

COMMISSION ADVISORY NO. 88-01

AGENCY

PART A: MUNICIPAL EMPLOYEES ACTING AS AGENT⁽¹⁾

INTRODUCTION

Massachusetts General Laws Chapter 268A §17(c) prohibits municipal employees, including elected officials, from acting as agent (or attorney) for anyone other than their municipality in connection with any matter in which their municipality is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if local employees attempted to "serve two masters" -- i.e., their municipality and a second party -- with different or conflicting interests. Section 17 is based on the principle that public employees should be loyal to their public employer, and where their loyalty to the municipality conflicts with their loyalty to a private party or employer, the municipality's interest must win out.

For instance, on matters involving their city or town, local employees are prohibited from acting as agents for other individuals, corporations, the state or federal government, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §17 include: submitting applications or supporting documentation; preparing documents that require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §17 not only prohibits municipal employees from representing private parties before their *own* board or agency, but also prohibits them from representing anyone:

- before *other* municipal boards and agencies
- before state, county or federal agencies
- to private business or charitable organizations, or
- to private individuals
- in any instance where their municipality is a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist local employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for purposes of illustration only. Whether or not §17 is triggered will depend on the specific facts of the situation.

MATTERS IN WHICH THE MUNICIPALITY HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter, local employees should first determine if their municipality is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a municipal agency, board, commission, authority or other body;
- any effort to change municipal regulations, policies or procedures;
- any contract, court case or other legal matter in which the city or town is a party, or otherwise has a direct and substantial interest; or

- any ruling or other action by a federal, county, regional or state agency involving matters which are subject to regulation by the municipality.

If their municipality is *not* a party and does *not* have a "direct and substantial interest" in the matter, the restrictions of §17 will not be triggered, and the local employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the city or town *does* have a "direct and substantial interest" in the matter, the municipal employee must also determine whether an activity would constitute "acting as agent". Section 17(c) prohibits a local employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the municipal employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party
- can be considered "acting as agent".

Note that the restrictions of §17(c) are not triggered if the municipal employee is not *representing* someone before a third party. A municipal employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the municipal employee *may* violate §17(a) if he or she accepts pay or other compensation for such activities.)

For example, a municipal employee may *not* submit a grant application to a local agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee *may* advise his neighbor on the application procedures and the content of the application.

A municipal employee may *not* sign and send letters on behalf of a grassroots organization advocating a change in local government regulations, even if the letters are addressed to private individuals. The employee *may* participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A municipal employee may *not* attend a community meeting and speak on behalf of a private company, if the city or town is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee *may* help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that municipal employees may not act as an agent in matters of concern to their municipalities.

PERMITTED CONSTITUENCY WORK

Municipal employees may generally act as agents for others if their municipal jobs authorize it. This applies to both appointed and elected officials performing constituency work.

Certain government jobs authorize employees to act as the agents for private parties concerning matters of interest to the municipality. For example, a Housing Authority employee's responsibility may include advocating on behalf of low-income citizens to increase the number of local affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a

prohibited act of agency. Generally, a municipal employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the municipal employee's job responsibilities;
- the municipal employee receives no compensation beyond his or her regular salary;
- the municipal employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the municipal employee is associated;
- the municipal employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the city or town.

On the other hand, if a municipal employee represents a relative, his or her employer or a business associate before local agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will not be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes *only* those activities "within the proper discharge of official duties." An economic development specialist would *not* be performing permissible constituency work if she called the Tax Assessor's Office to discuss her friend's tax assessment, since the tax assessment has nothing to do with the development specialist's official duties. Alternatively, if a Council on Aging employee pursues a citizen's complaint against a service provider, this *is* a permissible constituency service since the provider is contracted with and supervised by the Council on Aging.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " *EC-COI-83-137*. Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties," the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " *Id.*

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties," the employee should seek legal advice from his or her city or town counsel or the Legal Division of the State Ethics Commission.

SPECIAL MUNICIPAL EMPLOYEES

"Special municipal employees" may generally act as agents before municipal agencies other than their own.

Municipal employees are considered "special municipal employees" if:

- their municipal position is uncompensated, or they work for the municipality for less than 800 hours a year, or they hold a contract or position which allows for private employment during "normal working hours";
- they hold a position which the city council, board of selectmen, or board of aldermen have designated to be a "special municipal employee" position; *and*
- they are not the Mayor, nor a member of the city council, board of selectmen or board of aldermen.

Note that in municipalities with a population of 10,000 or less, selectmen are automatically designated as "special municipal employees."

If a municipal employee holds a job that has been designated a "special municipal employee" position, the employee may represent private parties on matters of direct and substantial interest to their city or town *if*:

- the employee has not participated at any time as a municipal employee or special municipal employee in the matter;
- the matter is not and has not been the subject of the employee's official responsibility; and

- the matter is not pending in the municipal agency or board for which the employee works.

There is one narrow instance where a special municipal employee may represent a private party before the board he or she works for -- the special municipal employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special municipal employees" may generally assist with work under a contract with the municipality, if their appointing authority certifies in writing that the interest of the municipality requires such aid or assistance (a copy of this certification must be filed with the city or town clerk, and is a public record).

Also note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations; drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be considered under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your city or town counsel or the Legal Division of the State Ethics Commission.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 17 also allows municipal employees to assist anyone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, municipal employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is *not* available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The Conflict of Interest Law recognizes that municipal employees may be asked to assist members of their immediate families in dealing with local government matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed municipal employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A municipal employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

- the municipal employee must be appointed (not elected);
- the municipal employee must be representing a family member or a person for whom the employee is a fiduciary on a matter in which the employee did not participate (as a local official), and for which the employee did not have official responsibility; and
- the municipal employee must receive written permission from the official who appointed the employee to his or her position *before* the action occurs.

TESTIMONY UNDER OATH

Municipal employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a *paid* witness.

MATTERS OF GENERAL LEGISLATION

Municipal employees may represent others on matters of general legislation, and home-rule petitions. For example, municipal employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation, or legislation related to their municipalities' governmental organization, powers, duties, finances or property. Note that matters involving *other* types of "special legislation", municipal regulations or administrative policies are *not* eligible for this exemption.

For more information about this exemption, or for a determination as to whether a bill is "general legislation" or "special legislation", contact your city or town counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's *own* behalf is not considered acting as agent, a municipal employee may always represent his or her own interests or points of view. For instance, a local employee may file her own grant application, or represent himself before the Zoning Appeals Board.

Note, however, that in matters involving the city or town, a municipal employee may *not* act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

Municipal employees may represent themselves before their own agencies, although they may *not* take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

Municipal employees may also express their personal points of view concerning a matter pending before local government agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, municipal employees must *also* observe §19 of the conflict law, which prohibits municipal employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their city or town counsel or the Legal Division of the State Ethics Commission at (617)371-9500. Copies of all Advisories are available from the Commission office or online at www.mass.gov/ethics.

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FOOTNOTES

1. Advisory No. 94-01 covers State employees; Advisory No. 94-02 covers County employees.

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