

## COMMISSION ADVISORY NO. 05-04

### VOTING ON MATTERS INVOLVING COMPETITORS

The conflict of interest law is intended to ensure that public employees act in the best interests of the citizens they represent, and do not pursue their own self-interests or other private interests. The law prohibits a public employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects:

- his or her own financial interests or those of a business partner;
- the financial interests of his or her immediate family members (i.e., the employee's spouse; and the parents, siblings and children of either the employee or the employee's spouse);
- the financial interests of a private or "after-hours" employer, or anyone with whom the employee is negotiating or has an arrangement for prospective employment; or
- any organization, either charitable or for-profit, in which the employee is serving as an officer, director, partner or trustee.

The term "public employee" includes both elected and appointed state, county and municipal employees, whether paid or unpaid, full-time or part-time. An unpaid volunteer board member as well as, in some instances, a consultant who is a contractor are considered public employees for purposes of the conflict of interest law.

#### **I. PARTICIPATION IN A PARTICULAR MATTER**

The conflict of interest law defines participation as participating in agency action or in a particular matter personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. Thus, a public employee participates not only when he makes a final decision or vote on a matter, but also when he discusses the merits of a matter with a colleague or makes a "non-binding" recommendation. A particular matter is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding. [14](#)

#### **II. DETERMINING PROHIBITED FINANCIAL INTERESTS**

The restrictions of the conflict of interest law apply regardless of the size of the financial interest. They apply in any instance when the private financial interests are directly and immediately affected, or when it is reasonably foreseeable that the financial interests would be affected. Also, the conflict of interest law prohibits any type of official action in such matters, regardless of whether the proposed action would positively or negatively affect the private financial interests.

**Example:** Generally, a state employee may not participate in reviewing a license for an automotive service station to conduct emissions testing where his father's service station is located across the street and is a direct competitor in providing emissions testing. It does not matter whether the state employee will approve or reject the license application. (A state employee is required to disclose the potential conflict of interest to his appointing authority who may provide the employee with an exemption, as discussed below. Similar exemptions may also be available to municipal employees.)

#### **III. PARTICIPATING IN MATTERS CONCERNING BUSINESS COMPETITORS**

A public employee may not participate in matters affecting the financial interests of competitors if those particular

matters also affect the public employee's financial interests. There is no one easy "rule" for a public employee to rely upon when deciding who competitors are and whether the competitors' particular matters will also affect the public employee's financial interest. In some smaller communities, every similar business may be in competition; in larger cities it is possible that the "competitive zone" is much smaller. Local authorities are often in a better position than the Commission to identify the local factors that would determine a competitor. We suggest that an appointed public employee rely on his appointing official or town or city counsel to make such a determination. A public employee who has potential conflicts involving possible competitors should seek guidance from town or city counsel or from the Commission.

Example: A municipal employee who holds liquor licenses (or whose place of business holds a license) may not vote on any liquor license matter involving a competitor.

Example: A state inspector whose family owns a restaurant may not inspect a restaurant owned by a competitor of his family's restaurant.

### **III. ABSTAINING WHEN A CONFLICT OF INTEREST OCCURS**

Not only must a public employee abstain from voting, she may not participate in any official discussion of the matter. Ordinarily, the best course of action is simply to leave the room during the deliberation and vote of the board.

Example: A selectman who discusses the environmental and traffic impacts of a license application for a gas station owned by her son but abstains from the final vote will have participated through her discussion of the license application.

While a municipal employee and members of boards and commissions at both the state and municipal levels are not required to disclose the reason for the abstention, an appointed state or county employee who would normally be required to participate in a particular matter as part of her job must disclose, in writing, to her state appointing official and the State Ethics Commission even if she wishes to abstain. The appointing official then determines if such an abstention should occur by following the exemption process discussed below. This disclosure is required even if the appointed state or county employee abstains.

### **VI. EXEMPTIONS**

Statutory exemptions can, in certain instances, allow a public employee to take actions that would otherwise be prohibited.

#### *State and County Employees*

One exemption is available to all appointed state and county employees. This exemption is not available to any elected employee. As discussed above, an appointed state or county employee who would normally be required to participate in a particular matter as part of his job must disclose, in writing, to his appointing official and the State Ethics Commission the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the state or county employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are public records and, in addition, must be filed with the State Ethics Commission.

Example: A state employee responsible for approving small business grants must make a written disclosure to her appointing official when her spouse's grant application is assigned to her and may not participate in reviewing any of the grant applications including her spouse's unless the appointing authority provides her with a written determination that will allow her to do so. Both the disclosure and the written determination must be filed with the State Ethics Commission.

#### *Municipal Employees*

As noted above, an appointed municipal employee may choose to abstain from a matter in which she has a prohibited financial interest and, if she does so, need not make a disclosure. In order to participate in a matter involving abutting property, a municipal employee must disclose, in writing, to her appointing official the nature and circumstances of the matter and the financial interest. The appointing official, who receives the disclosure described above, may assume responsibility for the matter, assign responsibility for the matter to another employee or provide the municipal employee with a written determination allowing her to participate in the matter. Both the disclosure and the appointing official's determination are maintained as a public record by the appointing official and are not filed with the State Ethics Commission.

This exemption is not available to any elected municipal employee.

Example: An appointed building inspector may make a disclosure and receive a written determination from his appointing official that will allow him to inspect a retail clothing store's renovations where his wife owns a competing retail store. The exemption is not available to an elected Recreation Commissioner voting to hire a private landscaping company that is a direct competitor of her family landscaping business; rather, she must abstain.

An additional exemption is available to municipal employees. It allows a municipal employee to act provided that the particular matter is one of general policy and provided further that the issue affecting the private financial interests of the municipal official and his immediate family members also affects a "substantial segment" of the municipality's population. The Ethics Commission has advised that at least 10% of a municipality's population is a "substantial segment" for the purposes of the conflict of interest law; therefore, a municipal employee may act on matters affecting his own financial interests, or the interests of immediate family members, if the financial interest also affects at least 10% of his municipality's residents (as determined by the most recent federal census).

Example: An elected city councilor who owns a gas station located just outside the border of the city in a neighboring town may not participate in a decision to increase taxes on gas stations located in the city. Of the 12 gas stations located in the city, three are located less than a mile from his gas station and are direct competitors of his gas station. The vote on whether city gas stations will be assessed additional taxes would affect the financial interest of his competitors. That financial interest, the tax on gas stations, is not shared by a substantial segment of the population. He may not participate in the discussion or vote.

## VII. RULE OF NECESSITY

Finally, if more than one member of a board or committee is disqualified because of actual conflicts of interest, the board may not be able to act because it does not have a quorum. (If the number for a quorum is not set by law, a quorum is generally a majority of the board members.) In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the rule of necessity, public officials should review the Ethics Commission's [Primer on Self-Dealing, Financial Interests and the Rule of Necessity](#) or contact the city solicitor, town counsel or the Ethics Commission.

## VIII. CONCLUSION

While certain private relationships may not trigger the restrictions discussed above, they may require disclosure and compliance with other sections of the conflict of interest law. Again, for further advice, contact your town counsel, city solicitor or the Legal Division of the State Ethics Commission at 617-371-9500.

**ISSUED:** March, 1987

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## FOOTNOTE

<sup>1</sup>Note, however, that general legislation is not a particular matter. Thus, a public official may act on matters of general legislation, and certain home-rule petitions. For example, a legislator, a town manager or a state agency head may draft, promote or oppose general legislation, or

legislation related to a municipal government's organization, powers, duties, finances or property. Matters involving other types of "special legislation," regulations or administrative policies are not eligible for this exemption. For a determination as to whether a bill is "general legislation" or "special legislation," contact the city solicitor, town counsel, agency counsel or the Legal Division of the State Ethics Commission.

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