum of $2,000 as a civil penalty for his conduct in violating 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: June 19, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 661

IN THE MATTER
OF
THOMAS LUSSIER

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Thomas Lussier 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 March 1, 2001, 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 Lussier. The Commission has concluded its inquiry and, on June 25, 2002, found reasonable cause to believe that Lussier violated G.L. c. 268A.

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

Findings of Fact

1. At all relevant times, Lussier was employed as the executive director for the Massachusetts Teachers Retirement Board ("MTRB"). As such, he was a state employee as that term is defined in G.L. c. 268A, §1(q).

2. In January 1995, the MTRB secured a Corporate American Express Account. Lussier, as executive director, had access to that account.

3. Between 1997 and early 2001, Lussier charged both business and personal expenses on the corporate credit card. At all times during which Lussier charged personal expenses on the MTRB corporate credit card, he also incurred legitimate business expenses on behalf of the MTRB for which he was entitled to, but did not seek, reimbursement. The amount of the unreimbursed business expenses, however, was significantly less than the charged personal expenses (as is detailed below).

4. In February 2001, the media reported that Lussier used the MTRB corporate credit card to charge thousand of dollars in personal items. Until that time, Lussier had not made an accounting or reimbursed the MTRB for his personal expenses charged to the MTRB corporate credit card.

5. After the media reported on the matter, Lussier made an accounting of and reimbursed the MTRB

$3,012.77 for such personal expenses, plus $504.50 in interest for a total of $3,517.27.

6. At about this same time, the Office of the State Auditor began investigating this matter. In a January 2002 report, the State Auditor determined that Lussier's personal expenses charged to the MTRB card plus interest were $3,642.39. Lussier reimbursed the MTRB the $114.62 difference.

7. Lussier acknowledges that he used the MTRB corporate credit card for personal use, but asserts that he anticipated that any personal expenses would be offset by the eligible business expenses that he had not submitted for reimbursement, and that he intended to make a complete reconciliation. Lussier asserts that he never intended to allow personal expenses to exceed business expenses for which he was rightfully entitled through reimbursements.[1/] Notwithstanding Lussier's assertions, his business expenses fell more than $3,000 short of offsetting his charged personal expenses. Lussier's use of the MTRB corporate credit card for personal expenditures without reimbursing the MTRB until after the matter was reported in the media was not justified as the expenditures were not legitimate business purchases.

8. Lussier has since made a full reimbursement to the MTRB. In addition, the MTRB has eliminated agency corporate credit cards.

Conclusions of Law

9. General Laws chapter 268A, §23(b)(2) prohibits a state 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.

10. As executive director, Lussier had authorization to use the MTRB corporate credit card for legitimate MTRB purchases.

11. The use of the MTRB corporate credit card was a privilege.

12. The use of the MTRB corporate credit card for personal purchases not related to MTRB business and not timely reimbursed was unwarranted.

13. Where the expenditures exceeded $50 (individually or in the aggregate), they were of substantial value.

14. By charging personal expenses to the MTRB corporate credit card without making timely reimbursements, Lussier knowingly or with reason to know used his official position to secure for himself unwarranted privileges of substantial value not properly available to similarly situated individuals. By doing so, Lussier violated G.L. c. 268A, §23(b)(2) by using the MTRB corporate credit card for personal use and without timely reimbursement.

Resolution

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

(1) that Lussier pay to the Commission the sum of $5,000 as a civil penalty for his conduct in violating G.L. c. 268A, §23(b)(2)[2/] Lussier reimbursed the MTRB for the personal expenses, plus interest. Full restitution therefore has been made; and

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

DATE: July 2, 2002

[1/]The MTRB had no written regulations, procedures, or internal controls governing the use of corporate credit cards by Lussier and senior staff.

[1/]Lusser reimbursed the MTRB for the personal expenses, plus interest. Full resititution therefore has been made.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 664

IN THE MATTER
OF
DIANE WONG

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Diane Wong 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 13, 2001, 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 Wong. The Commission has concluded its inquiry and, on May 30, 2002, found reasonable cause to believe that Wong violated G.L. c. 268A, §23(b)(2) and (b)(3).

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

Findings of Fact

1. Diane Wong served as the Massachusetts Bay Transportation Authority's Assistant General Manager for Organization Diversity between December 1, 1997 and June 2002.

2. In early 1998, shortly after she was hired, Wong was interested in establishing a database of people and firms interested in providing diversity training to MBTA employees. There were no written procedures at the time at the MBTA for accumulating such information. Other employees at the MBTA with more experience than Wong suggested the use of a Request for Proposals ("RFP"). The RFP was drafted in very broad terms so that it would elicit the broadest possible spectrum of persons and firms interested in providing such training.

3. On or about March 30, 1998, the Office of Organizational Diversity and the MBTA's Department of Human Resources jointly issued an RFP soliciting proposals from firms interested in providing diversity training to MBTA employees.

4. In conjunction with the issuance of the RFP, Wong and Human Resources personnel organized a five-member RFP review committee to review proposals and select contractors.

5. Fifty firms submitted proposals in response to the RFP. Praxis Consultants & Trainers was one of the firms that submitted a proposal.

6. Wong's son-in-law, Marc Saunders, was one of Praxis's three principals.

7. Copies of the 50 proposals, together with rating sheets, were distributed to the five members of the RFP review committee.

8. The RFP review committee sorted the bidders into those whose proposals were useful in the immediate future, those whose proposals might be useful in the future, and those whose proposals were not useful. Praxis was one of the firms deemed useful.

9. Subsequent to the RFP review committee's informal discussions, Wong unilaterally decided to contract with two proposers, one of which was Praxis.

10. Praxis executed three contracts with the MBTA, the first in or about late May 1998 for $10,000, the second in or about September 1998 for $10,000, and the third in or about late 2000 for $20,000. All of the contracts incorporated Praxis's April 30, 1998 proposal in response to the RFP. Praxis provided the trainings under the first two contracts, for which the MBTA paid Praxis a total of $20,000. The trainings by Praxis were well-received by MBTA employees who attended. The MBTA canceled the final training, however, and withheld payment.

11. Each of the three contracts was initiated by Wong's Office of Organizational Diversity, and each called for the submission of invoices directly to Wong.

Conclusions of Law

12. Section 23(b)(2) prohibits a state employee from knowingly or with reason to know using their position to obtain for themselves or others unwarranted privileges of substantial value not properly available to similarly situated individuals.

13. As an MBTA official, Wong was a state employee, as that term is defined in G.L. c. 268A, § 1.

14. By selecting Praxis as a winning bidder, Wong knowingly or with reason to know used her position as an MBTA employee.

15. Praxis's ability to secure MBTA contracts awarded by one of the principal's in-laws, absent further input from the duly organized RFP review committee, constituted an unwarranted privilege, not properly available to similarly situated individuals.

16. The unwarranted privilege led directly to the award of three contracts worth, in total, $40,000 to Praxis, and therefore was of substantial value.

17. Therefore, by knowingly or with reason to know using her position at the MBTA to secure for Praxis an unwarranted privilege of substantial value not properly available to similarly situated individuals, Wong violated §23(b)(2).

18. Section 23(b)(3) prohibits a state 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 their favor in the performance of their 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. 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.

19. By awarding three contracts to Praxis, a company in which her son-in-law was one of three principals, Wong knowingly or with reason to know, acted in a manner that would cause a reasonable person, having knowledge of all the relevant circumstances, to conclude that Praxis could unduly enjoy Wong's favor in the performance of her official duties. The appearance of a conflict of interest was exacerbated by Wong's role in initiating, and participating in, the RFP review committee process that identified Praxis's proposal as useful. Wong made no public disclosure or, again exacerbating the appearance of a conflict of interest, any disclosure even to her colleagues at the MBTA, in connection with any of the three contract awards. Therefore, in so acting, Wong violated G.L. c. 268A, §23(b)(3) on three occasions.

Resolution

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

(1) that Wong pay to the Commission the sum of $5,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2) and §23(b)(3); and

(2) that she 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 10, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 665

IN THE MATTER
OF
ROBERT COMISKEY

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Robert Comiskey 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 30, 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 Comiskey. The Commission has concluded its inquiry and, on September 5, 2002, found reasonable cause to believe that Comiskey violated G.L. c. 268A, §23(b)(2).

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

Findings of Fact

1. Comiskey served as the Dover ambulance squad administrator from 1975, when the position was created, until his resignation in June 2001.

2. Comiskey, his wife and son served as emergency medical technicians ("EMTs") on the ambulance squad, earning an hourly wage of approximately $14.00.

3. EMTs are required to attend 28 hours of additional training sessions every two years to maintain certification. 105 CMR 170.

4. As ambulance squad administrator, Comiskey was responsible for approving and submitting to the state Office of Emergency Management Services ("OEMS") the attendance rosters for Dover's EMT training sessions. The OEMS requires the rosters as proof that EMTs are attending training sessions necessary for them to maintain certification. The OEMS-issued rosters require the EMTs to list their EMT identification numbers and to print and sign their names. EMTs are paid their prevailing hourly wage for attending the training sessions, which average three hours in length and occur six to eight times per year.

5. Between 1996 and 2001, Comiskey certified that he, his wife and son attended certain training sessions although they had not. As a result, all three received attendance credit for training sessions they did not attend. In addition, the parties received the following compensation for training sessions they did not attend: Comiskey, $323.14; wife, $444.73; and son, $86.52.

6. It is unclear whether Comiskey, his wife and son attended sufficient training sessions to maintain their certifications.

7. Following an investigation by OEMS, Comiskey surrendered his EMT license and resigned as ambulance squad administrator in June 2001.

Conclusions of Law

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

9. As the Dover ambulance squad administrator, Comiskey was, during the relevant period, a municipal employee as that term is defined in G.L. c. 268A, §1.

10. Comiskey used his position as ambulance squad administrator by, in his official capacity, certifying to the OEMS that he, his wife and son attended training sessions for which they received attendance credit and compensation for their purported attendance.

11. Securing training session attendance credit and compensation for such non-attendance were special benefits and, as such, privileges.

12. The receipt of training session credits was a privilege of intangible substantial value as they are required for EMTs to maintain certification. The payments received for training sessions not attended were privileges of substantial value individually ($323.14; $444.73; and $86.52 to Comiskey, his wife, and son, respectively) and in the aggregate ($854.39 total).

13. Comiskey and his family members' receipt of training session attendance credit and compensation was unwarranted because they had not, in fact, attended the EMT training sessions.

14. The privilege of receiving training session attendance credit and compensation for sessions not attended was not otherwise properly available to similarly situated individuals.

15. Therefore, by falsely certifying to the OEMS that he, his wife and son attended training sessions thereby enabling him, his wife and his son to improperly obtain training credits and compensation for sessions they did not attend, Comiskey used his position to secure for himself and his family members unwarranted privileges of substantial value that were not properly available to similarly situated individuals, violating §23(b)(2).[1/]

Resolution

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

(1) that Comiskey pay to the Commission the sum of $5,000.00[2/] as a civil penalty for his conduct in violating G.L. c. 268A, §23(b)(2);

(2) that he reimburse the Town of Dover the sum of $854.39, forthwith; 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: September 12, 2002

[1/] Comiskey's actions also raise concerns under §§19 and 23(b)(3) of G.L c. 268A. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or an immediate family member has a financial interest. General Laws, c. 268A, §23(b)(3) prohibits a municipal employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. As a matter of enforcement discretion, the Commission decided to resolve this matter under §23(b)(2) to emphasize that the most serious aspect of the conduct described involved the abuse of public position for private gain.

[2/]The Commission is empowered to impose a fine of up to $2,000 for each violation of the conflict of interest law. The size of the fine in this disposition agreement reflects the seriousness of the conduct and the potential harm to public health and safety.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK,ss. COMMISSION ADJUDICATORY
DOCKET NO. 666

IN THE MATTER
OF
JUNE LEMIRE

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and June Lemire 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 June 26, 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 Lemire. The Commission has concluded its inquiry and, on October 23, 2002, found reasonable cause to believe that Lemire violated G.L. c. 268A, §23(b)(3).

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

Findings of Fact

1. Lemire is the Southbridge Housing Authority ("SHA") executive director.

2. George DiBonaventura worked for the SHA as a full-time maintenance supervisor from 1983 until his retirement in late 1999. DiBonaventura is Lemire's boyfriend.

3. In late 2000, the SHA Commission began discussing renovating the porch and bathroom of its building on School Street.

4. In approximately June 2001, DiBonaventura applied to the architect to be hired as the clerk of the works on the renovation project.

5. At about this same time, the architect contacted Lemire as the SHA executive director for a reference concerning DiBonaventura's employment at the SHA. Lemire spoke favorably about DiBonaventura and recommended to the architect he be hired as the clerk of the works for the SHA project. Lemire did not disclose to the architect nor was the architect aware at the time of the recommendation that DiBonaventura was Lemire's boyfriend.

6. Lemire did not disclose to her appointing authority, the SHA, that she recommended to the architect that her boyfriend be hired as the clerk of the works.

7. The architect subsequently hired DiBonaventura as the part-time clerk of the works for three months for a total salary of $5,330.

Conclusions of Law

8. General Laws chapter 268A, §23(b)(3), in relevant part, prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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.[1/]

9. By speaking favorably about her boyfriend DiBonaventura and recommending he be hired as the clerk of the works for the SHA project, Lemire acted in a manner which would cause a reasonable person knowing these facts to conclude that her boyfriend could unduly enjoy her favor in the performance of her official duties. Therefore, Lemire violated §23(b)(3).

Resolution

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

(1) that Lemire pay to the Commission the sum of $500 as a civil penalty for his conduct in violating G.L. c. 268A, §23(b)(3);

(2) that she 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, 2002

[1/] A municipal employee can avoid a violation of §23(b)(3) by making an advance written disclosure to her appointing authority of the facts that would otherwise lead to such a conclusion. Lemire made no such disclosure. 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. Where there are serious §23 appearance problems such as in the present case, it seems likely that an employee will abstain, or if timely disclosure is made, directed to abstain or limit her involvement.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 624

IN THE MATTER
OF
JAMES FOSTER

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and James Foster 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 October 18, 2000, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Foster. The Commission has concluded its inquiry and, on April 10, 2001, found reasonable cause to believe that Foster violated G.L. c. 268A, §23(b)(2) and authorized the initiation of adjudicatory proceedings. On May 23, 2001, the Commission's Enforcement Division issued an Order to Show Cause. Foster answered on July 3, 2001, denying that he had violated the law and setting forth affirmative defenses. On October 9, 2002, the parties submitted a Joint Motion to Dismiss based on this disposition agreement rather than having a hearing on the charges and affirmative defenses. The Commission approved that motion on October 23, 2002.

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

Findings of Fact

1. At all relevant times, Foster was employed by the Milton School Department as the administrator of building and grounds. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. The school department had an account at Johnson Motor Parts to purchase auto parts for school department vehicles. Foster, as administrator of building grounds, had access and authority to use that account to purchase auto parts for such vehicles. Foster did not have authority to purchase auto parts for his or his family's personal vehicles.

3. Foster used the school department account at Johnson Motor Parts to charge auto parts in the total amount of $1097.90 for vehicles owned by himself and/or family members as follows:

(a) for a Dodge Caravan in the approximate amount of $100.91 on or about October 3, 1996;
(b) for a Buick Riviera in the approximate amount of $160.57 on or about October 15, 1996;

(c) for a Buick Riviera in the approximate amount of $129.72 on or about October 17, 1996;

(d) for a Buick Riviera in the approximate amount of $66.12 on or about December 4, 1996;

(e) for a Chrysler New Yorker in the approximate amount of $395.88 on or about January 30, 1997;

(f) for a Dodge Caravan and a Ford Explorer in the approximate amount of $80.75 on or about July 10, 1998; and

(g) for a Pontiac Firebird in the approximate amount of $163.95 on or about October 8, 1998.

Conclusions of Law

4. General Laws chapter 268A, §23(b)(2) 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.

5. By charging to the school account auto parts for vehicles owned by himself and/or his family, Foster knowingly or with reason to know used his official position to secure for himself or others unwarranted privileges of substantial value not properly available to similarly situated individuals. By doing so, Foster violated G.L. c. 268A, §23(b)(2) on each of the above-described seven occasions.

Resolution

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

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

(2) that Foster 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 7, 2002

[1/] After an investigation into this matter, Foster reimbursed the town for the auto parts he charged to the town account. Therefore, no further restitution is sought.

[2/] Criminal charges related to these and other matters were brought by the District Attorney's Office. The parties have since entered into a resolution.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 670

IN THE MATTER
OF
MICHAEL J. D'AMICO

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Michael J. D'Amico 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 April 17, 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 D'Amico. The Commission has concluded its inquiry and, on September 5, 2002, found reasonable cause to believe that D'Amico violated G.L. c. 268A, § 19.

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

Findings of Fact

1. D'Amico was Quincy's Ward 4 City Councillor between January 1996 and January 2002.

2. D'Amico purchased a home at 57-59 Penn Street in Quincy in March 1999.

3. Subsequent to D'Amico's purchase of 57-59 Penn Street, Lappen Auto Supply Company, Inc. ("Lappen"), which owned commercial property abutting D'Amico's Penn Street property, petitioned the Quincy Zoning Board of Appeals for "set back relief through a variance and a Special Permit to construct in a flood plain." Lappen wanted to construct a new warehouse that would link the two buildings already sited on its property.

4. Four letters supporting Lappen's application were submitted to the zoning board, one from D'Amico. D'Amico's May 11, 1999 letter was written on city council stationery.

5. Councillor D'Amico's letter recommended six "conditions for consideration before granting Lappen Auto Supply['s]" application. One of the six conditions suggested by Councillor D'Amico was that "[l]andscape, retaining walls and fencing plan for Penn Street abutters be directed and agreed upon by Building Inspector and abutters." D'Amico's letter closed: "As the Ward Four Councillor, I would have no objections to the Zoning Board of Appeals granting the request, providing the above six conditions are agreed to." D'Amico signed the letter "Michael J. D'Amico, Ward Four Councillor."

6. The Zoning Board of Appeals did not adopt Councillor D'Amico's recommendation that landscaping, retaining walls and fencing be provided subject to the agreement of Penn Street abutters. The board did, though, condition its grant on Lappen's submission to the building inspector for review and approval of "a reasonable landscape plan," which was to include "the southwesterly end of the lot." (Penn Street abuts the southwesterly end of Lappen's lot.) As was customary, the landscape plan submitted to the building department included only landscaping slated for Lappen's property; it did not include improvements for abutters.

7. Quincy city ordinance 17.36.070 requires that businesses adjacent to residential districts screen abutting properties. The ordinance does not, though, as D'Amico requested, require that those businesses construct retaining walls or provide landscaping services other than screening, nor does it require that the screening provided be subject to abutters' agreement.

8. In August 1999, at a cost of $6,700 to Lappen, a landscaper performed work at D'Amico's property. The cost for the work performed on Councillor D'Amico's property was comparable to the cost borne by Lappen to landscape a second abutter's property.

Conclusions of Law

9. Section 19 of G.L. c. 268A prohibits municipal employees from participating in their official capacity in particular matters in which, to their knowledge, they or an immediate family member have a financial interest.

10. As a city councillor, D'Amico was, in spring 1999, a municipal employee as that term is defined in G.L. c. 268A, § 1.

11. The Zoning Board of Appeals' consideration of Lappen Auto Supply's petition for a variance and a special permit was a particular matter.

12. By submitting the above-referenced letter to the Zoning Board of Appeals on city council stationery, and signing the letter as Ward Four Councillor, D'Amico participated, in his official capacity, in that particular matter.

13. D'Amico had a financial interest in the Zoning Board of Appeals decision because one of the requested "conditions" submitted by D'Amico would have obligated Lappen to pay for landscaping, retaining walls and fencing for D'Amico's property, and would have given D'Amico a role in deciding what type of landscaping, retaining walls and fencing would be provided. In addition, the work would have mitigated any damage to D'Amico's property value precipitated by Lappen's expansion.

14. D'Amico knew of his financial interest in the Zoning Board of Appeals matter when he submitted his letter to the board.

15. Therefore, by submitting a letter to the Zoning Board of Appeals in his official capacity, D'Amico participated in a particular matter in which he had a financial interest, thereby violating § 19.

Resolution

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

(1) that D'Amico pay to the Commission the sum of $1,250.00 as a civil penalty for violating G.L. c. 268A, §19;

(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: December 2, 2002

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 671

IN THE MATTER
OF
JAMES J. HARTNETT Jr.

DISPOSITION AGREEMENT

The State Ethics Commission and James J. Hartnett Jr. 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 August 8, 2001, 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 Hartnett. The Commission has concluded its inquiry and, on June 25, 2002, found reasonable cause to believe that Hartnett violated G.L. c. 268A, § 23 and G.L. c. 268B, § 7.

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

I. Background Facts

1. At all times relevant, Hartnett was the Commonwealth's Personnel Administrator and headed the state's Human Resources Division ("HRD"). As such, Hartnett was a state employee within the meaning of G.L. c. 268A.

Hartnett's appointing authority for G.L. c. 268A purposes was the Secretary of the Executive Office for Administration and Finance ("A & F"), under whose jurisdiction the HRD falls.

The HRD administers a civil service merit system to fill certain positions in state agencies and municipalities. One HRD office, the Office of Employee Relations, is responsible for state employee union issues, such as collective bargaining contract negotiations, benefits and other contract interpretations, and grievances.

Hartnett's duties as Personnel Administrator and head of HRD included meeting with union leaders to address union issues. Hartnett also served on several collective bargaining teams and was the chief negotiator for the state when he did so. About 25% to 35% of Hartnett's time as Personnel Administrator was devoted to union issues.

The National Association of Government Employees ("NAGE") is a union representing over 100,000 government employees nationwide and about 12,000 state employees; its headquarters are in Quincy, Massachusetts. NAGE is one of the two largest unions with which HRD has official relations. At all times relevant, Kenneth T. Lyons was the NAGE president.

As Personnel Administrator, Hartnett had official responsibility for contract extensions and contract negotiations concerning major contracts between NAGE and the Commonwealth. These contracts covered the state's clerical and support, trades and crafts, and professional staff employees.

Lyons was not usually involved in day-to-day contract negotiations. Occasionally, however, when the negotiating team needed some help, Lyons would become personally involved or contact Hartnett on behalf of NAGE.

II. Chapter 268A Violations

Findings of Fact

Lunches

When Hartnett first became Personnel Administrator in July 1997, he arranged to meet with the leader of each union representing state employees, to build a relationship with them. When Hartnett told his NAGE contact that he wanted to meet with NAGE's president, he was told that it was Lyons's longstanding custom to conduct NAGE business over lunch at Anthony's Pier 4 restaurant when he was in Boston. Thus, whenever they met in Boston to discuss union business or any matters of interest to NAGE, they did so over lunch at Pier 4.

Between January 1998 and July 2001, Hartnett had lunch meetings with Lyons approximately 20 times at Anthony's Pier 4. The average per person cost of these business lunches was $50, and about ten of the lunches cost more than $50 per person. Lyons always paid for these lunches through a NAGE account. According to Hartnett, he offered to pay at the earliest of these lunches, but Lyons refused his offer. Thereafter, Hartnett did not repeat his offer.

Hartnett knew that Lyons and/or NAGE was paying for these lunches.

Hartnett also knew that Lyons's reason for paying for these lunches was not because of any social relationship between Hartnett and Lyons, but because of Hartnett's official position as Personnel Administrator and Lyons's interest in conducting business with the HRD on behalf of NAGE.

Section 6 of the A & F Code of Conduct for managers and non-union employees—which policy Hartnett was mandated to follow—provides:

> Employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of value, from a person who or entity which the employee knows or has reason to know:
>
> (a) has, or is seeking to obtain, contractual or other business or financial relations with his or her agency/department;
>
> (b) conducts business or other activities which are regulated or monitored by the agency/department, except as permitted by statute or regulation; or
>
> (c) has interests that may be substantially affected by the employee's performance or non-performance of his or her official duties or has the appearance of being substantially affected.

The Code of Conduct further provides that these restrictions do not apply to:

> the acceptance of food or refreshments of nominal value on infrequent occasions in the ordinary course of a breakfast, luncheon, dinner, or other meeting attended for educational, informational or other similar purposes. However, *agency/departmental employees, while on official business, are specifically prohibited from accepting free food or other gratuity, except non-alcoholic beverages (coffee, tea, etc.), from persons with whom they have contact in the performance of their official duties.* Employees are not permitted to accept standing offers of meals or refreshments, nor are they permitted to accept several instances of offers of food or refreshments from the same person or entity which, in the aggregate, would exceed the definition of nominal value during a calendar year [emphasis added].[1/]

Hartnett's appointing authority, the Secretary of A & F, was not aware that Hartnett was having lunch periodically with Lyons, or that Lyons and/or NAGE was paying for Hartnett's lunch expenses. Hartnett made no disclosures regarding these lunches.

Holiday Parties

In 1998, 1999 and 2000, Lyons invited Hartnett and his wife to attend Fourth of July parties at Lyons's summer residence in Bourne, which they did. The per person cost for those parties—which included food, drink and entertainment—was $200.

Lyons also invited Hartnett and his wife to attend

Christmas parties in those same years, as well as in 1997. Hartnett and his wife attended on three or four occasions. Held at Anthony's Pier 4, these parties included a full dinner, open bar and professional entertainment. The per person cost was over $50.

The apparent purpose of these holiday parties was for Lyons to express appreciation to the people who worked with NAGE. NAGE paid for all the party expenses, and no guest was asked to pay.

Before attending the first holiday party in 1997, Hartnett offered to pay for his and wife's costs, and provided a check to cover their expenses. NAGE never cashed the check, and Hartnett did not repeat his offer.

Hartnett knew that Lyons and/or NAGE was using these parties to create goodwill for NAGE in its official dealings with HRD. Thus, Hartnett knew or had reason to know that he and his wife were invited to these parties not because of any personal or social relationship that he shared with Lyons, but because of Hartnett's official position as Personnel Administrator.

Seiko Watch

Shortly after Hartnett became Personnel Administrator, he met with Lyons for the first time at NAGE's headquarters. At that meeting, Lyons gave Hartnett a Seiko watch with a NAGE emblem on its face.

Hartnett believed that Lyons gave him this watch as a gesture of goodwill, and he accepted it because he wanted to generate goodwill for the Commonwealth with NAGE. Thus, Hartnett knew that he received the NAGE watch not because of any personal or social relationship that he shared with Lyons, but because of his official position as Personnel Administrator.

NAGE records indicate that the NAGE emblem watches were purchased for $229 each. The manufacturer's list price for the watch was $215, and its retail price was between $100 and $150. According to Hartnett, he has never worn the watch.

Conclusions of Law

Section 23(b)(2) of G.L. c. 268A prohibits a state employee from knowingly, or with reason to know, using or attempting to use his 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.

Section 23(b)(3) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence 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.

By receiving free business lunches and a NAGE/Seiko watch from Lyons, and by attending holiday parties sponsored by NAGE under the facts described above, Hartnett knew or had reason to know that he was using his official position as Personnel Administrator to obtain unwarranted privileges. Such conclusion is based on the following factors.[2/] First, Hartnett was in charge of the HRD. Second, he accepted lunch at Anthony's Pier 4, food and entertainment at the holiday parties, and the NAGE/Seiko watch from the NAGE president. Third, when Hartnett accepted these items, NAGE had and would continue to have interests in HRD matters that potentially had a significant impact on NAGE business. Fourth, Hartnett accepted these items in violation of the A & F Code of Conduct. Finally, Hartnett accepted these items knowing that Lyons was giving them to him primarily because of the authority that Hartnett could exercise as Personnel Administrator regarding NAGE.

The unwarranted privileges were of substantial value and, under the above-described circumstances, were not properly available to similarly situated individuals.

Therefore, based on the above circumstances, Hartnett 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, Hartnett violated G.L. c. 268A, § 23(b)(2).

In addition, by taking official actions of interest to Lyons and/or NAGE, at or around the same time that he was accepting from Lyons free lunches, holiday party hospitality, and the NAGE/Seiko watch Hartnett 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 Lyons and/or NAGE could improperly influence him in the performance of his official duties.[3/] Thus, Hartnett violated § 23(b)(3).[4/]

III. Chapter 268B Violations

Findings of Fact and Conclusions of Law

As Personnel Administrator, Hartnett was required to file an annual Statement of Financial Interests ("SFI") with the Ethics Commission.

General Laws c. 268B, § 5(g)(5) requires disclosure of the name and address of the donor, and the

fair market value, if determinable, of any gifts aggregating more than one hundred dollars in the calendar year, … if the recipient is a public employee and the source of such gift(s) is a person having a direct interest in a matter before the governmental body by which the recipient is employed.

General Laws c. 268B, § 7 provides a penalty for any person who files a false SFI under G.L. c. 268B, § 5.[5/]

Hartnett knew that NAGE had direct interests in matters pending before HRD during the relevant years.

In each of his SFIs for the years 1997 through 2000, Hartnett did not disclose his receipt of any gifts under § 5(g).[6/]

The items that Hartnett received from NAGE through Lyons were gifts aggregating over $100 in each calendar year, and Hartnett knew or had reason to know the value of those gifts.

Thus, Hartnett failed to disclose on his 1997 through 2000 SFIs his receipt of gifts from Lyons aggregating over $100 per calendar year, in violation of G.L. c. 268B, § 7.

IV. Resolution

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

(1) that Hartnett pay to the Commission the sum of $4,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2) and (b)(3) with regard to his receipt of the lunches at Anthony's Pier 4, food and entertainment at holiday parties, and the NAGE/Seiko watch; and for his violating G.L. c. 268B, § 7;

(2) that Hartnett amend his 1997 through 2000 SFIs to reflect his receipt of gifts from Lyons/ NAGE aggregating over $100 per calendar year in order to comply with G.L. c. 268B; and

(3) that Hartnett 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 3, 2002

[1/]The Code defines "nominal value" as $25 or less.

[2/]The conclusion in this particular case that there was a use of position to obtain an unwarranted privilege is based on the cumulative effect of all the factors cited. No one factor is determinative. The Commission could reach the same conclusion in another case, even in the absence of one or more of these factors. Thus, each situation must be evaluated case-by-case, based on its own particular factors.

[3/]Section 23(b)(3) provides further that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record. Hartnett made no such disclosure. 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.

[4/]Section 3 of the conflict-of-interest law prohibits a public employee from accepting or receiving anything of substantial value for himself for or because of any official act or act within his official responsibility. Hartnett's receipt of free lunches from Lyons while discussing official business raises § 3 issues, but the Commission declined to pursue this conduct under § 3 because of the specific circumstances involved.

[5/]Any person who willfully affirms or swears falsely in regard to any material matter before a commission proceeding under paragraph (c) of section four of this chapter, or who files a false statement of financial interests under section five of this chapter shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than three years, or in a house of correction for not more than two and one-half years, or both. G.L. c. 268B, § 7.

[6/]"Gift" means a payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received. G.L. c. 268B § 1(g).

James J. Hartnett Jr.
C/o Thomas R. Kiley, Esq.
Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110-2600

PUBLIC EDUCATION LETTER[1/]

Dear Mr. Hartnett:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that you violated the state conflict-of-interest law, G. L. c. 268A,

by asking someone with whom you had official dealings to provide employment help for a close friend of one of your daughters. Based on the staff's inquiry (discussed below), the Commission voted on August 8, 2002, that there is reasonable cause to believe that you violated the state conflict-of-interest law, G.L. c. 268A, § 23(b)(2) and (3).

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

I. Facts

In July 1997, you became the Commonwealth's Personnel Administrator in charge of the Human Resources Division ("HRD"). Your appointing authority for G.L. c. 268A purposes was the Secretary of the Executive Office for Administration and Finance ("A & F"), under whose jurisdiction HRD falls. In spring 2002, you retired from the HRD.

The HRD administers a civil service merit system to fill certain state and municipal positions. One HRD office, the Office of Employee Relations, is responsible for state employee union issues, such as collective bargaining contract negotiations, benefits and other contract interpretations, and grievances.

Your duties as the Personnel Administrator and head of HRD included meeting with union leaders to address union issues. You also served on several collective bargaining teams and were the chief negotiator for the state when you did so. About 30% of your time as Personnel Administrator was devoted to union issues.

The National Association of Government Employees ("NAGE") is a union representing over 100,000 government employees nationwide and about 12,000 Massachusetts state employees; its headquarters are in Quincy, Massachusetts. NAGE is one of the two largest unions with which HRD has official relations. At all times relevant, Kenneth T. Lyons was the NAGE president.

When you first became the Personnel Administrator in July 1997, you arranged to meet with the leader of each union representing state employees, to build a relationship with them. When you told your NAGE contact that you wanted to meet with NAGE's president, you were told that it was Lyons's longstanding custom to conduct NAGE business over lunch at Anthony's Pier 4 restaurant when he was in Boston. Thus, whenever you and Lyons met in Boston to discuss union business or any matters of interest to NAGE, you did so over lunch at Pier 4. These frequent meetings led to your developing a cordial business relationship with Lyons.

As the Personnel Administrator, you had official responsibility for contract extensions and contract negotiations concerning major contracts between NAGE and the Commonwealth. These contracts covered the state's clerical and support, trades and crafts, and professional staff employees. Lyons was not usually involved in contract negotiations. Occasionally, however, when the NAGE negotiating team needed some help, Lyons would become personally involved or contact you on behalf of NAGE.

In or about early 2000, you and Lyons met to discuss union business over lunch at Anthony's Pier 4. During that lunch, you told Lyons that your daughter's close friend was interested in a job as a police officer. You observed that it was difficult to become a municipal police officer unless one were a veteran or had scored high on the civil service exam. Lyons told you that the young man could have a job at the International Brotherhood of Police Officers Union, but you declined that offer, stating that the young man wanted to be in law enforcement. Lyons told you that he would personally contact a certain Boston University vice president to find out if there were any employment opportunities with the university's police department. The Boston University police and security officers were represented by a NAGE-affiliated union, and you knew that Lyons had contacts with police labor unions.

On or about April 18, 2000, you again met for lunch with Lyons at Anthony's Pier 4 to discuss NAGE-related matters, and your daughter's close friend's job prospects were also brought up. The Boston University vice president was also present. Knowing the dual purpose of the lunch, you brought a copy of the young man's resume with you and gave it to him. You told the vice president about the young man's interest in law enforcement, and asked him whether there were any police officer opportunities at the university. The university vice president said that he would see what he could do for you.

Lyons later conveyed to the Boston University vice president that it was important to Lyons personally that everything that could be done to help in the employment matter would be done. Subsequent to this lunch, the vice president discussed the matter with the Boston University president, and according to the vice president, the president contacted the university's police

chief. You received updates from both Lyons and the Boston University vice president regarding your daughter's close friend's employment prospects. Several months later, Boston University offered the young man a police dispatcher job for a probationary period, which he declined.

II. Discussion

As the Personnel Administrator, you were a state employee as that term is defined in G.L. c. 268A, § 1. As such, you were subject to the conflict-of-interest law, G.L. c. 268A, generally and, in particular for the purposes of this discussion, to § 23 of that statute.

A. Section 23(b)(2)

Section 23(b)(2) prohibits any state employee from knowingly, or with reason to know, using or attempting to use his official position to secure for himself or anyone else an unwarranted privilege of substantial value not properly available to similarly situated individuals. There is reasonable cause to believe that you violated § 23(b)(2) by asking Lyons for help to get your daughter's close friend a job.

The employment help for your daughter's close friend was a favor and a special benefit and, as such, a privilege. This privilege was of substantial value because Lyon's ability to get inside help from the university's vice president and then president, which resulted in an interview and a job offer, was worth more than $50, even though the job offer was ultimately rejected. In addition, the privilege was not otherwise properly available to similarly situated individuals: i.e., others seeking employment with the university's police department.

Finally, by soliciting and accepting help from Lyons under the totality of the circumstances described above, you knew or had reason to know that you were using your official position as Personnel Administrator to obtain an unwarranted privilege. This conclusion is based on the following factors:[2/]

(1) you were in charge of HRD and, in that capacity, officially responsible for contract negotiations and other matters involving NAGE and the Commonwealth;

(2) you knew or had reason to know, based on your relationship with Lyons, that your raising the subject of your daughter's close friend's desire to find a law enforcement job, and your noting how difficult it was to find such jobs, would result in Lyons's offering assistance in that regard;

(3) you knew or had reason to know that Lyons, in responding to your statements, would be likely to go to considerable lengths to help you primarily because of the authority that you could exercise as Personnel Administrator regarding NAGE;

(4) you accepted Lyons's arranging a business lunch at Anthony's Pier 4, where you met with Lyons and a university vice president who regularly had police union business with Lyons. At this meeting, and with Lyons present, you asked the university vice president whether there were any opportunities to become a police officer at Boston University and you gave him your daughter's close friend's resume;

(5) you knew or had reason to know that the university vice president was likely to go to considerable lengths to help you because he knew it was important to Lyons that he help you, and the university had significant business with Lyons and NAGE. Therefore, you knew or had reason to know that any job assistance that your daughter's close friend received from the university would be significantly influenced by your being the Personnel Administrator;

(6) you had these discussions about employment help for your daughter's close friend in the context of a business lunch with Lyons, the NAGE president, while you were acting in your capacity as Personnel Administrator; and

(7) during the pendency of these discussions, Lyons had and would continue to have interests in HRD matters that potentially had a significant impact on NAGE business.

Accordingly, there is reasonable cause to believe that you violated G.L. c. 268A, § 23(b)(2).

B. Section 23(b)(3)

There is also reasonable cause to believe that you violated § 23(b)(3) by intermixing your public and private dealings with Lyons. Section 23(b)(3) prohibits a state employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, with knowledge of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy his favor in the performance of official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence. This subsection's purpose is to deal with appearances of impropriety and, in particular, appearances that public officials have given certain people preferential treatment. Section 23(b)(3) provides that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record.

When you took official actions of interest to Lyons and/or NAGE at or around the same time that you solicited and received the above-described personal favor from Lyons, you knew or had reason to know that you were acting in a manner that would cause a reasonable person knowing all of the facts to conclude that Lyons and/or NAGE could unduly enjoy your favor or improperly influence you in the performance of your official duties as Personnel Administrator in violation of § 23(b)(3). You made no disclosure to dispel that appearance of impropriety.

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 also gives the appointing authority the opportunity to consider the appearance issues raised and to take appropriate action.[33]

In this case, while a timely, full disclosure would have resulted in your complying with § 23(b)(3), you would still have been in violation of § 23(b)(2). This is because the use of one's position to secure unwarranted privileges of substantial value for yourself or others always violates the law, regardless of any relevant public disclosure.

C. General Guidance

The Commission recognizes that a public employee may make inquiries or take actions concerning prospective employment opportunities without violating the conflict-of-interest law. *Commission Advisory No. 14* ("Negotiation for Prospective Employment") states:

> To comply with § 23(b)(2), a public employee must avoid misusing his or her position to exploit the vulnerability of persons or organizations that are dependent on the public employee's official actions. A public employee must, therefore, exercise caution when pursuing prospective employment with persons or organizations with matters pending within the official responsibility of the employee.

Thus, for example, a public employee may make general inquiries regarding prospective employment for himself (or for his family or friends) with persons who have or would be expected to have matters under his jurisdiction. Such inquiries, however, must be for information regarding possible employment prospects or suggestions that the public employee (or person on whose behalf he made the inquiry) might pursue. In addition, the public employee should not intermingle the private request for employment information with discussion or negotiation regarding public business. When a public employee is in doubt about how § 23(b)(2) would apply to his or her specific situation, particularly when seeking information from someone with whom he or she is discussing official business, the public employee should call the Commission for guidance in advance.

In our view, your initial statements to Lyons regarding your daughter's close friend's employment were not general inquiries for information. Rather, we infer from your stating to Lyons how difficult it was to obtain such a job that you were asking for his personal intervention and not just some ideas or leads. Indeed, Lyons appears to have reached the same conclusion because he immediately offered to give the young man a union job and, after you declined that, he told you that he would personally contact a university vice president who might be able to help. Significantly, he did not just give you the information on which to act.

Even if we accepted your view that the initial discussion was informational, your subsequent acceptance of a meeting with Lyons and the university vice president arranged by Lyons can hardly be viewed in that light. The meeting set up by Lyons confirms that you knew or had reason to know that Lyons was likely to go to considerable lengths to respond to your request, and in fact did so by inviting the university's vice president to lunch with you, and by informing the vice president that it was important to Lyons personally to help your daughter's close friend get a job. The Commission believes that Lyons took those actions primarily because of your position as Personnel Administrator, and not because of any personal relationship that he shared with you. You also knew or had reason to know that this second meeting was constructed by Lyons in such a way that one would expect the university vice president to do everything he could to have the university give the young man a job. And you knew or had reason to know that all of this private assistance was happening, at least in substantial part, because of your Personnel Administrator position.

Finally, when a public employee makes an employment inquiry or takes an action regarding prospective employment opportunities that complies with § 23(b)(2), the employee must still be mindful of § 23(b)(3). When a public employee contacts someone who "is a party to, or otherwise has an active interest in" a particular matter in which the employee is engaged, he or she should file a disclosure of the relevant facts prior to acting as a public employee on any matter of interest to that party. As the Commission noted in Advisory No.14, "[I]t is the act of having contacted the interested person or organization for possible future employment, while simultaneously having responsibility for a governmental matter in which the person or organization is interested, that triggers the disclosure requirements under § 23."

III. Disposition

The Commission is concerned that the misuse of one's official position or the failure to disclose relationships when appearances so require can significantly undermine the public's confidence in government. On the most serious level, such actions may raise the concern that the public official who has obtained a private benefit will not aggressively protect the public's interests when dealing officially with the party who provided that benefit. In such situations, the Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation.

In this case, however, the Commission chose to resolve this matter with a public education letter rather than imposing a civil penalty because it has not previously addressed this issue in a specific case. The Commission also believes that the public interest would best be served by providing educational guidance on the present facts, rather than seeking a civil penalty.

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

This matter is now closed.

DATE:December 3, 2002

[1/]The Commission has previously referred to similar letters as Public *Enforcement* Letters. Since the primary purpose of such letters, as noted in the Disposition section of the letter, has always been to provide "educational guidance," the Commission has decided to call these letters Public *Education* Letters.

[2/]The conclusion in this particular case that there was a use of position to obtain an unwarranted privilege is based on the cumulative effect of all the factors cited. No one factor is determinative. The Commission could reach the same conclusion in another case, even in the absence of one or more of these factors. Thus, each situation must be evaluated case-by-case, based on its own particular factors.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss.COMMISSION ADJUDICATORY
DOCKET NO. 622

IN THE MATTER
OF
ROBERT G. RENNA

DISPOSITION AGREEMENT

The State Ethics Commission and Robert G. Renna 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 23, 1999, pursuant to G.L. c. 268B, § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Renna. The Commission has concluded its inquiry and, on March 1, 2001, found reasonable cause to believe that Renna violated G.L. c. 268A, §§ 19 and 23.

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

Introduction

1. The Lexington-Arlington-Burlington-Bedford-Belmont Collaborative ("LABBB") operates public school programs for students with developmental challenges, and serves about 250 students between the ages of 10 and 22. LABBB is overseen by a board of directors comprising the public school superintendents and special education administrators of the five LABBB member communities. LABBB is a municipal agency within the meaning of G.L. c. 268A.

2. In 1977, the LABBB board of directors appointed Renna as one of its program directors. Renna continued to serve in that capacity until 2002. As such, Renna 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.

3. As a LABBB program director, Renna managed LABBB's Vocational Training Program in Lexington, and two smaller programs in Bedford and Belmont. Renna supervised the work of many LABBB employees and consultants. Renna's LABBB office was in the Lexington High School.

4. Since about 1981, the LABBB programs directed by Renna employed as a core component a counseling and management technique called "reality therapy," which LABBB employees working under

Renna's direction were encouraged to use philosophically and generally for classroom management. Renna himself was trained in reality therapy and provided reality therapy training at LABBB sites during LABBB hours to certain LABBB employees.

5. In 1993, Renna, two of his LABBB subordinates and a LABBB consulting psychologist formed a private, unincorporated business association called Northeast Reality Therapy Associates ("NERTA"). Until NERTA ceased its operations in 1997, NERTA's primary business was reality therapy training. Between 1993 and 1997, Renna trained others including LABBB staff in reality therapy for compensation under the NERTA name.

6. Reality Therapy training programs in which Renna, NERTA and LABBB all played roles at different points in time were held in June 1995, September 1995, June 1996, July 1996, February 1997, March 1997 and June/July 1997; some of these programs were held at Lexington High School.

Payment of LABBB Funds to NERTA

7. While employed by LABBB, Renna was responsible for managing a particular LABBB checking account ("the LABBB Vocational Account"). The LABBB Vocational Account was funded principally by the employers of LABBB students. It was used to pay both for expenses associated with the recreational activities and transportation of LABBB students, as well as for staff training. All checks written on the LABBB Vocational Account were either personally signed by Renna or stamped (with Renna's signature stamp) by Renna or one of two other LABBB employees.

8. As the signatory of the Vocational Account, Renna decided whether and to what extent the Vocational Account would be used to pay the tuition for LABBB staff to attend NERTA-sponsored reality therapy conferences, training and programs. Renna also approved or disapproved the decisions of LABBB staff concerning their participation in such training.

9. As a LABBB program director, Renna was in a position of trust with regard to LABBB funds in general and the LABBB Vocational Account in particular.

10. Between May 1995 and June 1997, Renna wrote ten checks on the LABBB Vocational Account totaling $10,350 for members of the LABBB staff to attend reality therapy training sessions. Renna endorsed these checks on behalf of NERTA and deposited them into NERTA's checking account. According to Renna, this money was used to pay for LABBB staff to attend NERTA-sponsored reality therapy conferences, training and programs.

11. In 2002, LABBB hired an independent accounting firm to sort out Renna's use of LABBB funds to pay NERTA. The independent auditor concluded that Renna had personally benefited from some of those payments. In settlement of the matter, Renna reimbursed LABBB for those amounts.

12. Except as otherwise provided therein, G.L. c. 268A, § 19 prohibits a municipal employee from participating as a municipal employee in a particular matter in which to his knowledge he or a business organization in which he is serving as an officer, director, trustee, partner or employee has a financial interest.

13. By deciding as a LABBB program director to make each above-described payment to NERTA using LABBB Vocational Account funds while knowing that NERTA had financial interests in those decisions, Renna participated as a municipal employee in particular matters in which to his knowledge he and a business organization of which he was an owner and employee had financial interests. Each time he so acted, Renna violated § 19. None of the § 19 exemptions apply in this case.

Use of LABBB Funds to Pay NERTA Instructors and Speaker

14. Between 1995 and 1997, at or around the time of each of NERTA's reality therapy programs, Renna received and deposited into NERTA's checking account numerous tuition payment checks from NERTA program participants, including LABBB staff, payable to NERTA.

15. In June 1995, Renna as a LABBB program director approved and/or authorized the preparation of two LABBB purchase orders requesting that LABBB pay a total of $7,650 to two reality therapy instructors who taught at a June 1995 NERTA reality therapy training program. Renna signed both his name and his supervisor's name to these two purchase orders as he was authorized to do on all such purchase orders. Renna then submitted the purchase orders or caused them to be submitted to LABBB's fiscal agent for approval and payment. LABBB's fiscal agent approved these LABBB purchase orders as submitted, and the two instructors were compensated with LABBB funds.

16. In June 1996, Renna wrote two LABBB Vocational Account checks totaling $3,479.86, payable to a reality therapy instructor who taught at a June 1996 NERTA reality therapy training program. The money covered the instructor's training fee, travel and expenses.

17. In March 1997, Renna wrote a $1,900 LABBB Vocational Account check payable to William Glasser, one of the creators and a leading proponent of reality therapy. The money covered Glasser's attendance fee for speaking at a March 14, 1997 NERTA program.

18. The money that LABBB paid to NERTA's

instructors and to Glasser should have been paid from the tuition payments provided by the program participants, including tuition payments provided by LABBB on behalf of its staff. By using additional LABBB funds to pay the instructors, Renna saved NERTA a substantial sum of money that NERTA would otherwise have had to pay, even if the events were jointly sponsored. NERTA benefited from this savings.

19. By deciding as a LABBB program director to pay NERTA program instructors with LABBB funds or from the LABBB Vocational Account while knowing that NERTA had financial interests in those decisions, Renna participated as a municipal employee in particular matters in which to his knowledge he and a business organization of which he was an owner and employee had financial interests. By so acting, Renna violated § 19. None of the § 19 exemptions apply in this case.

20. 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 obtain for himself or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals. Anything worth $50 or more is of substantial value for G.L. c. 268A purposes.

21. By his above-described use of LABBB funds to pay NERTA's instructors and Glasser when NERTA should have made those payments, Renna knowingly or with reason to know used his official position as a LABBB program director to obtain unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals. By so acting, Renna violated § 23(b)(2).

Use of LABBB Funds to Pay Renna's American Express Expenses

22. From 1995 through 1997, Renna used the LABBB Vocational Account to make at least ten payments to his personal American Express account. These payments totaled over $8,000. The LABBB Vocational Account and the procedures for its use were established by LABBB, and according to Renna, this money was used in accordance with LABBB procedures to pay for LABBB-related expenses incurred while out-of-state.

23. The independent auditor reviewed the AmEx charges and concluded that the expenses were attributable to conferences and seminars consistent with professional development activities that LABBB supported.

24. By deciding as a LABBB program director to use the LABBB Vocational Account to pay his AmEx account while knowing that he had financial interests in those decisions, Renna participated as a municipal employee in particular matters in which to his knowledge he had financial interests. By so acting, Renna violated § 19. None of the § 19 exemptions apply in this case.

Resolution

In partial settlement of these matters with LABBB, Renna reimbursed LABBB $9,000 and resigned his position as program director. In view of the foregoing violations of G.L. c. 268A by Renna, 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 Renna:

(1) that Renna pay to the Commission the sum of $4,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 23(b)(2), in accordance with the attached appendix; and

(2) that Renna 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 4, 2002

State Ethics Commission
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