

STATE ETHICS COMMISSION

Advisory Opinions

Enforcement Actions

for Calendar Year 2003

Commissioners

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Included in this publication are:

•**State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 2003.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe, 2003 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 2003.** Cite Conflict of Interest Formal Advisory Opinions as follows: *EC-COI-03-(number)*.

•**State Ethics Commission Advisories issued in 2003.** Cite Conflict of Interest Advisories as follows: *EC-ADV-03-(number)*.

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

State Ethics Commission

Advisory Opinions

2003

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*Advisory Opinion EC-COI-03-4 was omitted from the original 2003 Rulings and has been inserted on pages 796-1 to 796-5.

Summaries of Advisory Opinions Calendar Year 2003

EC-COI-03-1 - Pursuant to G.L. c. 268A, §4, a probation officer may receive statutory fees (compensation) from a party other than the Commonwealth for services rendered as a constable in relation to litigation matters involving only non-state parties. A probation officer may not receive compensation as a constable for services rendered in connection with criminal proceedings or proceedings before a state court or agency where the Commonwealth or a state agency is a party or has a direct and substantial interest. (This opinion modifies *EC-COI-94-4*.)

EC-COI-03-2 - Pursuant to G.L. c. 268A, §17, a City Councilor may not apply on behalf of and receive compensation from a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit because the City Council regulates the activities of the permit-granting agency.

EC-COI-03-3 - Pursuant to G.L. c. 268A, §21A, a board member is eligible to apply for a position under the supervision of the board on which he serves without first resigning his board position. The board, however, may not take any action regarding the board member's application, such as selecting him for an interview, until 30 days have elapsed after the board member has terminated his service as a member. The board, however, may act within the 30-day period on any other application.

EC-COI-03-4 - A certain public agency is a "municipal agency" as that term is defined in G.L. c. 268A, the conflict of interest law, and, accordingly, its members and employees are municipal employees within the meaning of that law. Another certain public agency is a "county agency" and, accordingly, its members and employees are county employees within the meaning of that law. The text of this opinion was not available as of the date of publication. When available, the opinion will be posted on the Commission's web site and added to these rulings.

CONFLICT OF INTEREST OPINION EC-COI-03-1

QUESTION:

May a District Court probation officer accept statutory fees for providing services as a municipally appointed constable?

ANSWER:

A probation officer may receive statutory fees (compensation) from a party other than the Commonwealth for services rendered as a constable in relation to litigation matters involving only non-state parties. A probation officer may not receive compensation as a constable for services rendered in connection with criminal proceedings or proceedings before a state court or agency where the Commonwealth or a state agency is a party or has a direct and substantial interest. Moreover, he may not receive compensation derived from a contract with the Commonwealth or a state agency, except under limited circumstances described below.

FACTS:

This opinion is rendered at the request of a probation officer in a district court. The officer would also like to serve as a municipally appointed constable. He would not conduct constable business during his probation officer working hours, and would not execute any arrests at any time. His sole function then would be serving court documents – such as complaints, subpoenas and notices – for private attorneys after his probation officer working hours and on weekends.

DISCUSSION:

Probation officers are state employees¹ for purposes of the conflict-of-interest law. Constables are municipal employees² for the purposes of the conflict-of-interest law.³ This opinion addresses in depth the issues under G.L. c. 268A, §§ 4 and 7 raised when probation officers serve as constables, and notes issues raised under G.L. c. 268A, §§ 6, 17, 19 and 23 as well.⁴

Section 4

Section 4(a) prohibits a state employee from “otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiv[ing] or request[ing] compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter⁵ in which the Commonwealth or a state agency is a party or has a direct and substantial interest.”⁶ Constables are compensated according to a statutory fee schedule for providing service of process.

Section 4 is based on the principle that “public employees should be loyal to the state, and where their loyalty to the state conflicts with their loyalty to a private party or employer, the state’s interest must win out.”⁷ In discussing § 17(a), the municipal counterpart to § 4(a), the Commission has stated that the section “does not require a showing of any attempt to influence – by action or inaction – official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered to the private interests when his sole loyalty should be to the public interest.”⁸ The purpose of the section – ensuring a public employee’s undivided loyalty – guides the Commission’s analysis.⁹

Under § 4(a), within the context of litigation matters, the Commission has found that the Commonwealth is a party to, and has a direct and substantial interest in all criminal matters and in all civil matters where the Commonwealth or a state agency is named as a party.¹⁰ Thus, full-time state employees may not receive compensation from private clients in particular matters that “bring the financial interest of the state into play” and in regulatory or adjudicatory proceedings in which the state is a party.¹¹

Next we consider whether a constable’s compensation for serving process would be “in relation to” a lawsuit maintained by one for whom the constable served process, and thus in violation of § 4(a). The word “related” is defined in *Webster’s Third New International Dictionary* (1993) as meaning “having relationship: connected by reason of an established or discoverable relation.” Service of process is not just “connected” to the prosecution of a lawsuit, it is *integrally* connected to the prosecution of the suit. Absent service on parties, a case cannot go forward. Accordingly, we conclude that a constable’s service of process is “in relation to” the suit being prosecuted by the party for whom the constable serves process.

Because neither the Commonwealth nor a state agency has a direct and substantial interest in litigation matters involving only private parties, a constable may, while also a state employee, receive compensation from a party other than the Commonwealth for his services as a constable in such cases. A constable may *not*, however, receive compensation from a party other than the Commonwealth or a state agency in connection with *any* matter in which the Commonwealth or a state agency is a party, such as a criminal proceeding. Nor may a constable receive compensation in connection with any proceeding before a state court or agency where the Commonwealth or a state agency is a party or has a direct and substantial interest. For example, § 4 would prohibit a constable from being compensated by anyone other than the Commonwealth or a state agency for serving process in a child custody matter involving the Department of Social Services, a personal injury case

where the state is a party or a workers compensation case involving an injured state employee.

Section 4 contains several exemptions to the prohibition against receiving compensation from non-state parties in relation to matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest. Two exemptions are relevant to our discussion. One is included in the language of the § 4(a). The section permits state employees to receive compensation that would be barred under § 4(a) when such compensation is “otherwise... provided by law¹² for the proper discharge of official duties.” The other relevant exemption provides that § 4 “shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.” This second exemption is commonly referred to as the “municipal exemption.”

“[O]therwise...provided by law for the proper discharge of official duties.”

The Commission, in EC-COI-94-4, indicated that since constable fees were provided for by law, this statutory language permitted a court employee who also served as a municipal constable to accept fees for service of process in litigation in which the Commonwealth or a state agency was a party or had a direct and substantial interest. We take this opportunity to reconsider that opinion.

In interpreting this statutory language, we are guided by the legislative purpose of § 4(a).¹³ We believe that reading the exception to apply to compensation for state employees discharging their official duties *as state employees* effectuates the purpose of the statute, namely to ensure an employee’s undivided loyalty to the Commonwealth. If a constable who is also a state employee may accept statutory fees from non-state parties for private matters in which the Commonwealth or a state agency has an interest or is a party, his loyalties will be divided. This concern does not develop where a law permits state employees to be compensated by a non-state party for doing his state job. In such a case, the employee’s sole loyalty remains with the Commonwealth.

Furthermore, a rule of statutory construction states that a “limited or restrictive clause contained in [a] statute is generally construed to refer to and limit and restrict [the] immediately preceding clause or the last antecedent.”¹⁴ Another way to state this rule is that “words are to be applied to the subjects that seem most properly related by context and applicability.”¹⁵ Applying

this canon of construction to § 4(a) would bind the “otherwise provided by law” language to the language immediately preceding it in the statute, to wit, that “[n]o state employee shall otherwise...” In other words, the only position named in the section that “official duties” can modify is the state employee position. There is no other public position mentioned in § 4(a).

In addition, if compensation for any and all official duties as a municipal or county employee were permissible under § 4(a), then the municipal exemption, which permits compensation for municipal officials under some circumstances under § 4, would be rendered superfluous. “It is a common tenet of statutory construction that, wherever possible, no provision of a legislative enactment should be treated as superfluous.”¹⁶ Insofar as compensation for municipal officials is provided for by municipal ordinance or bylaw, the reading of “otherwise provided by law” in EC-COI-94-4 would exempt such compensation from § 4(a), making the municipal exemption unnecessary.

Accordingly, based on its analysis of § 4(a) using long-standing traditions of statutory construction, the Commission concludes that the legislature intended, in drafting § 4(a), to allow state employees to collect private compensation provided by law for the proper discharge of their official duties *as state employees*. A probation officer is not required, as part of his official duties, to serve as a constable or to serve process. Therefore, a constable’s compensation, for service of process, though statutorily provided for, is not exempted from § 4(a)’s bar to state employees receipt of compensation in relation to particular matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

We recognize that our current reasoning is not consistent with the interpretation of “otherwise than provided by law” in EC-COI-94-4. To the limited extent EC-COI-94-4 is inconsistent with the opinion we announce today, we reverse EC-COI-94-4.¹⁷

The municipal exemption

The other exemption applicable to a state employee who is also serving in a municipal position, such as an appointed constable, is the municipal exemption, printed above. Under the exemption, a state employee who is also a constable may accept a fee for serving process even if that fee is in connection with a particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest so long as that compensation is not for work “within the purview” of the state agency that employs him. We turn then to the questions of what agency employs district court probation officers, and whether service of process is within the purview of that agency.

Under G.L. c. 276, § 83, a probation officer may be assigned by the Chief Justice for Administration and Management to “the several sessions of the trial court as he deems necessary.” As the Commission stated in EC-COI-94-4, “[s]ince the CJAM is the administrative head of the entire Trial Court and court officers are employees of the CJAM, court officers are employed by the Trial Court rather than the department to which they have been assigned.” Accordingly, the agency that employs a probation officer is not the department to which he is assigned, but the entirety of the Trial Court. We turn next to whether service of process is “within the purview” of the Trial Court.

Purview is defined in *Webster’s Third New International Dictionary* (1993) as meaning “range or limit of authority, competence, responsibility, concern or intention.” The Commission has found that the term purview includes “any matter which is regulated, reviewed, or supervised by the state agency in question.”¹⁸ Applying this rule in EC-COI-93-12 the Commission held that an aide to the Governor could not act on “any matter which involve[d] the Executive Branch of the State Government,” since the entirety of the executive branch was under the Governor’s purview.

Our past opinions lead us to conclude that the service of process is within the purview of the Trial Court, i.e., regulated, reviewed or supervised by the trial court. We start by noting that disputes over whether service has been perfected are necessarily addressed by the Trial Court. Further, process service is extensively regulated and supervised by the Trial Court. Under Mass. R. Civ. P. Rule 4(b), summonses served “shall bear the signature or facsimile signature of the clerk,” and “be under the seal of court.” Rule 4(c) provides that service of process can be made by “some person specially appointed by the court for that purpose. Rule 4(f) provides that the person serving the process shall make proof of service thereof in writing *to the court.*” (emphasis added.) Rule 4(g) provides that “[a]t any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended.” Rule 4(j) provides that, absent a showing of good cause, the court shall dismiss a case when service is not made on the defendant within 90 days of the filing of the complaint. Based on these rules of procedure, the Commission finds that service of process is within the purview of the Trial Court. Accordingly, a constable’s work serving papers in matters in which the state or an agency is a party, or has a direct and substantial interest, would be “within the purview of his agency” and therefore not exempted under the municipal exemption. In conclusion, § 4 does not contain any exemption that would allow a probation officer who is also a constable to be compensated for serving process in a matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

Section 7

Section 7 of the conflict of interest law prohibits a state employee from having a direct or indirect financial interest in a state contract unless a statutory exemption applies. Because a probation officer is a state employee, issues will arise under § 7 if his fee as a constable were derived from a contract which a private party or the constable had with the Commonwealth or a state agency. Under those circumstances, the probation officer would have a direct financial interest in the arrangement with the Commonwealth or the state agency in question.

For example, if a constable who is also a full-time state employee is asked to serve process for the Attorney General’s Office, he will have a financial interest in a contract made by a state agency, thus implicating § 7. The only exemption available to him is § 7(b). In order to be able to use that exemption, the constable needs to comply with the following requirements. First, he may not be employed by the contracting agency (in this example, the Attorney General’s office) or an agency that regulates the activities of the contracting agency. Second, he may not participate in or have official responsibility¹⁹ for any of the activities of the contracting agency. Third, the contract must be made after public notice²⁰ or competitive bidding. Fourth, he must file a statement making full disclosure of his interest in the contract with the Commission. Fifth, the services must be provided outside his normal working hours as a state employee. Sixth, his services may not be required as part of his regular state employee duties. Seventh, he may not be compensated for such services for more than five hundred hours during a calendar year. Finally, the head of the contracting agency must make and file with the Commission a written certification that no employee of that agency is available to perform the services as part of their regular duties.

If a state employee who is also a constable complies with all of the requirements of § 7(b), he may use that exemption to perform constable services for the state or a state agency. If *any* of the requirements of § 7(b) are not met, however, he may not use the exemption and therefore, may not do the work.

Other sections

As noted above, §§ 6, 17, 19 and 23 of the conflict-of-interest law also govern the conduct of a state employee also serving as a constable.²¹ Under § 6, a probation officer may not participate as such in a particular matter in which the town which appoints him constable has a financial interest. Under § 17, the municipal counterpart to § 4, the constable should not represent or accept compensation from third parties, including the Commonwealth, in connection with particular matters in

which the town which appoints him has a financial interest or is a party. Under § 19, the constable should not serve process for, among others, an immediate family member or an organization with whom he is negotiating for prospective employment. Finally, under § 23 the probation officer must refrain from using state resources to conduct his constable work, or using his status as a probation officer to solicit clients.

DATE AUTHORIZED: August 14, 2003

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

² “Municipal employee” means in relevant part “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). All constables are municipal employees. See G.L. c. 41, §§ 91-95.

³ EC-COI-85-41. See also EC-COI-86-8 (providing examples of the “broad range of statutory powers” afforded to constables).

⁴ The Commission notes that conflict-of-interest issues would also be raised by state employees serving process as deputy sheriffs. If those deputy sheriffs were county government employees, the arrangement would raise issues under §§ 4, 7, 11, 13 and 23. If the deputy sheriffs were state employees, the arrangement would raise issues under §§ 7 and 23. This opinion is, however, necessarily limited to the facts put to the Commission by the requester.

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

⁶ Section 4(c) prohibits a state employee from “otherwise than in the proper discharge of his official duties, act[ing] as agent or attorney for anyone other than the Commonwealth or a state agency for prosecuting any claim against the Commonwealth or a state agency, or act[ing] as agent or attorney for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.” The Commission has previously considered an official to be acting as an agent when he “speaks or acts on behalf of another in a representational capacity...[such as] submitting an application or other document to the government for another, or serving as another’s spokesperson.” EC-COI-92-25. The Commission has held that a constable’s service of process on private parties does not make the constable an “agent” of the party for whom he serves process. EC-COI-94-4. We do not disturb that holding today.

⁷ EC-COI-82-176.

⁸ *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977). See also *Edgartown v. State Ethics Comm’n*, 391 Mass. 83, 89 (1984) (Legislature’s concern about conflicts between public duties and private

interests “may reasonably have motivated it to prohibit involvements that might present potential for such conflicts”).

⁹ “[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975).

¹⁰ EC-COI-89-31; 88-1; 82-31.

¹¹ EC-COI-82-33.

¹² “By law” has been interpreted by the Commission to mean authorized by state statutes or regulations, or municipal ordinances or bylaws. EC-COI-92-4 (state); EC-COI-92-10 (municipal).

¹³ See footnote 7. See also EC-COI-96-1.

¹⁴ 2A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 47.26, at 334 (6th ed. 2000).

¹⁵ *Id.* at 333.

¹⁶ *Casa Loma, Inc. v. Alcoholic Beverages Control Comm’n*, 377 Mass. 231, 234 (1979).

¹⁷ The Commission notes that EC-COI-94-4 relied on an opinion of § 4(a) – EC-COI-84-143 – that the Commission then declined to follow in *In re Quinn*, 1986 SEC 265 (bail commissioner ordered to cease and desist accepting fees in violation of § 7).

¹⁸ EC-COI-92-22.

¹⁹ “Official responsibility” means “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).

²⁰ “The term ‘public notice’ is not defined in the conflict law. However, we have previously interpreted this term to require advertisement of the position ‘in a newspaper of general circulation.’” EC-COI-95-7 (quoting EC-COI-87-24).

²¹ A concise discussion of the application of §§ 6, 17 and 23 to a state employee serving in a municipal capacity can be found in EC-COI-92-25. EC-COI-85-41 contains a detailed discussion of § 23’s application to probation officers serving as constables.

CONFLICT OF INTEREST OPINION EC-COI-03-2

QUESTION:

May a City Councilor of the City of X apply on behalf of, or receive compensation from, a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit from the City's Department of Inspectional Services, or be privately compensated to perform work pursuant to these permits?

ANSWER:

No. The specific exemption that allows a municipal employee to apply on behalf of and receive compensation from a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit is not available to a City Councilor of the City of X because the City Council regulates the activities of the permit-granting agency.

FACTS:

You are a member of the City Council of the City of X (City). You are also an officer of a private construction company (Company). In that, you enter into contracts on behalf of the Company so it may serve as general contractor while you personally serve as the construction supervisor. You are also a licensed professional engineer.

Your private work involves preparing plans and documents clients use in applying for building permits. In the City, the Department of Inspectional Services (Department),¹ the Zoning Board, Planning Board and, in some instances, the Conservation Commission grant permits based on such plans. The Commissioner of Inspectional Services (Commissioner) is appointed by the Mayor and his appointment is confirmed by majority vote of the City Council.² The Commissioner is in charge of all subordinate officers and employees of the Department, including, the building commissioner, two building inspectors, a plumbing and gas inspector, the director of health and code services, sanitary code inspectors, sanitary inspectors, food and milk inspector, public health nurses, the sealer of weights and measures, and the assistant sealer of weights and measures.³

The City Council must review and approve or disapprove any ordinance involving Department regulations. If the Department wishes to change the fees it imposes, the Council must approve or disapprove such a change. The Council must also review and approve or disapprove any reorganization of the Department. The Mayor's appointees to the Department or his decisions to remove personnel from the Department must be reviewed and approved or disapproved by the Council. Although

the Council does not negotiate the union contracts involving Department personnel, it must approve or disapprove appropriating funds for those contracts. The Council must review and approve or disapprove pay increases/decreases in non-union contracts. The Council also must review and approve or disapprove the Department's budget and any supplemental budget requests.

It is most noteworthy that the City Council approves all the City ordinances that govern the operation of the Department. The Department and its composition are established by City ordinance.⁴ City ordinance establishes the fees the Department may charge for various types of inspections.⁵ The Commissioner is appointed by the Mayor, subject to confirmation of the City Council. The City ordinances require the Commissioner to make an annual report of the Department's activities to the City Council.⁶ City Ordinances.

The City Council approved the "City of X Zoning Ordinance" (Zoning Ordinance).⁷ For example, any change to the Zoning Ordinance, regardless of who proposed the change, must be reviewed and approved by the Council.⁸ The City Council has the authority to amend the Zoning Ordinance.⁹ The Department personnel must apply the Zoning Ordinance.

The City Council, like the Mayor, has no role in specific decisions about the application of the State Building Code or Health Code.¹⁰ Any disputes an applicant may have about the Department's interpretation of the Building Code may be appealed to the Commonwealth's Board of Building Regulations and Standards¹¹ or a state building inspector "may review any order or decision of a local inspector."¹²

Finally, the City Charter calls for a committee on personnel and administration, "to which shall be referred all personnel measures within the purview of the city council, and all measures the effect of which would be to alter the administrative structure of the city government."¹³

According to the City Attorney and the Ordinances, the City Council, as the legislative body of the City, does not oversee the day-to-day administration of municipal officers or boards.¹⁴

DISCUSSION

As a City Councilor, you are a municipal employee¹⁵ subject to the conflict law. Section 17 of G. L. c. 268A generally prohibits a municipal employee from receiving compensation from, or from acting (with or without compensation) as agent¹⁶ or attorney for, anyone other than the City in relation to any particular matter¹⁷ in which the City is a party or in which it has a "direct and substantial interest."¹⁸

Section 17 is aimed at prohibiting misconduct arising from divided loyalty and influence peddling.¹⁹ “The Legislature was entitled to [preclude] all potential conflicts before they become a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. These ‘section[s] of the statute [reflect] the old maxim that “a man cannot serve two masters.” [They seek] to preclude circumstances *leading to a conflict of loyalties by a public employee.*’”²⁰ Accordingly, there are concerns that a municipal employee may not only favor a private interest over his municipality’s interest in a particular matter but also be in a position, when acting as a private agent, to exert undue influence on behalf of his private client.

The Commission has concluded that being paid to prepare plans for submission to a municipal authority for approval constitutes receiving compensation in relation to a particular matter of direct and substantial interest to the municipality.²¹ Similarly, being compensated to perform work pursuant to a permit is presumptively in relation to the permit.²² With respect to building permits, the municipality “has a direct and substantial interest in an application for, and the issuance of, a building permit because the issuance of a permit is the local building official’s decision or determination that the work complies with all relevant codes, laws, ordinances, rules or regulations.”²³

In 1998, § 17 was amended to add the following exemption from the general prohibition:

This section shall not prevent a municipal employee from applying on behalf of anyone for a building, electrical, wiring, plumbing, gas fitting or septic system permit, nor from receiving compensation in relation to any such permit, *unless* such employee is employed by or provides services to the permit-granting agency or an *agency that regulates the activities* of the permit-granting agency.²⁴

As we said in *EC-COI-99-3*, this exemption allows “a municipal employee to apply for a permit, or be paid in relation to one, so long as the employee’s own agency is not the agency which issues the permit, and is not an agency which regulates the activities of the permit-issuing agency.”²⁵ As a City Councilor, you are not “employed by . . . the permit-granting agency,” which is the Department, and you do not, as a City Councilor, “provide services to” the Department, as that phrase is commonly understood. For the purposes of § 17, you are “employed by” the City Council because that is the municipal agency²⁶ in which you are holding an office.

The issue is whether the City Council is “an agency that regulates the activities of” the permit-granting agency.²⁷

Our analysis of this issue begins with the plain meaning of the statutory language in the exemption.²⁸ As we recently discussed in *EC-COI-99-2*, because the term “regulate” is not defined in the conflict law, we may look to commonly accepted meanings. “Regulate” has been defined as “to govern or *direct according to rule* or bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists.”²⁹ This meaning has been applied in the contexts of zoning,³⁰ electrical utility regulation,³¹ or insurance regulation.³² Similarly, concepts described in the general definitions of “regulate” appear, for example, in the General Laws about watershed resources³³ and fisheries.³⁴

To date, we have not applied this exemption in § 17 to the relationship between a city council and another city agency under the City’s form of government.³⁵ In *EC-COI-91-9*, the agency in issue was separate from the city council except that the council approved the agency’s budget. The agency’s appointing authority was a commission appointed by the mayor. In those circumstances, the Ethics Commission concluded that city councilors had “either regulatory control over, or participate[d] in, activities of the agency” for purposes of § 20, which prohibits a city councilor from having, in addition to his city council position, a direct or indirect financial interest in a city contract unless he qualifies for one of the § 20 exemptions. In that opinion, however, the Commission did not discuss what the phrase “regulatory control over” means, although the Commission cited the definition we have quoted above.

By contrast, but again in applying the § 20 rather than the § 17 prohibition, the Commission has decided that city councilors do not have official responsibility for, and do not regulate the activities of, a school committee for purposes of applying the phrase “regulates the activities of the contracting agency” appearing in § 20(b).³⁶ We stated in that opinion that “under no set of circumstances could we conclude that the Council directs or governs the activities of the School Committee, particularly given that the Legislature has expressly stated otherwise with respect to the School Department budget allocations, and educational policy and programmatic issues.”³⁷

Here, by contrast, the City Council, as the City’s legislative body, possesses considerable power over the Department. The City Council must review and approve any change in the Department’s regulations. The Council has the authority to approve the City’s Zoning Ordinance, which the Department applies as part of its duties, and any other City ordinances that govern the Department’s operations. The Council sets the fees that the Department charges. All measures involving expenditures of City funds

are subject to the Council's review and approval or disapproval. In addition, the Council reviews all measures that would alter the City government's administrative structure, including the Department. Moreover, the City Council must approve or disapprove the appointment of the Commissioner. These types of functions exemplify the power to "direct according to rule" or "to control that which already exists." We conclude, therefore, that the City Council regulates the activities of the Department.³⁸

Accordingly, we conclude that this exemption to § 17 is not available to you, as a City Councilor, because you are employed by an agency, the City Council, that regulates the activities of the permit granting authority, the Department.

As a result, the conflict of interest law continues to prohibit you from being compensated by and from acting (even for no compensation) as agent for your private engineering and construction clients or the Company in relation to any particular matter in which the City is a party or in which it has a direct and substantial interest. The conflict law prohibits you from being privately paid to prepare, for example, engineering plans that your clients must submit to the Department to obtain a building permit. Similarly, you may not be paid by a private source, or act as agent for a private party, to submit engineering plans to any other City agency for its review and approval. You may not, on behalf of a private client act as a construction supervisor, perform work pursuant to a building permit, or represent the private client in dealings with City officials who must inspect and approve the work.³⁹

DATE AUTHORIZED: September 18, 2003

¹ City Ordinances.

² City Charter.

³ City Ordinances.

⁴ City Ordinances.

⁵ City Ordinances.

⁷ City Ordinances.

⁸ City Ordinances.

⁹ City Ordinances.

¹⁰ Compare G. L. c. 143, § 3Z, entitled "Regulation of building inspectors also practicing for hire or engaged in business," if the city council accepts this section, part-time building inspectors may "practice for hire or engage in the business for which he is certified" provided that he not exercise "any of his powers and duties as such inspector" with respect to his own (private) work. We do not know whether the City Council has accepted § 3Z.

¹¹ G. L. c. 143, § 100.

¹² G. L. c. 143, § 3A.

¹³ City Charter.

¹⁴ The City Attorney, at your request and with your permission, provided us the relevant information and copies of the applicable provisions from the City Charter and City Ordinances.

¹⁵ "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).

¹⁶ The 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).

¹⁷ "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).

¹⁸ G. L. c. 268A, § 17.

¹⁹ *EC-COI-99-7*.

²⁰ *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984) (emphasis added in *Edgartown*) (quoting *Commonwealth v. Canon* 373 Mass. 494, 504 (1977), cert. denied, 435 U. S. 933 (1978) (Liacos, J., dissenting on other grounds)).

²¹ See e.g., *EC-COI-87-31*; *PEL 98-1*; *PEL-99-2*.

²² *EC-COI-87-3*; *EC-COI-88-9*.

²³ *EC-COI-88-9*. See also *PEL 99-2*; *PEL 98-2*.

²⁴ Emphasis added. St. 1998, c. 100.

²⁵ Although one employed by the permit-granting agency may be in the *best* position to exert influence, the language must also mean that the Legislature was concerned about other municipal employees who are part of the agency that "regulates the activities of the permit-granting agency." An individual who is employed by an agency that regulates the activities of the permit-granting agency, while perhaps not as influential as one employed by the permit-granting agency, is also in a position to exert undue influence. Similarly, one who *provides services* to the permit-granting agency may exert influence. In contrast, one who only provides services to an agency that, in turn, regulates the activities of the permit-granting agency may not be as influential. Again, keeping in mind the purposes of § 17, we have commented, "This serves to prevent the conflict of interest which would arise, if, for example, an employee's permit application were to be reviewed by a co-worker, subordinate *or superior* to his own agency." *EC-COI-99-3* (emphasis added).

²⁶ "Municipal agency, any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder." G. L. c. 268A, § 1(f).

²⁷ For purposes of this exemption, it is not relevant whether the City Council may also regulate the activities of the zoning board of appeals, planning board or conservation commission because those municipal agencies do not grant "building, electrical, wiring, plumbing, gas fitting

or septic system permits.” In general, the Commission is obligated to narrowly construe exemptions to the conflict law’s prohibitions. *EC-COI-01-1*.

When the express language does not include such permits or approvals such as a variance, special permit or order of conditions, the Commission has not interpreted such clear language to include those other types of municipal permits. “[W]hen the legislature expresses things through a list, the court assumes that what is not listed is excluded.” Singer, *Sutherland Statutory Construction*, § 47: 23 (6th Ed.). Section 17, therefore, prohibits a City Councilor from being privately compensated and from acting as agent or attorney for a private party in relation to, for example, permits issued by the zoning board of appeals, planning board or conservation commission.

²⁸ *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.”)

²⁹ *EC-COI-99-2* (from *Black’s Law Dictionary*, 5th ed. West, 1979). See also *Webster’s Third New International Dictionary* (1993) (“to govern or direct according to rule . . . to bring under the control of law or constituted authority . . . to reduce to order, method or uniformity . . . to fix the time, amount, degree, or rate of (as by adjusting, rectifying).”).

³⁰ *Foster v. Mayor of Beverly*, 15 Mass. 567, 569 (1944) (discusses G. L. (Ter. Ed.) c. 40, § 25, which provided that to promote health, safety, convenience, morals or welfare of inhabitants, a city “may by ordinance . . . regulate and restrict the . . . use of . . . land for trade, industry, residence or other purposes.”).

³¹ *Shea v. Boston Edison Company*, 431 Mass. 251, 253-254 (2000) (the Department of Telecommunications and Energy’s authority includes the right to approve of, and regulate, rates charged by investor-owned utilities to customers while the Department’s regulatory authority over municipal lighting plants (MLPs) “has been minimal.” “Most MLP’s are governed by a locally elected board Daily MLP operations are overseen by an appointed manager. . . . Without department review or approval, MLP’s have had the authority to acquire property, . . . enter into contracts to purchase electricity, . . . or to purchase equipment, supplies, or materials, . . . to incur debt, . . . and to raise capital.” *Id.* at 254).

³² *Ryan v. Fallon Community Health Plan*, 921 F. Supp. 34, 38, 37 (D. Mass. 1996) (“The Massachusetts law of breach of contract is not a law that ‘regulates insurance’ under either a common sense view or the McCarran-Ferguson Act factors,” which include whether the state law has the effect of transferring or spreading a policyholder’s risk, the state law is an integral part of the policy relationship between the insurer and insured, and whether the state law is limited to entities within the insurance industry.)

³³ G. L. c. 131, § 39A (describes how municipalities within Berkshire county may adopt rules and regulations to protect watershed resources; defines the term “regulated activities” as “removal, filling, excavation or other alteration of land within mountain regions . . .”; defines the term “regulations” as “reasonable rules or regulations to carry out provisions of this section for the protection of watershed resources . . .”)

³⁴ G. L. c. 130, § 80 (“No person shall take or sell fish from a fishery regulated by the director [of the Division of Marine Fisheries] without a regulated marine fishery permit . . .”).

³⁵ *EC-COI-99-3* describes firefighters who were effectively employed by the permit-granting agency.

³⁶ *EC-COI-99-2*.

³⁷ *EC-COI-99-2*.

³⁸ In addition, we are obligated to narrowly construe exemptions to the conflict law’s prohibitions. *EC-COI-01-1*. The language of this exemption shows that the intent is to allow municipal officials to work privately on these specific permits, as long as their municipal positions are sufficiently isolated from having an ability to affect the permit-granting agencies.

The public policy behind the conflict law supports not allowing a City Councilor to place himself, through his private endeavors, in a position to favor his private client’s interests over the interests of the City’s Inspectional Services Department in enforcing the Building Code or the City’s Zoning Ordinance. Similarly, the Commissioner would be understandably concerned about how the Department handled such an applicant’s permit application, or interpretation of the Building Code or Zoning Ordinance, knowing that the applicant was represented by a City official who had power over the Commissioner’s job, his budget, or administrative structure.

³⁹ These are some examples, and are not meant to be a complete list of particular matters that would be prohibited from the City Councilor’s private work within the City. He is also obligated to inquire from prospective clients whether the work will involve any matters that might put him in violation of the conflict of interest law. See e.g., *EC-COI-98-1* (in discussing § 4, the state counterpart to § 17, the Commission advised state employee that at the time a prospective private client approaches him, he has a duty to inquire whether his proposed work is reasonably likely to involve particular matters prohibited under § 4).

CONFLICT OF INTEREST OPINION EC-COI-03-3

QUESTION:

May you apply for a position under the supervision of the board on which you serve without first resigning your board position?

ANSWER

You are eligible to apply without having to resign. The board, however, may not take any action regarding your application, such as selecting you for an interview, until 30 days have elapsed after you have terminated your service as a member. The board, however, may act within the 30-day period on any other application.

FACTS

You are the Town’s representative to an authority (“Authority”), a state board. The Authority is a body corporate and a public instrumentality.¹ The Authority’s mandate is to provide transportation, and, in that connection, to issue bonds.² The Authority’s board

(“Board”) consists of five persons, one of whom must be a resident of the Town appointed by the selectmen. The members serve without compensation.³

The Board created an associate general counsel position among its staff. This is a full-time paid position. The Board periodically gives direction and oversight to its attorneys, including the associate general counsel. There may be a vacancy in the associate general counsel position. You are interested in applying and interviewing for that position without having to first resign your Board position.

DISCUSSION

For purposes of the conflict of interest law, as a Board member you are a state employee.⁴ Where you would be seeking an appointment to a position under the Board’s direction and oversight, that would be a position under the supervision of your board. The answer to your question, then, turns on the meaning of the phrase “eligible for appointment or election” as used in G.L. c. 268A, § 8A. Section 8A of states:

No member of a state commission or board shall be eligible for appointment or election by the members of such commission or board to any office or position under the supervision of such commission or board. No former member of such commission or board shall be so eligible until the expiration of thirty days from the termination of his service as a member of such commission or board.⁵

The Commission has explained in *EC-COI-92-30*⁶ that sections like 8A, 15A, and 21A

have their roots in the common law doctrine of incompatibility of offices. In *Gaw v. Ashley*, 195 Mass. 173 (1907), the Supreme Judicial Court first applied this doctrine to hold that a municipal board could not appoint its own member to a position under the board’s supervision. While the court seemed chiefly concerned that the appointee would continue to sit on the board, and thus that his present colleagues would be supervising his performance, the court phrased the prohibition more generally, as prohibiting the appointment itself. Soon after the court again applied this prohibition, in *Attorney General v. Henry*, 262 Mass. 127, 132 (1928), the Legislature enacted a narrow exception, allowing the town meeting to approve an otherwise prohibited appointment [footnote omitted]. St. 1929, c. 36, enacting G.L. c. 41, § 4A.⁷

The Commission also observed in *EC-COI-92-30* that the Supreme Judicial Court later held⁸ that G.L. c. 41, § 4A otherwise codified the common-law rule; and

that shortly after § 21A of G.L. c. 268A was enacted in 1967, the court observed: “The legislative purpose behind the enactment of [§ 21A] seems to confirm the purpose which was contained in G.L. c. 41, § 4A.”⁹

In *EC-COI-93-19* the Commission further observed as to the purpose of §§ 8A, 15A, and 21A:

This incompatibility includes the potential danger that a board member will attempt to persuade his fellow colleagues to appoint him or otherwise engage in conduct which might give the appearance of such self-dealing activity, and the danger that, as a result of alliances formed through service together on a board, board members will be persuaded to reappoint one who, under different circumstances, they would conclude should be removed from office.¹⁰

The Commission has previously made clear that, under § 8A, a state board member may not be appointed by his board to a position the board supervises and then immediately resign his board position.¹¹ Similarly, in *EC-COI-92-30*, the Commission stated, “No vote to elect you [by the city council] is valid unless it occurs more than thirty days after your service as a Councillor ends.”

The issue not decided in these prior opinions, and which we need to now decide, is to what extent a board member may indicate an interest in a position appointed and supervised by his board; and likewise, to what extent the board may indicate any interest in that application prior to the running of § 8A’s 30-day termination of service period.¹²

The phrase “eligible for appointment or election” is not defined in G.L. c. 268A nor does it appear among the terms and phrases defined in G.L. c. 4. We therefore look to “the common and approved usage of the language.”¹³ We also look to the purpose of the legislation.¹⁴ We apply common experience and common sense in interpreting such words as they appear in the conflict law.¹⁵

“Eligible” is commonly defined as “fitted or qualified to be chosen or used; entitled to something . . . worthy to be chosen or selected.”¹⁶ “Appointment” means “designation of a person to hold a non-elective office.”¹⁷ “Election” means “the act or process of choosing a person for office, position or membership by voting.”¹⁸

There is a certain degree of ambiguity in each of these terms. Taking them in reverse order, the word “election” as indicated by its dictionary meaning, explicitly leaves open the question as to whether it refers to the final act of selection or the entire process leading up to and including the final act. Similarly, the term “appointment” can be viewed as contemplating just the

final act by a board in selecting someone to fill a position.¹⁹ But it, too, can also arguably be viewed as including the entire process by which one is selected. Finally, the word “eligible” has the same ambiguity. One has to be qualified to be chosen, but when? At the beginning of the process or just at the time of the ultimate act that makes the choice final?

The ambiguity seems to markedly increase when all of the terms are put together into the phrase “eligible for appointment or election.” The Legislature could have just said that a board could not appoint or elect one of its own members to a position it supervises until the cooling off period was observed.²⁰ Instead, however, the Legislature appears to have intended something more subtle and arguably more expansive by focusing on when such a person is *eligible* for appointment or election.

In any event, standard rules of statutory interpretation as noted above indicate that one looks at the language “in the context of the objectives which the law seeks to fulfill.”²¹ As noted above, the Commission has already indicated that one of the purposes of this statutory language is to prevent or at least minimize the appearance of colleague exploitation. It is important that applicants have a level playing field and that the best applicant be chosen.²²

In order to achieve that purpose and give weight to what we view to be the legislative intent behind the repeated choice of the word “eligible” in this section, it follows that one has to be qualified to be chosen early in the selection process. Thus, any interaction by the board with one of its own members regarding his candidacy, such as an interview, exposes the board to at least the implicit pressure of favoring an “inside” colleague applicant over others. Indeed, even such decisions as to whom to interview carry that concern if the board knows a colleague is an applicant.

We believe, however, that our interpretation should not be so restrictive as to prevent a board from deciding when and where to post the vacancy and what deadline to set for applications without making its members ineligible as candidates for the position. The logistics of the posting would seem to have little to do with any act of selecting. Moreover, if the board knew one of its members was interested in the vacancy, the other board members could make him ineligible by taking any act to begin filling the position, such as posting the vacancy. Such an interpretation would appear to be inconsistent with the language and intent of the statute, which is to allow board members to be eligible for the selection process if the 30-day termination of service period is observed.

In addition, we believe that at least some weight should be given to the concern that too restrictive a position might result in losing the best candidate, if the best

candidate were a present board member who wanted to apply. For example, if a board needed to fill a position quickly, and consequently wanted to establish a quick deadline for applications, a present member would not even be able to apply if that deadline were less than 30 days away.

Ultimately, in balancing the equities and the objectives of the statute, we conclude that a board member may apply for a position without observing the 30-day cooling off period. The board may not take any action regarding that application until the 30-day cooling off period has been observed. The board may, however, interview other candidates and take any action it deems appropriate regarding those candidates at any time.

Additionally, we note that there are other provisions of the conflict of interest law that also serve to protect the integrity of the public hiring process. Thus, § 23(b)(2)²³ prohibits the non-applicant board members from selecting an unqualified colleague. More generally, it prohibits the board members from giving their colleague applicant any kind of preferential treatment. For example, they should not give their colleague access to them not otherwise made available to all other applicants.

Finally, when and if board members are called upon to consider the application of a former member with whom they have served, they should make a written disclosure of that fact pursuant to § 23(b)(3).²⁴

DATE AUTHORIZED: November 12, 2003

¹ Legislative Act.

² *Id.*

³ *Id.*

⁴ “State employee, a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council.” G.L. c. 268A, § 1(q). It should be noted that because Authority members are not paid, they are “special state employees” for G.L. c. 268A purposes. That distinction, however, does not factor into this opinion.

⁵ The phrase is identical in § 15A (the county counterpart to § 8A) and § 21A (the municipal counterpart to § 8A). Therefore, our interpretation will apply equally to county and municipal employees.

⁶ *EC-COI-92-30* involved a city councilor who wanted to be appointed by the city council as city clerk, a position supervised by the council.

⁷ G.L. c. 41, § 4A states in part:

Except as otherwise expressly provided, a district board, if authorized by vote of the district at an annual district meeting, or a town board may, if authorized by vote of the town at an annual town meeting, appoint any member thereof to another

town or district office or position for the term provided by law, if any, otherwise for a term not exceeding one year.

For cities, the prohibition is codified in G.L. c. 39, § 8, which provides in relevant part: “No member of the city council shall, during the term for which he was chosen, either by appointment or by election of the city council . . . , be eligible to any office the salary of which is payable by the city.”

⁸ *Mastrangelo v. Board of Health of Watertown*, 340 Mass. 491, 492 (1960).

⁹ *Starr v. Board of Health of Clinton*, 356 Mass. 426, 429 (1969).

¹⁰ In that opinion the Commission interpreted § 21A – the municipal counterpart to § 8A – as preventing an administrative assistant to the board of selectman who had become a selectman from being eligible for *reappointment* as such assistant unless he observed the 30-day requirement. In other words, the selectman would have to get town meeting approval or resign as selectman and wait 30 days before the selectmen could reappoint him as their administrative assistant.

¹¹ In *EC-COI-80-44* the Commission construed § 8A as making a Board of Registration of Barbers member ineligible to be appointed to an investigator position subject to that board’s supervision, even though the member was willing to resign and wait 30 days before assuming the duties of that position, where the board had already written a letter initiating the formal process to so appoint him. (The letter made clear that the board had been trying for over a year to so appoint him.) The Commission stated:

Since you were a board member at the time the Board initiated the formal process to appoint you to this position, and, therefore, were not eligible at that time for appointment, you are precluded by this section from accepting the position. The fact that you would resign your state position and wait 30 days before accepting the appointment is not, under these circumstances, significant.

¹² Of course, if a board member knows he plans to apply, he must abstain from any involvement in such decisions as a board member. Section 19 of G.L. c. 268A would prohibit a board member from participating as such in any particular matter in which he had a financial interest.

¹³ G.L. c. 4, § 6 (Third). See *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 425 (1992).

¹⁴ *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. The 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.”)

¹⁵ *EC-COI-98-02*.

¹⁶ *Webster’s Third New International Dictionary* (1993). See also *Black’s Law Dictionary* (Seventh Ed. 1999): “Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status.”

¹⁷ *Webster’s Third New International Dictionary* (1993). See also *Black’s Law Dictionary* (Seventh Ed. 1999): “the designation of a person, by the person or person having authority therefor, to discharge the duties of some office or trust.”

¹⁸ *Webster’s Third New International Dictionary* (1993).

¹⁹ See *Goutos v. U.S.*, 552 F.2d 922 (Ct. Cl. 1976) (an appointment is not made until the last act required by the person or body vested with the appointment powers is performed.)

²⁰ The Legislature, for example, could have said, “No member of a . . . board may be appointed or elected by the members of such board . . .” and, “No former member of such board may be so appointed or elected until the expiration of 30 days . . .”

²¹ *Int’l Organization of Masters, supra*.

²² As the Supreme Judicial Court has recognized,

[T]he Legislature’s concern about conflict between private interests and public duties may reasonably have motivated it to prohibit involvements that might present *potential* for such conflicts. . . . The Legislature was entitled to adopt the safer course of precluding all potential conflicts before they became a reality and before damage, even unwittingly, has been done. The Legislature may have recognized that it is not always easy to tell when an actual conflict has arisen. (emphasis in the original)

Edgartown v. State Ethics Commission, 391 Mass. 83, 89 (1984).

²³ Section 23(b)(2) prohibits a state employee from knowingly or with reason to know using or attempting to use his official position to secure an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals.

²⁴

Section 23(b)(3) prohibits a public employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person’s favor in the performance of his official duties. This subsection’s purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record.

**CONFLICT OF INTEREST OPINION
EC-COI-03-4**

QUESTION

Is the Martha's Vineyard Commission (MVC) a "municipal agency" for purposes of G. L. c. 268A?

ANSWER

We continue to conclude that the MVC is a "municipal agency" as that term is defined in the conflict of interest law. Accordingly, members and employees of the MVC are municipal employees for purposes of applying G. L. c. 268A to their conduct.

We also take this opportunity to analyze the enabling legislation for the Cape Cod Commission and conclude, for the reasons described below, that it is a "county agency" as that term is defined in G. L. c. 268A.

FACTS

You are counsel for the MVC and have asked the Commission to reconsider its conclusion in *EC-COI-91-3* that the MVC is a "municipal agency" for purposes of G. L. c. 268A. The first seven paragraphs of the facts set forth in the Commission's *EC-COI-91-3* opinion are relevant, and we restate them in this opinion.

"The Martha's Vineyard Commission was created as a 'public body corporate' by Chapter 831 of the Acts of 1977, 'to further protect the health, safety and general welfare of island 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 Martha's Vineyard ... by protecting these values from development and uses which would impair them, and by promoting the enhancement of sound local economies.' §§1, 2.¹

Every local municipal land regulatory agency is governed by the standards, regulations and criteria established by the MVC in considering applications for development permits relating to areas and developments subject to Chapter 831. § 5."

"The MVC is comprised of twenty-one members, of which six members are Selectmen in the member towns, or their designees; nine members are elected island-wide; one member is a Dukes County Commissioner; one member is appointed from the Governor's Cabinet; and four, non-voting members whose principal residence is not on Martha's Vineyard, are appointed by the Governor. § 2."

"The MVC receives its funding through the yearly property tax levies in the individual municipalities. § 4. The MVC may also accept private contributions and state or federal

grants. §§ 3, 4."

"One of MVC's statutory responsibilities is the designation of critical planning districts within Martha's Vineyard and the regulation of development within these critical planning districts. Districts of critical planning concern are areas which require protection for natural, cultural, ecological or historical reasons or which may be unsuitable for intensive development. § 8. Following nominations from individual towns or from seventy-five taxpayers, the MVC may designate specific areas to be districts of critical planning concern. § 8. The legislation requires the MVC to adopt regulations for the control of districts of critical planning concern,² and to specify broad guidelines for the development of the district. §§ 3, 7, 8. The Secretary of the Executive Office of Environmental Affairs is required to approve the standards and criteria which the MVC proposes to use in designating an area as one of critical planning concern."

"When the MVC approves a critical planning district, the municipalities in which the district is located may adopt regulations governing development within the district in accordance with the MVC guidelines and submit the regulations to the MVC for approval. If the regulations are not in conformance with MVC guidelines, or if a municipality fails to adopt regulations the MVC will adopt regulations. All adopted regulations are incorporated into the municipality's official ordinances or by-laws and are administered by the municipality. §10. A municipality may only issue a development permit in a district of critical planning concern in accordance with regulations provided by MVC. § 9."

"The MVC's second statutory responsibility is to develop criteria and standards to determine when a development project will be considered a development of regional impact³ and to review and approve all applications for developments of regional impact. §§ 12, 14. Generally, developments of regional impact (DRI) are those developments which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely to present development issues which are significant to more than one municipality. § 12."

"If a municipality determines that a development application meets the MVC DRI criteria, it must refer the development application to the MVC. § 13. The MVC is required to review all DRI permit applications, hold a hearing, and make findings concerning whether the probable benefits of the project outweigh the probable detriments, whether the proposed development will substantially interfere with the objectives of a municipality's or the county's general plan, and whether the proposed development is consistent with any municipality or MVC regulations. § 14. Absent approval by the MVC, a municipality may not grant a development permit for a DRI. §16. Furthermore, the MVC may specify conditions

to be met by the developer in order to minimize any economic, social or environmental damage. § 16.”

We include the following additional facts.⁴

The MVC may adopt regulations for control of districts of critical planning concern and in adopting such regulations may include any type of regulation a city or town may adopt under: G. L. c. 40, § 8C;⁵ G. L. c. 40A;⁶ G. L. c. 41, §§ 81K- 81GG;⁷ G. L. c. 111, § 27B⁸ as related to regional health board, and G. L. c. 131, §§ 40, 40A⁹ as pertaining to wetlands protection.¹⁰ “In making a finding of the probable benefits and detriments of a proposed development, the [MVC] shall not restrict its consideration to benefits and detriments within the municipality of the referring agency, but shall consider also the impact of the proposed development on the areas within other municipalities.”¹¹ “Any party aggrieved by a determination of the [MVC] may appeal to the superior court within twenty days after the [MVC] has sent the development applicant written notice, by certified mail, of its decision and has filed a copy of its decision with the town clerk of the town in which the proposed development is located.”¹²

In addition, because you have asked us to compare the MVC to the Cape Cod Commission (CCC), we include the following information about the CCC.¹³ We observe that the CCC is generally very similar in structure and function to the MVC as both involve planning functions for the concepts of “developments of regional impact”¹⁴ and “districts of critical planning concern.”¹⁵ Rather than reiterate all the similarities here, we note the following aspects of the CCC that do not have similar provisions in the MVC enabling legislation. The Act establishing the CCC, St. 1989, c. 716, specifies that all of Cape Cod, which is coterminous with Barnstable County, is subject to the CCC’s jurisdiction.¹⁶ “The [CCC] shall be an agency within the structure of Barnstable county government pursuant to this act, and shall operate in accordance with Barnstable county administrative and budgetary procedures.”¹⁷

The “Assembly of Delegates” which is the legislative body for Barnstable County,¹⁸ must review and approve or disapprove the CCC’s “proposed regulations of general application to enable it to fulfill its duties . . . , including, but not limited to, regulation concerning the process of designating districts of critical planning concern; the review of developments of regional impact, and the imposition of impact fees . . . ,” the CCC must submit such proposed regulations to the Assembly of Delegates “for adoption by ordinance.”¹⁹

Similarly, the Assembly of Delegates must hold at least one public hearing to consider the CCC’s “final regional policy plan” and shall either adopt the final regional policy plan by ordinance or return it to the CCC for restudy and

redrafting.²⁰

When the CCC proposes designating certain areas that are of critical value to Barnstable County as “districts of critical planning concern,”²¹ the CCC must submit a proposed designation to the Assembly of Delegates for adoption by ordinance.²²

The CCC is funded under procedures established by the Barnstable County home rule charter.²³ A budget proposal for a fiscal year must be submitted annually under Barnstable County administrative and budgetary procedures.²⁴ Subject to the Barnstable County home rule charter, the CCC may levy reasonable fees to recover its regulatory activities and services that it provides.²⁵

If the CCC’s budget exceeds its revenues by a certain amount specified in § 18(d)(i), the Assembly of Delegates must seek voter approval in order to assess an amount in excess of that limit.

DISCUSSION

The issue before us is whether the MVC is a state, county or municipal agency for purposes of applying G. L. c. 268A to its members and employees.²⁶ A “state agency” is defined as “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 county, city or town.”²⁷

The definitions of “county agency” and “municipal agency” are similar, but do not include the phrase, “any independent . . . authority, district, commission, instrumentality or agency.” A county agency is “any department or office of county government and any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.”²⁸ 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.”²⁹

Since the enactment of G. L. c. 268A in 1962, numerous public agencies have been created to function at the state, county or municipal levels of government. It is fair to observe that, since then, not every public agency created by an act of government necessarily fits precisely into one of the three definitions specified in G. L.c. 268A. Although the MVC enabling act states that it “shall be a public body corporate,” it does not expressly state whether the MVC shall be a state, county, or municipal agency for purposes of G. L. c. 268A.³⁰ As a result, it has been left to the Ethics Commission to employ a reasonable interpretation in determining which statutory definition

most closely applies to a public agency or instrumentality. As has often been observed, the conflict of interest law must be given a “workable meaning”³¹ and the Commission has long endeavored “to construe the law so as to effectuate its purpose to the extent it is reasonable to do so.”³²

In determining whether a public instrumentality is a state, county, or municipal agency we focus on whether the agency primarily serves the state, county, or municipal levels of government.³³ “When an agency possesses attributes of more than one level of government, the State Ethics Commission will review the interrelation of the agency with the different governmental levels.”³⁴ We consider which level of government funds and oversees the agency, and whether the agency carries out functions similar to those of a particular level of government.³⁵ Applying these factors to the MVC, we continue to conclude that it is a municipal agency. Its member municipalities, rather than state or county officials, control the MVC. Only one MVC member is a Dukes County Commissioner, or his designee.³⁶ As we observed in *EC-COI-91-3*, we continue to conclude that municipal control and service to municipal issues dominate the MVC. Although the MVC exists to address issues about developments that affect interests beyond the specific municipality in which they are located, the MVC planning process is primarily a collaborative effort among the member municipalities, rather than an external control imposed by a state or county entity.

You have suggested arguments for two alternative analyses. First, you submit that we should determine that the MVC is a state agency because its purpose is to assure “that regional development on Martha’s Vineyard protects the regional and state-wide values which the legislature has found to be at risk in the absence of the [MVC].” Alternatively, you suggest that we compare the MVC to the CCC and conclude the MVC better fits within the county, rather than municipal, level of government for purposes of the conflict of interest law.

We decline to adopt either alternative. There are several significant differences between the CCC and the MVC, as we have described above. Unlike the CCC, the MVC is not required to submit its regulations, regional plan, or development standards to a county assembly of delegates or county commissioners for review and approval. The MVC’s enabling legislation does not require it to follow Dukes County administrative and budgetary procedures. Moreover, the CCC, which was created after the MVC, plainly allows Barnstable County greater input and control than what is afforded to Dukes County in the MVC enabling legislation. Simply put, Dukes County government does not have the type of regulatory review over the MVC that Barnstable County government has over the CCC. Finally, the MVC does not have jurisdiction over all the land within Dukes County while the CCC covers all of

Barnstable County.

Similarly, we do not believe that the MVC falls within the definition of “state agency.” As the Commission observed in *EC-COI-91-3*, the MVC does not have jurisdiction over Commonwealth land and the municipal representation outweighs the Commonwealth’s representation on the MVC. The “MVC’s relationship with municipal government outweighs its relationship with” state government.³⁷

You also submit that we consider a Superior Court decision concluding that the MVC is not a “local board” within the meaning of G. L. c. 40B, § 20 because the MVC “does not perform local functions, it performs regional ones.”³⁸ For the following reasons, we conclude that the Superior Court’s decision does not determine the issue before us. The Superior Court’s decision did not consider G. L. c. 268A or any issues related to it. In describing the MVC as performing regional rather than local functions, the Superior Court said nothing about whether the MVC, should, as a result, be a “county agency” or “state agency” as those terms are defined in the conflict of interest law. The Superior Court concluded that because the MVC is not a “local board” as defined in G. L. c. 40B, § 20, a Chapter 40B housing project within the jurisdiction of the MVC “must be referred to the MVC before a local ZBA can act on it.”³⁹

The purposes of G. L. c. 40B are different from G. L. c. 268A. The definition of “municipal agency” in G. L. c. 268A, § 1(f) is very different from the definition of “local board” in G. L. c. 40B, § 20. In addition, although G. L. c. 40B, entitled “Regional Planning,” includes the enabling laws for the Metropolitan Area Planning Council and other similar regional planning districts, which the Ethics Commission has concluded are “state agencies,”⁴⁰ the MVC was not created pursuant to c. 40B.⁴¹ Accordingly, the application of the term “local board” in the context of G. L. c. 40B comprehensive permit for affordable housing does not answer the question of whether the MVC is a state, county, or municipal agency for purposes of G. L. c. 268A.

For all of the above reasons, we continue to conclude that the MVC is a municipal agency for purposes of applying G. L. c. 268A to its members and employees. As a result, its members and employees are municipal employees under the conflict of interest law.⁴²

Although we have not formally stated that the CCC is a county agency for purposes of G. L. c. 268A, we now conclude that the CCC is a county agency. First, as the Legislature expressly stated, the CCC is an “agency within the structure of Barnstable county government.” Further, our conclusion is bolstered by the significant extent of Barnstable County government’s regulatory control over the CCC. Barnstable County government must approve

the CCC's rules and policies. Although the CCC obtains funding from its member municipalities, its budget process is linked to Barnstable County government.

DATE AUTHORIZED: December 16, 2003

¹ The Elizabeth Islands, certain Indian lands and land owned by the Commonwealth are excluded from the MVC's jurisdiction.

The citations to the sections of St. 1977, c. 831 appear in the text, rather than the endnotes, of *EC-COI-91-3*.

² The MVC may include local municipal regulations in adopting its regulations.

³ The MVC's proposed criteria are subject to the approval of the Secretary of EOEA.

⁴ Unless stated otherwise, the cited sections refer to sections within St. 1977, c. 831. We have reviewed the MVC's enabling legislation as amended by St. 1979, c. 319, and St. 1992, c. 97. The amendments did not change the facts relevant to our analysis.

⁵ "Conservation commission; establishment; powers and duties."

⁶ "Zoning."

⁷ "Subdivision Control."

⁸ Regional health districts; regional board of health; powers and duties; administration; organization; management; accounts; rules and regulations."

⁹ "Removal, filling, dredging or altering of land bordering waters." § 40; "Orders protecting wetlands." § 40A.

¹⁰ St. 1977, c. 831, § 3.

¹¹ § 15.

¹² § 18. We note also another change since *EC-COI-91-3* was issued. Either a Dukes County Commissioner or his designee may serve on the MVC. St. 1992, c. 97, § 1

¹³ The CCC has consented to our reviewing its enabling legislation and formally determining its agency status for purposes of the conflict of interest law.

¹⁴ "A development which, because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality, and which conforms to the criteria established in the applicable standards and criteria for developments of regional impact pursuant to section twelve." St. 1989, c. 716 § 2(h).

¹⁵ See *CKA, LLC, Down Island Golf Club, Inc et al. V. Zoning Board of Appeals of Oak Bluffs and the Martha's Vineyard Commission*, Dukes County Civil Action 2001-00068 (May 29, 2002)

¹⁶ St. 1989, c. 716, § 1. Unless stated otherwise, the following citations refer to sections in St. 1989, c. 716, as amended by St. 1990, c. 2.

¹⁷ § 3(a).

¹⁸ § 2(b).

¹⁹ § 6(a).

²⁰ § 8(e).

²¹ § 10(a).

²² § 10(b).

²³ § 18(a).

²⁴ § 18(b).

²⁵ § 18(c).

²⁶ At the outset, we note that it cannot be denied that the MVC should be considered a public agency or public instrumentality for purposes of G. L. c. 268A, and you have not raised that issue.

²⁷ G. L. c. 268A, § 1(p).

²⁸ G. L. c. 268A, § 1(c).

²⁹ G. L. c. 268A, § 1(f).

³⁰ *Contrast* G. L. c. 71, § 89(v) ("Notwithstanding the provisions of this section or any other general or special law to the contrary, for the purposes of G. L. c. 268A: (i) a charter school shall be deemed to be a state agency.").

³¹ *Graham v. McGrail*, 370 Mass. 133, 140 (1976). See also *Life Insurance Assoc. of Massachusetts v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

³² *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992). See e.g., *EC-COI-83-107; EC-COI-87-24; EC-COI-93-6; EC-COI-94-9; EC-COI-98-2; EC-COI-98-3; EC-COI-00-1*. As we concluded in *EC-COI-92-26*, we do not consider regional municipal entities to be "independent" municipal entities for purposes of applying the conflict of interest law, as we did in *EC-COI-91-3*, because the Appeals Court in *McMann*, while agreeing with the Commission's conclusion that a regional school district is a municipal agency, questioned the statutory basis for including the term "independent" when that specific term is not recognized in G. L. c. 268A, § 1(f). *McMann* at 428, n. 5.

³³ See e.g., *EC-COI-99-5*.

³⁴ *EC-COI-91-3*.

³⁵ See *EC-COI-99-5*, and opinions cited therein. In *EC-COI-99-5*, we concluded that a regional planning agency, the Hampshire Council of Governments, which was created as result of the dissolution of Hampshire County government, primarily serves and is controlled by its member municipalities, rather than the state. Accordingly, we concluded that it is a municipal agency for purposes of G. L. c. 268A.

³⁶ St. 1992, c. 97, § 1.

³⁷ *EC-COI-91-3*, n. 4.

³⁸ *CKA, LLC, Down Island Golf Club, Inc et al. V. Zoning Board of Appeals of Oak Bluffs and the Martha's Vineyard Commission*, Dukes County Civil Action 2001-00068 (May 29, 2002), p. 16.

³⁹ *CKA, LLC, Down Island Golf Club* at 4. Such a conclusion is significant to affordable housing proponents and opponents because not only the town's ZBA but also the MVC has **permit-granting authority** over a G. L. c. 40B project if the magnitude of the project makes it a development of regional impact within the MVC's jurisdiction. As that Superior Court decision observes, a "local board" under G. L. c. 40B, § 20 is "any town or city board of survey, board of

health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.” Under G. L. c. 40B, § such “local boards” may make only **recommendations** to their municipality’s zoning board of appeals, which is the municipal board authorized to issue a comprehensive permit or approval for an affordable housing project.

⁴⁰ *EC-COI-95-2*.

⁴¹ While the MVC’s regional planning attributes are similar to those of entities created under c. 40B, the Legislature did not refer to G. L. c. 40B in St. 1977, c. 831 or the amendments thereto, and the Legislature was obviously aware of regional planning entities created under c. 40B when it created the MVC. General Law Chapter 40B was first enacted by St. 1955, c. 374. The Southeastern Regional Planning and Economic Development District was created under G. L. c. 40B by St. 1968, c. 663 and the Metropolitan Area Planning Council was created under G. L. c. 40B by St. 1970, c. 849.

⁴² *See EC-COI-99-5*.

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State Ethics Commission
Enforcement Actions
2003

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Summaries of Enforcement Actions Calendar Year 2003

In the Matter of Kendell Longo - Former Rowley Board of Health Secretary Kendell Longo, paid a \$4,000 civil penalty to resolve allegations that she violated the state's conflict of interest law. Longo, who served as secretary between 1996 and 1999, signed a septic system certificate of compliance and an occupancy permit for a property at 31 Red Pine Way owned by her brother, Brett Longo. These actions violated G.L. c. 268A, §§19 and 23(b)(2). By accessing, signing and issuing the septic system certificate of compliance and signing the occupancy permit, both of which Brett was not entitled to, Longo used her position to obtain an unwarranted privilege for him.

In the Matter of Susan P. Bernstein - Framingham Planning Board member Susan P. Bernstein admitted violating the state's conflict of interest law and agreed to pay a civil penalty of \$2,000. Bernstein, a real estate agent, violated G.L. c. 268A, §17(c) by appearing before the selectmen seeking Town Meeting approval to rezone a client's property. The property was sold on February 22, 2002 and Bernstein received a commission of \$6,400.63. By acting on behalf of her client in discussions with the town manager and selectmen and by presenting the zoning change article to the board of selectmen, Bernstein acted on behalf of her client in connection with a matter in which the town had an interest, i.e., the rezoning decision. The Agreement highlights that Bernstein had attended State Ethics Commission educational seminars and received prior warning about this type of violation.

In the Matter of Francis H. Dubay - The Commission fined Erving Selectman Francis H. Dubay \$1,000 for violating the state's conflict of interest law by serving as the town's assistant treasurer. Dubay violated G.L. c. 268A, §19 by participating in the decision to appoint himself to the part-time position. Because he received compensation for the position, he also violated §20 by having a financial interest in a second contract or position with the town. According to the Disposition Agreement, "if Dubay had not cast the deciding vote, he would not have been appointed to the position." Dubay resigned his position as assistant treasurer.

In the Matter of Francisco Cabral - Former Fall River Wiring Inspector Francisco Cabral paid a \$750 civil penalty to resolve allegations that he violated the state's conflict of interest law. According to a Disposition Agreement, Cabral, who was a full-time wiring inspector between February 2001 and December 2002, inspected electrical work performed by his son, Timothy Cabral, on several occasions between November 2001 and March 2002. These actions violated G.L. c. 268A, §19.

In the Matter of John Sawyer - Former Gloucester

Electrical Inspector John Sawyer paid a \$2,000 civil penalty to resolve allegations that he violated the state's conflict of interest law. According to a Disposition Agreement, Sawyer, who served as an electrical inspector between 1988 and 2002, inspected electrical work performed by his brother, Joseph Sawyer, on numerous occasions between January 1999 and February 2001. These actions violated G.L. c. 268A, §19. By inspecting electrical work performed by his brother, Sawyer participated in matters affecting the financial interest of an immediate family member.

In the Matter of Ralph Crossen - Former Barnstable Building Commissioner Ralph Crossen entered into a disposition agreement with the Commission and agreed to pay \$1,100, a \$1,000 civil penalty and a forfeiture of \$100. Crossen was the Barnstable Building Commissioner from 1994 until September 2000. By acting as a consultant for a private client and by receiving compensation for that consulting, Crossen acted as agent for and received compensation from the client in connection with matters in which Crossen had participated as a municipal employee in violation of G.L. c. 268A, §18(a).

In the Matter of Hal Abrams - Former Boston Inspectional Services Department Inspector Hal Abrams entered into a disposition agreement with the Commission and agreed to pay \$2,440, a \$2,000 civil penalty and a forfeiture of \$440 for violating G.L. c. 268A, the state's conflict of interest law. By receiving compensation from and acting as an agent for GVL in relation to matters in which the City had a direct and substantial interest, Abrams violated §§17(a) and 17(c).

In the Matter of John W. Ohman - The Commission fined Barnstable County Delegate John W. Ohman \$1,000 for violating G.L. c. 268B, the state's financial disclosure law, for the second time, by filing his Statement of Financial Interests after the deadline. Ohman filed his 1999 Statement of Financial Interest 69 days late and was fined \$500. His 2001 Statement was 55 days late. This marks the first time that a late filer has paid double the penalty for the repeated late filing of a Statement of Financial Interests.

In the Matter of Mary Jane Saksa - The Commission fined Worcester County Sheriff's Office Director of Substance Abuse Programs Mary Jane Saksa \$1,000 for soliciting subordinates. Saksa also forfeited \$1,320, the amount of compensation she received as a result of the solicitations. By supervising subordinates that she had solicited to become Excel representatives and/or to purchase Excel products, Saksa violated §23(b)(3). Saksa could have avoided violating §23(b)(3) of the conflict law by making an advance written disclosure to her appointing authority of the facts that would otherwise lead to such a conclusion. Saksa made no such disclosure.

In the Matter of Tamarin Laurel-Paine - Former Middlefield Planning Board member Tamarin Laurel-Paine paid a \$1,000 civil penalty to resolve allegations that she violated the state's conflict of interest law. According to a Disposition Agreement, Laurel-Paine, a Planning Board member between 1992 and 2002, took part in Planning Board discussions concerning a proposed rezoning that affected property she had recently purchased. By discussing the expansion of the business district to include property she owned, Laurel-Paine participated in a matter affecting her financial interest in violation of §19.

In the Matter of Robert Kominsky - The Commission fined West Bridgewater Police Chief Robert Kominsky \$1,000 for asking his subordinates to perform personal errands for him. By having a subordinate do personal errands for him on municipal time, Kominsky violated §23(b)(2). By asking subordinates to do personal errands for him while supervising those subordinates, Kominsky violated §23(b)(3).

In the Matter of Life Insurance Association of Massachusetts - The Commission issued a Decision and Order finding that the Life Insurance Association of Massachusetts (LIAM) violated M.G.L. c. 268A, the state's conflict of interest law, by illegally providing free meals on two occasions — to a former Insurance Commissioner and to Massachusetts legislators. The Commission ordered LIAM to pay a civil penalty of \$4,000.

In the Matter of David F. McCarthy - The Commission fined Greenfield Police Chief David F. McCarthy \$4,000 for violating the state's conflict of interest law. In a Disposition Agreement, Chief McCarthy admitted that he violated G.L. c. 268A, §19 by participating in personnel matters affecting his son, Daniel McCarthy. Chief McCarthy sought support for Daniel's candidacy, recommended to selectmen that two additional sergeant positions be created, approached one selectman and asked him not to oppose or postpone the promotions and denied a grievance regarding the pay rate of the newly appointed sergeants. The Disposition Agreement notes that Chief McCarthy received advice about the conflict law on three previous occasions. On each occasion, the Chief was advised not to participate in any matters involving his son's financial interest.

In the Matter of Michael Kelleher

In the Matter of Edward Felix

In the Matter of Steven Angelo - The Commission imposed civil penalties of \$2,000 each on Saugus Selectman Michael Kelleher and Police Chief Edward Felix for violating G.L. c. 268A, the state's conflict of interest law regarding a January 2002 traffic stop. The Commission also cited former Town Manager Steven Angelo for his involvement in the same incident. According to two Disposition Agreements, Kelleher and Felix admitted violating §23 of the conflict of interest law. By calling his

subordinate Angelo, Kelleher used his position as selectman to speak directly with Chief Felix, which he knew or should have known would send a clear implicit message that he wanted preferential treatment in violation of §23(b)(2). By using his position as police chief to request that his officers on the scene drive Kelleher home, Felix also violated §23(b)(2). In a Public Education Letter, the Commission stated there was reasonable cause to believe Angelo violated §23(b)(2) by using his position to secure preferential treatment from the police for Kelleher.

In the Matter of Louis Cornacchioli - The Commission fined Rutland Selectman Louis Cornacchioli \$2,000 for violating the state's conflict of interest law by threatening to use his selectman's position to retaliate against the police department if traffic citations against his son were not dismissed. Cornacchioli's son, Michael, appealed four traffic citations issued by a Rutland police officer in September 2002. When the police officer who issued the citations was unable to attend an appeal hearing scheduled for January 7, 2003, the police chief notified the court and the judge rescheduled the hearing for January 9, 2003. After the hearing was rescheduled, Cornacchioli contacted the Rutland police chief on a recorded line. He was extremely upset and angry that Michael's hearing was rescheduled instead of dismissed. He made it clear that he would "allow his personal dissatisfaction with the police department to factor into his decision-making." He also made it clear that he wanted the officer not to show up at the January 9 hearing. By threatening to use his position against the police department in order to seek actions that would result in the dismissal of his son's traffic citations, Cornacchioli violated §23(b)(2).

In the Matter of Donald P. Besso - The Commission issued a Decision and Order concluding the adjudicatory hearing of Wareham resident Donald P. Besso by finding that Besso did not violate M.G.L. c. 268A, §3(a), the state's conflict law, by, as the Enforcement Division alleged, offering a \$100 restaurant gift certificate to Wareham Zoning Board of Appeals member David Boucher. In the Decision and Order, the Commission stated that the Enforcement Division had not proved that Besso's motivation for offering the gift certificate was substantially, or in large part, to reward Boucher for an "official act." The Commission instead found that Besso offered the gift certificate because Boucher was courteous, allowed Besso to interrupt his personal time and provided him general information about the process.

In the Matter of James Barnes - The Commission fined James Barnes of Dorchester \$2,000 for violating G.L. c. 268A, §3(a) of the state's conflict of interest law, by leaving \$100 for a state Division of Occupational Safety (DOS) employee who proctored an exam Barnes was taking to get licensed to perform deleading work. According to the Disposition Agreement, "Barnes gave the money to Wong to thank him for his kindness in offering

to review the incorrect answers by hand and to ensure that Wong would follow through on his offer.” After Rivera and Barnes left the office, Wong discovered the money; he reported the incident and turned the money over to his superiors.

In the Matter of Michael Fredrickson - The Commission fined Massachusetts Board of Bar Overseers General Counsel Michael Fredrickson \$5,000 for violating the state’s conflict of interest law by using his office, office equipment and office time to write and prepare two novels for publication and by instructing subordinates to use their office hours to assist him. Fredrickson also paid a \$5,000 civil forfeiture to the BBO as reimbursement for the time he and his subordinates spent on his novels and the value of the equipment used. By using state resources, other state employees and his own state-paid time for his novels, Fredrickson violated §23(b)(2).

In the Matter of Suzanne Traini - The Massachusetts State Ethics Commission fined Southborough Board of Health (BOH) member Suzanne Traini \$1,500 for violating G.L. c. 268A, the state’s conflict of interest law, by participating in discussions of septic permits for property she was in the process of purchasing. Section 19 of the conflict law generally prohibits a municipal employee from officially participating in matters in which she or a business partner has a financial interest. According to the Disposition Agreement, Traini signed offers to purchase property at 26 Lynbrook Road and surrounding land for a total of \$575,000 in September 2000. In October, the BOH approved septic permits for two lots on the property. Traini abstained from the approvals. After the Massachusetts Water Resources Authority and the Massachusetts District Commission expressed concern that the septic permits should not have been granted because the setback from a nearby waterway was insufficient, the Public Health Director recommended at a January 2001 meeting that the permits be rescinded and a public hearing be held. Traini objected to the proposed rescission, stating that, by law, the BOH could not rescind a permit once a construction permit had been issued. Another BOH member suggested that Traini abstain from the discussion; she declined to do so. The BOH took no action on the permits.

In the Matter of John Sanna, Jr. - The Commission fined Buzzards Bay Water District Commissioner John Sanna, Jr. \$2,000 for violating the state’s conflict of interest law by borrowing equipment from the Water District. The Ethics Commission notified Sanna in March 2002 that he appeared to have violated the conflict of interest law by borrowing equipment from the Water District in Fall 2001. Sanna was warned that future violations would be resolved publicly. Despite the Commission’s warning, Sanna borrowed a paint spray gun in late summer 2002 and a metal detector in December 2002. Sanna failed to return the items he borrowed until the Ethics Commission

contacted him in August 2003. By borrowing the paint spray gun and metal detector, Sanna violated §23(b)(2).

In the Matter of Robert DeMarco - The Commission fined MassHighway Highway Safety Team Director Robert DeMarco \$2,000 for violating the state’s conflict of interest law by using his position to obtain donations for an organization he created to race a dragster competitively. In spring 2000, DeMarco purchased a dragster and created Crew Chief Racing, a sole proprietorship and developed the SMART safe-driving program to provide highway safety education to teenagers in high schools throughout the state. The state was not involved in Crew Chief Racing or the SMART program. DeMarco solicited businesses for donations in the amount of \$1,000 or more and in kind donations. During the solicitations, he gave solicitees his state business card, provided written materials citing his position as Director of the Highway Safety Team, mentioned his state position in conversations and/or drove to the solicitations in his state automobile, which has state government license plates. By using his official position to influence solicitees to make donations to his race team, DeMarco violated §23(b)(2).

In the Matter of David Bunker - The Commission fined former State Rep. David Bunker \$2,000 for violating the state’s conflict of interest law by using his position to obtain unwarranted per diems. Bunker also forfeited \$1,080 representing 30 per diems to which he was not entitled. Bunker, who did not maintain accurate records of his schedule, acknowledged that he was not entitled to approximately 30 per diems paid to him.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 667

IN THE MATTER
OF
KENDELL LONGO

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Kendell Longo 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 Longo. The Commission has concluded its inquiry and, on May 30, 2002 and September 5, 2002, found reasonable cause to believe that Longo violated G.L. c. 268A, §§ 19 and 23(b)(2).

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

Findings of Fact

1. Between 1996 and 1999, Longo was employed as the Town of Rowley Health Department secretary. As such, Longo was a municipal employee as that term is defined in G.L. c. 268A.

2. Longo's brother, Brett Longo ("Brett"), purchased the property at 31 Red Pine Way in Rowley in April 1997. Brett is the president, treasurer and clerk of the B.J. Longo Corporation and has a financial interest in the corporation.

3. In June 1997, Brett and/or B.J. Longo Corporation and an engineer submitted a sanitary disposal system repair plan for 31 Red Pine Way to the Rowley Board of Health. According to the plan, Brett and/or B.J. Longo Corporation intended to build a duplex on the property and install a new septic system. The old septic system that serviced an existing carriage house was to be collapsed and backfilled, the leaching area that serviced the carriage house abandoned, and the carriage house razed. The existing well was to be tested and inspected. The then-health agent signed off on the plan on September 17, 1997, and Brett and/or B.J. Longo Corporation was issued a disposal system construction permit by the Board of Health.

4. A disposal system was constructed at 31 Red Pine Way.

Certificate of Compliance

5. On December 30, 1998, Longo issued a certificate of compliance for 31 Red Pine Way by signing the inspector line on the certificate.

6. A certificate of compliance certifies that a septic system has been designed and installed in accordance with the Title V and all applicable local requirements. Title V is the portion of the state environmental code governing the siting, construction, inspection and maintenance of septic systems. Until a certificate of compliance has been issued, sewerage cannot be discharged into a septic system.

7. A municipality cannot issue a certificate of compliance until several steps have occurred:

(a) an as-built plan must be submitted to the Board of Health;

(b) the disposal system installer and designer must certify in writing on the certificate of compliance that the system has been constructed in accordance with Title V, the approved design plan, and any local requirements, and that any changes to the design plan have been reflected on as-built plans, which have been submitted to the Board of Health by the designer; and

(c) a sanctioned representative of the Board of Health must inspect the system to determine if the work has been completed in accordance with Title V, the disposal system construction permit, and any local requirements.

8. When Longo issued the certificate of compliance for 31 Red Pine Way on December 30, 1998, she knew that (a) no site inspection by a sanctioned Board of Health representative had been conducted on the property; (b) no "as-built" plan was on file; (c) the installer and designer had not signed the certificate of compliance; (d) Brett and/or B.J. Longo Corporation owned the property; (e) Brett and/or B.J. Longo Corporation was involved in developing the property; and (f) the property would be more marketable and therefore more valuable with a certificate of compliance.

9. Because Brett and/or B.J. Longo Corporation owned 31 Red Pine Way and applied for the certificate of compliance either on Brett's behalf or on behalf of B.J. Longo Corporation, Brett directly and/or through B.J. Longo Corporation had a financial interest in having the certificate issued (as the company was working on the project) and the property was more marketable with a septic system certificate of compliance.

Occupancy Permit

10. On January 2, 1999, Longo also signed on behalf of the Board of Health an occupancy permit for 31 Red Pine Way.

11. A municipality cannot issue an occupancy permit for a dwelling if a certificate of compliance has not been issued. An occupancy permit is required in order for a structure to be considered habitable. An occupancy permit may not issue until, among other required approvals, a certificate of compliance for the septic system is obtained. Brett directly and/or through B.J. Longo Corporation had a financial interest in having the occupancy permit issued because it, like the certificate of compliance, makes the property more marketable.

12. When Longo signed the certificate of occupancy for 31 Red Pine Way on January 2, 1999, she knew or had reason to know that the required approvals for such a certificate of compliance had not been obtained.

Conclusions of Law

13. 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 an immediate family member has a financial interest.

14. The decisions to issue the septic system certificate of compliance and sign the occupancy permit on behalf of the Board of Health for 31 Red Pine Way were particular matters.¹

15. Longo participated² in the particular matters by deciding to issue the septic system certificate of compliance and by signing the occupancy permit as an employee of the health department.

16. Brett is Longo's brother and therefore an immediate family member.³

17. As owner of the property and through his interest in B.J. Longo which was developing the property, Brett had a financial interest in having the septic system certificate of compliance and the occupancy permit issued because the property would be habitable, more marketable and therefore more valuable.

18. Longo knew of her brother's financial interests at the time she signed the septic system certificate of compliance and occupancy permit.

19. Accordingly, by signing the septic system certificate of compliance and the occupancy permit for 31 Red Pine Way, as set forth above, Longo participated in her official capacity in particular matters in which she knew an immediate family member had a financial

interest, thereby violating G.L. c. 268A, § 19 on each occasion.

Section 23(b)(2)

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 her position to obtain for herself or others an unwarranted privilege of substantial value, which is not properly available to similarly situated individuals.

21. Longo used her official position as health department secretary to access, sign and issue the septic system certificate of compliance and sign the occupancy permit for 31 Red Pine Way.

22. As indicated above, Brett and/or B.J. Longo Corporation were not entitled to a certificate of compliance for 31 Red Pine Way at the time of its issuance. In turn, because a valid certificate of compliance had not issued, Brett and/or B.J. Longo Corporation were not entitled to an occupancy permit. Thus, Longo knew or had reason to know that her issuance of the certificate of compliance and signing of the occupancy permit under those circumstances were uses of her official position to secure for Brett and/or B.J. Longo Corporation unwarranted privileges of substantial value that were not properly available to similarly situated persons. Thus by so doing, Longo violated G.L. c. 268A, § 23(b)(2) on each occasion.

Resolution

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

(1) that Kendell Longo pay to the Commission the sum of \$4,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 23(b)(2); and

(2) that Kendell Longo 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 5, 2003

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

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

³ "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 674**

**IN THE MATTER
SUSAN P. BERNSTEIN**

DISPOSITION AGREEMENT

The State Ethics Commission and Susan P. Bernstein 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 25, 2002, 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 Bernstein. The Commission has concluded its inquiry and, on October 23, 2002, found reasonable cause to believe that Bernstein violated G.L. c. 268A, § 17.

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

Findings of Fact

Bernstein's Conduct as Private Real Estate Broker

1. Bernstein has been an elected Framingham Planning Board member from 1991 to the present. As such, Bernstein is a municipal employee as that term is defined in G.L. c. 268A, § 1, and subject to the provisions of the conflict-of-interest law, G.L. c. 268A.

2. During the time relevant, Bernstein worked full-time as a real estate agent.

3. In March 2001, the property owner of 82 Leland Street in Framingham decided to sell the property.

She retained Bernstein as her real estate broker on the sale.

4. Although the property in question was zoned for manufacturing use, most of the properties surrounding it were zoned for residential use and contained private residences. The property owner was concerned with preserving the residential neighborhood and wanted to sell her property to someone who would use it for residential purposes. Thus, she discouraged offers from potential buyers looking to develop the property for uses that she felt would be detrimental to the neighborhood.

5. In July 2001, Bernstein received an offer on the property from a developer who wanted to use the property for residential purposes. He proposed subdividing the property, renovating the existing house, and building duplexes on the remaining lots. To do so, he would have to obtain a use variance from the Framingham Zoning Board of Appeals ("the ZBA"), or have the property rezoned to allow residential development.

6. On July 20, 2001, the owner and the developer ("the parties") executed a purchase and sale agreement, subject to the buyer's obtaining a use variance.

7. On July 27, 2001, the parties filed an application with the ZBA for a use variance regarding the property. They also submitted a petition from the neighbors in support of the use variance. On October 16, 2001, the ZBA voted 2-1 to deny the request because it did not see the need for a variance in this situation. The ZBA also indicated that it might be more appropriate to have Town Meeting vote to rezone the property.

8. The next Town Meeting was scheduled for April 2002.

9. In light of the ZBA's decision not to grant the use variance, the parties' purchase and sale agreement terminated in November 2001.

10. The property owner was discouraged by the turn of events and did not want to wait six months until Town Meeting could consider whether to rezone the property.

11. Bernstein discussed with the property owner the need to consider offers from buyers intending other than residential uses.

12. On December 5, 2001, Bernstein learned that there would be a Special Town Meeting held in January 2002. She also learned that the selectmen planned to open and close the warrant for the Special Town Meeting on December 6, 2001.

13. As there would not be enough time to collect 100 signatures (which would have required the selectmen to include the rezoning article on the Special Town Meeting warrant), Bernstein advised the property owner to draft a letter to the selectmen requesting that the board vote to include the article on the warrant.

14. The property owner faxed to Bernstein a letter asking the selectmen to include the rezoning article on the warrant, and Bernstein delivered it to town hall.

15. On December 6, 2001, Bernstein spoke with the town manager about the property owner's letter. Bernstein then telephoned the chairman of the Board of Selectmen and one other selectman, and discussed the proposed rezoning article.

16. On the evening of December 6, 2001, Bernstein presented the property owner's request to the selectmen, explaining the situation and asking the board to include the article on the warrant. Bernstein made clear that she was representing the property owner, her real estate client, in this matter.

17. The selectmen voted 3-1 against including the rezoning article on the warrant, primarily because other town boards had not yet had a chance to review the proposed article.

18. Subsequently—after obtaining more than the 200 signatures required to call a special town meeting—the property owner was able to get the proposed rezoning article on the warrant for a second Special Town Meeting held on January 9, 2002. Town Meeting voted in favor of the article 83-32, and the property was rezoned from manufacturing to residential.

19. On January 22, 2002, the parties executed a new purchase and sale agreement. The sale closed on February 22, 2002. Shortly thereafter, approximately one year after listing the property, Bernstein received a commission of \$6,400.63 from the sale.

20. At no time did Bernstein vote or participate in this matter as a Planning Board member, nor did she act as an agent for the property owner before any other town boards or committees, or at the Special Town Meeting.

Bernstein's Knowledge of Conflict-of-Interest Law

21. On a number of occasions in the years just prior to this situation, Bernstein had become familiar with the conflict-of-interest law by attending Ethics Commission seminars in January 1998 and May 29, 2001.

22. In August 2001, Bernstein received a private educational letter from this Commission regarding another

conflict-of-interest matter. The letter advised Bernstein not to act as an agent for anyone other than the town in relation to a particular matter in which the town had a direct and substantial interest. The letter also warned that any similar conduct would be pursued more aggressively in the future.

Conclusions of Law

23. Section 17(c) prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the same municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

24. The town's decisions regarding rezoning the property were particular matters in which the town was a party and had direct and substantial interests.

25. Bernstein acted as agent on behalf of the property owner on each of the following occasions: when she discussed the zoning change article with the town manager; when she discussed the zoning change article with the individual selectmen; and when she presented the proposed zoning change article to the board of selectmen. Thus, Bernstein acted as an agent for the property owner in connection with the rezoning particular matters.

26. Bernstein's actions as an agent for the property owner were not in the proper discharge of her official duties.

27. By acting as an agent for someone other than the town in connection with the particular matters, Bernstein violated § 17(c).¹

28. Bernstein fully cooperated with the Commission's investigation.

Resolution

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

(1) that Bernstein pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 17(c);² and

(2) that Bernstein 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 12, 2003

¹ Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the town in relation to a particular matter in which the town is a party or has a direct and substantial interest. Bernstein's receipt of a commission, a form of compensation, for her role as real estate broker on this particular sale raises § 17(a) issues, but the Commission has chosen not to address those issues, in part because Bernstein's efforts regarding the rezoning particular matters did not succeed in facilitating the sale, which was the actual basis of her commission.

² This resolution reflects the Commission's concern that Bernstein violated § 17 despite her familiarity with the conflict-of-interest law, and despite her having previously, explicitly and in writing received notice from the Commission that such agency conduct would violate § 17.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 676**

**IN THE MATTER
OF
FRANCIS H. DUBAY**

DISPOSITION AGREEMENT

The State Ethics Commission and Francis H. Dubai 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 23, 2002, 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 Dubai. The Commission has concluded its inquiry and, on February 5, 2003, found reasonable cause to believe that Dubai violated G.L. c. 268A, §§ 19 and 20.

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

Findings of Fact

1. During the time relevant, Dubai was an Erving selectman, having been elected to that position in May 2002. As such, Dubai was a municipal employee as that

term is defined in G.L. c. 268A, § 1(g).

2. The population of Erving is less than 2,000, making the Erving selectmen special municipal employees for purposes of the conflict-of-interest law, as that term is defined in G.L. c. 268A, § 1(n).

3. In spring 2002, the newly elected town treasurer was in need of an assistant treasurer. She approached Dubai and asked if he were interested in the position. The position paid approximately \$12 per hour and required a commitment of at least ten hours per week.

4. On May 15, 2002, Dubai called the Ethics Commission for advice on whether he could hold a part-time paid, appointed position under the elected town treasurer when he was also a selectman. He was told that he would be in compliance with the conflict-of-interest law if he filed a written disclosure of the situation with the town clerk, and had the selectmen vote to approve his holding the part-time paid position while also being a selectman. Dubai did not ask whether he could participate in the vote on his own appointment.

5. On June 10, 2002, the selectmen, including Dubai, discussed whether to appoint Dubai as the assistant treasurer. Dubai seconded the motion to appoint himself to the position and voted in favor of the motion, which carried 2-1.

6. At the time of the vote, the dissenting selectman, who had been on the board longer than Dubai, stated that Dubai might have a problem with the Ethics Commission for voting on his own appointment. Dubai heard but did nothing in response to this statement.

7. Dubai's participation in the vote appears to have been determinative because only one of the other two selectmen voted to approve Dubai's appointment to the position. Thus, if Dubai had not cast the deciding vote, he would not have been appointed to the position.

8. Despite having received advice from this Commission on how to comply with the conflict-of-interest law regarding holding two town positions, Dubai did not follow that advice. He failed to file a disclosure with the town clerk, and the selectmen never voted to approve the exemption of his financial interest in the assistant treasurer position from the conflict-of-interest law restrictions.

Conclusions of Law

9. Section 19 of G.L. c. 268A prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which, to his knowledge, he has a financial interest.³

10. The board of selectmen's decision to appoint

Dubay as the assistant treasurer was a particular matter.

11. As the assistant treasurer position was compensated, Dubay had a financial interest in the particular matter of his appointment to that position, and he knew of his financial interest.

12. Dubay participated in that particular matter as a selectman by discussing his own appointment, seconding the motion, and casting the deciding vote in favor of his appointment. He did so despite the concerns of a fellow selectman who had been on the board longer than Dubay.

13. Accordingly, by participating in the particular matter concerning his appointment as assistant treasurer, Dubay violated § 19.

14. Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the same city or town is an interested party of which financial interest the employee has knowledge or reason to know.

15. Section 20 prohibited Dubay, a municipal employee as a selectman, from holding the assistant treasurer position because his appointment as assistant treasurer was a contract made by the town in which the town had a direct and substantial interest, and in which Dubay knowingly had a financial interest.

16. As noted above, a special municipal employee may comply with this section of the conflict-of-interest law by filing with the town clerk a full disclosure of his financial interest, and by having the board of selectmen approve the exemption of his interest pursuant to § 20(d).

17. Dubay was a special municipal employee and could have complied with the § 20(d) exemption provision, but he failed to do so. Thus, Dubay violated § 20.

18. While a special municipal employee's failure to comply with the § 20(d) exemption provision (which requires the selectmen's vote of approval) may not seem like a serious violation in light of the selectmen's having voted to appoint him to the second position, the Commission views Dubay's violation as significant where Dubay was given advice prior to his appointment on his *need* to comply with § 20(d), but failed to do so. In addition, to the extent that the selectmen's vote to appoint Dubay as the assistant treasurer might also be viewed as the approval of Dubay's exemption pursuant to § 20(d), it should be noted that this vote passed only because Dubay participated in and cast the deciding vote, in violation of § 19.

19. Dubay has since resigned his position as assistant treasurer.

20. Dubay fully cooperated with the Commission's investigation and resolution of this matter.

Resolution

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

(1) that Dubay pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 20;⁴ and

(2) that Dubay 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 18, 2003

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

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

³ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

⁴ The civil penalty reflects, in part, Dubay's failure to follow the § 20 advice that he received from this Commission in advance of his conduct, and his failure to heed a fellow selectman's warning.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 677

IN THE MATTER
OF
FRANCISCO CABRAL

DISPOSITION AGREEMENT

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

On December 18, 2002, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Cabral. The Commission has concluded its inquiry and, on March 12, 2003, found reasonable cause to believe that Cabral violated G.L. c. 268A, § 19.

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

Findings of Fact

1. Cabral was Fall River's full-time wiring inspector between February 2001 and December 2002.
2. When electrical work is to performed in Fall River, the inspector conducts a preliminary and a final inspection.
3. Cabral's son Timothy Cabral is a licensed electrician. He performs electrical work in Fall River and neighboring communities.
4. Francisco Cabral inspected his son's electrical work on several occasions between November 2001 and March 2002.
5. In each case, Cabral determined whether his son's work complied with the Massachusetts electric code.
6. The Commission is aware of no evidence indicating that any of the work performed by Timothy Cabral and inspected by Francisco Cabral did not comply with the code.
7. Francisco Cabral cooperated fully with the Commission in this matter.

Conclusions of Law

8. Section 19 of G.L. c. 268A prohibits a municipal employee from participating in his official capacity in a particular matter in which, to his knowledge, he or a member of his immediate family has a financial interest.

9. As a Fall River wiring inspector, Cabral was a municipal employee as that term is defined in G.L. c. 268A, §1.

10. The electrical inspections of Timothy Cabral's work were determinations, and therefore particular matters.¹

11. Cabral participated² in those particular matters by performing the inspections.

12. Timothy Cabral is Francisco Cabral's son, and therefore an immediate family member.³

13. Timothy Cabral had a financial interest in Francisco Cabral's inspections, of which Francisco Cabral had knowledge when he performed the inspections. Had Francisco Cabral determined that his son's work did not comply with the electric code, Timothy Cabral would have had to bring the work into compliance at his own expense.

14. Therefore, by performing inspections of his son's electrical work, Cabral participated as a municipal employee in particular matters in which to his knowledge an immediate family member had a financial interest. Each time he did so, Cabral violated § 19.

Resolution

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

- (1) that Cabral pay to the Commission the sum of seven hundred and fifty dollars, (\$750.00) as a civil penalty for violating G. L. c. 268A § 19; and
- (2) that Cabral 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 19, 2003

¹ "Particular matter" means any judicial or other proceeding,

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

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

³ “Immediate family” means the employee and his spouse, and their parents, children, brothers and sisters.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 678**

**IN THE MATTER
OF
JOHN SAWYER**

DISPOSITION AGREEMENT

The State Ethics Commission and John Sawyer 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 23, 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 Sawyer. The Commission has concluded its inquiry and, on February 5, 2003, found reasonable cause to believe that Sawyer violated G.L. c. 268A, § 19.

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

Findings of Fact

1. Sawyer was Gloucester’s full-time electrical inspector between July 1988 and July 2000. After stepping down as Gloucester’s full-time electrical inspector in July 2000, Sawyer served as the part-time assistant electrical inspector until June 2002.

2. When electrical work is to be performed in Gloucester, the inspector conducts two inspections: a preliminary inspection and a final inspection.

3. Sawyer’s brother, Joseph Sawyer, is a licensed electrician. He performs electrical work in

Gloucester and neighboring communities.

4. John Sawyer inspected his brother’s electrical work numerous times between January 1999 and February 2001. Sawyer conducted most of those inspections when he was the electrical inspector, and a few as the part-time assistant inspector.

5. In each case, Sawyer determined whether his brother’s work complied with the Massachusetts electric code.

6. The Commission is aware of no evidence indicating that any of the work performed by Joseph Sawyer and inspected by John Sawyer did not comply with the electric code.

Conclusions of Law

7. 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 a member of their immediate family have a financial interest.

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

9. The electrical inspections of Joseph Sawyer’s work were determinations, and therefore particular matters.¹

10. Sawyer participated² in those particular matters by performing the inspections.

11. Joseph Sawyer is John Sawyer’s brother, and therefore an immediate family member.³

12. Joseph Sawyer had a financial interest in John Sawyer’s inspections, of which John Sawyer had knowledge when he performed the inspections. Had John Sawyer determined that his brother’s work did not comply with the electric code, Joseph Sawyer would have had to bring the work into compliance at his own expense.

13. Therefore, by performing inspections of his brother’s electrical work, Sawyer participated as a municipal employee in particular matters in which to his knowledge an immediate family member had a financial interest. Each time he did so, Sawyer violated § 19.

Resolution

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

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

(2) that Sawyer 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, 2003

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

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

³ “Immediate family” means the employee and his spouse, and their parents, children, brothers and sisters.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 668**

**IN THE MATTER
OF
RALPH CROSSEN**

DISPOSITION AGREEMENT

The State Ethics Commission and Ralph Crossen 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 March 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 Crossen. The Commission has concluded its inquiry and, on June 25, 2002, found reasonable cause to believe that Crossen violated G.L. c. 268A.

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

Findings of Fact

1. From 1994 until September 2000, Crossen was the Barnstable building commissioner. As such, Crossen was a municipal employee as that term is defined in G.L. c. 268A, § 1, and subject to the provisions of the conflict-of-interest law, G.L. c. 268A.

2. As the building commissioner, Crossen was the *ex officio* chair of the Barnstable Site Plan Review Committee (“the SPRC”). The SPRC comprised representatives from various town regulatory departments, such as building, planning, health and engineering. The SPRC, acting as a clearing house for development projects, met to review plans and advise applicants how to obtain town approvals for their projects, and endeavored to expedite the regulatory process.

Haseotes’s Ice Cream Shop

3. Hyannis is a village within the town of Barnstable that also serves as the town’s central business/commercial district.

4. In May 2000, Byron Haseotes Jr. filed a site plan with the building division regarding proposed renovations to a residential building on Ocean Street in Hyannis. Haseotes also filed a site plan review application with the SPRC, which stated in pertinent part that the work was to convert an existing structure to retail use for the sale of ice cream and hot dogs. While the proposed business was to be strictly take-out, Haseotes planned to have some outdoor seating.

5. On June 8, 2000, the SPRC met to consider Haseotes’s site plan review application. Crossen chaired the meeting in his capacity as building commissioner and *ex officio* SPRC chair. The Health Department representative noted that the proposed seating, indicating a restaurant use, would trigger a public restroom requirement unless Haseotes got a variance. Crossen advised that the plan could be approved that day if the outdoor seating were eliminated. Undecided about how to proceed, Haseotes’s representative indicated that Haseotes would advise the SPRC at a later date.

6. Following the June 8, 2000 meeting, the SPRC, including Crossen, administratively approved Haseotes’s plan for retail use only. Haseotes was advised to file with the Zoning Board of Appeals (“the ZBA”) to obtain a special permit allowing a restaurant in a retail zone.

7. Crossen left his municipal position as building commissioner and *ex officio* SPRC chair in September 2000.

8. On September 28, 2000, the town’s Licensing Board informed Haseotes that any seating for dining at the ice cream shop would require a common victualer

license. Thus, the Licensing Board had concluded that the ice cream shop was a restaurant.¹

9. At some point, Haseotes decided to create the seating that he wanted by constructing a canopy awning adjacent to the ice cream shop. Haseotes began this work without obtaining the necessary permits and/or approvals from the Historic District Commission (“the HDC”) and the Building Department.

10. On November 6, 2000, Building Commissioner Elbert Ulshoeffter (Crossen’s successor) issued a stop work order to Haseotes because, in part, he had not obtained an historic or building permit for the awning.

Crossen’s Acts of Agency and Receipt of Compensation

11. After leaving his municipal position in September 2000, Crossen began to work as a consultant under the name R.M. Crossen & Associates. In that capacity, Crossen helped permit applicants to navigate Barnstable’s complex regulatory process.

12. In January 2001, Haseotes hired Crossen to provide consulting services and assist him in obtaining the various permits required for his ice cream shop.

13. Among other tasks, Crossen met with Building Commissioner Ulshoeffter in early 2001 to find out what was needed to deal with the stop work order and to discuss other pending matters, including the restaurant use issue.

14. During their meeting, Crossen told Ulshoeffter that he did not understand how the Licensing Board had concluded that the ice cream shop was a restaurant. According to Crossen, the town ordinance did not support this conclusion. Crossen pointed out that the seating was outdoor, not indoor, that there was no waitstaff, and that there were three other ice cream/take-out businesses in town that were not considered restaurants. Crossen then explained that Haseotes’s business was a retail use and not a restaurant use.

15. After their meeting, Ulshoeffter researched the restaurant use issue and concluded that Crossen’s position that Haseotes’s business was a retail use was correct.

16. In the meantime, on February 5, 2001, Haseotes himself filed an application for SPRC approval regarding the awning and outside seating.

17. On February 15, 2001, the SPRC met to consider approval for Haseotes’s outside seating area and awning. The board deferred to Ulshoeffter on the restaurant use issue. Ulshoeffter explained to the board that Haseotes’s business was a take-out food service and

not a restaurant. The SPRC approved the plan.

18. Crossen attended the February 15, 2001 SPRC meeting as part of his consulting duties for Haseotes.

19. By March 23, 2001, Haseotes had paid Crossen a portion of what he had agreed to pay him for his consulting work.

Conclusions of Law

20. Section 18(a) of G.L. c. 268A prohibits a former municipal employee from knowingly acting as agent for or receiving compensation² from anyone other than the same municipality in connection with any particular matter³ in which the municipality is a party or has a direct and substantial interest, and in which matter he participated⁴ as a municipal employee.

21. The determination regarding whether Haseotes’s shop involved a restaurant use was a particular matter.

22. The restaurant use issue had serious significance for both the town and Haseotes in that it required Haseotes to obtain a special permit from the ZBA. Thus, the town was a party to and had a direct and substantial interest in that determination.

23. Crossen participated as building commissioner in the restaurant use determination at the SPRC meeting in June 2000.

24. Crossen became a former municipal employee when he left his position as building commissioner in September 2000.

25. In early 2001, Crossen met with Building Commissioner Ulshoeffter on behalf of Haseotes to discuss the restaurant use issue and argue to Ulshoeffter that Haseotes’s shop was not a restaurant. Crossen received compensation for the work that he performed on behalf of Haseotes.

26. By meeting with the building commissioner on Haseotes’s behalf to discuss the restaurant use issue, Crossen acted as agent for someone other than the town in connection with a particular matter in which the town was a party and/or had a direct and substantial interest, and in which matter Crossen had participated as a municipal employee. Therefore, Crossen violated §18(a).

27. In addition, by receiving money from Haseotes for his consulting work, including the work described in Paragraphs 13 and 14 above, Crossen received compensation from someone other than the town in relation to a particular matter in which the town was a

party and/or had a direct and substantial interest, and in which matter Crossen had participated as a municipal employee. Therefore, Crossen violated §18(a).

Resolution

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

- (1) that Crossen pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 18(a);
- (2) the Crossen pay to the Commission the additional sum of \$100, which represents compensation earned in violation of § 18; and
- (3) that Crossen 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, 2003

¹ This conclusion was later found to be incorrect.

² “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).

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

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 663**

**IN THE MATTER
OF
HAL ABRAMS**

DISPOSITION AGREEMENT

The State Ethics Commission and Hal Abrams 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 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 Abrams. The Commission has concluded its inquiry and, on May 30, 2002, found reasonable cause to believe that Abrams violated G.L. c. 268A, § 17.

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

Findings of Fact and Conclusions of Law

1. Between February 13, 1991 and December 13, 1999, Abrams was a local building inspector for the Boston Inspectional Services Department (“the ISD”). As such, Abrams was a municipal employee within the meaning of G.L. c. 268A, § 1.

2. Between August 30, 1999 and November 30, 1999, Abrams was on unpaid medical leave from his ISD employment. During that time, the city co-paid Abrams’s health insurance premiums, and both the city and Abrams anticipated that Abrams would resume his ISD duties when his leave ended. Therefore, during the time relevant, Abrams remained a municipal employee subject to the conflict-of-interest law.

3. In mid-October 1999, Abrams entered into an oral consulting contract with Global Ventures Ltd. (“GVL”), a Boston developer.

4. Abrams worked for GVL as a consultant for about two months and earned a total of about \$8,800 in compensation.

5. Abrams ceased working for both GVL and the ISD in early December 1999.

Applying for Permit from Boston Landmarks Commission

6. While working for GVL, Abrams served as a consultant on GVL's development at 485-497 Harrison Avenue in Boston's South End.

7. The Harrison Avenue project, which was estimated to cost \$1.2 million, was within the jurisdiction of the city's South End Landmark District Commission ("the Landmark Commission").

8. In early November 1999, Abrams as a consultant for GVL on the Harrison Avenue project visited the Landmark Commission office with the project architect. They discussed with the Landmark Commission staff how to apply for and receive Landmark Commission approval for the Harrison Avenue project.

9. On November 8, 1999, Abrams went with the project architect to file a Landmark Commission application on behalf of GVL for design approval regarding the Harrison Avenue project. At the time, Abrams was acting in his capacity as GVL's consultant on the Harrison Avenue project. Thereafter, the Landmark Commission sent correspondence concerning the project to Abrams's attention at GVL.

10. GVL paid Abrams for his duties as a consultant on the Harrison Avenue project.

11. Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving compensation¹ from anyone other than the municipality in relation to a particular matter² in which the municipality is a party or has a direct and substantial interest.

12. Section 17(c) of G.L. c. 268A prohibits a municipal employee from, otherwise than in the proper discharge of his official duties, acting as agent for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest.

13. The design approval application for the Harrison Avenue project was a particular matter.

14. The city had a direct and substantial interest in this particular matter because the Landmark Commission was responsible for reviewing and approving the design approval application.

15. Abrams acted as an agent for GVL when he appeared at the Landmark Commission office and discussed the process that GVL would have to follow to receive design approval from the Landmark Commission.

Abrams did not perform this conduct in the proper discharge of his official duties.

16. Abrams received compensation from GVL for discussing the design approval of the Harrison Avenue project with the Landmark Commission staff. Abrams's receipt of this compensation was not provided by law for the proper discharge of his official duties.

17. According to Abrams, he understood that the restrictions on his working as a consultant for or receiving compensation from GVL were only in relation to those particular matters which concerned projects within his assigned ward as an ISD local building inspector. It is, however, irrelevant to a violation of § 17 whether the particular matter concerned a project within Abrams's assigned ward or not. The project could have been located in any city ward, so long as the particular matter was of direct and substantial interest to the city.

18. Thus, Abrams received compensation from and acted as an agent for GVL, a private party other than the city, in relation to the design approval application for the Harrison Avenue project, a particular matter in which the city had a direct and substantial interest. By so doing, Abrams violated § 17(a) and (c).

Acting as Agent with Regard to ISD Permit

19. During the time relevant, GVL was working on a renovation project at 24 Cumberland Street in Boston.

20. On October 29, 1999, GVL applied to the ISD for a permit to perform construction work at 24 Cumberland Street. The estimated cost of this project was \$2,000.

21. On or about November 9, 1999, Abrams telephoned the ISD and spoke to an ISD employee. During that conversation, Abrams inquired as to the status of the permit for 24 Cumberland Street and asked the ISD staff to process the application as soon as possible.

22. On November 29, 1999, Abrams visited the ISD office to ascertain the status of his medical leave. While at the ISD office, Abrams learned that the ISD staff at the permit counter could not find the Landmark Commission approval on the 24 Cumberland Street permit application. Abrams informed the ISD staff that the Landmark Commission had already returned its approval on the project, which was a prerequisite to the ISD's approval. In fact, the Landmark Commission had not yet approved the application as submitted.

23. After receiving an amended version of the application later on November 29th, the Landmark Commission approved the application with one item to be submitted on amendment.

24. The ISD prepared the permit for issuance on November 29, 1999.

25. The construction permit application for 24 Cumberland Street was a particular matter.

26. The city had a direct and substantial interest in this particular matter because the ISD was responsible for reviewing and approving the permit application.

27. Abrams's compensation from GVL did not include his work with regard to the 24 Cumberland Street project or his dealings with the ISD on GVL's behalf. Nevertheless, Abrams acted as an agent for GVL when he spoke with the ISD staff about the 24 Cumberland Street permit, as discussed above. Abrams did not perform this conduct in the proper discharge of his official duties.

28. Thus, Abrams acted as an agent for GVL, an entity other than the city, in relation to the construction permit application for 24 Cumberland Street, a particular matter in which the city had a direct and substantial interest. By so doing, Abrams violated § 17(c).

Receiving Compensation for Terrace Street Project

29. In June 1998, GVL filed applications with the Boston Zoning Board of Appeals ("the ZBA") for two zoning variances regarding renovations to its development at 150-170 Terrace Street in Boston. The estimated cost of this project, which was contingent upon obtaining the zoning variances, was \$14.3 million.

30. While working for GVL, Abrams served as a consultant on the Terrace Street project.

31. On November 23, 1999, the ZBA held a 20-minute hearing on GVL's two zoning variance requests. Abrams attended the hearing with members of the GVL design team.

32. GVL paid Abrams for his duties as a consultant on the Terrace Street project, including his attendance at the ZBA hearing.

33. The zoning variance application process for the Terrace Street project was a particular matter.

34. The city had a direct and substantial interest in this particular matter because the ZBA was responsible for reviewing and approving the zoning variance applications.

35. Abrams received compensation from GVL for attending the ZBA hearing on the Terrace Street project. Abrams did not receive this compensation as provided by law for the proper discharge of his official

duties.

36. Thus, Abrams received compensation from and acted as an agent for GVL, a private party other than the city, in relation to the zoning variance application process for the Terrace Street project, a particular matter in which the city had a direct and substantial interest. By so doing, Abrams violated § 17(a).

Resolution

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

(1) that Abrams pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 17(a) and (c);

(2) that Abrams pay to the Commission the sum of \$440 as a civil forfeiture reflecting that portion of the compensation attributable to the § 17(a) violation; and

(3) that Abrams 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 17, 2003

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. 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. 675

IN THE MATTER
OF
JOHN W. OHMAN

DISPOSITION AGREEMENT

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

On July 24, 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. 268B, by Ohman. The Commission has concluded its inquiry and, on September 5, 2002, found reasonable cause to believe that Ohman violated G.L. c. 268B, § 5(g).

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

1. Ohman is an elected official and serves as a delegate on the Barnstable County Assembly of Delegates. Ohman was designated to file a Statement of Financial Interests ("Statement"), in accordance with G.L. c. 268B and 930 CMR 2.00.

2. Ohman was required to file a Statement for calendar year 1999. Ohman filed his 1999 Statement 69 days late. In settlement of that matter, Ohman signed a disposition agreement and paid a \$500 civil penalty.

3. On December 5, 2001, Ohman was notified of his obligation to file a Statement for calendar year 2001.

4. On March 11, 2002, Ohman was mailed a 2001 form and instruction booklet. The Statement was required to be filed by May 28, 2002.

5. Ohman did not file his Statement on or before May 28, 2002.

6. On May 31, 2002, the Commission sent a Formal Notice of Lateness to Ohman, which was received on June 11, 2002. This Notice advised Ohman that a Statement had not been filed and was, therefore, delinquent and further, that failure to file such a Statement within ten days would result in civil penalties. Therefore, the Statement was required to be filed by June 21, 2002.

7. The Notice also advised Ohman that his late filing of a Statement for a second time would lead to a doubling of the fine amount.

8. On June 24 and July 2, 2002, the Commission sent warning letters to Ohman advising him that his Statement had not been filed and was, therefore, delinquent.

9. Ohman filed his 2001 Statement with the Commission on August 16, 2002, 55 days late.

10. Ohman's failure to file a Statement within ten days of receiving the Formal Notice of Lateness was a violation of G.L. c. 268B, § 5(g).

11. General Laws c. 268B, § 4(d) authorizes the Commission to impose a civil penalty of up to \$2,000 for each violation of c. 268B. The Commission has adopted the following schedule of penalties for Statements or amendments to such Statements that are filed more than ten days after receipt of the Formal Notice of Delinquency:

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

12. The Commission has adopted the following schedule for the repeated late filing of a Statement:

1-10 days delinquent:	\$100
11-20 days delinquent:	\$200
21-30 days delinquent:	\$400
31 days or more:	\$1,000
Non-filing:	\$2,000

13. Ohman filed his Statement over 31 days late. Therefore, based on the Commission's penalty schedule for the repeated late filing of a Statement, Ohman's penalty is \$1,000 dollars.

14. Ohman has not presented any mitigating circumstances.

In view of the foregoing violation of G.L. c. 268B by Ohman, 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 Ohman:

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

(2) that Ohman 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, 2003

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 679**

**IN THE MATTER
OF
MARY JANE SAKSA**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Mary Jane Saksa 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 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 Saksa. The Commission has concluded its inquiry and, on April 16, 2003, found reasonable cause to believe that Saksa violated G.L. c. 268A, § 23(b)(2) and (b)(3).

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

Findings of Fact

1. Mary Jane Saksa serves as the Director of the Substance Abuse Program ("Program") for the Worcester County Sheriff's Office.

2. As the Program Director, Saksa supervises approximately 18 subordinates, who serve as substance abuse counselors, treatment managers, job developers (for inmates and those on probation), and support staff.

3. Between April 1998 and March 2001, Saksa worked part-time, on her own, as a regional sales representative for Excel Communications, Inc., a private company that provides telephone, telecommunication and e-commerce services through its independent representatives. Excel has a sales/commission arrangement whereby its representatives have their own

field offices to sell Excel's long distance telephone service while also recruiting people to become Excel representatives and start their own field offices. Representatives make between \$35-145 for each person they recruit to become representatives. Representatives also earn commissions each time a person to whom they, or representatives they recruited, have sold Excel's long-distance service places a long-distance call.

4. During the time she was working as an Excel representative, Saksa solicited several of her Sheriff's Office subordinates as to whether they had an interest in becoming Excel representatives and/or whether they wanted to switch their long distance telephone service to Excel.

5. Some subordinates Saksa solicited did not have a prior social and/or business relationship with her. These subordinates have stated that they felt pressured by Saksa to become involved with Excel because Saksa was their supervisor. Others stated that they did not feel pressured to join Excel.

6. In total, between April 1998 and March 2001, Saksa received \$1,320 in compensation related to her Excel solicitation of sheriff department subordinates with whom she did not have a substantial prior social and/or business relationship.

Conclusions of Law

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

8. As Worcester County Sheriff's Office Director of Substance Abuse Programs, Saksa is a state employee, as that term is defined in G.L. c. 268A, § 1.

9. By soliciting subordinates with whom she did not have a substantial prior social and/or business relationship to become associated with Excel, Saksa knew or had reason to know that she was using her official position to initiate a business relationship with a subordinate employee.

10. Such a business relationship is an unwarranted privilege in this case because Saksa initiated the relationships as noted above and because her subordinates' decisions to become associated with Excel were not entirely voluntary. In fact, such decisions will rarely be voluntary because they will be influenced, and were so influenced in this case, by the inherently exploitable nature of the relationship between a supervisor and her subordinates. Saksa's solicitation of a business relationship under the above conditions was also not properly available

to similarly situated individuals.

11. The amount of compensation that Saksa received from her soliciting these subordinates to join Excel was \$1,320 and therefore of substantial value.

12. Thus, under the totality of the circumstances, by using her official position as the Worcester County Sheriff's Office Director of Substance Abuse Programs to secure for herself an unwarranted business relationship with her subordinates to become Excel representatives and/or to purchase Excel products whereby she personally profited by \$1,320, Saksa violated G.L. c. 268A, § 23(b)(2).

13. 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 her favor in the performance of their official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.¹

14. By supervising subordinates that she had solicited to become Excel representatives and/or to purchase Excel products, without disclosing these facts, Saksa, 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 her subordinates could unduly enjoy Saksa's favor in the performance of her official duties. Therefore, in so acting, Saksa violated G.L. c. 268A, § 23(b)(3) on each occasion.

Resolution

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

- (1) that Saksa pay to the Commission the sum of \$1,000 as a civil penalty for her conduct in violating G.L. c. 268A, § 23(b)(2) and 23(b)(3);
- (2) that Saksa disgorge the economic benefit she received by violating G.L. c. 268A, § 23(b)(2) and 23(b)(3), namely the \$1,320, compensation she earned; and
- (3) 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 24, 2003

¹ Section 23(b)(3) provides, in part, that it "shall be unreasonable to so conclude if such officer or employee has disclosed in writing to her 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." Saksa 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, in this case, to reflect whether she should pursue a private business relationship with a subordinate. Importantly, the written notice also gives the appointing authority the opportunity to consider the issues and to take appropriate action. Where there are serious '23 appearance concerns such as in the present case, it seems likely that an employee will not initiate such a relationship, or if timely disclosure is made, she will be directed by her appointing authority to avoid such a relationship or, at least, first seek legal advice.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 680

IN THE MATTER
OF
TAMARIN LAUREL-PAINE

DISPOSITION AGREEMENT**

This Disposition Agreement is entered into between the State Ethics Commission and Tamarin Laurel-Paine 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 5, 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 Laurel-Paine. The Commission has concluded its inquiry and, on November 26, 2002, found reasonable cause to believe that Laurel-Paine violated G.L. c. 268A, § 19.

The Commission and Laurel-Paine now agree to the following findings of fact and conclusions of law.

Findings of Fact

1. For all times relevant, Laurel-Paine was a member of Middlefield's planning board, a position she held from 1992 to 2002. In May 2001, Laurel-Paine was

elected chair of the planning board. She did not actually chair any meetings until fall 2001, because at each planning board meeting during the spring and summer of 2001, at least part of the meeting related to land that she co-owned. In 2002, her term expired and she did not seek re-election to the board.

2. In March 2001, Laurel-Paine and her business partner applied to the Middlefield Zoning Board of Appeals for a special permit to build a 20,000 square foot warehouse for their business, with an attached house, on a 28-acre parcel they had purchased in the middle of town. The parcel, which was then zoned agricultural/ residential, abutted the town's business district.

3. The zoning board commenced its public hearing on Laurel-Paine's application for a special permit granting a home occupation use in April 2001. On April 30, 2001, the zoning board continued the hearing to give the board time to contact town counsel for advice.

4. Based on town counsel's advice to the zoning board, the selectmen decided that it would be appropriate to expand the business district to include Laurel-Paine's property, thereby providing a business-zoned location for which the zoning board could then issue a special permit for a business use.

5. By letter dated May 7, 2001, the selectmen petitioned the planning board "to consider expanding the current business district ... to include property recently purchased by Tamarin Laurel-Paine," and requested that the planning board hold a public hearing as required under G.L. c. 40A, § 5. Thereafter, the matter would go to the town for a vote at a special town meeting.

6. On May 14, 2001, the planning board held a meeting to discuss the matter of extending the business district. To avoid conflict-of-interest concerns, Laurel-Paine did not chair the meeting, but she did read into the record the May 7, 2002 letter from the selectmen to the Planning Board, and she handed out relevant documentation. (Thereafter, Laurel-Paine did not chair any subsequent Planning Board meetings at which the board discussed rezoning her property, nor did she cast any votes upon that particular matter.)

7. The planning board met again on May 22, 2001. The discussion turned to what had occurred following the zoning board hearing on Laurel-Paine's application. A selectman and zoning board member explained that the town had consulted with a lawyer who suggested that it would be better for the town to vote to amend the business district to include Laurel-Paine's property, rather than to defend a legal challenge of a zoning board special permit granting a home occupation use. In addition, the lawyer had said that "it wouldn't present a problem of 'spot zoning,' because 'it is a contiguous

expansion of the existing district, and not a new creation on a lot isolated from the current business use.'" In response, a planning board member asked if the lawyer thought that the town "would alleviate a tenuous legal position by establishing a commercial district," which question was answered affirmatively. Shortly thereafter, Laurel-Paine stated that the "suggested creation of a new 'commercial' district for this one spot in town is opposite to the lawyer's advice for an extension of the existing [business] district not being spot zoning."

8. On June 4, 2001, the planning board conducted a public hearing on whether the board should recommend to town meeting that Laurel-Paine's parcel be rezoned. Laurel-Paine did not participate in the hearing.

9. Among the concerns raised in the context of the rezoning matter were whether to impose additional restrictions and regulations on business uses town-wide, and whether to impose a specific set of standards that would apply only to Laurel-Paine's property.

10. On June 7, 2001, the planning board convened again to discuss, among other things, what to recommend to town meeting regarding Laurel-Paine's property. Prior to resuming that discussion, Laurel-Paine spoke at length on the concept of additional business regulations and restrictions. While her comments addressed general concerns on imposing new business use restrictions, Laurel-Paine made several references to the proposed restrictions in the context of the recent controversy that concerned her own property. The board then resumed discussing whether to recommend an expansion of the business district to include Laurel-Paine's property. Prior to the board's voting on that issue, Laurel-Paine reminded the board, "We are obligated to provide 'a report with recommendations by the planning board' to submit to Town Meeting," and asked what those recommendations were. After further discussion, the board, with Laurel-Paine abstaining, agreed that the proposal to extend the business district to include Laurel-Paine's property should be brought to the town for a vote, but without making any particular recommendations.

11. On July 30, 2001, the town voted to rezone Laurel-Paine's property by a vote of 133-50.

Conclusions of Law

12. Section 19 of G.L. c. 268A prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which, to his knowledge, he has a financial interest.³

13. As a planning board member, Laurel-Paine was, in May and June 2001, a municipal employee as that term is defined in G.L. c. 268A, § 1.

14. The town's decision on whether to rezone Laurel-Paine's property was a particular matter.

15. The planning board discussed that particular matter at its meetings in May and June 2001, as set forth above. By taking part in those planning board discussions as a planning board member, Laurel-Paine participated as a municipal employee in the above-noted particular matter.⁴

16. Laurel-Paine had a financial interest in the town's decision on rezoning her property because the decision would have a reasonably foreseeable impact how she could develop her land and her business. Laurel-Paine knew of this financial interest when she participated in the particular matter as described above.

17. Accordingly, by participating in the particular matter concerning the rezoning of her land, Laurel-Paine violated § 19.

Resolution

In view of the foregoing violation of G.L. c. 268A by Laurel-Paine, 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 Laurel-Paine:

- (1) that Laurel-Paine pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 19; and
- (2) that Laurel-Paine waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: April 28, 2003

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

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

³ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See

EC-COI-84-98. The interest can be affected in either a positive or negative way.
EC-COI-84-96.

⁴ Laurel-Paine's participation in this particular matter in the meetings as set forth above would have been permissible had she formally recused herself as a planning board member, stepped down from her seat as a board member, and made clear that she was speaking as a private citizen on her own behalf. She did not do so. Although Laurel-Paine recused herself from chairing and voting as a planning board member, and publicly disclosed her business interests, those actions were not sufficient to avoid a violation of the conflict-of-interest law based on her active participation in the relevant discussions.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 681

IN THE MATTER
OF
ROBERT KOMINSKY

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Robert Kominsky 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 18, 2002, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Kominsky. The Commission has concluded its inquiry and, on April 16, 2003, found reasonable cause to believe that Kominsky violated G.L. c. 268A, § 23(b)(2) and (b)(3).

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

Findings of Fact

1. Kominsky is the West Bridgewater Police Chief. As the police chief, Kominsky is a municipal employee as that term is defined in G.L. c. 268A, § 1. In his official capacity, he participates in all personnel matters concerning subordinate officers including hiring, termination, discipline and overall supervision.

2. On several occasions over a year and a half, Kominsky asked subordinate police employees to make cash deposits in the chief's son's account at a correctional facility in Dedham. The requests took place at the police station during normal working hours. The officers performed these errands on town time, using a police vehicle. Each errand took approximately an hour and involved a distance of 50 miles round trip. The subordinates complied because the requests came from the chief as their supervisor.

Conclusions of Law

3. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know using his position to secure for himself or others unwarranted privileges of substantial value not properly available to similarly situated individuals.

4. By asking his subordinates to perform personal errands for him, Kominsky knowingly or with reason to know used his position as police chief. Where Kominsky was the supervisor and had the ability to and did take action concerning the terms and conditions of the subordinates' employment, his requests for private errands constituted a use of his position.

5. Kominsky's ability to secure personal favors under these circumstances was a special advantage or privilege. There was no public safety justification for such requests. Therefore, asking for such favors under these circumstances was an unwarranted privilege.

6. Having a subordinate do personal errands for a supervisor on municipal time using public resources is of substantial value as each hour long trip would exceed \$50 in taxicab costs as well as the cost that the town incurred for the subordinates' salaries while performing the errands. There is no town ordinance or other policy that would permit a supervisor to ask subordinates to do personal errands on work time and 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.

7. Therefore, by knowingly using his position as police chief to secure for himself these unwarranted privileges of substantial value not properly available to similarly situated individuals, Kominsky violated §23(b)(2).

8. 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.

9. By asking for private favors from subordinates while supervising those subordinates, Kominsky acted in a manner which would cause a reasonable person knowing these facts to conclude that the subordinates might unduly enjoy his favor in the performance of his official duties as their supervisor. Moreover, he did not make the relevant disclosure that would have dispelled the appearance of conflict from arising or allowed his appointing authority to review the situation. Therefore, in so acting, Kominsky violated G.L. c. 268A, §23(b)(3) on each occasion.

Resolution

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

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

(b) 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 29, 2003

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 528

IN THE MATTER
OF
LIFE INSURANCE ASSOCIATION
OF MASSACHUSETTS

DECISION & ORDER

Appearances: Wayne Barnett, Esq.
Counsel for Petitioner

John J. Curtin, Jr., Esq.
Counsel for Respondent

Commissioners: Wagner, Ch., Cassidy,¹ Roach, Dolan,
Todd²

DECISION AND ORDER

I. Procedural History

On December 16, 1997, following an adjudicatory hearing, the Ethics Commission (Commission) concluded that the Life Insurance Association of Massachusetts (LIAM) violated G.L. c. 268A, § 3(a) on nine occasions between 1989 and 1993, by paying for dinners to legislators and to the Insurance Commissioner, and, in one instance, a set of golf clubs to a retiring legislator. The Commission levied a civil penalty against LIAM in the amount of \$13,500. This Decision was appealed to the Superior Court, which affirmed the Commission's Decision and Order. LIAM appealed the Superior Court Decision to the Supreme Judicial Court. The case was before the Supreme Judicial Court with a companion case of Scaccia v. State Ethics Commission, 431 Mass. 351 (2000) (Scaccia). In light of its decision in Scaccia, the Court remanded Life Insurance Association of Massachusetts v. State Ethics Commission, 431 Mass. 1002 (2000) to the Superior Court for further remand to the Commission. The Supreme Judicial Court directed the Commission to review the record and make "further findings and a determination whether LIAM's expenditures were intended to influence a specific 'official act performed or to be performed' by public officials."³

On June 8, 2001, the Superior Court (Fabricant, J.), following the instructions of the Supreme Judicial Court, remanded the case to the Commission.

The parties, at the request of the Commission, submitted memoranda on November 9, 2001. The Respondent filed a reply memorandum on November 29, 2001 and the Petitioner filed a reply memorandum on

December 6, 2001. On April 17, 2002, the full Commission held a hearing and heard the parties' arguments. Deliberations began in executive session on that date.⁴

In rendering this Decision and Order which concludes, as fully discussed below, that LIAM violated G.L. c. 268A, § 3(a) on two occasions, each undersigned member of the Commission has considered the evidence and the legal argument of the parties. This Decision contains a general legal discussion, followed by a discussion of each of the nine gratuities. The discussion of each individual gratuity begins with the two gratuities that we find violate § 3(a), followed, in chronological order, by discussions of the gratuity allegations that we find have not been proven by a preponderance of the evidence.

II. Decision

A. Legal Discussion

This case requires us to examine and apply the language of G.L. c. 268A, § 3(a), which states:

Whoever otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee or to any member of the judiciary, or to any person selected to be such an employee or member of the judiciary, for or because of any official act performed or to be performed by such an employee . . .

The Supreme Judicial Court has asked us to focus on whether LIAM's expenditures for meals and a set of golf clubs for various legislators and the Insurance Commissioner "were intended to influence a specific 'official act performed or to be performed.'"⁵ G.L. c. 268A, § 1(h) defines the term "official act" as "any decision or action in a particular matter or in the enactment of legislation."

When construing statutory language, we begin with the proposition that 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 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 that the law seeks to fulfill.⁶

At the time of the enactment of § 3, the drafters of the Massachusetts conflict of interest law were also studying proposed federal conflict of interest legislation.⁷ The Massachusetts drafters have indicated that they used a report by the Association of the City of New York Special Committee on the Federal Conflict of Interest Laws (New

York Special Committee) as a basic text in drafting the conflict of interest law.⁸

The New York Special Committee recognized five policy objectives to be addressed in any conflict of interest legislation: government efficiency; equal treatment of equal claims;⁹ public confidence; preventing the use of public office for private gain; and preserving the integrity of government policy-making institutions.¹⁰ The issue of gifts and gratuities given to public officials raises concerns that public office may be used for private gain; that donors of gifts receive unequal access in the halls of government; and that public confidence is eroded in the decision-making processes.

These concerns are raised whether or not there is an actual *quid pro quo* for a gift. The conflict of interest law is concerned not only with actual conflicts of interest but also with perceptions of conflicts.¹¹ Whether actual or perceived, each situation erodes public confidence in government.¹²

While acknowledging the prophylactic purposes of the conflict of interest law, we also recognize that not all gifts are impermissible under the statute. The Supreme Judicial Court, in Scaccia, following the rationale of the United States Supreme Court in United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999), found that “for the commission to establish a violation of G.L. c. 268A, § 3(a) and (b), 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” regarding the giver’s interests. Further, in discussing the intent of the giver, the Supreme Judicial Court indicated that “a gratuity in violation of the statute . . . 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.”¹³

In the Scaccia decision, the Supreme Judicial Court also relied upon an opinion concerning a federal gratuities criminal case from the D.C. Circuit, U.S. v. Schaffer, 183 F.3d, 833 (D.C. Cir. 1999). The Schaffer Court succinctly defined the intent element as follows:

A gratuity can take the form of a reward for past action –i.e. for a performed official act . . . Second, a gratuity can be intended to entice a public official who has already staked out a position favorable to the giver to maintain that position . . . Finally, a gratuity can be given with the intent to induce a public official to propose, take, or shy away from some future official act . . . This third category would additionally encompass gifts given in the hope that, when the particular official actions move to the forefront, the public official will listen hard to, and hopefully

be swayed by, the giver’s proposals, suggestions and/or concerns.”¹⁴

The Supreme Judicial Court recognized, and we acknowledge, that direct evidence of an illegal gratuity is not likely to be present in a particular case. The Supreme Judicial Court did not articulate with specificity the sufficiency and qualitative nature of the evidence necessary to prove the requisite nexus between a specific official act and an intent to influence or reward a public official. However, the Court provided some initial guidance, stating:

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 . . . Accordingly, evidence regarding the subject matter of pending legislation and its impact on the giver, the outcome of particular votes, the timing of the gift, or changes in a voting pattern would be some of the appropriate factors in proving a violation.¹⁵

From our research, the Schaffer Court is one of very few in the United States that has been required to review the adequacy of the proof of nexus in a gratuities case, as the Commission is now called upon to do. The Schaffer Court acknowledged that the intent element is subjective and it examined the totality of the circumstances surrounding the gratuities, “focusing upon the more realistic and probative question of whether the acts in question were substantially, or in large part motivated by the requisite intent to influence. . . .”¹⁶

Accordingly, when deciding whether a gratuity has been given “for or because of an official act performed or to be performed” under G.L. c. 268A, § 3, we will weigh the totality of all of the circumstances surrounding the gratuity, drawing reasonable inferences from the circumstances. We will consider whether the gratuity was given substantially, or in large part was motivated by, the requisite intent to influence a present or future official act of the public official or to reward a past action.¹⁷

We consider the Supreme Judicial Court’s factors as suggestions, not as an exclusive list. In addition to the factors given by the Supreme Judicial Court, we would add, among other factors: whether the gift was aberrational conduct for the giver;¹⁸ the location of the entertainment; the nature, amount, and quality of the gift; whether the gift was considered a business expense; to whom the gift was targeted; whether there was reciprocity; the existence or absence of any personal friendship; the intensity of the

lobbying activities;¹⁹ the sophistication of the parties; and whether the gratuity is part of a repetitive occurrence.

We consider how a public official voted or whether a public official had actual knowledge about the precise identity of a giver to be factors, but such factors are not dispositive of the intent by a donor, such as LIAM, to influence a specific official act. These are merely additional factors to be weighed in the totality of the circumstances. The Supreme Judicial Court has stated that, unlike a bribe, “only a one-way nexus need be established for a gratuity violation.”²⁰ Therefore, the relevant issue here is the intent of LIAM in giving the gratuities, not the intent of the public officials who accepted the gratuities.

Before turning to an analysis of the specific gratuities at issue, it is necessary to understand the context and background of the lobbying process.

B. The Lobbying Process

1. Subsidiary Background Facts

All of the facts stipulated by the parties or found by the Commission in its original December 16, 1997 Decision and Order are incorporated by reference into this Decision and Order. Following a review of the complete administrative record we find the following additional facts by a preponderance of the evidence:

1. One of the benefits LIAM offered to its members was the power to collectively advocate on an issue and present a unified position.

2. The LIAM Executive Committee set the policy for LIAM. William Carroll reported to the Executive Committee. The Executive Committee was composed of executives of LIAM members who were appointed to serve by the members’ chief executive officers.

3. LIAM advisory committees were composed of employees of LIAM members. Advisory committees advised William Carroll and the Executive Committee on legislative and regulatory issues.

4. Over 100 individuals from LIAM member companies volunteered to serve on advisory committees.

5. The advisory committees included lawyers, actuaries, insurance underwriters and others with expertise in the particular subject matter. LIAM used this expertise on its advisory committees, and the committees’ research to develop advocacy positions.

6. LIAM staff members sent pieces of legislation to the appropriate advisory committee to study. LIAM advisory committees reviewed legislation and regulations according to their assigned subject matter. For example, the Health Insurance Advisory Committee reviewed proposed health insurance legislation.

7. LIAM advisory committees reviewed and researched legislative bills to determine the issues presented by the bill and the bill’s impact on the insurance industry. An advisory committee made a recommendation to the Executive Committee. The Executive Committee used the recommendation to take a position whether to favor or disfavor a bill. Generally the Executive Committee adopted the advisory committee’s recommendation.

8. The written research and recommendations of the advisory committees were organized into packets and given to LIAM legislative agents or legislative agents of LIAM member companies.

9. The legislative agents met with legislators in the legislators’ offices to disseminate the materials. A company expert may accompany a legislative agent on a legislative visit.

10. LIAM also sent educational materials and letters to legislators’ State House offices.

11. LIAM legislative agents testified at legislative committee hearings on major bills of importance to LIAM and its members and submitted written materials.

12. LIAM also built coalitions in the community with individuals or groups that shared LIAM’s interest on issues.

13. One of LIAM’s advisory committees was a Legislative Counsel Committee composed of legislative agents for LIAM and LIAM member companies. In the relevant time frame, members of the Legislative Counsel Committee included: Luke Dillon; Edward Dever; William Sawyer; Alvaro Sousa and John Spillane.

14. The Legislative Counsel Committee met weekly when the Legislature was in session to discuss the Executive Committee’s positions on pieces of legislation. The purpose of the meetings was to make sure that the legislative agents understood the issues so they could lobby effectively.

15. At the Legislative Counsel Committee meetings the legislative agents discussed which legislators and staff members to

approach on a particular piece of legislation.

16. At the Legislative Counsel Committee the legislative agents tried to coordinate which lobbyist visited which legislator.

17. It was important that a LIAM legislative agent met with the chairmen of a committee and the members of the committee who best understood the issue and could explain the issue to other legislators. The personal relationship and rapport between a legislative agent and legislator was important in selecting which legislator to meet.

18. One of LIAM's lobbying objectives was to provide many materials so that legislators would clearly understand LIAM's positions.²¹

19. LIAM sought to be identified, by its lobbying efforts in the Legislature, as "the primary spokesman for the life and health insurance industry in the commonwealth."²²

20. In their lobbying activities, LIAM legislative agents met with legislators and committee chairmen outside of public hearings.

21. LIAM expected its lobbyists to be on speaking terms with all members of the Legislature.

22. Often, not only William Carroll, but also several other representatives of the insurance industry would meet with legislative committee chairmen. It was important to LIAM to maintain good relationships with the Insurance Commissioner, the Division of Insurance, the Legislature, and the legislative Joint Committee on Insurance.

23. William Carroll had instructed LIAM staff and Luke Dillon not to discuss legislation at dinners with legislators.

24. During the relevant time frame, Representative Woodward never bought dinner for William Carroll.

25. During the relevant time frame no state representative paid for William Carroll's lunch or dinner.

26. William Carroll's duties at LIAM included: directing the staff; performing general administrative duties; coordinating LIAM advisory committees; and serving as media spokesman. He was responsible for budget expenditures. His duties included coordinating the lobbying effort by the various lobbyists who represent LIAM and LIAM members. He was a registered legislative agent.

27. William Carroll was involved with lobbying activities approximately 10% of his work time. He was more likely to become involved as a lobbyist if the issue was of particular importance to LIAM. He decided on which bills he would offer testimony.

28. If an issue was of critical importance to LIAM, William Carroll would seek a meeting or be asked by other legislative agents to meet with a legislator, legislative staff, or employees of the Division of Insurance to explain LIAM's position.

29. During the relevant time period, William Carroll had substantial dealings with state regulators.

30. William Carroll has lobbied, among others, Representatives Francis Woodward, Francis Mara, Frank A. Emilio, Marc Pacheo, Thomas P. Walsh, Michael P. Walsh, John F. Cox, and Angelo Scaccia.

31. Luke Dillon was the chief legislative agent under contract for LIAM. He took the positions approved by the Executive Committee and the materials prepared by the advisory committees to the legislators and advocated LIAM's views. Occasionally William Carroll would accompany Mr. Dillon on legislative visits.

32. Luke Dillon's duties for LIAM included: representing LIAM on legislative matters; performing legislative agent activities; advising William Carroll; and developing relationships with Massachusetts state employees, including state legislators.

33. Luke Dillon worked hard to establish good professional relationships with the Legislature and the executive branch so that legislators and members of the executive branch would return his telephone calls and meet with him on an informal basis.

34. In his duties Luke Dillon testified at legislative hearings and held informal meetings with members of the Legislature to discuss pending bills.

35. Luke Dillon lobbied, among others, Representatives Francis Woodward, Francis Mara, Frank Emilio, Thomas Walsh, Michael Walsh, John Cox, Kevin Poirier, and Kevin Honan.

36. At LIAM, Francis O'Brien's duties included monitoring legislation and regulations. He worked on the National Association of Insurance Commissioners (NAIC) accreditation issue, taxation and tax reform issues. He was a registered legislative agent.

37. The Joint Committee on Insurance (Insurance Committee) was the legislative committee

with the largest number of bills of interest to LIAM.

38. The co-chairmen of the Insurance Committee had significant power over Insurance Committee activities.

39. Generally the entire Insurance Committee had a role in determining whether a proposed bill should or should not pass.

40. Between 1989-1993 Health Care Committee bills of interest to LIAM were pending.

41. The House and Senate Committee on Bills in Third Reading examined and corrected bills, reviewed the bills for accuracy in text and consistency with other state laws, reported any legal changes made to the bill as amendments, and could consolidate bills.

42. Any Legislative committee to which a bill was assigned could vote to give the bill a favorable or unfavorable recommendation to the Legislature, or to place the bill on file, or to send the bill to another committee.

43. Each bill initiated in the House of Representatives and reported out of committee passed through three readings in the House. If the bill affected state finances it was referred to the House Ways and Means Committee after the first reading.

2. Discussion

The overall context of sophisticated lobbying practice is the lens through which the specific acts, described below, must be viewed. Certainly, LIAM has federal and state constitutional rights, as with any individual or group, to petition government officials and advocate its position on a piece of legislation. LIAM's meetings with public officials in their offices, testimony before legislative committees, and submission of materials through standard committee channels are all appropriate means to use to advocate. Such advocacy is a crucial part of the democratic governmental process. But, when such lobbying becomes combined with personal, expensive, or lavish entertainment, professional boundary lines become blurred.

This is particularly the case where the entertainment is repeated, planned, and targeted to certain public officials who likely will be the most influential in matters affecting LIAM's interests. There were no personal friendships and no reciprocity between William Carroll and any of the legislators. William Carroll considered entertainment important to building relationships with public officials. LIAM's business was to educate and influence public officials about the interests of the insurance industry.

Our careful review of the record leads us to believe that, for the most part, these expenditures were not occasional, spur-of-the-moment dinners. Each year, each meal to specific individuals built on prior meals and entertainment. LIAM hoped that the cumulative effect of such gratuities would create a sense of entitlement and indebtedness by the public officials. For example, Mr. Carroll testified that he could not recall Representative Woodward, on any occasion in their relationship, ever buying Mr. Carroll a meal. Carroll could not recall any occasion, between 1990 and 1993, when any legislator ever bought him lunch or dinner. Carroll and Dillon each testified that it was important to them to establish personal relationships with legislators so that legislators would be receptive to listening to LIAM's positions. Carroll also testified that the personal relationship and rapport between a legislative agent and a legislator was important in identifying which legislative agent to send to speak with a particular legislator. Except for the incidences discussed below, our review of the record leads us to conclude that LIAM's goal in engaging in a repeated pattern of entertainment was to foster access so that, when the appropriate time came and LIAM needed a legislator to focus on a bill, the legislator would be receptive to LIAM's interests and listen hard to LIAM's arguments.

We have been directed by the Supreme Judicial Court to determine whether these entertainment expenditures were intended to influence or reward a specific official act. We acknowledge that not all attempts to use entertainment to obtain access will violate G.L. c. 268A, § 3. It is our view that repeated entertainment targeted to particular influential public officials to foster access undermines public confidence in governmental decision-making.²³

C. Specific Gratuities

We turn to applying the legal principles articulated above to the specific gratuities given in this case.

May 13, 1992 Four Seasons Dinner with Insurance Commissioner Doughty

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

44. The Commissioner of Insurance, as head of the Division of Insurance (Insurance Division), was responsible for the regulation of insurance in the Commonwealth. The Insurance Division licensed insurance companies, approved and licensed the products of companies, approved policy forms relative to insurance projects, licensed insurance agents, examined companies to determine solvency, reviewed mergers and demutualization of companies.

45. Solvency was considered by LIAM to be the most important issue in 1992. LIAM considered the passage of new laws and regulations, required for NAIC accreditation of the Commonwealth's Division of Insurance, as a big issue in 1992.

46. Insurance company solvency was important because insurance companies self-insured against insolvency through a guaranteed fund. The Commonwealth determined an assessment each insurance company in the state paid into the fund. The guaranteed funds paid the outstanding claims of an insolvent insurance company.

47. Insurance companies who were solvent did not want other companies to become insolvent because the solvent companies would have to subsidize claims covered by the insolvent company.

48. In the early 1990's, members of Congress criticized the strength of insurance regulations in the various states. In response to the criticism, NAIC developed a state accreditation program that included basic statutes each state was required to have and criteria regarding organization, financing and administration of departments of insurance.

49. NAIC would send an investigative team to a state to review the state's insurance laws and insurance department and to make a recommendation whether the state should be accredited.

50. NAIC accreditation of a state insurance body meant that the organization was qualified, according to national standards, to adequately regulate the insurance industry in its state. Most insurance companies supported this accreditation process because it led to consistent regulations from state to state.

51. The insurance companies were willing to accept the increased regulatory scrutiny caused by NAIC accreditation because it improved insurer solvency.

52. NAIC established January 1, 1994 as the deadline for insurance departments to meet the standards in its accreditation program.

53. Beginning January 1, 1994, insurance companies domiciled in a non-accredited state risked losing their ability to conduct business in accredited states until their state's insurance agency had been accredited.

54. One method in which an insurance company domiciled in a non-accredited state could conduct business in an accredited state would be to voluntarily subject itself to examination and approval by regulators in an accredited state.

55. Frank O'Brien advised LIAM's Executive Committee that, "examinations are costly in terms of money, time and trouble. Being in a non-accredited state means that a company will be subjected to more and perhaps more stringent examinations. A company will also possibly be placed in the unenviable position of having to conform its practices to the laws of the accredited examining state in a manner that results in conflicts with the domiciliary regulator."²⁴

56. A company domiciled in a non-accredited state could be less competitive in the market place against insurance companies domiciled in accredited states.

57. LIAM created a NAIC Certification Committee Negotiation Task Force that met with representatives of the Commonwealth's Insurance Division in late January 1992. At the first meeting LIAM was designated as the Division's prime contact point on accreditation matters. The LIAM/Division working group planned to meet weekly, with a goal of filing legislation in March.

58. On April 29, 1992 William Carroll spoke with Cindy Martin, a Division of Insurance employee on the NAIC/Division working group, to schedule a meeting with Commissioner Doughty about the management issues, such as restructuring, funding and staffing of the Division. Ms. Martin recommended a meeting in the middle of May when it was anticipated that the Division would finalize its estimates for funding and staffing needs.

59. On April 29, 1992, Ms. Martin advised William Carroll that the Division was checking NAIC data on staffing averages throughout the United States and that the Division, in comparison, "didn't look very good." She also informed Mr. Carroll that the Division had not requested additional staffing in the FY 93 budget.²⁵

60. William Carroll wanted Ms. Martin and Commissioner Doughty "to open up with us on some of these internal budgeting and staffing matters so that we can be effective advocates and advisors" at the Legislature.²⁶

61. On April 29, 1992, Ms. Martin advised William Carroll that NAIC focused on whether the Division, quantitatively and qualitatively was "in a

position to get the job done.” She admitted that the Division, at that time, would not meet the qualitative standards.²⁷

62. On April 29, 1992, Carroll was able to schedule a meeting with Commissioner Doughty at her office for May 19, 1992.

63. After the April 29, 1992 telephone conversation with Ms. Martin, William Carroll was prepared to recommend to the Executive Committee that the Committee establish a deadline by which LIAM would be assured about progress on restructuring the Division. If the deadline passed and there was a lack of progress LIAM needed to develop a process “for going upstairs,” to Commissioner Doughty’s supervisors.

64. In LIAM’s opinion, Commissioner Doughty was not paying adequate attention to the managerial aspects of the Division of Insurance. One of the more important criteria for NAIC accreditation was the Division’s management.

65. On May 13, 1992, William Carroll and Luke Dillon, the contract lobbyist for LIAM, took Commissioner Doughty out to dinner at the Four Seasons Hotel in Boston.

66. At the time of the May 13, 1992 dinner, the Division of Insurance was preparing for the examination by the NAIC.

67. The purpose of the dinner with Commissioner Doughty was to discuss the accreditation process with her. LIAM, through Carroll and Dillon, wanted to stress the importance of having a sufficiently staffed and trained Division and to reiterate the insurance industry’s offer to provide continued technical assistance, particularly in the computer technology area. LIAM intended to give Commissioner Doughty some constructive criticism about the management of the Division. LIAM did discuss the NAIC accreditation issues at the dinner. LIAM also discussed NAIC proposed legislation at the dinner.

68. LIAM considered it important to convey its concerns about the Division’s perceived weaknesses in the NAIC accreditation process. Commissioner Doughty had not been receptive to LIAM’s proposals in meetings at her office prior to the dinner. William Carroll believed that Commissioner Doughty would be more receptive to LIAM’s proposals in the informal setting of a restaurant.

69. LIAM believed that Commissioner Doughty was not providing “hands-on” management.

According to William Carroll, “the purpose of this dinner was for myself and Luke Dillon to urge her to pay attention to the in-house administrative organizational management aspects.”

70. An important issue for LIAM was to have Commissioner Doughty focus on what the Division needed in order to become accredited and to consider using the technical expertise of the insurance industry.

71. At the time of the Four Seasons dinner, LIAM thought that the Division was far from meeting the NAIC criteria in such areas as proper staffing, proper funding, proper equipment, proper organization, and proper procedures.

72. William Carroll believed that if the Division did not pass NAIC accreditation because of poor management, the domestic insurance companies in Massachusetts would have disadvantages working in other states and some insurance companies could go out of business.

73. On May 14, 1992, the day after the dinner, William Carroll confirmed a May 26, 1992 meeting with Commissioner Doughty, other members of the Division, Jim Gallaher (Chairman of LIAM’s Executive Committee), Bill O’Connell (Chairman of the LIAM NAIC Certification Committee Task Force), and himself in order to discuss the NAIC accreditation process, staffing, funding and organization of the Division.

74. On June 4, 1992, Mr. O’Connell reported to the Executive Committee that the LIAM Task Force and the Division had reached agreement on all legislative issues.

75. As of August 31, 1992, LIAM and the Division of Insurance had been meeting on a regular basis to draft and review the various bills needed to be filed for NAIC accreditation. Frank O’Brien was in almost daily contact with the Division.

76. On July 10, 1992, Representative Francis Mara prepared an amendment to the deficiency budget establishing a Division of Insurance Trust Fund that would be funded by revenues collected by the Division. The amendment was adopted. Representative Mara also prepared an amendment allowing the Insurance Commissioner to make a special Division of Insurance maintenance assessment totaling \$1,014,000, payable by the life insurance companies licensed to do business in the Commonwealth. The amendment was adopted. LIAM lobbied the Legislature in support of the Division funding.

77. As of September 21, 1992, LIAM was continuing its strong support for the Division of Insurance's efforts to become accredited.

78. As of September 23, 1992, the NAIC legislative package was being reviewed by the Governor's office prior to filing with the Legislature.

79. In an October 19, 1992 memorandum, Francis O'Brien reported that, because the Division of Insurance was understaffed, LIAM might have an opportunity to become drafters of the regulations that would be needed to implement the NAIC legislative changes.

80. Francis O'Brien reported that, by approaching the Division of Insurance in October 1992 about drafting regulations, LIAM could "take advantage" of relationships it had fostered during NAIC legislative discussion meetings.

81. The NAIC legislative package was filed on November 4, 1992 for the 1993 legislative session.

82. The Division passed the accreditation process and the insurance industry paid a special assessment to further fund the Division's activities.

2. Discussion

On May 13, 1992, William Carroll and Luke Dillon, the chief LIAM legislative agent, took Insurance Commissioner Doughty to dinner at the Four Seasons Hotel. No one, other than these three individuals, attended the dinner. Carroll paid for the dinner, which was over \$100 per person, and was reimbursed by LIAM as a business expense. This was a business dinner. Neither Carroll nor Dillon shared a personal friendship with the Insurance Commissioner. As discussed below, we conclude that the payment of this dinner was a violation of G.L. c. 268A, § 3(a).

This meal was of substantial value and was given to a public employee. The evidence supports inferences that the Insurance Commissioner was presently engaged and would, in the near future, be engaged in numerous specific official actions concerning the Insurance Division's application to NAIC and in NAIC's determination about the Division accreditation. This application and the certification decision were particular matters.²⁸ For example, the Insurance Commissioner needed to make decisions about the Division's funding level, the Division's staffing and reorganization to comply with NAIC criteria, and the use of technology offered by the insurance industry. All of these official actions were discussed at the May 13 dinner.²⁹

Additionally, there is ample evidence that LIAM,

through Carroll and Dillon, intended, by hosting the dinner and at the dinner, to influence the Insurance Commissioner's decisions and actions regarding the NAIC application. First, in 1992, the most important issues for LIAM were NAIC accreditation of the Commonwealth's Division of Insurance and insurer solvency.

It was very important to LIAM that its members be domiciled in a NAIC accredited state. Insurance companies domiciled in a non-accredited state risked losing their ability to conduct business in accredited states, could be subject in accredited states to more stringent examinations, and could be harmed by competition in the marketplace from insurance companies domiciled in accredited states.

LIAM was aware that this accreditation process was time-limited. NAIC had established January 1, 1994 as the deadline for insurance commissions to become accredited. The accreditation process required additional statutes to be enacted and regulations to be promulgated in Massachusetts, as well as an upgrade of the Division's organization, finances, and management. At the time of the May dinner, the Insurance Division was preparing legislation to implement the accreditation process and was preparing for its own examination by NAIC examiners.

In late January 1992, LIAM had established a separate Task Force, called the NAIC Certification Committee Negotiation Task Force, specifically to deal with the NAIC accreditation issues. This Task Force became the Division of Insurance's primary industry contact and met regularly with Division employees on the accreditation issue. Further, William Carroll testified that he personally became involved in lobbying if the issue was of major significance to LIAM and its members.

William Carroll began meeting with Insurance Commissioner Doughty, in her office, in January 1992. By April 29, 1992, according to LIAM internal memoranda, William Carroll and LIAM were worried that the Division was not doing enough to prepare for accreditation and was in danger of not passing the examination. Carroll was concerned about the Division's lack of progress and Commissioner Doughty's lack of leadership on the issues and was proposing to the LIAM Executive Committee, if sufficient progress wasn't made, that LIAM "go upstairs" to Commissioner Doughty's superiors. In LIAM's opinion, Commissioner Doughty was not taking an assertive role in the accreditation process. She was not reaching out to the insurance industry for help, particularly with technology needs. LIAM had been trying to get more information about the Division's budgeting and staffing issues, but the Commissioner was not forthcoming in these office meetings.

On April 29, 1992, William Carroll spoke with a Division employee on the Task Force to schedule a meeting

with Commissioner Doughty about management issues, such as re-structuring, funding and staffing of the Division. She suggested a meeting with the Commissioner on May 19, 1992.

Significantly, during that April 29 conversation, Mr. Carroll learned from the Division employee that, when compared to other states, the Division staffing averages “did not look good.” She also told Mr. Carroll that the Division had not requested additional staffing in the FY93 budget request. She advised Carroll that NAIC focuses on whether an insurance body, quantitatively and qualitatively is “in a position to get the job done” and she acknowledged that the Division, at that time, would not meet the NAIC qualitative standards.

Thus, after the April 29 telephone call with the Division employee and prior to the May 13, 1992 dinner, LIAM knew that some of its concerns about the Division’s deficiencies were valid. It also knew that the Insurance Commissioner was not responding favorably to its advocacy efforts at meetings at her office. At the time of the Four Seasons dinner, LIAM thought that the Division was far from meeting the NAIC criteria in such areas as proper staffing, proper funding, proper equipment, proper organization, and proper procedures.

William Carroll and Luke Dillon took Commissioner Doughty to the Four Seasons Hotel, generally recognized as one of the luxury restaurants in Boston, to discuss the same management issues that were planned to be discussed in the Insurance Commissioner’s office. This was not a casual or informal working dinner. The meal was over \$100 per person. Carroll acknowledged that he thought LIAM’s message would be better received in the ambiance of the Four Seasons restaurant.³⁰

The parties discussed the accreditation process at dinner.³¹ LIAM criticized Commissioner Doughty’s management of the Division and expressed LIAM’s concerns about the Division’s weaknesses in the accreditation process. LIAM wanted Commissioner Doughty to focus on what the Division needed to become accredited and to consider using the technical expertise of the insurance industry to help the Division. According to William Carroll, “the purpose of this dinner was for myself and Luke Dillon to urge her to pay attention to the in-house administrative organizational management aspects.” LIAM stressed the importance of having a Division that was properly staffed and trained. LIAM conveyed its concerns about inadequate staffing, funding, and management issues existing at the Division. LIAM wanted the Commissioner to quickly take concrete actions to improve her staffing, training, and funding.

Finally, we find no other credible explanation for why William Carroll and Luke Dillon would have taken

Commissioner Doughty to, and paid for a dinner, at the Four Seasons restaurant, other than with an intent to induce her to propose and take specific actions to seek further staffing and funding, to reorganize her division, and to better utilize the insurance industry. This dinner was outside the normal business channels that had been established between the parties. There was a future business meeting already scheduled in her office to discuss these issues. Prior to this dinner Carroll had been meeting with the Insurance Commissioner at her office, but felt he had been unsuccessful in having his message heard. Additionally, as he suggested, William Carroll could have taken the issues to the Commissioner’s superiors at that time. At this dinner, William Carroll did not follow his own LIAM policy not to discuss business at dinners where he paid for the public official’s meal. The weight of the evidence supports a conclusion that LIAM took the Insurance Commissioner to the Four Seasons “in the hope that, when the particular actions move to the forefront, the [Insurance Commissioner] will listen hard to, and hopefully be swayed by, [LIAM’s] proposals, suggestions and/or concerns.”³²

Further, the evidence reflects the fact that Commissioner Doughty did listen to Carroll and Dillon and that the Insurance Division’s doors opened to LIAM. The day after the dinner, William Carroll wrote a letter to Commissioner Doughty, confirming a scheduled meeting on May 26 with Carroll, the Chairman of LIAM’s Executive Committee, the Chairman of LIAM’s NAIC Certification Task Force, and other members of the Division to discuss the NAIC accreditation process, staffing, funding and the organization of the Division. Within three weeks LIAM was reporting that all legislative issues had been resolved between LIAM and the Division. During the summer representatives of LIAM were meeting on almost a daily basis with Division representatives. Also, during the summer, the Division sought additional funding for staffing from the Legislature. The Legislature, in July 1992, enacted a special assessment on insurance companies to help fund the Division. By October 1992, LIAM was hopeful of building on the personal relationships LIAM representatives had cultivated during the accreditation process earlier in the year so that it could assist in writing the regulations required for accreditation.

In conclusion, we find, by a preponderance of the evidence, that LIAM gave the Insurance Commissioner a meal of substantial value for or because of her official actions performed or to be performed in violation of G.L. c. 268A, § 3(a).³³

March 13, 1993 Amelia Island Ritz Carlton Dinner

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

83. NCOIL (National Conference of Insurance Legislators) was a national organization of legislators who were interested in insurance issues.

84. LIAM was not a member of NCOIL but was a member of the Industry Advisory Committee. The Industry Advisory Committee was composed, not only of insurance companies, but also of accounting firms and attorneys. The Industry Advisory Committee financially supported NCOIL's educational initiatives.

85. Legislative members of NCOIL met three to four times per year for educational seminars and conferences.

86. William Carroll attended some of NCOIL's conferences between 1989-1993 to learn what issues legislators were addressing, as these issues would likely become future legislation.

87. One factor in LIAM's consideration whether to send a LIAM representative to an NCOIL conference was whether Massachusetts legislators would also attend the conference.

88. In 1993, certain laws had to be passed in order for the Massachusetts Division of Insurance to be accredited by NAIC.

89. H. 53 was the bill filed by the Secretary of Consumer Affairs, on behalf of the Governor, that contained the changes needed to the Commonwealth's insurance laws so that the Division of Insurance could receive NAIC accreditation. LIAM made many recommendations to the Division of Insurance as the Division drafted H. 53.

90. H. 53 would provide the Division of Insurance with the powers it needed to monitor the solvency of insurance companies and to intervene if necessary.

91. H. 53 was required to be enacted prior to a NAIC inspection of the Division.

92. As of November 4, 1992, LIAM wanted the NAIC legislation passed by June 1993.

93. In 1993, the largest LIAM member companies were John Hancock Mutual Life Insurance Company, New England Life Insurance Company, Massachusetts Mutual Life Insurance Company and State Mutual Life Insurance Company.

94. As of January 7, 1993, LIAM's Executive Committee agreed that H. 53 should be heard by the Legislature as soon as possible in the

new legislative session.

95. Donald Flanagan was a legislative agent who represented the Health Insurance Association of America and the Massachusetts Association of Life Underwriters. The Health Insurance Association of America was composed of health insurance companies. The Massachusetts Association of Life Underwriters was composed of Massachusetts life insurance agents. Occasionally, Donald Flanagan and William Carroll would coordinate lobbying activities and share information regarding mutual interests of their respective clients.

96. As of January 1993, Donald Flanagan, on behalf of the Massachusetts Association of Life Underwriters, advised William Carroll that his client wanted to become actively involved in the NAIC accreditation issues and wanted to work with LIAM to promote the issue.

97. In January 1993, the Division of Insurance requested a meeting with LIAM to develop a coordinated strategy to win passage of H. 53.

98. Between January 1993 and February 4, 1993 Luke Dillon met with staff in the House Committee on Ways and Means concerning the assessment on life insurance companies and the increase in property and casualty agent's license fees that was passed in 1992. LIAM wanted this Division revenue approach reexamined and changed.

99. Between January 1993 and February 4, 1993, Luke Dillon discussed H. 53 hearing dates with members of the Joint Committee on Insurance.

100. As of February 8, 1993, LIAM's legislative goal was to see H. 53 enacted into law by June 1, 1993. LIAM's target dates in this process included hearings before the Joint Committee on Insurance by March 1, 1993. LIAM expected the Administration, the Insurance Committee, LIAM, the property and casualty insurance industry and agents, and Donald Flanagan's client, Massachusetts Association of Life Underwriters, to be involved in meeting this targeted hearing date.

101. March 30, 1993 was the LIAM target date for the Joint Committee on Insurance to favorably report H. 53 out of Committee. The target date for passage by the House Committee on Ways and Means was April 15, 1993. As of February 8, 1993, LIAM's target date, for House passage of H. 53 was May 1, 1993 and passage by the Senate Committee on Ways and Means by May 20, 1993.

102. LIAM proposed that H. 53 would be

passed by the Senate and given final enactment by the House and the Senate on May 30, 1993. June 1, 1993 was the target date for the Governor's signature.

103. On February 12, 1993, William Carroll, Frank O'Brien, Luke Dillon, William Sawyer and others met with Commissioner Doughty and members of her staff about H. 53.

104. At the February 12, 1993 meeting, Commissioner Doughty informed the insurance industry representatives that passage of H. 53 needed to be perceived by the Legislature not only as an Administration initiative but also as an industry initiative. The Division of Insurance believed that H. 53 needed to be passed by July 1993 because the latest date the Division could be reviewed by NAIC was November 1993.

105. The Division of Insurance representatives urged the insurance industry representatives to encourage their chief executive officers to become involved in the lobbying effort and to meet with the Legislative leadership. William Carroll agreed to involve the chief executive officers in the lobbying efforts. Generally, the chief executive officers only became involved in lobbying activities in rare circumstances.

106. Commissioner Doughty advised the insurance industry representatives that a legislative hearing needed to be held in March 1993.

107. Commissioner Doughty planned to meet with the Joint Committee on Insurance beginning with House Chairman Francis Mara, in the week following February 12, 1993.

108. At the February 12, 1993 meeting, Commissioner Doughty advised the insurance industry representatives that NAIC was unwilling to extend the January 1, 1994 deadline for accreditation. She also informed the industry representatives that, if Massachusetts was not accredited, Massachusetts examinations would not be accepted out of state. She knew one state had pending legislation that would prohibit companies in unaccredited states from doing business in that state.

109. At the February 12, 1993 meeting, William Carroll informed the Division of Insurance that LIAM had visited key legislators about H. 53 because the industry needed this legislation passed as soon as possible. As of February 12, 1993 William Carroll had not received any legislative commitment about an early hearing date.

110. As of February 12, 1993, LIAM knew

that the Joint Commission on Insurance had scheduled a hearing for March 22, 1993, but did not know if the Committee would have H. 53 on its agenda. One of the advantages of a hearing was to identify potential opposition to a bill.

111. At the February 12, 1993 meeting, William Sawyer identified Representative John Cox as one of the key legislators in the passage of H. 53.

112. At the February 12, 1993 meeting, William Sawyer opined that passage by July 1, 1993 was very optimistic given "the institutional pace of the legislature. This is particularly the case since this bill has no legs, is 156 pages long and is a bill of first impression. They'll gag on this."³⁴

113. At the February 12, 1993 meeting, William Carroll and Luke Dillon reported that each had met with Representative Thomas Walsh.

114. At the February 12, 1993 meeting, Commissioner Doughty agreed to prepare a status report and schedule regarding tasks to be done, for distribution to LIAM, the chief executive officers, and legislators.

115. As of February 24, 1993, LIAM and Luke Dillon knew that the Joint Committee on Insurance had placed H. 53 on its agenda for the March 22, 1993 hearing. Luke Dillon had spoken with the Insurance Committee Chairman.

116. William Carroll was registered for and attended the NCOIL Amelia Island conference in March 1993.

117. William Carroll made the Ritz Carlton dinner reservation at the suggestion of William Sawyer, John Hancock's legislative agent, who was also involved with the lobbying strategy for the NAIC certification issues.

118. On March 12, 1993, William Carroll met with the maitre d' at the Amelia Island Ritz Carlton to plan a dinner. He made a reservation for March 13, 1993. He did not have a definite count of the number of dinner attendees.

119. Some of the menu items were very expensive so the maitre d' suggested Mr. Carroll create a limited menu for the dinner. Mr. Carroll selected a few items from the menu and the restaurant printed a limited menu for Mr. Carroll's guests.

120. William Carroll chose approximately five entree items from the Ritz Carlton menu to offer to his guests. He also chose wines to be placed on

each table.

121. At the time that William Carroll arrived at the restaurant for dinner on March 13, 1993, the Ritz Carlton had arranged two tables, each sitting 10-12 individuals in a corner of the dining room.

122. Those present at the dinner with Carroll included Dillon, William Sawyer and his wife, registered legislative agent Arthur Lewis and his wife, Massachusetts Medical Society registered insurance industry legislative agent Andrew Hunt, Blue Cross Blue Shield registered legislative agent Marcy McManus, Health Insurance Association of America and Massachusetts Association of Life Underwriters registered legislative agent Donald Flanagan, Francis Carroll of the Small Business Service Bureau, Inc., Representative Francis Mara and his wife, Representative Thomas Walsh and his wife, Representative William Cass, Representative Michael Walsh and his wife, Representative Kevin Honan and his guest, Representative Angelo Scaccia and his son, representative John Cox and his wife, and Representative Poirier.

123. William Carroll sat next to Representative Francis Mara and his wife. Also at the table were Luke Dillon and Donald Flanagan.

124. Some of the guests at the Ritz Carlton dinner ordered additional wine and alcoholic beverages, including six glasses of Remy Martin cognac at a cost of \$85 per glass. None of the guests paid for these extra beverages.

125. Only people from Massachusetts attended the Ritz Carlton dinner. William Carroll knew all of the legislators who attended.

126. At the time of the March 1993 Ritz Carlton dinner, William Carroll was not personal friends with any of the legislators who attended the dinner.

127. In 1993, Representative Mara was the House Chairman and Representative Thomas Walsh was the House Vice Chairman of the Joint Committee on Insurance.

128. Prior to March 1993, William Carroll had testified before Representative Francis Mara and had met him at his state house office to argue LIAM's positions on issues.

129. Representative Thomas Walsh was serving as the Chairman of a sub-committee of the Joint Insurance Committee. The sub-committee was studying insurer solvency, including the NAIC certification process. In approximately October 1991,

Jay Curley of the Joint Committee on Insurance approached LIAM on behalf of Representative Thomas Walsh to provide Representative Walsh with a "non-controversial solvency measure" for Representative Walsh to late-file.

130. William Carroll originally met Representative Angelo Scaccia when he became House Chairman of the Joint Committee on Taxation.

131. Representative John Cox, who attended the March 1993 dinner with his wife, was, at the time of the dinner, House Chairman of the Committee on Bills in Third Reading. This Committee was the last committee to examine a bill before it was presented to the full House of Representatives for a vote.

132. In 1993 Representative Cass was House Vice Chairman of the Joint Committee on Health Care and had been on the Insurance Committee.

133. In 1993, Representative Poirier was a member of the House Committee on Ways and Means.

134. Donald Flanagan, legislative agent for the Massachusetts Association of Life Underwriters, attended the March 13 dinner. Mr. Flanagan was not personal friends with William Carroll.

135. Marcy McManus, the Blue Cross Blue Shield legislative agent, attended the March 13 dinner. At the time of the dinner, William Carroll and Marcy McManus were not personal friends. Prior to the dinner, Ms. McManus volunteered to contribute part of the payment for the dinner. However, she never contributed her portion.

136. Francis Carroll attended the March 13 dinner. He was a business acquaintance, but not a friend of William Carroll. Prior to the dinner, Francis Carroll volunteered to contribute part of the payment for the dinner. He subsequently sent William Carroll a contribution.

137. Prior to the dinner, Arthur Lewis, another legislative agent, volunteered to contribute part of the payment for the dinner. He subsequently sent William Carroll a contribution.

138. Francis Carroll ran and managed a service bureau for small businesses. Health insurance issues were major issues for small businesses.

139. None of the state representatives who attended the Ritz Carlton dinner made an offer to Mr.

Carroll to pay for their meal or their guest's meal.

140. The Joint Committee on Insurance held a hearing on H. 53 on March 22, 1993. There was no testimony in opposition to the bill. William Carroll and Charles Soule, Chairman of LIAM's board of directors, as well as several insurance company chief executive officers, testified in favor of H. 53.

141. William Carroll reported on April 8, 1993 that LIAM would attempt to seek technical changes in H. 53 when the bill reached the Committee on Bills in Third Meeting.

142. On May 19, 1993, Francis O'Brien advised William Carroll that H. 53 needed to be enacted by Labor Day in order for the Division of Insurance to promulgate its regulations prior to its November 1993 NAIC review.

143. On June 16, 1993 the Joint Committee on Insurance reported an amended H. 53 out of committee with a favorable recommendation. H. 53 became H. 5220. The amended bill contained changes recommended by LIAM.

144. Following the Committee report, LIAM intended to continue to use "special efforts" in the House of Representatives to continue swift passage of the bill.³⁵ LIAM's primary mission was to gain passage of H. 5220.

145. H. 5220 was reported out of the House Committee on Ways and Means with a favorable recommendation on September 20, 1993.

146. H. 5220 was reported out of the Senate Committee on Ways and Means with a favorable recommendation on October 4, 1993.

147. In 1993, only domestic insurance companies paid a 14% net investment income tax on investment income. This tax had an effect on the ability of domestic insurance companies to compete in the insurance market place.

148. On March 24, 1993, the Joint Committee on Taxation held a hearing concerning repeal of the net investment income tax.

149. William Carroll testified before Representative Angelo Scaccia, regarding the repeal of the net investment income tax. Representative Scaccia was not receptive to LIAM's position. In 1993 and in prior years, the net investment income tax bill was not reported out of committee.

150. Numerous bills that LIAM was

following and that were sponsored by attendees of the Ritz Carlton dinner were the subject of hearings within four weeks of the dinner. H. 3772, sponsored by Representative Mara, concerned the regulation of the purchase of long-term care insurance and was the subject of a hearing by the Joint Committee on Insurance on April 7, 1993. Another bill sponsored by Mara, H. 3763, concerned access to affordable private health insurance and was the subject of a hearing by the Insurance Committee on April 5, 1993. The Insurance Committee held a hearing on April 2, 1993 on H. 3773, a bill regulating individual health insurance and inequitable health insurance market practice. Also on April 7, 1993 the Insurance Committee considered H. 1317, sponsored by Representative Cox, that would prohibit an Insurance Commissioner from working in the insurance industry for one year after leaving office.

151. LIAM submitted written opposition to H. 3773 and H. 3763.

2. Discussion

On March 13, 1993, William Carroll hosted a dinner at the Grill Restaurant at the Amelia Island Ritz Carlton Hotel. He paid for the dinner with his LIAM credit card, although he subsequently received partial reimbursement from certain other Massachusetts legislative agents. The total cost of the dinner for the approximately 24 attendees was \$3089.16, or approximately \$129 per person. Fourteen of the attendees included Massachusetts legislators with some spouses or other family members, and 10 attendees were legislative agents and some of their spouses. Therefore, as we found in the original Decision and Order, William Carroll, by paying for Massachusetts legislators' and their spouses' dinners, gave items of substantial value to public officials. As discussed below, we also find that LIAM provided these meals with an intent to influence the legislators' specific official acts.

For LIAM, the most important piece of legislation before the Legislature in 1993 was H. 53, regarding insurer solvency and NAIC certification of the Division of Insurance. Time was of the essence in passing this piece of legislation. If it were not passed in a rapid time frame, there would not be time for the Division of Insurance to become accredited before January 1, 1994. LIAM had set a goal of passage by June 1, 1993. The LIAM Executive Committee wanted the bill heard by legislative committees as soon as possible in 1993. There was a risk of serious economic consequences to LIAM member companies, such as an inability to sell insurance in accredited states, if the Division was not accredited.

As of the March 13, 1993 dinner, LIAM knew that the Insurance Committee would hold a hearing on H.

53 on March 22, nine days after the Ritz Carlton dinner. In February, LIAM had established an internal target date that the bill would be reported out of Committee with a favorable recommendation by March 30. In January and February 1993, LIAM had established a specific agenda, with target dates for passage of H. 53. LIAM knew that its timetable was ambitious and that it would be unusual, given the complexity of the bill, for the Legislature to act in an expedited fashion. As William Sawyer frankly said, passage by July was very optimistic given “the institutional pace of the legislature. This is particularly the case since this bill has no legs, is 156 pages long and is a bill of first impression. They’ll gag on it.” LIAM also knew, from a meeting with Commissioner Doughty that it was important for passage of the bill that the Legislature perceive not only that this was an Administration bill, but also that the insurance industry strongly supported it. Commissioner Doughty wanted the insurance industry, including the chief executive officers, to take a visible role in promoting the legislation.

As of March 13, 1993, the official acts LIAM wanted members of the House of Representatives to take were not only to hold a hearing and give the bill a favorable report, but also, just as important, to prioritize and expedite movement of H. 53 through the various House committees.³⁶

For the following reasons, we conclude that William Carroll, as LIAM’s Executive Director, gave the Ritz Carlton dinner, with an intent to influence the legislators who attended to act favorably on H. 53 on an expedited basis. First, at the time of the dinner, William Carroll knew that he would be appearing before the legislators in nine days. According to William Carroll, one of LIAM’s lobbying objectives was to “make sure that we have a continuing flow of information to the legislators so that there will never be any doubt in their mind as to where we stand and why we stand on a particular position.” LIAM also wanted to be known on Beacon Hill as “the primary spokesman for the life and health insurance industry in the commonwealth.”

Carroll planned this dinner, at the suggestion of William Sawyer. Sawyer was the legislative agent for John Hancock Mutual Life Insurance Company, one of LIAM’s largest members. Sawyer was involved in the strategy for passage of H.53. Further, one of the other attendees was Donald Flanagan, a legislative agent who had informed Carroll in January 1993, that his client, the Massachusetts Association of Life Underwriters, was concerned about passage of H.53, and that the client wanted to coordinate lobbying strategy with LIAM. Thus, three of the planners to this particular dinner were involved in a coordinated lobbying strategy to win expedited passage of H. 53. Finally, Carroll discussed the dinner with other legislative agents or interested corporate parties, Francis Carroll, Marcy McManus, and Arthur Lewis, prior

to the dinner. Prior to the dinner, these three individuals had volunteered to contribute toward the meal.

Furthermore, we conclude, from our review of the record, that the identity of the legislators who attended the dinner and their respective committee assignments was not coincidental or random. William Carroll testified that his decision, in part, whether to attend an NCOIL conference, depended upon the identity of the Massachusetts legislators who also attended the conference. William Carroll also testified it was important to him, when lobbying, that contacts were made with the chairmen of a committee and those legislators who understood the issues and could convey those issues to other legislators. The LIAM Legislative Counsel Advisory Committee also had discussions about which legislators to approach and which legislative agents would talk to which legislators, depending on the rapport and relationship individual lobbyists had with particular legislators.

All of the dinner guests were from Massachusetts. None of the dinner guests were personal friends of any of the legislative agents who attended. The only attendees were Massachusetts’s legislative agents, legislators, and some family members. William Carroll, in 1991 – 1993, knew and had lobbied all or most of the attendees before the dinner.³⁷

Representative Thomas Walsh served on a sub-committee studying the NAIC program. Representatives Mara and Walsh were the Chair and Vice Chair respectively, of the Insurance Committee where the bill was pending. The parties stipulated that Representative Cass was also an Insurance Committee member. Further, in February 1993, William Sawyer had identified Representative Cox, another attendee at the dinner, as a key legislator in this particular bill process. He was also a member of the Committee on Bills in Third Reading, the last committee to consider H. 53 before it went to the full House, and the Committee where there would be an opportunity to make amendments or technical changes. Representative Poirier was a member of the House Ways and Means committee, which would consider H. 53 because of financing aspects in the bill. LIAM’s intended target date for passage by House Ways and Means was April 15, 1993. Other guests were representatives from legislative committees that would also take an important role in moving H. 53 forward.

Luke Dillon had been lobbying Representative Mara about the need for an early hearing date for this legislation. At least Representatives Walsh and Mara, at the time of the dinner, knew that LIAM wanted early passage of the bill and that the bill was important to LIAM.

Additionally, LIAM considered this dinner to be a business expense. The dinner was not planned as part of the conference and was not on the agenda of the

conference. Given the cost to dine at this Ritz Carlton restaurant,³⁸ and of this particular dinner, we draw an inference that the location was selected to impress the attendees. William Carroll did not ask any legislator to pay for his and/or his spouse's meal and no legislator offered to or did contribute to the dinner.

Nine days after this dinner, on March 22, 1993, Carroll and the Chairman of LIAM's Board of Directors testified before the Insurance Committee. LIAM identified technical changes that it wanted to the bill when it reached the Committee of Bills in the Third Reading. LIAM amended its timetable and hoped for passage around Labor Day. H. 53, despite its technical complexity, was reported out of the Insurance Committee with a favorable recommendation on June 16, 1993, less than two months after the hearing on the bill. The bill contained many changes recommended by LIAM. Following the Insurance Committee report, LIAM intended to "make a special effort on the House side to move H. 5220 (the successor to H. 53) expeditiously."³⁹

On the motion of Representative Mara, certain amendments were approved and the bill passed the House on November 4, 1993. H. 5200, was passed by the Senate and sent to the Governor for signature on November 6, 1993.

The Respondent argues that the record does not support a finding that the legislators knew who was paying for their meals.⁴⁰ As we stated earlier, the relevant issue is not the legislators' knowledge or intent, but LIAM's intent. We acknowledge that no legislation was discussed at the dinner. However, weighing the circumstantial evidence and the reasonable inferences derived from the evidence, we conclude that LIAM (with the assistance of William Sawyer and Donald Flanagan) took advantage of the timing between the conference and the Insurance Committee hearing on H. 53 to plan and give an expensive dinner to a select group of Massachusetts legislators, who would be influential in the passage of H. 53. LIAM knew it needed to create a strong industry presence and needed to influence these particular legislators to expedite a complex piece of legislation outside the normal pace of the Legislature. Further, it is more likely than not that LIAM was trying to influence official actions surrounding H. 53, rather than other pieces of legislation in 1993. According to testimony and LIAM documents, H. 53 was LIAM's most important legislative initiative in 1993.

Accordingly, we conclude that the Petitioner has proven, by a preponderance of the evidence, that LIAM violated G.L. c. 268A, § 3(a) when it gave legislators a meal at the Amelia Island Ritz Carlton.

We now address the remaining meals in chronological order.

July 21, 1989 Copley Place Marriott Boston, Massachusetts Dinner

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

152. On July 21, 1989, William Carroll and his wife and Representative Francis Woodward and his wife attended the opening session and reception at the NCOIL conference at the Boston Copley Place Marriott Hotel.

153. Most of the other attendees at the opening reception left to attend a Boston Red Sox game at Fenway Park. William Carroll had earlier purchased 10 tickets for an NCOIL pool of tickets to distribute to conference attendees. Neither the Carrolls nor the Woodwards attended the Red Sox game. A number of conference attendees from out of state attended the baseball game.

154. William Carroll could have attended the Red Sox game, which would have afforded him an opportunity to meet other Massachusetts and out-of-state conference attendees.

155. At the end of the opening reception, William Carroll and his wife had a conversation with Representative Woodward and his wife. The two couples spontaneously decided to have dinner together at the Marriott Hotel restaurant.

156. Prior to the Carrolls' and the Woodwards' conversation, Mr. Carroll had not made any dinner reservations.

157. The Marriott Hotel restaurant selected by the Carrolls and Woodwards was physically located close to the area where the NCOIL reception was being held.

158. No legislation was discussed at the dinner.

159. At the time of the July 21, 1989 Marriott Hotel dinner, William Carroll had known Representative Woodward for four years and Mrs. Woodward for a lesser period of time.

160. William Carroll initially met Representative Woodward in 1984. The two men had a cordial relationship. However, although they lived in adjoining towns, they did not socialize with each other.

161. Prior to 1989, William Carroll had

testified before Representative Woodward's committee, had provided written testimony to Representative Woodward, and had met at the State House with Representative Woodward to discuss legislation.

162. Between 1987 and 1989 LIAM strenuously opposed bills in the Legislature and regulations at the Division of Insurance concerning the confidentiality of HIV-related information handled by the insurance industry and restrictions on the use of such information in the indemnity process.

163. On March 6, 1989, Carroll and Steven Tringale, the LIAM Vice President for Health Policy, testified before the Insurance Committee about H. 4901. LIAM opposed three aspects of H. 4901: a ban on AIDS testing; a broad delegation of rule-making authority to the Insurance Commissioner; and restrictions on underwriting.

164. On March 6, 1989, LIAM requested that the Insurance Committee permit LIAM to work with the Committee to develop a re-draft of H. 4901, addressing issues of confidentiality, informed consent, and the NAIC guidelines on sexual orientation.

165. In 1989, on LIAM's request, Representative Frank Emilio filed House No. 609, a bill incorporating provisions of the NAIC model privacy statute. H. 609 was thought to protect consumer privacy by, among other things, requiring insurers to provide notice of insurance information practices to insurance applicants, requiring notification to an applicant of reasons for an adverse indemnity decision, limiting disclosure of personal information, and providing for insurer liability for damages caused by unauthorized disclosure of information. The bill was sent to a study committee.

166. In 1989, Senator Lois Pines also filed a privacy bill supported by the Civil Liberties Union of Massachusetts. LIAM strongly advocated against this bill, providing testimony and mounting a grass roots campaign by insurance agents against the bill. As a result of the opposition the bill remained in the Commerce and Labor Committee, which was chaired by Senator Pines.

167. During the week of July 17, 1989, the House approved an amendment to the universal health care laws, (chapter 23) that was sponsored by Representative Woodward. The amendment would delay implementation of the law for two years. LIAM's position on the universal health care bill was one of "non-opposition" or "unenthusiastic support."⁴¹

168. In 1989, the Legislature considered S.

715, a bill that would have required commercial insurers to provide lower rates for non-smoking individuals for individual life and accident and health insurance policies. On June 22, 1989, the Insurance Committee had released the bill with a recommendation that it ought not to pass.

169. On October 10, 1989, S. 715 was the subject of a floor fight in the House of Representatives. A motion to report the bill to a third reading failed. Representatives Woodward and Walsh opposed the bill before the House of Representatives.

170. LIAM opposed S. 715 on the grounds that the bill would create unnecessary government regulation of underwriting and increase the costs of insurance products. LIAM strenuously lobbied against this bill.

2. Discussion

On July 21, 1989, at the end of an opening session and reception of an NCOIL conference, William Carroll and his wife and Representative/Insurance Committee Chairman Francis Woodward and his wife met outside the reception room. Carroll had known Woodward for approximately four years and had testified before and provided lobbying materials to Woodward over the years.

Most of the conference attendees were leaving to go to a Red Sox baseball game. The Carrolls could have gone to the game, which would have given Mr. Carroll an opportunity to meet other Massachusetts and out-of-state conference participants. However, the Carrolls and the Woodwards decided to stay at the hotel to have dinner together. Carroll treated this dinner as a business expense and was reimbursed the cost by LIAM.

This dinner was qualitatively different from the other dinners described in this Decision and Order. Unlike the other dinners, Carroll did not plan this dinner, make prior reservations, or select an impressive, prestigious location. The dinner was a spontaneous unexpected occurrence.⁴² However, we also note that Carroll treated this meal expenditure as a business, rather than a personal expense. The inference is raised that Carroll saw this dinner, which began spontaneously, as an opportunity to build good will for future legislative initiatives.

One pending initiative was S. 715. Prior to this dinner, on June 22, 1989, the Insurance Committee that Woodward chaired had released S. 715, a bill to provide lower insurance rates to individuals who were non-smokers. LIAM opposed this bill and the Insurance Committee recommended that the bill ought not to pass. This bill became the subject of a debate on the floor of the House of Representatives on October 10, 1989. Representative Woodward was one of the House

members who led the successful defeat of the bill. LIAM, in preparation for the floor debate, had strenuously lobbied members of the Legislature.

Also, just prior to the dinner, on July 17, 1989, the House of Representatives approved an amendment to the universal health care laws that would delay implementation of the law for two years. Representative Woodward sponsored this amendment. LIAM had not taken a strong position on passage of the universal health care bill.

After viewing the totality of the circumstances and weighing the circumstantial and direct evidence, we are unable to find that the Petitioner has proven sufficient links between the payment of a spur-of-the-moment dinner and any specific official actions LIAM wanted to influence regarding S. 715. Certainly it is beneficial for LIAM to have the Chairman of the Insurance Committee argue a position, consistent with LIAM's position, before the House of Representatives. But this argument was several months after this meal and the record does not reflect what lobbying actions LIAM took between the dinner and the debate or any contacts Carroll or LIAM had with Representative Woodward, other than this unplanned dinner. There is not enough evidence for us to conclude that LIAM paid for this meal "in the hope that, when the particular actions move to the forefront, [Woodward] will listen hard to, and hopefully be swayed by, [LIAM's] proposals, suggestions and/or concerns."⁴³ Also, the evidence is not sufficient to conclude that the meal was a reward for the Insurance Committee's recommendation, in June 1989, that S. 715 ought not to pass.

Additionally, in light of LIAM's professed lack of interest in the universal health care bill, we can not conclude that Carroll paid for Representative Woodward and his wife's meals as a reward for action Woodward took to delay the universal health care bill during the week preceding the dinner. Our view of the evidence leads us to conclude that it is more likely that Carroll used the opportunity of the spontaneous dinner to develop good will. Consequently, we find that there is insufficient evidence to conclude that LIAM violated G.L. c. 268A, § 3(a) by paying for Representative Woodward and his wife's meal.

December 20, 1989 Locke Ober Restaurant Dinner

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

171. On November 28, 1989, the Insurance Committee held a hearing on S. 2099. S. 2099 proposed a statewide freeze for rates on individual and small group insurance products. S. 2099 was reported out of the Insurance Committee,

accompanied by a new draft, on December 28, 1989.

172. On November 28, 1989, Stephen Tringale, Vice President of Health Policy for LIAM, testified in opposition to S. 2099. Mr. Tringale testified that the proposed legislation would dramatically restructure the regulation, pricing, underwriting, and financing of the health financing system and would not stabilize health care coverage in the marketplace. LIAM proposed that any subsidies in the health insurance area be explicit, publicly accountable and need-based.

173. The December 20, 1989 dinner at Locke Ober Restaurant was a spontaneous social occasion.

174. Luke Dillon had a personal friendship with Robert Smith.

175. The 1989 Locke-Ober dinner was reimbursed by LIAM as a business expense because Luke Dillon considered the dinner an important way to foster relationships with legislators and staffers with whom he will have meetings and before whom he testified at hearings.

176. In 1989, in Luke Dillon's work, it was important to have a good relationship with Representative Francis Mara, who was Vice Chairman of the Insurance Committee and a member of the Health Care Committee.

177. In 1989, Robert Smith served as an Insurance Committee staff person. In his job he prepared summaries of pending bills in the committee, provided explanations of proposed bills, and participated in drafting proposed legislation. From time to time Luke Dillon discussed the language of proposed bills with Smith. Between 1989-1993, Mr. Smith was a source of information for Luke Dillon and LIAM.

178. During 1989, Luke Dillon took Robert Smith out to lunch or dinner on occasions other than December 20, 1989. One such occasion was December 13, 1989.

179. In July 1991 Smith spoke with Frank O'Brien, Government Relations counsel of LIAM, about the strategy surrounding some bills.⁴⁴ Mr. Smith advised that a member of the House had filed a bill about unisex rates. According to Frank O'Brien "in Bob's opinion this does not portend well for the industry. He is of the opinion that if the industry uses up its political muscle on this bogus issue, then it will be weakened and may have a significantly harder time defeating issues which we have successfully blocked

in the past. Bob specifically pointed to the AIDS issue as an example of this.”

180. Smith, in July 1991, also alerted Frank O’Brien that there would be attempts in 1992 to use financial assessments against insurance companies to fund specific areas of the Division of Insurance. He advised O’Brien that he had personally made an effort to remove an outside section of the budget which would have assessed the insurance industry for certain costs incurred by the Attorney General’s office and replaced it with a section which would have assessed a similar amount of money but funneled it to the Division of Insurance.

181. In July 1991 Smith also advised Frank O’Brien that the issue of mandated benefits was “finally going the industry’s way.” According to O’Brien, Smith “points to the outside sections in the budget which would have removed several of the most costly mandated benefits as being evidence of this. Although he doesn’t believe that the legislature has the stomach to remove any of the current mandated benefits entirely, he believes that the legislature will approve some sort of scheme which would allow companies to issue low option policies which would not include some of the mandated benefits now required.”

182. Robert Smith advised Frank O’Brien that legislation to provide a subsidy to senior citizens through the uncompensated care pool, would not pass in 1991. He told Frank O’Brien that “the longer the length of time between the 67% rate increases suffered by seniors a year ago, the less amount of pressure is brought to bear on the legislature to aid seniors.”

183. In 1991 Frank O’Brien graded certain contacts as receptive to LIAM’s interests. Robert Smith of the Insurance Committee received a grade of “A”.

2. Discussion

On December 20, 1989, Luke Dillon, the LIAM contract lobbyist, hosted a dinner at Locke Ober’s Restaurant for Insurance Committee Vice Chairman Mara and Insurance Committee staff person Robert Smith. Dillon and Smith were personal friends. The dinner was not a planned event and did not coincide with a professional conference, but it was held at a prestigious Boston restaurant.

The record reflects that this dinner was held at the end of the legislative session. Several bills of interest to LIAM, such as an AIDS privacy bill and S. 715, regarding non-smoker insurance rates, had already passed

through the Committee. One of the bills that remained pending in the Insurance Committee was S. 2099. This bill proposed a statewide freeze for rates on individual and small group insurance products. LIAM opposed this bill. Eight days after this dinner, a new draft of S. 2099 was reported out of the Insurance Committee.

Although we are able to identify specific matters pending in the Legislature in which LIAM had an interest and on which LIAM had taken a position, there is insufficient circumstantial or direct evidence to conclude that Dillon provided the meal to influence or induce any of Representative Mara’s or staffer Smith’s present or future official actions. For example, from the timing between the dinner and the release of a new draft of S. 2099, a reasonable inference can be drawn that members and staff of the Insurance Committee were working on the draft at the time of the dinner. But, there is a dearth of evidence concerning LIAM’s interest in or participation or lobbying activities around the new legislative draft. Additionally, there is no evidence of what the changes in the new draft were. Thus, there is insufficient evidence connecting payment of the dinner with LIAM’s intent to influence Mara’s or Smith’s official actions concerning S. 2099.

Consequently, we find that the Petitioner has not proven, by a preponderance of the evidence, that LIAM violated G.L. c. 268A, § 3(a) when it reimbursed Dillon for Mara’s and Smith’s meals at Locke Ober’s Restaurant.

March 22 and 23, 1990 Fountain’s Restaurant, Tulsa, Oklahoma Dinners

November 24, 1990 Stouffer Restaurant Orlando, Florida Dinner

1. Additional findings

We make the following additional findings based on the preponderance of the evidence:

184. The March 1990 NCOIL conference in Tulsa, Oklahoma was sparsely attended.

185. On March 22, 1990 William Carroll hosted a dinner at the Fountains Restaurant with Representative Woodward and his wife and William Sawyer and his wife.

186. On March 23, 1990, William Carroll hosted a dinner for William Sawyer and his wife, Representative Woodward and his wife, and Thomas Driscoll, who was a representative of Liberty Mutual Insurance Company, at the Fountains Restaurant.

187. The group attended the same restaurant on each evening because of a scarcity of restaurants in Tulsa, Oklahoma.

188. On March 22 and 23, 1990, William Carroll could have gone to dinner with NCOIL attendees from states other than Massachusetts, but he chose, each day, to attend dinner with a group entirely from Massachusetts.

189. William Carroll arranged for the November 24, 1990 dinner at the Stouffer Hotel in Orlando, Florida. At the time of the arrangements Mr. Carroll did not know how many people would attend the dinner.

190. The Stouffer dinner was a social event and most, but not all, of the attendees were from Massachusetts. No legislation was discussed during dinner.

191. During 1990, LIAM was following certain legislative bills, including: an antitrust bill pending in the Commerce and Labor Committee; utilization review bill; a health bill sponsored by Representative Mara; AIDS testing legislation, unisex insurance bill; bill providing life insurance to children with catastrophic illness.

192. In 1990, the Insurance Commissioner, Senator Pines and LIAM, through Representative Emilio, re-filed their respective privacy bills regarding AIDS privacy in the Legislature. The Commerce and Labor Committee refused to transfer the Pines bill to the Insurance Committee as it believed the Insurance Committee was biased toward the industry. The Insurance Committee reported a draft that was unacceptable to all interested constituencies. After strong industry opposition, Senator Pines' bill was, again, not reported out of the Commerce and Labor Committee.

193. H.553 (Emilio bill) was based on the NAIC model privacy act. LIAM developed a brochure, dated May 9, 1990, explaining H. 553 and supporting passage of the bill. The Emilio bill required detailed disclosure authorization forms, required notification to applicants about what types of personal information insurance companies could collect, required notification of the reasons of an adverse indemnity decision, included consumer rights to access personal information, included enforcement rights in the Division of Insurance, and included consumer rights to pursue civil actions for violations of the law.

194. As of May 3, 1990, LIAM was closely following the Emilio bill in the Insurance Committee.

195. As of May 3, 1990, the LIAM Executive Committee had agreed to try and move the Emilio bill favorably out of the Insurance Committee and to try and substitute the NAIC

language for the Pines privacy bill in the Commerce and Labor Committee.

196. At the May 3, 1990 LIAM Executive Committee meeting, the members discussed the development of a public relations policy regarding the privacy bill. Between May 3, 1990 and June 7, 1990, William Carroll and others met with the editorial staff of the Boston Globe newspaper regarding the privacy issue.

197. As of September 24, 1990, the Emilio bill had not reached the Governor's desk and remained in the Legislature.

198. In fall 1990 LIAM met with representatives of the Division of Insurance and the Office of Consumer Affairs to write a consensus privacy bill.

199. LIAM planned to re-file the Emilio bill in the 1991 legislative session with a different Legislative sponsor as Representative Emilio had lost his September 1990 primary race and was not re-elected to the Legislature.

200. The deadline for filing legislation for the 1991 legislative session by parties other than state agencies was December 5, 1990.

201. As of November 14, 1990, in addition to the LIAM privacy bill, LIAM had two other bills ready for filing in the 1991 session. The other bills were the valuation of capital stock of subsidiaries of insurers, previously sponsored by Representative John Cox and the bill permitting life insurance companies to exchange policies issued with policies issued by affiliated life insurers, previously sponsored by Representatives Driscoll, Constantino and Woodward.

202. In 1990, LIAM sponsored the following bills: H. 553 (An Act Relative to Insurance Information and Privacy Protection); H. 734 (An Act Relative to Permitting Insurers to Value Real Estate at an Assessed Value); H. 1349 (An Act to Permit Life Insurance Companies to Exchange Policies Issued with Policies Issued by Affiliated Life Insurers); H. 2157 (An Act Relating to the Valuation of Capital Stock of Subsidiaries of Insurers); H. 3427 (An Act Establishing a Market for Taxable Bonds of the Commonwealth and Reforming the Taxation of Domestic Life Insurance Companies); H. 5649 (An Act Relative to the Investments of Insurance Companies); H. 5905 (An Act Further Regulating the Acquisition of Capital Stock by Life Insurance Companies).

2. Discussion

The Petitioner has alleged that LIAM violated § 3 on three occasions in 1990. As previously found by the Commission, William Carroll hosted dinners on two consecutive nights at the Fountains Restaurant in Tulsa, Oklahoma for Representative Woodward and his wife. Carroll also hosted a dinner at the Stouffer Restaurant in Orlando, Florida in November 1990. Representative Emilio and his spouse attended the meal in Orlando Florida. Each of these meals was of substantial value. However, as discussed below, the evidence does not support a finding that each meal was given to influence present or future official actions, or to reward past official actions of Representatives Woodward or Emilio.

At the time of the March Oklahoma dinners, Woodward was Chairman of the Insurance Committee. At the time of the dinner, Carroll had known Woodward, his wife, Sawyer, and his wife for several years and had hosted a dinner in Boston in 1989 for Woodward and his wife. Carroll could have had dinner on either or both of those evenings with other conference attendees. Although Carroll testified that he considered the dinner to be a social occasion, he treated the dinner as a LIAM business expense.

The record reflects numerous bills pending in the Legislature before and after these dinners. However, the Petitioner has not identified any specific past, present or future actions relating to a specific piece of legislation that LIAM wanted Woodward to take or that Woodward had taken. A reasonable inference can be drawn that LIAM had a substantial interest in the AIDS privacy bill, as LIAM drafted a version of the legislation and developed a media policy to promote its legislation. But, there is insufficient evidence linking payment of Woodward's dinner to specific actions LIAM wanted Woodward to take regarding this particular bill. Accordingly, although the record would support a finding that LIAM was seeking to foster generalized good will, the record does not support a finding that LIAM paid for the dinner "for or because of an official act performed or to be performed" by Representative Woodward. Therefore, we conclude that the Petitioner has not proven that LIAM violated G.L. c. 268A, § 3(a) when it paid for the two March dinners for Representative Woodward and his wife.

At the time of the Florida dinner, Carroll had known Representative Emilio for many years, as the Representative had served on the Insurance Committee for 10 years. He was also the sponsor of H.553, the LIAM bill concerning AIDS privacy and confidentiality. As indicated above, LIAM had a strong interest in passage of this bill.

However, at the time of the November Stouffer Restaurant dinner, Representative Emilio had lost his

primary election and was going to be leaving office, less than two months later, in January 1991. Additionally, as of November 15, 1990, nine days before the dinner, LIAM had concluded that its privacy bill would not be released by the Insurance Committee or passed in 1990 and it was seeking a sponsor to re-file the bill for 1991. Thus, we conclude that LIAM did not pay for Representative Emilio and his spouse's meals in order to influence Emilio to take some present action or to induce him to take future action regarding the privacy bill. As indicated above with the Woodward 1990 dinners, the Petitioner has not identified any other particular official actions LIAM wanted Emilio to take regarding any other legislation that was pending. Moreover, there is insufficient evidence to support a finding that the dinners were given to reward Representative Emilio for any prior actions he had taken.

We conclude that the Petitioner has not proven, by a preponderance of the evidence, that LIAM paid for the Stouffer Restaurant meals for Representative Emilio and his spouse "for or because of an official act performed or to be performed" by Emilio. Accordingly, LIAM, by paying for the Stouffer Restaurant dinner, did not violate G.L. c. 268A, § 3(a).

January 8, 1991 Retirement Dinner for Representative Emilio

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

203. Until 1990, Representative Frank Emilio (Emilio) had served ten years on the Insurance Committee. According to William Sawyer, John Hancock's lobbyist, Representative Emilio had been very helpful to John Hancock.

204. The purpose of the January 8, 1991 dinner and gift of golf clubs to former Representative Emilio was to recognize Emilio's retirement from the Legislature. Emilio had been an insurance agent and was well liked by insurance lobbyists.

205. William Carroll did not attend the Emilio retirement dinner.

206. The 1991 Emilio retirement dinner was unusual, as LIAM had never been involved in such a legislative retirement dinner before or after the Emilio dinner.

207. William Sawyer notified William Carroll of LIAM's share of the gift and dinner after the dinner was held.

208. Neither William Carroll nor any of the

LIAM staff were personal friends with Representative Emilio in 1990-1991.

2. Discussion

As found by the Ethics Commission in its December 1997 Decision and Order, LIAM, with other legislative agents for the insurance industry, contributed toward a gift of golf clubs and a dinner at Joe Tecce's Restaurant on January 8, 1991. LIAM's contribution was of substantial value.

At the time of the gift and the dinner, Emilio was no longer a public official as he lost his primary election in September 1990. The issue is whether the golf clubs and dinner were given with an intent to reward or influence a specific identifiable official act. Having reviewed the totality of the evidence, we are constrained by the Scaccia decision to conclude that the Petitioner has not proven, by a preponderance of the evidence, that this gift and dinner were "for or because of" a specific official act.

As discussed above, in 1989 and 1990, Emilio had agreed to sponsor privacy legislation drafted by LIAM, concerning the confidentiality of HIV-related information handled by insurance companies and the restrictions on the use of said information in the indemnity process. LIAM was very interested in this legislation, to the extent of not only lobbying the Legislature, but also developing a public relations press strategy to promote its bill. Although Emilio agreed to sponsor the legislation, there is no additional evidence regarding Emilio's actions relating to the bill or any interaction he had with LIAM regarding the bills.

However, there was other testimony that the stated purpose of the dinner was to celebrate Emilio's retirement. Emilio had been a member of the Insurance Committee for ten years. Prior to becoming a legislator, Emilio had been an insurance agent. William Sawyer believed that Emilio had been a good friend to John Hancock Life Insurance Company while he was a legislator. At the time of the gift and dinner, Emilio was no longer a public official and was no longer able to take official acts concerning legislation of interest to LIAM.

Weighing all of the evidence, we can not conclude that LIAM's contribution was given specifically as a reward for his past actions on the privacy legislation and not as a gesture of good will for Emilio's long service in the Legislature and in the Insurance Committee. Therefore, the Petitioner has not proven, by a preponderance of the evidence, that LIAM violated G.L. c. 268A, § 3 by contributing to the gift of golf clubs and dinner, in order to reward Emilio for a specific past official act.

November 16, 1991 Avanti Restaurant Scottsdale, Arizona Dinner

1. Additional Findings

We make the following additional findings based on the preponderance of the evidence:

209. William Carroll arranged for the November 16, 1991 dinner at the Avanti Restaurant in Scottsdale, Arizona. At the time of the arrangements Carroll did not know how many people would attend the dinner.

210. The individuals attending the November 16, 1991 dinner at the Avanti Restaurant were all from Massachusetts.

211. In 1991 LIAM had established a separate Privacy Task Force under Frank O'Brien.

212. As of August 15, 1991, following negotiations, the Commerce and Labor Committee transferred Pines' AIDS privacy bill to the Insurance Committee. The Insurance Committee reported out of committee a privacy bill that represented the consensus bill drafted by LIAM and the Division of Insurance.

213. In 1991 a privacy bill consistent with LIAM's and Division of Insurance negotiations was passed by the Legislature and signed into law (Chapter 516 of the Acts of 1991) by the Governor.

214. In 1991 LIAM was following the progress of H. 6100. The Health Care Committee reported the bill out of committee in September 1991. The bill addressed the hospital payment system and small group health insurance market reform. LIAM had offered amendments to the bill to maintain hospital cost controls; phase-in Blue Cross Blue Shield freedom to contract over two-years; retain the uncompensated care pool, separate the small group section, exclude out-of-the-state associations; revise rating requirements; and restructure the reinsurance pool. As of November 5, 1991 the bill remained in the House Ways and Means Committee.

215. On November 5, 1991, the LIAM Health Insurance Advisory Committee, with member William Sawyer present, discussed how to quicken the process of H. 6100. At the time Blue Cross had extended its master contract with each hospital until November 30, 1991 and the rate setting commission had issued emergency regulations regarding hospital charges and the uncompensated care pool. The LIAM Health Insurance Advisory Committee discussed the possibility of challenging either of the temporary extensions in order to create a "crisis" environment and quicken passage of the legislation.

216. Representative Finneran reported H. 6100 out of the Ways and Means Committee with a new draft (H. 6280) on November 18, 1991. On November 19, 1991 the bill was taken out of order and ordered to a third reading. On November 21, 1991 further amendments were considered and the bill was passed to be engrossed.

217. The Senate passed H. 6280 with amendments on December 13, 1991. The House rejected the Senate amendments. On December 17, 1991 a conference committee was created, which reported the bill on December 21, 1991. Both branches of the Legislature enacted the bill on December 23, 1991.

218. On March 6, 1991 William Carroll testified, before the Joint Committee on Taxation on behalf of LIAM in favor of H. 4076, An Act Reforming the Taxation of Domestic Life Insurance Companies. The purpose of the bill was to repeal the net investment income tax levied against domestic life insurance companies. LIAM filed a bill to repeal the net investment income tax every year during William Carroll's tenure at LIAM.

219. In 1991, neither Representatives Woodward, Pacheco, Ranieri, nor Senator Havern served on the Health Care Committee or on the Ways and Means Committee.

220. In 1991 Frank O'Brien believed LIAM had a strong relationship with the Legislature and was able to "influence the legislature through a combination of timely PAC contributions, accurate technical advice, and a visible and substantial presence on the hill."

2. Discussion

The Commission has previously found that, on November 16, 1991, William Carroll hosted a dinner at the Avanti Restaurant in Scottsdale, Arizona. LIAM paid for this dinner. In attendance were four legislators: Senator Robert Havern and his spouse; Representative Francis Woodward and his spouse; Representative Marc Pacheco; and Representative Daniel Ranieri and his spouse. This meal was of substantial value.

During 1991 there were at least two specific pieces of legislation in which LIAM had a substantial interest. As discussed above, for several years LIAM had been lobbying on behalf of the privacy bill it drafted. Finally, in 1991, a bill, consistent with LIAM's wishes, was passed and signed by the Governor.

Additionally, in November 1991, LIAM was lobbying for H. 6100, a bill addressing the hospital payment

system and small group health insurance market reform. The bill had been reported out of the Health Care Committee, but was stalled in the House Ways and Means Committee. The LIAM Health Care Advisory Committee was so concerned about quickening the process of this bill that William Sawyer suggested manufacturing a "crisis" atmosphere to place pressure on the Legislature to pass the bill. William Sawyer was one of the attendees at the dinner.

Just two days after this dinner, the bill was reported out of the House Ways and Means Committee as a different draft. On November 19, 1991 the bill was taken out of order and ordered to a third reading. On November 21, five days after the dinner, the House of Representatives passed the bill.

The evidence supports a finding that LIAM had a strong interest and was or had expended a great deal of effort seeking passage of these bills. Also, the timing between the dinner and the passage of H. 6100, as well as the fact that three days after the dinner, this particular bill was taken out of order and expedited, is suspect. But the evidence does not support a connection between the dinner and specific official acts that LIAM sought to influence of any of the legislators attending the dinner. For example, none of the legislators attending the dinner were on the Health Care Committee or the Ways and Means Committee where the bill was pending. There is no evidence that any of the legislators who attend the dinner spoke about the bill to any of the legislators who were on the Ways and Means and Health Care Committees, or to Representative Finneran, who reported the bill out of committee. There is no evidence whether any of the legislators voted on the final draft of the bill. There is no evidence that LIAM had approached any of these legislators on an individual basis to lobby on behalf of this bill. There is no evidence whether LIAM was or was not successful in obtaining the amendments it proposed. Any evidence offered on any of the above would be relevant on the issue of LIAM's intent to influence a specific act.

Additionally, only one of the legislators attending the dinner, Representative Pacheco, was serving on the Insurance Committee in 1991 when the privacy bill was pending. Representative Pacheco was not the Chairman or Vice Chairman at the time. There is no evidence of any specific official act that LIAM was seeking to influence, other than good will.

Similarly, although William Carroll had testified on behalf of the net investment income tax bill before the Taxation Committee six months prior to the dinner, and Senator Havern was a member of the Taxation Committee, there is no evidence of the status of the bill at the time of the dinner, any official actions Senator Havern had taken regarding the bill, and any present or future actions he

would take regarding the bill.

In conclusion, we find that the Petitioner has not proven, by a preponderance of the evidence, that LIAM violated G.L. c. 268A, § 3(a) when it paid for a dinner at the Avanti Restaurant for Senator Havern and his wife, Representative Woodward and his wife, Representative Ranieri and his wife, and Representative Pacheco.

D. Conclusion

From our review of the entire record, we conclude by a preponderance of the evidence that LIAM violated G.L. c. 268A, § 3(a) when it paid for the May 13, 1992 Four Seasons Restaurant dinner and the March 13, 1993 Ritz Carlton dinner. We also conclude that the Petitioner has not proven, by a preponderance of the evidence, that LIAM violated G.L. c. 268A, § 3(a) on the remaining seven occasions.

We are constrained by the Scaccia decision in reaching this conclusion. We are troubled by LIAM's repeated gifts and entertainment expenditures in order to develop the access to the Insurance Committee and to the Insurance Division that LIAM enjoyed. One example of that access is described in an internal LIAM memorandum dated July 24, 1991, authored by Frank O'Brien. Robert Smith was a staff member to the Insurance Committee and he provided LIAM lobbyists with inside information about the workings and deliberations of the Insurance Committee. He also made recommendations about LIAM's legislative strategy. It is unlikely that ordinary citizens and consumers would enjoy such access to the Insurance Committee. According to LIAM memoranda, it was unsuccessful in convincing the Commerce and Labor Committee to transfer Senator Pine's AIDS privacy bill to the Insurance Committee because it was the perception of legislators on the Commerce and Labor Committee that other legislators on the Insurance Committee were biased toward the insurance industry. Other internal LIAM memoranda revealed LIAM's confidence in the access it had developed at the Division of Insurance in 1992-93, when it proposed to take a substantive role in drafting, not just commenting upon, the regulations required by NAIC—regulations to which the insurance industry would be subject.

All of these activities reflect the New York Special Committee's concern, expressed in its 1960 report, and shared by the Massachusetts drafters who included § 3 in the conflict of interest law, that "open and known channels for decision-making are frustrated when a government official appears to perform an ordinary role but is in fact responding to the demands of others to whom he is secretly economically tied. It is not simply that he or the outside group makes money out of it. They may not. It is that the public processes of government are being subverted while policy is made silently by forces not known

or responsive to the electorate."⁴⁵

We do not condone LIAM's conduct. We simply find that the majority of the allegations were not proven by a preponderance of the evidence under the standards established by the Supreme Judicial Court. However, our review of the record in its entirety leads us to conclude that LIAM, by its conduct, undermined the spirit of the conflict of interest law. In our opinion, when professional lobbying activities become interwoven with private lavish entertainment, under the guise of good will, public confidence in government is eroded. Citizens can never be sure whether a government decision is made on the merits or is influenced by repeated entertainment over time, given to the decision-makers by those with a substantial stake in the outcome. We note, with approval however, that the Legislature in 1994 amended G.L. c. 3, § 43 to further limit what a legislative agent can give to a public official or public employee.⁴⁶

E. Order

Pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission rescinds the civil penalty levied on December 16, 1997 and hereby orders the Life Insurance Association of Massachusetts to pay the following civil penalty for violating G.L. c. 268A, § 3(a) on two occasions. We order the Life Insurance Association of Massachusetts to pay to the State Ethics Commission within 30 days of issuance of this Decision and Order, \$2000 for each violation of G.L. c. 268A, § 3(a), resulting in a total civil penalty of \$4000 (four thousand dollars).

DATE AUTHORIZED: April 14, 2003

DATE ISSUED: May 12, 2003

¹ Commissioner Cassidy participated in the oral argument of this matter, but his term expired during the pendency of these proceedings and he is not a signatory to this Decision and Order.

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

³ Life Insurance Association of Massachusetts, 431 Mass. at 1002.

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

⁵ Life Insurance Association of Massachusetts, 431 Mass. at 1002. The Court affirmed the Commission's original findings that the entertainment given to the legislators and paid by LIAM were things of substantial value and that the Commission was within its discretion to use \$50 as a benchmark for substantial value.

⁶ Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted).

⁷ Special Commission on Code of Ethics Report, H. 3650, 8 (1962).

⁸ Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, 1960; see, Special Commission on Code of Ethics Report at 8; H.R. No. 748, 87th Cong., 1st Sess. 2 (1961).

⁹ According to the New York Special Committee “a government that plays favorites among its citizens is fundamentally objectionable to American conceptions of the equality of men under law, notions of fair play, and the assumptions of free competition. Few things make an American citizen angrier than to find out that he did not get a fair shake; and a secret personal interest of a deciding official is a kind of dice loading.” Id. at 8.

¹⁰ According to the New York Special Committee, “the institutions . . . are, in varying degrees, sensitive to the wishes of different interests in ways that are acceptable and indeed necessary in a democracy. But these open and known channels for decision-making are frustrated when a government official appears to perform an ordinary role but is in fact responding to the demands of others to whom he is secretly economically tied. It is not simply that he or the outside group makes money out of it. They may not. It is that the public processes of government are being subverted while policy is made silently by forces not known or responsive to the electorate.” Id. at 9.

¹¹ As the Supreme Judicial Court has recognized “the Legislature’s objective ‘was as much to prevent giving the appearance of conflict’ as to suppress all tendency to wrongdoing.” Scaccia v. State Ethics Commission, 431 Mass. 351, 359 (2000); (citing Selectmen of Avon v. Linder, 352 Mass. 581, 583 (1967)).

¹² The New York Special Committee recommended that gifts, as well as bribes be included in a conflict of interest statute. The New York Special Committee stated:

Regulation of conflicts of interest is regulation of evil before the event; it is regulation against potential harm. These regulations are in essence derived, or secondary—one remove away from the ultimate misconduct feared. The bribe is forbidden because it subverts the official’s judgment; the gift is forbidden because it may have this effect, and because it looks to others as though it does have this effect. This potential or projective quality of conflict of interest rules is peculiar and important.

Conflict of Interest and Federal Service at 19-20.

¹³ Scaccia, 431 Mass. at 355-356.

¹⁴ Schaffer, 183 F.3d at 842.

¹⁵ Scaccia, 431 Mass. at 357

¹⁶ Schaffer, 183 F.3d. at 843.

¹⁷ See, St. 1962, c.779, § 1. The preamble to G.L. c. 268A stated “A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.” (emphasis added).

¹⁸ This factor would include whether the occurrence was unusual within the relationship that had been established by the parties.

¹⁹ We note that it is not mandatory that any decision or legislation at issue be controversial.

²⁰ Scaccia, 431 Mass. at 356.

²¹ According to William Carroll, “we just make sure that we have a continuing flow of information to the legislators so that they will never have any doubt in their mind as to where we stand and why we stand on a particular position.”

²² We credit LIAM’s internal business memorandum of August 2, 1991.

²³ Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, 1960 at 8-9.

²⁴ We credit an internal LIAM memorandum dated September 21, 1992.

²⁵ We credit an internal memorandum from Carroll to the NAIC Certification Committee Task Force dated April 29, 1992.

²⁶ Id.

²⁷ Id.

²⁸ “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).

²⁹ “Official act”, any decision or action in a particular matter or in the enactment of legislation. G.L. c. 268A, § 1(h). (emphasis added).

³⁰ Carroll was concerned that LIAM’s message to the Insurance Commissioner would appear to be criticism.

³¹ Carroll testified that he had instructed LIAM employees and legislative agents not to discuss legislation when they took legislators out to lunch or dinner.

³² Schaffer, 183 F.3d at 842.

³³ In the original December 1997 Decision and Order, the Commission did not find credible William Carroll’s self-serving testimony that he did not, by hosting dinners, intend to influence any official acts of the dinner attendees. We leave that credibility determination undisturbed because of our view of the totality of the evidence as discussed in this Decision and Order and because one member of the 1997 Commission had acted as the Hearing Commissioner who heard and observed Carroll’s testimony.

³⁴ We credit an internal office memorandum dated February 19, 1993 to William Carroll from Frank O’Brien.

³⁵ We credit a June 17, 1993 memorandum from William Carroll to the LIAM Executive Committee.

³⁶ The Supreme Judicial Court has stated that “in order for the commission to establish a violation of G.L. c. 268A, § 3(a) . . . 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, such as holding a hearing on proposed legislation that, if passed, could benefit the giver of the gratuity.” Scaccia, 431 Mass. at 356. We believe that certain substantive official actions taken surrounding a hearing, nonetheless may be significant. For example, a decision whether or not to hold a hearing in the first instance can be an official act, where the effect of not holding a hearing is not reporting a bill out of committee (and allowing the bill to die). On the facts before us, where it was

urgent, not only that a hearing be held, but also that it be expedited because the consequence of delay meant that the Insurance Division's accreditation would be jeopardized and that LIAM's members would suffer economic harm, LIAM was seeking official action from the Legislature.

³⁷ Additional facts raising inferences that this dinner was planned for invited guests are that, by the time Mr. Carroll arrived at the restaurant for dinner, the waitstaff had been notified and had prepared the appropriate number of places for the attendees. Further, the Ritz Carlton was located away from the conference site and the attendees had to drive to the site.

³⁸ William Carroll testified that there were very expensive menu items, prompting him to arrange for a special menu for the dinner in order to control the costs associated with the meal.

³⁹ There were various other bills before other guest legislator's committees in the three weeks after the March 13, 1993 dinner in which LIAM had an interest and was following. For example, Carroll testified about repealing the net investment income tax before Representative Scaccia's Taxation Committee at the end of March. There were also bills of interest before the Health Care Committee.

⁴⁰ We note that when the waitstaff had a question about the meal, they approached William Carroll. The waitstaff gave William Carroll the bill. On both of these occasions other attendees were present.

⁴¹ We credit a July 26, 1989 memorandum from William Carroll to the LIAM Executive Committee.

⁴² We do not imply that a meal that is unplanned will never violate § 3(a). Spontaneity is only one factor and we view the spontaneity of this meal within the context of the totality of the other circumstances surrounding this dinner.

⁴³ Schaffer, 183 F.3d at 842.

⁴⁴ We credit an internal memorandum dated July 24, 1991, authored by Frank O'Brien.

⁴⁵ Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, 1960 at p. 9.

⁴⁶ G.L. c. 3, § 43 states:

Notwithstanding the provisions of any general or special law to the contrary, no executive or legislative agent shall knowingly offer or knowingly give to any public official or public employee, as defined in section one of chapter two hundred and sixty-eight B, or to a member of such person's immediate family any gift, as defined in said section one of said chapter two hundred and sixty-eight B, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public official or employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such agent's business or in connection with a personal or social event

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 682**

**IN THE MATTER
OF
DAVID F. McCARTHY**

DISPOSITION AGREEMENT

The State Ethics Commission and David F. McCarthy 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 25, 2002, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by McCarthy. The Commission has concluded its inquiry and, on April 16, 2002, found reasonable cause to believe that McCarthy violated G.L. c. 268A, §19.

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

Findings of Facts

1. McCarthy is the Town of Greenfield police chief. As such, he is a municipal employee as that term is defined in G.L. c. 268A, §1.

2. Scott Daniel McCarthy, one of the Chief's sons, has been a Greenfield police officer since July 1, 1992.

3. In Greenfield the chief recommends and the selectmen appoint all new hires and promotions.

4. Beginning in March 1999, Daniel was one of five Greenfield patrol officers who were on the civil service list for any sergeant vacancy that would occur in the department. Daniel's score placed him second on the list, although he was slightly more senior in service in the department than the other four. The list was set to expire in or about October 17, 2000.

5. Chief McCarthy knew, from previous advice he had received from the State Ethics Commission (see below) that because his son was a candidate for a sergeant's promotion, he as Chief would not be able to participate in filling any sergeant vacancy. Instead, that process would be turned over to his deputy. Nevertheless, in late 1999, Chief McCarthy spoke with Lt. Martin Carter – one of the two lieutenants under the then deputy chief – and asked whether Carter would consider supporting

Daniel being promoted to sergeant when a vacancy occurred. Lt. Carter stated that he would not.

6. The Deputy Chief abruptly retired in late July 2000. Shortly thereafter, Chief McCarthy decided to recommend a department reorganization, which would include various promotions, including promoting a sergeant to lieutenant, thereby creating a sergeant vacancy, and adding two new sergeant positions. Any such reorganization had to be approved by the selectmen.

7. Aware that the Chief's son was on the sergeant's list and that the deputy chief's resignation would result in a sergeant vacancy, the town manager in late July or early August 2000, asked Lt. David Guilbault to decide on whom to recommend to fill the sergeant positions.

8. In or about early to mid-August 2000, Lt. Guilbault asked all sergeants and lieutenants for their recommendations as to whom should be appointed to sergeant.

9. At about the same time, Chief McCarthy asked Sgt. Viorel Bobe to accompany him on a ride. During the course of the ride the Chief told Sgt. Bobe that he had heard that Bobe was not supporting making Daniel a sergeant. The Chief asked Bobe to be fair regarding Daniel, noting that others had opposed Bobe's promotion to sergeant, and that the Chief had promoted Bobe despite that opposition.

10. In an August 16, 2000 memo to the selectmen, Chief McCarthy laid out his formal recommendations for the reorganization. In that memo he recommended that the selectmen add two new sergeants in addition to filling the sergeant vacancy, and he noted that the civil service sergeants list was set to expire within a month, and another list would not be created for at least a year.

11. In an August 22, 2000 memo from Chief McCarthy to Selectmen Chairman John Mackin, the Chief recommended that Lt. Guilbault be promoted to captain and a sergeant be promoted to lieutenant. The memo then states, "Lt. David Guilbault will make the presentation for the sergeant recommendations."

12. Just prior to the August 22, 2000 board of selectmen meeting, Chief McCarthy approached a selectman at his place of employment and asked him not to oppose the promotions. The selectman had asked the Chief to delay the promotions so that the process could be reviewed and a more public process implemented given that the Chief's son was one of the sergeant candidates, but the Chief refused, stating that the sergeants list was set to expire. The Chief again asked the selectman to support the appointments, and instead offered at some later time to review the manner in which future promotions

would occur.

13. At the August 22, 2000 Selectmen's meeting, Lt. Guilbault recommended to the selectmen that three of the patrolmen who were on the sergeants' list, including Daniel McCarthy, be promoted to sergeant positions.

14. At their August 22, 2000 meeting the selectmen approved the reorganization and made the recommended appointments/promotions.

15. As a result of his promotion to sergeant, Daniel's salary increased from \$667.80 to \$739.20 per week.

16. In August 2001, one of the newly appointed sergeants filed a grievance regarding the pay rate for the new sergeants. The Chief participated in denying the grievance by meeting with department personnel and formulating an offer to instead pay each sergeant a one time, lump sum amount of \$439. The sergeants rejected the offer, and the matter was eventually decided by an arbitrator.

Conclusions of Law

17. Section 19 of G.L. c. 268A prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which, to his knowledge, he or an immediate family member³ has a financial interest.⁴

18. The decisions to reorganize the department, including promoting a sergeant to lieutenant thereby creating a sergeant vacancy and adding two additional sergeant positions, and to lobby officers behind the scenes to support his son's promotion, were particular matters. In addition, the decisions to deny the grievance over that pay rate and to offer \$439 to each sergeant, were each particular matters.

19. Chief McCarthy participated in each of those particular matters as is described above.

20. As Chief McCarthy's son, Daniel is a member of the Chief's immediate family.

21. Daniel had a financial interest in each of the above particular matters because each would likely affect his salary.

22. Accordingly, by participating in each of the foregoing particular matters concerning his son, Chief McCarthy violated § 19.

Prior Notice

23. In 1992, town counsel provided Chief

McCarthy with a written opinion regarding how § 19 would apply to the Chief's conduct vis-à-vis his son as a police officer in his department. The letter explained that §19 prohibited the Chief from participating as such in any particular matter involving his son's financial interests.

24. By letter dated August 28, 1997, the Commission's Legal Division responded to Chief McCarthy's request for advice regarding appointing his son as a K-9 officer. Because the Chief's request referred to past conduct, the letter gave only general advice, but in considerable detail, as to §19 prohibiting the Chief from participating as such in any particular matter involving his son's financial interest.

25. By letter dated December 2, 1997, the Commission's Enforcement Division warned Chief McCarthy that his involving himself in a personnel decision in which his son had a financial interest, a K-9 officer appointment, appeared to violate §19.

Resolution

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

- (1) that McCarthy pay to the Commission the sum of \$4000 as a civil penalty for violating G.L. c. 268A, §19; and
- (2) that McCarthy waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: May 28, 2003

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

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

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

⁴ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 683**

**IN THE MATTER
OF
MICHAEL KELLEHER**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Michael Kelleher 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 11, 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 Kelleher. The Commission has concluded its inquiry and, on March 12, 2003, found reasonable cause to believe that Kelleher violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Kelleher has been a Saugus selectman since 1999. The selectmen appoint the town manager.
2. Steven Angelo ("the Town Manager") was the Saugus town manager from July 1998 to August 2002. Kelleher and Angelo are friends.
3. Edward Felix ("the Chief") has been the Saugus police chief since 1996. The town manager appoints the chief.
4. On the evening of January 3, 2002, Kelleher, the Town Manager and others socialized at a Saugus restaurant beginning at around 9 P.M. Later in the evening, the parties went to a Saugus club where they stayed until

just before midnight.

5. At that time, the Town Manager went home. Kelleher drove to another Saugus club.

6. Kelleher drank alcoholic beverages at each of the above establishments.

7. At approximately 1:45 A.M., Kelleher left the club and drove towards his home.

8. At approximately 2:00 A.M., two Saugus police officers on patrol observed Kelleher's car drift over the center line and then back to his side of the road. They pulled the car over.

9. After being pulled over, Kelleher used his cell phone to call the Town Manager to inform him that the police had stopped him.

10. The police officers promptly approached Kelleher's car and informed him of the reason for the stop. When the officers observed Kelleher close up, his voice was slurred, his eyes were red, and he and his vehicle smelled of alcohol. The officers suspected the selectman was intoxicated. The officers asked Kelleher if he had been drinking, to which Kelleher responded that he drank a couple of beers. Based on their observations, the officers intended to perform a field sobriety test on Kelleher, which was standard police procedure.

11. The officers requested Kelleher's driver's license. His license, which he gave them, had been expired for over a year. In accordance with standard operating procedures, the officers returned to the cruiser and called in the information.

12. According to Kelleher, he called the Town Manager because he was concerned that he, Kelleher, was being or was about to be harassed by the police because he had supported the Town Manager in a long-standing bitter contract negotiation with the police union.

13. According to the Town Manager, Kelleher told the Town Manager that he did not believe he had been legitimately stopped. The Town Manager advised Kelleher to contact the Chief. Kelleher stated that he did not have the Chief's telephone number and asked the Town Manager to call the Chief instead. The Town Manager agreed.

14. The Town Manager then called the Chief at home. According to the Town Manager, he told the Chief that Kelleher had been stopped by the police and was concerned he was being harassed. The Town Manager asked the Chief to call the selectman in his car at the scene. According to the Town Manager and the Chief, all the Town Manager did was ask the Chief to check into

the matter. The Chief told the Town Manager he would call him back to report on what happened.

15. The Chief telephoned Kelleher at the scene and spoke with him briefly. The Chief then telephoned the lieutenant on duty at the station and instructed the lieutenant to have the officers drive the selectman home. The Chief was aware when he gave this instruction that Kelleher had been drinking and may have been driving under the influence and had given the officers a license that had expired over a year ago. The lieutenant called the officers at the scene and conveyed the Chief's message to drive Kelleher home, but also said that he would support the officers if they decided to arrest the selectman.

16. After his call to the station, the Chief had an additional telephone conversation with Kelleher. The Chief then spoke to the officers. They informed him that, in their opinion, Kelleher had been driving under the influence and should be given a field sobriety test. Nevertheless, the Chief asked them to simply drive Kelleher home.

17. At that point the two patrol officers drove Kelleher home.

18. The Chief then telephoned the Town Manager and told him that the officers drove Kelleher home.

19. The two patrol officers and sergeant at the scene believed that Kelleher was intoxicated and, but for the Chief's intervention, a field sobriety test would have been administered per standard operating procedure. They also believed the selectman would have been arrested for operating a motor vehicle under the influence of alcohol ("OUI"). According to standard police procedures, Kelleher also would have been issued citations for not staying within his own lane and driving with an expired license.

20. Citations for failing to stay within one's own lane and driving with an expired license carry \$100 and \$50 fines, respectively. The potential costs of a first-time OUI conviction include \$575 in court fines and costs, loss of license for 45 days and significant insurance surcharges.

Conclusions of Law

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

22. As a selectman, Kelleher is a municipal employee as that term is defined in G.L. c. 268A, § 1.

23. Being driven home without taking a field

sobriety test that may have led to an arrest, and, not receiving citations for driving over the center line and driving with an expired license were unwarranted privileges or exemptions for Kelleher. Standard operating procedure would have required that Kelleher be subjected to a field sobriety test, which, in the opinions of the officers on the scene, would have resulted in his arrest. He also should have been cited for not staying in his own lane and driving with an expired license

24. These privileges or exemptions were of substantial value as each involved fines of \$50 or more. Avoiding a field sobriety test that may have resulted in an OUI arrest was of substantial value because the likely costs were significant, including large fines and court costs, loss of license for 45 days and significant insurance surcharges. These unwarranted privileges or exemptions were not otherwise properly available to similarly situated people.

Kelleher used his official position as selectman to secure these unwarranted privileges or exemptions. Knowing or having reason to know that he was facing citations for crossing the center line, driving with a license that had been expired for over a year and that he had been drinking and would be subject to a field sobriety test and the possibility of an OUI arrest, Kelleher called his subordinate, arranged to have the Chief awoken at 2 A.M. by the Chief's appointing authority and have him intervene in the situation. In addition, Kelleher used his position to speak directly with the Chief from the scene about the situation. Kelleher knew or had reason to know that the Chief would promptly be advised of the situation including the expired license and the suspicion of operating under the influence. Accordingly, Kelleher knew or had reason to know that his arranging to have the Chief intervene would send the clear implicit message that he wanted preferential treatment because of his selectman's position.

26. Therefore, by knowingly or with reason to know using his position as selectman to secure for himself these unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals, Kelleher violated §23(b)(2).

Resolution

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

- (1) that Kelleher pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2); and¹

- (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 25, 2003

¹In connection with this same matter, Police Chief Felix has also entered into a disposition agreement and former Town Manager Angelo has agreed to a public education letter.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 684**

**IN THE MATTER
OF
EDWARD FELIX**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Edward Felix 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 11, 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 Felix. The Commission has concluded its inquiry and, on March 12, 2003, found reasonable cause to believe that Felix violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Edward Felix has been the Saugus police chief since 1996. The chief is appointed by the town manager.
2. Steven Angelo ("the Town Manager") was the Saugus town manager from July 1998 to August 2002.
3. Michael Kelleher ("the Selectman") has been a Saugus selectman since 1999. The selectmen appoint the town manager. Kelleher and Angelo are friends.

4. On the evening of January 3, 2002, the Selectman, the Town Manager and others socialized at a Saugus restaurant beginning at around 9 P.M. Later in the evening, the parties went to a Saugus club where they stayed until just before midnight.

5. At that time, the Town Manager went home. The Selectman drove to another Saugus club.

6. The Selectman drank alcoholic beverages at each of the above establishments.

7. At approximately 1:45 A.M., the Selectman left the club and drove towards his home.

8. At approximately 2:00 A.M., two Saugus police officers on patrol observed the Selectman's car drift over the center line and then back to his side of the road. They pulled the car over.

9. After being pulled over, the Selectman used his cell phone to call the Town Manager to inform him that the police had stopped him.

10. The police officers promptly approached the Selectman's car and informed him of the reason for the stop. When the officers observed the Selectman close up, his voice was slurred, his eyes were red, and he and his vehicle smelled of alcohol. The officers suspected the Selectman was intoxicated. The officers asked the Selectman if he had been drinking, to which the Selectman responded that he drank a couple of beers. Based on their observations, the officers intended to perform a field sobriety test on the Selectman, which was standard police procedure.

11. The officers requested the Selectman's driver's license. His license, which he gave them, had been expired for over a year. In accordance with standard operating procedures, the officers returned to the cruiser and called in the information.

12. According to the Selectman, he called the Town Manager because he was concerned that he, the Selectman, was being or was about to be harassed by the police because he had supported the Town Manager in a long-standing bitter contract negotiation with the police union.

13. According to the Town Manager, the Selectman told the Town Manager that he did not believe he had been legitimately stopped. The Town Manager advised the Selectman to contact Chief Felix. The Selectman stated that he did not have the Chief's telephone number and asked the Town Manager to call the Chief instead. The Town Manager agreed.

14. The Town Manager then called Felix at home.

According to the Town Manager, he told Felix that the Selectman had been stopped by the police and was concerned he was being harassed. The Town Manager asked Felix to call the Selectman in his car at the scene. According to the Town Manager and Felix, all the Town Manager did was ask Felix to check into the matter. Felix told the Town Manager he would call him back to report on what happened.

15. Felix telephoned the Selectman at the scene and spoke with him briefly. Felix then telephoned the lieutenant on duty at the station and instructed the lieutenant to have the officers drive the Selectman home. Felix was aware when he gave this instruction that the Selectman had been drinking and may have been driving under the influence and had given the officers a license that had expired over a year ago. The lieutenant called the officers at the scene and conveyed Felix's message to drive the Selectman home, but also said that he would support the officers if they decided to arrest the Selectman.

16. After his call to the station, Felix had an additional telephone conversation with the Selectman. Felix then spoke to the officers. They informed him that, in their opinion, the Selectman had been driving under the influence and should be given a field sobriety test. Nevertheless, Felix asked them to simply drive the Selectman home.

17. At that point the two patrol officers drove the Selectman home.

18. Felix then telephoned the Town Manager and told him that the officers drove the Selectman home.

19. The two patrol officers and sergeant at the scene believed that the Selectman was intoxicated and but for Felix's intervention, a field sobriety test would have been administered per standard operating procedure. They also believed that the Selectman would have been arrested for operating a motor vehicle under the influence of alcohol ("OUI"). According to standard police procedures, the Selectman also would have been issued citations for not staying within his own lane and driving with an expired license.

20. Citations for failing to stay within one's own lane and driving with an expired license carry \$100 and \$50 fines, respectively. The potential costs of a first-time OUI conviction include \$575 in court fines and costs, loss of license for 45 days and significant insurance surcharges.

Conclusions of Law

21. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know using his position to obtain for himself or others unwarranted privileges or exemptions of substantial value not properly

available to similarly situated individuals.

22. As the police chief, Felix is a municipal employee as that term is defined in G.L. c. 268A, § 1.

23. Being driven home without taking a field sobriety test that may have led to an arrest, and, not receiving citations for driving over the center line and driving with an expired license were unwarranted privileges or exemptions for the Selectman. Standard operating procedure would have required that the Selectman be subjected to a field sobriety test, which, in the opinions of the officers on the scene, would have resulted in his arrest. He also should have been cited for not staying in his own lane and driving with an expired license.

24. These privileges or exemptions were of substantial value as each involved fines of \$50 or more. Avoiding a field sobriety test that may have resulted in an OUI arrest was of substantial value because the likely costs were considerable, including large fines and court costs, loss of license for 45 days and significant insurance surcharges. These unwarranted privileges or exemptions were not otherwise properly available to similarly situated people.

25. Felix used his official position as police chief to secure these unwarranted privileges or exemptions for the Selectman by requesting as chief that his officers on the scene drive the Selectman home.

26. Therefore, by knowingly or with reason to know using his position as police chief to secure for the Selectman these unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals, Felix violated §23(b)(2).

Resolution

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

- (1) that Felix pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, §23(b)(2); and¹
- (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 25, 2003

¹In connection with this same matter, Selectman Kelleher has also entered into a disposition agreement and former Town Manager Angelo has agreed to a public education letter.

Steven Angelo
39 Popmunet Road
E. Falmouth, MA 02536

Re: Public Education Letter

Dear Mr. Angelo:

As you know, the State Ethics Commission has conducted an investigation into a Saugus Police traffic stop of Selectman Michael Kelleher for improper operation of his automobile on January 4, 2002. The Commission has completed that inquiry and found reasonable cause to believe that Kelleher violated the state conflict of interest law, General Laws c. 268A, § 23(b)(2) by seeking to use his selectman position to secure for himself unwarranted privileges or exemptions in relation to the stop. In addition, the Commission found reasonable cause to believe that Saugus Police Chief Edward Felix violated § 23(b)(2) by using his police chief position to intervene and provide preferential treatment to Kelleher in connection with the stop. The Commission and Kelleher and Felix have separately entered into disposition agreements by which they each agree that their conduct violated § 23(b)(2) and each pay a \$2,000 fine. You have received and read copies of those agreements.

The State Ethics Commission has also conducted a preliminary inquiry into allegations that you also violated §23(b)(2), by using your town manager position to contact the police chief to secure preferential treatment for Kelleher regarding the improper operation of his motor vehicle. Based on the staff's inquiry (discussed below), the Commission voted on March 12, 2003, 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 in your case 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 were the Saugus town manager from July 1998 to August 2002. Michael Kelleher (“the Selectman”) has been a Saugus selectman since 1999. The selectmen appoint the town manager. You and Kelleher are friends. Edward Felix (“the Chief”) has been the Saugus police chief since 1996. The town manager appoints the chief.

On the evening of January 3, 2002, you, the Selectman and others socialized at a Saugus restaurant beginning at around 9 P.M. Later in the evening, the parties went to a Saugus club where they stayed until just before midnight. At that time, you went home. The Selectman drove to another Saugus club. The Selectman drank alcoholic beverages at each of the above establishments. At approximately 1:45 A.M., the Selectman left the club and drove towards his home.

At approximately 2:00 A.M., two Saugus police officers on patrol observed the Selectman’s car drift over the center line and then back to his side of the road. They pulled the car over. After being pulled over, the Selectman used his cell phone to call you to inform you that the police had stopped him.

The police officers promptly approached the Selectman’s car and informed him of the reason for the stop. When the officers observed the Selectman close up, his voice was slurred, his eyes were red, and he and his vehicle smelled of alcohol. The officers suspected the Selectman was intoxicated. The officers asked the Selectman if he had been drinking, to which the Selectman responded that he drank a couple of beers. Based on their observations, the officers intended to perform a field sobriety test on the Selectman, which was standard police procedure.

According to the Selectman, he called you because he was concerned that he, the Selectman, was being or was about to be harassed by the police because he had supported you in a long-standing bitter contract negotiation with the police union.

According to you, the Selectman told you that he did not believe he had been legitimately stopped. You advised the Selectman to contact the police chief. The Selectman stated that he did not have the Chief’s telephone number and asked you to call the Chief instead. You agreed, called the Chief at home and told him that the Selectman had been stopped by the police and was concerned he was being harassed. You asked the Chief to call the Selectman in his car at the scene. According

to you and the Chief, all you did was ask the Chief to check into the matter. The Chief told you he would call you back to report on what happened. A short time later, the Chief telephoned you and told you that the officers drove the Selectman home. You did not question that action.

The two patrol officers and sergeant at the scene believed that the Selectman was intoxicated and, but for the Chief’s intervention, a field sobriety test would have been administered per standard operating procedure. They also believed the Selectman would have been arrested for operating a motor vehicle under the influence of alcohol (“OUI”). According to standard police procedures, the Selectman would also have been issued citations for not staying within his own lane and driving with an expired license. Citations for failing to stay within one’s own lane and driving with an expired license carry \$100 and \$50 fines, respectively. The potential costs of a first-time OUI conviction include \$575 in court fines and costs, loss of license for 45 days and significant insurance surcharges.

At the time of the above stop, the selectmen were split on the question of whether to retain you as town manager. Earlier action by the selectmen made clear that Selectman Kelleher supported your retention.

II. Discussion

As the town manager, you were a municipal employee as that term is defined in G.L. c. 268A, §1(g). 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. 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.

There is reasonable cause to believe that you violated §23(b)(2) by using your town manager position to secure preferential treatment from the police for the Selectman regarding the improper operation of his vehicle, for the following reasons.

First, the preferential treatment of being driven home without taking a field sobriety test that may have led to an arrest, and, not receiving citations for driving over the center line and driving with an expired license were unwarranted privileges or exemptions for the Selectman. Police standard operating procedures would have required that the Selectman be subjected to a field sobriety test, which, in the opinions of the officers on the scene would have resulted in his arrest. The Selectman also should have been cited for not staying in his own lane and driving with an expired license. Thus, these

unwarranted privileges or exemptions were not otherwise properly available to similarly situated people.

Second, these unwarranted privileges or exemptions were of substantial value. As indicated above, avoiding a field sobriety test that may have resulted in an OUI arrest was of substantial value because the likely costs were considerable, including large fines and court costs, loss of license for 45 days and significant insurance surcharges.

Finally, you used your official position as town manager to secure these unwarranted privileges or exemptions for the Selectman. By, as town manager, waking your subordinate, the Chief, at 2 A.M. and requesting that he check into the matter, you knew or had reason to know that you were using your official position to have the Chief intervene. You also knew or had reason to know that in so calling the Chief, you were using your position to cause the Chief to give the Selectman preferential treatment. We reach this conclusion based on the totality of the circumstances, which included: (1) the Selectman provided you with no basis for his harassment concern; (2) there was no reason why this matter could not wait until the next morning; (3) you knew the Selectman had been drinking; (4) you and the Selectman were friends; (5) you needed the Selectman's vote to retain your position; (6) you knew that the Chief, who would be aware of most of these factors, would interpret your call as a request for special treatment; and (7) you knew or should have known when the Chief called you back and informed you that the police had driven the Selectman home, that the Selectman had received special treatment yet you did nothing about it.

In your defense, you argue that you were merely passing on a citizen's concern about possible police misconduct to the most responsible person – the police department chief and state that you did not explicitly invoke your official position. In the Commission's view, however, under the totality of the circumstances you knew or had reason to know that you, as town manager, were in effect asking the Chief for preferential treatment for the Selectman and, according to the Chief, is how he understood your request. While you made a judgment based on a middle-of-the-night telephone call from a friend claiming harassment, you did not conduct or request the Chief to conduct an independent inquiry or follow-up with the Chief once you learned that the Selectman had been driven home. Furthermore, there was no evidence of police misconduct and the action the police officers' proposed was entirely consistent with Police standard operating procedure and the law. Ultimately, the Selectman, rather than being the victim of harassment by the police, was in fact the recipient of preferential treatment from them.

Therefore, by knowingly or with reason to know

using your position as town manager to secure for the Selectman these unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals, there is reasonable cause you violated §23(b)(2).

III. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$2,000 for each violation. The Commission chose to resolve this case with a education letter rather than imposing a fine because it believes the public interest would best be served by doing so. Public officials should understand that they do not need to explicitly invoke their positions in order to get their subordinate's attention. The purpose of this public education letter is to emphasize that point. Therefore, when a public official as in this case asks a subordinate to intervene in a matter involving another, especially another public official, he must be careful not to send, even implicitly, a message that preferential treatment is being sought.

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

DATE: June 25, 2003

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 686**

**IN THE MATTER
OF
LOUIS CORNACCHIOLI**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Louis Cornacchioli 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 21, 2003, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Cornacchioli. The Commission has concluded its inquiry and, on August 14, 2003, found reasonable cause to believe that Cornacchioli violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Cornacchioli is a Rutland selectman.
2. On September 9, 2002, and September 28, 2002, a Rutland police officer issued a total of four traffic citations to Cornacchioli's son, Michael. These citations were for speeding and driving without a license in one's possession on each occasion. The total potential costs of the citations were \$330 plus significant insurance surcharges.¹
3. Michael appealed all four citations to a clerk magistrate. After a hearing, the clerk magistrate found Michael responsible for all four citations. Michael appealed the finding to a judge and a hearing was scheduled for January 7, 2003.
4. In the early morning of January 7th, the (above-mentioned) police officer contacted the Rutland Police Department to report that he would be unable to attend the appeal hearing because of a family health emergency. The Rutland police chief forwarded this information to the court. The judge rescheduled the hearing for January 9, 2003.
5. On January 7th, after the judge rescheduled the appeal hearing, Cornacchioli telephoned the police department. The conversation was taped on a recorded line. Cornacchioli informed the police dispatcher that he was a selectman and wanted to talk to the chief. The dispatcher connected Cornacchioli to the chief. During his conversation with the chief, Cornacchioli was extremely upset and angry that Michael's hearing was rescheduled instead of dismissed. Cornacchioli blamed the police for calling in to report the officer's absence, which led to the rescheduling, because if the police did not notify the court and the officer was absent at the hearing the charges would likely be dismissed. He further made it clear that he would allow his personal dissatisfaction with the police department to factor into his decision-making as an elected official. He repeatedly cited instances where he had supported the police department, and stated that this was a "personal slap" against him. Cornacchioli also stated, "Well, let me tell you something, they have lost a friend on the board of selectmen..." In effect, Cornacchioli made it clear that he wanted the police to ensure that the officer did not show up at the January 9th hearing and/or for the police to take action that would result in his son's case being dismissed.
6. Cornacchioli also took other action including contacting the officer's father-in-law and requesting he ask the officer not to show up for the hearing.

Conclusions of Law

7. Section 23(b)(2) prohibits a municipal employee from knowingly or with reason to know using his position to obtain for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.
8. As a selectman, Cornacchioli is a municipal employee as that term is defined in G.L. c. 268A, § 1
9. Cornacchioli used his position when he introduced himself to the dispatcher as a selectman, repeatedly cited to the chief instances when he acted as a selectman on behalf of the police department and indicated that he would be acting on matters concerning the police department as a selectman in the future. In effect, Cornacchioli was threatening to use his selectman's position to retaliate against the police department if the citations were not dismissed.
10. The privilege was having his son's case dismissed. The privilege was unwarranted as it would have been based on Cornacchioli's intervention as a selectman and not on the merits.
11. The privilege was of substantial value – the dismissal of the citations would have saved Michael at least \$330. (As noted, Michael would probably also avoid an increase in his insurance premiums as a result of the dismissed citations.)
12. These unwarranted privileges or exemptions were not otherwise properly available to similarly situated people.
13. Therefore, by knowingly or with reason to know using his position as selectman to attempt to secure for his son these unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals, Cornacchioli violated §23(b)(2).

Resolution

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

- (1) that Cornacchioli pay to the Commission the sum of \$2,000 as a civil penalty for 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: August 20, 2003

¹ The September 9, 2002 citations were \$150 (\$125 for speeding and \$25 for license not in possession). The September 28, 2002 citations were for \$180 (\$145 for speeding and \$35 for operating a motor vehicle without a license.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 669**

**IN THE MATTER
OF
DONALD P. BESSO**

DECISION & ORDER

Appearances: Karen Beth Gray
Counsel for Petitioner

Leonard Bello
Counsel for Respondent

Commissioners: Wagner, Ch., Roach, Dolan, and
Todd

Presiding Officer: Commissioner J. Owen Todd,
Esq.

I. Procedural History

On November 25, 2002, 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, Donald P. Besso (Besso) violated G .L. c. 268A, § 3(a)² by offering Town of Wareham Zoning Board of Appeals (ZBA) member David Boucher a \$100 restaurant gift certificate for official acts Boucher took concerning a Cumberland Farms' special permit application.

On December 11, 2002, Besso filed an Answer to the OTSC, generally denying the allegations. A pre-

hearing conference was held on January 31, 2003. On January 24, 2003, the parties submitted Stipulations of Fact (Stipulation).

An evidentiary hearing was held on February 27, 2003. After conclusion of the evidentiary portion of the hearing, Petitioner submitted a legal brief on April 24, 2003. Respondent did not submit a brief. The parties presented closing arguments before the full Commission on June 18, 2003.³ Deliberations began in executive session on June 18, 2003.⁴

In rendering this Decision and Order, each undersigned member of the Commission has considered only the testimony, the evidence in the public record, including the hearing transcript, and the arguments of the parties.⁵

II. Findings of Fact, Including Stipulations (as noted below)

1. Besso owns and resides at property on Depot Street, Wareham (Stipulation).

2. Besso has resided on the property for 30 years, and owned the property for 23 years. Before he acquired title to the property, his grandmother, and, later, his mother had owned the property.

3. Besso is employed as a Maintenance Supervisor for the Bourne Recreation Authority, a position he has held for twenty-one years.

4. David Boucher (Boucher) was, at all relevant times, an appointed member of the Wareham Zoning Board of Appeals (ZBA) (Stipulation).

5. Boucher resides approximately three-quarters of a mile "down the street" from Besso's residence.

6. Besso's property abuts property owned by Cumberland Farms (Cumberland Farms). (Stipulation).

7. On or about June 14, 2000, Cumberland Farms Dairy filed an application for a special permit (Application) from the ZBA to raze its existing building and replace it with a larger convenience store offering gasoline sales. (Stipulation).

8. On August 15, 2000, Cumberland Farms sent Besso notice that the ZBA scheduled a public hearing on the Application for September 13, 2000.

9. Besso first spoke to Boucher about the Application sometime prior to the September 13, 2000 ZBA public hearing.

10. Besso called Boucher because Boucher was a member of the ZBA.

11. Before Besso spoke to Boucher about the Application, Besso had never met Boucher and had no social relationship with him, although Besso's wife and Boucher's wife knew each other because their children attended the same school.

12. Besso opposed Cumberland Farms' proposal. (Stipulation)

13. During that initial conversation, Besso told Boucher that he—Besso— opposed the Cumberland Farms' project.

14. Besso believed that Cumberland Farms' proposal would decrease the value of his property.

15. Boucher informed Besso that Besso should write his concerns in a letter to the ZBA and present the letter and speak about his concerns at the ZBA meeting.

16. Besso circulated a petition among his neighbors.

17. On September 13, 2000, the ZBA held a public hearing on the Application. (Stipulation).

18. Besso spoke during the September 13, 2000 public hearing and expressed his opposition to the Application.

19. During this public hearing, Besso expressed his reasons for opposing the Application, including traffic, garbage, people from Cumberland Farms going onto his property, noise, gasoline tanks and gasoline fumes, and health reasons.

20. Some ZBA members expressed concern about the proposed expansion's impact on traffic in the area. (Stipulation).

21. It was Besso's understanding that the ZBA did not vote on the Application during the September 13, 2000 public hearing because the ZBA expressed the desire to review traffic in the area.

22. Sometime soon after the September 13, 2000 ZBA meeting, Besso again called Boucher to ask about the procedures and how the traffic review would unfold.

23. During this conversation, Besso reiterated the concerns he expressed at the September 13, 2000 ZBA meeting.

24. During this conversation, Boucher told Besso that he was well aware of the traffic issues and the

problems associated with the Cumberland Farms' site because he lives approximately one mile from the site.

25. Besso believed that Boucher opposed the Application because Boucher told him that the site was not suitable for that project.

26. The ZBA held a meeting on January 24, 2001, during which it again considered the Application. (Stipulation).

27. At this meeting, Besso presented his petition and expressed his concerns.

28. On January 24, 2001, the ZBA members voted 3 to 2 to approve the Application. (Stipulation).

29. Boucher voted to deny the Application. (Stipulation).

30. The 3 to 2 vote resulted in a denial of the Application because a supermajority (four of the five-member ZBA) was required for the approval of a special permit. (Stipulation).

31. Besso first heard that the Application had been denied based on a conversation Mrs. Boucher had with Mrs. Besso.

32. The official notice from the ZBA about the decision on the Application stated, "SPECIAL PERMIT GRANTED." The decision attached to the notice stated, "The Board finds to grant a Special Permit to construct a new building with a gas station. VOTE: 3-2-0. REASON: The Special Permit is granted with the attached conditions."

33. The ZBA's decision contained twelve (12) conditions, including restrictions that deliveries be made during non-peak hours; requirements about maintenance; and engineering requirements.

34. After Besso received official notice about the January 24, 2001 ZBA vote on the Application, Besso called Boucher and asked him about the special permit having been denied when the notice stated that the special permit was granted.

35. Boucher told Besso that the notice was a mistake and that the permit had actually been denied.

36. Besso subsequently went to see his attorney, Leonard Bello, to ask him about the special permit.

37. As a result of Besso's question, Mr. Bello called the chairman of the ZBA and confirmed that the ZBA had made an error in stating on the decision that the special permit was granted.

38. Soon thereafter, Besso called Boucher to inform him about Mr. Bello's conversation with the chairman of the ZBA. During his conversation with Boucher, Besso also asked Boucher about the procedures that would follow the special permit decision.

39. On February 6, 2001, Cumberland Farms filed an appeal of the ZBA denial in the Land Court, requesting the Court to annul or reverse the denial, remand the matter to the ZBA, and direct the ZBA to approve the special permit. (Stipulation).

40. On June 8, 2001, the Land Court remanded the matter to the ZBA for a re-vote. The Land Court's Order of Remand (Order) stated that the matter was remanded to the ZBA "for reconsideration of its decision on plaintiff's special permit application, without reopening the public hearing but at a meeting open to the public and duly noticed." The Order further stated that on or before July 11, 2001, the ZBA "render and file such decision in conformity with the requirements of G. L. c. 40A, § 9, with the Wareham town clerk" and the Land Court.

41. Section 9 of G. L. c. 40A sets forth numerous requirements regarding the issuance of special permits. Among other requirements, "Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law; and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use." In addition, "The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question . . . and setting forth clearly the reason for its decision and of its official actions."

42. Subsequent to the Land Court's remand, Besso received notice that the ZBA would hold a hearing on the Application.

43. Besso again called Boucher to ask him what he (Besso) could do during the hearing.

44. Besso had new information, including video tape of traffic conditions, flooding conditions, and approximately sixty (60) pictures of the area.

45. Boucher told Besso that Besso would not be allowed to introduce new material at the hearing.

46. Boucher told Besso that the ZBA would have a re-vote and that Boucher did not know how the vote would turn out.

47. Besso considered selling his property to Cumberland Farms because he did not know how the vote would turn out. If the vote were in favor of the

Application, which would allow Cumberland Farms to build, Besso would move.

48. Besso informed Boucher that he was considering selling his property if the re-vote went in favor of Cumberland Farms.

49. Prior to the July 11, 2001 ZBA meeting, Besso instructed his lawyer to contact Cumberland Farms about purchasing his property.

50. Cumberland Farms offered to purchase a portion of Besso's property for \$50,000.

51. Besso rejected the offer, and made a counter offer that Cumberland Farms purchase all of his property or none of it because he did not want to live next to a gas station.

52. Besso contacted realtors to obtain an appraisal of his property.

53. Besso ultimately rejected Cumberland Farms' offers to purchase his property.

54. Boucher reviewed a traffic report prepared by Cumberland Farms and a traffic report prepared by an engineer the Town hired.

55. During the July 11, 2001 hearing, Boucher stated that he was concerned with on-site circulation, and that in a prior plan, for Cumberland Farms' West Wareham site, the applicant had prepared a traffic circulation on-site plan, but had not done one for this site.

56. On July 11, 2001, the ZBA held a re-vote that resulted in an outcome identical to the January vote, 3 to 2. (Stipulation).

57. Boucher again voted to deny the Application. (Stipulation).

58. Boucher voted against the Application because of the effects the Cumberland Farms' proposal would have on the off-site traffic circulation.

59. The ZBA decision on the July 11, 2001 vote stated, "MOTION FAILS DUE TO LACK OF A 4/5ths VOTE." Accordingly, the Application was denied.

60. The ZBA decision stated the following reason:

"Although the traffic study by the applicant and supported by the Town's consultant that a new exit lane directly North onto Route 6 & 28 will improve traffic light intersection levels of service, it failed to take into account movement *on-site*. The lay out of the pumps in particular

and the layout of the parking, loading, and fueling in general effect the enter and exit lanes from Depot Street, will cause queuing problems and will constitute in an adverse way to any existing bad intersection. Cars and pumps will block the lanes and therefore cause entering or exiting traffic to be in conflict with traffic movement on Depot Street raising new problems not solved by the new exit lane on Route 6 & 28.”

61. During the nearly year-long process in which Cumberland Farms applied to obtain the special permit (from June 2000 when the Application was first filed through the ZBA’s second denial in July 2001), Besso had numerous conversations with Boucher (Stipulation), after normal working hours.

62. Boucher recalled that these conversations were lengthy because Besso was not “a quick study” about the issue.

63. These conversations included Boucher’s explanations to Besso about the application and hearing process regarding the special permit. (Stipulation).

64. During the conversations Besso and Boucher had concerning the Application, Besso did not ask Boucher how he would vote on the Application.

65. In addition to Boucher, another member of the ZBA voted both times against the Application.

66. Besso never attempted to communicate with the other member of the ZBA who voted against the Application.

67. Besso never offered a gift to the other ZBA member who had voted against the Application.

68. Sometime after the July 11, 2001 ZBA re-vote of the Application, Besso went to the Daniel Webster Inn and Restaurant in Sandwich, Massachusetts and purchased a \$100 gift certificate for Boucher. (Stipulation).

69. Approximately three days after the July 11, 2001 ZBA denial of the Application, Besso telephoned Boucher and thanked him for the significant time Boucher had given him regarding the permitting process, and for the efforts Boucher had put into the hearing.

70. During this telephone conversation, Besso asked Boucher if he could come over to Boucher’s house to show him a book about the construction of the Cape Cod canal.

71. Approximately, forty-five minutes after that telephone call, Besso arrived at Boucher’s home and offered Boucher the \$100 gift certificate he had purchased from the Daniel Webster Inn and Restaurant. (Stipulation).

72. When Besso went to Boucher’s home to offer him the gift certificate, Besso believed that the Cumberland Farms’ special permit process was over.

73. During his meeting with Boucher at Boucher’s home, Besso told Boucher that the offer of the gift certificate could not be construed as a payoff because the vote had already occurred.

74. Boucher believed that Besso offered the gift certificate to thank him for listening to Besso and taking the time to answer his many questions about the special permit process.

75. Boucher stated that, during all of their conversations, Besso never asked Boucher how he intended to vote and Boucher never told Besso how he intended to vote.

76. Besso testified that he offered the gift certificate to Boucher because Boucher had taken time to answer his questions and that he was grateful for being allowed to interrupt Boucher at dinner time and during Boucher’s family time. Besso testified that he would not have been so generous with his family time.

77. Boucher refused to accept the gift certificate and told Besso he could not accept the gift certificate. (Stipulation).

78. In refusing to accept the gift certificate, Boucher told Besso that it was not appropriate for him to accept it.

79. After Boucher refused to accept the gift certificate, Besso offered the gift certificate to Boucher, as a birthday present for Boucher’s wife.

80. Boucher again refused to accept the gift certificate.

81. Besso left the gift certificate at Boucher’s residence.

82. While Besso was meeting with Boucher at Boucher’s house, after Besso offered the gift certificate, they discussed the book Besso brought with him about the construction of the Cape Cod canal.

III. Decision

Petitioner must prove, by a preponderance of the evidence,⁶ each of the following elements:

- (1) Besso, directly or indirectly, gave, offered or promised;
- (2) Anything of substantial value;

- (3) To a municipal employee;
- (4) For or because of any official act;⁷
- (5) Performed or to be performed by such an employee.

There is no dispute that Besso offered something of substantial value to a municipal employee. The gift certificate was worth \$100, Boucher, as a member of the ZBA, was a municipal employee,⁸ and Besso offered the gift certificate by communicating his offer directly to Boucher and leaving the gift certificate at Boucher's home. At least in Besso's mind, as discussed below, he believed that the process before the ZBA had been completed when he offered the gift to Boucher. Accordingly, if the gift were proved to be "for or because of any official act," it would be for an "official act performed" rather than "to be performed."⁹ There is no evidence that Besso offered the gift in advance of Boucher's future actions, official or unofficial.

The issues in this case are: whether there were specific "official act(s)" and whether the offer was "for or because of any official act" (or acts) performed, which, as we discussed in *In re LIAM*, 2003 SEC 1114, constitutes intent to violate § 3(a). Thus, the questions to be answered are whether there were identifiable official acts and was the gift certificate given, as we concluded in *LIAM*, "substantially or in large part" as a reward for the acts.¹⁰ For the following reasons, we conclude that Petitioner has not met its burden of proof.

Official Act

The definition of "official act" is "any decision or action in a particular matter"¹¹ As we will discuss further below, because a violation of § 3(a) must be linked to an "official act," the relevant official act (or acts) must fit within the statutory definition. The Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 407-408 (1999), emphasized, in analyzing the federal analog to G. L. c. 268A, § 3, that to prove a violation, there must be a link to a particular "official act," as that term is defined in the statute.¹²

Votes

First, Boucher's votes were decisions "in a particular matter" (the Application) and, therefore, were "official acts" as defined. Petitioner has alleged in the OTSC that the gift certificate was "for official acts Boucher took as a ZBA member concerning Cumberland Farms' special permit application."¹³ Petitioner has proved by a preponderance of evidence that Boucher participated in the votes.

Traffic

Petitioner has also argued that there were official

acts in addition to the votes. These included Boucher's official participation in the ZBA meetings regarding the Application and reviewing traffic studies. Boucher expressed his concerns about traffic issues and reviewed traffic reports that had been prepared as part of the hearing process.

Zoning boards of appeal typically review the documents and hearing testimony an applicant and interested parties submit. Such actions are all part of the decision-making process in a particular matter. Here, the ZBA reviewed traffic studies and based its denial, in part, on traffic issues. The second ZBA decision, coming after the July 11, 2001 hearing, emphasizes traffic concerns and states that there was a traffic study which the ZBA considered in its decision on the Application. Under G. L. c. 40A, § 9, the ZBA may impose conditions in a special permit and must state "the reason for its decision and of its official actions." Such actions fit within the defined phrase "actions in a particular matter." Accordingly, Petitioner has proved that Boucher's review of the traffic issues also was an official act or acts.

Providing information about the special permit process

Finally, Petitioner argues that Boucher's actions outside of the ZBA meetings, including answering Besso's numerous questions about the ZBA process and providing him advice about how to express his concerns, also constituted "official acts." For the following reasons, we conclude, on these facts, that Petitioner has not proved these actions by Boucher were "any decision or action in a particular matter" under the plain meaning of that phrase in the definition.

Petitioner argues that the type of advice Boucher provided amounts to constituent services which, in the case of state legislators, the Commission has construed to be "acts within [a legislator's] official responsibility."¹⁴ But Petitioner did not present evidence about the official duties or the scope of the official responsibility of the members of this ZBA. Further, there was no evidence offered to support a finding that Boucher's or the ZBA's official duties include the provision of such advice, which was provided outside the time they spend in ZBA meetings. Accordingly, we conclude that Petitioner has not proved these actions to be "official acts."¹⁵

"For or because of"

In analyzing intent, whether the gratuity was given "for or because of an official act performed," we "weigh the totality of all of the circumstances surrounding the gratuity, drawing reasonable inferences from the circumstances."¹⁶ The Commission may consider such factors as the subject matter of the pending particular matter and its impact on the giver, the outcome of particular

votes, the timing of the gift, or changes in a voting pattern.¹⁷

In addition, we may consider, as we discussed in *LIAM*, the following factors, which are most relevant to this case: whether the gift was aberrational conduct for the giver; the nature, amount and quality of the gift; whether the gift was a business expense for the giver; to whom was the gift targeted; whether there was reciprocity; the existence of personal friendship; sophistication of the parties; and whether the gift is part of a repetitive occurrence. “We will consider whether the gratuity was given **substantially, or in large part, was motivated by** the requisite intent to influence a present or future official act of the public official or to reward a past action.”¹⁸ The issue, therefore, is whether Besso offered the gift certificate substantially, or in large part, as a reward for Boucher’s votes and review of the Application.

The outcome was very important to Besso and he spent considerable time and effort to oppose the Application. The vote ultimately supported Besso’s goal and Besso sought to offer the gift certificate soon after the second vote. Boucher was one of the swing votes. But we also believe that while Boucher told Besso that the outcome of the second vote was not certain, there was no doubt in Besso’s mind that Boucher opposed the Application and would vote against it.

Besso’s chief defense is that his only motivation was to thank Boucher for the time Boucher provided, **outside** of the hearing, to give him guidance about the process. There is no evidence that Besso displayed a pattern of offering gifts to public officials. The gift was a single \$100 gift certificate for a restaurant meal. There is no evidence that this gift was any type of business expense for Besso. There is no evidence that this was part of a repetitive occurrence.

We find Besso’s defense to be credible. His testimony on this point was very consistent. Besso’s testimony about appreciating how he had interrupted Boucher’s family time, at Boucher’s home, was credible. While Boucher might be considered to be relatively sophisticated because he was a ZBA member and understood the process, Besso, although a long-time municipal employee in another town, was unsophisticated, at least at the beginning of the Application process, about how the ZBA operated. Although Besso showed an appreciation of Boucher’s attention to some of the traffic issues that also were of great concern to Besso, the evidence shows that during their conversations, they discussed the procedure, rather than the substance of the Application.

We note that Besso did not offer any type of gift to the other ZBA member, who also voted both times against the Application. Besso knew little about the process and how to convey his concerns to the other ZBA

members. Besso appreciated that he had interrupted Boucher’s personal time and that Boucher freely provided him information.

Having reviewed the totality of the circumstances, we conclude that Petitioner has not proved, by a preponderance of the evidence, that Besso “substantially, or in large part was motivated by, the requisite intent to . . . reward” Boucher for his votes or his review of the traffic issues.

IV. Conclusion

We conclude that although there is evidence that Besso was grateful for Boucher’s official and unofficial actions, Petitioner has not proved, by a preponderance of the evidence, that Besso’s motivation for offering the \$100 gift certificate was substantially or in large part a reward for Boucher’s *official* acts.¹⁹ We conclude that on these facts, Besso offered the gift certificate because Boucher was personally courteous to him, allowed him to interrupt his personal time, and provided him general information about the special permit process. None of these has been proved in this record to be official acts as defined in G. L. c. 268A, § 1(h).

We emphasize that we do not condone Besso’s offer. We also acknowledge that, notwithstanding our conclusion that the evidence does not prove a nexus between the offer and the official acts, Boucher did the right thing by refusing to accept Besso’s gift. By so doing, Boucher avoided the possibility of violating § 3(b). Such offers always involve a significant risk that, under particular facts, they will violate G. L. c. 268A.

V. Order

Because Petitioner has not met its burden, this matter is dismissed.

DATE AUTHORIZED: August 14, 2003

DATE ISSUED: August 21, 2003

¹ 930 CMR §§ 1.01(1)(a) *et seq.*

² “Whoever . . . directly or indirectly, gives, offers or promises anything of substantial value to any present . . . municipal employee . . . for or because of any official act performed or to be performed by such an employee . . . shall be punished by a fine . . .” G. L. c. 268A, § 3(a).

³ 930 CMR § 1.01(9)(e)(5).

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

⁵ Counsel for Petitioner was not involved in any way in the Commission’s deliberations.

⁶ 930 CMR § 1.01(9)(m)(2).

⁷ “Official act, any decision or action in a particular matter or in the

enactment of legislation.” G. L. c. 268A, § 1(h).

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

⁹ *Scaccia v. State Ethics Commission*, 431 Mass. 351, 355-356 (2000); *U.S. v. Schaffer*, 183 F. 3d. 833, 842 (D. C. Cir. 1999).

¹⁰ *In re LIAM* 2003 SEC ____.

¹¹ Emphasis added.

¹² 526 U.S. at 408 (1999).

¹³ Emphasis added.

¹⁴ G. L. c. 268A, § 3(b); *EC-COI-92-2*.

¹⁵ Given the analysis in *Sun Diamond* and the Supreme Judicial Court’s adherence to that same analysis in *Scaccia*, we cannot agree with Petitioner’s reasoning based on the Commission’s former conclusions about “official acts” in *EC-COI-92-2*. As *EC-COI-92-2* indicates, the Commission once believed that “it is **unnecessary** to prove that gratuities given were generated by some specific act performed or to be performed.” (emphasis added). The Supreme Judicial Court’s holding in *Scaccia* has modified how we must apply § 3.

¹⁶ *In re LIAM* 2003 SEC ____.

¹⁷ *Scaccia* at 357.

¹⁸ *LIAM*, (emphasis added). The *LIAM* Decision and Order cites the following: “See, St. 1962, c.779, § 1. The preamble to G.L. c. 268A stated ‘A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.’ (emphasis added).”

¹⁹ When a gratuity is given “substantially, or in large part . . . to influence a present or future official act . . . or to reward a past” official act, in violation of § 3, “substantially, or in large part” does not necessarily mean the main, primary or only reason.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 685

IN THE MATTER
OF
JAMES BARNES

DISPOSITION AGREEMENT

The State Ethics Commission and James Barnes 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 March 12, 2003, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Barnes. The Commission has concluded its inquiry and, on May 21, 2003, found reasonable cause to believe that Barnes violated G.L. c. 268A.

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

Facts

1. Barnes is a private citizen who lives in Dorchester and performs painting and plastering work. In or about 2002, he decided to get licensed to perform deleading work.

2. To obtain a deleading license, applicants first have to take a preparatory course, which lasts about a week and costs about \$500. Thereafter, applicants have to pass the U.S. Environmental Protection Agency Third-Party Lead Exam (“the EPA exam”) with a score of at least 70%. Examinees are given three chances to pass the EPA exam before they have to retake the preparatory course at their own expense.

3. In fall 2002, Barnes took the deleading preparatory course. There he met David Rivera. Barnes and Rivera became study partners and decided to take the EPA exam together.

4. In Massachusetts, the state Division of Occupational Safety (“the DOS”) administers the EPA exam.

5. On December 4, 2002 at about 10:30 a.m., Rivera and Barnes arrived together at the DOS office in Westborough to take the EPA exam. DOS Field Supervisor Brian Wong set up Rivera and Barnes at individual

computer stations to take the exam. Rivera and Barnes were the only ones who took the exam at that time.

6. Rivera finished his exam first at about 2:00 p.m. Wong scored the exam and found that Rivera had not scored 70%. Rivera asked if he could take the exam again, and Wong set him up at the computer station to do so.

7. Barnes finished his exam about 2:30. He, too, received a score of less than 70%, so Wong set him up to take the exam again.

8. At about 3:45 p.m., Rivera finished his second exam with a score of 66%. Because Rivera's score was close to passing, Wong offered to review Rivera's incorrect responses by hand, to see if Rivera should have gotten credit for them as correct responses.

9. Wong routinely reviewed incorrect responses by hand when the scores were between 65% and 69%. Wong did this because the regulations had changed in 2000, but the exam had not been revised. Thus, the computer might score an answer as incorrect when in fact, under the revised regulations, the answer should have been marked correct. In reviewing the responses by hand, Wong would print out the questions and answers from the computer disk, note which questions had been answered incorrectly, and see whether any of those answers related to outdated questions. If so, Wong would call the examinee and give him or her a chance to provide the correct answer to the question. This process would take Wong a significant amount of time.

10. In response to Wong's offer, Rivera wanted to thank him in some way. Wong refused, stating that his offer to review was normal procedure and part of his job when scores were this close to passing. He would inform Rivera of the result of his review at a later date.

11. At about 4:00 p.m., Barnes finished his second exam with a score of 65%. As he had done with Rivera, Wong offered to review Barnes' incorrect answers by hand and let him know the result at a later date.

12. Wong made copies of Rivera's and Barnes' test scores for them to take with them.

13. While Wong stepped away from his counter to use the copy machine, Barnes reached over the counter and placed \$100 in cash on a shelf located immediately beneath the counter where Wong was working. Barnes gave the money to Wong to thank him for his kindness in offering to review the incorrect answers by hand, and to ensure that Wong would follow through on his offer.

14. Rivera and Barnes then left the building together.

15. At about 4:30, Wong discovered the \$100 in cash on the shelf. Wong knew immediately that either Rivera or Barnes had left the money for him. Wong reported the incident and turned the money over to his superiors.

Violations

16. General Laws chapter 268A, § 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly giving anything of substantial value to any public employee for or because of any official act performed or to be performed by such employee.

17. As a DOS field supervisor, Wong was a public employee.

18. Wong's review by hand of the incorrect exam answers was an official act.

19. Barnes' gave Wong \$100 in cash by leaving it on the shelf for Wong to find.

20. The \$100 was an item of substantial value.

21. Barnes left \$100 for Wong for or because of the official act that Wong would perform as a DOS field supervisor concerning the EPA exam.

22. By leaving \$100 as a thank you and to ensure that Wong would review the incorrect answers by hand, Barnes gave something of substantial value to a public employee for or because of an official act to be performed by that employee. Therefore, Barnes violated G.L. c. 268A, § 3(a).

Resolution

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

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

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

DATE: October 1, 2003

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 688

IN THE MATTER
OF
MICHAEL FREDRICKSON

DISPOSITION AGREEMENT

The State Ethics Commission and Michael Fredrickson 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 September 5, 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 Fredrickson. The Commission has concluded its inquiry and, on April 14, 2003, found reasonable cause to believe that Fredrickson violated G.L. c. 268A.

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

Findings of Fact

1. Fredrickson is the Board of Bar Overseers ("the BBO") general counsel. In the Commission's view, the BBO is a state agency within the meaning of G.L. c. 268A.¹

2. During the time relevant, Fredrickson supervised a staff comprising several attorneys and three administrative assistants. Fredrickson and his administrative assistants did not socialize outside of the office.

3. Fredrickson's appointing authority is the twelve-member BBO, which oversees all attorneys registered to practice law in the state. During the time relevant, the board members, being volunteers, were only occasionally on site at the BBO office.

4. In the mid-1990s, Fredrickson began writing a mystery novel called *A Cinderella Affidavit*. That novel was published in May 1999.

5. In 1997, Fredrickson began writing a second novel, *Witness for the Dead*. It was published in May 2001.

6. Fredrickson spent substantial time during his regular BBO office hours writing and preparing his novels

for publication. This included time spent almost daily in his office, working on his office computer, and up to five hours per week immediately after each novel was published.

7. In the course of writing and preparing his novels for publication, Fredrickson requested his administrative assistants to perform novel-related tasks for him. The assistants spent substantial time during their regular BBO office hours performing the following tasks: making photocopies, addressing correspondence, faxing documents, making telephone calls, and mailing items. They also instructed Fredrickson in the use of the office equipment, such as his computer, the printer and the postage meter. These tasks were performed by the assistants sporadically throughout the years in question.

8. Fredrickson knew that his administrative assistants were performing novel-related work for him during their office hours.

9. Because Fredrickson was their supervisor, the administrative assistants felt that they were required to perform the novel-related work for him. When the work dominated a significant amount of their office time, the assistants became uncomfortable with the situation, but they did not say anything to Fredrickson about it.

10. According to Fredrickson, the time that he spent working on his novels at the office was offset by the time that he spent working on BBO matters at home. During the time relevant, however, Fredrickson never discussed with his appointing authority, the twelve-member BBO, his use of his BBO office and computer, his own BBO time, or his subordinate staff to write and publish his novel, and the board was completely unaware of the situation. Moreover, Fredrickson kept no records to document the asserted offset.²

Conclusions of Law

11. As the BBO general counsel, Fredrickson is, in the Commission's view, a state employee within the meaning of G.L. c. 268A.

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

13. By using his BBO office, his BBO equipment and his BBO time to write and prepare his novels for publication, and by requesting his BBO subordinates to use their office hours to assist him with his novel-related tasks, Fredrickson knowingly used his position as BBO general counsel to secure unwarranted privileges of substantial value.

14. Fredrickson's use of his BBO office, equipment and time to work on his novels constituted an unwarranted privilege because a state employee is paid to perform state business using state resources during state office hours, and is not entitled to use those resources and hours for personal business.

15. In addition, Fredrickson's use of his subordinates' time constituted an unwarranted privilege because Fredrickson's subordinates' time was supposed to be spent on BBO business, Fredrickson initiated the use as noted above, and his subordinates' decisions to help their supervisor were not entirely voluntary. In fact, such decisions will rarely be voluntary because they will be influenced, and were so influenced in this case, by the inherently exploitable nature of the relationship between a supervisor and his subordinates.

16. Fredrickson's use of his BBO office, equipment and time, and his solicitation and use of his subordinates' help to facilitate his personal activities, was not properly available to similarly situated individuals because § 23(b)(2) prohibits state, county and municipal employees from using their government time and resources to further their private businesses.

17. Finally, the value of the time, help and state resources that Fredrickson obtained was worth well over \$50 and, therefore, of substantial value.

18. Thus, Fredrickson knowingly used his official position as the BBO general counsel to secure for himself unwarranted privileges of substantial value. By doing so, Fredrickson violated G.L. c. 268A, § 23(b)(2).³

Resolution

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

- (1) that Fredrickson pay to the Commission the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2);
- (2) that Fredrickson pay to the BBO the sum of \$5,000 in the nature of a civil forfeiture reflecting the time that he and his subordinates spent performing novel-related tasks during their BBO hours, and the value of the BBO equipment used; and
- (3) that Fredrickson waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this

or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: October 9, 2003

¹ Pursuant to G.L. c. 268A, § 1(p), a state agency is defined as any department of a state government, including the judicial branch, and including "any division, board, bureau, commission, institution, tribunal or other instrumentality within such department." The Supreme Judicial Court created the BBO in 1974 as an administrative body under the SJC's supervision.

² Fredrickson appears to have kept records of and reimbursed the BBO for his use of BBO paper, postage and telephone calls in connection with his novels.

³ Section 6 of the conflict-of-interest law prohibits a state employee from participating as such in a particular matter in which he has a financial interest. Fredrickson's participation in determinations regarding how he and his subordinates should use their BBO time, and regarding his use of BBO resources for his novel-related purposes, raises § 6 issues. The Commission, however, declined to pursue this conduct under § 6 because of the specific circumstances involved.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 690**

**IN THE MATTER
OF
ROBERT DEMARCO**

DISPOSITION AGREEMENT

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

On February 5, 2003, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by DeMarco. The Commission has concluded its inquiry and, on August 14, 2003, found reasonable cause to believe that DeMarco violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. DeMarco is employed by the state as

MassHighway's Highway Safety Team director. In that capacity, he investigates accident scenes and provides education about highway safety as part of his job responsibilities.

2. In spring 2000, DeMarco purchased a dragster and planned to race it competitively. He created Crew Chief Racing, a sole proprietorship, and was to serve as crew chief.

3. In order to support his race team, DeMarco solicited donations from businesses, particularly auto and truck businesses. DeMarco sought financial donations in the amount of \$1,000 or more and in kind donations. DeMarco encouraged potential donors to support Crew Chief Racing by linking it and the donations he received to a program he developed called the SMART safe driving program. DeMarco told potential donors that SMART program representatives planned to bring this program to as many high schools in the Commonwealth as he could, thereby providing highway safety education for teenagers.

4. The state was not involved in the SMART program.

5. During his solicitations, DeMarco often gave solicitees his state business card. He also provided written materials regarding Crew Chief Racing and the SMART program that cited his state Director of Safety position and mentioned this state position in conversation. In a significant number of instances, he drove to the solicitations in his state automobile, which has state government license plates. Based on these actions by DeMarco, many solicitees believed that the state was involved in the SMART Program and Crew Chief Racing.

6. The SMART program has only been presented to two high schools. DeMarco has not raced the dragster competitively.

Conclusions of Law

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

8. As the MassHighway's Highway Safety Team director, DeMarco is a state employee as that term is defined in G.L. c. 268A, § 1.

9. By giving solicitees his state business card, providing written materials regarding Crew Chief Racing and the SMART program that cited his state position and mentioning this state position in conversation, and by driving to solicitations in his state automobile, which has state government license plates, DeMarco knew or had reason

to know that he was using his official position to influence solicitees to make donations to his race team.

10. Where DeMarco used his state position to obtain donations for his private hobby, the donations were unwarranted privileges. There is no law, rule or agency policy authorizing the use of such public resources to promote DeMarco's private racing hobby.

11. The privileges were of substantial value – DeMarco sought and received significant financial commitments (\$1,000 or more) from corporate sponsors for his race team.

12. These unwarranted privileges were not otherwise properly available to similarly situated people.

13. Therefore, by knowingly, or with reason to know, using his state position to attempt to secure for himself these unwarranted privileges of substantial value not properly available to similarly situated individuals, DeMarco violated §23(b)(2).

14. DeMarco has offered to reimburse any individual/company that made a donation based on the impression that the state was involved in the SMART Program and/or Crew Chief Racing.

Resolution

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

(1) that DeMarco pay to the Commission the sum of \$2,000 as a civil penalty for 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: October 14, 2003

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 691

IN THE MATTER
OF
SUZANNE TRAINI

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and Suzanne Traini 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 25, 2002, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Traini. The Commission has concluded its inquiry and, on November 26, 2002, found reasonable cause to believe that Traini violated G.L. c. 268A, § 19.

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

Findings of Fact

1. Traini is a Southborough Board of Health member.

2. On or about September 18, 2000, Traini signed offers to purchase property at 26 Lynbrook Road (the "Property") and surrounding land for a total of \$575,000. Her offers were contingent on zoning, septic and conservation commission approvals, and were secured with a \$500 deposit.

3. At its October 10, 2000 meeting, the Board of Health approved and signed septic permits for two lots on the Property. At that meeting, Traini verbally disclosed her financial interest in these permits and recused herself from the board's actions on the permits.

4. Sometime prior to January 23, 2001, both the Massachusetts Water Resources Authority and the Massachusetts District Commission, at the urging of an abutter, contacted Southborough's Public Health Director to discuss concerns as to whether the Property's setback from a nearby waterway was sufficient. The agencies' position at that time was that the setback from the waterway should be 400 feet. The Southborough Board of Health's longstanding position was that the setback need only be 200 feet. The Property's setback was more than the 200 feet required by the Board of Health, but

less than the 400 feet that the state agencies believed was appropriate.

5. At the January 23, 2001 Board of Health meeting, the Public Health Director, based on the calls he had received from the MWRA and the MDC, said that the Board of Health should rescind the Property's permits and instead hold a public hearing with an eye toward granting a variance for the Property.

6. At that January 23, 2001 meeting, although advised to abstain by a fellow board member, Traini recommended that the board to adhere to its longstanding position that the setback only needed to be 200 feet. Traini also stated that the board could not under Title V rescind a septic permit once a construction permit had been issued.

7. The Board of Health took no action on the Property at its January 23, 2001 meeting. The permits remained in effect.

8. In March 2001, Traini executed a purchase and sale agreement for the Property at a reduced price of \$507,500, secured with a \$25,000 deposit.

9. Traini's purchase of the Property fell through after the Board of Health at its March 27, 2001 meeting suspended its septic permits for the Property. (The suspension was unrelated to the setback issue discussed at the January 23, 2001 meeting.) Traini forfeited \$5,000 of her deposit.

10. Traini cooperated with the Commission's investigation of this matter.

Conclusions of Law

11. Except as otherwise permitted in that section, § 19 prohibits a municipal employee from participating as such in a particular matter in which she has a financial interest. None of the exemptions apply.

12. As a Board of Health member, Traini is a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

13. The Board of Health's decision to maintain its policy of setback distances from the Sudbury River Aqueduct, and not to consider rescinding the Property's permits, was a particular matter.

14. Because Traini had outstanding a written offer to purchase the Property, which was contingent on obtaining all necessary town permits, she, to her knowledge, had a financial interest in this particular matter.

15. At the January 23, 2001 meeting of the Board

of Health, by discussing the propriety of the Board changing its policy and considering rescinding the Property's permits, Traini participated in her capacity as a Board of Health member, thereby violating § 19.¹

Resolution

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

- (1) that Traini pay to the Commission the sum of \$1,500.00 as a civil penalty for violating G.L. c. 268A, § 19; 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: November 12, 2003

¹ According to Traini, her intention was to point out that the board's rescission of the permits would be improper under Title V. While one's intentions may be a mitigating factor, the application of § 19 is triggered by any participation in a particular matter in which a municipal employee has a financial interest, regardless of motivation or intention. In this case, moreover, had the board decided to change its setback policy and consider rescinding the Property's permits – and it is impossible to say what they would have done had Traini recused herself – such a step would have at the very least delayed her acquisition of the property, always a matter of critical importance in real estate transactions.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION
SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 692**

**IN THE MATTER
JOHN SANNA, JR.**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and John Sanna 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 August 14, 2003, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Sanna. The Commission has concluded its inquiry and, on October 7, 2003, found reasonable cause to believe that Sanna violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Since April 2001, John Sanna has been an elected Buzzards Bay Water District Commissioner. The three-member commission oversees all aspects of the operation of the water district, and has the authority to hire and fire water district personnel.
2. In March 2002 the State Ethics Commission notified Sanna that he appeared to have violated the conflict law when he borrowed water district equipment in fall 2001, and that the Commission was unlikely to resolve another violation privately.
3. Despite the Commission's warning, in late summer 2002 Sanna borrowed the district's paint spray gun. A paint spray gun can be rented for approximately \$30 per day.
4. In or about December 2002, Sanna borrowed one of the district's metal detectors. The cost to rent a metal detector is approximately \$20 per day.
5. Sanna failed to return the items until he was contacted by the State Ethics Commission in August 2003.
6. The water district has a policy barring loans of water district equipment except in "extraordinary circumstances...and then only with the permission of a Supervisor or the Commissioners."

Conclusions of Law

7. Section 23(b)(2) prohibits municipal employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

8. As a Buzzards Bay Water District Commissioner Sanna is, pursuant to G.L. c. 268A, § 1(g), a municipal employee.

9. When he borrowed water district equipment, Sanna knew or had reason to know that the decision to allow him to take the equipment would be influenced by his authority as a Water District Commissioner. Sanna therefore knew or had reason to know that he was using his position to obtain the paint spray gun and the metal detector.

10. Because non-official use of the property is not allowed under the water district's policies except in "extraordinary circumstances," borrowing the equipment under the circumstances Sanna borrowed them was an unwarranted privilege not available to similarly situated individuals.

11. The costs to rent a paint spray gun for almost a year and a metal detector for nine months exceed \$50. Therefore, the unwarranted privileges were of substantial value.

12. Accordingly, Sanna violated G.L. c. 268A, § 23(b)(2) when he borrowed the paint spray gun and the metal detector. Sanna's violations warrant a substantial fine because he disregarded a prior State Ethics Commission warning that borrowing equipment under these conditions violated the conflict-of-interest law.

Resolution

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

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

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

DATE: November 24, 2003

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

SUFFOLK, ss COMMISSION ADJUDICATORY
DOCKET NO. 695

IN THE MATTER
OF
DAVID BUNKER

DISPOSITION AGREEMENT

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

On November 12, 2003, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Bunker. The Commission has concluded its inquiry and, on December 16, 2003, found reasonable cause to believe that Bunker violated G.L. c. 268A, § 23(b)(2).

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

Findings of Fact

1. Between January 2001 and January 2003, Bunker was a state representative from Rutland.

2. A member of the general court is entitled to receive a per diem allowance for each day that the member is present at the State House in the performance of his duties. Bunker's per diem allowance based on his residence in Rutland was \$36.¹

3. In mid-July 2002, Bunker became sick with mononucleosis. While he was ill, Bunker was at the State House only on infrequent occasions. Bunker requested and received, however, per diem allowances for three to four days a week during the period of mid-July 2002 to mid-September 2002.

4. Bunker acknowledges that he was not entitled to approximately 30 per diem allowances paid to him during this period.²

Conclusions of Law

5. Section 23(b)(2) prohibits public employees from, knowingly or with reason to know, using or attempting to use their official position to secure for themselves or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.

6. As a state representative, Bunker was a state employee pursuant to G.L. c. 268A, § 1.

7. By certifying as a state representative to the state treasurer that he was present at the State House, Bunker used his state representative position to secure his per diem allowance.

8. Approximately 30 of the per diems Bunker received were an unwarranted privilege because he was not present at the State House on those days as required by G.L. c. 3, § 9B.

9. At \$36 per day, 30 per diems totaled \$1,080. Therefore, the privilege was of substantial value.

10. The privilege, which Bunker received, is not properly available to other members of the legislature as it is contrary to state law.

11. Thus, by receiving \$50 or more in travel per diems for days in which he was not present at the State House, Bunker knowingly used his state representative position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of §23(b)(2).

Resolution

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

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

(2) that Bunker reimburse the Commonwealth of Massachusetts the sum of \$1,080 as a civil forfeiture for the per diem allowances that he was not entitled to receive; and

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

Dated: December 18, 2003

mileage, meals and lodgings of thirty-six dollars per day . . .” Legislators are entitled to the per diem allowance whether the Legislature is in session or prorogued “upon certification to the state treasurer that he was present at the state house.”

²According to Bunker, he was present at the State House on some occasions while he was ill. During this period, however, he acknowledges that he did not, due to his illness and fatigue, maintain accurate records of his schedule and can not now determine exactly how many days he was present at the State House.

¹G.L. c. 3, § 9B provides that Legislators are entitled to a \$7,200 annual payment for expenses. In addition, a “member of the general court who lives in . . . Rutland . . . shall receive a per diem allowance for

State Ethics Commission

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