

ADVICE ♦ EDUCATION ♦ DISCLOSURE ♦ ENFORCEMENT

2011
Advisory Opinions
Enforcement Actions

MASSACHUSETTS STATE ETHICS COMMISSION
One Ashburton Place, Room 619
Boston, MA 02108
617-371-9500
www.mass.gov/ethics

Included in this publication are:

State Ethics Commission Formal Advisory Opinions issued in 2011

Cite Conflict of Interest Law Formal Advisory Opinions as follows: *EC-COI-11-(number)*.

Cite Financial Disclosure Law Formal Advisory Opinions as follows: *EC-FD-11-(number)*.

State Ethics Commission Formal Advisory Opinion issued in 2010

(*EC-COI-10-2* was not included in the 2010 Rulings.)

State Ethics Commission Advisories issued in 2011

Cite Conflict of Interest Advisories as follows: *Advisory-11-(number)*.

State Ethics Commission Decisions and Orders and Disposition Agreements issued in 2011

Cite Enforcement Actions by name of respondent, year, and page, as follows:

In the Matter of John Doe, 2011 SEC (page number).

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

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EC-COI-10-2 – Section 4 of the conflict of interest law, G. L. c. 268A, does not prohibit a state Division of Professional Licensure investigator/inspector, who is not involved in creating, evaluating, or administering examinations by the Board and has no role in the Board's policies, approvals or audits of education programs, from, on his time off from his DPL position and in his private capacity, engaging in private or other non-state teaching activities for private or other non-state compensation, provided that those teaching activities are limited exclusively to actual teaching of course subject matter and do not include curriculum development, student evaluation, testing, grading, attendance keeping or reporting, or any other activity relating to the process of initial or ongoing state licensing.

Summary of Advisory Opinions Calendar Year 2011

EC-COI-11-1 – Section 7 of the conflict of interest law, G.L. c. 268A, prohibits a newly-elected state legislator from having a financial interest in a state contract even though the contract was negotiated prior to his election and uses standard agency contract terms that were not individually negotiated with his company. The legislator may be allowed until the contract expiration date to eliminate the prohibited financial interest in the state contract where the contract will terminate by its own terms in several months and early termination would have the potential to create a hardship for the employees who do the work.

EC-FD-11-2 - A person required to file a Statement of Financial Interests must report his position as co-counsel to a County Regional Retirement Board in response to Question 4 on the SFI form, which asks filers to "Identify any other government position(s) held in [the relevant calendar year] by you . . . in any federal, state, county, district or municipal agency, whether compensated or uncompensated, full- or part-time."

EC-COI-11-3 – Section 19 of the conflict of interest law, G. L. c. 268A, will not prohibit a City Councilor who is also a Trustee of a Library from voting on the City's budget which appropriates funds for the Library because the Library is a municipal agency for purposes of the conflict of interest law, and not a "business organization." Before acting on the budget or any other Library-related matters, the City Councilor should make a public disclosure of his Library affiliation in compliance with Section 23(b)(3).

**CONFLICT OF INTEREST OPINION
EC-COI-10-2**

QUESTION:

Does the conflict of interest law permit an investigator/inspector for the Division of Professional Licensure (“DPL”), who is not involved in creating, evaluating, or administering examinations by the Board of State Examiners of Plumbers and Gas Fitters (“Board”) and has no role in the Board’s policies, approvals or audits of education programs, to be paid by a private school or by another non-state educational program provider¹ to teach plumbing and gas fitting courses required for state licensure during his time off from his state position?

ANSWER:

The conflict of interest law does not prohibit a DPL investigator/inspector, who is not involved in creating, evaluating, or administering examinations by the Board and has no role in the Board’s policies, approvals or audits of education programs, from, during his time off from his state position and in his private capacity, engaging in private or other non-state plumbing and gas fitting course teaching activities for private or other non-state compensation, provided that those teaching activities are limited exclusively to actual teaching of course subject matter and do not include curriculum development, student evaluation, testing, grading, attendance keeping or reporting, or any other activity relating to the process of initial or ongoing state licensing.

FACTS:

You are a licensed master plumber and gasfitter employed as an investigator/inspector by the DPL in its Office of Investigations. As such, you have two areas of responsibility: First, investigating complaints against licensed plumbers and gas fitters or unlicensed persons engaging in plumbing and gas fitting work; and, second, conducting permit inspections of all plumbing and gas fitting work performed by or under contract to a state agency or entity on state-owned, leased or occupied buildings.

In your DPL position, you are not involved in the state licensing of plumbers and gas fitters. You are not involved in the evaluation of education or experience requirements for applicants for examination and licensure by the Board. You are also not involved in creating, evaluating, or administering

examinations by the Board and have no role in the policies, approvals or audits of continuing education programs.

You would like, during your off hours from your DPL position, to teach plumbing and gas fitting courses to students at a private school who are completing the primary education hours needed to qualify for admission to the Board examination for either a journeyman or master plumbing or gas fitting license. The courses, which are part of an educational program certified by the Board, are taken to fulfill the Board’s requirement, in order to qualify for examination, for specified numbers of “clock hours of plumbing and gas fitting theory,”² which the Board requires to be divided into five year-long “tiers” of 110 clock hours each covering Board-specified subject areas and which must be completed in order. (Students must pass a school or instructor designed examination for each tier before progressing to the next.)³ The Board has also specified the particular subject matter to be covered in each of five to twelve lessons in each tier, further determining the subjects to be taught and the order of their presentation.

In addition, or alternatively, you would like, also during your time off from your DPL position, to teach, at a private school or other non-state educational program provider, continuing education courses which licensed journeyman and master plumbers and gas fitters are required to take in order to renew their licenses. Mandatory continuing education (“MCE”) courses for plumbers and gas fitters may only be provided by Board-approved schools and programs which have applied for and entered into a Provider Agreement with the Board, pursuant to which a detailed outline and lesson plan of each course offered and the name and license number of all course instructors is provided annually to the Board together with proof of an indemnification bond and liability insurance satisfactory to the Board. MCE instructors may only use course materials which have been approved by the Board, and the materials must contain a Board-specified statement of that approval. MCE instructors may teach no less than three and no more than six hours per day to classes no larger than 49 students. MCE providers are required to report class attendance to the Board and to issue certificates of completion, including the course subject matter and clock hours and the instructor’s name, license number and signature signed under the penalties of perjury.⁴

For both your proposed pre-licensing course teaching and your proposed MCE course teaching, you would be compensated by the private school or other non-state course provider for which you will perform your teaching and not by the Commonwealth or a state agency.⁵

DISCUSSION:

As a state employee, you are subject to § 4 of G. L. c. 268A which, in relevant part, prohibits a state employee from being compensated by or acting as agent for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.⁶ The purpose of § 4 is to avoid the creation of divided loyalties which could cause a state employee to compromise the public interest out of his loyalty or obligation to his non-state employer or principal.

Prior Commission advisory opinions have considered potential § 4 issues in the context of a public employee who wanted to teach privately and be paid for so doing. In *EC-COI-82-176*, the Commission was asked whether a Registry of Motor Vehicles inspector would violate § 4 by teaching a driver education class, and concluded that he would not because his compensation as a private teacher would not be “in connection with” the state-required driver examination. In *EC-COI-85-16*, the Commission was asked whether an assistant district attorney could, consistent with § 4, form a non-profit corporation to sponsor educational conferences and training courses for law enforcement personnel. The Commission stated that he could because the corporation’s program was not of direct and substantial interest to the state because it was for the enrichment of attendees, a supplement to other required training and “did not rise to the level of formalized training.” The Commission, however, further stated that “if the course offered by the corporation became mandatory for state law enforcement personnel, then it would be of direct and substantial [interest] to the state.”

The courses that you wish to teach are mandatory for those seeking to gain or retain state plumbing or gas fitting licenses and are of direct and substantial interest to the Board which has required, delineated and, as to the MCE cases, approved them. Thus, the answer to the question of whether you may for non-state compensation⁷ teach Board-required plumbing or gas fitting courses for a private school or another non-state course provider turns on whether the

mandatory courses are also particular matters within the meaning of § 4.

The Commission in *EC-COI-85-16* did not address the question of whether and, if so, under what circumstances, a mandatory course is itself a “particular matter” for § 4 purposes. Here, we determine that the individual plumbing and gas fitting courses which are offered by private schools and non-state course providers to students seeking to meet the requirements for initial and continued licensing are not, in and of themselves, particular matters as that term is used in § 4 of G. L. c. 268A, for the following reasons.

The state licensing of a plumber or gas fitter, including the determination that the plumber or gas fitter has satisfied all requirements, including the requisite number of clock hours of plumbing and gas fitting theory courses to qualify for examination for such licensing, is a particular matter in which the Board, the DPL and the Commonwealth are parties and have a direct and substantial interest. By comparison, the individual courses in required subject areas which plumbers and gas fitters must successfully complete in order to be eligible for admission to the licensing examination or to renew or continue their state licensing, while of direct and substantial interest to the Board, are not, in and of themselves, “particular matters.”

As defined in G. L. c. 268A, §1(k), the term “particular matter” means and includes, with certain exclusions not here relevant, “any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination [or] finding.” Thus, although the plumbing and gas fitting courses are of direct and substantial interest to the Board, which requires them and determines their subject area and content, they do not fall within the definition of a particular matter, as a course is not a judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination or finding. By contrast, the determinations that particular students attended and passed a required course, or completed a required number of hours of education in a required subject area, and the recording and reporting of that information in connection with the licensing of the students are particular matters of direct and substantial interest to the Commonwealth.

Accordingly, some teacher or instructor activities when conducted on behalf of, or for compensation from, a private school or other non-state course

provider raise issues under § 4 and some do not. This is because not all teacher or instructor activities relate to the state licensing process; many, if not most, relate instead to the imparting of technical skills and knowledge from teacher to student by the teaching of the subject matter of courses. Teacher activities which relate to the state licensing process raise conflict of interest law issues, and those which relate solely to the imparting of technical skills or knowledge by teaching the subject matter of courses, even required courses or courses in required subject areas, do not.

Therefore, under § 4, you may not for private or other non-state compensation, or on behalf of a private school or other non-state course provider, engage in teacher or instructor activities which relate to the state plumber or gas fitter licensing process, as distinct from those teacher or instructor activities which consist solely of teaching course subject matter or content. Thus, under § 4, for example, you may not, as part of your paid non-state teaching activities or on behalf of or as agent for your non-state employer, record, certify or report class attendance or hours; you may not evaluate, test, examine or otherwise determine the competence of students; and you may not assist in the creation of examinations or other tests of student competence; nor may you determine or assist in determining the curriculum or syllabus for any course. You further may not, as part of your paid non-state teaching activities or on behalf of or as agent for your non-state employer, make or assist in making any report or certification to any state agency concerning students or your non-state teaching activities.⁸

By contrast, § 4 will not prohibit you from, during your time off from your DPL position and in your private capacity,⁹ teaching or instructing the technical skills and knowledge, including knowledge of plumbing and gas fitting theory and applicable state codes, which must be mastered in order to become a competent plumber or gas fitter and to qualify for initial or ongoing state licensing. Nor will § 4 prohibit you from receiving private or other non-state compensation provided exclusively for that actual subject matter teaching.¹⁰

CONCLUSION:

For the above-stated reasons, we conclude that the conflict of interest law, G. L. c. 268A, does not prohibit a state DPL investigator/inspector, who is not involved in creating, evaluating, or administering examinations by the Board and has no role in the Board's policies, approvals or audits of education

programs, from, on his time off from his DPL position and in his private capacity, engaging in private or other non-state teaching activities for private or other non-state compensation, provided that those teaching activities are limited exclusively to actual teaching of course subject matter and do not include curriculum development, student evaluation, testing, grading, attendance keeping or reporting, or any other activity relating to the process of initial or ongoing state licensing.¹¹

DATE AUTHORIZED: July 16, 2010

¹ “Non-state educational program provider” or “non-state course provider” refer to and include any educational program not operated by the Commonwealth or a state agency, including municipal or regional vocational or technical schools, association-sponsored programs, labor training programs, employer training programs or other private programs.

² 248 CMR 11.02.

³ 248 CMR 11.06.

⁴ 248 CMR 11.04 and 11.05.

⁵ Previously, the Commission's Legal Division informally advised you that § 4 of G. L. c. 268A would bar you from participating in these non-state paid teaching activities. The informal opinion indicated, however, that the DPL might be able allow such teaching through a regulation. The Board subsequently adopted regulations regarding such teaching, 248 CMR 11.05(2)(f) and 11.06(2)(a)(4) which state, in relevant part, that a DPL employee may “when not on duty” serve as an instructor for a licensing education program or a continuing education course put on by a private or non-profit entity “so long as [the employee takes] no part in any Board function regarding policies, procedures, approvals, or other official actions which would create a conflict of interest pursuant to relevant public laws.” The regulations, however, do not eliminate the § 4 concerns created by these teaching activities. Under §4(a), a state employee may only receive compensation from a non-state source in connection with a particular matter involving the Commonwealth when the payment is “as provided by law for the proper discharge of official duties” (emphasis added), meaning where the non-state payment is authorized by law or regulation to be paid as compensation for the employee's performance of his duties as a state employee. The regulations instead authorize non-state compensated teaching by DPL employees “when not on duty,” making clear that the teaching being compensated for is not part of the DPL employees' official duties and that, thus, the non-state compensation for such teaching is not “as provided by law for the proper discharge of official duties” within the meaning of § 4. As a result, the regulations have no effect on the application of § 4 to your proposed private teaching activities.

⁶ Section 4 more specifically prohibits a state employee from (a) “otherwise than as provided by law for the proper discharge of official duties” directly or indirectly requesting or receiving compensation from, or (b) “otherwise than in the proper discharge of official duties” acting as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

⁷ “Non-state compensation” means and refers to pay or other compensation received from a source other than the Commonwealth or a state agency, including compensation received from a private school or a non-state course provider.

⁸ It appears that the Board Regulations may require MCE instructors to perform some of the activities which § 4 prohibits you from performing. If this is the case, you will be prohibited from acting as a MCE instructor at a private school or for any other non-state course provider.

⁹ Section 23(b)(2) of G. L. c. 268A would prohibit you from using any state resources, including, for example, your DPL work time, your DPL title, or DPL office equipment in connection with your teaching for a private school or non-state course provider.

¹⁰ If you do become a part-time teacher or instructor at a private school or other non-state course provider, you must be careful in your actions as a DPL employee to avoid violating §§ 6 and 23(b) in any dealings that you may have with your non-state employer or your students. Thus, § 6 will generally prohibit you from participating as a DPL employee in any particular matter in which your private school or non-state course provider employer has a financial interest. Under § 23(b)(3), you should make a written disclosure to your DPL appointing official before participating in any matter relating to a current or former student, such as, for example, the inspection of a former student’s plumbing or gas fitting work, and, under § 23(b)(2), you must act fairly and impartially should you participate in any such matter after making your disclosure.

¹¹ As a practical matter, the restrictions imposed by G. L. c. 268A, § 4, as described above, may significantly limit your opportunities to teach plumbing or gas fitting for a private school or other non-state course provider either because the Board Regulations require instructors to perform certain activities which § 4 prohibits you from performing or because potential employers will be unwilling to hire a teacher subject to the many restrictions imposed on you by § 4.

A newly-elected state legislator seeks guidance with respect to steps he must take to comply with Section 7 of the conflict of interest law, General Laws chapter 268A. Section 7 prohibits state employees from having financial interests in state contracts, unless an exemption applies.

The legislator, who was sworn in in January 2011, is the 100% owner of a small family business. In addition to the legislator, the business has two full-time employees and a bookkeeper. The business provides services to a state agency; this has been the usual practice for at least 30 years. Sometimes the business uses independent contractors in addition to its two regular employees to help with the work. As it has done in prior years, the business entered into a contract with the state agency prior to the legislator’s election. The contract was a standard form contract and the terms are not individually negotiable. Under the standard contract, the state agency specified the price and equipment for the services to be provided. The contract will expire in several months.

Prior to being sworn in, the legislator sought advice from the Commission’s Legal Division and was advised that, once he became a state employee upon his swearing-in, the contract between his business and the state would give him a prohibited financial interest in a state contract in violation of Section 7, and that no exemption under Section 7 was available to allow him to retain that financial interest. The legislator was advised that he would need to take steps to eliminate that financial interest. While Section 7(a) of the conflict of interest law requires that prohibited financial interests must be terminated within 30 days after a state employee learns of the violation, the legislator was given extra time, until 30 days after being sworn in, to comply with the law.

The legislator states that he has explored various ways to comply with the law. First, because the contract itself specifies the use of his business’s equipment and personnel, it is not feasible to eliminate his financial interest in the contract by having the state agency contract directly with his employees. It is also not feasible to sell the part of his family business which will provide services under the state contract because that equipment is in use for other purposes. He is reluctant to sell a business that has been in his family for 50 years, and he is also concerned that early termination of the contract will put his employees out of work. He requests that the Commission allow the contract to run its course and terminate in several months, on its expiration date, rather than requiring an earlier termination.

**CONFLICT OF INTEREST OPINION
EC-COI-11-1**

FACTS:

QUESTION:

Where a newly-elected state legislator has a financial interest in a state contract negotiated prior to his election and using standard agency contract terms that were not individually negotiated with his company, and where the contract will terminate by its own terms in several months and early termination has the potential to create a hardship for the employees who do the work, may the legislator be allowed until the contract expiration date to eliminate the prohibited financial interest in a state contract?

ANSWER:

Yes. Here, the evils aimed at by Section 7 – use of position by state employees to obtain contractual benefits, and public perception that state employees have an “inside track” to such opportunities – are not present here, where a family business has a 30 year history of entering into such contracts, the contract in question was entered into prior to the legislator’s election, and it was a standard form contract not individually negotiated with the legislator’s company. In light of the potential hardship to the company employees who may be out of work if the contract is terminated prematurely, the legislator may have until the contract termination date to eliminate the prohibited financial interest in a state contract.

ANALYSIS:

Section 7 of the conflict of interest law prohibits state employees from having a financial interest in a state contract, unless an exemption applies. Section 7 is intended to prevent state employee from using their positions to obtain contractual benefits from the state and to avoid any public perception that state employees have an “inside track” on such opportunities. *EC-COI-94-4*.

While the facts here do not give rise to any concern about an “inside track,” the legislator’s company’s contract with the state agency gives him a prohibited financial interest in a state contract, unless an exemption applies. Members of the General Court have only one potential exemption available, under Section 7(b), and it applies only where the member has a 10% or less interest in the contracting company. Since the legislator is the 100% owner of his family business, he cannot use that exemption, and no other exemption is available. Consequently, in order to comply with Section 7, the legislator must divest himself of that financial interest.

The statute requires that such divestment be accomplished within 30 days from when a violator learns of the violation. However, the Commission has previously permitted extra time to dispose of prohibited financial interests in public contracts where strict application of the 30 day rule would cause hardship to innocent third parties. *EC-COI-96-4*. The Commission has also permitted extra time when legal constraints will prevent complete divestment within the required 30 days. *EC-COI-91-2*.

In the particular circumstances of this contract, it appears likely that requiring immediate termination of the contract will cause hardship to the employees of the legislator’s company. The Commission finds that additional time is warranted to prevent such undue hardship, and that; therefore, the contract between the legislator and the state agency may be allowed to continue until its stated termination date. Going forward, the legislator will of course remain subject to the prohibition against having a financial interest in a state contract unless an exemption applies for as long as he remains a state employee.

DATE AUTHORIZED: February 18, 2011

**CONFLICT OF INTEREST OPINION
EC-FD-11-2**

FACTS:

A person required by G.L. c. 268B, § 5 to file Statements of Financial Interests (“SFIs”) with the Commission requests guidance as to whether he must supplement his answers to SFI Question 4 for the SFIs he filed for calendar years 2006-2009.

Question 3 on the 2009 SFI form, “Positions Held,” required each SFI filer to identify “each position you held in 2009 or now hold as a PUBLIC OFFICIAL or DESIGNATED PUBLIC EMPLOYEE.” The SFI forms for 2006-2008 contained the same question. In response to that question, the requestor identified his current state position (and also listed his former state position, although not required to do so).

Question 4 on the 2009 SFI form directed filers to “[i]dentify any other government position(s) held in 2009 by you . . . in any federal, state, county, district or municipal agency, whether compensated or uncompensated, full- or part-time. Please review the Instructions which detail the information that should be disclosed.” The 2006, 2007, and 2008 SFI forms

contained the same first sentence asking filers to “[i]dentify any other government position(s) held in 2009 by you . . . in any federal, state, county, district or municipal agency, whether compensated or uncompensated, full- or part-time,” but did not contain the reference to the Instructions contained in the 2009 Form. The 2009 Instructions for Question 4 specified that the filer should include “work performed pursuant to any consulting or contractual agreement with any such agency,” while the Instructions for 2006, 2007, and 2008 similarly stated that the filer should include “consulting and contractual agreements with any of these agencies.”

During 2006 through 2009, in addition to holding the position that required him to file SFIs, the requestor maintained a private law practice. In his private practice, the requestor provided legal counsel to the Board of a County Regional Retirement System (“Board”). The Retirement System has a number of member municipalities. As co-counsel to the Board, the requestor provided legal work and advice on any matters that appeared before the Board, and was compensated for his legal work and advice by the Board. He did not consider himself an employee of the Board and did not receive benefits, sick time, or vacation time, nor was he eligible to be a member of the Retirement System; he was an independent contractor to the Board.

The requestor did not identify his position as co-counsel to the Board in response to Question 4 on his SFIs for 2006-2009. On the SFIs for all four years he did report the income he earned in that position in response to Question 5, which asked him to identify each business with which he was associated as well as the income for each such business. The money earned from work performed for the Board was not separately identified as such, but the amount earned was included in the gross income reported for requestor’s law office.

QUESTION:

Must a person required to file a Statement of Financial Interests report his position as co-counsel to a County Regional Retirement Board in response to Question 4 on the SFI form, which asks filers to “Identify any other government position(s) held in [the relevant calendar year] by you . . . in any federal, state, county, district or municipal agency, whether compensated or uncompensated, full- or part-time”?

ANSWER:

Yes, a position as co-counsel to a County Regional Retirement Board is a government position that must be reported in response to Question 4.

ANALYSIS:

The definitions of state, county, and municipal employees for purposes of the conflict of interest law include all “person[s] performing services for or holding an office, position, employment, or membership in” a state, county, or 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(d), (g) and (q). In its *Advisory 06-01, “Consultants and Attorneys Who Provide Services to Government Agencies May Be Public Employees Subject to the Conflict of Interest Law,”* issued in August 2006, the Commission noted that the statutory definition of who is a public employee for purposes of the conflict of interest law is very broad, and expressly stated:

“Due to the broad definition of public employee in G.L. c. 268A and the multi-factor analysis [that is, the Commission’s analysis for determining when an entity is a public agency], otherwise private attorneys who personally provide legal services to a public agency are public employees for purposes of the conflict of interest law, and subject to its restrictions.”

There are only three definitional categories for public agencies under the conflict of interest law: state; county; and municipal agencies. *EC-COI-00-2*. The Commission has previously determined that a municipal Retirement Board is a municipal agency for purposes of the conflict of interest law. *Id.* While there may be a question as to whether a County Regional Retirement Board should be considered a municipal or a county agency for purposes of the conflict of interest law, there is no question that it is a public agency. Furthermore, under *Advisory 06-01*, requestor was on notice that, as a private attorney providing legal services to a public agency, he was potentially subject to the conflict of interest law in that role.

SFI Question 4 asked the filer to identify his or her other government positions, and the Instructions stated explicitly that this included part-time positions performed pursuant to consulting and contractual agreements with public agencies. The requestor’s arrangement with the Board was just such an arrangement. As such, it should have been reported on the requestor’s SFI forms in response to Question 4. The requestor’s SFIs for 2006-2009 should be

revised to include that information. Since Question 4 requires the requestor to report the income he received from that arrangement, the requestor should also revise his responses to Question 5 so that that income is not reported twice. These corrections should be made within 30 days of the date of this Opinion.

The requestor will be required to file an SFI this year for calendar year 2010, pursuant to G.L. c. 268B, § 5(b), since he held a position requiring him to file during 2010. For subsequent years, whether he will be required to file will depend on whether he holds any public office or major policymaking position in a governmental body. If the only government position that the requestor holds is his position with the Board, then the requestor will be required to file if he is designated by the Board as holding a major policymaking position. The procedures set forth in 930 CMR 2.00 govern designation of governmental positions as major policymaking positions.

Date Authorized: March 18, 2011

**CONFLICT OF INTEREST OPINION
EC-COI-11-3**

FACTS:

A City Councilor has served in the past, and wishes to serve in the future, as a Trustee of a Library located in the City. He requests guidance as to whether, as a City Councilor, he may vote on the City's budget, which appropriates funds for the Library.

A Library Association was incorporated in 1884 by ten private citizens of the City "for the purpose of establishing and maintaining a public library with reading rooms connected therewith."¹ In 1887, members of several families, including some of the original incorporators of the Library, agreed to donate a library building to the Library Association "for the purpose of maintaining therein a Free Public Library," provided that they were given the privilege of naming the Library. Funds to maintain the Library and purchase books, works of art, "and other things necessary for the promotion of the best interests of said Library" were donated at the same time. The Library Association was given authority by statute to hold real and other property, including books, in 1887.

The Library Association adopted bylaws in 1911, and amended those bylaws in 1979. Pursuant to those bylaws, the Library Association is required to have at least seven, and no more than fifteen, Trustees. The Mayor, City Council President, and Superintendent of Schools are all *ex officio* Trustees of the Library. The other Trustees are elected by the Association's corporate members (80% of whom must be residents of the City). The bylaws provide that the Trustees "shall be responsible for the management" of the Library. The bylaws do not contain any reference to payment of any salaries or stipends to Trustees.

The Library has a link on the City's website. According to the Library's website, it has a staff of five: a Director; Heads of Adult and Children's Services; a Local History librarian; and a Reference Librarian. The Library has a circulating collection and hosts visits by school classes. The Library's website indicates that it currently has fifteen Trustees, including the Mayor, City Council President, and Superintendent of Schools.

The Library receives at least some public funding. City Council minutes reference a construction bond payment for the Library by the City, indicating that the City bears some of the Library's capital construction costs. In addition, City Council minutes reference City payments for librarian salaries, Library construction projects, Library energy and utility costs, Library office expenses, and Library books and periodicals. The City's Public Works Department helps maintain the Library parking lot during the winter.

QUESTION:

May a City Councilor who is also a Trustee of a Library vote on the City's budget, which appropriates funds for the Library?

ANSWER:

Yes. Section 19 of the conflict of interest law prohibits a municipal employee from participating, in his municipal role, in any particular matter in which a "business organization" of which he is a trustee has a financial interest. The City Councilor would only be prohibited from participating as a Councilor in matters in which the Library has a financial interest if the Library is considered a "business organization" for purposes of the conflict of interest law. For the reasons explained below, the Library is a municipal agency for purposes of the conflict of interest law, and not a "business organization." Accordingly, a City Councilor who is also a Library Trustee may

vote on the Library's budget without violating Section 19. Before acting on the budget or any other Library-related matters, however, the City Councilor should make a public disclosure of his Library affiliation in compliance with Section 23(b)(3).

ANALYSIS:

In determining whether an entity, including a nonprofit corporation, should be considered a municipal agency for purposes of the conflict of interest law, the Commission has traditionally looked at five factors: (1) the means by which the entity was created (e.g., legislative, administrative or other governmental action); (2) the entity's performance of some essentially governmental function; (3) whether the entity receives or expends public funds; and (4) the extent of control and supervision of the entity exercised by governmental officials or agencies. *See EC-COI-00-3; 95-10; 94-7; 89-24*. In addition, the Commission considers the extent to which there are significant private interests involved in the entity or whether the state or its political subdivisions have the powers and interests of an owner. *MBTA Retirement Board v. State Ethics Commission*, 414 Mass. 582 (1993). No one factor is dispositive; the Commission balances all of the factors based on the totality of the circumstances.

We now apply these factors and considerations to the Library.

1. No statute, rule, regulation, ordinance, or other law required the creation of the Library. Instead, the Library was created by private citizens, who incorporated it in 1884 and provided the building and initial funds to buy books and other necessities.

2. The Library provides public library services in the City. To determine whether an entity serves an essential governmental function, the Commission considers whether its functions are "contemplated by state or federal legislation," whether its roles are "traditional or exclusive roles of government," and whether the tasks it performs are "uniquely within the bailiwick of government." *EC-COI-06-5; 00-3; 00-2; 95-10 n.10; 88-19*. Among the "classic essential governmental services" are responsibility for police and fire services, municipal infrastructure (water, sewer, drainage, streets) and public school education. *EC-COI 06-5 n. 21; 00-3; 95-10 n. 10*. The chapter of the General Laws that governs libraries, G.L. c. 78, is classified as part of Title XII, "Education."

Courts generally hold that operation of public libraries is a governmental function.² As one court commented,

At the present time it is generally recognized and conceded by all thoughtful people that such institutions form an integral part of a system of free public education and are among its most efficient and valuable adjuncts It is also true that education of the people ought not to and does not stop upon their leaving school, but must be kept abreast of the time by almost constant reading and study. It would therefore seem that no more important duty or higher purpose is incumbent upon a state or municipality than to provide free public libraries for the benefit of its inhabitants.³

Another case notes that "[p]ublic libraries were recognized as governmental responsibilities as early as 1810."⁴

The Commission previously has found that non-profit corporations that carry out a public entity's statutory obligations serve an essentially governmental function.⁵ The Library, by providing public library services in the City, is serving an essentially governmental function.

3. The Library receives at least some public funding, for capital construction costs, librarian salaries, Library energy and utility costs, Library office expenses, Library books and periodicals, and snow plowing.

4. City employees exercise some control over the Library, in that, pursuant to the Library Association's bylaws, the Mayor, City Council President, and Superintendent of Schools are all *ex officio* trustees of the Library. This does not give City employees a majority on the Board, but does give them a degree of influence.

5. The original donation of the Library building and the money to purchase books and other necessities was made on the condition that the building would always be used for the purpose of maintaining a free public library for the citizens of the City. This is some indication that if the Library was to dissolve, its assets would not belong to private interests, but that there would be some public claim to them.

After weighing these factors, and considering the totality of the circumstances, we find that the Library serves an essentially governmental function, expends

some public funds to do so, is subject to the influence if not control of City employees, and could not revert to purely private ownership consistent with the intention of the donors. We therefore conclude that the Library is a municipal agency for purposes of the conflict of interest law. A municipality is not a “business organization” for purposes of the conflict of interest law. *EC-COI-06-3*. While we have left open the possibility that an entity created by a level of government (federal, state, county, or municipal) could be a business organization, *EC-COI-06-3 n. 62*, the Library has none of the attributes of a business organization. *EC-COI-07-2*. We therefore do not consider the Library to be a “business organization” for purposes of the conflict of interest law.

It remains to answer the requestor’s specific question. As pertinent to that question, Section 19 of the conflict of interest law prohibits the requestor, as a City Councilor, from participating in any particular matter if he is a Trustee of a “business organization” and that business organization has a financial interest in the matter. In light of our conclusion that the Library is not a business organization, a City Councilor who is also a Library Trustee would not violate Section 19 of the conflict of interest law by voting on the City’s budget, which appropriates funds for the Library.⁶

Section 23(b)(3) of the conflict of interest law prohibits every public employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position, or undue influence of any person or party. It further provides that it shall be unreasonable to so conclude if the public employee publicly discloses the facts that would otherwise lead to such a conclusion. A City Councilor who is also a Library Trustee should publicly disclose his affiliation with the Library prior to acting on Library-related matters in his Councilor role, to satisfy Section 23(b)(3).

DATE AUTHORIZED: May 20, 2011

¹ A “library association” is a distinct legal entity, G.L. c. 71, § 1 (“Library corporations and associations which have been legally established shall continue to have all the powers and privileges and be subject to all the duties and restrictions attaching thereto.”)

² See *Chalfant v. Wilmington Institute*, 574 F.2d 739 (3d Cir. 1978) (“It is not surprising that in a constitutional

democracy such as ours one of the functions which was first recognized as the responsibility of government was that of assuring an informed citizenry through the maintenance of public libraries.”), *City of Wichita, Kan. v. U.S. Gypsum Co.*, 828 F. Supp. 851, 862 (D. Kan. 1993) (“Public libraries are an established resource for the education of the public, which is an important governmental function not limited to children.”); *Seibold v. Kinston-Lenoir County Public Library*, 141 S.E.2d 519 (N.C. 1965) (“The operation of a public library meets the test of ‘governmental function’”); *Alvey v. Brigham*, 286 Ky. 610, 617 (Ky. 1941) (“operation of such a free public library ... is manifestly a governmental function”).

³ *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212, 217 (4th Cir. 1945), cert. denied, 326 U.S. 721, 66 S.Ct. 26, 90 L.Ed. 427 (1945), quoting *Johnson v. Baltimore*, 158 Md. 93, 103, 104, 148 A. 209, 213.

⁴ *Chalfant*, supra, at 740 n.2.

⁵ See *EC-COI-94-7* (non-profit corporation carrying out Executive Office of Elder Affairs’ statutory obligation to operate home care programs for the elderly performed governmental function); *EC-COI-84-7* (non-profit corporation performing a portion of public entity’s statutory duties performed governmental function); *EC-COI-89-24* (non-profit corporation which furthered state college’s legislatively mandated function of education and research performed governmental function).

⁶ If Library Trustees are paid, then a City Councilor who is also a Library Trustee would be required to abstain as a Councilor from participation in any matter related to such payment, because he would have a personal financial interest in such payments. For instance, if the City’s appropriation for the Library includes stipends for Library Trustees, then the Councilor would have to abstain from voting on those stipends. Having done so, he could then vote on the budget as a whole.

ADVISORY 11-1: PUBLIC EMPLOYEE POLITICAL ACTIVITY

Introduction

Public employees -- employees and volunteers of state, county, and municipal agencies -- have most of the same rights as other citizens to engage in private political activity. However, the conflict of interest law, G.L. c. 268A, restricts some political activity of public employees. In addition, the campaign finance law, G.L. c. 55, restricts public employees’ political fundraising. The campaign finance law is enforced by the Office of Campaign and Political Finance (“OCPF”). Questions regarding the campaign finance law should be directed to OCPF. This Advisory addresses restrictions on public employee

political activity imposed by the conflict of interest law.

In their public roles, public employees are subject to Section 23(b)(2)(ii) of the conflict of interest law. That section provides that public employees may not knowingly (or with reason to know) use or attempt to use their official positions to secure for themselves or others unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals. Section 23(b)(2)(ii) restricts the extent to which public employees may engage in political activity in their public roles, or use public resources in connection with such political activity.

This Advisory explains the restrictions placed by the conflict of interest law on public employee political activity. This Advisory addresses “**election-related political activity**,” which is activity directed at influencing people to vote for or against candidates and/or ballot initiatives. This Advisory also addresses “**non-election-related political activity**,” which is activity directed at influencing governmental decision-makers which does not involve an election. Non-election-related political activities include, for example, supporting or opposing: town meeting warrant articles, municipal bylaw changes, user fees for public services or school activities, changes to funding for public services, the renovation or construction of public buildings, roads, bridges, and other public infrastructure, closure of public libraries, schools or fire stations, and changes to state and local tax rates, laws, regulations, and budgets.

The restrictions on public employee political activity are not the same for all public positions. Elected officials may engage in more political activity than appointed officials and employees. Public employees who hold policy-making positions have more leeway to make public statements and take official action on political issues than do non-policy-makers. This Advisory has separate sections addressing the restrictions for each type of position.

How to Use this Advisory

Which parts of this Advisory apply to you depends on the type of public position you hold. Different rules apply to elected and appointed public employees. Different rules apply to policy-making public employees and non-policy-makers. A “policy-making” position is one in the top management level of a governmental agency in which the holder actively participates in determining the agency’s

policies or plans of action. A non-policy-maker does not participate in determining agency policy, but instead carries out or puts into action policies determined by others. All elected positions are policy-making. Chief executives, town and city managers, department heads and board members are presumed to hold policy-making positions.

If you are an **ELECTED** public employee, the following sections of this Advisory apply to you: Sections 1, 2, 3, 4, and 5.

If you hold a **POLICY-MAKING** public position, the following sections of this Advisory apply to you: Sections 1, 2, 3, and 5.

If you were **APPOINTED** to your public position and are not a policy-maker, the following sections of this Advisory apply to you: Sections 1, 2, and 5.

If you have a question about **election-related political activity** by public employees, see Sections 1 through 4 of this Advisory.

If you have a question about **non-election-related political activity** by public employees, see Section 5 of this Advisory.

1. May Do: Political Activities by Public Employees That Generally Do Not Raise Conflict of Interest Law Issues

In general, public employees of all types may engage in private political activity, subject to the restrictions on political fundraising imposed by G.L. c. 55. The conflict of interest law does not prohibit a public employee from engaging in political activity on his own time, using his own or other private resources, and when he is acting for himself and not as an agent or representative of anyone else.

Below are some examples of **election-related political activity** that public employees may engage in privately without raising any issue under the conflict of interest law, provided that they use no public resources in connection with such activity.

Example: An appointed Assistant District Attorney may run for State Representative, as long as he does so on his own time and without using his paid public work time, his official title, or public resources such as his office email address or copy machine. The conflict of interest law does not, however, prohibit the Assistant District Attorney from including the fact of his public service in biographical information

contained in his campaign literature or in his party primary nomination papers (and on the primary ballot) as allowed by state elections law.¹ The conflict of interest law does not require him to take a leave of absence from his Assistant District Attorney position to run, although the District Attorney's office may have its own policy that does so.

Example: A public school teacher may support a local ballot question, such as a tax limit override question, if she does so on her own time, and without the use of public resources. She may serve on a ballot question committee, so long as she does so without pay and does not fundraise or act as the agent for the campaign in any matter involving her town. She may distribute campaign literature, make get-out-the vote telephone calls, conduct campaign polls and research, drive voters to the polls, and display or hold signs.

Example: A state agency employee may support the election (or reelection) of a candidate for elected public office on his own time, and without the use of public resources. He may serve on a candidate's campaign committee (in an uncompensated capacity not involving fundraising or acting as the agent for the campaign in any matter involving the state), distribute campaign literature, make get-out-the vote telephone calls, conduct campaign polls and research, drive voters to the polls, and display or hold signs.

Below are further examples of election-related political activity that any public employee may do on his own time and without the use of his official title or public resources without raising any issue under the conflict of interest law:

- with his own stationery, computer, or wireless account, write letters to the editors or blog about political issues,
- distribute advocacy literature or hold a sign expressing his political views,
- with his own computer and email or wireless account, send emails or text messages expressing his political views,
- contribute his own funds in compliance with the campaign finance law to a campaign committee for a candidate or concerning a ballot question,
- answer voter survey questions, and

- vote in any election.

Similarly, public employees may engage in **non-election-related political activity** on their own time, without the use of public resources and as private citizens. Below are examples of non-election-related political activity that do not raise any issue under the conflict of interest law.

Example: A member of a town Conservation Commission, acting as a private citizen and without using his title or any public resources, may participate in a grass roots group's efforts to convince local government to build a new public school, provided that he does not act as the group's agent or representative and is not compensated for his participation. He may attend and speak on his own behalf at meetings concerning political issues; use his own stationery, computer, or wireless account to write letters to the editor or blogs; distribute advocacy literature or hold a political sign; use his own computer, email, or wireless account to send emails or text messages expressing his political views; draft and propose a warrant article for town meeting; attend public hearings concerning the proposal; and vote at town meeting.

Any public employee, acting in her official capacity and using public resources, and acting in a neutral and non-partisan manner, may notify the public that a state, county or federal election will be held on a certain date and encourage all voters to vote. A public employee may also neutrally notify the public generally that a town meeting will be held on a certain date and neutrally encourage all voters or members to attend. Public resources may not be used to notify only a subset of voters in order to influence the outcome of the vote or meeting. For example, notifying only the parents of school children of a ballot question whether to fund a new public school, and not notifying childless homeowners, would be prohibited, because it would not be neutral.

2. May Not Do: Political Activities by Public Employees That Generally Are Prohibited by the Conflict of Interest Law

In general, a public employee may not use his public position to engage in political activity. Section 23(b)(2)(ii) of the conflict of interest law prohibits the use of one's public position to engage in political activity, because a public employee who does so is using his official position to secure for himself or others (such as a candidate or a ballot question committee) unwarranted privileges of substantial

value that are not properly available to similarly situated persons.

There are two exceptions to this general rule. First, elected officials, and public employees who hold policy-making positions, have more leeway to make statements about and take action concerning ballot questions, while using their public positions and public resources, than do appointed public employees who do not hold policy-making positions. Second, elected officials have greater latitude than non-elected public employees to engage in certain other election-related political activities. These exceptions are discussed in more detail below in sections 3 and 4.

Subject to these exceptions, a public employee **may not** engage in political activity, whether election-related or non-election related, on his public work time; while acting in his official capacity or while in his official uniform; in a public building (except where equal access for such political activity is allowed to all similarly situated persons); or with the use of other public resources, such as staff time, public office space and facilities, public office equipment such as computers, copiers, and communications equipment, public websites and links to public websites, or public office supplies such as official stationery.

A public employee who engages in such political activity, unless the activity is of truly minimal duration or significance (such as wearing a political campaign button to work in a public office), violates the conflict of interest law.

Example: A state employee sends out a blast email urging all her contacts to vote for a particular candidate for Governor. This is a violation of the conflict of interest law, because she is using public resources to support a particular candidate.

Example: A state legislator directs his district office staff, who are paid state employees, to use paid state work time to visit voters in his district, pass out his campaign literature, and urge voters to vote for him. This is a violation of the conflict of interest law, because he is using his official position and public resources to gain election.

Example: A police chief urges voters entering a polling place to vote for a particular candidate for District Attorney. The police chief is wearing his uniform and standing near the entrance to the polling place while he does so. This violates the conflict of

interest law because he is using his official uniform to support that candidate.

Example: An incumbent Selectman seeking reelection uses her official position to gain access to the Board of Selectmen's meeting room, which under town policy is not available for private use, to make a campaign video featuring herself in the meeting room standing next to the town's seal, urging voters to vote for her, and soliciting campaign donations. This violates the law, because the Selectman is using her official position to gain access to and use the meeting room and the town seal, both of which are public resources, for the private purpose of securing her reelection to the Board. The Selectman would not violate the law by using in her campaign materials a news media photograph of herself in the Board's meeting room taken during a public meeting, even if the photograph included the town seal, because then she would not be using her official position to get an unwarranted privilege.

Example: Municipal Department of Public Works employees who are union officers use paid work time to attend a fundraiser for a mayoral candidate as representatives of their union. This violates the conflict of interest law because they are using their public work time, which is a public resource, to obtain an unwarranted privilege for themselves, the use of work time for private purposes.

Example: A City Councilor puts links on her city council website to her campaign website and to websites of other candidates who belong to her political party. This violates the conflict of interest law, because she is using her City Council website to obtain an unwarranted privilege of substantial value for herself, and to confer such an unwarranted privilege on the other candidates whose websites are linked.

Below are further examples of **election-related political activities** that public employees **MAY NOT DO. Public employees MAY NOT:**

- send campaign-related emails using official computers or email,
- send campaign-related documents using official fax machines,
- use a public office telephone to make campaign-related calls,

- use on-duty public employees or public supplies, materials, or equipment to create, reproduce or distribute campaign materials,
- use official letterhead stationery, even if privately paid for, to advocate for or endorse a candidate or to support or oppose a ballot question,
- use any public seal, logo, or insignia, on campaign materials,
- use public office staff or equipment to do any of the following: conduct campaign research, write campaign or political speeches, conduct campaign polls, answer campaign questions, or create or maintain voter or supporter databases or campaign website or links,
- use public office staff or space for a press conference to endorse, promote or oppose a candidate or ballot question position,
- if appointed, use a public title while campaigning,
- if appointed, use a public title to endorse a candidate,
- if appointed, use a public title to support or oppose a ballot question (except to the extent appointed policy-makers are permitted to do so, as further discussed below in Section 3 of this Advisory),
- if appointed, perform election campaign tasks while on public work time,
- hold campaign planning meetings or any other campaign-related event in public office space, or
- wear a public employee uniform while performing campaign tasks or urging support for a particular candidate or measure.

Political fundraising is regulated by G.L. c. 55, the campaign finance law. In addition to the restrictions of Chapter 55, Section 23(b)(2)(ii) of the conflict of

interest law prohibits all public employees – whether elected, appointed, or policy-making – from directly or indirectly soliciting political contributions of any kind, including personal services, in any situation where such a solicitation is inherently coercive.

A solicitation is inherently coercive, and therefore prohibited by the conflict of interest law, if it is directed by a public employee at his subordinate, persons or entities doing business with or having a matter pending before his public agency, or anyone subject to his or his agency’s authority. By contrast, campaign contributions which are voluntarily made in response to a general rather than a targeted solicitation may be accepted from such sources if they are received and reported by the official’s campaign committee in compliance with the campaign finance law.

Example: A Superintendent of Schools suggests to her office staff that they contribute to the campaign of a School Committee candidate. This is inherently coercive because it is directed at subordinate employees, and violates the conflict of interest law.

Example: An incumbent candidate for reelection to a School Committee personally solicits, or directs his campaign workers to solicit, donations from local businesses that have contracts with the School Department. Such solicitations are inherently coercive because they are targeted at persons doing business with the candidate's agency, who are subject to his official authority. Therefore, such solicitations violate the conflict of interest law. The candidate may not direct his campaign workers to do what he is prohibited from doing himself.

The conflict of interest law also restricts the extent to which a public employee may represent campaigns and grass roots groups in dealings with government agencies. A public employee who is not serving in a "special" position may not represent a political campaign or a grass roots group in its dealings with public agencies at his level of government (state, county, or municipal), pursuant to Sections 4, 11 and 17 of the law.

Example: A full-time municipal employee may not (even as an unpaid volunteer) sign a municipal campaign finance report to be filed with the town clerk, nor could he be paid to help prepare the report even if he did not sign or deliver it.

Example: A full-time state employee with the Department of Conservation and Recreation may not act as a candidate’s attorney (even on her own time

and without a fee) before the State Ballot Law Commission, nor could she be paid to review signatures on nomination papers, even if she did not appear before the Commission.

These restrictions generally apply to “special” public employees only as to matters in which the employee participated, or for which the employee had official responsibility, or which is pending in the special public employee’s agency.

Example: A town Conservation Commissioner whose position has been designated as “special” may sign a municipal campaign finance report on behalf of a candidate for selectman and file the report with the town clerk because Conservation Commissioners have no official responsibility for campaign finance reports.

Example: A town clerk whose position has been designated as “special” by the Select Board may not sign such a report to be filed with her own office, because, as town clerk, she has official responsibility for receiving such reports.

If you are uncertain whether your position is a “special” position for purposes of the conflict of interest law, you should obtain advice from the Ethics Commission’s Legal Division by calling (617) 371-9500, or online at www.mass.gov/ethics.

3. May Do: Elected and Appointed Policy-making Public Employees and Ballot Questions

Elected public employees, and appointed policy-makers, have more leeway under the conflict of interest law to take certain actions regarding ballot questions than do non-policy-makers. The reason for this is that part of the role of elected public employees and policy-makers is to inform and guide public debate on public issues.

For example, on the municipal level, municipal police chiefs, fire chiefs, library directors and school superintendents, although appointed, serve in policy-making positions and are customarily expected (if not required) to take positions on matters within the purview of or affecting their respective agencies. A police or fire chief is expected to take a position on whether a new public safety building is needed. A library director is expected to have a view on whether the public library should be expanded. A school superintendent is expected to recommend to the School Committee and the town’s voters whether the public high school should be renovated or replaced. Therefore, by taking these actions, these policy-

making public employees do not obtain or confer any unwarranted privileges of substantial value in violation of Section 23(b)(2)(ii).

By contrast, rank and file police officers and firefighters, public school teachers, and librarians serve in non-policy-making positions, and it is not part of their responsibilities to use public resources or their official positions to inform and guide the public discussion on these issues (although they may of course do so as private citizens).

The extent to which elected public employees and policy-makers may use their official positions and public resources to make statements about ballot questions depends upon the positions they hold. Specifically, elected officials and appointed policy-makers may take official actions concerning ballot questions relating to their particular areas of official responsibility. They may also use public resources to inform the public, as opposed to for purposes of advocacy, without violating the conflict of interest law.

The conflict of interest law does not define the scope of a public employee’s official responsibility. Such scope may be defined by applicable statute, precedent, bylaw, job description or practice. For example, the official responsibility of a state agency commissioner may be defined in the agency’s enabling law. The official responsibility of a police chief may be defined by state statute, local ordinance or bylaw, or employment contract. Because the conflict of interest law does not define it, the Commission’s Legal Division will not advise on the scope of a public employee’s official responsibility and will refer the employee to agency or municipal counsel for a determination as to whether the public employee is in a relevant policy-making position with respect to a particular ballot question. Municipalities vary in how they define the official responsibilities of particular positions. For instance, one city may want its police chief to take public positions on renovating a public safety building, while another may draft its chief’s employment contract to include a provision forbidding her from doing so.

Below are some examples of actions that elected officials and policy-makers may take with respect to ballot questions, consistent with the conflict of interest law.

Example: A question concerning school aid will be on the statewide ballot at the next election. A School Committee may discuss the question at its own meetings and at informational meetings sponsored by

a public or private group. It may invite or permit ballot question committees to address its meetings, or to use public buildings for meetings, provided that the invitations and permissions are made in accordance with a policy of equal access for all viewpoints. It may vote to take a position on the ballot question, and issue an official statement reporting that position. It may also use any means by which official actions are usually reported (such as posting on real and virtual bulletin boards and on websites, and broadcasting public meetings via local public access cable television) to distribute information about their position. In reporting its position, the School Committee should only provide factual information and not engage in advocacy.

Example: A question concerning legalizing medical use of marijuana will be on the statewide ballot at the next election. The Colonel of State Police, acting in her official capacity, may assign her staff to use paid work time to analyze the impact of this proposal on agency operations. In her official capacity, on behalf of the State Police and without any compensation apart from her State Police salary, the Colonel may also: provide the resulting analysis to persons requesting it or attending public meetings of the agency or visiting its office; post the analysis on a governmental bulletin board or website, provided that it does not advocate for or against the ballot question; hold an informational forum, or participate in such a forum held by a private group; and communicate with the press concerning the ballot question and its potential impact on the State Police, but only in a manner and to a degree consistent with the established practices of the State Police. The conflict of interest law forbids the Colonel from doing any of these things for pay apart from her State Police salary; she may not be paid by a ballot question committee to do the actions listed in this example. Beyond this limited non-advocacy activity directed at *informing* the public (including the fact of their own position for or against a ballot question), elected officials and appointed policy-makers **may not** use public resources for election-related political purposes (except only to the limited extent allowed to elected officials as explained in Section 4 below). Thus, neither an individual appointed policy-maker nor a board comprised of such employees may use their individual titles or their board name in a political advertisement in favor of or against a ballot question. No public employee may use public resources to send out a mass mailing, place an advertisement in a newspaper, or distribute to voters, directly or through others, such as school children, a flyer concerning the substance of a ballot question.

By contrast, while elected officials may not use their board or agency name in such advertisements, they may use their individual titles, see Section 4 below.

4. May Do: Election-Related Political Activities in which Only Elected Public Employees May Engage

Elected public employees have greater latitude under the conflict of interest law to engage in certain election-related political activities than do appointed public employees, even those holding policy-making positions. This is in part because elected public employees are generally elected to perform the functions of their office rather than to provide a required number of hours of service in exchange for compensation, and in part because elected public employees normally must participate in election-related political activities in order to continue in their elected positions. For that reason, elected officials do not obtain or confer unwarranted privileges of substantial value by engaging in such activities, and therefore do not violate Section 23(b)(2)(ii) of the conflict of interest law.

Most elected public employees are not legally required to work a minimum number of hours per week or a specified work schedule, or to maintain fixed office hours. This category of elected officials, which includes most holders of state, county and municipal elected offices, are not required to take time off from their public positions in order to campaign for reelection or for election to a new office, or to confine their campaigning to nights and weekends. Thus, an elected public official who does not have required public work hours is not prohibited by the conflict of interest law from campaigning for reelection, or for or against a ballot question, during the hours in which he typically or normally performs his public duties, or during what would otherwise be considered “normal business hours.”

Elected public employees are also not prohibited by the conflict of interest law from referring to or identifying themselves by their official titles in campaigning for reelection or for election to new office, as well as in political fundraising activities, whether for themselves or others. Similarly, elected public employees are not prohibited from identifying themselves by their individual official titles in endorsing other candidates for elected office, and in supporting or opposing ballot questions.

Finally, elected public employees are not prohibited by the conflict of interest law from, in their official capacity, either individually or as a governmental

body (such as a Board of Selectmen, City Council or School Committee) stating their viewpoints and positions on ballot questions regardless of the subject matter of the ballot questions. However, unlike with ballot questions, elected boards and other elected governmental bodies may not as a body endorse or oppose candidates for offices elected by the voters.

5. Non-Election-Related Political Activity: What Public Employees May and May Not Do

Not all political activity involves elections. Political activity may involve matters which will not be decided by election, or which will occur before any election has been scheduled. Examples of such political activity includes supporting or opposing town meeting warrant articles, municipal bylaw changes, and the other types of decisions set forth in the Introduction to this Advisory.

The prohibition of Section 23(b)(2)(ii) of the conflict of interest law against the use of official position to obtain or confer unwarranted privileges of substantial value applies to non-election-related political activity as well as to election-related activity. As with election-related activity, the applicable restrictions depend upon the particular public position that a person holds. This section of this Advisory describes the restrictions on non-election-related political activity under the conflict of interest law.

It is important to note that once an election is scheduled (or, in some cases, even just anticipated) concerning a matter, political activity relating to the matter will be deemed to be election-related political activity and a public employee's involvement in such activity will be subject to the greater restrictions described above in the sections of this Advisory concerning election-related political activity. Most importantly, election-related political activity is subject to the restrictions of the campaign finance law and the public employee wishing to participate in such activity must observe those limits. Any action prohibited by the campaign finance law will generally be considered "unwarranted" for purposes of Section 23(b)(2)(ii). A public employee who is uncertain about the restrictions imposed by the campaign finance law should consult OCPF.

A. Appointed Non-policy-making Public Employees

Appointed public employees who do not hold positions in the top management level of their agencies and do not make policy for their agencies are barred by the conflict of interest law from

engaging in non-election-related political activity in their official capacity or during their public work hours. The only exception to this is if the employee is authorized and directed by a superior elected or appointed policy-making public employee with the authority to engage in non-election-related political activities concerning matters within the purview of his agency to participate in such activities in support of the superior's own lawful political activity.

Example: A non-policymaking public school teacher may not, during her school work hours, prepare, produce and distribute to municipal officials and residents a flier in support of a new public school, or hold a sign in front of the school supporting the construction of a new school, or attend meetings of a grass roots group supporting the construction of a new school. She also may not use her school email or computer to send out a mass message supporting the construction of a new school, or use her school website to advocate for the construction of a new school.

Example: A rank and file police officer or firefighter may not, while on duty or in uniform, hold a sign supporting the construction of a new public safety building, and may not allow his or her official title and rank to be used in an advertisement, flyer or other materials distributed in support of the new building.

However, participation in non-election-related political activities is not prohibited where it is duly authorized by a superior elected or appointed policy-making public employee with the authority to engage himself in such activities concerning matters within the purview of his agency, as set forth in Subsection B below.

Example: A Superintendent of Schools may authorize and direct subordinates to engage in non-election-related political activities in favor of a new school in furtherance of the superintendent's own lawful advocacy for the new school as an appointed policy-maker acting within the purview of his own agency. The subordinates engaging in those activities, as lawfully authorized and directed by the Superintendent, do not violate the law. By contrast, the Superintendent may not authorize or direct subordinate employees to engage in non-election related political activities in favor of a new public safety building, as that would not be a matter within the purview of the school department, and not an activity in which the Superintendent himself could legally engage.

B. Appointed Policy-making Public Employees

Just as appointed policy-makers have more leeway to take positions on election-related matters within the purview of or affecting their respective agencies, they also have more leeway to take such actions with respect to non-election-related matters. This is because a policy-maker's use of his official title, public work time and other public resources for that purpose, if within the purview of or affecting his agency, is within his responsibilities and therefore not unwarranted under Section 23(b)(2)(ii).

Example: A police chief may, in his official capacity and during his public work hours, support, and seek to convince the town meeting or the city council to support, the construction of a new public safety building. The chief may write a letter to the editor of a local newspaper in his capacity as chief advocating for a new public safety building, allow his name and official title to be used in a newspaper advertisement supporting the construction of a new public safety building, and advocate as chief for a new public safety building on the police department's website. He could also, while on duty and in uniform, attend meetings of public boards or visit public officials in their offices in order to advocate for a new public safety building, or telephone, email or otherwise correspond for the same purpose. He could use his subordinates' work time and department funds (if consistent with the department's budget and municipal policy) to prepare and distribute a flyer supporting the new public safety building.

These principles apply to all persons holding appointed policy-making positions, including appointed municipal board members, regarding non-election-related political activities concerning matters *within their official responsibility*. A police chief **may not**, in his official capacity, engage in similar activities in support of the construction of a new public school or library, as those matters are not within the purview of the police department. Similarly, a public schools superintendent may, in her official capacity, seek to convince the municipal government, including the town meeting, to support a new public school, but not to support a new public safety building or public library, which are outside of the purview of the school department.

C. Elected Officials

Elected officials are presumed to hold policy-making positions and, thus, may engage in the same non-election-related political activities as public employees in appointed policy-making positions. In addition, because they hold their positions by popular

vote, elected officials are not required to limit their non-election-related political activities to matters within their respective official responsibilities or within the purview of their own agencies. An elected official generally may, in his official capacity, engage in non-election-related political activities concerning any matter. If, however, an elected official has specific paid work hours, he may engage in such activity during his public work hours only as to matters within his official responsibility or his agency's purview.

Finally, once a matter is anticipated to be or is placed on the ballot for decision by the voters at an election, political activity relating to the matter will be deemed to be election-related political activity and a public employee's involvement in such activity will be subject to the greater restrictions described above in the sections of this Advisory concerning election-related political activity. Election-related political activity is regulated by the campaign finance law, and activity prohibited under that law will generally be impermissible under the conflict of interest law.

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This Advisory Replaces Advisory 84-01: Political Activity

¹ Detailed information on the inclusion of official position information on nomination papers and election ballots may be obtained from the Office of the Secretary of the Commonwealth concerning state and county elections and from the city or town clerk concerning municipal elections.

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In the Matter of Stephen McCarthy

The Commission approved a Disposition Agreement in which West Bridgewater Board of Assessors Chairman Stephen McCarthy violated section 23(b)(2)(ii) of the conflict of interest law by improperly approving and processing a property tax abatement application submitted by friends. McCarthy paid a \$5,000 civil penalty. In January 2010, McCarthy assisted friends Daniel and Marjorie McNally in preparing a property tax abatement application that requested that their property assessment be reduced from \$280,600 to \$240,000. The application came before the Assessors in February 2010; McCarthy told fellow board members that he had been called by a friend regarding the abatement request, and that the property assessment should be lowered. The Assessors took no action on the application. To approve an abatement application, a minimum of two board members had to sign the application and an abatement certificate prepared by staff. McCarthy and Assessors Head Clerk Donna Cotter are also friends. In or about March 2010, McCarthy signed the McNally abatement application and certificate. He directed Cotter to process the abatement. As Head Clerk, Cotter knew that two board member signatures were required to approve an abatement application. Nonetheless, Cotter processed the application and certificate and submitted them to the tax collector. As a result the McNallys' property assessment was lowered to \$254,500, and their property tax liability was reduced by \$339.30 for 2010, and by unknown amounts in future years. McCarthy violated section 23(b)(2)(ii) by approving the abatement application and certificate for the McNallys without obtaining a second board member signature, and by directing Cotter to process the abatement.

In the Matter of Donna Cotter

The Commission approved a Disposition Agreement in which West Bridgewater Board of Assessors Head Clerk Donna Cotter violated section 23(b)(2)(ii) of the conflict of interest law by improperly approving and processing a property tax abatement application submitted by friends of board chairman Stephen McCarthy. Cotter paid a \$1,000 civil penalty. In January 2010, McCarthy assisted his friends, Daniel and Marjorie McNally, in preparing a property tax abatement application that requested that their property assessment be reduced from \$280,600 to \$240,000. The application came before the Board of Assessors in February 2010; McCarthy told fellow

board members that he had been called by a friend regarding the abatement request, and that the property assessment should be lowered. The board took no action on the application. To approve an abatement application, a minimum of two board members must sign the application and an abatement certificate prepared by staff. McCarthy and Cotter are also friends. In or about March 2010, McCarthy signed the McNally abatement application and certificate. Although McCarthy was the only board member who signed these documents, he directed Cotter to process the abatement. As Head Clerk, Cotter knew that two board member signatures were required to approve an abatement application. Nonetheless, Cotter processed the application and certificate and submitted them to the tax collector. As a result the McNallys' property assessment was lowered to \$254,500, and their property tax liability was reduced by \$339.30 for 2010, and by unknown amounts in future years. Cotter violated section 23(b)(2)(ii) by processing the McNallys' abatement application and certificate, upon the request of her friend McCarthy, knowing that they were not properly approved by the board.

In the Matter of Louis Picano

The Commission issued a Decision and Order finding that Lynn Board of Health Inspector Louis Picano repeatedly violated section 20 of the conflict of interest law by also performing constable duties as an appointed city constable, and section 23(b)(3) by performing Board of Health inspections of properties owned by private parties for whom he had performed constable services. The Commission ordered Picano to pay a \$35,000 civil penalty. In September 1998, the Enforcement Division sent a private letter to Picano warning him that the conflict of interest law prohibited a health inspector from also performing the duties of an appointed constable, unless the constable work was part of his health inspector duties and he did not receive additional compensation for performing the constable duties. Picano was also warned that he would also violate the conflict of interest law if he were to perform health inspections for property owners for whom he had performed constable services. Picano continued to perform constable duties even after receiving the 1998 warning letter. While constable duties were part of a health inspector's duties at one time, this was no longer the case as of 2004. From 2006 through 2009, Picano performed constable services on at least 50 occasions for private property owners and property

managers, for which he was paid. On at least 32 occasions during this same period, Picano performed inspections as a health inspector on properties owned or managed by private parties for whom he had performed constable services. Picano violated section 20 on at least fifty (50) occasions by receiving payments for constable services to private parties pursuant to his constable appointment contract made by the City while he was also serving as a BOH Inspector. He violated section 23(b)(3) on at least thirty-two (32) occasions by performing BOH inspections of properties owned by private parties for whom he had performed constable services. Picano did not file a written disclosure with his appointing authority to dispel the appearance of a conflict of interest created by his conduct.

In the Matter of William Schmidt

The Commission dismissed an adjudicatory proceeding involving former Executive Office of Health and Human Services Director of Planning and Control William Schmidt and approved a Disposition Agreement in which Schmidt admitted to violating the financial disclosure law. Schmidt paid a \$400 civil penalty. Schmidt failed to file his Statement of Financial Interests for calendar year 2009 within 10 days of receiving a Formal Notice of Lateness. Schmidt failed to file his 2009 SFI by the May 17, 2010 deadline. On June 14, 2010, he was sent a notice advising him that he had 10 days to file or he would be subject to civil penalties. Schmidt did not file within the 10 day period. He filed his 2009 SFI on July 26, 2010, or 29 days late. The Commission schedule of civil penalties for late filers and non-filers called for a \$400 civil penalty for filing an SFI between 21 and 30 days after the 10 day period following receipt of a notice.

In the Matter of Mary Capman

The Commission approved a Disposition Agreement in which former Gardner Golf Commission member Mary Capman admitted to violating section 19 of the conflict of interest law. Capman paid a \$500 civil penalty. In the fall of 2008, golf commission members began discussing the possibility of installing a computer system at the Gardner Municipal Golf Course. In October 2008, Capman informed the golf commission that her step-son owned J.D. Associates, a company that sold point-of-sale software and hardware, and she offered to contact the company to arrange an informational presentation at a golf commission meeting. Capman relayed to the golf commission at its November 2008 meeting a cost estimate provided to her by her step-son., and Capman then introduced the step-son's business partner to the golf commission at the

December 2008 meeting so that the partner could make a presentation. In March 2009, the golf commission purchased point-of-sale software, hardware and services from J.D. Associates totaling \$10,210. Pursuant to the contract between the golf commission and J. D. Associates, in lieu of a cash payment, the golf commission provided J. D. Associates with two family golf memberships and two individual golf memberships for a three year period. The value of the four memberships was approximately \$12,000. The point-of-sale equipment was installed in the golf course pro shop in April 2009. In June 2010, the Gardner City Solicitor voided the contract between the golf commission and J. D. Associates. At that time, the equipment was removed from the pro shop and returned to J. D. Associates, and the golf course memberships were rescinded. Capman violated section 19 by participating as a golf commission member in the contract with J. D. Associates, a company owned by her step-son.

In the Matter of Eril Ligonde

The Commission approved a Disposition Agreement in which a Middlesex Sheriff's Office (MSO) corrections officer assigned to the Billerica House of Corrections, Captain Eril Ligonde, admitted to violating section 23(b)(2)(ii) of the conflict of interest law by using public resources in connection with a political fundraiser for then-Sheriff James DiPaola. Ligonde paid a \$10,000 civil penalty. In October 2009, Ligonde decided to hold a campaign fundraiser for DiPaola. He contacted MSO corrections officers Richard McKinnon and Heidi Ricci, who both agreed to assist him. Ligonde contacted DiPaola's MSO staff and campaign staff to schedule the date of the fundraiser. Ricci arranged to hold the fundraiser at the Tewksbury Country Club on November 19, 2009. Ricci also used an MSO computer to create two spreadsheets, one which listed 500 MSO employees, which she provided to Ligonde, and one which listed 50 MSO employees, which she provided to McKinnon. Ligonde used the list to solicit MSO employees for campaign contributions, and to track how many tickets to the fundraiser each employee received and how much money each employee donated to the campaign. While on state time and within MSO facilities, Ligonde repeatedly solicited MSO employees, mostly his subordinates, for contributions for the political fundraiser. At the fundraising event, Ricci delivered to the campaign treasurer an envelope containing approximately \$4,000 in campaign contributions solicited by Ligonde and McKinnon. G.L. c. 55, the campaign finance law, prohibits appointed public employees from soliciting political contributions and also

prohibits anyone from soliciting or receiving campaign contributions in government buildings. Section 23(b)(2)(ii) of the conflict of interest law prohibits a state employee from, knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. Ligonde violated section 23(b)(2)(ii) by using his MSO position to secure for DiPaola campaign donations obtained in violation of G.L. c. 55. Ligonde also violated section 23(b)(2)(ii) by soliciting MSO employees on state time and in state buildings to attend the fundraiser

In the Matter of Richard McKinnon

The Commission approved a Disposition Agreement in which a Middlesex Sheriff's Office (MSO) corrections officer assigned to the Billerica House of Corrections, Corrections Officer Richard McKinnon admitted to violating section 23(b)(2)(ii) of the conflict of interest law by using public resources in connection with a political fundraiser for then-Sheriff James DiPaola. McKinnon paid a \$3,000 civil penalty. In October 2009, MSO Captain Eril Ligonde decided to hold a campaign fundraiser for DiPaola, and he approached McKinnon and Corrections Officer Heidi Ricci, who both agreed to assist him. Ligonde contacted DiPaola's MSO staff and campaign staff to schedule the date of the fundraiser. Ricci arranged to hold the fundraiser at the Tewksbury Country Club on November 19, 2009. Ricci also used an MSO computer to create two spreadsheets, one which listed 500 MSO employees, which she provided to Ligonde, and one which listed 50 MSO employees, which she provided to McKinnon. Ligonde and McKinnon used the lists to solicit MSO employees for campaign contributions, and to track how many tickets to the fundraiser each employee received and how much money each employee donated to the campaign. While on state time and within MSO facilities, McKinnon repeatedly solicited MSO employees, mostly peers and superiors, for contributions for the political fundraiser. At the fundraising event, Ricci delivered to the campaign treasurer an envelope containing approximately \$4,000 in campaign contributions solicited by Ligonde and McKinnon. G.L. c. 55, the campaign finance law, prohibits appointed public employees from soliciting political contributions and also prohibits anyone from soliciting or receiving campaign contributions in government buildings. McKinnon violated section 23(b)(2)(ii) by using his MSO position to secure for DiPaola campaign donations obtained in violation of G.L. c. 55. In addition, McKinnon violated section 23(b)(2)(ii) by

soliciting MSO employees on state time and in state buildings to attend the fundraiser, and by maintaining the lists of MSO employees on MSO computers.

In the Matter of Heidi Ricci

The Commission approved a Disposition Agreement in which a Middlesex Sheriff's Office (MSO) corrections officer assigned to the Billerica House of Corrections, Corrections Officer Heidi Ricci, admitted to violating section 23(b)(2)(ii) of the conflict of interest law, by using public resources in connection with a political fundraiser for then-Sheriff James DiPaola. Ricci paid a \$2,000 civil penalty. In October 2009, MSO Captain Eril Ligonde decided to hold a campaign fundraiser for DiPaola, and he approached Corrections Officer Richard McKinnon and Ricci, who both agreed to assist him. Ligonde contacted DiPaola's MSO staff and campaign staff to schedule the date of the fundraiser. Ricci arranged to hold the fundraiser at the Tewksbury Country Club on November 19, 2009. Ricci also used an MSO computer to create two spreadsheets, one which listed 500 MSO employees, which she provided to Ligonde, and one which listed 50 MSO employees, which she provided to McKinnon. Ligonde and McKinnon used the lists to solicit MSO employees for campaign contributions, and to track how many tickets to the fundraiser each employee received and how much money each employee donated to the campaign. At the fundraising event, Ricci delivered to the campaign treasurer an envelope containing approximately \$4,000 in campaign contributions solicited by Ligonde and McKinnon. G.L. c. 55, the campaign finance law, prohibits appointed public employees from soliciting political contributions and also prohibits anyone from soliciting or receiving campaign contributions in government buildings. Ricci violated section 23(b)(2)(ii) by using state time and MSO computers to assist Ligonde and McKinnon, and by creating and maintaining the lists of MSO employees for political fundraising purposes.

In the Matter of Joseph Turner

The Commission issued a Decision and Order in which it determined that Billerica Department of Public Works, Cemetery and Parks and Trees Division Foreman Joseph Turner violated sections 19 and 23 of the conflict of interest law by selling Town cemetery plots to his parents. The Commission ordered Turner to pay a civil penalty of \$440. According to the Decision, Turner's duties as Division Foreman included selling cemetery plots. Town policy restricted the sale of plots based on immediate need. In May 2008, Turner deviated from that policy and sold four cemetery plots to his parents for \$1,560, just prior to a scheduled price increase, thereby saving his parents \$440. Turner violated the

conflict of interest law by, as Division Foreman, selling four cemetery plots to his parents, and by using his Division Foreman position to secure the plots for his parents in violation of Town policy restricting sales for immediate need, and just before a price increase was to go into effect. Turner also violated the law because his actions would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that Turner's parents could improperly influence him or unduly enjoy his favor in the performance of his official duties or that he was likely to act or fail to act as a result of kinship with, or undue influence by his parents. Turner did not file any written disclosures with his appointing authority, the Town Manager. In its Decision, the Commission states that the relatively low civil penalty of \$440, representing the amount of money saved by the parents by purchasing the cemetery plots prior to the price increase, was warranted for the following reasons: Turner's supervisor was aware of Turner's conduct and failed to take corrective action; the unwarranted privilege Turner secured for his parents was of modest value; it was a very close question as to whether Turner knew of the impending price increase; and the illegality of Turner's conduct would not have been obvious to a person in Turner's position, particularly to one like Turner who had not received training on the conflict of interest law.

In the Matter of Robert Fortes

The Commission issued an Allowance of Joint Motion and Order of Dismissal dismissing the adjudicatory proceeding involving former Massachusetts Bay Transportation Authority Assistant General Manager for Strategic Planning and Performance Robert Fortes for allegedly violating the financial disclosure law. The Commission's Enforcement Division issued an Order to Show Cause charging Fortes with violating the financial disclosure law by failing to timely file his 2009 Statement of Financial Interests. As an MBTA Assistant GM, Fortes was a "designated major policy maker", and was required to file his 2009 SFI by May 17, 2010. Fortes did not file his 2009 SFI until September 14, 2010. According to the Order, the matter was dismissed after Fortes produced evidence detailing personal circumstances that impaired his ability to timely file his SFI. During the relevant time period, Fortes was a primary caregiver for a terminally ill relative. The Commission concluded that the interests of the parties and the Commission would be served by dismissing the adjudicatory proceeding.

In the Matter of Michael Tocco

The Commission approved a Disposition Agreement in which Division of Professional Licensure, Board of Registration in Pharmacy member Michael Tocco admitted to violating section 23(b)(2)(ii) of the conflict of interest law by contacting a representative of Omnicare, a pharmaceutical provider, on behalf of an Omnicare client, while matters affecting Omnicare were pending before the Board. Tocco paid a \$2,000 civil penalty. Tocco is President of Integrated Pharmacy Solutions (IPS), a business that provides consulting services to hospitals and pharmacies. An IPS client is Northeast Rehab Hospital (Northeast), which operates a facility in Nashua, New Hampshire. Omnicare provides pharmaceutical products to Northeast. During the relevant time, Omnicare also had matters pending before the Board. In March 2010 during a seminar sponsored by the Massachusetts College of Pharmacy, and again in August 2010, at the conclusion of a Board meeting, Tocco contacted the Omnicare compliance officer to request assistance with Northeast's contract with Omnicare, in an effort to have Omnicare change the contract provisions. Tocco violated section 23(b)(2)(ii) by contacting Omnicare's compliance officer on two occasions on behalf of his client, Northeast, while Omnicare was subject to Tocco's regulatory authority as a Board member.

In the Matter of Alan Cohen

The Commission approved a Disposition Agreement in which Agawam High School Guidance Counselor Alan Cohen admitted to violating section 23(b)(2)(ii) of the conflict of interest law, by hiring the School Principal's son to a summer teaching position without following the School's standard hiring procedures. Cohen paid a \$1,000 civil penalty. Cohen was responsible for hiring summer school staff. Cohen knew that the previous summer school physical education teacher was retiring. Cohen and the Principal (Cohen's supervisor) would often talk about their children with each other, and Cohen knew from those conversations that the Principal's son would soon be graduating from college with a degree in physical education. Cohen contacted the Principal's son, who expressed an interest in the four week, summer school physical education teaching position. The Principal's son then submitted his resume, transcripts and an application. The resume and application indicated the Principal's son did not have his college degree or teaching certification but that he anticipated receiving them on December 31, 2010, after he completed student teaching. Cohen hired the Principal's son without following the School's standard hiring procedures, which required that the position be posted internally and that a hiring committee be convened to review applications and

interview candidates. By failing to follow standard procedure when considering an employment application for the son of his supervisor, Cohen violated section 23(b)(2)(ii).

In the Matter of Edward Wheeler

The Commission approved a Disposition Agreement in which Middlesex Registry of Deeds First Assistant Register Edward Wheeler admitted to violating section 23(b)(2) of the conflict of interest law by using Registry equipment and work time to conduct his private law practice. Wheeler agreed to pay a \$5,000 civil penalty. A review of Wheeler's work computer revealed hundreds of documents dating from January 2005 through June 2010 related to Wheeler's private law practice. Many of these documents were accessed or edited during Wheeler's Registry work hours. In addition, Wheeler's law practice letterhead listed the fax number for the Registry. The Agreement states that Wheeler emailed private law practice documents to and from his Registry and home computers, used the Registry fax machine to transmit law practice documents, and printed law practice documents using Registry printers. Wheeler claimed that most of the private legal work he performed at the Registry was conducted during his lunch breaks. Nevertheless, he acknowledged that he used a substantial amount of public work time for his private law practice. Wheeler earned approximately \$10,000 a year from his private legal work. Wheeler violated section 23(b)(2) by using Registry equipment, supplies, facilities and time to perform his private legal work.

In the Matter of William Conlon

The Commission issued a Public Education Letter to Brockton Police Chief William Conlon regarding Conlon's decision to allow two police union officials to attend a political fundraiser for Brockton Mayor James Harrington on paid city time. As explained in the PEL issued to Conlon, "collective bargaining agreements cannot explicitly or implicitly authorize conduct that violates the conflict of interest law." In June 2008, Conlon authorized two police officers, who were elected police union officials, to collect special detail pay to attend a political fundraiser for Mayor Harrington to conduct union business. Special detail pay allows elected police union officers to earn their regular pay while engaged in activities unrelated to their normal police duties. The collective bargaining agreement with the police union allows elected union officials, "time off for Union business if that need arises during the regularly scheduled work hours, subject, nevertheless to the sole discretion of the Chief of Police or the Chief's designee." Although the collective bargaining

agreement does not define "Union business," Conlon defended his decision by stating that it was a past practice to interpret "Union business" as including attendance at political fundraisers. Conlon also stated that it was a past practice to allow union officials to engage in union activities without forgoing pay. The PEL states that, "[n]otwithstanding the collective bargaining agreement or any interpretation thereof, paying municipal employees to attend a political fundraiser is a use of public resources for a political and/or private purpose and, as such, is violation of G.L. c. 268A, section 23(b)(2)." By agreeing to the Commission's issuance of the PEL, Conlon does not admit to violating the conflict of interest law.

In the Matter of G. Paul Dulac

The Commission approved a Disposition Agreement in which Marblehead School Superintendent G. Paul Dulac admitted to violating section 23(b)(2) of the conflict of interest law by hiring the spouse of a school committee member to a half-time teaching position without following standard procedures. Dulac paid a civil penalty of \$500. A vacant half-time instructional technology specialist position at the Veterans Middle School in Marblehead was scheduled to be filled for the school year beginning in September 2009. The standard procedure to fill the position included posting the job, having the Principal interview candidates and forwarding a hiring recommendation to the Superintendent. The Superintendent then conducts additional candidate interviews and hires the selected candidate. Tammy Nohelty, the spouse of School Committee member Richard Nohelty, learned of the vacancy and contacted school Principal Elizabeth Moore to express an interest in the teaching position before the position was posted. Ms. Nohelty had taught at the Veterans Middle School the prior school year. Ms. Nohelty was interviewed for the position by Moore and by the Veterans Middle School Assistant Principal three days before the position was advertised; that same day, Moore submitted a recommendation to Dulac to hire Ms. Nohelty. Several days after the hiring recommendation was made, the position was posted in the *Boston Globe* as well as posted internally within the School Department. Two applicants responded to the *Boston Globe* advertisement and one applicant responded to the internal posting. None of these applicants was interviewed for the position. Upon receiving Moore's recommendation to hire Ms. Nohelty, Dulac did not inquire of his assistant, per his normal practice, whether any other applications had been received. Dulac also caused the date of Moore's recommendation to hire Ms. Nohelty to be changed

from August 13, 2009, a date before the position was posted, to August 23, 2009, a date after the position was posted. Dulac then interviewed and hired Ms. Nohelty. Dulac knew that Ms. Nohelty was Richard Nohelty's spouse. Dulac asserted that he was not aware of any other candidates for the position. By hiring the spouse of a school committee member for the teaching position without following the standard hiring procedure, Dulac violated section 23(b)(2).

In the Matter of Elizabeth Moore

The Commission approved a Disposition Agreement in which Marblehead Veterans Middle School Principal Elizabeth Moore admitted to violating section 23(b)(2) of the conflict of interest law by hiring the spouse of a school committee member to a half-time teaching position without following standard procedures. Moore paid a \$500 civil penalty. A vacant half-time instructional technology specialist position at the Veterans Middle School was scheduled to be filled for the school year beginning in September 2009. The standard procedure to fill the position included posting the job, having the Principal interview candidates and forwarding a hiring recommendation to the Superintendent. The Superintendent then conducts additional candidate interviews and hires the selected candidate. Tammy Nohelty, the spouse of School Committee member Richard Nohelty, learned of the vacancy and contacted Moore to express an interest in the teaching position before the position was posted. Ms. Nohelty had taught at the Veterans Middle School the prior school year. Ms. Nohelty was interviewed for the position by Moore and by the Veterans Middle School Assistant Principal three days before the position was advertised; that same day, Moore submitted a recommendation to Superintendent G. Paul Dulac to hire Ms. Nohelty. Several days after the hiring recommendation was made, the position was posted in the *Boston Globe* as well as posted internally within the School Department. Two applicants responded to the *Boston Globe* advertisement and one applicant responded to the internal posting. None of these applicants was interviewed for the position. Upon receiving Moore's recommendation to hire Ms. Nohelty, Dulac did not inquire of his assistant, per his normal practice, whether any other applications had been received. Dulac also caused the date of Moore's recommendation to hire Ms. Nohelty to be changed from August 13, 2009, a date before the position was posted, to August 23, 2009, a date after the position was posted. Dulac then interviewed and hired Ms. Nohelty. Moore knew that Ms. Nohelty was Richard Nohelty's spouse. Moore asserted that she was not aware of any other candidates for the position. By

hiring the spouse of a school committee member for the teaching position without following the standard hiring procedure, Moore violated section 23(b)(2).

In the Matter of Paul Truehart

The Commission concluded an adjudicatory matter involving former Southampton Board of Health (BOH) member Paul Truehart by approving a Disposition Agreement in which Truehart admitted to violating section 17 of the conflict of interest law, and agreed to pay a \$3,000 civil penalty, and by dismissing the adjudicatory hearing. Truehart admitted that he had violated section 17 of the conflict of interest law by performing private septic system work in the Town. Septic system work in the Town is regulated by the BOH. In his private capacity, Truehart performed the following septic work in the town, during the time when he was serving as a member of the BOH: Between May and July, 2008, Truehart completed a septic system upgrade at 11 East Street and was paid \$19,500 for the work. He signed the Title V certificate form as the installer in order to receive a certificate of compliance from the BOH. In October 2009, Truehart repaired a septic system at 2 Parsons Way and was paid \$2,900 for the work. He contacted the BOH Agent to inspect the work and also signed the Title V certificate form as the installer in order to receive a certificate of compliance from the BOH. Sometime in 2009, Truehart installed septic systems at 11 and 17 Riverdale Road Extension and was paid \$46,858. Truehart contacted the BOH Agent to inspect the installations, and signed the Title V certificate form as the installer in order to receive certificates of compliance from the BOH. Truehart violated section 17(a) by being paid by the property owners for performing septic system work at 11 East Street, 2 Parsons Way and 11 and 17 Riverdale Road Extension. He violated section 17(c) by signing Title V certificate forms for each of these properties, and by contacting the Health Agent to inspect his work at 2 Parsons Way and 11 and 17 Riverdale Road Extension. These activities were conducted on behalf of the property owners.

In the Matter of A. Joseph DeNucci

The Commission concluded an adjudicatory proceeding involving former State Auditor A. Joseph DeNucci by approving a Disposition Agreement in which DeNucci admitted to violating section 23(b)(2) of the conflict of interest law, and agreed to pay a \$2,000 civil penalty, and by dismissing the adjudicatory hearing. The Commission's Enforcement Division alleged that DeNucci violated section 23 by hiring his cousin, Guy Spezzano, to a fraud examiner position with the Office of the State

Auditor's (OSA) Bureau of Special Investigations (BSI). In January 2008, DeNucci suggested to Spezzano, his unemployed, 75 year-old first cousin, that Spezzano work at the OSA. Spezzano submitted an incomplete employment application on February 7, 2008, but was nonetheless interviewed for a position on February 14, 2008. DeNucci offered Spezzano a full-time fraud examiner position by letter dated March 24, 2008, and Spezzano began work in the BSI's Brockton Office on June 2, 2008 at an annual salary of \$40,545, plus benefits. The Agreement states that Spezzano did not meet the requirements for the position based on the position's job description. Spezzano worked until going out on sick leave on December 1, 2009, and was terminated in April after exhausting all sick leave benefits. DeNucci violated section 23(b)(2) by directing his staff to interview, and then by hiring, his unqualified 75 year-old cousin for a position at the OSA.

In the Matter of John Judd

The Commission approved a Disposition Agreement in which Goshen Board of Selectmen (BOS) member John Judd admitted to violating section 23(b)(2)(ii) of the conflict of interest law by requesting that the BOS re-bid the contract to purchase washed, screened sand, and to purchase sand from his cousin's business. Judd paid a \$2,500 civil penalty and agreed to complete training on the conflict of interest law. In August 2009, the Town participated in a cooperative purchasing arrangement with the Hampshire County Council of Governments to purchase 3,000 tons of washed, screened sand. The contract was put out to bid, and the lowest responsive bidder was awarded the contract. Judd's cousin, Francis Judd, owns George D. Judd & Sons, LLC, which submitted a bid that was rejected as non-responsive. At the October 12, 2010 BOS meeting, Judd requested that the town re-bid the contract to secure a better price, and he criticized the highway superintendent for not purchasing sand from Judd & Sons. At that meeting, Judd also presented a contract for the BOS's approval calling for the Town to purchase 50% of the Town's sand from Judd & Sons. The proposed contract was valued at approximately \$13,500. Judd's attempt to secure a Town contract for his cousin was unsuccessful as the BOS did not approve or sign the contract. Judd violated section 23(b)(2)(ii) by, as a BOS member, attempting to have the BOS purchase 50% of the Town's sand from Judd & Sons without following the standard procurement process.

In the Matter of Whiting Willauer

The Commission approved a Disposition Agreement in which Nantucket Board of Selectmen (BOS)

member Whiting Willauer admitted to violating sections 19, 23(b)(3) and 17(c) of the conflict of interest law, on several occasions by voting to award contracts to the Alliance for Substance Abuse Prevention (ASAP) and to the Family & Children's Services of Nantucket County, Inc., doing business as Nantucket Behavioral Health Services, Inc. (BHS). During the relevant time period, Willauer was a member of the board of directors of ASAP, and he was the President of BHS. Willauer paid a \$3,000 civil penalty. Willauer, as a BOS member, voted to award contracts to ASAP and BHS as follows:

- In 2006, the BOS approved a \$5,000 contract with ASAP;
- In 2007, the BOS approved a \$15,000 contract with ASAP; and
- On June 23, 2010, the BOS approved a \$152,100 contract with ASAP and BHS as a joint venture.

At the November 17, 2010 BOS meeting, the BOS members discussed whether Willauer had a conflict of interest when he voted to award the contract to ASAP/BHS in June, 2010. Although Willauer responded that he needed clarification on how to handle the situation in the future, he took no steps to seek any clarification. At the December 8, 2010 BOS meeting, a member moved to re-vote the June 23, 2010 contract award to ASAP/BHS due to conflict of interest concerns, and Willauer again voted to award the \$152,100 contract to ASAP/BHS. Willauer violated section 19 each time he voted as a BOS member to award contracts to BHS, a non-profit organization in which Willauer served as president. By participating in the award of contracts to ASAP, while failing to publicly disclose that he served on ASAP's board of directors, Willauer violated section 23(b)(3). Willauer violated section 17(c) on or about June 23, 2010, by acting as agent for BHS when, in his capacity as BHS President, he signed the \$152,100 contract between ASAP/BHS and the Town of Nantucket.

In the Matter of Charles Birchall, III

The Commission approved a Disposition Agreement in which former Lawrence Public Schools (LPS) Graphics Department Clerk Charles Birchall, III admitted to violating sections 2(b) and 23(b)(2) of the conflict of interest law for accepting a bribe to issue an LPS purchase order to Wellington Publishing for a piece of equipment, which Birchall knew would not be delivered to the LPS, and for using LPS Graphics Department time, equipment and supplies to print

copies of a book for Wellington. Birchall paid a \$6,000 civil penalty for the violations, and he paid to the LPS a civil forfeiture of \$2,449, the amount of the unjust enrichment he received through his violations of the conflict of interest law. On or about September 8, 2008, Birchall, as LPS Graphics Department Clerk, generated a purchase order in the amount of \$4,893 to buy a folding machine from Wellington. Birchall did so knowing that Wellington was not going to deliver the machine to the LPS. On or about October 20, 2008, Wellington issued an invoice for \$4,945 to the LPS, which reflected the purchase order amount plus an additional \$52 in shipping costs. On November 17, 2008, the City of Lawrence paid the \$4,945 invoice. On November 27, 2008, Wellington paid Birchall \$2,200 for issuing the purchase order. The LPS never received a folding machine from either Wellington or Birchall. In 2007, Wellington owners Algrid Sunskis and Stephen Jarvis asked Birchall to print copies of a book they had written. Birchall printed at least 100 copies of the book using LPS Graphics Department equipment and supplies. Birchall spent about 16 hours during his regular work day to print copies of the book and was paid approximately \$300 by LPS, his regular rate of pay, for the time he spent printing the book copies. Sunskis and Jarvis also paid Birchall at least \$249 for his work. Birchall violated section 2(b) by receiving a \$2,200 payment from Wellington in return for generating a fraudulent \$4,893 purchase order to Wellington for a folding machine he knew Wellington would not deliver to the LPS. Birchall violated section 23(b)(2) by using LPS Graphics Department time, equipment and supplies to print approximately 100 copies of the book for Wellington, and by accepting \$249 from Wellington as payment for doing so.

In the Matter of Timothy Bassett

The Commission approved a Disposition Agreement in which former Essex Regional Retirement Board (ERRB) Chair and Executive Director Timothy Bassett admitted to violating section 23(b)(2) of the conflict of interest law by conducting his private lobbying business during normal work hours and using ERRB facilities and equipment. Bassett paid a \$10,000 civil penalty. Bassett served as the ERRB Chair/Executive Director from 2003 to 2010. As Executive Director, Bassett was paid an annual salary of approximately \$134,000. From 2003 to 2009, Bassett was a registered lobbyist and worked part-time as a lobbyist for Peter McCarthy Associates. Bassett earned approximately \$14,000 a year as a lobbyist. From 2003 to 2009, during ERRB work hours, Bassett frequently met with McCarthy and lobbying clients at his ERRB office, and he

frequently used ERRB equipment, computers, fax machines and printers to conduct his lobbying business. Bassett also met during ERRB work hours with legislators and their staff at the State House to lobby on behalf of his private clients. Bassett violated section 23(b)(2) by conducting his private lobbying work while on ERRB time and/or using ERRB-provided facilities and equipment.

In the Matter of Joseph L. Lally Jr.

The Commission issued an Allowance of Joint Motion to Dismiss the Proceeding and Order of Dismissal dismissing the adjudicatory proceeding involving Joseph P. Lally, Jr. An Order to Show Cause alleged that Lally violated sections 2(a) and 3(a) of the conflict of interest law by offering jobs and/or career assistance to two state employees with the intent to influence them in connection with a \$15 million state contract to purchase performance management software from Cognos Corporation. The matter was stayed in August 2011 pending Lally's sentencing in the related federal criminal proceeding against him. Lally pled guilty on March 8, 2011 in the federal proceeding against him to conspiring to deprive Massachusetts citizens of former Massachusetts House Speaker Salvatore DiMasi's honest services and to extortion under color of official right involving the payment of bribes to DiMasi and kickbacks to Richard McDonough and Richard Vitale. Lally testified at the federal trial of DiMasi, McDonough and Vitale. On October 19, 2011, the federal court sentenced Lally to 18 months in prison and 36 months of supervised release, and fined him \$50,000. In light of Lally's conviction and sentencing, the Commission determined that the interests of justice, the parties and the Commission were best served by dismissing the adjudicatory proceeding.

In the Matter of Michael O'Donnell

The Commission approved a Disposition Agreement in which Carver Board of Selectmen member Michael O'Donnell admitted to violating section 19 of the conflict of interest law by participating in discussions and negotiations regarding the Town Administrator's employment contract while the Administrator was negotiating a collective bargaining agreement with the Carver Police Union. O'Donnell is also a police sergeant and a member of the Union. O'Donnell paid a \$2,000 civil penalty for the violation. At the February 22, 2011 and March 8, 2011 Board meetings, O'Donnell participated in discussions and negotiations concerning a new employment contract for the Administrator. During this time, the Administrator was involved in Union contract negotiations on behalf of the town. The

Commission had previously advised O'Donnell in a June 2006 letter that the conflict of interest law prohibited him from participating as a Board member in the matters relating to the Administrator's contract while the Administrator was involved in Union contract negotiations. The Commission explained that O'Donnell, as a Union member, had a financial interest in who would conduct the negotiations on the town's behalf. In March 2011, after O'Donnell was provided with a copy of the June 2006 letter, he assured Commission Enforcement staff that he would not participate further in matters involving the Administrator employment contract. Nonetheless, on March 28, 2011, after receiving an email from the Board chair that Administrator contract negotiations would resume on March 29, 2011, O'Donnell forwarded the email to another Board member. In that email, O'Donnell told the Board member that if he attended the March 29, 2011 meeting, the Board would have a quorum and could vote on the Administrator's employment contract. O'Donnell also stated in the email that town citizens "would not want me to support something as egregious as this during this recession." O'Donnell violated section 19 by participating in discussions and negotiations relating to the Town Administrator employment contract at the February 22, 2011 and March 8, 2011 Board meetings, and by sending the March 28, 2011 email to another Board member advocating against the Administrator's contract and advising him not to attend the upcoming Board meeting, all while O'Donnell was a member of the Union and the Administrator was involved in Union contract negotiations.

In the Matter of Michael Jackson

The Commission approved a Disposition Agreement in which Middlesex Sheriff's Office (MSO) Senior Deputy Sheriff Michael Jackson admitted to violating section 23(b)(2)(ii) of the conflict of interest law, by soliciting donations for a campaign fundraiser for then-Sheriff James DiPaola from subordinate MSO employees during work hours. Jackson paid a \$5,000 civil penalty. In October 2009, Jackson decided to hold a campaign fundraiser for DiPaola. He then solicited MSO employees, most of whom were his subordinates, at the MSO workplace during work hours. The fundraiser occurred on October 14, 2009 at Jackson's home, and was attended by 30 people, most of whom were MSO employees and their spouses. The fundraiser raised approximately \$4,800. Jackson violated section 23(b)(2)(ii) by soliciting campaign donations for Sheriff DiPaola from MSO subordinates at the MSO workplace during work hours.

In the Matter of Richard Bretschneider

The Commission concluded an adjudicatory proceeding and issued a Decision and Order finding that former Nantucket Sheriff Richard Bretschneider violated the financial disclosure law by failing to timely file his Statement of Financial Interests for calendar year 2010. Bretschneider was ordered to pay a civil penalty of \$1,200. Bretschneider was required to file a 2010 SFI by May 2, 2011. He failed to file his SFI by that date, and on May 6, 2011, he was sent a Notice advising him that he had 10 days to file or he would be subject to civil penalties. Bretschneider did not file within the 10-day period. Bretschneider filed his 2010 SFI on September 21, 2011, more than 111 days late. The adjudicatory proceeding was initiated by the Commission's Enforcement Division filing an Order to Show Cause on October 13, 2011 alleging that Bretschneider failed to file his 2010 SFI within 10 days of receiving a Formal Notice of Lateness. On November 22, 2011, the Presiding Officer in the adjudicatory proceeding issued an Order on a Motion for Summary Decision requiring Bretschneider to file an answer to the OTSC by December 6, 2011 or to otherwise show cause why summary decision should not be entered against him. Bretschneider did not file the required answer. The Order entered summary decision against Bretschneider. The civil penalty of \$1,200 was assessed in accordance with the Commission's penalty schedule for late filers.

In the Matter of David Landy

The Commission concluded an adjudicatory proceeding and issued a Decision and Order finding that former Pension Reserves Investment Management Board employee David Landy violated the financial disclosure law by failing to timely file his Statement of Financial Interests for calendar year 2010. Landy was ordered to pay a civil penalty of \$800. Landy was required to file a 2010 SFI by May 2, 2011. He failed to file his SFI by that date, and on May 6, 2011, he was sent a Notice advising him that he had 10 days to file or he would be subject to civil penalties. Landy did not file within the 10-day period. Landy filed his 2010 SFI on August 1, 2011, more than 71 days late. The adjudicatory proceeding was initiated by the Commission's Enforcement Division filing an Order to Show Cause on October 13, 2011 alleging that Landy failed to file his 2010 SFI within 10 days of receiving a Formal Notice of Lateness. Landy did not respond to the OTSC. On November 22, 2011, the Presiding Officer for the adjudicatory proceeding issued an Order on a Motion for Summary Decision requiring Landy to file an answer to the OTSC by December 6, 2011 or to otherwise show cause why summary decision should

not be entered against him. Landy did not file the required answer. The Order entered summary decision against him. The civil penalty of \$800 was assessed in accordance with the Commission's penalty schedule for late filers.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0004**

**IN THE MATTER OF
STEPHEN McCARTHY**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Stephen McCarthy (“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 18, 2010, 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 October 14, 2010, found reasonable cause to believe that McCarthy violated G.L. c. 268A.

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

Findings of Fact

1. Since 2005, McCarthy has been a member of the West Bridgewater Board of Assessors (“BoA”), serving as chairman since 2007.
2. The BoA has three members who are elected to serve four-year terms.
3. Donna Cotter is the West Bridgewater Assessing Department head clerk.
4. Cotter is close friends with McCarthy and his family.
5. Daniel and Marjorie McNally live in West Bridgewater. McCarthy is friends with the McNallys.
6. On a Saturday in January 2010, Daniel McNally telephoned McCarthy with questions about his real estate taxes. McCarthy went over that day to the McNallys’ house, bringing with him a real property

tax abatement application. McCarthy assisted the McNallys in preparing their abatement application.

7. On January 21, 2010, the McNallys filed for a real property tax abatement. The McNallys sought to reduce their assessment from \$280,600 to \$240,000. Along with the standard application form, the McNallys submitted a letter to the BoA. The letter states that McCarthy “is familiar with” the McNally’s property and “discussed the assessment” with them prior to their submitting the abatement application.

8. At some point in February 2010¹, the McNallys’ abatement application came before the BoA. At this February BoA meeting, McCarthy stated that he had received a call from a friend regarding an abatement. McCarthy referenced the street where his friend resided. McCarthy indicated that the property deserved to have its assessment lowered. Another BoA member told McCarthy that he should recuse himself if the applicants were friends of his. The BoA took no action on the McNallys’ abatement application.

9. To grant an abatement, at least two BoA members must approve and sign the disposition section of an abatement application. The standard operating procedure in West Bridgewater is that, once an abatement application has been approved and signed by the BoA, the Assessing Department fills out an abatement certificate, which is sent back to the BoA for the required signatures. Once signed, the certificate is sent by the Assessing Department to the town tax collector, who adjusts the property owners’ taxes accordingly.

10. In about March 2010, McCarthy signed both the McNallys’ abatement application disposition section and the abatement certificate. McCarthy’s signature is the only signature on both of these documents. Neither of the other BoA members approved the abatement. McCarthy provided the values for the abatement on the abatement application disposition section, adjusting the property down from \$280,600 to \$254,500.

11. McCarthy told Cotter to process the McNallys’ abatement, despite it having not been approved by the BoA and it having only one BoA member’s signature on both the abatement application and abatement certificate. At the time, McCarthy knew that to grant an abatement, at least two BoA members must approve the applications and sign both the abatement application and the abatement certificate.

12. Cotter processed both the abatement application and abatement certificate and forwarded the certificate to the town tax collector.

13. The abatement resulted in the McNallys receiving a tax reduction of \$339.30 for fiscal year 2010 and potentially reducing their tax liability in subsequent years.

Conclusions of Law

14. As the BoA chairman, McCarthy was a municipal employee as defined by G.L. c. 268A, § 1.

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

16. The unilateral approval of an abatement by one BoA member is an unwarranted privilege, as an abatement must be granted by at least two BoA members.

17. McCarthy knowingly used his official position to secure for the McNallys the abatement by, in his capacity as BoA chairman, signing the McNallys' abatement application disposition section and abatement certificate and directing the Assessing Department senior clerk to process the abatement without the requisite BoA approval and number of signatures.

18. This unwarranted privilege was of substantial value because the abatement resulted in the McNallys receiving a tax reduction of \$339.30 for fiscal year 2010 and potentially reducing their tax liability in subsequent years.

19. This unwarranted privilege was not properly available to similarly situated individuals (i.e., other property owners seeking an abatement).

20. Therefore, by, in the manner described above, using his official position as BoA chairman to secure for the McNallys a property tax abatement without proper BoA approval, McCarthy knowingly or with reason to know used his official position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of § 23(b)(2)(ii).

Resolution

2356

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, based on the following terms and conditions agreed to by McCarthy:

- (1) that McCarthy pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$5000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that McCarthy waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: January 31, 2011

¹ The exact dates are unclear, in part, because BoA meeting minutes do not detail which abatements are discussed.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0005**

**IN THE MATTER OF
DONNA COTTER**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Donna Cotter ("Cotter") 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 18, 2010, 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 Cotter. The Commission has concluded its inquiry and, on October 14, 2010,

found reasonable cause to believe that Cotter violated G.L. c. 268A.

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

Findings of Fact

1. Donna Cotter has been in the West Bridgewater Assessing Department from 1997 to the present, serving most recently as head clerk. According to the job description for the position, the head clerk operates with some degree of decision making, is responsible for maintaining assessment records, and has knowledge of the Assessing Department operations.

2. Since 2005, Stephen McCarthy has been a member of the West Bridgewater Board of Assessors ("BoA"), serving as chairman since 2007.

3. The BoA has three members who are elected to serve three-year terms.

4. Cotter is friends with McCarthy and his family.

5. McCarthy is friends with the McNallys who own property in West Bridgewater.

6. In January 2010, the McNallys filed for a real property tax abatement. The McNallys sought to reduce their assessment from \$280,600 to \$240,000.

7. At some point in February 2010¹, the McNallys' abatement application came before the BoA. At this February BoA meeting, McCarthy stated that he had received a call from a friend regarding an abatement. McCarthy referenced the street where his friend resided. McCarthy indicated that the property deserved to have its assessment lowered. Another BoA member told McCarthy that he should recuse himself if the applicants were friends of his. The BoA took no action on the McNallys' abatement application.

8. To grant an abatement, at least two BoA members must approve and sign the disposition section of an abatement application. The standard operating procedure in West Bridgewater is that, once an abatement application has been approved and signed by the BoA, the Assessing Department fills out an abatement certificate, which is sent back to the BoA for the required signatures. Once signed, the certificate is sent by the Assessing Department to the town tax collector, who adjusts the property owners' taxes accordingly.

9. In about March 2010, McCarthy signed both the McNallys' abatement application disposition section and the abatement certificate. McCarthy's signature is the only signature on both of these documents. Neither of the other BoA members approved the abatement. McCarthy provided the values for the abatement on the abatement application disposition section, adjusting the property down from \$280,600 to \$254,500.

10. Shortly thereafter, McCarthy gave these abatement documents to Cotter.

11. Cotter processed both the abatement application and abatement certificate and forwarded the certificate to the town tax collector.

12. At the time, Cotter knew that to grant an abatement, at least two BoA members must approve the application and sign both the abatement application and the abatement certificate.

13. The abatement resulted in the McNallys receiving a tax reduction of \$339.30 for fiscal year 2010 and potentially reducing their tax liability in subsequent years.

Conclusions of Law

14. As the West Bridgewater Assessing Department head clerk, Cotter is a municipal employee as defined by G.L. c. 268A, § 1.

15. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a municipal employee from, knowingly, or with reason to know, using or attempting to use her official position to secure for herself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

16. The unilateral approval of an abatement by one BoA member is an unwarranted privilege, as an abatement must be granted by at least two BoA members.

17. Cotter knowingly, or with reason to know, used her official position to secure for the McNallys the abatement by, in her capacity as Assessing Department head clerk, processing the abatement without the requisite BoA approval and number of signatures.

18. This unwarranted privilege was of substantial value because the abatement resulted in the McNallys receiving a tax reduction of \$339.30 for fiscal year

2010 and potentially reducing their tax liability in subsequent years.

19. This unwarranted privilege was not properly available to similarly situated individuals (i.e., other property owners seeking an abatement).

20. Therefore, in the manner described above, Cotter knowingly, or with reason to know, used her official position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of § 23(b)(2)(ii).

Resolution

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

- (1) that Cotter pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$1,000.00 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that Cotter waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: January 31, 2011

¹ The exact dates are unclear, in part, because BoA meeting minutes do not detail which abatements are discussed.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 08-0016**

**IN THE MATTER OF
LOUIS PICANO**

Appearances: Candies Pruitt-Doncaster, Esq.

2358

Counsel for Petitioner

Frank Mondano, Esq.
BALLIRO & MONDANO
Counsel for Louis Picano

Commissioners: Charles B. Swartwood, Ch.,
David L. Veator
Patrick J. King
Paula Finley Mangum
Martin F. Murphy

Presiding Officer: Commissioner Paula Finley
Mangum

DECISION AND ORDER

Petitioner filed an Order to Show Cause (“OTSC”) on August 24, 2010, against Respondent Louis Picano (“Picano”). The OTSC alleged that Picano was at all relevant times, a City of Lynn (“City”) Board of Health Sanitary Inspector (“BOH Inspector”) and also a constable appointed by the City’s Mayor. The OTSC alleged that from 2006 to 2009, Picano repeatedly violated § 20 by serving as a BOH Inspector at the same time he received payment for his constable services to private parties pursuant to his constable appointment contract made by the City. In addition, the OTSC alleged that Picano repeatedly violated § 23(b)(3) by performing BOH inspections of properties owned and/or managed by private parties for whom he had performed constable services.

On November 2, 2010, the parties filed a Joint Motion to Cancel the Adjudicatory Hearing and to Decide the Matter on Stipulations of Fact and Law (“Joint Motion”). The parties also filed Stipulations of Fact and Law on November 2, 2010 (“Stipulations”). On November 12, 2010, the Hearing Officer allowed the Joint Motion and provided the parties with the opportunity to file briefs. The Petitioner timely filed a brief. The Respondent did not file a brief. In rendering this Final Decision and Order, each undersigned member of the Commission has considered the evidence in the public record.

I. FACTS

The Commission finds the following facts based on the parties’ Stipulations.

1. Between 1998 and 2009, Picano was a City BOH Inspector, and as such Picano was a municipal employee.

2. Between 1998 and 2009, Picano was a constable appointed by the City's Mayor.

3. Picano's constable appointment was a contract made by a municipal agency in which the City was an interested party.

4. Picano had a financial interest in his constable appointment contract each time that he accepted payment for his constable services to private parties.

5. Picano knew of his financial interest in his constable appointment contract.

6. On or about September 18, 1998, the Commission's Enforcement Division sent a private educational letter to Picano advising that G.L. c. 268A, § 20 prohibited BOH Inspectors from holding both BOH Inspector and City constable positions unless their work as constables was part of their BOH Inspector duties and they did not receive additional compensation for performing constable services.

7. From 1998-2009, Picano, while continuing to serve as a BOH Inspector, received additional compensation for performing constable services.

8. The Commission's letter of September 18, 1998, also advised Picano that performing BOH inspections of properties owned by private parties for whom he had performed constable services violated G.L. c. 268A, § 23(b)(3).

9. Following receipt of a complaint in 2006, the Enforcement Division conducted a telephone interview with a person identifying himself as Louis Picano. That person acknowledged receipt of a letter from the Ethics Commission in the late 1990's and informed the Enforcement Division that he was only serving process as part of his duties as a BOH Inspector. The Enforcement Division records indicate that the call was placed to the Lynn BOH office where Picano works.

10. Since 2004, constable services have not been part of Picano's BOH Inspector duties.

11. From 2006-2009, Picano, on at least fifty (50) occasions, performed constable services on behalf of private property owners and/or managers in the City for which he received compensation.

12. From 2006-2009, Picano, on at least thirty-two (32) occasions, performed inspections as a BOH Inspector on properties owned and/or managed by

private parties for whom he performed constable services.

II. DISCUSSION

A. G.L. c. 268A, § 20 Allegations

Section 20 of G.L. c. 268A prohibits a municipal employee from knowingly having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town. In order to establish a violation of § 20 against Picano, Petitioner must prove by a preponderance of the evidence that Picano (1) was a municipal employee, (2) who had a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, (3) of which financial interest he had knowledge or reason to know.

There is no dispute that: (1) Picano was, at all relevant times, a BOH Inspector in the City of Lynn, and as such that he was a municipal employee, (2) Picano was, at all relevant times, a constable appointed by the City's Mayor, and Picano's constable appointment was a contract made by a municipal agency in which the City was an interested party; and (3) Picano knew of his financial interests in his constable appointment contract. It is also undisputed that from 2006 to 2009, while Picano was serving as a BOH Inspector, that, on at least fifty (50) occasions, he also performed constable services on behalf of private owners and/or managers in the City for which he received compensation.

Therefore, based on the parties' Stipulation of Facts and Law, we find that Petitioner has proved by a preponderance of the evidence that Picano violated § 20 on at least fifty (50) occasions by receiving payments for constable services to private parties pursuant to his constable appointment contract made by the City while he was also serving as a BOH Inspector.

B. G.L. c. 268A, § 23(b)(3) Allegations

Section 23(b)(3) prohibits a municipal 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 could improperly influence or unduly enjoy his favor in the performance of his official

duties or that he was likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. Section 23(b)(3) further

provides that “[i]t shall be unreasonable to so conclude if such . . . 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.” In order to establish a violation, Petitioner must prove by a preponderance of the evidence that: (1) Picano was a municipal employee; (2) who knowingly, or with reason to know, acted in a manner; (3) which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude; (4) that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

As previously discussed, Picano was, at all relevant times, a BOH Inspector in the City of Lynn, and as such he was a municipal employee. Picano knowingly, or with reason to know, acted in a manner which would cause a reasonable person having knowledge of the relevant circumstances to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act as a result of kinship, rank, position or undue influence of any party or person, by performing inspections as a BOH Inspector of properties owned by private parties for whom he had performed constable services. It is undisputed that, on at least thirty-two (32) occasions, Picano performed BOH inspections of properties owned by private parties for whom he had performed constable services. A reasonable person who knew that Picano was being paid by private property owners to perform constable services would conclude that he would be less than diligent in identifying health code violations when he inspected their premises. There is no evidence that Picano filed any disclosure forms pursuant to § 23(b)(3) to eliminate this appearance. Additionally, Picano had been advised by the Enforcement Division that performing BOH inspections of properties owned by private parties for whom he had performed constable services violated § 23(b)(3).

Therefore, based on the parties’ Stipulation of Facts and Law, we find that Petitioner has proved by a preponderance of the evidence that Picano violated § 23(b)(3) on at least thirty-two (32) occasions by performing BOH inspections of properties owned by private parties for whom he had performed constable services.

III. ORDER

Having concluded that Respondent Louis Picano violated G.L. c. 268A, §§ 20 and 23(b)(3) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby ORDERS Louis Picano to pay a civil penalty of \$35,000.

DATE AUTHORIZED: February 18, 2011

DATE ISSUED: February 23, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0002**

**IN THE MATTER OF
WILLIAM SCHMIDT**

FINAL ORDER

On March 10, 2011, the parties filed a Joint Motion to Suspend Proceedings, Accept Proposed Settlement and Dismiss the Case (“Joint Motion”), along with a proposed Disposition Agreement. The parties request that the Commission approve the Disposition Agreement in settlement of this matter and dismiss this adjudicatory proceeding. The full Commission considered the Joint Motion in deliberations on March 18, 2011.

In the proposed Disposition Agreement, the parties agree to findings of fact and conclusions of law. The Disposition Agreement states that, in his position as Director of Planning and Control at the Executive Office of Health and Human Services, Respondent William Schmidt was a state employee as defined in G.L. c. 268A, § 1 for more than 30 days in 2009, and that he held a major policymaking position as defined in G.L. c. 268B and 930 CMR 2.00. As such, Schmidt was required to file a Statement of Financial Interests (“SFI”) for calendar year 2009 by May 17, 2010. He failed to do so.

Schmidt received a Formal Notice of Lateness on June 14, 2010, which advised him that failure to file his 2009 SFI within 10 days of receipt of such Notice would result in the imposition of civil penalties. Taking into account three additional days for receipt of the Notice by first class mail, Schmidt would incur no penalty if the SFI was filed by June 27, 2010. Schmidt missed this deadline. Failure to file by this date was a violation of G.L. c. 268B, § 5.

Schmidt filed his 2009 SFI on July 26, 2010, twenty-nine days after the deadline. At the time, the schedule of penalties for first-time late submission of an SFI listed a \$400 civil penalty for filing 21 – 30 days late.

In the Disposition Agreement, Schmidt agrees to pay a civil penalty of \$400. This is the amount that Petitioner demanded in the Order to Show Cause. Respondent has tendered the payment of the \$400 civil penalty. In addition, Respondent further agrees to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this or any other administrative or judicial proceeding to which the Commission is or may be a party.

In support of the Joint Motion, the parties assert that settlement of this matter would be in the interests of justice, the parties and the Commission.

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion. The Disposition Agreement is **APPROVED**. Respondent's tendered payment of the \$400 civil penalty for violating G.L. c. 268B, § 5 is accepted. Commission Adjudicatory Docket No. 11-0002, In the Matter of William Schmidt, is **DISMISSED**.

DATE AUTHORIZED: March 18, 2011

DATE ISSUED: March 21, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0002**

**IN THE MATTER OF
WILLIAM SCHMIDT**

DISPOSITION AGREEMENT

The State Ethics Commission and William Schmidt ("Schmidt") 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).

The State Ethics Commission is authorized to enforce G.L. c. 268B, the Financial Disclosure Law, and in that regard to initiate and conduct adjudicatory

proceedings. On November 19, 2010, the Commission found reasonable cause to believe that Schmidt violated G.L. c. 268B, § 5, and authorized the initiation of adjudicatory proceedings.

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

Findings of Fact

1. Schmidt served as the Executive Office of Health and Human Services Director of Planning and Control for more than 30 days in 2009. As the Executive Office of Health and Human Services Director of Planning and Control, Schmidt was a state employee as that term is defined in G.L. c. 268A, § 1.

2. In accordance with G.L. c. 268B and 930 CMR 2.00, Schmidt's position of Executive Office of Health and Human Services Director of Planning and Control was designated as a major policy-making position for calendar year 2009. As such, Schmidt was required to file a Statement of Financial Interests ("SFI") for calendar year 2009 by May 17, 2010, in accordance with G.L. c. 268B and 930 CMR 2.00.

3. Schmidt was informed of his obligation to file an SFI for calendar year 2009.

4. Schmidt did not file an SFI on or before May 17, 2010.

5. On June 14, 2010, the Commission sent by first class mail a Formal Notice of Lateness ("Notice") to Schmidt. The Notice advised Schmidt that his SFI had not been filed and was, therefore, delinquent. The Notice further advised Schmidt that failure to file his 2009 SFI within 10 days of receipt of such Notice would result in the imposition of civil penalties. The Commission allows three days for receipt of the Notice if sent by first class mail. Therefore, Schmidt would not incur a civil penalty if he filed his SFI by June 27, 2010.

6. Schmidt did not file an SFI with the Commission until July 26, 2010.

7. Schmidt's failure to file an SFI within 10 days of receiving the Notice was a violation of G.L. c. 268B, §5.

8. General Laws c. 268B, § 4 authorizes the Commission to impose a civil penalty of up to \$10,000 for each violation of c. 268B.¹ During the relevant time, the Commission had two schedules of

penalties for SFIs filed more than 10 days after the receipt of the Notice.

For first time late submission of an SFI: 1-10 Days Late: \$100; 11-20 Days Late: \$200; 21-30 Days Late: \$400; 31 or More Days Late: \$1,000; Non-filing of an SFI: \$10,000.

For the repeated late submission of an SFI: 1-10 days delinquent: \$200; 11-20 days delinquent: \$400; 21-30 days delinquent: \$800; 31 days or more: \$2,000; Non-filing of an SFI: \$10,000

9. This is the first time Schmidt submitted his SFI late.

10. Schmidt's SFI was 29 days late, and based on the Commission's fine schedule for first time late submission of an SFI, the civil penalty is \$400.

Resolution

In view of the foregoing violation of G.L. c. 268B, § 5 by Schmidt, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, based on the following terms and conditions agreed to by Schmidt:

- (1) that Schmidt pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$400 as a civil penalty for violating G.L. c. 268B, § 5; and
- (2) that Schmidt waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: March 22, 2011

¹ General Laws c. 268B, the Financial Disclosure Law, as amended by c. 28 and c. 105 of the Acts of 2009, authorizes the Commission to impose a civil penalty of up to \$10,000 for each violation of c. 268B.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0009**

**IN THE MATTER OF
MARY CAPMAN**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Mary Capman ("Capman") 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 July 16, 2010, 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 Capman. On November 19, 2010, the Commission concluded its inquiry and found reasonable cause to believe that Capman violated G.L. c. 268A.

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

Findings of Fact

1. Capman was, a Gardner Golf Commission ("GGC") member from 2001 until her resignation in March 2010. She served as the GGC secretary, responsible for taking meeting minutes. As such, Capman was a municipal employee as that term is defined in G.L. c. 268A, § 1.

2. The GGC was responsible for overseeing the grounds and operation of the Gardner Municipal Golf Course ("Golf Course").

3. In the Fall of 2008, GGC members began discussing the possibility of installing a computer system at the Golf Course.

4. In October 2008, Capman informed the GGC that her step-son, Don Capman, Jr. ("Don"), owned J.D. Associates ("JDA"), a Leominster company that sold Point of Sale ("POS") software and hardware. Capman offered to contact JDA and arrange for JDA to make an informational presentation at a GGC meeting.

5. At the November 18, 2008 GGC meeting, Capman stated that she had a casual conversation with Don, who had provided her with an estimate of the costs in

the vicinity of \$5,000 for installation of a POS system at the Golf Course's pro shop. JDA was interested in making a presentation to the GCC. GCC members indicated an interest in hearing the presentation.

6. On December 16, 2008, Capman introduced Don's partner, John Deery ("Deery"), to the GGC, and Deery gave a presentation, with Capman present, about the POS equipment the pro shop would require.

7. Capman did not file a written disclosure with her appointing authority, the City Council, concerning her familial relationship with Don when she introduced Deery to the GGC.

8. In February 2009, the GGC's Chairman, Capman, and one other GGC member had an informal meeting with Deery at a GGC member's business office to discuss a proposed agreement between the GGC and JDA. Don was not present at the meeting. Capman did not speak, and there were no official votes taken. The Chairman finalized the terms of the agreement with Deery at the February meeting.

9. On February 26, 2009, Deery signed a contract ("Contract") on behalf of JDA for POS equipment and services to be provided to the GGC. On March 1, 2009, the GGC Chairman signed the Contract on behalf of the GGC. The Contract was for a total of \$10,210 in hardware, software, and services to be provided by JDA. In lieu of monetary payment for JDA's goods and services, the Contract specified that JDA would receive the following at the Golf Course for three years (2009 through 2011): two annually transferable, fully paid family memberships; and two annually transferable, fully paid individual memberships.

10. In 2009, the Golf Course's non-resident, family golf memberships were each valued at \$1,160 per year and its non-resident, individual golf memberships were each valued at \$810. Golf memberships were also subject to either \$150 or \$200 surcharges per year. Therefore, the total value of these four memberships for the term of the Contract was approximately \$12,000.

11. Although Capman did orally inform the other members of the GGC, she did not file a written disclosure with the City Council concerning her familial relationship with Don when the GGC entered into the Contract with JDA.

12. By April 2009, the POS equipment had been installed at the Golf Course and was fully functional.

The 2009 family Golf Course memberships made available by the contract were given to, and used by, Don and his wife, as well as by Deery and his wife. The individual memberships were also given to, and used by, JDA employees for 2009.

13. In June 2010, the Gardner City Solicitor voided the Contract between GGC and JDA, and mandated that the POS equipment be removed from the Golf Course and returned to JDA. The JDA Golf Course memberships were also rescinded in June 2010. At that time, JDA had received approximately \$4,000 worth of goods and services from the Contract.

Conclusions of Law

Section 19

14. Section 19(a), in relevant part, prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which to her knowledge, her immediate family³ has a financial interest.⁴

15. Section 19(b)(1) provides that it is not a violation of §19 if the municipal employee first advises the official responsible for appointment to her position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.

16. The decision to have JDA address the GGC about a potential POS equipment and services contract was a particular matter.

17. Additionally, the decision to award the Contract was another particular matter.

18. Capman's step-son had a financial interest in those decisions because he would receive a financial benefit from the Contract.

19. By introducing and recommending JDA to the GGC, getting an estimated cost amount from JDA and communicating that amount to the GGC, Capman participated in her capacity as a GGC member in the decision to have JDA make a presentation to the GGC, and in the decision to award the Contract to JDA.

20. As her step-son, Don was a member of Capman's immediate family.

21. Capman did not disclose to her appointing authority Don's financial interest, and receive a written determination as required by § 19(b)(1).

22. Therefore, based on the foregoing, Capman violated § 19.

Resolution

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

- (1) that Mary Capman pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$500 as a civil penalty for violating G.L. c. 268A, § 19; and
- (2) that Mary Capman waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: March 25, 2011

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. 11-0006**

**IN THE MATTER OF
ERIL LIGONDE**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Eril Ligonde ("Ligonde") 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 April 16, 2010, 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 Ligonde. The Commission has concluded its inquiry and, on January 21, 2011, found reasonable cause to believe that Ligonde violated G.L. c. 268A.

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

Findings of Fact

1. During the relevant time period, James DiPaola was the elected Middlesex County Sheriff. The Middlesex Sheriff's Office ("MSO") is responsible for the operation of the Billerica House of Correction ("BHC").

2. During the relevant time period, Ligonde was a captain at the MSO assigned to the BHC.

3. During the relevant time period, Richard McKinnon and Heidi Ricci were BHC corrections officers ("COs").

4. The Massachusetts Campaign Finance Law, G.L. c. 55, prohibits an appointed and compensated public employee from soliciting political contributions (c. 55, § 13) and prohibits anyone from soliciting or receiving campaign contributions in government buildings (c. 55, § 14).

5. In October 2009, Ligonde wanted to hold a fundraiser for DiPaola's re-election campaign. Ligonde approached McKinnon and Ricci about helping him to organize the fundraiser. Both agreed to provide assistance.

6. Ligonde contacted DiPaola's MSO administrative assistant to schedule the event. Once a date was set, Ligonde (sometimes with McKinnon) repeatedly spoke or met with DiPaola's campaign treasurer to discuss the fundraiser.

7. Ricci arranged to hold the fundraiser at the Tewksbury Country Club ("TCC"). DiPaola's campaign treasurer arranged to have tickets printed for the event. DiPaola's campaign treasurer contacted Ligonde when the tickets were ready, and Ligonde picked up the tickets at the campaign treasurer's house.

8. The text on the front of the fundraiser tickets was, "Friends of Middlesex Sheriff James V. DiPaola Cordially Invite You to a Reception in His Honor." The information printed on the tickets included the location (TCC) and date and time of the fundraiser (November 19, 2009, from 6:00 to 9:00 p.m.). At the bottom of the tickets were the words, "Suggested Donation \$50/\$100. Please make checks payable to The DiPaola Committee" and "Paid for by the DiPaola Committee."

9. While on state time and while using an MSO computer,¹ Ricci created and maintained a document listing approximately 500 MSO employees, which Ligonde used to solicit donations for the fundraiser from MSO employees. In addition to the employees' names, the list noted how many tickets, if any, each employee had received, and the "amount donated." While on state time and while using an MSO computer, Ricci created and maintained a second solicitation list, with the names of approximately 50 employees who were the responsibility of McKinnon to solicit for donations for the fundraiser.

10. Ligonde, and, to a lesser extent, McKinnon, on state time and in MSO buildings, repeatedly solicited and received donations for the fundraiser from MSO employees. Ligonde was a captain; therefore, most of his solicitations were of his subordinates.

McKinnon was not a superior officer; his solicitations were either of his peers or his superiors.

11. At the TCC fundraiser, Ricci delivered to DiPaola's campaign treasurer an envelope containing approximately \$4,000 in cash and checks, which Ligonde and McKinnon had solicited. Tickets were also sold at the door by DiPaola's campaign treasurer.

12. Approximately 60 people, most of them MSO employees and their spouses, attended the fundraiser.

13. The DiPaola campaign reports filed with the Office of Campaign and Political Finance (OCPF) listed McKinnon's wife and Ligonde's ex-wife as having made "in kind" contributions of \$500 to the DiPaola campaign in connection with the fundraiser. DiPaola's campaign treasurer did not speak with McKinnon's wife prior to the fundraiser. DiPaola's campaign treasurer never communicated with Ligonde's ex-wife regarding the fundraiser. Ligonde's ex-wife was not involved with the event in any way, nor was she aware that the DiPaola campaign had reported to OCPF that she had made an in-kind contribution.

Conclusions of Law

14. As an MSO captain, Ligonde was a state employee as defined by G.L. c. 268A, § 1.²

Soliciting MSO Subordinates to Purchase Fundraiser Tickets

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

16. Ligonde, knowingly or with reason to know, used or attempted to use his official position to secure the donations. Ligonde, as an MSO captain in a paramilitary organization, had authority over the subordinates he solicited. Consequently, any request by him to a subordinate unavoidably implicated his official position, particularly where those requests were made during his MSO work hours and in MSO buildings.

17. Each donation received as a result of Ligonde's solicitations was an unwarranted privilege to DiPaola as it was obtained in violation of G.L. c. 55, which

prohibits appointed and compensated employees, such as Ligonde, from making such solicitations (c. 55, § 13) and/or doing so in a public building (c. 55, § 14).

18. This unwarranted privilege was of substantial value because the suggested donation per ticket to the fundraiser was “\$50/\$100,” and MSO employees and/or their relatives paid those amounts.³

19. This unwarranted privilege was not properly available to similarly situated individuals (i.e., other candidates vying for public office).

20. Therefore, by, in the manner described above, using his MSO captain position to secure for DiPaola donations obtained in violation of G.L. c. 55, Ligonde knowingly or with reason to know used his official position to obtain unwarranted privileges of substantial value not properly available to other similarly situated individuals in repeated violation of § 23(b)(2)(ii).

Use of State Resources

21. The Commission has consistently held that the use of public resources of substantial value for political purposes amounts to the use of one’s official position to secure an unwarranted privilege. These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee’s time on the public payroll.

22. Ligonde solicited numerous MSO employees on state time in state buildings to attend a fundraiser for DiPaola, and Ligonde maintained a list on MSO computers of approximately 500 MSO employees for potential solicitation.

23. By using MSO time, facilities and equipment to organize and solicit donations for a fundraiser for DiPaola’s reelection campaign, Ligonde used his MSO captain position.

24. The use of these MSO resources was a privilege.⁴

25. The privilege was unwarranted because state resources are to be used solely for official state purposes.

26. The privilege was of substantial value because the value of the resources was well over \$50.00.

27. The privilege was not properly available to other candidates vying for public office.

28. Therefore, based on the foregoing, Ligonde repeatedly violated § 23(b)(2)(ii).

Resolution

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

- (1) that Ligonde pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$10,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that Ligonde waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: March 23, 2011

¹ When users log on to the MSO network, a screen is displayed stating that it is unacceptable to use the office’s technology resources for, among other things, “any political purposes.”

² MSO employees are employees of the Commonwealth. 1997 Mass. Acts 48.

³ See *Commonwealth v. Famigletti*, 4 Mass. App. 585, 587 (1976) (Court held that \$50 in cash is considered “substantial value”).

⁴ See Advisory 84-01: Political Activity.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0007**

**IN THE MATTER OF
RICHARD MCKINNON**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Richard McKinnon (“McKinnon”) 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 April 16, 2010, 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 McKinnon. The Commission has concluded its inquiry and, on January 21, 2011, found reasonable cause to believe that McKinnon violated G.L. c. 268A.

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

Findings of Fact

1. During the relevant time period, James DiPaola was the elected Middlesex County Sheriff. The Middlesex Sheriff’s Office (“MSO”) is responsible for the operation of the Billerica House of Correction (“BHC”).

2. During the relevant time period, McKinnon was a BHC corrections officer (“CO”).

3. During the relevant time period, Heidi Ricci was a BHC CO.

4. During the relevant time period, Eril Ligonde was a captain at the MSO assigned to the BHC.

5. The Massachusetts Campaign Finance Law, G.L. c. 55, prohibits an appointed and compensated public employee from soliciting political contributions (c. 55, § 13) and prohibits anyone from soliciting or receiving campaign contributions in government buildings (c. 55, § 14).

6. In October 2009, Ligonde wanted to hold a fundraiser for DiPaola’s re-election campaign. Ligonde approached McKinnon and Ricci about helping him to organize the fundraiser. Both agreed to provide assistance.

7. Ligonde contacted DiPaola’s MSO administrative assistant to schedule the event. Once a date was set, Ligonde (sometimes with McKinnon) repeatedly spoke or met with DiPaola’s campaign treasurer to discuss the fundraiser.

8. Ricci arranged to hold the fundraiser at the Tewksbury Country Club (“TCC”). DiPaola’s

campaign treasurer arranged to have tickets printed for the event. DiPaola’s campaign treasurer contacted Ligonde when the tickets were ready, and Ligonde picked up the tickets at the campaign treasurer’s house.

9. The text on the front of the fundraiser tickets was, “Friends of Middlesex Sheriff James V. DiPaola Cordially Invite You to a Reception in His Honor.” The information printed on the tickets included the location (TCC) and date and time of the fundraiser (November 19, 2009, from 6:00 to 9:00 p.m.). At the bottom of the tickets were the words, “Suggested Donation \$50/\$100. Please make checks payable to The DiPaola Committee” and “Paid for by the DiPaola Committee.”

10. While on state time and while using an MSO computer,¹ Ricci created and maintained a document listing approximately 500 MSO employees, which Ligonde used to solicit donations for the fundraiser from MSO employees. In addition to the employees’ names, the list noted how many tickets, if any, each employee had received, and the “amount donated.” While on state time and while using an MSO computer, Ricci created and maintained a second solicitation list, with the names of approximately 50 employees who were the responsibility of McKinnon to solicit for donations for the fundraiser.

11. Ligonde, and, to a lesser extent, McKinnon, on state time and in MSO buildings, repeatedly solicited and received donations for the fundraiser from MSO employees. Ligonde was a captain; therefore, most of his solicitations were of his subordinates. McKinnon was not a superior officer; his solicitations were either of his peers or his superiors.

12. At the TCC fundraiser, Ricci delivered to DiPaola’s campaign treasurer an envelope containing

approximately \$4,000 in cash and checks, which Ligonde and McKinnon had solicited. Tickets were also sold at the door by DiPaola’s campaign treasurer.

13. Approximately 60 people, most of them MSO employees and their spouses, attended the fundraiser.

14. The DiPaola campaign reports filed with the Office of Campaign and Political Finance (OCPF) listed McKinnon’s wife and Ligonde’s ex-wife as having made “in kind” contributions of \$500 to the DiPaola campaign in connection with the fundraiser. DiPaola’s campaign treasurer did not speak with McKinnon’s wife prior to the fundraiser. DiPaola’s

campaign treasurer never communicated with Ligonde's ex-wife regarding the fundraiser. Ligonde's ex-wife was not involved with the event in any way, nor was she aware that the DiPaola campaign had reported to OCPF that she had made an in-kind contribution.

Conclusions of Law

15. As an BHC CO, McKinnon was a state employee as defined by G.L. c. 268A, § 1.²

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

17. The Commission has consistently held that the use of public resources of substantial value for political purposes amounts to the use of one's official position to secure an unwarranted privilege. These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee's time on the public payroll.³

18. McKinnon solicited numerous MSO employees on state time in state buildings to attend a fundraiser for DiPaola, and McKinnon maintained a list on MSO computers of approximately 50 MSO employees for potential solicitation.

19. By using MSO time, facilities and equipment to organize and solicit donations for a fundraiser for DiPaola's reelection campaign, McKinnon used his MSO CO position.

20. The use of these MSO resources was a privilege.

21. The privilege was unwarranted because state resources are to be used solely for official state purposes.

22. The privilege was of substantial value because the value of the resources was well over \$50.00.⁴

23. The privilege was not properly available to other candidates vying for public office.

24. Therefore, based on the foregoing, McKinnon repeatedly violated § 23(b)(2)(ii).

Resolution

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

- (1) that McKinnon pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$3,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that McKinnon waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: March 23, 2011

¹ When users log on to the MSO network, a screen is displayed stating that it is unacceptable to use the office's technology resources for, among other things, "any political purposes."

² MSO employees are employees of the Commonwealth. 1997 Mass. Acts 48.

³ See Advisory 84-01: Political Activity.

⁴ See *Commonwealth v. Famigletti*, 4 Mass. App. 585, 587 (1976) (Court held that \$50 in cash is considered "substantial value").

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0008**

**IN THE MATTER OF
HEIDI RICCI**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Heidi Ricci (“Ricci”) 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 April 16, 2010, 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 Ricci. The Commission has concluded its inquiry and, on January 21, 2011, found reasonable cause to believe that Ricci violated G.L. c. 268A.

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

Findings of Fact

1. During the relevant time period, James DiPaola was the elected Middlesex County Sheriff. The Middlesex Sheriff’s Office (“MSO”) is responsible for the operation of the Billerica House of Correction (“BHC”).

2. During the relevant time period, Ricci was a BHC corrections officer (“CO”).

3. During the relevant time period, Richard McKinnon was a BHC CO.

4. During the relevant time period, Eril Ligonde was a captain at the MSO assigned to the BHC.

5. The Massachusetts Campaign Finance Law, G.L. c. 55, prohibits an appointed and compensated public employee from soliciting political contributions (c. 55, § 13) and prohibits anyone from soliciting or receiving campaign contributions in government buildings (c. 55, § 14).

6. In October 2009, Ligonde wanted to hold a fundraiser for DiPaola’s re-election campaign. Ligonde approached McKinnon and Ricci about helping him to organize the fundraiser. Both agreed to provide assistance.

7. Ligonde contacted DiPaola’s MSO administrative assistant to schedule the event. Once a date was set, Ligonde (sometimes with McKinnon) repeatedly spoke or met with DiPaola’s campaign treasurer to discuss the fundraiser.

8. Ricci arranged to hold the fundraiser at the Tewksbury Country Club (“TCC”). DiPaola’s campaign treasurer arranged to have tickets printed for the event. DiPaola’s campaign treasurer contacted Ligonde when the tickets were ready, and Ligonde picked up the tickets at the campaign treasurer’s house.

9. The text on the front of the fundraiser tickets was, “Friends of Middlesex Sheriff James V. DiPaola Cordially Invite You to a Reception in His Honor.” The information printed on the tickets included the location (TCC) and date and time of the fundraiser (November 19, 2009, from 6:00 to 9:00 p.m.). At the bottom of the tickets were the words, “Suggested Donation \$50/\$100. Please make checks payable to The DiPaola Committee” and “Paid for by the DiPaola Committee.”

10. While on state time and while using an MSO computer,¹ Ricci created and maintained a document listing approximately 500 MSO employees, which Ligonde used to solicit donations for the fundraiser from MSO employees. In addition to the employees’ names, the list noted how many tickets, if any, each employee had received, and the “amount donated.” While on state time and while using an MSO computer, Ricci created and maintained a second solicitation list, with the names of approximately 50 employees who were the responsibility of McKinnon to solicit for donations for the fundraiser.

11. Ligonde, and, to a lesser extent, McKinnon, on state time and in MSO buildings, repeatedly solicited and received donations for the fundraiser from MSO employees. Ligonde was a captain; therefore, most of his solicitations were of his subordinates. McKinnon was not a superior officer; his solicitations were either of his peers or his superiors.

12. At the TCC fundraiser, Ricci delivered to DiPaola’s campaign treasurer an envelope containing approximately \$4,000 in cash and checks, which Ligonde and McKinnon had solicited. Tickets were also sold at the door by DiPaola’s campaign treasurer.

13. Approximately 60 people, most of them MSO employees and their spouses, attended the fundraiser.

14. The DiPaola campaign reports filed with the Office of Campaign and Political Finance (OCPF) listed McKinnon’s wife and Ligonde’s ex-wife as having made “in kind” contributions of \$500 to the

DiPaola campaign in connection with the fundraiser. DiPaola's campaign treasurer did not speak with McKinnon's wife prior to the fundraiser. DiPaola's campaign treasurer never communicated with Ligonde's ex-wife regarding the fundraiser. Ligonde's ex-wife was not involved with the event in any way, nor was she aware that the DiPaola campaign had reported to OCPF that she had made an in-kind contribution.

Conclusions of Law

15. As a BHC CO, Ricci was a state employee as defined by G.L. c. 268A, § 1².

16. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, using or attempting to use her official position to secure for herself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.

17. The Commission has consistently held that the use of public resources of substantial value for political purposes amounts to the use of one's official position to secure an unwarranted privilege. These resources include publicly provided stationery, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee's time on the public payroll.³

18. Ricci, on state time and using MSO computers, assisted Ligonde and McKinnon regarding their DiPaola fundraiser by creating and maintaining lists of over 500 MSO employees for potential solicitation to attend the fundraiser for DiPaola.

19. By using MSO time, facilities and equipment to organize and solicit donations for a fundraiser for DiPaola's reelection campaign, Ricci used her MSO CO position.

20. The use of these MSO resources was a privilege.

21. The privilege was unwarranted because state resources are to be used solely for official state purposes.

22. The privilege was of substantial value because the value of the resources was well over \$50.00.⁴

23. The privilege was not properly available to other candidates vying for public office.

24. Therefore, based on the foregoing, Ricci repeatedly violated § 23(b)(2)(ii).

Resolution

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

- (1) that Ricci pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$2,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that Ricci waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: March 23, 2011

¹ When users log on to the MSO network, a screen is displayed stating that it is unacceptable to use the office's technology resources for, among other things, "any political purposes."

² MSO employees are employees of the Commonwealth. 1997 Mass. Acts 48.

³ See Advisory 84-01: Political Activity.

⁴ See *Commonwealth v. Famigletti*, 4 Mass. App. 585, 587 (1976) (Court held that \$50 in cash is considered "substantial value").

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0018**

**IN THE MATTER OF
JOSEPH TURNER**

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

James T. Dangora, Jr., Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III, Ch.
David L. Veator,
Paula Finley Mangum
Martin F. Murphy

Presiding Officer: Commissioner David L. Veator

DECISION AND ORDER

Procedural Background

This matter was commenced on September 8, 2010, with the issuance of an Order to Show Cause (“OTSC”) alleging that Respondent Joseph Turner violated G. L. c. 268A, §§ 19¹, 23(b)(2)² and 23(b)(3) in 2008 by, while serving as a Town of Billerica (“Town” or “Billerica”) Department of Public Works (“DPW”) Cemetery, Parks and Trees Division (“Division”) Foreman, using his Division position to sell four cemetery plots to his parents before they had a need for the plots and prior to an increase in the price of cemetery plots. Turner answered the OTSC on September 27, 2010, denying most of the allegations. Turner’s subsequent Motion for Summary Decision was denied and an adjudicatory hearing was held on December 14, 2010, at which the parties put into evidence exhibits and testimony. The parties made their closing arguments at the December 14th hearing before Commissioner Veator and thereafter submitted final briefs.

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.

Allegations and Defenses

The OTSC alleges that Turner violated G. L. c. 268A, §§ 19, 23(b)(2) and (3), in May 2008, when, acting in his capacity as Division Foreman, he sold four cemetery plots to his parents for \$1,560, and directed the Division Clerk to complete the deed paperwork for the plots, before his parents needed the plots and shortly before prices for the plots were increased, saving his parents \$440 on their purchase. According to the OTSC, Turner thus participated as a municipal employee in a particular matter in which he knew his parents had a financial interest in violation of § 19,

and knowingly or with reason to know, used his official position to obtain for them privileges of substantial value in violation of § 23(b)(2) and acted in a manner which would cause a reasonable person to conclude that his parents could improperly influence or unduly enjoy his favor in the performance of his official duties in violation of § 23(b)(3).

In his Answer, Turner denies all of the allegations of the OTSC except for the Commission’s jurisdiction, his municipal employment, that his parents are members of his immediate family and three statements of law. In his affirmative defenses, Turner denies, inter alia, that he sold the cemetery plots or that his parents gained financially, and asserts that his superiors were fully aware of and permitted the transaction.

Findings of Fact

1. Turner has been employed by the Town for thirty-eight years and was, at all relevant times, the senior working foreman in the Division. As such, Turner reports to the Cemetery Superintendent, who in turn reports to the DPW Director. Turner’s appointing official is the Town Manager.

2. During the relevant period, Turner’s duties as Division Foreman in practice included selling or assisting in the sale of cemetery plots.³ Turner’s duties also included being the person in charge of the Division when the Cemetery Superintendent was on vacation.

3. At all relevant times, Town policy restricted the purchase of Town cemetery plots to Town residents. In addition, there was a Town policy or practice that generally restricted the purchase of cemetery plots to situations where the plot was immediately needed for a burial. Generally, plots were not sold “pre-need.” During the relevant period, this no “pre-need” sales policy or practice was stated in the Town’s Annual Reports and on the DPW and Division websites, but was not stated on the Town Cemetery Commission’s website.

4. The Town’s no “pre-need” sale of cemetery plots policy or practice was subject to two exceptions at the discretion of the Cemetery Superintendent. Thus, where a plot or plots had been previously purchased by a family for a burial and the family had not at that time purchased the maximum number of plots allowable, the family could subsequently purchase additional plots up to the allowable maximum even if there had not been an additional death requiring a

burial. In addition, in some cases plots had been committed to buyers, but not actually sold, where a death was imminent, but had not yet occurred.

5. The Town's Cemetery Commission establishes rules and regulations regarding the Town's cemeteries and sets the fees charged for cemetery plots. The Cemetery Commission Rules and Regulations set forth the terms and conditions under which plot owners may use and care for burial plots and transfer "rights of burial" in cemetery plots, but do not regulate or restrict the original purchase of such plots. In early 2008, the Cemetery Commission at its regular meetings discussed in open public session increasing the fees for cemetery plots and, by May 2008, decided to do so effective July 1, 2008. Due to an error in the posting of the notice of the fee increase, however, it did not take effect until mid-August 2008.

6. By May 2008, at least some Division staff members had become aware of the impending fee increase, including Cemetery Superintendent Neville Rivet, who attended Cemetery Commission meetings, and Division Clerk Fiona McKenna, who testified that she learned in March or April 2008 that the Cemetery Commissioners were considering an increase.

7. In May 2008, Turner's parents, residents of Billerica, were elderly and his father was in ill health. Neither of Turner's parents was, however, at the time, facing imminent death; and both were still living as of the date of the adjudicatory hearing in December 2010.

8. In May 2008, Turner was aware of the Town practice or policy of not selling cemetery plots "pre-need." Given Rivet's and McKenna's knowledge of the pending increase of cemetery plot fees, that Turner talked to McKenna regularly to get his work assignments (which Rivet communicated to Turner through McKenna) and that Turner's duties involved selling plots, it is more likely than not that by May 2008, Turner was also aware that the fees for cemetery plots were soon to increase. In any case, Turner had reason to know of the price increase at that time.

9. On or about May 22, 2008, Turner accepted from his parents his father's personal check for \$1,560, dated May 22, 2008, for the purchase of four cemetery plots.⁴ Turner decided to arrange the sale of the plots to his parents on May 22, 2008, although he knew that his parents were not then in need of a

cemetery plot for a burial. In addition, despite knowing that, under Division practice and policy, "pre-need" sales were only made at the discretion of the Cemetery Superintendent, Turner chose not to wait to discuss the sale with Superintendent Rivet, who was then on vacation. To effect the sale, Turner wrote the identifying numbers and letters of four plots, which he obtained from the cemetery plan, on his father's check, gave the check to Division Clerk McKenna, and directed her to process the paperwork for the sale of the plots.

10. Turner's father's name was clearly and prominently printed on the \$1,560 check, which was dated May 22, 2008. McKenna, who was aware that the check was from Turner's father, deposited the check with the Town Treasurer in the normal course and prepared a "deed" for the sale of the plots to Turner's father for signature by then Superintendent Rivet.⁵ McKenna was aware of the Town policy or practice of not selling plots "pre-need." McKenna did as Turner directed because, as the senior Division foreman, he was in charge in Superintendent Rivet's absence.

11. Superintendent Rivet's signature on the plot deed was the final step required to complete the sale of cemetery plots. Turner's father's name was clearly hand-printed on the top of the deed. Either shortly before or shortly after he signed the deed on or about June 5, 2008, but in any case before the deed was mailed to Turner's parents, McKenna and Rivet discussed the fact that the deed was for plots being sold to Turner's parents. Superintendent Rivet was aware of the policy or practice on not selling plots "pre-need." Rivet did not take any action to stop or rescind the sale of the plots to Turner's parents. In addition, although he testified that he believed and thought that he reported the transaction to his superior, DPW Director Abdul Alkhatib, Rivet's uncertainty on the point makes it more likely than not that he did not do so.

12. Turner did not have approval in advance of Superintendent Rivet or of his predecessor Superintendent Charles Faria, for his parents to purchase and for him to sell to them cemetery plots "pre-need."

13. Turner did not seek or obtain a written determination from his appointing official, the Town Manager, under §19(b)(1) permitting him to participate in the sale of the cemetery plots to his parents, nor did he make a disclosure to the Town Manager as provided in §23(b)(3).

14. Turner's parents had a monument placed on one of the purchased plots in October 2008. No action was taken by the Cemetery Superintendent, the Division, the DPW, the Cemetery Commission or the Town to prevent the placement of the Turners' monument or to have it removed.

15. In June 2009, DPW Director Alkhatib received a telephone call reporting Turner's parents' "pre-need" purchase of cemetery plots from an unidentified telephone caller. In August 2009, the DPW Director appointed a Division employee junior to Turner as Acting Superintendent to replace Rivet, who retired that month. Turner contested the appointment before the Civil Service Commission due to an alleged procedural irregularity. The Civil Service Commission proceedings were dismissed on agreed terms in March 2010. The Division employee junior to Turner was subsequently appointed as Cemetery Superintendent. During this same period, the Town, through its Police Chief, conducted an investigation of Turner's sale of the cemetery plots to his parents.

16. Turner's first ethics training was in March 2010.

Discussion

Petitioner must prove its case and each element of the alleged violations by a preponderance of the evidence. 930 CMR 1.01(10)(o). The burden of proving compliance with an exemption to a prohibition under G. L. c. 268A is on the public employee claiming the exemption. *In Re Pathiakis*, 2004 SEC 1167, 1172; *In Re Celluci*, 1988 SEC 346, 349. The weight to be attached to any evidence in the record, including evidence concerning the credibility of witnesses, rests within the sound discretion of the Commission. 930 CMR 1.01(10)(n).

As to all alleged violations, there is no dispute that Turner was, at all relevant times, a Billerica municipal employee and that his parents are his immediate family members within the meaning of G. L. c. 268A. The parties have so stipulated.

Section 19

In order to establish a §19 violation by Turner, Petitioner was required to prove that Turner participated as a municipal employee in a particular matter in which his immediate family member(s) had, to his knowledge, a financial interest. Petitioner has established that Turner violated §19 by participating as Division Foreman in the 2008 sale of cemetery plots to his parents, as follows:

First, as noted above, there is no dispute that Turner, as a Division foreman, was a municipal employee of the Town at all times here relevant and that Turner's parents are members of his immediate family.

Second, given that for conflict of interest law purposes, a "particular matter" is, *inter alia*, any "contract...decision, [or] determination,"⁶ the sale of the cemetery plots to Turner's parents was clearly a particular matter, as the evidence shows it to have been a contract and to have involved decisions and determinations, including that Turner's parents were eligible to purchase the plots and that the plots should be sold to them.

Third, the evidence shows that Turner's parents had a substantial and obvious financial interest in the decision to sell and the sale to them of the cemetery plots. In short, if the sale occurred, his father's check would be cashed and his parents would receive four cemetery plots in exchange for their \$1,560. While financial interest is not defined in the statute, Turner's parents' interest as purchasers of the cemetery plots was well within the Commission's established interpretation of the phrase to include a financial interest of any size, either positive or negative, as long as it is direct and reasonably foreseeable. Turner's parents' financial interest in the decision to sell them the plots for \$1,560 was not remote, speculative or not sufficiently identifiable. Given that the evidence shows that he personally presented his father's check for the purchase of the plots to the Division Clerk, Turner unavoidably knew of his parents' financial interest in the sale of the cemetery plots to them.

Fourth, the evidence shows that Turner participated "personally and substantially" as a municipal employee in the particular matter of the sale of the cemetery plots to his parents.⁷ Thus, the evidence shows that Turner, as Division Foreman and as part of his duties in that position, personally made at least the initial decision to sell the plots to his parents "pre-need," selected the plots, wrote the plot numbers on his father's check and directed Division Clerk McKenna to do the necessary paperwork to complete the sale. Turner's official participation was substantial in that, without it, his parents would not have been able to purchase the plots when they did and for the amount they paid.

In taking these actions, Turner did not simply act on behalf of his parents in their purchase of the plots. Instead, he took actions which he could only take as Division Foreman, including deciding to follow the

process for routine plot purchases and not do what he testified he did with other “pre-need” purchases, i.e., refer the matter to the Superintendent to decide in his discretion. In short, Turner, as Division Foreman, made the decision to sell and sold the four cemetery plots to his parents. The fact that the sale required the Superintendent’s signature on the deed for completion and could have been halted by the Superintendent, does not alter the fact that Turner personally and substantially participated in the sale. One does not have to be the final decision-maker in order to participate in a matter for §19 purposes.

Accordingly, Petitioner has proved by a preponderance of the evidence that on or about May 22, 2008, Turner personally and substantially participated as Division Foreman and a municipal employee in the particular matter of the decision to sell and sale of the cemetery plots to his parents in which he knew his parents, his immediate family members, had a financial interest. In so doing, Turner violated §19.

Finally regarding the alleged §19 violation, at no time did Turner, pursuant to §19(b)(1), make a written disclosure to his appointing official, the Town Manager, and receive a written determination from that official allowing his participation in the decision to sell and the sale of the plots to his parents notwithstanding their financial interest in that decision and sale. The burden of proving facts establishing a §19(b)(1) disclosure and determination was on Turner. Turner did not meet that burden.⁸

Section 23(b)(2)

To establish that Turner violated § 23(b)(2), Petitioner was required to prove that Turner, knowingly or with reason to know, used or attempted to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. Petitioner has established that Turner violated § 23(b)(2) by using his position as Division Foreman to secure cemetery plots for his parents “pre-need,” in violation of established Town policy, and just before a substantial price increase.

First, the preponderance of the evidence shows that Turner’s parent’s “pre-need” purchase of the cemetery plots was an unwarranted privilege which was not properly available to them or to similarly situated individuals, as follows:

Although Turner argues that there was no policy prohibiting “pre-need” sales of plots, the evidence in the record of the existence of that policy is overwhelming. In addition to the testimony of Petitioner’s witnesses DPW Director Alkhatib, Cemetery Commissioner Busalacchi, former Cemetery Superintendent Rivet and Cemetery Division Clerk McKenna, the excerpts from the Town of Billerica Annual Reports and the DPW website page (Exhibits 9 and 15) explicitly support the existence of the policy. Indeed, even Turner at the adjudicatory hearing supported the existence of at least an unwritten policy when he testified, “I had never seen anything in writing. There was talk. No, there weren’t to be pre-need sales but I never saw anything in writing.” That same testimony supports the conclusion that Turner was aware of the no “pre-need” sales policy at all relevant times.

While the evidence indicates that there were exceptions to the policy and that the Cemetery Superintendent had some discretion in enforcing the policy, the preponderance of the evidence is that Turner’s parents’ situation was not within either of the established exceptions to the policy that would justify a sale at the Superintendent’s discretion. The evidence shows that, as exceptions to the rule against “pre-need” sales, plots were sold pre-need in two types of situations.⁹ The first situation was one of imminent death, where plots were “committed” or reserved in cases where a person was believed to be about to die in a matter of hours or days. The second situation involved cases where a family had previously bought a plot or plots (but fewer than the total number allowed to be purchased) upon the death of a family member now buried in the plot and the family later sought to purchase additional adjoining or nearby graves up to the maximum number allowed. There is no evidence that Turner’s parents had previously purchased a plot for a burial and were in May 2008 seeking to buy adjoining plots up to the permitted maximum, and the evidence shows that neither of Turner’s parents was facing imminent death at that time.

While Turner testified and argues that both the then current and the immediately prior Cemetery Superintendents had exercised their discretion to permit his parents to purchase plots “pre-need,” there is, however, no evidence in the record of any actual approval by either Cemetery Superintendent apart from Turner’s testimony, which was not credible. Faria did not testify¹⁰ and Rivet denied giving Turner approval. The credibility of Turner’s hearing

testimony was undermined by his unconvincing attempt to minimize his involvement in the sale of the cemetery plots to his parents when he had unequivocally stated under oath during the preliminary inquiry that he had sold his parents the plots and where the evidence clearly establishes that he effectively did so, and by his inconsistent testimony about when the Cemetery Superintendent's approval was required for the sale of cemetery plots and his own role in those sales. Superintendent Rivet's failure to act to undo the sale or to prevent its completion was not equivalent to his approval of it in the proper exercise of his discretion and did not legitimize the sale or Turner's participation in it.

Second, the evidence shows that the privilege of purchasing the plots "pre-need" in May 2008 was of substantial value¹¹ to Turner's parents in two ways. First, it was of intangible, that is, non-quantifiable, substantial value in that Turner's parents thus gained the peace of mind of knowing that they would be buried in the Town cemetery. Such peace of mind, although not specifically quantifiable, is in our view plainly worth \$50 or more, as it would spare the surviving spouse and others (including, most likely, Turner) the inconvenience and stress of locating a suitable cemetery plot at the time of death. Second, it was of substantial value because it allowed them to avoid a \$440 price increase in mid-2008 and any subsequent price increases.

Third, the evidence shows that Turner used his position as Division Foreman to secure for his parents the unwarranted privilege of the opportunity to purchase cemetery plots "pre-need" and pre-price increase. Thus, it was only as Division Foreman that Turner was able to effect the "pre-need" sale of the plots to his parents, contrary to Division policy and practice, and direct the Division Clerk to process the paperwork required to complete the sale.

Fourth, the evidence shows that Turner acted knowingly or with reason to know in his use of his official position to obtain for his parents the unwarranted privilege of purchasing cemetery plots "pre-need" and pre-price increase. Thus, the preponderance of the evidence shows that Turner knew that the sale to his parents was contrary to Division policy and practice and that he probably also knew of the 2008 price increase.¹²

Accordingly, Petitioner has proved by a preponderance of the evidence that on or about May 22, 2008, Turner violated § 23(b)(2) by, knowingly or with reason to know, using his position as Division Foreman to secure for his parents the unwarranted

and substantially valuable privilege, not properly available to similarly situated individuals, of purchasing cemetery plots "pre-need," in violation of established Town policy and practice, and just before a substantial price increase.

Section 23(b)(3)

In order to establish that Turner violated § 23(b)(3), Petitioner was required to prove that Turner, knowingly or with reason to know, acted in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. Petitioner has met its burden.

The preponderance of the evidence in the record of Turner's actions in connection with the 2008 sale of cemetery plots to his parents would, in our view, cause a reasonable person, with knowledge of the relevant circumstances, to conclude that Turner's parents could improperly influence him or unduly enjoy his favor in the performance of his official Division Foreman duties or that he was likely to act or fail to act as a result of kinship with or undue influence by his parents. Most importantly, the evidence establishes that Turner did not treat his parent's "pre-need" purchase of plots as he testified he had treated all others, by referring them to the Superintendent. Indeed, contrary to his practice with others making similar "pre-need" purchase requests, Turner on his own decided to and sold his parents four cemetery plots "pre-need."

The evidence further shows that Turner did not at any time here relevant, make a written disclosure to his appointing official, the Town Manager, of the relevant circumstance which would otherwise have caused an appearance of conflict of interest in violation of § 23(b)(3) pursuant to the final sentence of that section, such as to avoid his violation of that section. Proof that no disclosure was made was not an element of Petitioner's proof of a §23(b)(3) violation. The burden of proving that he made a §23(b)(3) disclosure was on Turner. Turner did not meet that burden.

Accordingly, Petitioner has proved by a preponderance of the evidence that on or about May 22, 2008, Turner violated § 23(b)(3) by, knowingly or with reason to know, acting with respect to his parents' "pre-need" purchase of cemetery plots in a manner which would cause a reasonable person, with

knowledge of the relevant circumstances, to conclude that Turner's parents could improperly influence him or unduly enjoy his favor in the performance of his official Division Foreman duties or that he was likely to act or fail to act as a result of kinship with or undue influence by his parents.

Conclusion and Finding

For the above stated reasons, we conclude that Petitioner has proved by a preponderance of the evidence that Turner violated G. L. c. 268A, §§, 19, 23(b)(2) and 23(b)(3), and we so find.

Order

Although we have found that Turner violated the conflict of interest law, there are factors in this case that make a small civil penalty appropriate. First, Turner's supervisor, despite knowing that Turner had sold his parents cemetery plots "pre-need," failed to take action to avoid or to immediately rescind the transaction by which Turner violated the law, thus missing the opportunity to avoid harm to the Town and block Turner's securing of an unwarranted benefit for his parents. This failure to immediately and decisively act came very close to a de facto after-the-fact approval of the transaction, particularly given the Cemetery Superintendent's discretion concerning the sale of plots. While this post-violation inaction by others does not excuse Turner's violations, it did as a practical matter deprive him of the opportunity to correct his mistake while it was relatively harmless, and it may have misled him into erroneously believing that there was no mistake that needed correction. Instead, as a result of this inaction and the subsequent slowness to take corrective action of the Division and the Town, Turner's violation was allowed to compound with time and his parents' installation of a monument. Second, the unwarranted privilege that Turner secured for his parents was of relatively modest value. Third, while we have found that Turner had reason to know, and most likely actually knew of the impending price increase at the time of the transaction, the evidence on this point made this a very close question. Fourth, the conduct constituting Turner's violation was not of a kind whose illegality would be obvious to a person in his position, particularly where Turner did not receive any ethics training until after the violation in 2010. For all of these reasons, we conclude that a civil penalty of \$440, the amount saved by Turner's parents by buying their four cemetery plots before the August 2008 fee increase, is the appropriate sanction for Turner's violations.

Accordingly, having found that Respondent Joseph Turner violated G. L. c. 268A, §§ 19, 23(b)(2) and 23(b)(3), as specified above, the Commission, pursuant to the authority granted it by G. L. c. 268B, § 4(j), hereby **ORDERS** Turner to pay a total civil penalty of \$440 for those violations.

DATE AUTHORIZED: April 15, 2011

DATE ISSUED: May 10, 2011

¹ Section 19, in relevant part, prohibits a municipal employee from participating as such in a particular matter in which a member of his immediate family has, to the employee's knowledge, a financial interest.

² In 2008, § 23(b), in relevant part, prohibited a municipal employee from knowingly or with reason to know (2) using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals; and (3) acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of the undue influence of any party or person (provided further that it shall be unreasonable to so conclude if the municipal employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion). Section 23(b) was amended in 2009 in respects not relevant to this matter.

³ What is referred to as "the sale of cemetery plots," is actually the sale of the burial rights to specific plots in Town cemeteries.

⁴ This price was \$440 less than under the new rates effective August 2008.

⁵ What is referred to as a "deed" is in fact a receipt for the "right of internment" in a specific cemetery plot or plots.

⁶ G. L. c. 268A, § 1 (k).

⁷ "Participate" includes participating in agency action or in a particular matter personally and substantially as a municipal employee through approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. G. L. c. 268A, § 1 (j).

⁸ Turner also failed to introduce evidence sufficient to establish that his immediate supervisors, Superintendent Faria and Superintendent Rivet, approved of his participation in the sale of the cemetery plots to his parents. Turner's only evidence was his unconvincing testimony. In any case, because neither superintendent was Turner's appointing official, even had Turner succeeded in proving their approval of his sale of the plots to his parents, that would not have disproved his violation of §19, as a §19(b)(1) determination may only be made by the appointing official, here the Town Manager.

⁹ Turner argues that the Town prevented him from gathering evidence of additional "pre-need" sales, but the evidence shows that he in fact made little effort to do so. In any case, Turner introduced no evidence of any other exceptions to the no "pre-need" sales policy.

¹⁰ Billerica Police Chief Daniel Rosa testified to out of court statements by Faria denying that he had authorized the purchase by Turner's parents. While we found Chief Rosa credible in his testimony, we do not rely on these statements in reaching our conclusion.

¹¹ Anything worth \$50 or more is of "substantial value" for G. L. c. 268A purposes. 930 CMR 5.05.

¹² Given Turner's clearly established knowledge of the no "pre-need" sales policy, it is not necessary for us to further find that he also in fact knew of the impending price increase, as his "pre-need" sale of the plots to his parents, with knowledge of that policy, establishes his violation of § 23(b)(2) regardless of whether he also knew or had reason to know of the price increase. The preponderance of the evidence does, however, establish that Turner had at least reason to know of the price increase.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 11-0001**

**IN THE MATTER OF
ROBERT FORTES**

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Robert Fortes
Respondent

Commissioners: Charles B. Swartwood, III, Ch.
David L. Veator
Patrick J. King
Paula Finley Mangum
Martin F. Murphy

Presiding Officer: Commissioner David L. Veator

**ALLOWANCE OF JOINT MOTION AND
ORDER OF DISMISSAL**

On May 6, 2011, the parties filed a Joint Motion to Dismiss, requesting that the Commission dismiss these adjudicatory proceedings concerning Respondent's alleged violation of G.L. c. 268B by filing his Statement of Financial Interests for calendar year 2009 more than 31 days late. Presiding Officer David L. Veator referred the Joint Motion to the full Commission for deliberations on May 20, 2010, pursuant to 930 CMR 1.01(6)(a) and (c).

In support of the Joint Motion, the parties assert that Respondent has provided corroboration to the Commission of his assertion that there were circumstances that impaired his ability to timely file his SFI for calendar year 2009, namely that he was a primary caregiver to his uncle who was terminally ill, and that, based on these mitigating circumstances, the interests of justice, the parties and the Commission will be served by dismissal of these adjudicatory proceedings. Having reviewed the affidavits and other documents submitted by Respondent, we find that sufficient basis has been established to allow the Joint Motion.

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion. Commission Adjudicatory Docket No. 11-0001, In the Matter of Robert Fortes, is **DISMISSED**.

DATE AUTHORIZED: May 20, 2011
DATE ISSUED: May 31, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 11-0010**

**IN THE MATTER OF
MICHAEL TOCCO**

DISPOSITION AGREEMENT

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

On January 21, 2011, 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 Tocco. The Commission has concluded its inquiry and, on March 18, 2011, found reasonable cause to believe that Tocco violated G.L. c. 268A.

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

Findings of Fact

1. The Board of Registration in Pharmacy (“the Board”) regulates pharmacies and pharmacists in Massachusetts. The ten-member board includes physicians, pharmacists, and pharmacy industry representatives.
2. Tocco has been a Board member since November 2007. He is also president of Integrated Pharmacy Solutions (“IPS”), a Melrose firm that consults to hospitals and pharmacies.
3. Among IPS’s clients is Northeast Rehab Hospital (“Northeast”), which operates several facilities, including a 16-bed acute care facility in Nashua, New Hampshire.
4. Omnicare is a nationwide provider of pharmaceuticals to nursing homes and other senior care facilities. Northeast’s Nashua facility is an Omnicare client.
5. Since 2008, several regulatory matters have come before the Board involving Omnicare, some of which are still being litigated by the Board.
6. In March 2010, Tocco was attending a Massachusetts College of Pharmacy seminar at Gillette Stadium. Tocco approached the Omnicare compliance officer and asked her assistance in getting his client, Northeast, out of its contract with Omnicare. The Omnicare compliance officer informed Tocco that she was not involved in contracts and suggested he talk instead to Omnicare’s

general manager for New Hampshire. The Omnicare compliance officer contacted the general manager and informed him of Tocco’s inquiry. Tocco did not follow-up with the Omnicare general manager.

7. On August 17, 2010, after the conclusion of a Board meeting in Boston, Tocco approached the Omnicare compliance officer this time about extending the contract between Omnicare and Northeast. The compliance officer again advised Tocco to speak with Omnicare’s general manager for New Hampshire, however, Tocco expressed his unwillingness to do so. No further action was taken by Tocco with Omnicare personnel concerning this matter.

8. The Omnicare compliance officer did not feel pressured by Tocco concerning the two above-described conversations; however, the employee felt that Tocco’s actions were inappropriate because Omnicare had matters before the Board at these times and Tocco was, at these times, a Board member.

Conclusions of Law

9. As a Board member, Tocco is a state employee as defined by G.L. c. 268A, § 1.
10. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.
11. Tocco twice requested assistance from the Omnicare compliance officer regarding contracts involving Northeast and Omnicare when Omnicare was and would be subject to his regulatory authority as a Board member concerning pending matters. Under the circumstances, Tocco knew or had reason to know that he was using or attempting to use his Board member position to obtain the assistance he wanted.
12. The requested assistance would benefit Tocco’s company IPS and/or its client Northeast because it would provide them with an advantage in their attempts to re-negotiate contract terms with Omnicare. This advantage was a privilege within the meaning of G.L. c. 268A, § 23(b)(2)(ii) and was of substantial value in that the contracts were significant. The advantage was unwarranted and not properly available to similarly situated individuals because neither IPS nor Northeast has any right to

have a Board member intervene on its behalf with Omnicare concerning contract terms while Omnicare had matters pending before the Board.

13. Therefore, Tocco, by this above-described conduct, knowingly or with reason to know, used or attempted to use his official position to secure for IPS and/or Northeast an unwarranted privilege of substantial value which was not properly available to similarly situated individuals.¹ In so doing, Tocco twice violated G.L. c. 268A, § 23(b)(2)(ii).

Resolution

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

- (1) that Tocco pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that Tocco waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: May 4, 2011

¹ The fact that Tocco may not have intended for his conduct to be perceived as an attempt to use his official position to secure any such unwarranted advantage is not the test here. Section 23(b)(2)(ii) of G.L. c. 268A embodies an objective test by which a public employee's conduct is judged by what the employee knew or had reason to know at the time of his conduct. See *In re Galewski*, 1991 SEC 504; *In re Singleton*, 1990 SEC 476. Thus, as long as he had reason to know his conduct would or could be so perceived there is a violation regardless of his lack of intent.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0011**

**IN THE MATTER OF
ALAN COHEN**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Alan Cohen ("Cohen") 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 February 18, 2011, 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 Cohen. The Commission has concluded its inquiry and, on May 20, 2011, found reasonable cause to believe that Cohen violated G.L. c. 268A.

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

Findings of Fact

1. Cohen is an Agawam High School ("AHS") guidance counselor and the summer school director.
2. Steven Lemanski is the AHS principal ("Principal").
3. The Principal is Cohen's supervisor.
4. In accordance with AHS policies and procedures, summer school hirings must be posted internally for ten days before a hiring and a screening committee must review applications.
5. Prior to September 2010, Cohen, as the summer school director, was responsible for running the summer school program, including staff hiring.
6. The 2010 summer program ran for four weeks, from July 6 through August 2. Some time prior to the start of the 2010 summer school program, Cohen learned that the previous summer school physical education ("PE") teacher would be retiring. According to Cohen, he and the Principal often talk about their children, and Cohen knew that the Principal's son was finishing college and would

graduate with a major in PE. Cohen immediately thought of the Principal's son to fill the position.

7. At Cohen's request, the Principal's son submitted his resume and transcripts and filled out a summer school teacher application on May 28, 2010. The Principal's son's resume, as well as his summer school application, indicated he did not have his college degree or teaching certification but that he anticipated receiving them on December 31, 2010, after he completed student teaching.

8. Cohen hired the Principal's son without posting the summer school PE position or convening a screening committee to review applications. The Principal's son earned \$1,200 for teaching the course, or about \$30 per hour.

Conclusions of Law

9. As an AHS guidance counselor and the summer school director, Cohen is a municipal employee as defined by G.L. c. 268A, § 1.

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

11. The standard hiring process for personnel at AHS includes posting and interviewing candidates. Cohen hired the Principal's son without posting the summer school PE position or convening a screening committee to review applications. Where the hiring procedure was not followed, the Principal's son's hiring as the summer school PE teacher was an unwarranted privilege secured for him by Cohen.

12. The Principal's son's hiring was of substantial value because the position was a compensated one.

13. Cohen used his official position as summer school director to secure for the Principal's son this unwarranted privilege by hiring the Principal's son as the summer school PE teacher.

14. This privilege was not otherwise properly available to similarly situated individuals, such as other potential applicants for the position.

15. Therefore, by hiring his supervisor's (the Principal's) son as the summer school PE teacher without following the required hiring procedure, Cohen knowingly used his summer school director position to secure for the Principal's son an

unwarranted privilege of substantial value that was not properly available to similarly situated individuals, thereby violating § 23(b)(2)(ii).

16. When a candidate for a school department position is an immediate family member of a school principal, particular care must be taken to ensure that all standard hiring procedures are followed. That did not occur in this case.

Resolution

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

- (1) that Cohen pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that Cohen waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: June 8, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0012**

**IN THE MATTER OF
EDWARD WHEELER**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Edward Wheeler ("Wheeler") 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 10, 2010, 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 Wheeler. On November 19, 2010, the Commission concluded its inquiry and found reasonable cause to believe that Wheeler violated G.L. c. 268A.

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

Findings of Fact

1. Wheeler began practicing law privately in 1980 when he passed the Massachusetts Bar. From 1980 to 2003, he had a solo practice in Malden, Massachusetts, focusing primarily on real estate title work.

2. In 2003, Wheeler was hired by Middlesex Register of Deeds Eugene Brune (“Brune”) as First Assistant Register of Deeds (“First Assistant”). When Wheeler was hired, Brune told him that, although he was expected to work for the Middlesex Registry of Deeds (the “Registry”) during Registry hours, Wheeler could still have a private law practice on the side, as long as he did so after Registry hours, or using vacation or personal time

3. Wheeler was given, and still has, a Registry office in which there is a state-issued laptop computer and printer, as well as a state-issued fax machine with a fax number designated specifically for the First Assistant. Wheeler does not typically take his state-issued laptop out of the Registry.

4. Wheeler works Monday through Friday, 8:00 a.m. to 4:00 p.m., as First Assistant Register at the Registry office in Cambridge, and earns \$79,000 per year.

5. Since becoming First Assistant in 2003, Wheeler has maintained a private law practice, from which he earns approximately \$10,000 per year.

6. Wheeler’s Registry computer hard drive has hundreds of documents dating from January 2005 through June 2010 that are related to Wheeler’s private law practice, e.g., invoices for private counsel services, and documents with his private letterhead regarding private real estate, probate, contract and other types of cases (“Private Documents”), and not to his work as First Assistant. The Private Documents are mixed in with Registry-related documents on the hard drive.

7. All of the Private Documents with Wheeler’s private letterhead contain Wheeler’s Registry fax number as part of his contact information.

8. The time and date stamps on the Private Documents indicate that Wheeler was accessing and/or editing many of those documents during Registry hours. Wheeler’s work on the Private Documents appears to have occurred infrequently between 2005-2008. It became more frequent in 2009 and 2010, with Wheeler typically working on two Private Documents per month in 2009, and five Private Documents per month during 2010, during several days of each month, at various times throughout the day, sometimes several times a day.

9. According to the Registry records, Wheeler was on duty at the Registry when the bulk of the Private Documents was completed on his Registry computer.

10. Wheeler does not have a separate office for his private law practice, and does not own, nor have access to, a private fax machine.

11. Wheeler often emailed himself Private Documents from his home computer to his Registry computer.

12. Wheeler regularly used his Registry printer to print out Private Documents, and used the Registry fax machine to send and receive Private Documents.

13. While Wheeler did some private legal work on his personal home computer, he did much of his private legal work on his Registry laptop in his Registry office.

14. Wheeler has asserted that much of his private work at the Registry was done during his lunch break. He said he did not have a regular lunch break but would take his break whenever his Registry schedule allowed. His computer records indicate that he created or modified approximately half of the Private Documents at times that would be consistent with the typical time of a lunch break. As for the remaining half, one quarter of the Private Documents were created or modified during work hours at times that would not be consistent with the time of a lunch break, and one quarter of the Private Documents were created or modified after Registry hours or on weekends.

15. Because Wheeler’s computer records only indicate when a document was last modified, and not

for how long it was worked on, one cannot determine from the records how much state time was used for his private practice. Nevertheless, Wheeler has acknowledged that he used a substantial amount of state time for this purpose.

Conclusions of Law

Section 23(b)(2)

16. Section 23(b)(2) prohibits a public employee from knowingly, or with reason to know, using or attempting to use her official position to secure for herself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.¹

17. 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 publicly provided stationery, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee's time on the public payroll.

18. By using Registry-provided office supplies, space, equipment and time to handle his private legal work for several years, Wheeler used his official Registry position.

19. The use of these Registry resources was a privilege.

20. The privilege was unwarranted because state resources are to be used solely for official state purposes.

21. The privilege was of substantial value because the value of the resources was well over \$50.00.²

22. The privilege was not properly available to other private law practitioners.

23. Therefore, based on the foregoing, Wheeler violated § 23(b)(2).

Resolution

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

- (1) that Edward Wheeler pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that Edward Wheeler waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: February 16, 2011

¹ G.L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended.

² See *Commonwealth v. Famigletti*, 4 Mass. App. 585, 587 (1976) (Court held that \$50 in cash is considered "substantial value").

PUBLIC EDUCATION LETTER WILLIAM CONLON

William Conlon
c/o Stephen Pfaff, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street, Fourth Floor
Boston, MA 02110

Re: Public Education Letter

Dear Mr. Conlon:

As you know, the Ethics Commission has been reviewing information relating to actions taken by you in your capacity as Brockton Police Chief, and has authorized an inquiry into allegations that, in 2008, you violated section 23(b)(2) of G.L. Chapter 268A, the conflict of interest law, by authorizing two police officers to use special detail time to attend a political fundraiser for Brockton Mayor James Harrington.

Based upon our investigation, which included your statement under oath, the Commission voted on February 18, 2011, to find reasonable cause to believe that you violated G.L. c. 268A, § 23(b)(2).

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry, and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of, and future compliance with, 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, and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

On June 19, 2008, you authorized two Brockton police officers, who were elected members of their union, to use special detail time, and earn their regular shift pay, to attend a political fundraiser for Mayor Harrington that evening at 6:00 pm. The purpose of their attendance was to conduct police "union business." At the time, the two officers' shifts were 4:00 pm - midnight and midnight - 8:00 am, respectively.¹

A "special detail" is an occasion where an officer receives his/her regular pay while engaging in activities unrelated to his or her normal duties. For example, one might obtain approval to use special detail time to attend professional development courses. The relevant section of the collective bargaining agreement, "Union Business Leave," states, in part, the following:

All elected Officers ... shall be allowed time off for Union business if that need arises during the regularly scheduled work hours, subject, nevertheless to the sole discretion of the Chief of Police or the Chief's designee.

The collective bargaining agreement does not define "Union business." When asked whether being allowed "time off" included receiving one's regular pay, you replied that it had been a past practice to allow police officers who were union officials to engage in union activities without foregoing pay. Where it had been the "past practice" to interpret the collective bargaining agreement's reference to "union business" as including attendance at political fundraisers, you believed that this entitled the police

officers at issue to use a special detail to attend Mayor Harrington's fundraiser.

The value of the special details that you authorized on June 19, 2008, totaled approximately \$500.

II. Legal Discussion

As the Brockton Police Chief, you are a "municipal employee" as that term is defined in G.L. c. 268A, § 1(g). As such, you are subject to the provisions of the conflict of interest law that apply to municipal employees, and, in particular, for the purposes of this discussion, to § 23 of that statute.

Section 23(b)(2)² of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using his official position to secure for himself or others an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals. Notwithstanding the collective bargaining agreement or any interpretation thereof, paying municipal employees to attend a political fundraiser is a use of public resources for a political and/or private purpose and, as such, is a violation G.L. c. 268A, § 23(b)(2). See Commission Advisory 11-1 ("[A] public employee may not engage in political activity, whether election-related or non-election related, on his public work time.").

Attending the fundraiser on paid public work time was a privilege. The privilege was unwarranted because no statute or regulation authorized the use of compensated public work time by the two officers to attend a political event. The unwarranted privilege was of substantial value, i.e., at least \$50 or more. You used your official position as the Brockton Police Chief to authorize the police officers to attend the fundraiser. This privilege was not properly available to similarly situated individuals. Therefore, by authorizing police officers to use public work time to attend a political fundraiser, you knowingly or with reason to know, used your official position as chief to secure for the two officers the unwarranted privilege of using public resources worth \$50 or more for a private and/or political purpose. Therefore, the Commission found that there was reasonable cause to believe that 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 \$10,000 for each violation, except that a civil penalty of up to \$25,000 may be imposed for G.L. c. 268A, § 2

violations (bribes). The Commission, however, has chosen to resolve this case with a Public Education Letter rather than by imposing a fine because it believes the public interest would best be served by doing so. Public officials should understand that collective bargaining agreements cannot explicitly or implicitly authorize conduct that violates the conflict of interest law. The purpose of this public education letter is to emphasize that point.

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.

This matter is now closed.

DATE: June 22, 2011

¹ As to the officer working the midnight - 8:00 am shift, you expressed concern that without the special detail to attend the fundraiser, the officer could suffer fatigue during his shift.

² As was in effect prior to the 2009 amendment, 2009 Mass Acts 28.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0013**

**IN THE MATTER OF
G. PAUL DULAC**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and G. Paul Dulac (“Dulac”) 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 10, 2010, 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 Dulac. The

Commission has concluded its inquiry and, on November 19, 2010, found reasonable cause to believe that Dulac violated G.L. c. 268A.

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

Findings of Fact

1. Dulac has been the Marblehead Public Schools Superintendent since 2007.

2. Elizabeth Moore (“Moore”) has been the Town of Marblehead Veterans Middle School (“Veterans”) Principal since 2005.

3. The standard hiring process for personnel at Veterans includes posting and advertising the open position, interviewing qualified candidates by the principal, submitting a nominating packet including a “nomination for appointment” by the principal to the superintendent, final interviews and appointment by the superintendent, all in that order.

4. In early August 2009, a one-year, half-time, paid position for an instructional technology specialist opened up at Veterans. The specialist was to teach a 7th and 8th grade course called “Media Literacy,” which covers digital photo editing, Internet safety, and other topics. The position needed to be filled by August 26, 2009, which is when faculty training was scheduled to commence. The first day of school for students was September 8, 2009.

5. Tammy Nohelty (“Nohelty”) is the wife of School Committee Member Richard Nohelty. Nohelty had previously worked one year (2008-2009) as an artist-in-residence at Veterans, during which time she taught digital photo editing.

6. Prior to the advertisement or posting of the special position, Nohelty learned of the specialist position opening and called Moore to express an interest in the position.

7. On August 13, 2009 (three days before the position was advertised), Nohelty was interviewed by Moore and the newly appointed Veterans’ assistant principal.

8. On August 13, 2009, without any posting or advertising of the position, Moore submitted a nomination for appointment form dated August 13, 2009, to Dulac recommending Nohelty for the specialist position.

9. Moore left for a 10-day vacation beginning August 14, 2009. Dulac was on vacation from August 11 – 17, 2009.

10. On Sunday, August 16, 2009, the specialist position was advertised in the Boston Globe. On Monday, August 17, 2009, the position was posted internally.

11. In response to the Boston Globe advertisement, the Superintendent's Office received two applications for the position, on August 19, 2009, and August 21, 2009, respectively. Both applicants were licensed in instructional technology and had considerable relevant teaching experience. In addition, one internal candidate expressed interest in the position on or about August 17, 2009. None of these candidates was interviewed for the position.

12. When Dulac returned from vacation, he received Moore's nomination for appointment form recommending Nohelty for the position and noted that it was dated August 13, 2009. Dulac believes that he orally confirmed with the Veterans' assistant principal that Nohelty was still Moore's recommendation. According to Dulac, he also asked the Veterans' assistant principal whether there were any other applicants for the position, and she told him there was none. However, Dulac knew that pursuant to standard procedures, his own assistant would have received any such applications (as indicated above, the Superintendent's Office had in fact received three such applications). Nevertheless, Dulac failed to ask his assistant whether there were such applications.

13. Dulac then decided to have the date changed from August 13, 2009, to August 23, 2009, on the nomination form that had been submitted by Moore, so that the written recommendation would appear to have been made after the posting.

14. On August 24, 2009, Dulac interviewed Nohelty and decided to hire her as the instructional technology specialist.

15. Moore and Dulac both state that the other candidates' applications for the specialist position were not brought to their attention until after the hiring of Nohelty, and, therefore, they believed Nohelty to be the only candidate for the position at the time she was hired.

16. At all relevant times, Dulac knew that Nohelty was School Committee Member Richard Nohelty's wife.

Conclusions of Law

17. As the Marblehead Public Schools Superintendent, Dulac is a municipal employee as defined by G.L. c. 268A, § 1.

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

19. The standard hiring process for personnel at Veterans includes posting and advertising the open position, and interviewing qualified candidates. A nomination for appointment is then submitted by the principal to the superintendent. Moore, the Veteran's principal, submitted a nomination for appointment to hire Nohelty as the specialist prior to the position being posted and without considering other candidates. Dulac hired Nohelty as the specialist. Where the standard hiring procedure was not followed, Nohelty's appointment to the specialist position was an unwarranted privilege.

20. Nohelty's hiring was an unwarranted privilege of substantial value because the specialist position was a paid position.

21. Dulac knowingly or with reason to know used his position as superintendent to secure for Nohelty this unwarranted privilege by having the date changed in the nomination for appointment.

22. This privilege was not otherwise properly available to similarly situated individuals, such as other potential applicants for the position.

23. Therefore, by hiring Nohelty for the specialist position without following the standard hiring procedure, Dulac knowingly or with reason to know used his superintendent position to secure for Nohelty an unwarranted privilege of substantial value that was not properly available to similarly situated individuals, thereby violating § 23(b)(2).

Resolution

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

- (1) that Dulac pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$500 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that Dulac waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: June 28, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 11-0014**

**IN THE MATTER OF
ELIZABETH MOORE**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and Elizabeth Moore (“Moore”) 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 10, 2010, 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 Moore. The Commission has concluded its inquiry and, on November 19, 2010, found reasonable cause to believe that Moore violated G.L. c. 268A.

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

Findings of Fact

1. Moore has been the Town of Marblehead Veterans Middle School (“Veterans”) Principal since 2005.
2. G. Paul Dulac (“Dulac”) has been the Marblehead Public Schools Superintendent since 2007.

3. The standard hiring process for personnel at Veterans includes posting and advertising the open position, interviewing qualified candidates by the principal, submitting a nominating packet including a “nomination for appointment” by the principal to the superintendent, final interviews and appointment by the superintendent, all in that order.

4. In early August 2009, a one-year, half-time, paid position for an instructional technology specialist opened up at Veterans. The specialist was to teach a 7th and 8th grade course called “Media Literacy,” which covers digital photo editing, Internet safety, and other topics. The position needed to be filled by August 26, 2009, which is when faculty training was scheduled to commence. The first day of school for students was September 8, 2009.

5. Tammy Nohelty (“Nohelty”) is the wife of School Committee Member Richard Nohelty. Nohelty had previously worked one year (2008-2009) as an artist-in-residence at Veterans, during which time she taught digital photo editing.

6. Prior to the advertisement or posting of the special position, Nohelty learned of the specialist position opening and called Moore to express an interest in the position.

7. On August 13, 2009 (three days before the position was advertised), Nohelty was interviewed by Moore and the newly appointed Veterans’ assistant principal.

8. On August 13, 2009, without any posting or advertising of the position, Moore submitted a nomination for appointment form dated August 13, 2009, to Superintendent Dulac recommending Nohelty for the specialist position.

9. When Moore submitted the appointment form for Nohelty, she knew that Nohelty was School Committee Member Richard Nohelty’s wife.

10. Moore left for a 10-day vacation beginning August 14, 2009. Dulac was on vacation from August 11-17, 2009.

11. On Sunday, August 16, 2009, the specialist position was advertised in the Boston Globe. On Monday, August 17, 2009, the position was posted internally.

12. In response to the Boston Globe advertisement, the Superintendent’s Office received two applications

for the position, on August 19, 2009, and August 21, 2009, respectively. Both applicants were licensed in instructional technology and had considerable relevant teaching experience. In addition, one internal candidate expressed interest in the position on or about August 17, 2009. None of these candidates was interviewed for the position.

13. When Dulac returned from vacation, he received Moore's nomination for appointment form recommending Nohelty for the position and noted that it was dated August 13, 2009. Dulac believes that he orally confirmed with the Veterans' assistant principal that Nohelty was still Moore's recommendation. According to Dulac, he also asked the Veterans' assistant principal whether there were any other applicants for the position, and she told him there was none. However, Dulac knew that pursuant to standard procedures, his own assistant would have received any such applications (as indicated above, the Superintendent's Office had in fact received three such applications). Nevertheless, Dulac failed to ask his assistant whether there were such applications.

14. Dulac then decided to have the date changed from August 13, 2009, to August 23, 2009, on the nomination form that had been submitted by Moore, so that the written recommendation would appear to have been made after the posting.

15. On August 24, 2009, Dulac interviewed Nohelty and decided to hire her as the instructional technology specialist.

16. Moore and Dulac both state that the other candidates' applications for the specialist position were not brought to their attention until after the hiring of Nohelty, and, therefore, they believed Nohelty to be the only candidate for the position at the time she was hired.

Conclusions of Law

17. As the Veterans' principal, Moore is a municipal employee as defined by G.L. c. 268A, § 1.

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

19. The standard hiring process for personnel at Veterans includes posting and advertising the open

position, and interviewing qualified candidates. A nomination for appointment is then submitted by the principal to the superintendent. Moore submitted a nomination for appointment to hire Nohelty as the specialist prior to the position being posted and without considering other candidates. Where the standard hiring procedure was not followed, Nohelty's appointment to the specialist position was an unwarranted privilege.

20. Nohelty's hiring was an unwarranted privilege of substantial value because the specialist position was a paid position.

21. Moore knowingly, or with reason to know, used her Veterans' principal position to secure for Nohelty this unwarranted privilege by recommending to the superintendent that Nohelty be hired for the specialist position.

22. This privilege was not otherwise properly available to similarly situated individuals, such as other potential applicants for the position.

23. Therefore, by recommending that Nohelty be hired for the specialist position without following the standard hiring procedure, Moore knowingly, or with reason to know, used her Veterans' principal position to secure for Nohelty an unwarranted privilege of substantial value that was not properly available to similarly situated individuals, thereby violating § 23(b)(2).

Resolution

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

- (1) that Moore pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$500 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that Moore waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: June 28, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0025**

**IN THE MATTER OF
PAUL TRUEHART**

FINAL ORDER

On April 26, 2011, the parties filed a Joint Motion to Dismiss (“Joint Motion”), along with a proposed Disposition Agreement. The parties requested that the Commission approve the Disposition Agreement in settlement of this matter and dismiss this adjudicatory proceeding. By order of the Commission, the parties subsequently filed a Joint Statement Regarding Proposed Disposition Agreement, explaining the basis of the proposed penalty. The full Commission completed deliberations about the Joint Motion on June 16, 2011.

In the proposed Disposition Agreement, the parties agree to the following findings of fact. Paul Truehart was a member of the Southampton Board of Health from 2008 to 2010. He also does business as Truehart Paving and Construction Services (“Truehart Construction”), a sole proprietorship located in Southampton. He is licensed to install septic systems.

On May 27, 2008, the BOH approved an application and plans for a septic system upgrade at 11 East Street, Southampton. Truehart abstained. The application listed Truehart Construction as performing the septic system work. Truehart, through his sole proprietorship, upgraded the septic system and charged \$19,500 for the work. On July 11, 2008, Truehart, as owner of Truehart Construction, signed a Title V Certificate of Compliance Designer and Installer Sign-off form (“Title V Certificate”) for the 11 East Street property for submission to the BOH in order to obtain a BOH Certificate of Compliance.

In November, 2007, before Truehart was on the BOH, the BOH approved applications and plans for construction of septic systems at 11 and 17 Riverdale Road Extension, Southampton. Subsequently, the properties were sold, and in 2009, the new owners hired Truehart Construction. At this time, Truehart

was a member of the BOH. Through his d/b/a/, Truehart performed site work and installed the septic systems and charged \$46,858. Truehart contacted the BOH’s Health Agent to inspect his work. On September 28, 2009, as owner of Truehart Construction, Truehart signed the Title V Certification for the properties for submission to the BOH.

In mid-October, 2009, the BOH, through its Health Agent, approved an application and plans for the repair of a septic system at 2 Parsons Way, Southampton, which had failed inspection. Truehart abstained from approving the application and plans. The application listed Truehart Construction as performing the work. Truehart, through his d/b/a, repaired the septic system and charged \$2,900 for the work. He contacted the BOH’s Health Agent to inspect his work. On October 26, 2009, he signed the Title V Certificate for 2 Parsons Way.

Under G.L. c. 268A, § 17(a), otherwise than as provided by law, a municipal employee may not receive compensation from anyone other than the city or town or municipal agency in relation to a particular matter if the same city or town is a party or has a direct and substantial interest in the matter.

Under G.L. c. 268A, § 17(c), other than in the discharge of his official duties, a municipal employee may not act as agent or attorney for anyone other than the city or town or municipal agency in connection with a particular matter if the same city or town is a party or has a direct or substantial interest in the matter.

The parties agree to conclusions of law in the Disposition Agreement, as follows: The BOH decisions to approve applications and plans for septic system upgrades, repairs or installations were particular matters, as were the Health Agent’s inspections of the Riverdale Road Extension construction and Parsons Way repairs. The Town of Southampton had a direct and substantial interest in these particular matters.

The compensation that Truehart requested and received from the owners of 11 East Street, the Riverdale Road Extension properties, and 2 Parsons Way was in relation to these particular matters. Accordingly, Truehart violated § 17(a) by requesting and receiving the compensation.

In addition, Truehart acted as agent for the owners of the properties in connection with these particular matters. He acted as agent for the owners of the

Riverdale Road Extension properties and 2 Parsons Way by contacting the BOH's Health Agent to inspect his work. He acted as agent for the owners of all of the properties when he signed Title V Certificates to be submitted to the BOH. By engaging in this conduct, he violated § 17(c).

In the Disposition Agreement, Truehart agrees to pay a civil penalty of \$3,000 and has tendered the payment. In addition, Respondent further agrees to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this or any other administrative or judicial proceeding to which the Commission is or may be a party.

In support of the Joint Motion, the parties assert that settlement of this matter will fairly and equitably resolve this matter, obviate the need for a hearing on any factual issues, and save time and resources for everyone involved.

The parties explain in their Joint Statement Regarding Disposition Agreement that although Truehart Construction charged \$69,258 for its work on the projects described above, Truehart's gross profits from all of these projects together was approximately \$5,000 total. In addition, the Commission takes note that Truehart did not participate as a Board of Health member with regard to applications regarding septic system work to be done by his own company, and thus did not approve applications affecting his own financial interests. He appears to have operated under a misunderstanding that if he did not participate as a Board of Health member in approving these applications, he could do the work. Instead, under § 17, he was prohibited from receiving compensation from, or acting as agent for, his clients in connection with this work, because the Town, through its Board of Health, has a direct and substantial interest in approving such applications and conducting inspections of the work.

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion. The Disposition Agreement is **APPROVED**. Respondent's tendered payment of the \$3,000 civil penalty for violating G.L. c. 268A, § 17(a) and (c) is accepted. Commission Adjudicatory Docket No. 10-0025, In the Matter of Paul Truehart, is **DISMISSED**.

DATE AUTHORIZED: June 16, 2011

DATE ISSUED: June 30, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0025**

**IN THE MATTER OF
PAUL TRUEHART**

DISPOSITION AGREEMENT

The State Ethics Commission (the "Commission") and Paul Truehart ("Truehart") 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, 2010, 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 Truehart. On June 18, 2010, the Commission concluded its inquiry and found reasonable cause to believe that Truehart had violated G.L. c. 268A, § 17.

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

Findings of Fact

1. Truehart was, from 2008 to 2010, an elected member of the Southampton Board of Health ("BOH").

2. Truehart is licensed to install septic systems and owns Truehart Paving and Construction Services ("Truehart Construction"), a sole proprietorship located in Southampton.

11 East Street

3. On May 27, 2008, the BOH approved an application and plans for a septic system upgrade at 11 East Street, Southampton.

4. Truehart abstained as a BOH member from approving the application and plans for the 11 East Street septic system upgrade.

5. The application listed Truehart Construction as performing the septic system work.

6. Truehart, d/b/a Truehart Construction, upgraded the septic system and charged \$19,500 for the work.

7. On July 11, 2008, Truehart, as Truehart Construction's owner, signed the Title V Certificate of Compliance Designer and Installer Sign-off form ("Title V Certificate") for the 11 East Street property for submission to the BOH in order to obtain a BOH Certificate of Compliance.

2 Parsons Way

8. In mid-October 2009, the BOH, through its Health Agent, approved an application and plans for the repair of a septic system at 2 Parsons Way, Southampton, which had failed inspection.

9. Truehart abstained as a BOH member from approving the application and plans for the 2 Parsons Way septic system repair.

10. The application listed Truehart Construction as performing the septic system work.

11. Truehart, d/b/a Truehart Construction, repaired the septic system and charged \$2,900 for the work.

12. Upon completion of the repair, Truehart, as Truehart Construction's owner, contacted the BOH's Health Agent to inspect Truehart's work.

13. On October 26, 2009, Truehart, as Truehart Construction's owner, signed the Title V Certificate for 2 Parsons Way for submission to the BOH.

11 Riverdale Road Extension, Parcel 2A and 17 Riverdale Road Extension, Parcel 2B

14. In November 2007, the BOH approved applications and plans for septic systems construction at 11 and 17 Riverdale Road Extension. Truehart was not a member of the BOH in 2007 and did not participate as a BOH member in the BOH approval process. Truehart was elected to the BOH in 2008.

15. Subsequent to such BOH approval, the properties were sold, and the new owner hired Truehart Construction in 2009 to perform site work and install the septic systems.

16. Truehart, d/b/a Truehart Construction, performed the site work and constructed the septic systems for \$46,858.

17. Upon completion of the construction, Truehart, as Truehart Construction's owner, contacted the BOH's Health Agent to inspect Truehart's work.

18. On September 28, 2009, Truehart, as Truehart Construction's owner, signed the Title V Certificates for 11 and 17 Riverdale Road Extension for submission to the BOH.

Conclusions of Law

Section 17(a)

19. 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 or requesting compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

20. As a BOH member, Truehart was a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

21. The BOH decisions to approve applications and plans for septic system upgrades, repairs or installations were particular matters.

22. The Health Agent's inspections of the Parsons Way repairs and Riverdale Road Extension construction were particular matters.

23. Because the applications and plans for septic system upgrades, repairs, installations and inspections involved approvals by the BOH and/or its Health Agent, the Town of Southampton had direct and substantial interests in these particular matters.

24. The compensation that Truehart requested and received from the owners of 11 East Street, 2 Parsons Way and 11 and 17 Riverdale Road Extension for upgrading, repairing or installing the septic systems and signing the Title V Certificates was in relation to the BOH decisions to approve the applications and plans, and/or its Health Agent's inspections.

25. This compensation was not as provided by law for the proper discharge of Truehart's official duties as a BOH member.

26. By acting as described above, Truehart violated § 17(a).

Section 17(c)

27. 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 or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or acting as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

28. As stated above, the BOH decisions to approve the applications and plans for septic system upgrades, repairs and installations, and the Health Agent's inspections, were particular matters. Because the applications, plans and inspections involved BOH and/or Health Agent approval, the Town had direct and substantial interests in those particular matters.

29. By signing the Title V Certificates of Compliance for 11 East Street, 2 Parsons Way and 11 and 17 Riverdale Road Extension for submission to the BOH, Truehart acted as agent on behalf of the owners of those properties.

30. By contacting the Health Agent to inspect Truehart's work at 2 Parsons Way and 11 and 17 Riverdale Road Extension, Truehart acted as agent on behalf of the owners of those properties.

31. Truehart acted on behalf of the owners of 11 East Street, 2 Parsons Way and 11 and 17 Riverdale Road Extension in connection with the BOH decisions to approve the applications and plans, and/or the Health Agent's inspections.

32. Truehart's actions as agent were not in the proper discharge of Truehart's official duties as a BOH member.

33. By acting as described above, Truehart violated § 17(c).

34. Truehart states that he believed that by abstaining as a BOH member as described above, he would be in compliance with the conflict of interest law. By so abstaining, Truehart did in fact comply with G.L. c. 268A, § 19, which prohibits a municipal employee from participating as a municipal employee in a particular matter in which he has a financial interest. However, § 17 imposed additional restrictions on Truehart, which could not have been addressed by Truehart abstaining as a BOH member. To comply with § 17, Truehart needed to refrain from performing private compensated work in connection

with any septic system applications approved by the BOH, which included the septic system installations, signing the Title V Certificates, and contacting his subordinate, the Health Agent, to perform inspections.

Resolution

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

- (1) that Truehart pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$3,000 as a civil penalty for violating G.L. c. 268A, § 17(a) and (c); and
- (2) that Truehart waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: June 30, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0019**

**IN THE MATTER OF
A. JOSEPH DENUCCI**

FINAL ORDER

On June 24, 2011, the parties filed a Joint Motion to Suspend Proceedings, Accept Proposed Disposition Agreement and Dismiss the Proceedings ("Joint Motion"), requesting that the Commission approve a Disposition Agreement in settlement of this matter and dismiss this adjudicatory proceeding. Pursuant to 930 CMR 1.01(6)(a) and (c), the Presiding Officer, Patrick J. King, referred the Joint Motion, along with the Disposition Agreement, to the full Commission for deliberations on July 15, 2011.

In the Disposition Agreement, Respondent A. Joseph DeNucci ("DeNucci"), the former State Auditor,

admits that he violated G.L. c. 268A, § 23(b)(2)¹ when he directed his staff to interview his first cousin, Guy Spezzano, and then offered him a job as a fraud examiner in the State Auditor's Bureau of Special Investigations. DeNucci admits that by his actions, he knowingly used his position as State Auditor to hire his cousin which was a privilege of substantial value because the salary was \$40,545, plus benefits. The privilege was unwarranted because at the time he was hired, his cousin was not qualified for the position based on the job description. The privilege also was not properly available to similarly situated individuals.

DeNucci agrees to pay a civil penalty of \$2,000² for his § 23(b)(2) violation. He further agrees to waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in the Disposition Agreement in this and any other administrative or judicial proceeding to which the Commission is or may be a party. DeNucci has tendered the payment of the \$2,000 civil penalty.

In support of the Joint Motion, the parties assert that the interests of justice, the parties and the Commission will be served by the Disposition Agreement which addresses all the allegations of the Order to Show Cause.³ They further assert that the Disposition Agreement will fairly resolve this matter and obviate the need for a hearing, thus saving the resources and time of all participants.

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion. The Disposition Agreement is **APPROVED**. DeNucci's tendered payment of the \$2,000 civil penalty for violating § 23(b)(2) is accepted. Commission Adjudicatory Docket No. 10-0019, In the Matter of A. Joseph DeNucci, is **DISMISSED**.

DATE AUTHORIZED: July 15, 2011

DATE ISSUED: August 1, 2011

1 At the relevant time, § 23(b)(2) prohibited a state employee from knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others, unwarranted privileges or exemptions of substantial value (\$50 or more) which were not properly available to similarly situated individuals. The conduct in this matter occurred prior to the 2009 amendment of G.L. c. 268A.

2 This is the maximum penalty that may be imposed because the conduct involves one 2008 incident that

occurred prior to the increased penalties available with the 2009 amendment of G.L. c. 268A.

3 The parties state that the § 23(b)(3) count in the Order to Show Cause was dropped because it was based on the same conduct as the § 23(b)(2) violation.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0019**

**IN THE MATTER OF
A. JOSEPH DeNUCCI**

DISPOSITION AGREEMENT

The State Ethics Commission (the "Commission") and A. Joseph DeNucci ("DeNucci") 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 May 19, 2010, 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 DeNucci. The Commission has concluded its inquiry and, on July 16, 2010, found reasonable cause to believe that DeNucci violated G.L. c. 268A.

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

Findings of Fact

1. DeNucci was the Auditor of the Commonwealth of Massachusetts ("State Auditor") from 1987 until January 2011. The State Auditor is an elected constitutional officer. The State Auditor is responsible for all of the activities of the Office of the State Auditor ("OSA"). Under G.L. c. 11, sec. 6, "The state auditor may appoint and remove such employees as the work of the department may require." OSA had 322 employees as of July 2009.

2. In addition to auditing state agencies, OSA is authorized to investigate fraud in public assistance programs. The OSA's Bureau of Special

Investigations (“BSI”) is charged with this responsibility. BSI employs approximately 30 fraud examiners.

3. Guy Spezzano is DeNucci’s first cousin. In or about January 2008, Spezzano, then age 75, was unemployed. DeNucci suggested to Spezzano that he come to work at the OSA.

4. On February 7, 2008, Spezzano submitted to the OSA the first page of the OSA’s two-page job application. Spezzano never completed the second page of the application, which requests information about the applicant’s previous employment experience and references.

5. DeNucci instructed his deputies to interview Spezzano. A deputy auditor interviewed Spezzano on February 14, 2008, and recommended that he be placed in BSI as a fraud examiner.

6. After learning during his February 14, 2008 interview that BSI had a Brockton office, Spezzano asked to work at BSI’s Brockton office. (Upon being hired, Spezzano went to work at the Brockton office.)

7. By letter dated March 24, 2008, DeNucci offered to Spezzano a full-time position as a fraud examiner. Spezzano accepted the offer and began working at BSI on June 2, 2008. Spezzano’s annual salary was \$40,545, plus benefits.

8. The fraud examiner job description lists the position’s requirements, which included data gathering and writing skills, familiarity with “the law as it relates to fraud,” and being “well-versed in the use of various information technology systems.” Spezzano did not have the skills or knowledge to meet these requirements. Spezzano holds a B.S. degree from Boston University in music, which he received in 1954. Spezzano worked as a salesman for a meat company from 1995 to 2007. Spezzano was also a professional jazz musician.

9. On December 1, 2009, approximately one year and a half after starting work for the OSA, Spezzano went out on sick leave. In April 2010, having used all of his accrued sick leave, including catastrophic sick leave, Spezzano’s employment with the OSA was terminated.

Conclusions of Law

10. As the State Auditor, DeNucci was, at all times relevant to this matter, a state employee as defined in G.L. c. 268A, § 1.

11. Section 23(b)(2) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.¹

12. By directing his staff to interview Spezzano, and by offering the job to Spezzano, DeNucci knowingly used his official position to hire his first cousin as an OSA fraud examiner.

13. Being hired as an OSA fraud examiner was a privilege.

14. This privilege was of substantial value because the position’s salary was \$40,545, plus benefits.

15. The privilege was unwarranted because, at the time Spezzano was hired, he was not qualified for the position based on the job description.

16. This privilege was not otherwise properly available to similarly situated individuals.

17. By, in the manner described above, using his official position as the State Auditor to secure for his cousin a job as an OSA fraud examiner, DeNucci knowingly used his official position to obtain an unwarranted privilege of substantial value for his cousin that was not properly available to other similarly situated individuals. Therefore, in so acting, DeNucci violated § 23(b)(2).

Resolution

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

- (1) that DeNucci pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$2,000 as a civil penalty for violating G.L. c. 268A, § 23(b)(2); and
- (2) that DeNucci waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: August 1, 2011

¹ G.L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended. The conduct in this case occurred prior to the enactment of the 2009 law and its provisions are inapplicable to DeNucci.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0016**

**IN THE MATTER OF
JOHN JUDD**

DISPOSITION AGREEMENT

The State Ethics Commission (“Commission”) and John Judd (“Judd”) 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 May 20, 2011, 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 Judd. The Commission has concluded its inquiry and, on July 15, 2011, found reasonable cause to believe that Judd violated G.L. c. 268A.

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

Findings of Fact

1. Judd has been a member of the Goshen Board of Selectmen (“BOS”) since May 2010.
2. Judd’s cousin, Francis Judd, operates George D. Judd & Sons, LLC, which is in the business of selling stone, sand, and gravel.
3. In August 2009, Goshen participated in a cooperative purchasing arrangement with the Hampshire County Council of Governments to purchase 3,000 tons of “washed screened sand.” The

council followed a standard procurement process by which it issued a request for quotes. The low bidder bid \$12 per ton and was awarded the contract. George D. Judd & Sons provided a bid for \$8.25 per ton, but its bid was deemed unresponsive since it was for screened sand, not washed screened sand, as specified in the request for quotes.

4. At the October 12, 2010 BOS meeting, Judd, in his capacity as a selectman, raised the issue of the town sand contract. Judd said the town should re-bid the contract to get a better price. Judd criticized the highway superintendent for not buying the sand from Judd’s cousin. Judd provided the BOS with a proposed contract for the BOS to sign which stated that the town would purchase 50% of its “screened sand” as needed from George D. Judd & Sons for \$9 per ton (“the proposed sand contract”). The value of the proposed sand contract was approximately \$13,500. The BOS did not sign the proposed sand contract.

Conclusions of Law

5. As a BOS member, Judd is a municipal employee as defined by G.L. c. 268A, § 1.
6. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a municipal employee from, knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.
7. There is a standard contract bid process for the town sand contract. Judd attempted to have the BOS purchase 50% of the town’s requirement for sand from his cousin’s company, George D. Judd & Sons, without going through the standard contract bid process. Where the standard contract bid process would not have been followed, the proposed sand contract would have been an unwarranted privilege.
8. The proposed sand contract was of substantial value because the contract was valued at approximately \$13,500.
9. Judd used his official position as a BOS member to attempt to secure for his cousin’s company, George D. Judd & Sons, this unwarranted privilege by having the BOS members sign the proposed sand contract he provided.
10. This privilege was not otherwise properly available to similarly situated individuals, such as

other potential businesses that would have wanted the proposed sand contract and would have been required to follow the standard contract bid process for the town sand contract.

11. Therefore, by as a selectman attempting to have the BOS purchase 50% of the town's requirement for sand from his cousin's company, George D. Judd & Sons, without going through the standard contract bid process, Judd knowingly used his BOS position to attempt to secure for his cousin's company, George D. Judd & Sons, an unwarranted privilege of substantial value that was not properly available to similarly situated individuals, thereby violating § 23(b)(2)(ii).

Resolution

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

- (1) that Judd pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$2,500 as a civil penalty for violating G.L. c. 268A, § 23(b)(2)(ii);
- (2) that Judd meet with State Ethics Commission staff to receive training regarding the requirements of the conflict of interest law; and
- (3) that Judd waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: August 9, 2011

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0019**

**IN THE MATTER OF
WHITING WILLAUER**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Whiting Willauer ("Willauer") 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 April 15, 2011, 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 Willauer. The Commission has concluded its inquiry and, on September 16, 2011, found reasonable cause to believe that Willauer violated G.L. c. 268A.

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

Findings of Fact

- 1. Willauer was a member of the Nantucket Board of Selectmen ("BOS") from April 2005 through March 2008, and from April 2010 to the present.
- 2. Willauer served on the board of directors of the Alliance for Substance Abuse Prevention, Inc. ("ASAP") from November 2003 until May 2011. ASAP is a non-profit organization whose mission is to provide leadership, education, and support in the community for the prevention and treatment of alcoholism, addiction, substance abuse, and related problems.
- 3. Since June 2008, Willauer has served as the uncompensated president of a nonprofit organization called Family & Children's Services of Nantucket County, Inc., doing business as Nantucket Behavioral Health Services, Inc. ("BHS"). BHS provides outpatient mental health services, and operates the only licensed mental health clinic on Nantucket.
- 4. In 2006 and 2007, Willauer, as a BOS member, voted to award contracts to ASAP in the amounts of \$5,000 and \$15,000, respectively.
- 5. On June 23, 2010, the BOS, with Willauer participating in his capacity as a selectman, voted to

award a \$152,100 town contract to BHS and ASAP as a joint venture.

6. On June 23, 2010, Willauer, as president of BHS, signed the \$152,100 contract on behalf of BHS.

7. At its November 17, 2010 meeting, the BOS discussed whether Willauer had a conflict of interest when he participated in the June 23, 2010 vote to award the \$152,100 town contract to BHS/ASAP. Willauer stated that he (Willauer) needed clarification on how to handle such situations in the future. Willauer did not take any steps to obtain such clarification.

8. At the December 8, 2010 BOS meeting, a BOS member moved that, in light of the conflict of interest concerns previously raised, the BOS re-vote whether to award the \$152,100 town contract to BHS/ASAP, previously approved at the June 23, 2010 BOS meeting. The BOS re-voted 4-0 in favor of awarding the contract to BHS/ASAP, with Willauer participating.

Conclusions of Law

9. As a BOS member in a town with a population of 10,000 or fewer persons, Willauer was, at all times relevant to this matter, a special municipal employee as defined in G.L. c. 268A, § 1.

Section 19

10. Section 19, in relevant part, prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which to his knowledge, a business organization in which he is serving as officer, director, trustee, partner or employee, has a financial interest.³

11. The BOS's decision to award the \$152,100 town contract to BHS/ASAP was a particular matter.

12. Willauer, as a BOS member, participated in the particular matter by voting at both the June 23, 2010 and the December 8, 2010 BOS meetings to award the \$152,100 town contract to BHS/ASAP.

13. Although BHS is a non-profit organization, it appears to be a business organization for purposes of the conflict of interest law, as its activities regularly involve providing services for fees, and these activities constitute a significant portion of BHS's total activities. See EC-COI-07-2.⁴

14. As BHS' president, Willauer is an officer of a business organization.

15. BHS, as a recipient of the \$152,100 town contract awarded to the joint venture of BHS/ASAP, had a financial interest in the particular matter.

16. At the time of his participation, Willauer knew that BHS had a financial interest in the particular matter.

17. Accordingly, by participating as a selectman in each decision to award the \$152,100 town contract to BHS/ASAP at the June 23, 2010, and the December 8, 2010 BOS meetings, while he was also serving as BHS' president, and while he knew that BHS had a financial interest in those decisions, Willauer violated § 19.

Section 17(c)

18. 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.

19. A special municipal employee is subject to § 17(c) only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving.

20. The award of a \$152,100 town contract to BHS/ASAP was a particular matter.

21. The contract was a subject of Willauer's official responsibility as a BOS member, as the BOS voted to award the contract on June 23, 2010.

22. The town was a party to the contract.

23. On June 23, 2010, as BHS' president, Willauer signed the \$152,100 town contract. Thus, Willauer acted as BHS's agent in connection with the contract.

24. Willauer's actions as agent for BHS were not in the proper discharge of his official duties.

25. Willauer's actions as agent were in connection with a particular matter, the award of a \$152,100

town contract to BHS/ASAP, which, at the time he acted as BHS' agent was, or within one year had been, the subject of Willauer's official responsibility as a BOS member.

26. Therefore, by as BHS president, signing the \$152,100 town contract, which, at the time he so acted was, or within one year had been, the subject of his official BOS responsibility, Willauer violated § 17(c).

Section 23(b)(3)

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

28. By participating in his capacity as a BOS member in the award of contracts to ASAP,⁵ a non-profit organization on whose board of directors he was serving, Willauer knowingly, or with reason to know, acted in a manner which would cause a reasonable person, having knowledge of all the relevant circumstances, to conclude that ASAP could unduly enjoy his favor in the performance of his official duties. Willauer did not file any § 23(b)(3) disclosure to dispel this appearance of impropriety. Therefore, in so acting, Willauer repeatedly violated § 23(b)(3).

Resolution

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

- (1) that Willauer pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$3,000 as a civil penalty for violating G.L. c. 268A, §§ 17(c), 19 and 23(b)(3); and

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

DATE: September 27, 2011

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 In *EC-COI-07-2* the Commission decided, in certain circumstances, some non-profit organizations were "business organizations" for purposes of the conflict of interest law. The Commission uses a four factor test to determine whether a non-profit is a business organization. Those factors are:

1. whether the organization's activities involve commerce, trade, the sale of goods or the provision of services in exchange for fees (or other compensation) or any other activities, including professional activities, that are commonly understood to be business activities;
2. whether the organization's business activities are engaged in for its support or profit;

3. whether the organization's business activities are continuously or regularly engaged in; and

4. whether the organization's business activities constitute a significant rather than *de minimis* portion of the total activities of the organization.

⁵ ASAP does not appear to be a business organization for purposes of the conflict of interest law as it mainly provides advocacy, education and support without collecting any fees, and it is not involved in any other activities that are commonly understood to be business activities.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0020**

**IN THE MATTER OF
CHARLES BIRCHALL, III**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission ("Commission") and Charles Birchall ("Birchall") 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 July 16, 2010, 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 Birchall. On May 20, 2011, the Commission concluded its inquiry and found reasonable cause to believe that Birchall violated G.L. c. 268A.

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

Use of LPS Resources

Findings of Fact

1. Birchall has been employed by the Lawrence Public Schools ("LPS") as a Graphics Department clerk from 2002 to the present.

2. As a Graphics Department clerk, Birchall's duties include graphic design, high volume printing, and ordering Graphics Department goods and supplies.

3. Algird Sunskis and Stephen Jarvis were the sole owners of Wellington House Publishing, Inc. ("Wellington Publishing") from its incorporation in 2007 until its dissolution in 2009.

4. In 2007, Wellington Publishing published *The First Year Teacher: Why You May Fail*, a book written by Sunskis and Jarvis. Sunskis and Jarvis asked Birchall to print copies of the book.

5. In or about the spring of 2007, Birchall printed at least 100 copies of the book using LPS Graphics Department equipment and supplies.

6. Birchall performed at least 16 hours of the printing during LPS work hours without taking time off from his Graphic Department job.

7. LPS paid Birchall approximately \$300 for the 16 hours he spent performing printing for Sunskis and Jarvis, thus that work was worth at least \$300.

8. The value of the use of the LPS equipment and supplies was well over \$50.

9. In or about the spring of 2007, Sunskis and Jarvis paid Birchall at least \$249, which Birchall kept, for this private printing work.

Conclusions of Law

10. Section 23(b)(2) of G.L. c. 268A, prohibits a public employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or others an unwarranted privilege or exemption of substantial value not properly available to similarly situated individuals.¹

11. As an LPS Graphics Department clerk, Birchall was a municipal employee, as defined by G.L. c. 268A, § 1(g).

12. The use of the Graphics Department time, equipment and supplies was a privilege.

13. The privilege was unwarranted because Birchall used the LPS resources for a private purpose.

14. The privilege was of substantial value because Birchall's LPS time was worth \$300, and use of the LPS equipment and supplies for the private printing was worth at least \$50 or more.²

15. The unwarranted privilege was not otherwise available to similarly situated individuals.

16. By, in his capacity as Graphics Department clerk, using LPS resources to print the books for Sunskis and Jarvis, Birchall used his official position to secure this unwarranted privilege.

17. Thus, by using his official position as Graphics Department clerk to perform private work for Wellington Publishing using LPS resources as described above, Birchall knowingly or with reason to know used his official position to secure for himself an unwarranted privilege of substantial value not properly available to similarly situated individuals in violation of § 23(b)(2).

18. In addition, Birchall's receipt of the \$249 payment from Wellington Publishing for this printing of the book was also a privilege.

19. It was unwarranted because he obtained the payment by using LPS resources to print the book.

20. By, in his capacity as Graphics Department clerk, using LPS resources to print the book for Sunskis and Jarvis, Birchall used his official position to secure this unwarranted privilege.

21. The \$249 payment was of substantial value because it was worth more than \$50.

22. The \$249 payment was not available to similarly situated individuals.

23. Therefore, Birchall violated 23(b)(2) by accepting the \$249 payment from Wellington Publishing for printing the books using LPS resources.

Folding Machine Kickback

Findings of Fact

24. On or about September 8, 2008, Birchall, in his capacity as the Graphics Department clerk, generated a \$4,893.12 LPS purchase order, which did not include shipping costs, to Wellington Publishing for a folding machine.

25. On or about October 20, 2008, Wellington Publishing issued an invoice in the amount of \$4,944.62, which included an additional \$51.50 for shipping, to the LPS for a folding machine.

26. On or about November 17, 2008, the City of Lawrence issued a check to Wellington Publishing for \$4,944.62 for the folding machine.

27. On or about November 27, 2008, Wellington Publishing paid Birchall \$2,200, which he kept, for issuing the purchase order.

28. The LPS did not receive a folding machine from either Wellington Publishing or Birchall.

Conclusions of Law

29. Section 2(b) of G.L. c. 268A, in relevant part, prohibits a municipal employee from corruptly receiving anything of value for himself in return for being influenced in the performance of any official act or act within his official responsibility.

30. Part of Birchall's duties as a Graphics Department clerk is to issue purchase orders for goods and supplies.

31. The issuance of a purchase order was the performance of an official act or act within Birchall's official responsibility.

32. As noted above, Birchall received a \$2,200 payment from Wellington Publishing for issuing the LPS purchase order.

33. The \$2,200 payment was an item of value.

34. At the time that Birchall received the payment of \$2,200 from Wellington Publishing, he did so in return for generating a fraudulent \$4,893.12 purchase order for an LPS folding machine.

35. The exchange was corrupt because it was a sham transaction. Birchall generated a \$4,893.12 purchase order to Wellington Publishing for a machine he knew Wellington Publishing was not going to order or deliver. Further, Birchall knew that when he received the invoice in the amount of \$4,944.62, which included \$51.50 for shipping, from Wellington Publishing for the machine, Wellington Publishing had not delivered, and would not be delivering, the machine. Instead, Birchall had agreed with

Wellington Publishing that he and Sunskis and Jarvis would split the proceeds of the \$4,944.62 LPS payment for a machine that was never delivered.

36. Thus, by corruptly receiving money in return for the performance of the official act and/or act within his responsibility as Graphics Department clerk, Birchall violated § 2(b).

Resolution

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

- (1) that Birchall pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$6,000 as a civil penalty for violating G.L. c. 268A, §§ 2(b) and 23(b)(2);
- (2) that Birchall pay to the City of Lawrence \$2,449 as a civil forfeiture of the unjust enrichment that he received through these violations of G.L. c. 268A, §§ 2(b) and 23(b)(2); and
- (3) that Birchall waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: October 6, 2011

1 G.L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended.

2 The Commission has established a \$50.00 threshold to determine "substantial value," relying on *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0023**

**IN THE MATTER OF
TIMOTHY BASSETT**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Timothy Bassett ("Bassett") 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 November 19, 2010, 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 Bassett. On October 14, 2011, the Commission concluded its inquiry and found reasonable cause to believe that Bassett violated G.L. c. 268A.

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

Findings of Fact

1. From 2003 to 2010, Bassett was the chairman and executive director of the Essex Regional Retirement Board ("ERRB"). One of Bassett's responsibilities was to oversee the ERRB's pension portfolio in order to maximize the financial return for its members. The Essex Regional Retirement System had over 5,000 members from 19 towns, 23 special districts, and six regional schools. Bassett's salary as executive director was approximately \$134,000 a year.

2. From 2003 to 2009, Bassett registered with the Secretary of State's Office as a lobbyist. From 2003 to 2009, Bassett was a part-time employee of Peter McCarthy Associates ("McCarthy Associates"), a lobbying firm. Bassett earned, on average, approximately \$14,000 a year from McCarthy Associates for his services as a lobbyist for certain McCarthy Associates clients.

3. From 2003 through 2009, Bassett, during his ERRB work hours, had many meetings with Peter McCarthy concerning their McCarthy Associates' clients.

4. Bassett and McCarthy each maintained home offices, but neither leased separate office space for their lobbying work.

5. Bassett frequently performed his private lobbying work at his ERRB office on EERB time.

6. Bassett also frequently conducted his private lobbying business using ERRB equipment, computers, fax machines and printers.

7. On occasion, while on ERRB time, Bassett met with legislators and/or their staff at their state offices regarding his private lobbying clients.

Section 23(b)(2)

8. Section 23(b)(2) prohibits a public employee from knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals.¹

9. 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 publicly provided stationery, office supplies, utilities, telephones, office equipment, office space or other facilities, or a public employee's work hours on the public payroll.

10. By conducting his private lobbying work while on ERRB time and/or using ERRB-provided office space and equipment, Bassett used his official ERRB position.

11. The use of these ERRB resources was a privilege.

12. The privilege was unwarranted because state resources are to be used solely for official state purposes.

13. The privilege was of substantial value because the value of the resources was well over \$50.00.²

14. The privilege was not properly available to other private lobbyists.

15. Therefore, based on the foregoing, Bassett repeatedly violated § 23(b)(2).

Resolution

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

- (1) that Bassett pay to the Commonwealth of Massachusetts, with such payment to be delivered to the Commission, the sum of \$10,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2);³ and
- (2) that Bassett waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: October 20, 2011

¹ G. L. c. 268A was amended by c. 28 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(ii) of G.L. c. 268A, as amended.

² See *Commonwealth v. Famigletti*, 4 Mass. App. 585, 587 (1976) (Court held that \$50 in cash is considered "substantial value").

³ At the time of the majority of Bassett's violations of § 23, the maximum civil penalty was \$2,000 per violation.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 10-0008**

**IN THE MATTER OF
JOSEPH P. LALLY, JR.**

Appearances: Stephen P. Fauteux, Esq.
Counsel for Petitioner

Joseph P. Lally, Jr.
Respondent

**IN THE MATTER OF
MICHAEL O'DONNELL, JR.**

Commissioners: Charles B. Swartwood, III, Ch.
Patrick J. King
Paula Finley Mangum
Martin F. Murphy

DISPOSITION AGREEMENT

Presiding Officer: Charles B. Swartwood, III, Ch.

The State Ethics Commission and Michael O'Donnell, Jr. ("O'Donnell") 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).

**ALLOWANCE OF JOINT MOTION TO
DISMISS THE PROCEEDING AND ORDER OF
DISMISSAL**

On November 10, 2011, the parties filed a Joint Motion to Dismiss the Proceeding requesting that the Commission dismiss this adjudicatory proceeding concerning Respondent's alleged violation of G. L. c. 268A, §§ 2(a) and 3(a) by offering jobs and/or career assistance to two state employees with the intent to influence their performance of official acts or acts within their official responsibility. Presiding Officer Swartwood referred the Joint Motion to Dismiss the Proceeding to the full Commission for deliberations and decision on November 18, 2011, pursuant to 930 CMR 1.01(6)(a) and (c).

On June 16, 2011, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into O'Donnell's possible violations of the conflict of interest law, G.L. c. 268A. The Commission concluded its inquiry and, on November 18, 2011, found reasonable cause to believe that O'Donnell repeatedly violated G.L. c. 268A, § 19.

The Commission and O'Donnell now agree to the following findings of fact and conclusions of law:

In support of the Joint Motion to Dismiss the Proceeding, the parties state that dismissal of this matter would be in the interest of justice and in the best interests of the parties and the Commission. Having reviewed the motion and the reasons therein stated for why dismissal of this proceeding is warranted, we find that sufficient basis has been established to allow the Joint Motion to Dismiss the Proceeding.

Findings of Fact

WHEREFORE, the Commission hereby **ALLOWS** the Joint Motion to Dismiss the Proceeding. Commission Adjudicatory Docket No. 10-0008, In the Matter of Joseph P. Lally, Jr., is **DISMISSED**.

1. O'Donnell has been an elected Town of Carver ("Town") Board of Selectmen ("BOS") member since 2005.

2. O'Donnell has been a full-time sergeant with the Carver Police Department since September 2000. As such, he is a member of the Carver Police Union ("Union") and is subject to the collective bargaining agreement between the Union and the Town.

DATE AUTHORIZED: November 18, 2011

DATE ISSUED: November 29, 2011

3. The Carver Town Administrator is responsible for negotiating all Town labor contracts, including the collective bargaining agreement with the Union. The Town and the Union have been in negotiations for several years, during which period the police have been without a contract. The negotiations have been referred to a state arbitrator, but the Town Administrator still participates in the negotiations.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0024**

4. In March 2006, the Commission learned that O'Donnell had participated as a selectman in BOS executive session negotiations regarding the renewal of the Town Administrator's employment contract. In a June 5, 2006 letter, the Commission advised O'Donnell that his participating as a selectman in matters concerning the Town Administrator's employment contract would violate G.L. c. 268A, § 19 because the Town Administrator was involved in

negotiations with the Union. That is, O'Donnell, as a Union member, had a financial interest in who would conduct those negotiations on behalf of the Town. See *EC-COI-93-17* (a selectman, who is also a teacher in the same town, is prohibited by § 19 from evaluating the town manager's performance or re-negotiating his contract, while the manager is negotiating with the teachers union on behalf of the school department).

5. In early 2011, the BOS began considering another new employment contract for the Town Administrator.

6. On February 22, 2011, the BOS met in executive session to discuss strategy regarding the Town Administrator's contract. O'Donnell participated in this portion of the meeting as a selectman. The Town Administrator was then invited into the executive session to negotiate with the BOS. O'Donnell was not present for that portion of the meeting.

7. The BOS followed the same format at its March 8, 2011 meeting. This time, O'Donnell participated in both the strategy and the negotiation portions of the executive session regarding the Town Administrator's contract.

8. In a telephone interview on March 22, 2011, with Commission Enforcement Division staff, O'Donnell confirmed that he participated in the two BOS executive session portions of the meetings regarding the Town Administrator's contract. When Commission Enforcement Division staff asked O'Donnell why he had not heeded the advice in the Commission's 2006 letter, he stated he could not recall receiving the letter, and, in any case, he thought he was only prohibited from participating as a selectman in matters concerning the police department. The Commission Enforcement Division staff advised O'Donnell that his understanding was incorrect and that he should abstain from involvement in the Town Administrator's contract. On March 22, 2011, the Commission Enforcement Division staff mailed a copy of the June 5, 2006 letter to O'Donnell.

9. On March 24, 2011, O'Donnell left Commission Enforcement Division staff a voicemail stating that he had received the copy of the 2006 letter. In the message, O'Donnell said that he had read the letter, and he then stated, "This is not something you guys are going to have to worry about in the future."

10. On March 28, 2011, the then-BOS chairman emailed BOS members to remind them that the BOS

was scheduled to resume contract negotiations in executive session with the Town Administrator on March 29, 2011. On the afternoon of March 28, 2011, O'Donnell forwarded the chairman's e-mail to a fellow BOS member. In the message, sent from O'Donnell's private e-mail account to the other BOS member's private e-mail account, O'Donnell wrote that he must "caution" the BOS member that, if that BOS member attended the BOS meeting, "You will give them a quorum to conduct a vote." In addition, O'Donnell stated in his e-mail that the citizens of Carver "would not want me to support something as egregious as this during this recession."

11. At the March 29, 2011 BOS meeting, in executive session, on a 2-1 vote, the BOS agreed upon a new contract with the Town Administrator. O'Donnell did not participate in discussion or vote on this matter.

12. O'Donnell states that he received the Commission's June 5, 2006 letter and sought no clarification from the Commission at that time. O'Donnell thought that the prohibition on him participating in matters concerning the Town Administrator's contract meant that he could not be present in the room and actively participate when the BOS discussed the Town Administrator's contract, or actively participate in such discussions with individual selectmen. O'Donnell claims that he did not understand that the e-mail that he sent to a fellow BOS member about the Town Administrator's contract constituted participating in the matter.

Conclusions of Law

13. As a Carver BOS member, O'Donnell is a municipal employee as that term is defined in G.L. c. 268A, § 1.

14. Except as otherwise permitted by exemptions to the section,¹ § 19 of G.L. c. 268A prohibits a municipal employee from participating² as such an employee in a particular matter³ in which, to his knowledge, he has a financial interest.⁴

15. The Town Administrator's contract was a particular matter.

16. O'Donnell, as a BOS member, participated in the Town Administrator's contract by significantly involving himself in the February 22, 2011 and March 8, 2011 BOS executive session discussions regarding the Town Administrator's contract.

17. O'Donnell, as a BOS member, also participated in the Town Administrator's contract on March 28, 2011, by sending an e-mail to another BOS member in which he advocated against the Town Administrator's contract and advised the other BOS member not to attend the March 29, 2011 BOS meeting so that there would not be a quorum to consider the Town Administrator's contract.

18. O'Donnell had a financial interest in the Town Administrator's contract because the Town Administrator was the lead negotiator for the Town in negotiations with the Union regarding a contract that would affect O'Donnell as a Union member.

19. At the time of his participation, O'Donnell knew that he had this financial interest in the Town Administrator's contract.

20. Accordingly, by so participating as a BOS member in the Town Administrator's contract discussions, O'Donnell violated § 19.

21. That the Commission in 2006 warned O'Donnell not to participate in the Town Administrator's contract under similar circumstances is an exacerbating factor.

Resolution

In view of the foregoing violations of G.L. c. 268A by O'Donnell, 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 O'Donnell:

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

DATE: December 8, 2011

¹ None of the exemptions applies.

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

³ "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, § 1(k).

⁴ "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. 11-0025**

**IN THE MATTER OF
MICHAEL JACKSON**

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Michael Jackson ("Jackson") 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 14, 2011, 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 Jackson. The Commission has concluded its inquiry and, on December 16, 2011, found reasonable cause to believe that Jackson violated G.L. c. 268A.

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

Findings of Fact

1. During the relevant time, James DiPaola was the elected Middlesex County Sheriff. The Middlesex Sheriff's Office ("MSO") is responsible for the operation of the Billerica House of Correction ("BHC").

2. During the relevant time, Jackson was an MSO senior deputy sheriff.

3. In October 2009, Jackson wanted to hold a fundraiser at his home for DiPaola's re-election campaign.

4. Jackson, on state time, and while at the MSO workplace, repeatedly solicited and received donations for the fundraiser from MSO employees, almost all of whom were Jackson's subordinates. The suggested donation for a ticket to the fundraiser was \$50-\$100 per person.

5. On October 14, 2009, a fundraiser for DiPaola's re-election campaign was held at Jackson's home.

6. Approximately 30 people, the majority of whom were MSO employees and their spouses, attended the fundraiser. According to Jackson, the fundraiser raised a total of approximately \$4,800.

Conclusions of Law

7. Section 23(b)(2)(ii) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. The Commission has interpreted that section to forbid soliciting anything from one's official subordinates, because of the inherently coercive nature of any such solicitation. EC-COI-93-23. The Commission has expressly identified solicitation of campaign contributions by Sheriff's Department employees from their subordinates as a violation of § 23(b)(2). In the Matter of Eiril Ligonde, 2011 SEC ____.

8. As an MSO deputy sheriff, Jackson was a state employee as defined by G.L. c. 268A, § 1.¹

9. Jackson knowingly, or with reason to know, used or attempted to use his official position to secure the

above-described campaign donations for the DiPaola fundraiser. Jackson, as an MSO deputy sheriff in a paramilitary organization, had authority over the subordinates he solicited. Consequently, any request by him to a subordinate unavoidably implicated his official position, particularly where those requests were made during his MSO work hours and in the MSO workplace.

10. Each donation received as a result of Jackson's solicitations was an unwarranted privilege² because it was obtained by soliciting a contribution from a subordinate, someone in an inherently exploitable position.

11. This unwarranted privilege was of substantial value because the suggested donation per ticket to the fundraiser was \$50-\$100 per person, and MSO employees and/or their relatives paid those amounts.³

12. This unwarranted privilege was not properly available to similarly situated individuals (i.e., other candidates vying for public office).

13. Therefore, by, in the manner described above, using his MSO deputy sheriff position to secure campaign donations for DiPaola, Jackson knowingly or with reason to know used his official position to obtain unwarranted privileges of substantial value not properly available to other similarly situated individuals in repeated violation of § 23(b)(2)(ii).

Resolution

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

- (1) that Jackson pay to the Commonwealth of Massachusetts, with such payment delivered to the Commission, the sum of \$5,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 23(b)(2)(ii); and
- (2) that Jackson waive all rights to contest, in this or any other administrative or judicial proceeding to which the Commission is or may be a party, the findings of fact, conclusions of law and terms and conditions contained in this Agreement.

DATE: December 21, 2011

¹ MSO employees are employees of the Commonwealth. 1997 Mass. Acts 48.

² The donations were also an unwarranted privilege because they were obtained in violation of G.L. c. 55, which prohibits appointed and compensated employees, such as Jackson, from making such solicitations (c. 55, § 13) and/or doing so in a public building (c. 55, § 14).

³ Substantial value is \$50 or more. 930 CMR 5.05.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY
DOCKET NO. 11-0022**

**IN THE MATTER OF
RICHARD M. BRETSCHNEIDER**

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Commissioners: Charles B. Swartwood, III, Ch.
David L. Veator
Patrick J. King
Paula Finley Mangum
Martin F. Murphy

Presiding Officer: Charles B. Swartwood, III, Ch.

**DECISION AND ORDER ON MOTION FOR
SUMMARY DECISION**

On November 7, 2011, Petitioner filed a Motion for Summary Decision (Motion) pursuant to 930 CMR 1.01(6)(e)(2).¹ For the reasons stated below, we grant Petitioner's Motion and Order Respondent, Richard M. Bretschneider, to pay a civil penalty of \$1,200.

I. Factual Background

The Order to Show Cause (OTSC) alleges that Respondent was the Nantucket County Sheriff and as such a state employee pursuant to G.L. c. 268A, § 1. The Order to Show Cause also alleges that Respondent was required to file a Statement of Financial Interests (SFI) for calendar year 2010 by

May 2, 2011, in accordance with G.L. c. 268B and 930 CMR 2.00. The Respondent did not file by that date.

The OTSC further alleges that on May 6, 2011, the Commission sent Respondent a Formal Notice of Lateness (Formal Notice) by first class and certified mail. The Formal Notice advised Respondent that his SFI had not been filed and was, therefore, delinquent. The Formal Notice further advised Respondent that his failure to file his 2010 SFI within 10 days would result in civil penalties. Respondent received the Notice on or before May 17, 2011. Therefore, Respondent was required to file his SFI by May 27, 2011.

The Respondent subsequently filed his SFI on September 21, 2011, more than one-hundred and eleven (111) days after the expiration of the grace period following receipt of the Formal Notice.

The OTSC alleges that Respondent's late filing violated G.L. c. 268B, § 5.² Petitioner requests that the Commission impose a civil penalty of \$1,200.³ The OTSC in this case was issued on October 13, 2011. Pursuant to 930 CMR 1.01(5)(c),⁴ Respondent's Answer was due by November 3, 2011. Respondent failed to file an Answer by that date.

On November 22, 2011, the Presiding Officer issued an Order on Motion for Summary Decision⁵ (Order on Motion) requiring Respondent to file an Answer by December 6, 2011 or to otherwise show cause why a summary decision should not be entered against him. The Order on Motion further provided that, if Respondent failed to file an Answer by that date, the Presiding Officer would request that the Commission consider at its December 16, 2011, meeting whether a summary decision should be entered against Respondent.⁶

Pursuant to 930 CRM 1.01(6)(e)(2), the Commission may enter a summary decision in favor of the Petitioner when the record discloses the Respondent's failure to file documents required by 930 CMR 1.00, to respond to notices or correspondence or to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the adjudicatory proceeding. The record in this case amply warrants the entry of a summary decision in favor of Petitioner.

Despite notice, the Respondent failed to file an Answer to the OTSC. In addition, he failed to file an

Answer or to otherwise respond orally or in writing to show cause why summary decision should not be entered against him pursuant to the Order on Motion.

II. Order

Respondent's failure to defend or otherwise respond to the allegations constrains us to enter summary decision in favor of Petitioner, concluding that Respondent has violated G.L. c. 268B, § 5. Accordingly, pursuant to the authority granted to it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Respondent, Richard M.

Bretschneider, according to the penalty schedule, to pay a civil penalty of \$1,200 for filing his SFI more than one-hundred and eleven (111) days after the expiration of the grace period following the Formal Notice of Lateness.

DATE AUTHORIZED: December 16, 2011

DATE ISSUED: December 21, 2011

¹ Pursuant to 930 CMR 1.01(6)(e)(2):

When the record discloses the failure of the Respondent to file documents required by 930 CMR 1.00, to respond to notices or correspondence, or to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the Adjudicatory Proceeding, the Presiding Officer may issue an order requiring that the Respondent show cause why a Summary Decision should not be entered against him or her. If the Respondent fails to show such cause, a Summary Decision may be entered in favor of the Petitioner. Any such Summary Decision shall be granted only by the Commission, shall be a Final Decision and shall be made in writing as provided in 930 CMR 1.01(10)(o).

² The last paragraph of § 5 provides that "[f]ailure of a reporting person to file [an SFI] within ten days after receiving notice as provided in clause (f) of section three of [G.L. c. 268B], or the filing of an incomplete statement of financial interests after receipt of such a notice, is a violation of [G.L. c. 268B] and the commission may initiate appropriate proceedings pursuant to the provisions of section four."

³ The Commission has adopted the following penalty schedule for late submission of an SFI after the expiration of the 10 day grace period following receipt of a Formal Notice: 1-10 days late (\$100); 11-

20 days late (\$200); 21-30 days late (\$300); 31-40 days late (\$400); 41-50 days late (\$500); 51-60 days late (\$600); 61-70 days late (\$700); 71-80 days late (\$800); 81-90 days late (\$900); 91-100 days late (\$1,000); 101-110 days late (\$1,100); 111-120 days late (\$1,200); 121 days to the day before an Order to Show Cause is issued (\$1,250); and date a Decision and Order is issued by the Commission (up to \$10,000) or more late (\$1000); and non-filing of SFI (\$10,000).

⁴ "Within 21 days of the issuance of an Order to Show Cause (OTSC), the Respondent shall file an Answer containing a full, direct and specific answer to each claim set forth in the Order admitting, denying, or explaining material facts."

⁵ Pursuant to 930 CMR 1.01(6)(e)(2), if the Respondent fails to file an Answer, "the Presiding Officer may issue an order requiring that the Respondent show cause why a Summary Decision should not be entered against him or her. If the Respondent fails to show such cause, a Summary Decision may be entered in favor of the Petitioner."

⁶ The Order on Motion was sent to Respondent by first class mail at the address shown on Respondent's 2010 SFI received by the Commission on September 21, 2011.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

SUFFOLK, ss.

**COMMISSION
ADJUDICATORY
DOCKET NO. 11-0021**

**IN THE MATTER OF
DAVID LANDY**

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Commissioners: Charles B. Swartwood, III, Ch.
David L. Veator
Patrick J. King
Paula Finley Mangum
Martin F. Murphy

Presiding Officer: Charles B. Swartwood, III, Ch.

**DECISION AND ORDER ON MOTION FOR
SUMMARY DECISION**

On November 7, 2011, Petitioner filed a Motion for Summary Decision (Motion) pursuant to 930 CMR 1.01(6)(e)(2).¹ For the reasons stated below, we grant Petitioner's Motion and Order Respondent, David Landy, to pay a civil penalty of \$800.

I. Factual Background

The Order to Show Cause (OTSC) alleges that Respondent was an employee of the Pension Reserve Investment Management Board and as such a state employee pursuant to G.L. c. 268A, § 1. The Order to Show Cause also alleges that Respondent was required to file a Statement of Financial Interests (SFI) for calendar year 2010 by May 2, 2011, in accordance with G.L. c. 268B and 930 CMR 2.00. The Respondent did not file by that date.

The OTSC further alleges that on May 6, 2011, the Commission sent Respondent a Formal Notice of Lateness (Formal Notice) by first class and certified mail. The Formal Notice advised Respondent that his SFI had not been filed and was, therefore, delinquent. The Formal Notice further advised Respondent that his failure to file his 2010 SFI within 10 days would result in civil penalties. Therefore, Respondent was required to file his SFI by May 19, 2011.²

The Respondent subsequently filed his SFI on August 1, 2011, more than seventy-one (71) days after the expiration of the grace period following receipt of the Formal Notice.

The OTSC alleges that Respondent's late filing violated G.L. c. 268B, § 5.³ Petitioner requests that the Commission impose a civil penalty of \$800.⁴

The OTSC in this case was issued on October 13, 2011. Pursuant to 930 CMR 1.01(5)(c),⁵ Respondent's Answer was due by November 3, 2011. Respondent failed to file an Answer by that date.

On November 22, 2011, the Presiding Officer issued an Order on Motion for Summary Decision⁶ (Order on Motion) requiring Respondent to file an Answer by December 6, 2011, or to otherwise show cause why a summary decision should not be entered against him. The Order on Motion further provided that, if Respondent failed to file an Answer by that date, the Presiding Officer would request that the Commission consider at its December 16, 2011, meeting whether a summary decision should be entered against Respondent.⁷

Pursuant to 930 CRM 1.01(6)(e)(2), the Commission may enter a summary decision in favor of the

Petitioner when the record discloses the Respondent's failure to file documents required by 930 CMR 1.00, to respond to notices or correspondence or to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the adjudicatory proceeding. The record in this case amply warrants the entry of a summary decision in favor of Petitioner.

Despite notice, the Respondent failed to file an Answer to the OTSC. In addition, he failed to file an Answer or to otherwise respond orally or in writing to show cause why summary decision should not be entered against him pursuant to the Order on Motion.

II. Order

Respondent's failure to defend or otherwise respond to the allegations constrains us to enter summary decision in favor of Petitioner, concluding that Respondent has violated G.L. c. 268B, § 5. Accordingly, pursuant to the authority granted to it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Respondent David Landy, according to the penalty schedule, to pay a civil penalty of \$800 for filing his SFI more than seventy-one (71) days after the expiration of the grace period following the Formal Notice of Lateness.

DATE AUTHORIZED: December 16, 2011

DATE ISSUED: December 21, 2011

¹ Pursuant to 930 CMR 1.01(6)(e)(2):

When the record discloses the failure of the Respondent to file documents required by 930 CMR 1.00, to respond to notices or correspondence, or to comply with orders of the Commission or Presiding Officer, or otherwise indicates a substantial failure to cooperate with the Adjudicatory Proceeding, the Presiding Officer may issue an order requiring that the Respondent show cause why a Summary Decision should not be entered against him or her. If the Respondent fails to show such cause, a Summary Decision may be entered in favor of the Petitioner. Any such Summary Decision shall be granted only by the Commission, shall be a Final Decision and shall be made in writing as provided in 930 CMR 1.01(10)(o).

² This time calculation includes a three (3) day period for receipt by mail of the Formal Notice in addition to the ten (10) day grace period.

³ The last paragraph of § 5 provides that “[f]ailure of a reporting person to file [an SFI] within ten days after receiving notice as provided in clause (f) of section three of [G.L. c. 268B], or the filing of an incomplete statement of financial interests after receipt of such a notice, is a violation of [G.L. c. 268B] and the commission may initiate appropriate proceedings pursuant to the provisions of section four.”

⁴ The Commission has adopted the following penalty schedule for late submission of an SFI after the expiration of the 10 day grace period following receipt of a Formal Notice: 1-10 days late (\$100); 11-20 days late (\$200); 21-30 days late (\$300); 31-40 days late (\$400); 41-50 days late (\$500); 51-60 days late (\$600); 61-70 days late (\$700); 71-80 days late (\$800); 81-90 days late (\$900); 91-100 days late (\$1,000); 101-110 days late (\$1,100); 111-120 days late (\$1,200); 121 days to the day before an Order to Show Cause is issued (\$1,250); and date a Decision and Order is issued by the Commission (up to \$10,000) or more late (\$1000); and non-filing of SFI (\$10,000).

⁵ "Within 21 days of the issuance of an Order to Show Cause (OTSC), the Respondent shall file an Answer containing a full, direct and specific answer to each claim set forth in the Order admitting, denying, or explaining material facts.”

⁶ Pursuant to 930 CMR 1.01(6)(e)(2), if the Respondent fails to file an Answer, "the Presiding Officer may issue an order requiring that the Respondent show cause why a Summary Decision should not be entered against him or her. If the Respondent fails to show such cause, a Summary Decision may be entered in favor of the Petitioner."

⁷ The Order on Motion was sent to Respondent by first class mail at the address shown on Respondent's 2010 SFI received by the Commission on August 1, 2011.

ADVICE



EDUCATION



DISCLOSURE



ENFORCEMENT



COMMISSION MEMBERS

Hon. Charles B. Swartwood, III, (ret.) Chairman
David L. Veator, Vice Chairman
Hon. Patrick J. King (ret.)
Paula Finley Mangum
Martin F. Murphy

MASSACHUSETTS STATE ETHICS COMMISSION
One Ashburton Place, Room 619
Boston, MA 02108