

ADVICE



EDUCATION



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Included in this publication are:

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In the Matter of Reginald Newcomb - Former Rockland Planning Board member Reginald Newcomb paid a \$5,000 civil penalty for repeatedly representing his realty trust before the Rockland Planning Board and for removing a critical document from a Planning Board file in an effort to gain constructive approval of an application. According to the Disposition Agreement, in May 2006, Newcomb purchased two adjacent residential lots on Hingham Street in Rockland. He subdivided one of the lots into two lots and built three duplex condominium units on the lots. In June 2006, Newcomb purchased a lot on Salem Street in Rockland. Newcomb attempted to divide the Salem Street Property into two lots. The Hingham Street and Salem Street lots were owned by the Rehab Realty Trust, of which Newcomb is the sole trustee, and he and his wife are the Trust's beneficiaries. The Hingham Street lots came before the Planning Board for site plan review on four occasions between September, 2006 and February, 2007. On each occasion, Newcomb stepped down from the Planning Board and presented the site plan on behalf of the Trust. On March 5, 2007, a State Ethics Commission investigator contacted Newcomb about his presentations before the Planning Board. During that conversation, "Newcomb confirmed that he made the presentations on behalf of the Trust, acknowledged that the conflict of interest law prohibited him from doing so, and agreed not to further represent the Trust before the Planning Board." Notwithstanding this conversation, during the period March 21, 2007 through August 31, 2007, Newcomb continued to represent the Trust before the Planning Board, the Rockland Town Clerk, and the Rockland Zoning Enforcement Officer with respect to both the Hingham Street lots and Salem Street lot. On March 21, 2007, Newcomb presented to the Planning Board a Form A application for the Salem Street lot, which was intended to demonstrate the inapplicability of the Subdivision Control Law to the property. The Planning Board has 21 days to act on a Form A application, or else the application is constructively approved. The Planning Board informed Newcomb that it would deny the application unless Newcomb provided sufficient information to address issues raised by Town Counsel. Newcomb, through counsel, provided the Planning Board with a written extension request, allowing the Planning Board until June 18, 2007, to act on the Form A application without constructive approval occurring. On June 13,

2007, the Planning Board denied the application. On June 14, 2007, Newcomb requested that the Planning Board Chair allow him to access the Planning Board office to verify the date that he filed the Form A application. The Chair permitted him to do so solely for the purpose of checking the date on his application. Although not authorized to do so, Newcomb removed the file from the Planning Board office to make a copy, and then returned the file. A subsequent review of the file revealed that Newcomb's written extension request was missing. When asked to return the document, Newcomb instead produced a copy. Also on June 14, 2007, Newcomb met with the Town Clerk and requested a certificate of approval as to the Salem Street lot Form A application based on the Planning Board's failure to act on the application within the required 21 days. Section 17(c) of the Conflict of Interest Law prohibits a municipal employee from acting as agent for anyone in connection with any particular matter in which the municipality is a party or has a direct and substantial interest. A special municipal employee is subject to § 17(c) only relative to a particular matter (a) in which he has participated, (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending before his own agency. Although Newcomb did not participate as a Planning Board member in these applications, they were subject to his official responsibility as a Planning Board member. As a result, § 17(c) prevented Newcomb from acting as agent for the Trust in connection with these applications. Newcomb's actions as agent for the Trust were not taken in the proper discharge of his official duties as a Planning Board member. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value not properly available to similarly situated individuals. Newcomb knowingly used his position as a Planning Board member to obtain unsupervised access to the Planning Board office so that he could remove his written extension request from the Planning Board file for the Salem Street lot. His removal of the document was a privilege of substantial value. It was an unwarranted privilege because the document was part of the official record and was relied upon by the Planning Board to satisfy the requirement that it acted on the application within 21 days.

In the Matter of John Silva - Former East Bridgewater Police Chief John L. Silva, Jr. paid a \$5,000 civil penalty for involving himself in disciplinary matters affecting his police officer son. According to the Disposition Agreement, in August 2003, Silva's police officer son was placed in protective custody for an alcohol-related incident. Silva issued a written directive to his son that he take a breathalyzer test at the beginning of each duty shift; secure his service weapon at the police station at the end of every shift; and attend counseling and alcohol programs. On November 19, 2003, Silva's son was arrested for operating a motor vehicle under the influence of alcohol and leaving the scene of an accident. As a result, the East Bridgewater Board of Selectmen charged Silva's son with violating the Police Department's rules and regulations. Silva received an opinion from the State Ethics Commission's Legal Division in November 2003 that Silva could not participate in disciplinary matters involving his son because of his son's financial interest in the matter, unless he first received written permission from his appointing authority, the Board of Selectmen. Silva did not receive such written permission from the Board of Selectmen. A Settlement Agreement reached with the Board of Selectmen in January 2004 called for a 120-day suspension without pay to coincide with the son's driver's license suspension, and upon his return to work, for Silva's son to take a breathalyzer test at the beginning of each shift and submit the results to Sergeant John Cowan or the designated liaison between the Police Department and the Board of Selectmen. Silva appointed himself the designated liaison and collected his son's breathalyzer tests. Silva authorized his son to return to work prior to the expiration of the 120-day suspension and/or reinstatement of his driver's license, and placed him on restricted desk duty. On three occasions between January 2004 and December 2004, Silva's son failed to take the breathalyzer tests as required under the Settlement Agreement. Silva allowed his son to work his police shifts despite his failure to take the breathalyzer tests on these three occasions. Silva did not report the missed breathalyzer tests to the Board of Selectmen. Section 19 of G. L. c. 268A prohibits a municipal employee from participating as such in a particular matter in which, to his knowledge, he or an immediate family member has a financial interest. Silva violated § 19 deciding to issue the written directive to his son; assigning his son to restricted desk duty prior to the expiration of the 120-day suspension and /or the reinstatement of his license; appointing himself the designated liaison and collecting his son's required breathalyzer tests; allowing his son to work his police shifts despite his

failure to take the breathalyzer tests on three occasions; and not reporting the missed breathalyzer tests to the Board of Selectmen. Section 23(b)(2) prohibits a public employee from using his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. Silva violated §23(b)(2) by failing to report his son's missed breathalyzer tests to the Board of Selectmen and allowing him to work his police shifts.

In the Matter of Joan Anderson -Westminster Conservation Commission ("ConCom") member Joan Anderson paid a \$2,000 civil penalty for participating in ConCom matters in which she and her husband had financial interests and in matters involving businesses with which she and her husband had private business dealings. Anderson at one time owned Brook Bound Nursery, a nursery and garden supply store in Westminster, while her husband, Jeffrey, owned Landscaping by Anderson, Inc. Westminster resident Robert Francis had significant business interests in American Drilling Services, Inc., Crocker Pond Properties, Inc., and Whitman River Dam, Inc. Francis is also a beneficiary of the M&R Nominee Trust. The Disposition Agreement details extensive private commercial dealings between the Andersons and Francis beginning in 1996, including Francis contracting with Landscaping by Anderson, Inc. and Brook Bound Nursery for various projects at a total cost of approximately \$150,000, and the Andersons purchasing property from the Trust. In 2002, Whitman River Dam, Inc. and Crocker Pond Properties, Inc., the companies in which Francis had significant business interests, purchased approximately 937 acres of undeveloped land near Crocker Pond and around the Whitmanville Reservoir. A portion of the Whitmanville Reservoir parcel is located directly across the street from the Andersons' residence. Anderson, in her capacity as a ConCom member, discussed, voted on and signed ConCom Orders of Conditions related to (a) the Whitmanville Reservoir parcel on July 28, 2003, and September 29, 2003; and (b) the Crocker Pond parcel on March 19, 2003, January 29, 2004, and February 9, 2004. Section 19 of the conflict of interest law prohibits a municipal employee from participating as such in a particular matter in which she or an immediate family member has a financial interest. Anderson violated § 19 by participating as a ConCom member in the Orders of Conditions affecting the Whitmanville Reservoir parcel while knowing that she and her husband owned property abutting the Whitmanville Reservoir parcel. As abutters, Anderson and her husband are presumed to have a

financial interest in these particular matters. Section 23(b)(3) of the conflict of interest law prohibits a 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 or unduly enjoy her favor in the performance of her official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. Anderson violated §23(b)(3) by repeatedly participating as a ConCom member in matters affecting Francis or his companies after she and her husband had a significant business relationship with Francis. By failing to file a written disclosure of the relevant facts, Anderson did not take the necessary steps to dispel the appearance of a conflict of interest created by her private business relationship with Francis.

In the Matter of Thomas E. Riley, Jr., P.J. Riley & Co., and Taylor Roth - The Ethics Commission issued a Decision and Order dismissing its cases alleging violations of the conflict of interest law by P.J. Riley & Co. and its executive vice president, Thomas Riley. The Commission also dismissed one allegation regarding senior inspector for the state Board of Examiners of Plumbers and Gasfitters Taylor Roth, but continued to proceed on other allegations against Roth. On April 23, 2008, the Commission's Enforcement Division filed Orders to Show Cause alleging that Riley & Co., Riley and Roth each violated section 3 of the conflict of interest law in connection with Roth's alleged receipt of Boston Red Sox game tickets from Riley and Riley & Co. in 2004, 2005 and 2006, contemporaneous with Roth's issuance of permits for, and inspection of, gas and plumbing work performed by Riley & Co. Section 3 prohibits anyone from offering or giving, and any public employee from soliciting or receiving, anything of substantial value given for or because of an official act performed or to be performed. Riley and Riley & Co. filed a joint motion for summary decision. They argued that there was no genuine issue in dispute as to any material fact and that there were no facts that demonstrate any linkage between their gift of Red Sox tickets to Roth in 2004, 2005 and 2006, and any official act which Roth took in the past or was to take in the future on any Riley & Co. project. Roth filed a separate motion for summary decision in which he denied that he received the tickets in 2004 and 2005, and he asserted that he turned over the unused tickets to his agency counsel in 2006. The Commission agreed that the facts presented in the case did not show the required linkage between the Red Sox tickets and any official act performed by Roth in connection with any

inspections or permits issued to Riley & Co. The OTSC filed against Roth also alleged that he violated §§ 23(b)(2) and 23(b)(3) of the conflict of interest law. Section 23(b)(2) prohibits a public employee from using his position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not available to similarly situated individuals. Section 23(b)(3) prohibits a 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 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. The D&O states that there are genuine issues of material fact concerning Petitioner's allegations that Roth violated §§ 23(b)(2) and 23(b)(3) by receiving Red Sox tickets from Riley and Riley & Co. in 2004, 2005 and 2006, and that Roth is not entitled to summary decision in his favor as to these § 23 allegations."

In the Matter of Matthew Amorello – The Ethics Commission issued a Decision and Order determining that former Massachusetts Turnpike Authority Chairman Matthew Amorello violated Section 6 of the conflict of interest law by participating in revising and approving the Turnpike Authority's sick leave buy-back policy when he knew that he had a financial interest in that policy." The Commission ordered Amorello to pay a \$2,000 civil penalty. Section 6 of the conflict of interest law provides in relevant part that a state employee may not participate as such in any particular matter in which, to his knowledge, he has a financial interest. The Commission found that Amorello participated in decisions involving the sick leave buy-back policy when, on July 26, 2006, Amorello was told by Turnpike Authority Human Resources Director Norman Chalupka that Chalupka had changed the sick leave buy-back policy from a cash payment in an amount equal to 20% of the value of accrued and unused sick time for retirees, with nothing for non-retirees, to a cash payment in an amount equal to 100% of the value of accrued and unused sick time for anyone leaving the Turnpike Authority. Amorello told Chalupka to review what other similar agencies had for policies and, "to make recommendations similar to those [agencies]." Amorello violated section 6 when he rejected the 100% buy-back policy at least as it applied to non-retirees. Amorello's comments on Chalupka's subsequent recommendation to change it from 100% to 50% constituted an approval of the revised sick leave buy-back policy which Chalupka then effected. Amorello could have avoided violating the conflict of

interest law if he had first made a written disclosure of all the facts surrounding his financial interest in the policy to his appointing authority, the Governor, and if the Governor had made a written determination allowing Amorello to participate in the policy change. Amorello did not file a written disclosure with the Governor.

In the Matter of Frederick Foresteire – The Ethics Commission issued a Decision and Order finding that Everett School Superintendent Frederick K. Foresteire violated section 23(b)(2) of the conflict of interest law, and imposed a \$6,000 civil penalty. Section 23(b)(2) of the conflict of interest law prohibits municipal employees from using or attempting to use their official positions to secure for themselves or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. The Commission found that Foresteire violated section 23(b)(2) by using his official position in connection with plumbing work performed at, and plywood supplied for, Foresteire’s home using School Department employees, time and resources. The School Department employee who did the plumbing work saw Foresteire at his home while doing the work, and Foresteire was sent payroll records which reflected that the employee had not used any vacation time to do that work. Foresteire paid the employee for doing the plumbing work, but unilaterally decided how much to pay him. The Decision states, “[w]here Foresteire is the Superintendent to whom School Department Maintenance Manager Lona DeFeo reports, and when he has the power to direct and supervise the entire school system, including the Maintenance Department employees, and when the matter involves private work at his home and for his benefit, we can reasonably infer that Foresteire directed DeFeo to arrange such work on his behalf. In the alternative, we can reasonably infer that even if Foresteire did not initially give the instruction to DeFeo, he subsequently knew or should have known that such work was being done on School Department time, using School Department resources and he did nothing to stop it.”

In the Matter of Lona DeFeo – The Ethics Commission issued a Decision and Order finding that Everett School Department Maintenance Manager Lona DeFeo violated Section 23(b)(2) of the conflict of interest law, and imposed a \$4,500 civil penalty. Section 23(b)(2) of the conflict of interest law prohibits municipal employees from knowingly, or with reason to know, using or attempting to use their official positions to secure for

themselves or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. The Commission found that DeFeo used her official position in connection with plumbing work performed at, and plywood supplied for, School Superintendent Frederick Foresteire’s home using School Department employees, time and resources. DeFeo directed a School Department employee to perform plumbing work at Foresteire’s home on School Department time. She also directed a School Department employee to pick up plywood from a vendor, deliver it to the high school, and cut it and stack it. She also directed another School Department employee to deliver plywood to Foresteire’s home using a School Department truck while on School Department time. DeFeo violated section 23(b)(2) by knowingly using her position to give Foresteire unwarranted privileges of substantial value by having School Department employees use School Department time and School Department resources to do private work at his home.

In the Matter of George Bitzas – The Ethics Commission approved a Disposition Agreement in which Agawam City Council member George Bitzas admitted to violating the conflict of interest law and paid a \$2,000 civil penalty. In October 2007, Bitzas met with Hannah Kozah, the owner of John’s Getty Auto, on two occasions after campaign signs supporting Susan Dawson for Mayor were placed on the property. Bitzas supported incumbent Mayor Richard Cohen. During the first meeting, Bitzas told Kozah that Mayor Cohen was upset about the Dawson signs being placed on Kozah’s property. Later that day, Bitzas again visited Kozah and showed Kozah a picture of a town employee whose personal vehicle had a Dawson campaign sign displayed. According to the Agreement, Bitzas told Kozah, “See what happens to him after the election.” The City Council is responsible for enacting temporary parking ordinances that regulate the ability of residents to obtain permits to park cars on their property during special events, and Kozah had previously asked Bitzas and Mayor Cohen to intercede on his behalf with the city Board of Appeals regarding Kozah’s application to park cars on his property during local events. Kozah was dissatisfied with the response he received from Bitzas and Cohen. Section 23(b)(2) prohibits a municipal employee from using or attempting to use his official position to obtain for himself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Bitzas violated section 23(b)(2) by invoking his official position as an Agawam City

Councilor, by purporting to speak for the mayor and by implicitly threatening city action against supporters of the mayor's opponent. Bitzas also violated § 23(b)(2) by attempting to use his position as a city councilor to get Kozah to take down the mayor's opponent's campaign signs.

In the Matter of Maureen Brennan – The Ethics Commission issued a Decision and Order determining that former Marlborough Department of Community Development finance assistant Maureen Brennan violated sections 19 and 23(b)(3) of the conflict of interest law as a result of her involvement in matters relating to a DCD housing rehabilitation loan to her fiancé, and then husband, Keith Wheeler. The Commission imposed a \$5,000 civil penalty. In September 2002, Wheeler (who Brennan married on October 19, 2002) was approved to receive a DCD loan to rehabilitate a house he owned in Marlborough. Brennan did not participate in the DCD's decision to provide the rehabilitation loan to Wheeler. Thereafter, however, Brennan participated as a DCD employee in matters relating to the DCD loan for the rehabilitation work on Wheeler's house. On September 26, 2002, Brennan signed and processed a DCD request for a \$8,495 progress payment to a contractor for work on Wheeler's house; on October 16, 2002, Brennan signed and processed a DCD request for a \$9,909 progress payment to a contractor for work on Wheeler's house; on March 17, 2003, Brennan signed and processed a DCD request for a \$2,750 progress payment to a contractor for work on Wheeler's house in response to an invoice that indicated it was a change order; and on June 7, 2004, Brennan drafted and submitted a "Single Case Waiver" request to the state Department of Housing and Community Development ("DHCD"), which provided the funds for the DCD rehabilitation loans, seeking approval to increase the limit on the amount of DCD rehabilitation assistance available to Wheeler from \$25,000 to \$29,664.95. Section 19 prohibits a municipal employee from participating as such in a particular matter in which she or a member or her immediate family has, to the employee's knowledge, a financial interest. Brennan violated § 19 when she signed and processed the progress payment in March 2003 and again when she drafted and submitted to DHCD the Single Case Waiver request in June 2004. Section 23(b)(3) provides that no municipal employee shall act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy her favor in the performance of her official duties, or that she is likely to act or fail to act as a result of kinship, rank,

position or undue influence of any person or party. Brennan violated § 23(b)(3) on each of the three times in 2002 and 2003 that she processed progress payments for Wheeler's house and also when she requested the Single Case Waiver for Wheeler's house. The Commission rejected an assertion by Brennan that the Enforcement Division failed to timely file its Order to Show Cause. The Commission also determined that Brennan did not violate the conflict of interest law in connection with her handling of a loan application filed by her cousin and his spouse.

In the Matter of Jack Speranza – The Ethics Commission issued an Order vacating its reasonable cause finding and terminating the adjudicatory proceeding involving Hopkinton Conservation Commission member and Community Preservation Committee member Jack Speranza. The determination is based on new information learned after the adjudicatory proceeding commenced. The adjudicatory proceeding was initiated on June 12, 2007, when the Commission's Enforcement Division alleged in an Order to Show Cause that Speranza violated section 17 of the conflict of interest law. On October 5, 2006, Speranza asked the Commission's Legal Division for advice as to whether he could act as a private attorney on behalf of a group of town residents who wanted to file a suit against the town regarding the CPC's proposed purchase of a parcel for open space. Speranza was advised that section 17 of the conflict of interest law prohibited him from so acting. On October 12, 2006, Speranza, acting as a private attorney on behalf of the Petitioners, filed a court petition against the town and obtained a temporary restraining order. Subsequently, Speranza, acting as a private attorney on behalf of the Petitioners, signed a stipulation agreement regarding the restraining order, filed a memorandum in support of continuing the injunction, and signed and filed a stipulation of dismissal. On November 7, 2007, Speranza filed an affidavit with the Commission which provided new and detailed information about Speranza's concerns about the various appraisals of the parcel, that the proposed purchase might violate state law and that Speranza was acting to fulfill the obligations of his oath as a town employee. The affidavit also described the information he provided and the questions he posed when he called the Commission's Legal Division for advice. A review of Speranza's affidavit provides a fuller factual presentation of the unusual underlying circumstances. Had such facts been known previously, the Commission would not have found reasonable cause and authorized an adjudicatory proceeding. The facts supporting the finding include the following:

Speranza's concerns about the appraisal process; his actions were taken in an effort to protect the public interest in ensuring the Town's compliance with the relevant statutory requirements rather than his own personal or private interests; the efforts Speranza made to comply with the conflict of interest law by seeking advice; the absence of any personal financial gain to him as a result of his representation of the petitioners; and Speranza's reporting of his actions to the Commission. These facts warrant the exercise of discretion, and the Commission vacated the prior finding of reasonable cause and the authorization of adjudicatory proceedings."

In the Matter of Terry Edwards – The Ethics Commission approved a Disposition Agreement in which former P.A. Landers, Inc. Project Manager Terry Edwards admitted to paying bribes to MassHighway inspector Thomas Kennedy in order to have Kennedy approve work performed by P.A. Landers. P.A. Landers delivered truckloads of asphalt to a MassHighway project site located on Route 44 in Plymouth. Kennedy was assigned to inspect the asphalt deliveries for foreign objects and conduct random yield inspections to verify that P.A. Landers was providing adequate amounts of asphalt. After conducting these inspections, Kennedy signed the weight slips provided by the P.A. Landers truck drivers and forwarded the weight slips to his supervisor, who signed them and submitted them to MassHighway for payment. These weight slips were necessary for P.A. Landers to receive payment for its work on the project. From May 2002 through November 2002, Kennedy solicited and received cash from Edwards for Kennedy's gasoline expenses. Each payment averaged \$200. Edwards gave Kennedy between \$2,000 and \$2,700 in cash using P.A. Landers' funds. Kennedy was not authorized to receive cash payments from any contractor under his supervision, and he received reimbursements from MassHighway for travel expenses incurred using his personal vehicle to travel to and from the Route 44 project. Edwards provided the cash payments with the intent to cause Kennedy to relax his inspections of P.A. Landers' asphalt deliveries on the Route 44 project site. Edwards was concerned that if Kennedy did not receive the cash payments, P.A. Landers risked delays in Kennedy's processing of paperwork necessary for P.A. Landers to receive payment for its work on the project. For example, on June 29, 2002, Kennedy signed six P.A. Landers weight slips without conducting proper inspections. Section 2(a) of the conflict of interest law prohibits anyone from corruptly giving anything of value to any state employee with the intent to influence any official act or act within his official responsibility. Edwards

violated section 2(a) by giving Kennedy between \$2,000 and \$2,700 in cash with the intent to influence Kennedy's performance of certain duties as a MassHighway construction inspector, including Kennedy's inspection of asphalt deliveries and his processing of paperwork necessary for P.A. Landers to receive payment for its work on the Route 44 project.

In the Matter of Taylor Roth – The Ethics Commission issued a Final Decision dismissing allegations that state Board of Examiners of Plumbers and Gasfitters Senior Inspector Taylor Roth violated the conflict of interest law. The Commission's determination was based on an evaluation of the credibility of the witnesses who testified in the case. The Commission's Enforcement Division initiated proceedings on April 23, 2008, with the issuance of an Order to Show Cause alleging that P.J. Riley & Co., Thomas Riley and Roth violated section 3 (the gift section of the conflict of interest law), and that Roth additionally violated section 23 (the standards of conduct section). On January 23, 2009, the Commission issued a Decision and Order dismissing the section 3 illegal gratuity allegations against Riley & Co., Riley and Roth, deciding that there were no facts that demonstrated any linkage between the gift of Red Sox tickets to Roth and any official act which Roth took in the past or was to take in the future on any Riley & Co. project. The remaining allegations were that Roth violated sections 23 (b)(2) and 23(b)(3) of the conflict of interest law in connection with his receipt of Red Sox tickets from Riley & Co. and Thomas Riley. Section 23(b)(2) prohibits a public employee from using his position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not available to similarly situated individuals. Section 23(b)(3) prohibits a 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 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. The evidence in the case consisted of the uncorroborated testimony of Thomas Riley and his assistant, Edward Kilnapp, that they provided Red Sox tickets to Roth in 2004, 2005 and 2006. Roth testified that he did not receive Red Sox tickets in 2004 and 2005, and that while he received tickets in 2006, he did not use them, but instead immediately turned them over to his agency's general counsel. The Commission credited Roth's testimony on the basis of his demeanor, and the lack of documentary or other independent corroboration of Kilnapp's and

Riley's testimony. The Commission determined that based on an assessment of the credibility of the witnesses, the Petitioner had not proved by a preponderance of the evidence that Roth violated sections 23(b)(2) and 23(b)(3) and so the Commission concluded the proceedings by finding for Roth.

In the Matter of Richard Wheeler – The Ethics Commission approved a Disposition Agreement in which Barre Department of Public Works Superintendent Richard Wheeler admitted to violating the conflict of interest law by attempting to use his official position to secure for himself an unwarranted privilege of substantial value and by participating in his official capacity in a matter in which he had a financial interest. Wheeler paid a \$4,000 civil penalty. Wheeler, as DPW Superintendent, supervises the Water Department employees. In 2005, in his private capacity, Wheeler installed a water line connecting his property at 75 Fruitland Road to the town water main. When the Water Department inspector came to inspect the water line, he found that a portion of it had been covered over and so could not be inspected. The inspector, who reports to DPW Superintendent Wheeler, asked Wheeler how he could inspect the covered water line. Wheeler told the inspector, "I inspect these too. I know how to do them." The water line was not uncovered and the inspector did not sign off on the application. In 2007, Wheeler applied for a sewer connection permit for 75 Fruitland Road. As DPW Superintendent, Wheeler signed the permit acknowledging receipt of his own application fee. Wheeler's contractor then installed and connected the sewer line to the town's main line without an inspection by the town. Although no inspection of the sewer line and connection ever occurred, Wheeler signed the permit as DPW Superintendent, confirming that an inspection had been performed and that the sewer line was correctly constructed and connected. Section 23(b)(2) of the conflict of interest law prohibits a public employee from 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. Wheeler violated section 23(b)(2) by requesting that the water department inspector conduct an inspection of the water line for his own property even though the water line had been backfilled and no inspection was possible unless the line was uncovered, and by Wheeler stating to the inspector that Wheeler had expertise with water lines, and indicating that the inspector did not need to conduct the inspection. Wheeler also violated section 23(b)(2) by signing off

as DPW Superintendent on the sewer permit confirming that the work had been inspected when it had not been. Section 19(a) of the conflict of interest law prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he, or an immediate family member, has a financial interest. Wheeler violated section 19(a) by signing off as DPW Superintendent on the sewer permit for his own property.

In the Matter of Thomas Kennedy – The Ethics Commission issued a Decision and Order finding that former MassHighway Inspector Thomas Kennedy solicited and received bribes from a MassHighway vendor doing work on Route 44 in Plymouth. Kennedy was ordered to pay a \$6,000 civil penalty. On April 8, 2008 the Commission's Enforcement Division filed two Orders to Show Cause alleging that Kennedy and P.A Landers Project Manager Terry Edwards violated the conflict of interest law. In June 2008, the company, Landers, entered into a disposition agreement with the Ethics Commission in which it admitted to providing illegal gratuities to Kennedy through its employee, Edwards. Landers paid a \$10,000 civil penalty. Edwards entered into a disposition agreement in April 2009 in which he admitted to paying bribes to Kennedy and paid a \$5,000 civil penalty. According to the Decision, Landers was the general contractor on a job on Route 44 between Middleborough and Plymouth. Landers delivered asphalt to the job site, and Kennedy was responsible for inspecting the loads and signing off on the weight slips given to him by Landers' truck drivers. Kennedy submitted those weight slips to his MassHighway supervisor in order to process payment to Landers. In June, 2002, Kennedy approached Edwards seeking reimbursement, first for a damaged tire on Kennedy's vehicle, and then for gasoline expenses. MassHighway was already reimbursing Kennedy for his gasoline expenses. Kennedy received these reimbursements from Landers. In exchange, rather than requiring that Landers "dotted every i and crossed every t," Kennedy made the project go smoothly for Landers. He processed paperwork to make sure that Landers received timely payments from MassHighway. On one day, he submitted six weight slips for Landers without having inspected the asphalt deliveries. Section 2(b) of the conflict of interest law prohibits a state employee from directly or indirectly corruptly asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive anything of value for himself or for any other person or entity, in return for being influenced in his performance of any official act or any act within his official responsibility. Kennedy violated

section 2(b) by soliciting and receiving reimbursements from Edwards for the damaged tire and for gasoline expenses, and in return, “making things go more smoothly” for Landers. The Decision states, “As a MassHighway inspector, Kennedy engaged in the most egregious type of breach of the public trust, exacting a price for the performance of his official duties and using his position to secure from a private contractor personal benefits to which he had no entitlement.”

In the Matter of Jack Scott – The Ethics Commission issued a Decision and Order finding that Norfolk property developer Jack Scott violated section 3 of the conflict of interest law by offering an illegal gift to a municipal employee. Specifically, Scott offered a free week’s stay at his fly-fishing cabin in Pennsylvania to the chairman of the Norfolk Conservation Commission at a time when Scott had matters pending before the ConCom. The Commission imposed the maximum civil penalty of \$2,000. On November 18, 2008, the Commission’s Enforcement Division issued an Order to Show Cause alleging that Scott violated sections (2)(a) and (3)(a) of the conflict of interest law. Beginning in May 2005, Scott, as President of Pine Creek Development Corporation, was seeking approvals from the ConCom in connection with a real estate development project on Applewood Road in Norfolk. Following a May 11, 2006 ConCom vote on an order of conditions for the property, but prior to the issuance of the order, Scott, on the morning of May 12, 2006, sent an e-mail to the ConCom chairman describing his fly-fishing cabin near Williamsport, Pennsylvania. In the e-mail, Scott thanked the chairman by saying “Jeff no bribe just a thanks for being on the up and up with us regardless of how this all plays out” and noted, “... my cabin is yours for a week with your family.” The cabin is owned by The Freestone Sportsman Group, Inc., of which Scott is the president, Chief Executive Officer and director. It is marketed as a hunting and fishing cabin and typically rents for \$700 a week. Section 2(a) of G.L. c. 268A, the conflict of interest law prohibits anyone from corruptly offering anything of value to a municipal employee with intent to influence any official act or act within his official responsibility. Section 3(a) prohibits anyone, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly offering anything of substantial value to any municipal employee for or because of any official act performed or to be performed by such an employee. The Commission determined that Scott’s offer was not made with the corrupt intent to influence the ConCom chairman, and therefore did not violate section 2(a). The

Commission determined that Scott violated section 3(a) by offering the ConCom chairman the cabin for one week as a reward or “thank you” for past and future actions related to his development project pending before the ConCom.

In the Matter of Thomas Commeret – The Ethics Commission issued a Public Education Letter to former Marblehead Community Charter Public School Head of School Thomas Commeret to resolve allegations that Commeret violated the conflict of interest law in connection with Commeret hiring former MCCPS Board of Trustees Robert Erbetta to perform construction-related and other work for the school while Erbetta was a member of the Board, and while Erbetta, in his capacity as a member of the Board, twice voted to renew Commeret’s employment contract with the MCCPS. According to the Public Education Letter issued to Commeret, the Commission found that there was reasonable cause to believe that he had violated section 23 of the conflict of interest law by hiring Erbetta to work at the school between 2003 and 2008 without disclosing this to the Board. Commeret asserted that although he did not make a written disclosure, he believed that the Board was aware that he had hired Erbetta. Section 23(b)(3) of the conflict of interest law prohibits a public employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public employee’s favor in the performance of his official duties. It further provides that it shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion. Commeret’s actions gave the appearance that Erbetta could improperly influence Commeret or unduly enjoy Commeret’s favor, or that Commeret was likely to act or fail to act as Head of School as a result of Erbetta’s undue influence. Commeret left his position in June 2009. The Commission issues Public Education Letters to provide public notice and education about conduct that the Commission has not previously addressed and has found reasonable cause to believe violates the conflict of interest law. The Public Education Letter to Commeret is the first instance in which the Commission has addressed publicly the application of the conflict of interest law to charter school employees.

In the Matter of Robert Erbetta – The Ethics Commission issued a Public Education Letter to former Marblehead Community Charter Public School Board of Trustees (“Board”) member Robert

Erbetta to resolve allegations that Erbetta violated the conflict of interest law in connection with former MCCPS Head of School Thomas Commeret hiring Erbetta to perform construction-related and other work for the school while Erbetta was a member of the Board and twice voted to renew Commeret's employment contract with the MCCPS. The Commission found there was reasonable cause to believe that Erbetta had violated sections 6, 7 and 23(b)(3) of the conflict of interest law by participating as a member of the Board in matters in which he and/or his construction company had a financial interest. For example, Erbetta acted as the Board's liaison regarding a school building project that involved work performed by his construction company. Section 6 of the conflict of interest law prohibits a state employee from participating in matters in which, to his knowledge, he or his business organization has a financial interest. Erbetta, while serving as a Board member, was being paid by the MCCPS for the various work he performed. Section 7 prohibits a state employee from having a financial interest in a contract made by a state agency, in which the Commonwealth or a state agency is an interested party, unless an exemption applies. Erbetta voted to renew Commeret's contract as Head of School while Commeret was approving invoices Erbetta had submitted for work performed at the school, raising the appearance of a conflict of interest. The Public Education Letter states that G.L. c. 71, section 89(v) requires members of boards of trustees of charter schools to annually disclose to the state ethics commission, the department of education, and the city or town clerk wherein such charter school is located, any financial interest that they or a member of their immediate families have in any charter school located in the commonwealth or in any other state or with any person doing business with any charter school. Erbetta filed disclosures pursuant to G.L. c. 71, and Erbetta believed that he could contract with the school as long as he filed these disclosures. He did not, however, file any disclosures that may have been required by Sections 6, 7 and 23(b)(3) of the conflict of interest law. The Commission issues Public Education Letters to provide public notice and education about conduct that the Commission has not previously addressed and has found reasonable cause to believe violates the conflict of interest law. The Public Education Letter to Erbetta is the first instance in which the Commission has addressed publicly the application of the conflict of interest law to charter school employees.

In the Matter of Scott Martin – The Ethics Commission issued a Decision and Order in which it

determined that Rowley Board of Water Commissioners Chair Scott Martin did not violate the conflict of interest law by arranging to have Water Department employees drive him from his place of private employment to the Water Department offices on a regular basis between March 2005 and January 2007. On January 12, 2009, the Commission's Enforcement Division filed of an Order to Show Cause alleging that Martin violated sections 23(b)(2) and 23(b)(3) of the conflict of interest law when, after Martin's driver's license had been suspended, he arranged to have Water Department employees drive him from his place of employment to the Water Department offices to sign bills and payroll. Section 23(b)(2) of the conflict of interest law prohibits a municipal employee from using or attempting to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals. The Commission determined that the free transportation of Martin from his place of employment to the Water Department to sign Water Department bills and payroll was not an unwarranted use of public resources. As to several side trips taken to accommodate Martin's need to conduct personal errands, the Commission determined that, while the side trips were unwarranted privileges, they were not of substantial value. Section 23(b)(3) prohibits a 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 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. The Commission found that, in connection with Water Department employees transporting Martin to the Water Department offices, Martin had not taken any actions regarding those employees apart from signing payroll, and therefore, the Petitioner had not established by a preponderance of the evidence that a reasonable person, with knowledge of the relevant circumstances, would conclude that Water Department employees could unduly influence Martin or unduly enjoy his favor in the performance of his duties as a Water Commissioner or that he was likely to act or fail to act as a Water Commissioner as a result of Water Department employees' undue influence upon him."

In the Matter of Scott Lanzetta – The Ethics Commission issued an Order concluding the adjudicatory matter involving former Milford Board of Sewer Commissioners member Scott Lanzetta by approving a Disposition Agreement and dismissing

the adjudicatory hearing. On September 22, 2009, the Commission's Enforcement Division filed an Order to Show Cause alleging that Lanzetta violated section 17(a) of the conflict of interest law by being paid by property owners in connection with sewer connection work completed by Lanzetta. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in connection with any matter in which the municipality is a party or has a direct and substantial interest.

In the Matter of Scott Lanzetta – The Ethics Commission approved a Disposition Agreement in which former Milford Board of Sewer Commissioners member Scott Lanzetta admitted to violating the conflict of interest law and agreed to pay a \$5,000 civil penalty. Lanzetta admitted that he had repeatedly violated section 17(a) of the conflict of interest law by receiving compensation for sewer connection work he had performed in his private capacity for properties located in Milford. Between 2005 and 2007, while serving as a member of the Board of Sewer Commissioners, Lanzetta received between \$1,000 and \$5,000 per job for 17 Milford sewer projects. Section 17(a) prohibits a municipal employee from receiving compensation from anyone other than the municipality in connection with any matter in which the municipality is a party or has a direct and substantial interest. The sewer connections required Sewer Department permits and inspections. By receiving payment for these jobs from property owners, Lanzetta violated section 17(a) on each occasion.

In the Matter of Valorie Daigle – The Ethics Commission approved a Disposition Agreement in which former Phillipston and Templeton Board of Health Agent Valorie Daigle admitted to violating the conflict of interest law and agreed to pay a \$5,000 civil penalty. Daigle served as the BOH Agent in both municipalities during 2006 and 2007. She is a registered sanitarian and was also employed part-time by Northland Engineers, Inc., a company she sold to her daughter in 2000. Northland provides soil testing and septic system design services to property owners. During 2006 and 2007, Daigle was a part-time employee and treasurer of Northland and was paid \$372 every two weeks for duties which included drafting and affixing her registered sanitarian stamp on septic system design plans. During 2006 and 2007, Daigle acted as the Phillipston BOH Agent witnessing on-site soil tests on nine properties in the town, for which she then drafted the septic system design plans as a Northland employee. Also in her capacity as a Northland employee, Daigle drafted and

affixed her stamp to a septic system design plan for a tenth property in Phillipston. The ten septic system design plans were submitted to the Phillipston BOH for approval. Section 17(a) of the conflict of interest law prohibits a municipal employee from receiving compensation from anyone other than the municipality in connection with any matters in which the municipality is a party or has a direct and substantial interest. Section 17(c) of the law prohibits a municipal employee from acting as an agent or attorney for anyone other than the municipality in connection with any matters in which the municipality is a party or has a direct and substantial interest. By receiving compensation from Northland for drafting ten septic system design plans submitted to the Town of Phillipston for approval, Daigle violated section 17(a) on each occasion. By affixing her registered sanitarian stamp on one of those plans, Daigle also violated section 17(c). In February 2007, Daigle, as the Templeton BOH Agent, witnessed on-site soil tests for two properties, and then, as a Northland employee, drafted and affixed her stamp to the septic system design plans for those properties. The plans were submitted to the Templeton BOH for approval. Although the Templeton BOH Agent position was designated as a “special municipal employee” position, Daigle could not avail herself of the “special municipal employee” exemption. Special municipal employees can receive compensation from, and can act as an agent or attorney for, anyone other than the municipality in connection with matters in which the municipality is a party or has a direct and substantial interest, as long as the municipal employee does not participate in the matter and/or the matter is not pending in the employee's department or agency. Since Daigle witnessed the on-site soil tests as BOH Agent for the two properties in Templeton, she violated sections 17(a) and 17(c) when she then drafted and stamped the septic system design plans that were submitted to the Templeton BOH for approval.

In the Matter of Bethann Pepoli – The Ethics Commission approved a Disposition Agreement in which former state Information Technology Division Acting Chief Information Officer Bethann Pepoli admitted to violating the conflict of interest law and agreed to pay a \$3,000 civil penalty. Pepoli solicited a sponsorship for a golf outing from Cognos Corporation, a software vendor seeking a \$15 million state contract, while, in her capacity as a state employee, she made recommendations regarding the award of that contract. According to the Disposition Agreement, Cognos submitted a response to an April 2007 ITD Request for Quotes to provide performance management software. Four responses to the RFQ

were received by ITD. Pepoli appointed a procurement management team to evaluate the responses. On May 18, 2007, the PMT recommended that either the procurement process be started over so more information could be obtained, or else a small pilot program contract be awarded, to be split between Cognos and another bidder. Pepoli, however, recommended to her superiors at the Executive Office for Administration and Finance that Cognos be awarded the full contract. In August 2007, Cognos was awarded a \$13 million contract. Pepoli is a member of the board of directors of the New England-Canada Business Council, a private, non-profit organization created to foster business, political and cultural relationships between Canada and New England. On May 14, 2007, during the time that the Cognos response to the RFQ was being reviewed, Pepoli sent an email to a Cognos official asking if Cognos would be interested in sponsoring an annual NECBC golf outing for \$1,300. On May 18, 2007, a Cognos representative informed Pepoli that Cognos would sponsor the golf outing. Cognos paid the \$1,300 sponsorship fee on June 4, 2007. Section 23(b)(2) of the conflict of interest law prohibits a state employee from 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. Pepoli violated section 23(b)(2) by using her official position as the ITD Acting CIO to induce Cognos to make the \$1300 donation to a private party. Section 23(b)(3) of the conflict of interest law prohibits a state 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 or unduly enjoy her favor in the performance of her official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. The section also provides that it shall be unreasonable to so conclude if such state employee has disclosed in writing to her appointing authority the facts which would otherwise lead to such a conclusion. Pepoli violated section 23() (3) by recommending that the Cognos bid be accepted after securing a \$1,300 donation from Cognos to the NECBC. Pepoli did not file a written disclosure with her appointing authority to dispel the appearance of impropriety.

In the Matter of Robert G. Cole – The Ethics Commission issued an Order approving a motion for summary decision and determining that former Massachusetts Turnpike Authority Director of Toll Operations Robert G. Cole violated G.L. c. 268B, the

financial disclosure law, by failing to timely file his Statement of Financial Interest for calendar year 2007. The Commission imposed a \$500 civil penalty. Cole was required to file an SFI for calendar year 2007 by May 1, 2008. Cole did not file by that date. On May 5, 2008, the Commission sent Cole a Formal Notice of Lateness advising Cole that his SFI was delinquent and that his failure to file within ten (10) days would result in civil penalties. The Commission thereafter sent follow-up letters to Cole on May 12, 2008, May 20, 2008, May 30, 2008 and June 11, 2008. Cole subsequently filed his SFI on August 25, 2008, ninety-eight (98) days after the expiration of the grace period following receipt of the Formal Notice. An adjudicatory proceeding was initiated by the Commission's Enforcement Division filing an Order to Show Cause on April 15, 2009 and an Amended Order to Show Cause on July 1, 2009. Cole failed to file an answer to the OTSC or AOTSC. On August 13, 2009, the Presiding Officer issued a Summary Decision Order requiring Cole to file an Answer by August 31, 2009, or to otherwise show cause why a summary decision should not be entered against him. Cole 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. The Commission determined that Cole's failure to defend or otherwise respond to the allegations warranted summary decision in favor of Petitioner, concluding that Cole violated the financial disclosure law and imposed a \$500 civil penalty according to the penalty schedule for first time late filers.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0002

IN THE MATTER OF
REGINALD NEWCOMB

DISPOSITION AGREEMENT

The State Ethics Commission and Reginald Newcomb 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 21, 2007, 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 Newcomb. The Commission has concluded its inquiry and, on January 16, 2008, found reasonable cause to believe that Newcomb violated G.L. c. 268A.

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

Findings of Fact

1. At all times relevant, Newcomb was an elected member of the Town of Rockland Planning Board. Planning Board positions have been designated special municipal employee positions for conflict of interest law purposes.

2. In his private capacity, Newcomb performs real estate construction and rehabilitation work.

3. In May 2006, Newcomb purchased two adjacent residential lots on Hingham Street in Rockland ("the Hingham Street Properties"). He then subdivided one of the lots into two lots and built three duplex condominium units on the three Hingham Street lots.

4. In or about June 2006, Newcomb purchased a lot on Salem Street ("the Salem

Street Property") in Rockland. As detailed below, Newcomb then attempted to divide the Salem Street Property into two lots.

5. At all times relevant, the Hingham Street Properties and the Salem Street Property were owned by the Rehab Realty Trust ("the Trust"). Newcomb is the sole trustee of the Trust. He and his wife are the Trust's beneficiaries.

*Newcomb Represented the Trust Before
Rockland Agencies*

6. The Hingham Street Properties came before the Planning Board for site plan review on four occasions between September, 2006 and February, 2007. On each of these occasions, Newcomb stepped down from the Planning Board and presented the site plan for the Hingham Street Properties on behalf of the Trust.

7. On March 5, 2007, a State Ethics Commission investigator contacted Newcomb regarding his presentations before the Planning Board. During this conversation, Newcomb confirmed that he made the presentations on behalf of the Trust, acknowledged that the conflict of interest law prohibited him from doing so, and agreed not to further represent the Trust before the Planning Board.

8. Notwithstanding his March 5, 2007 conversation with the investigator, Newcomb subsequently took the following actions on behalf of the trust:

a. On March 21, 2007, Newcomb presented a Form A application^{1/} for the Salem Street Property to the Planning Board on behalf of the Trust.

b. On April 12, 2007, Newcomb met with the Town Clerk on behalf of the trust and requested a certificate of approval for the Salem Street Property Form A application, based on the Planning Board's failure to follow proper procedures. Applicable regulations provide that the Planning Board has 21 days to act on a Form A application. If no action is taken, the application is constructively approved. The Town Clerk issued the certificate; however, the Registry of Deeds declined to file the certificate.

c. Also on April 12, 2007, Newcomb, as trustee of the Trust, sent a letter to the Planning Board stating that the Salem Street Property Form A application had been constructively approved.

d. On May 3, 2007, Newcomb filed a second Form A application for the Salem Street Property with the Town Clerk.

e. On June 13, 2007, Newcomb again presented the Form A application for the Salem Street Property to the Planning Board on behalf of the Trust.

f. On June 19, 2007, Newcomb, as trustee of the Trust, sent a letter to the Zoning Enforcement Officer, again requesting a certificate of approval for the Salem Street Property Form A application, based on the Planning Board's failure to act on the application within the required 21 days.

g. On August 22, 2007, during a Planning Board meeting, Newcomb inquired about the Planning Board signing off on occupancy permits for the Hingham Street Properties.

h. On August 23, 2007, Newcomb represented the Trust during a Planning Board site visit of the Hingham Street Properties. Following the site visit, Planning Board members signed off on two occupancy permits for the Hingham Street Properties.

i. On August 31, 2007, Newcomb represented the Trust during another Planning Board site visit of the Hingham Street Properties.

Newcomb Removed Extension Request from Planning Board File

9. On May 23, 2007, Rockland Town Counsel provided an opinion to the Planning Board recommending denial of the Salem Street Property Form A application.

10. Also on May 23, 2007, the Planning Board informed Newcomb that it would deny the Salem Street Property Form A application unless Newcomb could provide sufficient information

to address certain issues raised by Town Counsel.

11. Also on May 23, 2007, Newcomb, through town counsel, provided the Planning Board with a written extension request, allowing the Planning Board until June 18, 2007 to act on the Salem Street Property Form A application. The extension request read, in part, "We will present additional evidence on 6/13/07."

12. On June 13, 2007, the Planning Board denied the Salem Street Property Form A application, based on the issues identified by Town Counsel.

13. On June 14, 2007, Newcomb called Planning Board chair Robert Baker and requested access to the Planning Board office for the purpose of verifying the date that he filed the Salem Street Property Form A application. Baker granted Newcomb's request, but only for the limited purpose of checking the application date.

14. Newcomb then contacted Board of Selectman Secretary Mary Ann Stewart, who had the key to the Planning Board Office, and asked that she accompany him to the Planning Board Office and unlock the door. She did so. Contrary to Baker's instructions, Newcomb removed the file for the Salem Street Property from the Planning Board office and made a copy of the file. He then returned the file to the Planning Board office.

15. After Newcomb returned the file on June 14, 2007, Baker reviewed the file and determined that the written extension request was missing from the file. When Baker told Newcomb the extension request was missing, Newcomb delivered his copy to Baker. Also on June 14, 2007, Newcomb met with the Town Clerk and requested a certificate of approval for the Salem Street Property Form A application based on the Planning Board's failure to act on the application within the required 21 days.

Conclusions of Law

16. As a Rockland Planning Board member, Newcomb was at all times relevant a special municipal employee as defined by G.L. c. 268A, § 1(n).

Section 17(c)

17. Section 17(c) of G.L. c. 268A prohibits a municipal employee, otherwise than in the proper discharge of official duties, from acting as agent 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.

18. Section 17 applies less restrictively to special municipal employees. A special municipal employee is subject to § 17(c) only relative to a particular matter (a) in which he has participated, (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending before his own agency.

19. The Form A application for the Salem Street Property was a particular matter in which the town had a direct and substantial interest.

20. The site plan and occupancy permits for the Hingham Street Properties were also particular matters in which the town had direct and substantial interests.

21. Although Newcomb did not participate as a Planning Board member in the above-described particular matters, they were subject to his official responsibility as a Planning Board member. As a result, § 17(c) prevented Newcomb from acting as agent for the Trust in connection with these particular matters.

22. As detailed above, Newcomb repeatedly acted as agent for the Trust in connection with these particular matters.

23. Newcomb's actions as agent for the Trust were not taken in the proper discharge of his official duties as a Planning Board member.

24. Therefore, Newcomb repeatedly violated § 17(c).

Section 23(b)(2)

25. 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 of substantial value not properly available to similarly situated individuals.

26. Newcomb's removal of his extension request from the Planning Board file for the Salem Street Property was a privilege.

27. But for his Planning Board member position, Newcomb would not have been given unsupervised access to the Planning Board file. By requesting access from the Planning Board chair, Newcomb knowingly or with reason to know used his official position in an attempt to secure this privilege for the Trust.

28. Where Newcomb removed the extension request in an attempt to gain constructive approval of his Form A application, his removal of the document was of substantial value.

29. Newcomb's removal of the extension request was unwarranted because the document was part of the official record and was relied upon by the Planning Board, which had already denied the Salem Street Property Form A application.

30. Therefore, Newcomb violated § 23(b)(2) as described above, by knowingly or with reason to know, using or attempting to use his official position as a Planning Board member to secure for the Trust an unwarranted privilege of substantial value not otherwise properly available to similarly situated individuals.

Resolution

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

(1) that Newcomb pay to the Commission \$5,000.00 as a civil penalty for violating G. L. c. 268A §§ 17 & 23; and

(2) that Newcomb 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 21, 2009

^{1/} G.L. c. 41 § 81L excludes certain properties from the definition of “subdivision” based on the existence of certain conditions. Form A applications are made by applicants to a Planning Board to demonstrate the inapplicability of the Subdivision Control Law to their property.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0004**

**IN THE MATTER OF
JOHN L. SILVA, JR.,**

DISPOSITION AGREEMENT

The State Ethics Commission and John L. Silva, Jr. (“Silva”) 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 16, 2008, 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 Silva. The Commission concluded its inquiry and on June 19, 2008, found reasonable cause to believe that Silva had violated G.L. c. 268A.

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

Issuing Written Directive To His Son

Findings of Fact

1. During the relevant time, Silva was the East Bridgewater Police Chief.

2. In August 1996, Silva’s son became a full-time East Bridgewater police officer.

3. In August 2003, Silva’s son was placed in protective custody for an alcohol-related incident.

4. In September 2003, Silva issued a written directive to his son to do the following until further notice: take a breathalyzer test at the beginning of his duty shifts; place his service weapon in the station lock box at the end of every shift; and attend weekly counseling and an outpatient alcohol program providing proof of attendance.

Conclusions of Law

5. As Police Chief, Silva was a municipal employee as that term is defined under G.L. c. 268A, § 1(g).

Section 19

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

7. Silva’s son was an immediate family member as that term is defined under G. L. c. 268A, § 1(e).

8. Silva’s decision to issue a written directive to his son in September 2003 was a particular matter.

9. Silva participated in the decision by making it.

10. Silva’s son had a foreseeable financial interest in the decision because failure to comply with the directive either would have resulted in his suspension or other adverse consequences.

11. Silva was aware of that financial interest when he so participated.

12. Therefore, Silva violated § 19 by deciding to issue the September 2003 directive to his son, a particular matter in which Silva knew that his son had a financial interest.

Authorizing Son To Return To Work

Findings of Fact

13. On November 19, 2003, Silva's son was arrested for operating a motor vehicle under the influence of alcohol and leaving the scene of an accident.

14. As a result of the above-described arrest, the East Bridgewater Board of Selectmen brought numerous charges against Silva's son for violating the Police Department's rules and regulations.

15. On November 24, 2003, Silva requested an opinion from the State Ethics Commission's Legal Division regarding the restrictions applicable to him under the conflict of interest laws in connection with his son's arrest.

16. The Legal Division advised Silva that he could not participate in disciplinary matters involving his son absent a § 19(b)(1)^{1/} determination by his appointing authority.

17. Silva did not secure a § 19(b)(1) determination from his appointing authority to allow him to participate in his son's discipline.

18. Silva sent a letter to the Board of Selectmen dated November 24, 2003, advising that he could not be involved in any disciplinary hearing involving his son because of his son's financial interest in the matter.

19. Silva's son entered into a Settlement Agreement with the Board of Selectmen in January 2004 in connection with the violations of Police Department's rules and regulations arising from his arrest described above ("Settlement Agreement").

20. As part of the Settlement Agreement, Silva's son accepted an immediate 120-day suspension without pay to coincide with his license suspension by the Registry of Motor Vehicles.

21. Silva authorized his son to return to work on May 7, 2004, prior to the expiration of the 120-day suspension and/or reinstatement of his license, and placed him on restricted desk duty.

Conclusions of Law

Section 19

22. Silva's assignment of his son to restricted desk duty prior to the expiration of the 120-day suspension and/or the reinstatement of his license was a particular matter under § 19.

23. Silva participated in that particular matter by making the decision.

24. Silva's son had a foreseeable financial interest in reinstatement prior to the expiration of the 120-day suspension because the suspension was without pay and reinstatement allowed him to collect his salary.

25. Silva was aware of that financial interest when he so participated.

26. Therefore, Silva violated § 19 by deciding to assign his son to restricted desk duty prior to the expiration of the 120-day suspension, a particular matter in which Silva knew that his son had a financial interest.

Designating Himself Liaison

Findings of Fact

27. Under the Settlement Agreement, Silva's son agreed to take breathalyzer tests at the beginning of each of his shifts and to submit the results to Sergeant John Cowan or the designated liaison between the Police Department and the Board of Selectmen.

28. In or about January 2004, Silva appointed himself the designated liaison and collected his son's breathalyzer tests.

Conclusions of Law

Section 19

29. Silva's decision to designate himself liaison to the BOS for the purposes of collecting the breathalyzer tests, was a particular matter.

30. Silva participated by so deciding.

31. Silva's son had a foreseeable financial interest in Silva designating himself to collect the breathalyzer tests because Silva could overlook his son's failure to submit the tests, which failure otherwise could result in adverse employment consequences of a financial nature.

32. Silva was aware of that financial interest when he so participated.

33. Therefore, Silva violated § 19 by deciding to designate himself liaison to collect breathalyzer tests, a particular matter in which Silva knew that his son had a financial interest.

Allowing Son To Work Despite Missed Breathalyzer Tests

Findings of Fact

34. On three occasions between January 2004 and December 2004, Silva's son failed to take the breathalyzer tests as required under the Settlement Agreement.

35. Silva allowed his son to work his police shifts despite his failure to take the breathalyzer tests on these three occasions.

Conclusions of Law

Section 19

36. Silva's three decisions to allow his son to work despite missed breathalyzer tests are particular matters.

37. Silva participated in those particular matters by so deciding.

38. Silva's son had a foreseeable financial interest in those decisions because his son's failure to submit the breathalyzer tests would likely have resulted in adverse employment consequences of a financial nature.

39. Silva was aware of that financial interest when he so participated.

40. Therefore, Silva violated § 19 by deciding to allow his son to work despite missed breathalyzer tests, particular matters in which Silva knew that his son had a financial interest.

Failing to Report Missed Breathalyzer Tests

Findings of Fact

41. Silva did not report the missed breathalyzer tests to the Board of Selectmen.

Conclusions of Law

Section 19

42. Silva's decisions not to report his son's missed breathalyzer tests were particular matters.

43. Silva participated in those particular matters by so deciding.

44. Silva's son had a foreseeable financial interest in those decisions because in failing to report his son's missed breathalyzer tests to the Board of Selectmen, Silva's son avoided what would have likely resulted in adverse employment consequences of a financial nature.

45. Silva was aware of that financial interest when he so participated.

46. Therefore, Silva violated § 19 by deciding not to report his son's missed breathalyzer tests, particular matters in which Silva knew that his son had a financial interest.

Section 23(b)(2)

47. Section 23(b)(2) prohibits a public employee from knowingly, or with reason to know, using 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.

48. Silva's failure to report his son's missed breathalyzer tests was a privilege or exemption.

49. The privilege or exemption was unwarranted because the Settlement Agreement required Silva's son to take the breathalyzer tests at the beginning of each shift.

50. The failure to report the missed breathalyzer tests was an unwarranted privilege of substantial value, worth \$50.00 or more, because the Settlement Agreement made taking the test a precondition to working a shift.

51. The unwarranted privilege was not available to similarly situated individuals.

52. By allowing his son to take shifts without taking the breathalyzer test, Silva used his official position as police chief.

53. Therefore, Silva violated § 23(b)(2).

Resolution

In view of the foregoing violations of G.L. c. 268A by John L. Silva, Jr., 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 John L. Silva, Jr.:

(1) that John L. Silva, Jr., pay to the Commission the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 23, as noted above; and,

(2) that John L. Silva, Jr. 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 22, 2009

^{1/} It is not a violation of Section 19 if :

[T]he municipal employee first advises the official responsible for appointment to his position of the nature and circumstances of the particular matter and makes full disclosure of such financial interest, and receives in advance a written determination made by that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect from the employee.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0005**

IN THE MATTER OF JOAN ANDERSON

DISPOSITION AGREEMENT

The State Ethics Commission and Joan Anderson (“Anderson”) 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 25, 2007, 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 Anderson. The Commission concluded its inquiry and, on November 15, 2007, found reasonable cause to believe that Anderson violated G.L. c. 268A.

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

Findings of Fact

1. At all times relevant, Anderson was a Westminster Conservation Commission (“Con Com”) member. Con Com members are appointed by the Board of Selectmen.

2. Until recently, Anderson owned Brook Bound Nursery, a nursery and garden supply store in Westminster. Anderson’s husband, Jeffrey, is the president, treasurer and secretary of Landscaping by Anderson, Inc.

3. Robert Francis (“Francis”) is an individual who resides in Westminster and has significant interests in the following companies: American Drilling Services, Inc., Crocker Pond Properties, Inc., and Whitman River Dam, Inc. He is also a beneficiary, but not a trustee, of the M&R Nominee Trust (the “Trust”).

4. Between 1996 and 2000, Francis, personally and acting on behalf of American Drilling Services, Inc. and the Trust, hired Landscaping by Anderson, Inc., and Anderson d/b/a Brook Bound Nursery for various projects at a total cost of approximately \$150,000.

5. In 1999, the Andersons purchased property from M&R Nominee Trust. Francis negotiated the deal on behalf of the Trust.

6. In 2002, the Andersons entered into an agreement to purchase another parcel of land owned by the Trust. Francis again negotiated the deal on behalf of the Trust. Francis requested to terminate the deal and the Andersons agreed provided their attorney’s fees were reimbursed. Francis eventually reimbursed the fees, but not until some time after September 2003.

7. Also in 2002, Whitman River Dam, Inc. and Crocker Pond Properties, Inc. purchased approximately 937 acres of undeveloped land near Crocker Pond and around the Whitmanville Reservoir.

8. The Westminster Con Com has jurisdiction over the rivers, ponds, wetlands and dams that are located on these 937 acres.

9. A portion of these 937 acres (the "Whitmanville Reservoir parcel") is directly across the street from the Andersons' residence on South Ashburnham Road in Westminster.

10. Another portion is located near Crocker Pond (the "Crocker Pond parcel"), which is approximately two miles from the Andersons' residence.

11. Beginning in 2003, Whitman River Dam, Inc. sought from the Con Com Orders of Conditions to allow construction and improvement activities on the Whitmanville Reservoir parcel.

12. Anderson in her capacity as a Con Com member discussed, voted on and signed Con Com Orders of Conditions related to the construction and improvement activities on the Whitmanville Reservoir parcel. More specifically, in her capacity as a Con Com member, Anderson signed the following documents concerning that parcel:

- a) an Order of Conditions dated July 28, 2003; and
- b) an Order of Conditions dated September 29, 2003.

13. In addition, Anderson in her capacity as a Con Com member discussed, voted on and signed Con Com Orders of Conditions related to the construction and improvement activities on the Crocker Pond parcel. As a Con Com member, Anderson signed the following documents concerning that parcel:

- a) an Order of Conditions dated March 19, 2003;
- b) an Order of Conditions dated January 29, 2004; and
- c) an Order of Conditions dated February

9, 2004.

Conclusions of Law

14. As a Westminster Conservation Commission member, Anderson was a municipal employee as defined by G.L. c. 268A, § 1(g).

15. At all times relevant, Anderson's husband, Jeffrey Anderson, was Anderson's immediate family member as defined by G.L. c. 268A, § 1(g).

16. Section 19 prohibits a municipal employee from participating as such in a particular matter in which, to her knowledge, she or an immediate family member has a financial interest.

17. The Con Com's determinations regarding the aforementioned Orders of Conditions affecting the Whitmanville Reservoir parcel were particular matters.

18. Anderson participated as a Con Com member in these particular matters by discussing and voting on them at Con Com meetings. She also participated in these particular matters by signing the July 28, 2003 and September 29, 2003 Orders of Conditions.

19. At the time she so participated, Anderson knew that she and her husband owned property abutting the Whitmanville Reservoir parcel.

20. As abutters, Anderson and her husband are presumed to have a financial interest in these particular matters; and consequently, they are also presumed to have knowledge of that financial interest.^{1/}

21. Therefore, Anderson violated § 19 by participating as described above as a Con Com member in particular matters in which, to her knowledge, she and her husband had financial interests.

Section 23 (b)(3)

22. Section 23(b)(3) of G.L. c. 268A prohibits a public 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 her favor in the performance of her official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

23. As described in paragraphs 12 and 13 above, Anderson repeatedly participated as a Con Com member in matters affecting Francis or his companies after she and her husband had a significant business relationship with Francis. This official participation occurred after Anderson and her husband's companies provided approximately \$150,000 worth of supplies and services to Francis personally and to American Drilling Services, Inc. and the Trust.

24. In addition, Anderson participated in her capacity as a Con Com member in matters affecting Francis or his companies after Francis, on behalf of the Trust, and the Andersons engaged in two separate real estate transactions. One of these transactions resulted in a dispute over an agreement regarding legal fees that remained ongoing while Anderson participated in the Con Com's September, 2003, Order of Conditions.

25. By so participating, Anderson acted in a manner which would cause a reasonable person, knowing all the relevant circumstances, to conclude that Francis can improperly influence the performance of her official duties. Therefore, Anderson violated §23(b)(3).

Resolution

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

- (1) that Anderson pay to the Commission the sum of \$2,000 as a civil penalty for violating G.L. c. 268A §§ 19 & 23; and
- (2) that Anderson 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 22, 2009

^{1/} See Commission Advisory No. 05-02: "Voting on Matters Affecting Abutting or Nearby Property," which states: "Under the conflict of interest law, a property owner is presumed to have a financial interest in matters affecting abutting and nearby property."

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKETS
NOS. 08-0008, 0009, 0010**

**IN THE MATTERS OF
THOMAS E. RILEY, JR., P. J. RILEY &
COMPANY AND TAYLOR ROTH**

Appearances: Candies Pruitt-Doncaster, Esq.
Counsel for Petitioner

Paul J. Murphy, Esq.
Kevin T. Smith, Esq.
Counsel for Respondents Thomas
E. Riley, Jr. and P.J. Riley &
Company

Joseph W. Monahan, III, Esq.
Thomas J. Freda, Esq.
Counsel for Respondent Taylor
Roth

Commissioners: Matthew N. Kane, Jeanne M.
Kempthorne and Patrick J. King ^{1/}

Presiding Officer: Commissioner Jeanne M.
Kempthorne

DECISION AND ORDER

Background and Procedural History

These adjudicatory proceedings were commenced on April 23, 2008, with the issuance of three Orders to Show Cause. Answers were filed in mid-May. The Commission subsequently ordered the matters consolidated pursuant to 930 CMR 1.01(6)(g).

Respondent Taylor Roth (“Roth”) is a senior inspector for the state Board of Examiners of Plumbers and Gasfitters (“Board”). Respondent P.J. Riley & Company (“Riley & Co.”) is a state plumbing and gas-fitting contractor and Respondent Thomas E. Riley, Jr. (“Riley”) is the company’s executive vice president.

This consolidated matter concerns Roth’s alleged receipt of Boston Red Sox tickets from Riley and Riley & Co. (and the latter Respondents’ alleged provision of said tickets) in 2004, 2005 and 2006 contemporaneously with Roth’s issuance of permits for and inspection of gas and plumbing work performed by Riley & Co., in alleged violation of G. L. c. 268A, § 3 (by all three Respondents) and § 23(b)(2) and (3) (by Roth). More specifically, in each year Riley and Riley & Co. are alleged to have given, and Roth to have received a pair of Red Sox tickets, with a face value of \$160 per pair, to a single game for or because of Roth’s official acts of conducting inspections of Riley & Co.’s plumbing work, i.e., to reward or influence Roth’s official acts.

In their Answers, the three Respondents deny that they violated G. L. c. 268A. Roth denies that he received any tickets in 2004 and 2005, and states that he turned over the tickets he unexpectedly received in 2006 to Legal Counsel for the Board (“Board Counsel”) and, therefore, could not have violated G. L. c. 268A, §§ 3(b)^{2/} and 23(b)(2) and (3).^{3/} Riley and Riley & Co. admit that they gave a pair of tickets to Roth in each of the years 2004, 2005 and 2006, but assert that they did not do so “for or because of any official act” by Roth and, thus, could not have violated G. L. c. 268A, § 3(a).^{4/}

Respondents Riley and Riley & Co. filed a joint motion for summary decision, pursuant to 930 CMR 1.01(6)(f)(1), together with a supporting memorandum, statement of facts, affidavits and exhibits. Respondent Roth filed his separate motion for summary decision, pursuant to 930 CMR 1.01(6)(f)(1), together with a supporting memorandum, affidavits and exhibits. Petitioner filed two memoranda in opposition to the Respondents’ motions, together with supporting affidavits and exhibits. Respondents Riley and Riley & Co. also filed a joint reply memorandum.

The Law of Summary Decision

A motion for summary decision is like a motion for summary judgment under Mass. R. Civ. P. 56. Summary decision may be granted “if the pleadings, depositions, answers to interrogatories ... together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Taylor v. Board of Appeals of Lexington*, 68 Mass. App. Ct. 503, 508 (2007) (quoting Mass. R. Civ. P. 56). In a case where the opposing party has the burden of proof at trial, the moving party “is entitled to summary judgment if [the moving party] demonstrates...that the party opposing the motion has no reasonable expectation of proving an essential element of that party’s case.” *Correia v. Fagan*, 452 Mass. 120, 129 (2008) (quoting *Kourouvcilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991)). A party moving for summary judgment must demonstrate the absence of a triable issue of fact on every relevant issue raised by the pleadings and that it is entitled to judgment as a matter of law. *Kourouvcilis* at 711. All evidence must be viewed in the light most favorable to the non-moving party. *Williams v. Hartman*, 413 Mass. 398, 401 (1992).

Under the regulation, 930 CMR 1.01(6)(f)(1), a summary decision motion may be denied by the Presiding Officer, but may be granted only by the Commission itself.

Summary of the Facts in the Light Most Favorable to Petitioner

Roth is a senior inspector for the Board. As such, Roth inspects plumbing and gas pipefitting work performed on buildings owned by the Commonwealth for compliance with state plumbing and gas pipefitting codes. As a state inspector, Roth may pass or fail a project for compliance or non-compliance with the codes. Upon a finding of “leaks, defective or patched material, or evidence of unskilled or inferior workmanship” by Roth, no further progress is allowed until these issues are addressed.

Riley & Company is a Boston-based mechanical construction company focusing on public and private plumbing and gas pipefitting work. Riley is a principal of the company and its executive vice president. Edward Kilnapp (“Kilnapp”) is Riley’s assistant.

Between 2004 and 2006, Roth conducted inspections of Riley & Co.'s work on the following sites and dates: (1) Mass Highway Dewey Square Vent Building, Boston, 2/12/04, 3/23/04, 3/25/04 and 4/5/04; (2) MWRA Pump Station, Weymouth, 11/10/04; (3) Massport Black Falcon Terminal, Boston, 1/3/05, 3/21/05, 5/3/05 and 6/20/05; (4) MWRA Union Park, Boston, 2/16/05, 7/13/05, 9/13/05, 1/10/06, 2/13/06, 3/15/06 and 4/6/06; (5) MWRA Deer Island Plant, Boston, 9/14/05 and 2/14/06; (6) MCI Baystate Prison, Norfolk, 1/23/06; and (6) MTA Sumner/Callahan Vent Buildings, Boston, 3/21/06. (In the larger period of 2002 through March 2006, Roth conducted a total of about 49 inspections of Riley & Co.'s work on many of its eighteen public projects. Roth signed 15 of the company's 18 permits.) Roth did not always pass the Riley & Co. work he inspected.

Riley & Co. has held Red Sox season tickets since World War II. Between February and March each year, after receiving them from the Red Sox, Riley distributes a pair of tickets to 40 to 50 games to employees, friends, business acquaintances, social acquaintances and local charities on behalf of Riley & Co. The Red Sox tickets are business expenses for the company.

Between February and March of each of the years 2004, 2005 and 2006, Riley & Co. through Riley offered and gave to Roth a pair of Red Sox tickets for a single game. Roth agreed to accept and received the tickets. Roth thanked Riley for the tickets. Roth was the only public employee to whom Riley and Riley & Co. gave Red Sox tickets.

In each case, the face value of each Red Sox ticket was \$80. Riley and Roth are not personal friends, but did socialize at some plumbing industry events. In each of the years 2004, 2005 and 2006, Roth conducted two to three inspections of Riley & Co.'s work during the February and March period during which he received the company's Red Sox tickets.

In 2006, the pair of Red Sox tickets was offered to Roth by Riley through Kilnapp while the latter was talking by telephone with Roth in order to arrange an inspection of Riley & Co.'s work at the MTA Sumner/Callahan Vent Buildings where there was an existing engineering defect that had been the subject of communications between the company and Roth and his colleagues since October, 2005. Roth

agreed to accept the tickets and asked Kilnapp to send the tickets to his home. Roth performed the requested inspection, which was a permit termination inspection, on March 21, 2006, and failed the work due to the engineering defect. Riley & Co. was not responsible for the engineering defect. After receiving the tickets and consulting with his father and wife, Roth turned the tickets over to Board Counsel.

Riley and Riley & Co.'s Argument for Summary Decision

Riley and Riley & Co. argue that there are no facts that demonstrate any conceivable "linkage" between their gift of Red Sox tickets to Roth in 2004, 2005 and 2006 and any official act which Roth took in the past or was to take in the future on any Riley & Co. project. The fact that Riley & Co. gave Roth two tickets in the Spring of 2004, 2005 and 2006 as part of a seasonal practice in which it gave Red Sox tickets to its employees, friends, social and business acquaintances and charities, did not violate G. L. c. 268A, § 3(a), as construed by the Supreme Judicial Court in *Scaccia v. State Ethics Commission*, 431 Mass. 351 (2000).

According to Riley and Riley & Co., Petitioner's theories for linking their gifts to Roth's official acts as required by § 3(a) under *Scaccia* are dispelled by the undisputed facts. Thus, Petitioner's theory (stated in its interrogatory answers) that the tickets were given in 2004, 2005 and 2006 to enable Riley & Co. to collect the monies due on the public projects it worked on during those years is dispelled by the undisputed evidence showing that the payments to the company were not affected by Roth's official actions. Thus also, Petitioner's theory (stated in the Orders to Show Cause and in Petitioner's interrogatory answers) that the tickets given in 2006 were given to influence Roth to conduct an inspection of the Sumner/Callahan Project and to obtain Roth's approval to insulate the plumbing system is dispelled by the undisputed evidence that Roth was merely carrying out his regular and customary duties as a plumbing inspector under the applicable regulation when permits are to be terminated and that Roth did not do Riley & Co. a favor by, and the company did not receive any benefit from, [Roth's] doing the "walk-through" or termination inspection. Riley and Riley & Co. assert that Petitioner has not identified any facts that support the conclusion that the tickets were

given to influence a present or future act by Roth or to reward him for a past action, as opposed to merely in an effort to develop good will with a person with whom they interacted on a regular basis.

Roth's Argument for Summary Decision

Roth asserts that Petitioner will not be able to prove that he received Red Sox tickets from Riley or Riley & Co. in 2004 and 2005, and, given that he turned in the tickets sent to him in 2006, that he "did not exercise dominion and control over" them, and, thus, he cannot be found to have received any tickets in violation of G. L. c. 268A, § 3(b). In addition, according to Roth, there is no evidence of any linkage between the alleged gifts and any official act by Roth as required by *Scaccia*, and thus, even if the Petitioner were able to prove that Roth received the tickets, Petitioner would not be able to prove that Roth violated § 3(b).

Also according to Roth, Petitioner will not be able to prove that Roth violated section 23(b)(2) because Petitioner will not be able to prove: (a) that Roth received the tickets and (b) that Roth's receipt of the tickets was an unwarranted privilege. Finally according to Roth, Petitioner will not be able to prove that Roth violated § 23(b)(3) because: (a) Petitioner will not be able to prove that Roth received the tickets in 2004 and 2005 and (b) Roth turned in the tickets sent to him in 2006.

Petitioner's Arguments Against Summary Decision as to Riley and Riley & Co.

Petitioner asserts that there is a genuine issue of material fact as to why Riley and Riley & Co. gave Roth the Red Sox tickets where Roth denies the friendship that the former Respondents claim motivated the giving of the tickets. Petitioner argues that summary decision should be denied because Respondents have failed to demonstrate that Petitioner cannot prove the only essential element of its case that is in dispute, i.e., a "for or because of" link between the tickets given and Roth's official acts. Petitioner asserts that it will be able to prove this element of its case based on the compelling inference concerning why the tickets were given arising from the totality of the circumstances in which the tickets were given.

In attempting to demonstrate its ability to prove the "for or because of" element of § 3, Petitioner relies on the Court's statement in *Scaccia* that "the trier of fact can do no more than ascribe an intent [to influence or be influenced] on the basis of the circumstances surrounding" the gift, 431 Mass at 357 (quoting *United States v. Schaffer*, 188 F.3d 833, 843 (D. C. Cir. 1999)), and the Court's indication that factors which may prove a § 3 violation include the nature of the pending official action, its impact on the giver, the outcome of the public employee's act, the timing of the gift(s) and changes in the public employee's performance of his official acts. In addition, Petitioner relies on additional factors cited in the Commission's post-*Scaccia* Decision and Order in *In the Matter of Life Insurance Association of Massachusetts, Inc.*, 2003 SEC 1114. More specifically, for the tickets given in 2004 and 2005, Petitioner argues that it is inferable from the totality of the following circumstances that the tickets were given to reward or influence Roth's inspection of Riley & Co.'s work: Roth and Riley were not friends, there was no reciprocity, the pair of tickets were worth \$160, the tickets were given shortly before and/or after Roth's inspections, the tickets were probably a business expense, Roth had the power to pass or fail the work, and Roth was the only state employee given Red Sox tickets. For the tickets given in 2006, Petitioner argues that those tickets were given to influence Roth in his March 2006 inspection of Riley & Co.'s work on the Sumner/Callahan Vent Building and that this is inferable from the totality of the circumstances which existed in 2004 and 2005 and from the following additional circumstances: there was a controversy concerning the design of the project, the tickets were offered close in time to Roth's official act (and during the same telephone conversation in which the giver was requesting the official action with knowledge that the design issues had not been addressed), and Roth's inspection could have resulted in additional costs of up to \$168,000 for Riley & Co.

Petitioner's Arguments Against Summary Decision as to Roth

Petitioner asserts that there is a genuine issue of material fact as to why Roth received the Red Sox tickets from Riley and Riley & Co. where Roth denies the friendship that the former Respondents claim motivated the giving of the tickets. Petitioner argues that summary decision

should be denied because Roth has failed to demonstrate that Petitioner cannot prove the only essential elements of its case that are in dispute, i.e., a “for or because of” link between the tickets received and Roth’s official actions and whether Roth received tickets in 2004 and 2005. Petitioner asserts that it will be able to prove the first element of its case based on the compelling inference concerning why the tickets were received arising from the totality of the circumstances and the second element based on Riley’s testimony and the affidavit of Riley & Co. employee Kilnapp. More specifically, Petitioner relies upon the same totality of the circumstances analysis as it employs with Riley and Riley & Co., to demonstrate its ability to prove the “for or because of” element of its claim that Roth violated § 3(b).

As to its § 23(b) allegations against Roth, Petitioner in effect asserts that the evidence proving Roth’s receipt of the tickets from the other respondents while inspecting their work will establish that he acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that Riley and Riley & Co. 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 officially as a result of their undue influence in violation of § 23(b)(3). Petitioner further in effect asserts that the evidence proving Roth’s receipt of the tickets from the other respondents for his being an inspector and as a reward for or to influence his inspections of their work will establish that he used his official position to obtain unwarranted privileges of substantial value in violation of § 23(b)(2).

Decision

The Alleged §3 Violations

We find that, even taken in the light most favorable to Petitioner, there is no genuine issue concerning the material facts relating to Riley and Riley & Co.’s provision of tickets to Roth in 2004 and 2005. While there is a factual dispute concerning whether Roth, contrary to his denials, received tickets in those years as Petitioner alleges and Riley and Kilnapp testify occurred, there is, in any case, no evidence that in those years the gift of the tickets was linked to any particular official act or acts by Roth. Instead, the evidence favorable to Petitioner

indicates that the tickets in 2004 and 2005 were a seasonal goodwill gift by Riley and Riley & Co. Accordingly, as required by *Scaccia*, we conclude that all three Respondents are entitled to summary decision in their favor on the alleged 2004 and 2005 §3 violations.

The 2006 gift of tickets presented the most supportive set of circumstances for Petitioner’s allegations that the respondents violated § 3. The evidence favorable to Petitioner shows the following. The tickets were offered during the course of a conversation in which Riley and Riley & Co., through Kilnapp, were requesting Roth to perform the official action of performing an inspection/walk-through of the company’s work at the Sumner/Callahan vent building. This was action that the company had been seeking to have performed for some time and which was necessary to end the company’s work on the project. (Roth also had the power to order testing of their plumbing work which would have cost Riley & Co. as much as \$168,000.) Roth agreed to accept the tickets and to come to the job site in the same conversation and inspected (and failed) the work the next day. In addition, Roth apparently perceived the gift as improper, causing him to turn in the tickets.

Any suspicion that the 2006 gift was offered to induce Roth to perform the inspection/walk-through is, however, completely undercut by the evidence that the 2004 and 2005 gifts were offered to Roth as part of a seasonal practice and without any link to an official act. The undisputed evidence is that, to the extent he received ticket, Roth was one among a large and diverse group of persons who received Red Sox tickets from Riley & Co. each year at about the same time of year. We are therefore compelled by *Scaccia*, to conclude that all three respondents are entitled to summary decision in their favor as to the alleged 2006 §3 violations.

Roth’s Alleged § 23(b) Violations

We find that there are genuine issues of material fact concerning Petitioner’s allegations that Roth violated §§ 23(b)(2) and 23(b)(3) by receiving Red Sox tickets from Riley and Riley & Co. in 2004, 2005 and 2006. Roth denies he received the tickets, except in 2006, but Riley and Kilnapp assert under oath that they sent Roth the tickets in all three years. Roth asserts that there is no proof that he actually received the tickets in 2004 and 2005, but Riley testified that

Roth thanked him for the tickets. In any case, Petitioner does not necessarily have to prove that Roth in fact received the tickets, as his agreement to receive them, as testified to by Riley and Kilnapp, is a sufficient basis for the alleged violations. The evidence from Kilnapp and Riley concerning the distribution of the tickets in particular presents triable issues as to Roth. If Riley and Kilnapp are believed and Roth, should he testify, is not believed, the evidence would support the conclusion that Roth agreed to receive and received a pair of tickets in each of those years.

Thus, we conclude that Petitioner cannot be said to lack a reasonable expectation of proving that Roth agreed to accept and received Red Sox tickets from Riley and Riley & Co. in 2004, 2005 and 2006. While Roth turned in to Board Counsel the tickets he received in 2006, Petitioner could possibly argue that doing so only mitigated but did not avoid Roth's § 23 violation based upon his agreeing to accept the tickets during his telephone conversation with Kilnapp. Accordingly, we conclude that Roth is not entitled to summary decision in his favor as to these § 23 allegations. Petitioner has a triable case on these particular allegations against Roth.

Conclusion

For the above-stated reasons, we conclude that there is no triable issue of material fact as to whether the three respondents violated G. L. c. 268A, § 3 as alleged and that each is entitled to judgment in their favor as to the § 3 allegations as a matter of law. We conclude further that there is a triable issue of material fact as to whether Taylor Roth violated G. L. c. 268A, § 23(b)(2) and (3) as alleged and that he is not entitled to judgment in his favor as a matter of law as to the § 23(b) allegations.

Order

Accordingly, the joint motion for summary decision of Respondents Thomas E. Riley, Jr. and P.J. Riley & Company is **GRANTED** and all allegations against them (Adjudicatory Docket Nos. 08-0008 and 0009) are **DISMISSED**.

Accordingly also, Taylor Roth's motion for summary decision is **GRANTED IN PART** and **DENIED IN PART**: the allegations that he violated G. L. c. 268A, § 3 are **DISMISSED** and

the allegations that he violated G. L. c. 268A, § 23(b) are **NOT DISMISSED**.

Finally, the matter concerning Taylor Roth (Adjudicatory Docket No. 08-0010) is hereby separated from this consolidated matter and shall proceed to an adjudicatory hearing on the dates previously scheduled for this consolidated matter, subject to rescheduling by and at the discretion of the Presiding Officer.

DATE AUTHORIZED: January 16, 2009

DATE ISSUED: January 23, 2009

^{1/} Commission Chairman E. George Daher and Commissioner David L. Veator did not participate in this Decision and Order.

^{2/} Section 3(a), in relevant part, prohibits anyone from offering or giving anything of substantial value to a state employee "for or because of any official act performed or to be performed" by that employee.

^{3/} Section 23(b), in relevant part, prohibits a state 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 state employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion).

^{4/} Section 3(b), in relevant part, prohibits a state employee from seeking, accepting, receiving or agreeing to receive anything of substantial value for himself "for or because of any official act or act within his official responsibility performed or to be performed by him."

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 07-0032

**IN THE MATTER OF
MATTHEW AMORELLO**

Appearances: Stephen P. Fauteux, Esq.
Counsel for Petitioner

Thomas R. Kiley, Esq.
Counsel for Respondent

Commissioners: Matthenw N. Kane, Jeanne M.
Kempthorne and Patrick J. King

Presiding Officer: Commissioner Jeanne M.
Kempthorne

DECISION AND ORDER

I. Background & Procedural History

On November 5, 2007, Petitioner issued an Order to Show Cause (“OTSC”) against Matthew Amorello (“Amorello”), the former Board Chair and Chief Executive Officer of the Massachusetts Turnpike Authority (“MTA”). The OTSC alleges that Amorello violated G.L. c. 268A, § 6, § 23(b)(2) and § 23(b)(3) by participating in particular matters involving the MTA’s sick leave buy-back policy applicable to him and other non-union employees, including members of his senior staff, when he knew he and they had a financial interest in that policy. Amorello denies any violation.

An evidentiary hearing was held on August 5, 2008. The parties presented closing arguments to the Commission on October 17, 2008. In rendering this Decision and Order, each undersigned Commissioner has considered the testimony, the evidence in the public record and the arguments of the parties.

II. Findings of Fact

1. Matthew Amorello (“Amorello”) was Chairman and Chief Executive Officer of the Massachusetts Turnpike Authority (“MTA”) from February 2002 to August 15, 2006. The MTA Board and Chair are appointed by the Governor.

2. Marie Hayman (“Hayman”) was Chief of Staff at the MTA from March 2003 to August 2006. She was responsible for supervising the staff and reported directly to Amorello.

3. Keith Shirley (“Shirley”) worked directly with Amorello for a brief time at the Highway Department. In March 2002, he began working at the MTA, and, after promotion, became Deputy Chief of Staff.

4. Norman “Chuck” Chalupka (“Chalupka”) was the Director of Human Resources at the MTA. He had previously worked at the Highway Department and came to the MTA in 2002. He reported to Amorello most often through Hayman.

5. Mariellen Burns (“Burns”) was the MTA’s Director of Communications.

6. At all times material hereto, William Sweeney, the MTA’s Director of Payroll since June 1987, monitored sick leave payments upon termination and oversaw accrual of time.

***The MTA’s Sick Leave Buy-Back Policy
Prior to 2006***

7. As the MTA Board Chair and Chief Executive Officer, Amorello had authority to decide all matters regarding employee compensation and fringe benefits.

8. Pursuant to the MTA By-Laws, “the Chair, in his discretion, may delegate any portion of [his] powers and duties” involving personnel decisions. Sometime before early 2006, Amorello delegated responsibility to establish fringe benefit policies to Chalupka.

9. From 1979 until 1996, the MTA gave retiring non-union employees 50% of the cash value of their accrued unused sick time, and also gave them 50% of the cash value of the accumulated sick time toward health insurance premiums, a benefit known as sick leave “buy-back.” Non-retiring employees did not receive this benefit.

10. In 1996, the MTA reduced the buy-back for retiring employees to 20%, a change that generated considerable criticism by those affected. Amorello was aware of this criticism.

11. On March 7, 2002, Amorello signed an acknowledgement stating he had read and would comply with MTA’s policies, including the sick leave policy.

12. On June 6, 2005, the Superior Court ruled that the MTA's 20% policy could not be applied retroactively to non-union MTA retirees.

13. Sometime in late 2005 or early 2006, as a result of non-union employee concerns and the court decision, Amorello directed Chalupka to re-evaluate the 1996 policy change. He gave no direction relating to sick leave buy-backs for non-retiring employees.

14. Amorello did not monitor Chalupka's activities with respect to the sick leave buy-back policy for retirees. Nor did he receive periodic reports from him on the issue.

The 2006 Changes to the MTA's Sick Leave Buy-Back Policy

15. At some point prior to July 26, 2006, Chalupka changed the sick leave buy-back policy for MTA non-union employees. The new policy provided that non-union employees would receive 100% cash value upon leaving the MTA for any reason (*i.e.*, whether retiring or not). This new policy changed the amount of this benefit available to non-union employees who left without retiring from 0% to 100%, and, for retirees, from 20% cash value to 100% cash value. This policy is dated July 5, 2006.

16. Stacey Wagner, a non-union employee, resigned on July 7, 2006. She received no sick leave buy-back even though Chalupka had purportedly changed the policy to 100% on July 5, 2006. As of July 13th, MTA Payroll Director Sweeney was unaware of Chalupka's policy change. Chief of Staff Hayman was also unaware of the 100% policy at that time.

17. On July 17, 2006, by e-mail, Chalupka instructed that Wagner be paid "[i]n accordance with the revised sick leave policy directive." Sweeney, who received a copy of the 100% policy, then submitted another termination pay worksheet to the Personnel Department to pay Wagner 100% of her unused sick time.

18. On July 10, 2006, an MTA tunnel ceiling collapsed resulting in the death of a motorist.

19. Late on July 17, 2006, Amorello received notice that Governor Mitt Romney intended to remove him as Chair. Amorello filed an action on July 24, 2006, in the Supreme

Judicial Court ("SJC") seeking to prevent his removal.

20. On July 26, 2006, Amorello, after learning that the SJC had denied his request for relief, decided to resign. He was then 48 years old, had no intention of retiring, and did not believe he was eligible for a superannuation retirement.

21. That day, Amorello met with Hayman, Shirley and Chalupka. Amorello said to Chalupka: "I am stepping down. What does that mean?" In response, Chalupka told Amorello told "he had enacted a policy buy back, you have a vacation time and policy buy back for sick time" and that "he had implemented a 100 percent buy back of unused sick time" When Chalupka told him of the policy change, Amorello was aware of and understood that the 100% policy applied to him.

22. Amorello testified that "the definition [Chalupka] gave to me verbally was 100% for nonretiring individuals and then this 50:50 for retiring individuals." (In fact, Chalupka's policy as set forth in Exhibit 5 did not provide for a 50/50 benefit for retirees). Amorello did not ask Chalupka how he arrived at the 100% buy-back policy or for a written version of the policy.

23. Amorello was "outraged" and immediately told Chalupka that the change to a 100% buy-back for non-retirees was excessive and had to be revisited. Amorello instructed Chalupka to examine the policies of other authorities such as MassPort and the MBTA, and "to make a recommendations (sic) similar to those, similar to that effect."

24. Amorello knew that his directive meant that the benefit would be reduced. He communicated to the staff that the 100% policy was unacceptable.

25. Amorello did not notify his appointing authority or the MTA Board that he had directed his staff to revise the sick leave buy-back policy.

26. Later that day, Chalupka recommended to Amorello that the policy be changed from 100% to 50%. Amorello indicated that the revision was reasonable and that he was comfortable with it.

27. The MTA sick leave buy-back policy, Policy Directive 2-8.0, was thereupon changed to provide for a cash payment of 50% of the value of accumulated sick leave “[u]pon retirement, resignation, termination or death.” An employee with ten (10) or more years of service at the time of retirement under the MTA’s retirement system or the state system, would also be entitled to medical benefits coverage under the MTA Group Insurance Plan without contribution, until the contributions equaled 50% of the value of accumulated sick leave credit. The revised sick leave buy-back policy is dated July 5, 2006.

28. Chalupka did not testify at the adjudicatory hearing and indicated that if called to testify, he would invoke his rights under the Fifth Amendment of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights not to incriminate himself.

Amorello’s Departure from the MTA

29. On July 26, 2006, after Amorello had decided to step down, his attorneys began negotiating a severance package with the Governor’s Office. Amorello’s principal concern was to ensure that when he retired, he would receive the health care coverage available to MTA retirees.

30. At a dinner with Chalupka and others that evening, Amorello handed Chalupka a draft of his severance agreement. Chalupka suggested that Amorello ask for the retirement benefit.

31. Amorello knew that without a severance agreement, the sick leave buy-back policy as revised would apply to him.

32. Amorello ultimately signed a severance agreement (“Severance Agreement”) pursuant to which he agreed to relinquish his positions effective August 15, 2006.

33. The Severance Agreement provides:

The MTA agrees to provide Amorello with all health, dental, life and other benefits that he currently enjoys as Chairperson, Member and CEO of the MTA through February 15, 2007. At the future point when Amorello retires and becomes entitled to receive benefits from the MTA retirement plan, he shall be entitled to receive the same health care coverage that is available to

MTA retirees as of July 26, 2006.

34. Chalupka and the MTA Director of Operations to the Retirement Board and Retiree Benefits sent Amorello a letter dated August 10, 2006, which states:

You have chosen to leave 100% of your accumulated sick leave in the custody of the MTA. Should you choose to retire through the Retirement System at some future date, 50% of that accumulated sick leave will be made available to you in cash. The other 50% will be credited to a “medical bank” to allow for medical benefits coverage, without contribution on your part, until such time as contributions equal 50% of the value of accumulated sick leave credit (see Policy Directives 2.8-0 and 2-12.0).

A copy of Policy Directive 2-8.0 (Ex. 6) was enclosed with the letter.

35. Pursuant to the Severance Agreement, Amorello remained on the payroll until February 15, 2007. As of October 13, 2008, he has received no sick leave buy-back benefit from the MTA.

36. As of July 26, 2006, Amorello had accrued 613.8 hours of sick leave or 84.6 days. At his hourly rate of pay of \$120.08, if he had received 100% of the cash value of his sick leave, it would have been worth approximately \$73,706.

37. On or about July 26th, but prior to August 17, 2006, seven senior MTA employees received a payment pursuant to the revised sick leave buy-back policy, as follows: (a) Mariellen Burns, Director of Communications, resigned and received \$4,312; (b) Keith Shirley, Deputy Chief of Staff, resigned and received \$12,567; (c) Marie Hayman, Chief of Staff, retired and received \$58,746; (d) Victoria Tsao, Civil Engineer, retired and received \$48,058; (e) George Ward, Director of Highway Maintenance, retired and received \$35,821; (f) Paul Carr, Assistant Chief Engineer, retired and received \$38,874; and (g) Michael Swanson, Chief of Operations, retired and received \$40,440. In addition to these payments, all but Burns and Shirley were also eligible for health insurance premium contributions in an amount equal to the cash payment they received.

38. On or about August 17, 2006, the MTA revised its sick leave policy to provide benefits at the same level as the 1996 policy. Non-union employees became entitled to 20% sick leave buy-back only upon retirement. Employees who leave for other reasons would no longer be compensated for unused sick leave.

Other Sick Leave Buy-Back Policies

39. The sick leave buy-back policies for union employees at the MTA in effect during 2006 did not provide for any cash payment for an employee who voluntarily left. They did include provisions for cash payments and credits towards an employee's medical bank in the event of retirement.

40. Other state agencies had sick leave buy-back policies in 2006. The MBTA's policy for executive employees provided that the only payment they would receive for accrued, unused sick leave was 20% of the accrued sick leave balance at the time of retirement. The Massachusetts Convention Center Authority's policy provided that full-time, non-affiliated employees who worked until retirement and had completed at least five years of continuous employment would be paid up to six weeks' salary of unused accrued sick leave. Massport's policy provided that employees who had been employed for two years or more would be paid 50% of their unused sick time when they voluntarily separated from employment or when their termination was for non-disciplinary reasons. Employees who retired and immediately filed for retirement benefits with the MassPort Retirement System would receive compensation for 100% of their sick leave.

III. Decision

A. The § 6 Allegations

Section 6 of G.L. c. 268A provides in relevant part that a state employee may not participate as such in any particular matter in which, to his knowledge, he has a financial interest. In order to establish a violation of § 6, Petitioner must prove by a preponderance of the evidence that: (1) Amorello was a state employee; (2) he participated as a state employee; (3) in a particular matter; (4) in which he had a financial interest; and (5) he had knowledge of his financial interest. Only the participation, financial interest and knowledge

elements of the alleged § 6 violation are disputed by the parties.^{1/} We find that Petitioner has proven by a preponderance of the evidence that Amorello violated G.L. c. 268A, § 6.

Did Amorello Participate in Changing the Sick Leave Buy-Back Policy?

"Participate" is defined in G.L. c. 268A, § 1(j) as follows: "participate in agency action or in a particular matter personally and substantially as a state ... employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." Participation must be "personal and substantial."

When interpreting the modifying terms personal and substantial the Commission, as it noted in *In Re Pathiakis*, 2004 SEC 1167, 1174, has been guided by the interpretations of the federal Office of Government Ethics.^{2/} In 5 CFR 2635.402(b)(4), the Office of Government Ethics described and clarified the phrase personal and substantial as follows:

To participate personally means to participate directly. It includes the direct and active supervision of the participation of the subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. ... [I]t requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. ... [T]he single act of approving or participating in a critical step may be substantial.

Previous Commission decisions have discussed and addressed the issue of whether conduct rose to the level of personal and substantial. A public employee who discusses or makes recommendations on the merits of a matter will be deemed to have participated personally and substantially.^{3/} A public employee may participate by supervising or overseeing others.^{4/}

Applying these principles, we find that Amorello participated in decisions involving the sick leave buy-back policy. On July 26, 2006, when Amorello was advised by Chalupka that he

had changed the policy from 20% cash for retirees only with nothing for non-retirees, to 100% for anyone leaving the MTA, Amorello reacted swiftly. Amorello “asked [Chalupka] to relook at that,” (T. 115) and gave Chalupka specific instructions. He told Chalupka “to review other agencies similar to the [MTA], independent, . . . Massport, MBTA” (T. 131) and “to make a recommendations (sic) similar to those, similar to that effect.” By his actions and his express directions to Chalupka, his subordinate, Amorello rejected the 100% buy-back policy at least as it applied to non-retirees. By virtue of his disapproval and rejection of the revised sick leave buy-back policy, he “participated” for purposes of the conflict of interest law.

Chalupka clearly understood that he had received an unambiguous directive from the head of his agency that the 100% policy was not acceptable and needed to be changed. Chalupka returned to Amorello that same day “with a recommendation to change it from 100 to 50.” We conclude that Amorello’s comments on the recommendation constituted an approval of the revised sick leave buy-back policy which Chalupka then effected.

Amorello argues that he did not participate in any matters relating to the change in benefits for retirees. Under the circumstances, where Amorello vetoed one portion of the policy, but left the other portion as it was proposed, his actions constituted an acceptance of the 50/50 policy. In short, Amorello’s reactions to the policy and its proposed revisions constitute substantial and active participation.

Did Amorello Have a Financial Interest?

Section 6 encompasses any financial interest without regard to the size of that interest and whether the financial interest is positive or negative.^{5/} The financial interest, however, must be direct and immediate or reasonably foreseeable.^{6/} Financial interests that are remote, speculative or not sufficiently identifiable do not require disqualification under the conflict of interest law.^{7/}

The evidence demonstrates that Amorello had a financial interest in the sick leave buy-back policy. As of July 26, 2006, Amorello had approximately 613.8 hours in sick leave with a

100% cash value of approximately \$73,706. The terms of the policy would have applied to him as a non-union employee and he would have been legally entitled to such benefits. Had Amorello resigned from the MTA without a severance agreement, he would have been entitled to whatever benefits were available to him as a matter of law. Moreover, it is reasonable to infer that because Amorello had a legal entitlement to such benefits, that entitlement would have been, at a minimum, a bargaining chip in his severance negotiations.

The fact that Amorello’s disapproval of the 100% policy resulted in a decrease to 50% does not obviate his financial interest in the policy change. Section 6 prohibits a state employee from participating in a particular matter in which he has a financial interest either positive or negative. In any event, the net effect of Amorello’s actions was a substantial increase - - not decrease - - in buy-back benefits. As the result of Amorello’s participation, what began before July 2006 as a 0% cash payment for non-retirees became a 50% cash payment as of July 27, 2006. What began before July 2006 as a 20% cash payment only upon retirement became a 50% cash payment and a 50% contribution to health insurance premiums - - a huge increase in benefits for retirees.

Finally, the facts that Amorello has not yet received any payment for his sick leave and may never receive any such payment do not change our conclusion. The determination of whether he had a financial interest involves a determination of the facts at the time he was participating, not as determined by subsequent events. Accordingly, what Amorello will actually receive should he retire from the MTA is irrelevant. That said, we note that the Severance Agreement provides that when he retires, he shall be entitled to receive the same health care coverage available to MTA retirees as of July 26, 2006. In a letter dated five days before Amorello’s resignation was effective, Chalupka and the MTA Director of Operations to the Retirement Board and Retiree Benefits expressly stated that “[Amorello] ha[s] chosen to leave 100% of [his] accumulated sick leave in the custody of the MTA.” This statement indicates that rather than rejecting payment for sick leave to which he was entitled, Amorello decided to leave it in the custody of the MTA and should he retire, 50% of that accumulated sick leave will be made available to him in cash

and the other 50% will be credited to a medical bank for medical benefits coverage.

Did Amorello Have Knowledge of His Financial Interest?

Amorello testified that after making his decision to step down on July 26th, he said to Chalupka: “I am stepping down. What does that mean?” It was at that point that Chalupka told him that “he had enacted a policy buy back, you have a vacation time and policy buy back for sick time.” Amorello then went on to discuss the sick leave buy-back policy with Chalupka. Amorello’s question to Chalupka and his ensuing discussion with him demonstrates a conscious knowledge of his financial interest in the sick leave buy-back policy.

When Amorello was asked whether the 100% policy applied to him when he learned about it on July 26, 2006, he responded: “well, negotiations with the Governor’s attorneys on my severance agreement - - well, I guess it did apply to me.” Amorello admitted that he understood the 100% policy could apply to him, even though that was not a conscious consideration at the time he learned of the policy from Chalupka. He knew that he had a stake in the policy, but not specifically what his hours were. In sum, even though Amorello may not have known how much he would have been entitled to under the policy, he knew that he had a financial interest.

Finally, we note that § 6 contains an exemption procedure that would have allowed him to participate in matters involving the sick leave buy-back policy if he first made a written disclosure of all the facts to his appointing authority, the Governor, and the Governor made a written determination allowing him to participate. Amorello did not avail himself of this procedure.

B. The § 23(b)(2) Allegations

Section 23(b)(2) prohibits state employees from knowingly or with reason to know using or attempting to use their official positions to secure for themselves or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. In order to establish a violation, Petitioner must prove by a preponderance of the evidence that: (1) Amorello

was a state employee; (2) who used or attempted to use his official position; (3) to secure an unwarranted privilege or exemption^{8/} for himself or others; (4) which was of substantial value; (5) which was not properly available to similarly situated individuals; and (6) who did so, knowingly or with reason to know.

We conclude that Petitioner has failed to prove by a preponderance of the evidence that the sick leave buy-back policy was an unwarranted privilege. The record reflects that some form of a sick leave buy-back policy was available to MTA employees since 1979. Moreover, the buy-back percentage varies among state agencies. There seems to be no clear consensus on what percentage is “unwarranted.” Thus we are in no position to rule that the specific policy adopted by the MTA conferred an unwarranted privilege per se. As such, the sick leave buy-back policy was not in and of itself an unwarranted privilege.

Furthermore, the policy applied across the board to all non-union employees. It does not reflect any use of position by Amorello to secure a benefit solely for himself or a small group of individuals comprising an alleged “inner circle.” Although the timing of the change to the sick leave buy-back policy suggests an intention to benefit insiders likely to leave with Amorello, the timing alone is not enough to sustain the Petitioner’s charge.

Having found that Petitioner failed to demonstrate by a preponderance of the evidence that there was an unwarranted privilege, we need not decide whether the other elements of a § 23(b)(2) violation have been proven.

C. The § 23(b)(3) Allegations

Section 23(b)(3) prohibits a state employee from knowingly or with reason to know acting in a manner that would cause a reasonable person having knowledge of the relevant circumstances to conclude that any person 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) Amorello was a state 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.

While at first blush it might appear that Amorello’s conduct created an appearance of favoritism, our task is to determine whether such an appearance is warranted, or conversely is dispelled, by the “relevant circumstances,” that is, by the facts. A careful review of the record compels us to conclude that Petitioner has failed to demonstrate a § 23(b)(3) violation. The record does not reflect any evidence of any outside personal or social relationships between Amorello and his senior staff. Amorello testified that he brought the MTA’s General Counsel, Mike Powers, with him from the Highway Department to the MTA in February 2002. There is no evidence in the record, however, that Powers availed himself of the sick leave buy-back policy. Although there is evidence that other Highway Department employees came over to the MTA, the record does not reflect what role, if any, Amorello played in their hiring. Moreover, Shirley testified that he could not see how Virginia Tsao, a senior staff member who retired and received a sick leave buy-back under the revised 50% policy, could be a member of Amorello’s “inner circle” when Shirley had never heard her name.

The record further reflects that Shirley approached Amorello to ask if he could get “some sort of severance if [he] was to resign.” Rather than attempting to work out any type of special deal for Shirley, Amorello told him to “avail [himself] of the HR policy.”

As noted above in our discussion of § 23(b)(2), we find that the sick leave buy-back policy applied across the board to all non-union employees and did not single out any specific senior staff of Amorello’s. The OTSC refers to three people as Amorello’s close senior staff:

Hayman; Shirley; and Burns. Hayman retired from the MTA. Both Shirley and Burns resigned and received 50% of the cash value of their sick leave pursuant to the policy.^{1/} Four other senior employees (George Ward; Paul Carr; Michael Swanson; Virginia Tsao) received benefits from the revised sick leave buy-back policy. There is insufficient evidence in the record as to the nature of their relationship with or their interaction with Amorello. In addition, there is insufficient evidence that Amorello initially participated in reestablishing the 50/50 benefit for retirees. In light of these circumstances and based on the record before us, we find that Petitioner has failed to prove a violation of § 23(b)(3) by a preponderance of the evidence.

IV. Conclusion

Petitioner has proven by a preponderance of the evidence that Amorello violated G.L. c. 268A, § 6 when he participated in revising and approving the MTA’s sick leave buy-back policy when he knew that he had a financial interest in that policy. Petitioner has failed to prove by a preponderance of the evidence that Amorello violated G.L. c. 268A, § 23(b)(2) or G.L. c. 268A, § 23(b)(3).

V. Order

Having concluded that Respondent Matthew Amorello violated G.L. c. 268A, § 6 and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Matthew Amorello to pay a civil penalty of \$2,000.

DATE AUTHORIZED: January 16, 2009

DATE ISSUED: February 11, 2009

^{1/} Although Amorello denied the existence of a particular matter in his Answer, we find that his denial was never developed or even mentioned in his brief. We further find the existence of a particular matter for purposes of § 6.

^{2/} EC-COI-98-3.

^{3/} See, e.g., EC-COI-89-2 (discussion of the merits of a particular matter); 87-19 (participation includes any discussion, recommendation, vote, investigation); 85-75 (participation includes reviewing and making recommendations to others); 79-74 (participation

found where employee discussed with decision-makers factors that were central considerations of the final evaluation of a contract even if employee did not participate in selection, final review, approval and execution of contract); *In Re Craven*, 1980 SEC 17, 22 aff'd, *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983) (state representative participated by using position to exert pressure on agency to award contract).

^{4/} See, e.g., *EC-COI-93-16*; *87-27*. See also *EC-COI-89-7* (approving recommendation made by subordinate is not ministerial).

^{5/} See, e.g., *EC-COI-89-33*.

^{6/} See, e.g., *EC-COI-92-12*; *90-14*; *89-33*; *89-5*.

^{7/} See, e.g., *EC-COI-89-19*; *87-16*.

^{8/} The OTSC alleges that Amorello obtained an unwarranted privilege, not an unwarranted exemption. Accordingly, we address only the unwarranted privilege.

^{9/} Burns also received \$13,269.24 in special recognition pay for the additional hours that she worked after the accident. There is insufficient evidence in the record as to Amorello's involvement with that special recognition pay.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0004**

**IN THE MATTER OF
FREDERICK FORESTEIRE**

Appearances: Candies Pruitt-Doncaster, Esq.
Counsel for Petitioner

David Berman, Esq.
Counsel for Respondent

Commissioners: Matthew N. Kane,
David L. Veator and Patrick J. King ^{1/}

Presiding Officer: Commissioner Patrick J. King

DECISION AND ORDER

I. Background

On March 14, 2008, Petitioner issued an Order to Show Cause ("OTSC") against Respondent Frederick Foresteire ("Foresteire"), the Superintendent of the public schools in the City of Everett ("City"). It subsequently filed an amended OTSC ("AOTSC") on March 21, 2008.

The AOTSC alleges that in 2002, Foresteire requested, through the City's school staff, the services of a school maintenance worker to perform plumbing work at his home, and the services of school employees to obtain, cut and deliver plywood to his home. The AOTSC further alleges that Lona DeFeo ("DeFeo") the School Department Maintenance Manager, directed various school employees to do such work, some of which involved the use of school equipment, and some of which Foresteire knew or should have known was done on School Department time, and that he did not make any payment or reimbursement to the School Department for costs relating to the plywood. Finally, the AOTSC alleges that Foresteire unilaterally determined the amount to be paid for the plumbing work done by a School Department employee, thereby securing for himself a substantial discount. The AOTSC alleges that by engaging in this conduct, Foresteire violated G.L. c. 268A, § 23(b)(2) and G.L. c. 268A, § 23(b)(3).

Foresteire filed his original Answer on April 15, 2008 and an Amended Answer on April 28, 2008. In his Amended Answer, Foresteire denied any violation and asserted two affirmative defenses: the OTSC was not, with respect to either charge, issued within three years after a disinterested party knew of it and is therefore barred; and if he received plumbing services and/or plywood without paying the true value thereof, he did not solicit them and had no awareness of them.

A pre-hearing conference was held on May 16, 2008. Foresteire filed a Motion for Summary Decision and Memorandum in Support Thereof ("Summary Decision Motion") on the grounds that the OTSC failed to state a claim or, in the alternative, the matter was barred by the statute of limitations. After a hearing on June 19, 2008, the Presiding Officer denied the Summary Decision Motion.

Thereafter, on July 15, 2008, Petitioner filed a Motion to Bifurcate the Statute of Limitations and the Merits of the Order to Show

Cause (“Bifurcation Motion”) to which Foresteire assented. The Bifurcation Motion was allowed by the Presiding Officer on August 1, 2008. A further pre-hearing conference was held on August 12, 2008.

On September 2, 2008, the parties filed a Joint Motion to Consolidate Proceedings as to the Statute of Limitations (“Joint Motion to Consolidate”). The Joint Motion to Consolidate requested that the case be consolidated with the case of *In Re Lona DeFeo*, Adjudicatory Docket No. 08-0005, for the adjudicatory proceedings as to the discrete issue of the statute of limitations. The Joint Motion to Consolidate was allowed by Order of the Commission issued September 18, 2008.

Thereafter, an evidentiary hearing on the issue of the statute of limitations in the consolidated cases was held on September 22, 2008. After reviewing with the parties his initial determination as to the issues, the Presiding Officer informed them he would refer the matter of the statute of limitations to the full Commission for its review and determination at the conclusion of the case.

A further evidentiary hearing on the merits was held on December 10, 2008 and December 11, 2008. At the hearing, the parties made opening statements and introduced evidence through witnesses and exhibits. At the conclusion of Petitioner’s case, Foresteire filed a Motion to Dismiss on the grounds that upon the facts alleged and/or the law, Petitioner had not sustained its case. After hearing argument from the parties, the Presiding Officer denied the Motion to Dismiss. The parties presented closing arguments to the Presiding Officer on December 11, 2008, and subsequently filed briefs on January 9, 2009. In rendering this Decision and Order, each undersigned member of the Commission has considered the testimony, the evidence in the public record and the arguments of the parties.

II. Findings of Fact

1. Frederick Foresteire (“Foresteire”) has been the Superintendent of the public schools in the City of Everett (“City”) since 1989. Foresteire is a municipal employee.

2. Foresteire has all the duties and powers vested in him by statute and by his agreement with the City’s School Committee.

3. Dorothy Foresteire (“Dorothy”) is Foresteire’s wife.

4. Lona DeFeo (“DeFeo”) has been the Maintenance Manager for the City’s public schools since 1991. Throughout 2002, DeFeo reported to Foresteire.

5. Debbie Dunbrack (“Dunbrack”) who began working for the City’s public schools in June 2000 is a secretary in the Maintenance Department. As secretary, her duties include giving work assignments, doing payroll, answering the phones and keeping attendance. Dorothy is Dunbrack’s sister. Foresteire is her brother-in-law.

6. Michael Pomer (“Pomer”) works in the City’s School Department. His duties include plumbing, heating, clean-up, lawn care and deliveries. In 2002, Pomer was the only plumber in the School Department.

7. John Howe (“Howe”) worked for the schools’ Maintenance Department as a carpenter from August 1997 until June 2003 when he was laid off. His duties included repairing doors, windows and remodeling work.

8. William O’Leary (“O’Leary”) is currently a custodian at the City’s High School. In 2002, he worked in the public schools’ Maintenance Department. O’Leary lives next door to DeFeo. His mother is friends with DeFeo and is also DeFeo’s tenant.

9. Throughout 2002, Pomer, Howe and O’Leary reported to DeFeo. DeFeo is Dunbrack’s supervisor.

10. For the reasons set forth below in Section III C, the Commission finds that this proceeding was commenced within the applicable statute of limitations.

Plumbing Work at Foresteire’s Home

11. Dunbrack and Pomer have known each other for 18-20 years. He was her father’s plumber. They have a friendly relationship. Pomer was looking for outside work at times while employed by the School Department. He also

experienced financial problems. Dunbrack loaned Pomer money and was looking to find outside work for him.

12. In 2002, Foresteire and Dorothy were remodeling their home. Dunbrack learned from a conversation with Dorothy that the remodeling would involve some plumbing work. Dunbrack suggested to Dorothy that she hire Pomer as a plumber because she and Pomer were friends and she knew that he was looking to make extra money.

13. Dorothy told Dunbrack that “they would consider” using Pomer’s services. By “they,” Dorothy meant she and Foresteire.

14. Pomer has known Foresteire for over thirty years. Pomer does not have a social relationship with Foresteire or any of his relatives.

15. Pomer had previously done work at the Foresteire home. In the spring of 2002, he repaired a garbage disposal at the Foresteire home. Dunbrack asked him to do that work. He did not ask either Foresteire or his wife for payment for that work and did not suggest to Dunbrack that they should ask the Foresteires for payment.

16. Dunbrack asked Pomer if he would be interested in doing some work at Foresteire’s home to which he responded “yes.” He was originally told by Dunbrack to go to Foresteire’s home to see what plumbing work needed to be done. DeFeo told him to go do plumbing work at Foresteire’s home once or twice.

17. Between April 2002 and November 2002, Pomer did plumbing work at Foresteire’s home on approximately twenty occasions as directed by Dunbrack or DeFeo. Pomer took orders from Dunbrack because she gives out the assignments for work orders. Dunbrack, in turn, got these assignments from DeFeo, Foresteire or the principals at the schools. Dunbrack got the direction from Foresteire for Pomer to do work at Foresteire’s house.

18. Pomer’s plumbing work at Foresteire’s home involved replacing fixtures in the first and second floor bathrooms, replacing the kitchen sink and adding some heat in the kitchen. He saw Foresteire while performing work at his house.

19. Pomer’s work day for the Maintenance Department was from 8:00 a.m. to 3:00 p.m., with an unpaid, twenty minute lunch break. He did the work at Foresteire’s home during his regular School Department hours. There were times when he was in the middle of doing work and knew that he would need to go back to Foresteire’s house to finish the work.

20. Pomer had no conversations or discussion with Foresteire concerning the price for his work and did not negotiate a price with him. Pomer did not discuss compensation with Foresteire at the outset because he “felt a little bit uncomfortable” as Foresteire “was [his] boss.”

21. In return for his work at Foresteire’s home, Pomer was paid a total of \$1,960. He would ordinarily have charged \$3,000 for that private work. Pomer would have been willing to give Foresteire a 25% discount (\$750), resulting in a total price for the work of \$2,250, but Foresteire, who just paid what he wanted, did not give him an opportunity to offer the discount.

22. Pomer was paid by check for work on Foresteire’s home on four separate occasions. The checks were drawn on a joint account for Dorothy and Foresteire. The checks were signed by Dorothy. Foresteire gave two checks to Pomer.

23. While doing the work at Foresteire’s house, Pomer was receiving his School Department salary. During the entire time period that Pomer was working at Foresteire’s home, he took at most three days of vacation according to the School Department records. It is unlikely that he used any of his vacation time on the twenty occasions that he did work at Foresteire’s home. After Dunbrack prepared the payroll records, she e-mailed them to City Hall and then sent them to Foresteire.

24. Pomer felt uncomfortable doing work at Foresteire’s house when he should have been working at the schools. He complained on a few occasions to DeFeo about it.

The Plywood

25. Howe’s work hours were from 7:00 a.m. to 3:00 p.m., with a twenty minute lunch break. Howe has done private work at Foresteire’s house on several occasions which included putting in a frame on an air conditioner on the

second floor, putting up Christmas lights and hanging a track and some lights, for which he was paid by Foresteire.

26. In October 2002, DeFeo beeped Howe on his beeper and when he called her, DeFeo told him to go to Burnett & Moynihan to pick up plywood, to bring it back to the High School, to cut it into 2 x 8 sheets and to leave it on the bench.

27. Howe went to Burnett & Moynihan as instructed using the School Department's truck. He signed a receipt for 26 sheets of plywood.^{2/} Although Howe had the authority to place small orders for the School Department with Burnett & Moynihan, 26 sheets of plywood was a large order of the type that would be placed by DeFeo.

28. At the direction of DeFeo, Howe loaded the plywood onto the School Department truck, took it back to the High School, cut it into 52 2 x 8 sheets and left it on the bench. These activities took a total of three to four hours. Howe did this work during School Department hours.

29. O'Leary picked up the plywood from the High School and delivered it to Foresteire's home using the School Department's truck. Other than his School Department salary, Howe was not paid by anyone for the work that he did with the plywood.

30. The cost for the plywood picked up by Howe was \$234. The invoice for the plywood was paid for by the City.

31. Foresteire was indicted for receiving stolen School Department air conditioners in March 2004. That case was continued without a finding after the judge found that there were sufficient facts to warrant a jury finding of guilty. After payment of a fine and a one year probationary period, the indictment was dismissed.

III. Decision

In adjudicatory proceedings before the Commission, the burden of proof is on Petitioner, which must prove its case by a preponderance of the evidence.^{3/} The weight to be attached to any evidence rests in the sound discretion of the Commission.^{4/} The Commission is also responsible for making

determinations about the credibility of the witnesses.^{5/}

A. The Section 23(b)(2) Allegations

Section (23)(b)(2) of G.L. c. 268A prohibits a municipal employee from "knowingly, or with reason to know . . . us[ing] or attempt[ing] 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." In order to establish a violation of G.L. c. 268A, § 23(b)(2), Petitioner must prove by a preponderance of the evidence that: (1) Foresteire is a municipal employee; (2) who knowingly or with reason to know; (3) used or attempted to use his official position; (4) to secure an unwarranted privilege or exemption^{6/} for himself or others; (5) which was of substantial value; and (6) which was not properly available to similarly situated individuals.

Petitioner alleges that Foresteire, knowingly or with reason to know, used his position as Superintendent to obtain the unwarranted privileges of having School Department employees do private work for him on School Department time using School Department resources, and in the case of the plywood, for which he made no payment or reimbursement to the School Department, and, in the case of the plumbing services, for which he unilaterally determined payment to the School Department employee, thereby securing for himself a substantial discount. Petitioner further alleges that the use of School Department employees and resources was of substantial value and was not properly available to similarly situated individuals. Foresteire admits that, since 1989, he has been the Superintendent of the City's public schools and that he is a municipal employee. The remaining elements of a § 23(b)(2) violation, however, are contested. We find that Petitioner has proven by a preponderance of the evidence that Foresteire violated G.L. c. 268A, § 23(b)(2) as follows.

Foresteire Used His Position as Superintendent

The term "use" is not defined in the conflict of interest law. Accordingly, the word must be given its ordinary meaning and approved usage. *See Gateley's Case*, 415 Mass. 397, 399 (1993); G.L. c. 4, § 6, *Third* (words and phrases

construed according to “common and approved usage of the language”). Use has been defined as “to use, employ.” *Webster’s Third New International Dictionary* 2523 (1993). Applying these principles, we find that Foresteire used his position as Superintendent.

As Superintendent, Foresteire’s duties included “directing and supervising the entire school system (teachers, maintenance, and support staff).” *In Re Foresteire*, 1992 SEC 590, 590 (Disposition Agreement). As such, he was responsible for directing and supervising DeFeo, Pomer, Howe and O’Leary. In addition, throughout 2002, DeFeo reported to Foresteire.

DeFeo directed Pomer on at least one or two occasions to go do private work at Foresteire’s home. As the individual to whom DeFeo reported and as the person to whose home Pomer was sent, we can reasonably infer that DeFeo sent Pomer at Foresteire’s direction. This inference is based on the fact that Foresteire was aware that Pomer was performing work at his home during School Department hours because Pomer saw him there, and because Foresteire personally paid Pomer for doing that work. In addition, Foresteire was sent the payroll records which reflected that Pomer was not using vacation time to do private work at his house. As such, we find that Foresteire used his position as Superintendent to allow Pomer to do private work at his home during School Department hours.

We further find that Foresteire used his position to have Pomer do such work without any conversation, discussion or negotiation about the price. Rather, Foresteire unilaterally determined the price that he would pay for such work and did so, which price was lower than what Pomer would have charged someone else and even lower than the discount Pomer would have offered to Foresteire, had he been given the opportunity to do so. Pomer “felt a little bit uncomfortable” discussing price with Foresteire at the outset because Foresteire “was [his] boss.”

Our finding is supported by prior Commission opinions. The Commission has previously noted the “inherently exploitable nature” of a private business relationship between a supervisor and his subordinate employee. *EC-COI-92-7*. In such circumstances, even if no abuse occurs, the possibility that the public official may have

taken unfair advantage of the situation can never be completely eliminated. *Id.* In order to satisfy the requirements of § 23(b)(2), the private business relationship must be entirely voluntary and be initiated by the subordinate. Pomer, however, was uncomfortable doing work at Foresteire’s home during his School Department hours when he, the only plumber for the Maintenance Department, felt that he should have been working at the schools, and he complained about doing so to DeFeo.

We also find that Foresteire used his position as Superintendent to obtain free plywood, cut to specifications and delivered to his home by School Department employees, Howe and O’Leary, using School Department time and School Department resources, and which was paid for by the City. DeFeo, who reported to Foresteire, beeped Howe, told him to use a School Department truck to pick up plywood at Burnett & Moynihan, deliver it to the High School, cut it into 2 x 8 sheets, stack it and leave it on the bench, all of which he did. DeFeo also used her position to direct O’Leary, who also reported to her, to deliver the plywood to Foresteire’s home using a School Department truck and on School Department time. Even if she did not personally direct O’Leary to do so, as the individual to whom he reported, we can reasonably infer that she knew or had reason to know of O’Leary’s use of School Department time and resources for the delivery of plywood to Foresteire’s home, particularly given her prior instructions to Howe.

Where Foresteire is the Superintendent to whom DeFeo reports, and when he has the power to direct and supervise the entire school system, including the Maintenance Department employees, and when the matter involves private work at his home and for his benefit, we can reasonably infer that Foresteire directed DeFeo to arrange such work on his behalf. Dunbrack and her sister Dorothy did not have either the power or authority to give instructions to DeFeo, particularly an instruction that would result in the use of School Department time and resources for private work. In the alternative, we can reasonably infer that even if Foresteire did not initially give the instruction to DeFeo, he subsequently knew or should have known that such work was being done on School Department time, using School Department resources and he did nothing to stop it.

Foresteire Secured Unwarranted Privileges for Himself

The conflict of interest law does not define either “unwarranted” or “privilege.” Unwarranted is generally defined as “[h]aving no justification; groundless.” *The American Heritage Dictionary, Second College Edition* 1327 (1991); *Webster’s Third New International Dictionary* 2514 (1993) (“lacking adequate or official support: unjustified, unauthorized”); *EC-COI-98-2*. Privilege is generally defined as “a special legal right, exemption or immunity granted to a person or class of persons; an exception to a duty.” *Black’s Law Dictionary* 1234 (8th ed. 1999). See *In Re Costa*, 2001 SEC 1000, 1002 n.1 (privilege is “[a] special advantage, immunity, permission, right or benefit granted to an individual, class or caste”) quoting *The American Heritage Dictionary (Second College Ed.)*. The Commission has noted that “[§] 23(b)(2) dictates that the use of public time and resources must be limited to serving the public rather than private purposes.” *EC-COI-98-2* quoting *EC-COI-95-5* (use of public resources by public employees for private purposes constitutes an unwarranted privilege). Applying these principles, we find that Foresteire secured unwarranted privileges for himself.

The unwarranted privileges were School Department maintenance employees doing private work for him on School Department time, using School Department resources. There is no evidence in the record that Foresteire reimbursed the School Department or the City for the use of School Department time and resources. Moreover, Foresteire admits that the City paid an invoice for plywood, but denies that that plywood was delivered to his home. The unwarranted privileges also include having Pomer do plumbing work at his home without agreeing to a price and then paying an amount solely determined by him while he was Pomer’s boss.

The Unwarranted Privileges Were of Substantial Value

The Commission has previously stated that substantial value is \$50 or more. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). We find that the unwarranted privileges of having School Department employees doing private

work for Foresteire on School Department time using School Department resources were of substantial value.

The Unwarranted Privileges Were Not Properly Available to Similarly Situated Individuals

Similarly situated individuals would be those City residents who in 2002 were also undertaking renovations to their homes.^{7/} Such individuals would not have been able to obtain labor from School Department employees on School Department time or the use of School Department resources such as a truck and a saw for their personal home renovations. We find that a City resident or another School Department employee who did not have supervisory authority over, or to whom DeFeo, Pomer, Howe or O’Leary did not report, would not have had the ability or opportunity to direct them to arrange or to do private work on City time, using City resources. See *EC-COI-95-5* (use of municipal resources by municipal employees for personal purposes constitutes an unwarranted privilege not available to similarly situated individuals). Finally, we find that a similarly situated individual would not have been able to unilaterally determine what they would pay for Pomer’s plumbing services.

Foresteire Acted Knowingly or With Reason to Know

“Knowingly” is not defined in the conflict of interest law. It has been defined as “in a knowing manner ... with awareness, deliberateness, or intention.” *Webster’s Third New International Dictionary* 1252 (1993). See *Still v. Commissioner of Employment and Training*, 423 Mass. 805, 812 (1996) (act done knowingly “‘if it is [the] product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences’”), quoting *Black’s Law Dictionary* 872 (6th ed. 1990). “Reason to know” is also not defined in the conflict of interest law. It has been defined to “indicat[e] or denot[e] that the actor has, within his knowledge, facts from which a reasonable person of ordinary prudence and intelligence might infer the existence of a certain fact in question. Alternatively, the actor could regard the existence of the particular fact in question as so legally probable that he would base his conduct upon the assumption that the fact existed.” *Fidler v. Eastman Kodak Co.*, 555

F. Supp. 87, 92 (D. Mass. 1982), *aff'd*, 714 F.2d 192 (1st Cir. 1983) (applying discovery rule to determine statute of limitations in products liability action). We find that Foresteire knowingly or with reason to know used his position as the Superintendent of Schools to obtain unwarranted privileges of substantial value for himself.

As to the plumbing work, Petitioner offered direct proof of Foresteire's knowledge in the form of Pomer's testimony that he saw Foresteire while he was at Foresteire's house to perform the work, and that Foresteire personally paid Pomer for doing the work more than once. In addition, Petitioner also offered proof that Foresteire knew that Pomer was doing that work on School Department time without taking a vacation day because Foresteire received the payroll records showing that to be the case.

As to the plywood, Petitioner's proof of knowledge was circumstantial but sufficient to meet Petitioner's burden of proof. Howe delivered 52 2 x 8 plywood sheets to Foresteire's home in a City School Department truck. The amount of plywood was large enough that DeFeo would have had to place the order. While there was no testimony by O'Leary that he saw Foresteire when he delivered the plywood, it is a reasonable inference that Foresteire knew the source of the plywood and how it came to be at his house. In an earlier Commission prosecution for soliciting a City School Department employee to perform private work, Foresteire entered into a Disposition Agreement by which he agreed "that he will act in conformance with the requirements of G.L. c. 268A in his future conduct as a municipal employee." *In Re Foresteire*, 1992 SEC 590, 591. This imposed a duty on him to ascertain the circumstances of the work done at his home. In addition, a judge found sufficient facts from which a guilty finding could be made relating to Foresteire's receipt of stolen School Department air conditioners. See *John Doe, Sex Offender Registry Board No. 89230 v. Sex Offender Registry Board*, 452 Mass. 764, 777 (2008) (administrative agency can use even unproven prior acts to determine whether there has been repetitive behavior).

B. The Section 23(b)(3) Allegations

Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from knowingly or with

reason to know, "act[ing] 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." 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 that would otherwise lead to such a conclusion."

In order to establish a violation of G.L. c. 268A, § 23(b)(3), Petitioner must prove by a preponderance of the evidence that Foresteire: (1) 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.^{8/} Petitioner alleges that Foresteire, having jurisdiction over all the City's school staff, was poised to act in his official capacity vis a vis his subordinates, DeFeo, Pomer, Howe and O'Leary while work was being done. It further alleges that a reasonable person, having knowledge of the relevant circumstances, could conclude that DeFeo, Pomer, Howe and/or O'Leary could improperly influence or unduly enjoy Foresteire's favor in the performance of his official duties or that he was likely to act as a result of their undue influence. We find that Petitioner has not proven by a preponderance of the evidence that Foresteire violated G.L. c. 268A, § 23(b)(3) as follows.

Foresteire admits that he was the Superintendent and that he was a municipal employee. He further admits that throughout 2002, DeFeo reported to him. However, there is insufficient evidence in the record to establish that DeFeo, Pomer, Howe and/or O'Leary could improperly influence him or unduly enjoy his favor in the performance of his official duties. For example, Howe was laid off in June 2003 despite having done work at Foresteire's home. Moreover, there is insufficient evidence in the

record as to how Foresteire was poised to act regarding DeFeo, Pomer, Howe and/or O'Leary at the time that the work was done. In the absence of such evidence, Petitioner has failed to prove a violation of § 23(b)(3).

C. The Statute of Limitations Issue

The Commission's regulations include a three year statute of limitations.^{9/} When a Respondent asserts a statute of limitations defense, as Foresteire has done, Petitioner has the burden of showing that a disinterested party learned of the violation no more than three years before the OTSC was issued. With respect to alleged violations of G.L. c. 268A § 23, such as those with which Foresteire is charged, Petitioner must do so by submitting (1) an affidavit from an Enforcement Division investigator proving that no complaint relating to the charged violation was received by the Commission more than three years before the OTSC, and (2) an affidavit from the Respondent's public agency that the agency was not aware of any complaint relating to the charged violation more than three years before the OTSC.^{10/} We find, based on credible evidence presented at the September 22, 2008 evidentiary hearing, that Petitioner has satisfied this burden.

The OTSC was issued in March 2008. Petitioner previously submitted the affidavit of Senior Investigator David Giannotti affirming that he has reviewed the Enforcement Division's case files and complaint files and that the earliest complaint relating to the violations alleged in the OTSC was received by the Enforcement Division in December 2006.^{11/} Foresteire does not dispute that Petitioner has satisfied this aspect of its burden under 930 CMR 1.02(10) (c).

Petitioner has demonstrated that Foresteire's public agency was not aware of any complaint relating to his alleged violations more than three years before the OTSC was issued. Foresteire's public agency was the City's public schools, and we accordingly consider whether the City's School Committee, which has responsibility for the City's public schools, had received any complaint against Foresteire concerning plumbing work and delivery of plywood to his house as of March 2005, three years prior to the issuance of the OTSC.

First, we find credible the testimony of Assistant Deputy Inspector General Daniel O'Neil that his office did not learn of the allegation involving the plywood until after the March 31, 2004, Special Meeting of the School Committee, and did not inform the School Committee of that allegation until December 2006. Second, we find credible Mayor Ragucci's testimony that he did not know about the allegations in the OTSC at the time of the March 31, 2004 School Committee meeting. Neither Ragucci nor O'Neil had a motive to be untruthful regarding the date they learned of the allegations in the OTSC. Moreover, had Ragucci known about the plumbing and plywood allegations on March 31, 2004, we can infer that he would have raised those issues at the Special Meeting of the School Committee.

By contrast, we find that two of the four School Committee members who testified that the plumbing and/or plywood allegations were discussed in March 2004 have reason to favor Foresteire, as they have relatives currently employed by the City's public schools. In addition, five School Committee members testified that no complaints were made to the School Committee concerning those allegations prior to January 2007. We therefore conclude that the weight of the credible evidence establishes that the City's School Committee did not learn of the alleged violations by Foresteire that are the subject of this proceeding until December 2006, less than three years before the OTSC was issued.

Petitioner having satisfied its burden of proof under 930 CMR 1.02(10) (c), Foresteire can prevail on his statute of limitations defense only if he shows that the relevant events were either (1) a matter of general knowledge in the community, or (2) the subject of a complaint to the Commission, the Attorney General, a District Attorney, or the City's School Committee.^{12/} We find that the allegations contained in the OTSC were not a matter of general knowledge in the community. Based on credible evidence presented at the hearing, we find that only a small group of individuals, including their friends and relatives and some School Department employees, had knowledge of the allegations contained in the OTSC. In addition, although several rumors concerning the allegations contained in the OTSC appeared on a blog, there is no evidence regarding the number

of individuals who viewed the blog, nor is there any evidence concerning the information contained in the blog. Further, although there is credible evidence that a small number of individuals in the City had heard rumors that Foresteire received free plywood and had plumbing services at his home performed by a School Department employee, these rumors do not amount to proof that the plumbing and plywood matters were matters of general knowledge in the community.

Likewise, Foresteire failed to demonstrate that the relevant events were a subject of complaint to any other disinterested party. *See Nantucket v. Beinecke*, 379 Mass. 345, 350-51 (1979) (statute of limitations begins to run when a disinterested person capable of acting on behalf of the plaintiff to enforce the conflict of interest law knew or should have known of the wrong). As explained above, there was no evidence presented that any such complaint was made to the Commission or to the City's School Committee prior to March 2005. There was also no such evidence of any such complaint to the Attorney General or any District Attorney. The March 2004 Middlesex County indictments related to different conduct by Foresteire and DeFeo.

In sum, we conclude, based upon the credible evidence presented, that Foresteire does not prevail on his statute of limitations defense.

IV. Conclusion

Petitioner has proven by a preponderance of the evidence that Respondent Frederick Foresteire violated G.L. c. 268A, § 23(b)(2) when he knowingly or with reason to know used his position as the Superintendent of the City's public schools to obtain for himself, the unwarranted privileges of substantial value in having School Department employees use school time and school resources to do private work for him at his home and for receiving plywood paid for by the City which were not properly available to similarly situated individuals. Petitioner has failed to prove by a preponderance of the evidence that Foresteire violated § 23(b)(3).

V. Order

Having concluded that Respondent Frederick Foresteire violated G.L. c. 268A,

§ 23(b)(2) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Frederick Foresteire to pay a civil penalty of \$6,000.^{13/}

DATE AUTHORIZED: January 16, 2009

DATE ISSUED: February 12, 2009

^{1/} Commissioner Kempthorne abstained from participating in this matter.

^{2/} The receipt refers to laun (sic) which is simply a type of plywood.

^{3/} 930 CMR 1.01(9)(m)(2).

^{4/} 930 CMR 1.01(9)(l)(3).

^{5/} *See Amara & Sons, Inc. v. Providence Steamboat Company*, 360 Mass. 850, 850 (1971) (judge, as trier of fact, was "sole judge of the weight and credibility of the evidence which consisted in large part of oral testimony").

^{6/} The OTSC alleges that Foresteire obtained unwarranted privileges, not unwarranted exemptions. Accordingly, we address only the unwarranted privilege issue.

^{7/} Similarly situated individuals may also include School Department employees.

^{8/} *In Re Mazareas*, 2002 SEC 1050, 1053 (*footnote omitted*)

^{9/} 930 CMR 1.02(10).

^{10/} 930 CMR 1.02(10)(c)(1) and (3).

^{11/} *See* Affidavit of David Giannotti dated June 9, 2008.

^{12/} 930 CMR 1.02(10)(d).

^{13/} The penalty is calculated based on three separate violations as follows: \$2,000 for Pomer's plumbing work; \$2,000 for Howe's picking up and cutting up of the plywood; and \$2,000 for O'Leary's delivery of the plywood to his home.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0005**

**IN THE MATTER OF
LONA DEFEO**

Appearances: Candies Pruitt-Doncaster, Esq.
Counsel for Petitioner

Robert B. Christian, Esq.
Counsel for Respondent

Commissioners: Matthew N. Kane,
David L. Veator and Patrick J. King ^{1/}

Presiding Officer: Commissioner Patrick J. King

DECISION AND ORDER

I. Background

On March 27, 2008, Petitioner issued an Order to Show Cause (“OTSC”) against Respondent Lona DeFeo (“DeFeo”), the Maintenance Manager for the School Department in the City of Everett (“City”). The OTSC alleges that in 2002, the City’s Superintendent of Schools, Frederick Foresteire (“Foresteire”), requested through the City’s school staff, the services of a school maintenance worker to perform plumbing work at his home and the services of school employees to obtain, cut and deliver plywood to his home. The OTSC further alleges that DeFeo directed various school employees to do such work, some of which involved the use of school equipment, and some of which DeFeo knew or should have known was done on School Department time. Finally, it alleges that the School Department did not receive any payment or reimbursement from Foresteire relating to the plywood. The OTSC alleges that by engaging in this conduct, DeFeo violated G.L. c. 268A, § 23(b)(2) and G.L. c. 268A, § 23(b)(3).

DeFeo filed an Answer on April 16, 2008. In her Answer, DeFeo denied that she violated § 23(b)(2) or § 23(b)(3) and asserted two affirmative defenses: (1) the OTSC was barred by the applicable statutes of limitation; and (2) if the plumbing work and/or plywood were provided to Foresteire, she did not authorize, order or direct the same and had no awareness of it.

A pre-hearing conference was held on May 16, 2008. DeFeo subsequently filed a Motion for Summary Decision and Memorandum in Support Thereof (“Summary Decision Motion”) on the grounds that the OTSC failed to state a claim or, in the alternative, the matter was barred by the statute of limitations. After a hearing on June 19, 2008, the Presiding Officer denied the Summary Decision Motion.

Thereafter, on July 15, 2008, Petitioner filed a Motion to Bifurcate the Statute of Limitations and the Merits of the Order to Show Cause (“Bifurcation Motion”) to which DeFeo assented. The Bifurcation Motion was allowed by the Presiding Officer on August 1, 2008. A further pre-hearing conference was held on August 12, 2008.

On September 2, 2008, the parties filed a Joint Motion to Consolidate Proceedings as to the Statute of Limitations (“Joint Motion to Consolidate”). The Joint Motion to Consolidate requested that the case be consolidated with the case of *In Re Frederick Foresteire*, Adjudicatory Docket No. 08-0004, for the adjudicatory proceedings as to the discrete issue of the statute of limitations. The Joint Motion to Consolidate was allowed by Order of the Commission issued September 18, 2008.

Thereafter, an evidentiary hearing on the issue of the statute of limitations in the consolidated cases was held on September 22, 2008. After reviewing with the parties his initial determination as to the issues, the Presiding Officer informed them he would refer the matter of the statute of limitations to the full Commission for its review and determination at the conclusion of the case.

An evidentiary hearing on the merits was held on December 10, 2008 and December 11, 2008. At the hearing, the parties made opening statements and introduced evidence through witnesses and exhibits. At the conclusion of Petitioner’s case, DeFeo filed a Motion to Dismiss on the grounds that on the facts alleged and/or the law, Petitioner had not sustained its case. After hearing argument from the parties, the Presiding Officer denied the Motion to Dismiss. The parties presented closing arguments to the Presiding Officer on December 11, 2008. Petitioner subsequently filed a brief on January 9, 2009. DeFeo elected not to file a brief. In rendering this Decision and Order, each

undersigned member of the Commission has considered the testimony, the evidence in the public record and the arguments of the parties.

II. Findings of Fact

1. Lona DeFeo (“DeFeo”) has been the Maintenance Manager for the City of Everett’s (“City”) public schools since 1994. DeFeo is a municipal employee.

2. Frederick Foresteire (“Foresteire”) has been the Superintendent of the City’s public schools since 1989. Throughout 2002, DeFeo reported to Foresteire.

3. Dorothy Foresteire (“Dorothy”) is Foresteire’s wife.

4. Debbie Dunbrack (“Dunbrack”), who began working for the City’s public schools in June 2000, is a secretary in the Maintenance Department. As secretary, her duties include giving work assignments, doing payroll, answering the phones and keeping attendance. Dorothy is Dunbrack’s sister. Foresteire is her brother-in-law.

5. Michael Pomer (“Pomer”) has been working in the City’s School Department since October 1996. His duties include plumbing, heating, clean-up, lawn care and deliveries. In 2002, Pomer was the only plumber in the School Department.

6. John Howe (“Howe”) worked for the schools’ Maintenance Department as a carpenter from August 1997 until June 2003 when he was laid off. His duties included repairing doors, windows and remodeling work.

7. William O’Leary (“O’Leary”) is currently a custodian at the City’s High School. In 2002, he worked in the public schools’ Maintenance Department. O’Leary lives next door to DeFeo. His mother is a friend of DeFeo and is also DeFeo’s tenant.

8. Throughout 2002, Pomer, Howe and O’Leary reported to DeFeo. DeFeo is Dunbrack’s supervisor.

9. For the reasons set forth below in Section III C, the Commission finds that this proceeding was commenced within the applicable statute of limitations.

Plumbing Work at Foresteire’s Home

10. Dunbrack and Pomer have known each other for 18-20 years. He was her father’s plumber. They have a friendly relationship. Pomer was looking for outside work at times while employed by the School Department. He also experienced financial problems. Dunbrack loaned Pomer money and was looking to find outside work for him.

11. In 2002, Foresteire and Dorothy were remodeling their home. Dunbrack learned from a conversation with Dorothy that the remodeling would involve some plumbing work. Dunbrack suggested to Dorothy that she hire Pomer as a plumber because she and Pomer were friends and she knew that he was looking to make extra money.

12. Dorothy told Dunbrack that “they would consider” using Pomer’s services. By “they,” Dorothy meant she and Foresteire.

13. Pomer has known Foresteire for over thirty years. Pomer does not have a social relationship with Foresteire or any of his relatives.

14. Pomer had previously done work at the Foresteire home. In the spring of 2002, he repaired a garbage disposal at the Foresteire home. Dunbrack asked him to do that work. He did not ask either Foresteire or his wife for payment for that work and did not suggest to Dunbrack that they should ask the Foresteires for payment.

15. Dunbrack asked Pomer if he would be interested in doing some work at Foresteire’s home to which he responded “yes.” He was originally told by Dunbrack to go to Foresteire’s home to see what plumbing work needed to be done. DeFeo told him to go do plumbing work at Foresteire’s home once or twice.

16. Between April 2002 and November 2002, Pomer did plumbing work at Foresteire’s home on approximately twenty occasions as directed by Dunbrack or DeFeo. Pomer took orders from Dunbrack because she gives out the assignments for work orders. Dunbrack, in turn, got these assignments from DeFeo, Foresteire or the principals at the schools. Dunbrack got the direction from Foresteire for Pomer to do work at Foresteire’s home. Dunbrack kept DeFeo informed of work assignments.

17. Pomer's plumbing work at Foresteire's home involved replacing fixtures in the first and second floor bathrooms, replacing the kitchen sink and adding some heat in the kitchen. He saw Foresteire while performing work at his house.

18. Pomer's work day for the Maintenance Department was 7:00 a.m. to 3:00 p.m. with an unpaid, twenty minute lunch break. He did the work at Foresteire's home during his regular School Department hours. He would generally come into the Maintenance Department office each morning to find out what needed to be done, although there were some days he knew he would need to go back to Foresteire's house to finish work.

19. Pomer had no conversations or discussion with Foresteire concerning the price for his work and did not negotiate a price with him. Pomer did not discuss compensation with Foresteire at the outset because he "felt a little bit uncomfortable" as Foresteire "was "[his] boss."

20. In return for his work at Foresteire's home, Pomer was paid a total of \$1,960. He would ordinarily have charged \$3,000 for that private work. Pomer would have been willing to give Foresteire a 25% discount (\$750), resulting in a total price for the work of \$2,250, but Foresteire, who just paid what he wanted, did not give him an opportunity to offer the discount.

21. Pomer was paid by check for work on Foresteire's home on four separate occasions. The checks were drawn on a joint account for Dorothy and Foresteire. The checks were signed by Dorothy. Foresteire gave two checks to Pomer.

22. While doing the work at Foresteire's house, Pomer was receiving his School Department salary. During the entire time period that Pomer was working at Foresteire's home, he took at most three days of vacation according to the School Department records. It is unlikely that he used any of his vacation time on the twenty occasions that he did work at Foresteire's home.

23. Pomer felt uncomfortable doing work at Foresteire's house when he should have been working at the schools. He complained on a few occasions to DeFeo about it.

24. The School Department laid off employees, including members of its Maintenance Department, in the Summer of 2003. Pomer was not laid off. After the lay-offs, only DeFeo and Pomer were left in the Maintenance Department.

The Plywood

25. Howe's work hours were from 7:00 a.m. to 3:00 p.m., with a twenty minute lunch break. Howe has done private work at Foresteire's house on several occasions which included putting in a frame on an air conditioner on the second floor, putting up Christmas lights and hanging a track and some lights, for which he was paid by Foresteire.

26. In October 2002, DeFeo beeped Howe on his beeper and when he called her, DeFeo told him to go to Burnett & Moynihan to pick up plywood, to bring it back to the High School, to cut it into 2 x 8 sheets and to leave it on the bench.

27. Howe went to Burnett & Moynihan as instructed using the School Department's truck. He signed a receipt for 26 sheets of plywood.^{2/} Although Howe had the authority to place small orders for the School Department with Burnett & Moynihan, 26 sheets of plywood was a large order of the type that would be placed by DeFeo.

28. At the direction of DeFeo, Howe loaded the plywood onto the School Department truck, took it back to the High School, cut it into 2 x 8 sheets and left it on the bench.- These activities took a total of three to four hours. Howe did this work during School Department time.

29. O'Leary picked up the plywood from the High School and delivered it to Foresteire's home using the School Department's truck. Other than his School Department salary, Howe was not paid by anyone for the work that he did with the plywood.

30. The cost for the plywood picked up by Howe was \$234. The invoice for the plywood was paid for by the City.

III. Decision

In adjudicatory proceedings before the Commission, the burden of proof is on Petitioner which must prove its case by a preponderance of

the evidence.^{3/} The weight to be attached to any evidence rests in the sound discretion of the Commission.^{4/} The Commission is also responsible for making determinations about the credibility of the witnesses.^{5/}

A. The Section 23(b)(2) Allegations

Section (23)(b)(2) of G.L. c. 268A prohibits a municipal employee from “knowingly, or with reason to know . . . us[ing] or attempt[ing] 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.” In order to establish a violation of G.L. c. 268A, § 23(b)(2), Petitioner must prove by a preponderance of the evidence that: (1) DeFeo is a municipal employee; (2) who knowingly or with reason to know; (3) used or attempted to use her official position; (4) to secure an unwarranted privilege or exemption^{6/} for herself or others; (5) which was of substantial value; and (6) which was not properly available to similarly situated individuals.

Petitioner alleges that DeFeo, knowingly or with reason to know, used her position to provide Foresteire with the unwarranted privileges of the use of School Department employees on School Department time using School Department equipment for his private work, which were of substantial value, and which were not properly available to similarly situated individuals. DeFeo admits that, since 1994, she has been the Maintenance Manager for the City’s public schools and that she is a municipal employee. The remaining elements of a § 23(b)(2) violation, however, are contested. The Commission finds that Petitioner has proven by a preponderance of the evidence that DeFeo violated G.L. c. 268A, § 23(b)(2) as follows.

DeFeo Used Her Position as Maintenance Manager

The term “use” is not defined in the conflict of interest law. Accordingly, the word must be given its ordinary meaning and approved usage. *See Gateley’s Case*, 415 Mass. 397, 399 (1993); G.L. c. 4, § 6, *Third* (words and phrases construed according to “common and approved usage of the language”). Use has been defined as “to use, employ.” *Websters Third New International Dictionary* 2523 (1993). Applying

these principles, we find that DeFeo used her position as Maintenance Manager.

In 2002, Pomer, Howe and O’Leary reported to DeFeo as the Maintenance Manager for the City’s schools. DeFeo directed Pomer, on at least one or two occasions, to do private plumbing work at Foresteire’s home at a time when Pomer was the only plumber working for the School Department. In addition, DeFeo beeped Howe, told him to use a School Department truck to pick up plywood at Burnett & Moynihan, deliver it to the High School, cut it into 2 x 8 sheets, stack it and leave it on the bench, all of which he did. In each of these instances, DeFeo used her position as Maintenance Manager to direct those employees who reported to her to perform work for Foresteire.

Since DeFeo told Howe to cut the plywood and leave it in the shop at the High School, it is highly likely that she was the person who told O’Leary to deliver the plywood to Foresteire’s home and that she knew he would be doing it on School Department time and using a School Department vehicle for the delivery. For this reason, we find that DeFeo used her position to direct O’Leary to deliver plywood to Foresteire’s home using a School Department truck while on School Department time.

DeFeo Secured Unwarranted Privileges for Foresteire

The conflict of interest law does not define either “unwarranted” or “privilege.” Unwarranted is generally defined as “[h]aving no justification; groundless.” *The American Heritage Dictionary, Second College Edition* 1327 (1991); *Webster’s Third New International Dictionary* 2514 (1993) (“lacking adequate or official support: unjustified, unauthorized”); *EC-COI-98-2*. Privilege is generally defined as “a special legal right, exemption or immunity granted to a person or class of persons; an exception to a duty.” *Black’s Law Dictionary* 1234 (8th ed. 1999). *See In Re Costa*, 2001 SEC 1000, 1002 n.1 (privilege is “[a] special advantage, immunity, permission, right or benefit granted to an individual, class or caste”) quoting *The American Heritage Dictionary (Second College Ed.)*. In *EC-COI-95-5*, the Commission stated that the use of public resources by public employees for personal purposes constitutes an unwarranted privilege.

Applying these principles, we find that DeFeo secured unwarranted privileges for Foresteire.

The unwarranted privileges were School Department maintenance employees doing private work for Foresteire on School Department time, using School Department resources. There is no evidence in the record that Foresteire made any reimbursement for the use of such School Department time or resources. Moreover, Foresteire admits that the City paid an invoice for plywood, but otherwise denies that that plywood was delivered to his home.

The Unwarranted Privileges Were of Substantial Value

The Commission has previously stated that substantial value is \$50 or more. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). We find that the unwarranted privileges of having School Department employees doing private work for Foresteire on School Department time using School Department resources were of substantial value.

The Unwarranted Privileges Were Not Properly Available to Similarly Situated Individuals

Similarly situated individuals would be those City residents who in 2002 were also undertaking renovations to their homes.^{7/} Such individuals would not have been able to obtain labor from School Department employees on School Department time or the use of School Department resources such as a truck and a saw for their renovations. We find that a City resident or another School Department employee to whom Pomer, Howe or O’Leary did not report would not have had the ability or opportunity to direct them to do their personal work on City time, using City resources. See *EC-COI-95-5* (use of municipal resources by municipal employees for personal purposes is an unwarranted privilege not available to similarly situated individuals).

DeFeo Acted Knowingly

“Knowingly” is not defined in the conflict of interest law. It has been defined as “in a knowing manner ... with awareness, deliberateness, or intention.” *Webster’s Third*

New International Dictionary 1252 (1993). See *Still v. Commissioner of Employment and Training*, 423 Mass. 805, 812 (1996) (act done knowingly “if it is [the] product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences”), quoting *Black’s Law Dictionary* 872 (6th ed. 1990). Here, as noted above, the Commission finds that Petitioner has established that DeFeo acted “knowingly” where she intentionally directed School Department employees to perform work for Foresteire during School Department time using School Department resources.

B. The Section 23(b)(3) Allegations

Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from knowingly or with reason to know, “act[ing] 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.” 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 of G.L. c. 268A, § 23(b)(3), Petitioner must prove by a preponderance of the evidence that DeFeo: (1) 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 her favor in the performance of her official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.^{8/} Petitioner alleges that a reasonable person having knowledge of the relevant circumstances would conclude that Foresteire could improperly influence DeFeo or unduly enjoy her favor in the performance of her official duties or that she was likely to act as a result of his rank, position or undue influence. Section 23(b)(3) concerns “giving the appearance of

conflict.”^{9/} Here, a reasonable person with knowledge of the relevant circumstances would conclude that DeFeo had improperly used her official position, but not conclude that her conduct gave the appearance of conflict because it would not have been permissible, even with a written disclosure. For this reason, we find that Petitioner has not established that DeFeo violated §23(b)(3).

C. The Statute of Limitations Issue

The Commission’s regulations include a three year statute of limitations.^{10/} When a Respondent asserts a statute of limitations defense, as DeFeo has done, Petitioner has the burden of showing that a disinterested party learned of the violation no more than three years before the OTSC was issued. With respect to alleged violations of G.L. c. 268A § 23, such as those with which DeFeo is charged, Petitioner must do so by submitting (1) an affidavit from an Enforcement Division investigator proving that no complaint relating to the charged violation was received by the Commission more than three years before the OTSC, and (2) an affidavit from the Respondent’s public agency that the agency was not aware of any complaint relating to the charged violation more than three years before the OTSC.^{11/} We find, based on credible evidence presented at the September 22, 2008 evidentiary hearing, that Petitioner has satisfied this burden.

The OTSC was issued in March 2008. Petitioner submitted the affidavit of Special Investigator Paul Murray affirming that he has reviewed the Enforcement Division’s complaint files and that the earliest complaint relating to the violations alleged in the OTSC was received by the Enforcement Division in December 2006. DeFeo does not dispute that Petitioner has satisfied this aspect of its burden under 930 CMR 1.02(10) (c).

Petitioner has demonstrated that DeFeo’s public agency was not aware of any complaint relating to her alleged violations more than three years before the OTSC was issued. DeFeo’s public agency was the City’s public schools, and we accordingly consider whether the City’s School Committee, which has responsibility for the City’s public schools, had received any complaint against DeFeo concerning plumbing work and delivery of plywood to Foresteire’s

house as of March 2005, three years prior to the issuance of the OTSC.

First, we find credible the testimony of Assistant Deputy Inspector General Daniel O’Neil that the Inspector General’s Office did not learn of the allegation involving the plywood until after the March 31, 2004, Special Meeting of the School Committee, and did not inform the School Committee of that allegation until December 2006. Second, we find credible Mayor Ragucci’s testimony that he did not know about the allegations in the OTSC at the time of the March 31, 2004 School Committee meeting. Neither Ragucci nor O’Neil had a motive to be untruthful regarding the date they learned of the allegations in the OTSC. Moreover, had Ragucci known about the plumbing and plywood allegations on March 31, 2004, we find that he would have raised those issues at the Special Meeting of the School Committee.

By contrast, we find that two of the four School Committee members who testified that the plumbing and/or plywood allegations were discussed in March 2004 have reason to favor the Foresteire administration, as they have relatives currently employed by the City’s public schools. In addition, five School Committee members testified that no complaints were made to the School Committee concerning those allegations prior to January 2007. We therefore conclude that the weight of the credible evidence establishes that the City’s School Committee did not learn of the alleged violations by DeFeo that are the subject of this proceeding until December 2006, less than three years before the OTSC was issued.

Petitioner having satisfied its burden of proof under 930 CMR 1.02(10) (c), DeFeo can prevail on her statute of limitations defense only if she shows that the relevant events were either (1) a matter of general knowledge in the community, or (2) the subject of a complaint to the Commission, the Attorney General, a District Attorney, or the City’s School Committee.^{12/} We find that the allegations contained in the OTSC were not a matter of general knowledge in the community. Based on credible evidence presented at the hearing, we find that only a small group of individuals, including their friends and relatives and some School Department employees, had knowledge of the allegations contained in the OTSC. In addition, although several rumors concerning the

allegations contained in the OTSC appeared on a blog, there is no evidence regarding the number of individuals who viewed the blog, nor is there any evidence concerning the information contained in the blog. Further, although there is credible evidence that a small number of individuals in the City had heard rumors that Foresteire received free plywood and had plumbing services at his home performed by a School Department employee, these rumors do not amount to proof that the plumbing and plywood matters were matters of general knowledge in the community.

Likewise, DeFeo failed to demonstrate that the relevant events were a subject of complaint to any other disinterested party. *See Nantucket v. Beinecke*, 379 Mass. 345, 350-51 (1979) (statute of limitations begins to run when a disinterested person capable of acting on behalf of the plaintiff to enforce the conflict of interest law knew or should have known of the wrong). As explained above, there was no credible evidence presented that any such complaint was made to the Commission or to the City's School Committee prior to March 2005. There was also no such evidence of any such complaint to the Attorney General or any District Attorney. Although it was generally known in March 2004 that DeFeo and Foresteire had been indicted by a Middlesex County Grand Jury, those indictments related to different conduct by DeFeo and Foresteire.

In sum, we conclude, based upon the credible evidence presented, that DeFeo does not prevail on her statute of limitations defense.

IV. Conclusion

Petitioner has proven by a preponderance of the evidence that DeFeo violated G.L. c. 268A, § 23(b)(2) when she knowingly used her position as the Maintenance Manager for the City's public schools to obtain for Foresteire unwarranted privileges of substantial value in having School Department employees use School Department time and School Department resources to do private work for Foresteire which were not properly available to similarly situated individuals. Petitioner has failed to prove by a preponderance of the evidence that DeFeo violated § 23(b)(3).

V. Order

Having concluded that Respondent Lona DeFeo violated G.L. c. 268A, § 23(b)(2) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby **ORDERS** Lona DeFeo to pay a civil penalty of \$4,500.^{13/}

DATE AUTHORIZED: January 16, 2009

DATE ISSUED: February 12, 2009

^{1/} Commissioner Kempthorne abstained from participating in this matter.

^{2/} The receipt refers to laun (sic) which is simply a type of plywood.

^{3/} 930 CMR 1.01(9)(m)(2).

^{4/} 930 CMR 1.01(9)(l)(3).

^{5/} *See Amara & Sons, Inc. v. Providence Steamboat Company*, 360 Mass. 850, 850 (1971) (judge, as trier of fact, was "sole judge of the weight and credibility of the evidence which consisted in large part of oral testimony").

^{6/} The OTSC alleges that DeFeo obtained unwarranted privileges, not unwarranted exemptions, for Foresteire. Accordingly, we address only the unwarranted privilege issue.

^{7/} Similarly situated individuals may also include School Department employees.

^{8/} *In Re Mazareas*, 2002 SEC 1050, 1053 (*footnote omitted*).

^{9/} *Scaccia v. State Ethics Commission*, 431 Mass. 351, 359 (2000) (*citation omitted*).

^{10/} 930 CMR 1.02(10).

^{11/} 930 CMR 1.02(10)(c)(1) and (3).

^{12/} 930 CMR 1.02(10)(d).

^{13/} The civil penalty is calculated based on three separate violations as follows: \$1,500 for Pomer's plumbing work; \$1,500 for Howe's work in picking up and cutting the plywood; and \$1,500 for O'Leary's delivery of the plywood to Foresteire's home.

IN THE MATTER OF
GEORGE BITZAS

DISPOSITION AGREEMENT

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

On January 16, 2008, 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 Bitzas. The Commission concluded its inquiry and, on December 19, 2008, found reasonable cause to believe that Bitzas violated G.L. c. 268A.

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

Findings of Fact

1. From 1989 until the present, Bitzas has served as a councilor on the City Council (the “Council”) in the City of Agawam. As such, he is a municipal employee within the meaning of G.L. c. 268A, §1 of the conflict of interest law.

2. The Council is responsible for enacting ordinances, including temporary parking ordinances, that regulate the ability of residents to obtain permits to park cars on their property during special events.

3. John’s Getty Auto is an auto repair and inspection shop located on Main Street in Agawam. John’s Getty Auto is owned and operated by Hannah Kozah (“Kozah”).

4. In fall 2007, then Mayor Richard Cohen was running for re-election. Cohen was being challenged by Susan Dawson. Bitzas supported Cohen.

5. Kozah previously had asked Bitzas and Cohen to intercede on his behalf with the Board

of Appeals regarding Kozah’s wish to be able to park cars on his property during local events. Kozah was dissatisfied with the response he received from Bitzas and Cohen.

6. In early October 2007, Kozah supported Dawson in the mayoral election and placed two of her political signs on his property.

7. A couple of days after Kozah put up the Dawson signs, Bitzas made several visits in a single day to Kozah’s business to discuss the signs. During one of the conversations, Bitzas told Kozah that the mayor was “upset” about the signs. At another time on the same day, Bitzas pulled up to Kozah’s garage and, without getting out of his car, showed Kozah a photo he had taken. The photo showed a police officer in uniform doing traffic control, with his personal truck nearby displaying a large red Dawson sign in the rear window. Bitzas pointed out the officer in the photo and said to Kozah, “See what happens to him after the election.” Kozah said nothing in response. Bitzas then drove away.

Conclusions of Law

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

9. Bitzas invoked his official position as an Agawam City Councilor by purporting to speak for the mayor (stating that the mayor was “upset” about Kozah’s display of his opponent’s political signs) and by implicitly threatening city action against supporters of the mayor’s opponent (“see what happens to him after the election”).

10. Kozah knew, and Bitzas knew that Kozah knew, that Bitzas was an Agawam City Councilor and that as such, Bitzas had power over local parking regulations.

11. A reasonable person in Kozah’s position would have understood that Bitzas was

invoking his official position without Bitzas saying so expressly.

12. Bitzas' implicit invocation of his official regulatory power and his ability to take action against political adversaries in an attempt to coerce Kozah to take down the mayor's opponent's campaign signs was a use by Bitzas of his official city councilor position.

13. Bitzas' use of his official position to attempt to effect the removal of the campaign signs of the mayor's opponent was an unwarranted privilege for the mayor.

14. The use of signs in a political campaign as described above is of "substantial value."^{1/} Accordingly, a public official's use of his official position to effect the removal of the mayor's opponent's campaign signs is an unwarranted privilege of substantial value.

15. The unwarranted privilege which Bitzas obtained for the mayor was not available to "similarly situated individuals."

16. Thus, by attempting to use his position as a city councilor to get Kozah to take down the mayor's opponent's campaign signs, Bitzas knowingly, or with reason to know, attempted to use his councilor position to obtain an unwarranted privilege of substantial value for the mayor, which was not properly available to other similarly situated individuals, in violation of § 23(b)(2).

Resolution

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

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

(2) that Bitzas 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 25, 2009

^{1/} See *Ellis*, 1999 SEC 930 (city councilor violated §23(b)(2) by coercing constituent to take down opponent's campaign signs). As the Commission in *Ellis* observed:

A campaign sign advocating the election of a certain candidate posted in public view potentially increases the likelihood that that candidate will be elected. Similarly, the lack of such campaign signs backing the candidate's opponent is of benefit to that candidate. Consequently, in the Commission's view, such postings (or the prevention of such postings by an opponent) involve items of substantial intangible value within the meaning of §23(b)(2). As the Supreme Court said in *In City of Ladue v. Gilleo*, 114 S.Ct. 2038, 2045 (1994), as to residential signs in political campaigns:

[S]mall [political campaign] posters have maximum effect when they go up in the windows of homes, for this demonstrates that citizens of the district are supporting your candidate - an impact that money can't buy. [fn. 12, p. 2045 citing D. Simpson, *Winning Elections: A Handbook in Participatory Politics* 87 (rev. ed. 1981).]

The same observation would seem to apply to such campaign signs placed on the walls of small businesses for public view.

COMMONWEALTH OF MASSACHUSETTS STATE ETHICS COMMISSION

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0002**

IN THE MATTER OF MAUREEN BRENNAN

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Thomas R. Kiley, Esq.
Counsel for Respondent

Commissioners: Matthew N. Kane, Jeanne M. Kempthorne, David L. Veator

Presiding Officer: Commissioner Jeanne M. Kempthorne

DECISION AND ORDER

I. Background and Procedural History

This matter was commenced on February 28, 2008, with Petitioner's issuance of an Order to Show Cause ("OSC") alleging that Respondent Maureen Brennan violated G. L. c. 268A, §§ 19 and 23(b)(3) in 2002 through 2005, while she was employed as a finance assistant by the City of Marlborough ("City") Department of Community Development ("DCD"). More specifically, the OSC alleges that Brennan, in the years 2002 through 2004, participated as a DCD employee in several matters in which Keith Wheeler ("Wheeler"), first her fiancé and then her husband, had, to her knowledge, a financial interest, in violation of §§ 19 and 23(b)(3). In addition, the OSC alleges that, in or about 2005, Brennan violated § 23(b)(3) by participating as a DCD employee in processing a housing rehabilitation loan for her cousin James Matsikis and his wife Christina Matsikis.

In her Answer, Brennan denies most of the allegations of the OSC and that her actions violated G. L. c. 268A, §§ 19 and 23(b)(3). She pleads the statute of limitations as an affirmative defense.^{1/}

In August 2008, Brennan filed a motion to dismiss, together with a supporting memorandum, affidavit and exhibits, on the grounds that the statute of limitations, 930 CMR 1.01(10)(a) and (f), bars Petitioner's claims. In September 2008, Petitioner filed its memorandum in opposition to the motion and, with leave, a supplemental memorandum. Commissioner Kempthorne deferred decision on the motion, reserving it for resolution by the full Commission following the evidentiary hearing.

The matter was heard on October 20 and 21, 2008. Documents were admitted into evidence and both parties called witnesses to testify. Brennan testified on her own behalf. Following the hearing, the parties submitted in evidence a joint stipulation concerning the testimony of former City Solicitor James Agoritsas.

Petitioner also submitted in evidence Brennan's answers to six paragraphs of the OSC and to three interrogatories.

The parties filed their concluding memoranda on December 10th. After the presentation of testimonial and documentary evidence, and upon consideration of the evidence and the arguments of the parties, the Commission finds as follows.

II. Findings of Fact

During the years 2001 through 2005, Brennan held the position of DCD finance assistant, in which capacity she had served since the early 1990s. Brennan also served as the DCD finance officer. As DCD finance assistant/director, Brennan's duties included many actions relating to DCD loans to homeowners to rehabilitate properties in the City. Brennan was never the DCD Director, Department Head or Program Manager. Brennan has been an attorney since January 2002. The DCD is overseen by the Community Development Authority, whose chairman is the Mayor.

The Wheeler Rehabilitation Project

At all times here relevant, Wheeler owned and resided in a house ("Wheeler's House") in Marlborough. In or about 2001, Wheeler contemplated applying to the DCD for housing rehabilitation assistance. The DCD program was funded by a Community Development Block Grant ("CDBG") originating from the federal Department of Housing and Urban Development ("HUD") through the state Department of Housing and Community Development ("DHCD"). At the time, Wheeler and Brennan were engaged to be married.

Before Wheeler applied, Brennan disclosed her relationship with Wheeler and Wheeler's interest in applying for DCD assistance to DCD Director Alfred Lima ("Lima") and DCD administrative assistant Grace Lyons ("Lyons"). Lima and Lyons consulted with then City Solicitor James Golden ("Golden"). In a very brief conversation, they asked Golden if Wheeler could apply given his relationship with Brennan and Golden responded "Yes, but she can't touch it."^{2/} Whether Brennan could participate in the processing of payments or single case waivers relating to Wheeler was not addressed. Golden's

advice was not put into writing and was not filed with the Commission. Golden did not directly discuss the Wheeler matter (or the Matsikis matter) with Brennan.

Wheeler's application was approved. The loan was closed on September 3, 2002, without Brennan's participation, except that she notarized the mortgage. While, as DCD finance assistant/director, Brennan handled all DCD rehabilitation loan closings, she did not handle the closing on Wheeler's loan.

At the closing, Wheeler signed a 0% interest loan promissory note for \$7,700, a 3% interest loan promissory note for \$5,100, a deferred-payment loan agreement for \$15,000, a security agreement for \$15,000 and mortgage for \$21,000 (securing the \$5,100 3% interest loan and the \$15,000 deferred payment loan). Lima signed the notes and agreements for the City. All or most of the loan funds were retained by the City until they were paid to the contractors performing the work for the rehabilitation project.

In connection with the loans, Wheeler signed several standard DCD documents, including a Housing Rehabilitation Program rehabilitation contract which obligated Wheeler as the property owner to pay the contractor a total of \$18,224 for all services and materials necessary to complete the project. The project was defined in a "write-up" by the DCD rehabilitation specialist, to which Brennan signed Wheeler's name. Wheeler also signed a Neighborhood Improvement Program Agreement which, *inter alia*, required him to "correct all violations documented by the [City] Housing Rehabilitation Program inspections and as mandated by HUD requirements," and which provided, under the heading "Sanctions," "It is agreed that, if the OWNER fails to comply with these requirements and provisions, the funds conveyed or utilized as the subject matter of this Agreement, shall revert back to the Program, or if dispensed, the OWNER shall become personally liable for those such funds which shall be consistent with other applicable portions of this Agreement."

Contractors working on DCD loan-funded rehabilitation projects submit invoices for payment to the DCD, which in turn submits requests for payment to the City Auditor. The City Auditor makes such payments in response

to a payment request form containing a vendor number, an amount and a signature of a person with signing authority. To the City Auditor such a signature is a representation that the goods or services being paid for had been received. Brennan had signing authority under certain conditions.

As described in the City's May 2001 application for the CDBG to the DHCD, written by Lima with the assistance of Brennan and Lyons, the proper procedure for such progress payments was to have the homeowner, rehabilitation specialist and the Program Manager all sign the form. In practice, the DCD deviated from the proper procedure for progress payments, but generally the forms were signed by more than one person.

Prepayment inspection by the rehabilitation specialist is an important part of the process as it confirms that the work being paid for was in fact performed. The standard rehabilitation contract signed by Wheeler provides that compensation paid to a contractor is subject to inspection and a determination by the rehabilitation specialist whether "the work thus far performed and the materials thus far supplied...are in compliance with the Write-up," and empowers the rehabilitation specialist to direct the withholding of payment to the contractor upon his determination that the work or the materials do not comply with the write-up.

On September 26, 2002, Brennan as DCD finance assistant/director processed a progress payment of \$8,495 to a contractor working on Wheeler's House. On October 16, 2002, she similarly processed a progress payment of \$9,909 to a contractor working on Wheeler's House. In each case, Brennan signed, ostensibly as DCD "Program Manager," a "payment request form" certifying "that all of the rehabilitation work for this progress payment has been performed in accordance with the work write-up specifications, and therefore the progress payment shall be released in accordance with the payment schedule." Although she was not the DCD Program Manager, Brennan signed as such in order to assure payment by the City Auditor. In both cases, Brennan's was the only signature on the form. The signature lines for the owner(s) and the rehabilitation specialist remained blank.

On October 19, 2002, Brennan and Wheeler married. Brennan did not take up residence in Wheeler's House until about one year later.

On March 17, 2003, Brennan as DCD finance assistant/director processed a progress payment of \$2,750 to a contractor working on Wheeler's House. The contractor's invoice refers to this as a "change order." As with the 2002 payments, Brennan signed a payment request form containing the above-stated certification as DCD Program Manager, although she did not hold that position, in order to ensure payment by the City Auditor. She also initialed the contractor's invoice "Ok MB." Brennan's approval of this invoice/change order increased the project cost on Wheeler's House to \$20,970. As with the two 2002 progress payments, Brennan was the only signer of the form and the signature lines for the owner(s) and the rehabilitation specialist remained blank.

Thus, in 2002 and 2003, Brennan signed a total of \$21,154 in DCD progress payments to contractors working on Wheeler's House. The Housing Rehabilitation Program rehabilitation contract under which the progress payments were made obligated Wheeler as the property owner (and not the City) to pay the contractor for all services and materials necessary to complete the project. If the progress payments had not been made by the City, Wheeler would have been responsible under the rehabilitation contract for making them. Brennan was aware of this obligation of Wheeler's as the property owner given that the rehabilitation contract was a standard DCD form.

On or about June 7, 2004, Brennan prepared a Single Case Waiver form, requesting that DHCD increase the amount of rehabilitation assistance available on Wheeler's House to \$29,664.95, and sent it to DHCD with a cover letter she wrote and signed as DCD Finance Officer. The form states in part "The [City] respectfully requests a waiver for project number 99/01-203, to exceed our per-unit limit of \$25,000 and allow us to allocate a total of \$29,664.95 towards this project." In the cover letter, Brennan notified DHCD that the majority of the additional funding would be in the form of a zero percent, deferred payment loan due and payable upon sale. She explained on the waiver form that the change was necessary as the project had incurred unforeseen costs. Brennan further wrote "The waiver is recommended because

[Wheeler] has contributed a substantial amount of his own funds in order to make this project work..." and "is unable, at this point, to contribute additional funds in order to make this project work." Brennan further explained how it had been determined that Wheeler could not himself meet the additional cost of the project. At the time she acted, Brennan understood that if the DHCD did not approve the waiver, the City probably would require Wheeler to repay the money expended above the project limit.

Although, under DHCD procedure, a single case waiver request is supposed to precede the work, as of the time the Single Case Waiver was requested, the work at Wheeler's House had already been performed by the contractor and paid for, in whole or in part, by the City. The last four progress payments, totaling \$7,120, were signed by Lima and not by Brennan. Two of the payment request forms were signed solely by Lima as "Department Head." The other two forms were signed by both Lima as Department Head and Raymond Therrien as Rehabilitation Specialist.

The DHCD approved the Single Case Waiver on July 15, 2004. The DHCD employee who approved the waiver did not know at the time that Wheeler was Brennan's husband.

The work on Wheeler's House funded by the DCD increased the value of his property. Wheeler was required to pay back the DCD funding he received.

The Matsikis Rehabilitation Loan

In 2003, Brennan participated as the DCD finance assistant in processing a housing rehabilitation loan of approximately \$40,000 for her cousin James Matsikis and his wife Christina for their home in Marlborough where Christina operated a daycare center. Brennan and Lyons checked the DHCD CDBG manual to determine whether Brennan was prohibited from participating in her cousin's loan application. Brennan and Lyons then determined the Matsikises' eligibility for the loan and Brennan personally handled the loan closing. Brennan and the Matsikises are not close and do not socialize although they attended her wedding to Wheeler. Brennan and the Matsikises do not have any business relationship.

The HUD IG Subpoenas

On or about January 14, 2005, the HUD Office of the Inspector General (“HUD IG”) issued two subpoenas *duces tecum* to the City respectively seeking “escrow records” concerning Wheeler’s House (identified only by its street address) and the September 2002 closing and Brennan’s employment records. The HUD IG investigators serving the subpoenas did not disclose to Ronald Guest, who accepted service for the City, what they were investigating. In response to the subpoena for the records concerning Wheeler’s House, the DCD’s original file was turned over without a copy of the file being retained. Guest did not connect the street address on the subpoena with Wheeler or Brennan. The record is unclear as to whether and, if so, when the DCD received the file or a copy of the file back from the HUD IG.

Sometime after the HUD IG subpoenas were served, Lima informed then City Solicitor Agoritsas that Wheeler owned the house in question and of Wheeler and Brennan’s relationship. Lima also told Agoritsas of the advice that had been sought and received from then-City Solicitor Golden in 2001 and of controls that, according to Lima, had been put in place so that Brennan would not participate in the decision-making concerning Wheeler’s loan. Lima and Agoritsas did not discuss Brennan’s participation in the Wheeler progress payments or Single Case Waiver and, at the time, neither was aware of that participation. After speaking with Lima, Agoritsas spoke with Golden. Based on his conversations with Lima and Golden, Agoritsas did not perceive any problems with Brennan’s involvement in the rehabilitation assistance provided to Wheeler, which appeared to him to be purely ministerial.

Sometime later, Brennan and Agoritsas spoke briefly and she told him that she did not participate in the application or qualification of Wheeler’s loan or in any decision-making regarding the file. Brennan did not inform Agoritsas of her participation in authorizing the Wheeler progress payments, change order or Single Case Waiver request or her involvement in the Matsikis matter.

On or about January 25, 2005, Lima and Agoritsas met with the HUD IG investigators who did not provide them with any details of what the investigation had yielded to that point. They did not address Brennan’s participation in

the progress payments or the single case waiver for Wheeler’s House.

Brennan did not seek a § 19(b)(1) exemption from her appointing authority concerning her participation in the Wheeler matter, nor did she make any § 23(b)(3) disclosures regarding her participation in either the Wheeler or the Matsikis matters.

III. Decision

The burden of proving Brennan’s alleged violation of G. L. c. 268A is on Petitioner, which must prove its case by a preponderance of the evidence. 930 CMR 1.01(9)(m)(2). 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; *In re Cellucci*, 1988 SEC 346.

Respondent’s Statute of Limitations Affirmative Defense and Motion to Dismiss

Under the Commission’s statute of limitations regulation, an order to show cause must issue within three years after a disinterested person learned of the violation. 930 CMR 1.02(10)(a). Pursuant to the regulation and Commission precedent, in the face of Brennan’s statute of limitations affirmative defense and motion to dismiss, Petitioner has the burden of showing that it (and, as to the alleged § 23 violations, a disinterested person capable of acting for the City) did not know, nor should have known, of the alleged violations more than three years prior to the issuance of the OSC. *In the Matter of James H. Quirk*, 1998 SEC 918, 920; *In the Matter of Michael J. O’Toole*, 2008 SEC _ (Commission Adjudicatory Docket No. 07-0001, Decision and Order issued September 30, 2008); 930 CMR 1.02(10)(c). Petitioner may satisfy this burden by submitting the affidavits required by 930 CMR 1.02(10)(c) (1), (2) and (3). *Id.*

Petitioner Has Met Its Burden under 930 CMR 1.02 (10)(c)

Petitioner has met its burden under 930 CMR 1.02 (10)(c) (1), (2) and (3) by providing affidavits by an investigator from the Commission’s Enforcement Division, the Chief of the Criminal Bureau of Attorney General’s Office, the Chief Trial Counsel of the Middlesex

District Attorney's Office, and the City's Mayor and Chairman of the Community Development Authority. Consistent with the regulation, the affidavits indicate that the records of each office have been reviewed and there is no record of any complaint relating to Brennan's alleged violations more than three years before the OSC was issued.^{3/} Accordingly, the affidavits are sufficient to shift to Brennan the burden under 930 CMR 1.02 (10)(d).

Brennan Has Not Met Her Burden under 930 CMR 1.02 (10)(d)

930 CMR 1.02 (10)(d) provides that if the petitioner meets its burden under 930 CMR 1.02 (10)(c), as Petitioner has done, the respondent "will prevail on the statute of limitations defense only if he/she shows that more than the three (3) years before the order was issued the relevant events were either: (1) a matter of general knowledge in the community, or (2) the subject of a complaint to the Ethics Commission, the Department of the Attorney General, the appropriate Office of the District Attorney, or, with respect to a § 23 violation only, the respondent's public agency." Thus, under 930 CMR 1.02 (10), a respondent's public agency's knowledge of its employee's alleged conflict of interest which is not also general knowledge in the community and which is not communicated to the Commission, the Attorney General or the relevant district attorney, is of significance only with respect to Petitioner's § 23 claims. Therefore, proof of the City's receipt of a complaint concerning Brennan's alleged violations more than three years before the OSC was issued would bar Petitioner's § 23 allegations against Brennan, but would have no effect on Petitioner's § 19 allegations.

Brennan did not attempt to prove that the relevant events concerning her alleged violations were a matter of general knowledge in the community, and the evidence would not support that conclusion. Nor did Brennan attempt to prove, and the evidence does not suggest that the relevant events were "the subject of a complaint" to the Commission, Attorney General, District Attorney or the City more than three years before the OSC issued.^{4/} Accordingly, Brennan has not met her burden under 930 CMR 1.02 (10)(d).

Brennan instead argues that Petitioner's claims are time-barred because, she asserts,

disinterested parties capable of acting on behalf of the City received notice of her alleged violations more than three years before the OSC issued:

- a) when Brennan disclosed the Wheeler application to DCD Director Lima, who in turn informed City Solicitor Golden, in October 2001;
- b) when the HUD IG subpoenaed the file on Wheeler's House and Brennan's personnel records, in January 2005; and
- c) when City Solicitor Agoritsas and Lima were notified of HUD's action in seizing the file and records, and Agoritsas met with Brennan, in January 2005.

Brennan argues that, as City Solicitors, Golden and Agoritsas were disinterested persons capable of acting on behalf of the City to enforce the conflict of interest law, and that, under the principles of *Nantucket v. Beinecke*, 379 Mass. 345 (1979), and *Quirk*, the three-year statute of limitations period of the Commission's regulation began to run upon notice to them of the alleged violations and, thus, had lapsed prior to the issuance of the OSC on February 28, 2008. Brennan also contends that the HUD IG was a disinterested person capable of acting "on behalf of the taxpayers on the basis of the perceived conflict involving the Wheeler loan," who was aware of Brennan's violations more than three years prior to the OSC's issuance.

Brennan's arguments are not persuasive.

In contrast to the situations in *Quirk* and *O'Toole*, there is no basis in the evidence in this matter for concluding that Petitioner itself knew or should have known of Brennan's alleged violations more than three years before the OSC was issued. First, there is no legal basis for constructively attributing to Petitioner the former city solicitors' purported knowledge of Brennan's violations in the absence of evidence that they communicated that knowledge to the Commission. City solicitors are not agents of the Commission. Second, to the degree that Brennan argues for constructively attributing to Petitioner the HUD IG's purported knowledge of her alleged violations, her argument is without basis. There is no legal support for such an attribution and, in any case, the preponderance of

the evidence does not show that the HUD IG in fact knew of Brennan's alleged violations more than three years prior to the issuance of the OSC. The evidence shows only that, in January 2005, the HUD IG subpoenaed and obtained the file on Wheeler's House and Brennan's personnel file and reveals nothing about the focus of the investigation or the state of the HUD IG's knowledge prior to February 28, 2005.

In addition, even granting that City Solicitors Golden and Agoritsas were disinterested persons capable of acting on behalf of the City, the preponderance of the evidence is that neither knew or should have known of Brennan's violations prior to February 28, 2005. First, the evidence is clear that Golden did not in 2001, or at any other time more than three years prior to the issuance of the OSC, know or have reason to know of Brennan's alleged violations. Second, while it is a closer question as to what Agoritsas knew or should have known, and when, about Brennan's actions, we find that Agoritsas did not know nor should he have known of Brennan's alleged violations more than three years before the OSC issued.

Although the January 2005 HUD IG subpoenas were some notice to Agoritsas and the City that something was possibly amiss involving Wheeler's House and Brennan, the subpoenas and the HUD IG investigators revealed little about the nature of HUD's investigation. Furthermore, the HUD IG took the original DCD file and did not leave a copy, making it difficult for the matter to be reviewed on the local level. Finally, the preponderance of the credible evidence shows that Lima and Brennan, in their separate conversations with Agoritsas, minimized Brennan's participation in the Wheeler matter to the point that Agoritsas reasonably, albeit contrary to the actual facts, concluded that Brennan's involvement was purely ministerial. Lima did not know the actual extent of Brennan's participation concerning the Wheeler matter and, thus, could not have informed Agoritsas. Brennan did not tell Agoritsas anything about the Single Case Waiver. Nor did Brennan tell Agoritsas about her involvement in any change order for the Wheeler House or in the Matsikis matter. Although Brennan testified that she told Agoritsas that she likely processed payments regarding Wheeler's House, we conclude, first, that her testimony was not credible on this point and, second, that, whatever Brennan in fact told

Agoritsas about her involvement in the payments, she characterized her involvement as purely clerical and did not indicate to Agoritsas the true nature and extent of her participation (i.e., that she was the sole signer, had signed as the Program Director or Department Head and had signed without a sign-off by the rehabilitation specialist or the homeowner).

We conclude that the OSC was issued within three years after a disinterested person learned, or knew or should have known, of Brennan's violations, and was timely issued. Accordingly, Brennan's statute of limitations-based motion to dismiss and affirmative defense fail as to all allegations against her.

The Alleged Violations

Petitioner Has Proved that Brennan Violated §§ 19 and 23(b)(3) as to Wheeler

Section 19

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

Brennan was a municipal employee of the City at all times here relevant. As her husband since October 19, 2002, Wheeler is a member of Brennan's immediate family. Petitioner alleges that Brennan violated § 19 in 2003 by processing a progress payment for work on Wheeler's House and, in 2004, by submitting to the DHCD a Single Case Waiver request for Wheeler's House.

The March 2003 change order/progress payment request and the June 2004 Single Case Waiver request were particular matters.^{5/} Each involved determinations, decisions and recommendations by Brennan. By signing the progress payment/change order and by making the Single Case Waiver request, Brennan personally and substantially participated.^{6/} in those particular matters as a DCD employee. Particularly where she was the sole signer of each of these documents, Brennan's participation was neither ministerial nor clerical. To the contrary, in each of these matters, Brennan's participation was significant, decisive and consequential, and was thus plainly substantial.

Petitioner argues that Wheeler had a reasonably foreseeable financial interest in the progress payments because they paid the contractor for the rehabilitation work on Wheeler's House and because that work increased the home's value. Petitioner further argues that Wheeler had a financial interest in the Single Case Waiver because otherwise he would have been responsible for the approximately \$4,000 above the \$25,000 limit expended by the City on his home.

Brennan argues that Wheeler did not have any financial interest in the progress payments because they involved payments by the City to the contractor and not to Wheeler himself. She contends that Wheeler did not have any financial interest in the Single Case Waiver because the City had already paid out the funds and the waiver merely adjusted the relationship between the City and the state. In short, Brennan asserts that "there is nothing in this record to indicate any financial benefit whatsoever flowed to Mr. Wheeler from those events." According to Brennan, the progress payments did "not change Mr. Wheeler's obligations one iota."

We disagree. The term "financial interest," as used in the conflict of interest statute, is not limited to direct financial interests, but extends to reasonably foreseeable financial interests, whether large or small, positive or negative, so long as they are not remote, speculative or not sufficiently identifiable. *EC-COI-02-2* (and cases cited).

Wheeler had a financial interest in the progress payment, first, because it was for work on an ongoing project to make necessary and substantial repairs and improvements to his home. If the payment had not been made by the City to the contractor, the work on Wheeler's home would have ceased (unless he himself made the payment) and he would have lost the benefit of that work. Second, the Housing Rehabilitation Program rehabilitation contract, under which the progress payment was made, obligated Wheeler as the property owner (and not the City) to pay the contractor for all services and materials necessary to complete the project. Thus, if the progress payment had not been made by the City, Wheeler would have been responsible for making it. Finally, the funds from which the City would pay the contractor were effectively the funds Wheeler had borrowed and agreed to repay.

Wheeler also had a financial interest in the 2004 Single Case Waiver request approval. The waiver request form that Brennan drafted stated that the change was necessary as the project had incurred unforeseen costs and Wheeler had limited income and "is unable, at this point, to contribute additional funds in order to make this project work." When asked by Petitioner's counsel "So if the State did not approve this single case waiver, then Mr. Wheeler would be liable to pay back that money? Brennan answered "I mean, well, I don't know legally if he would be responsible for paying it. Keith, being the guy he is, yeah, I'm sure he would have paid it." Brennan explained that if the DHCD had not approved the waiver, the City "probably would have asked [Wheeler] to repay the money." In addition, the standard Neighborhood Improvement Program Agreement signed by Wheeler (and which Brennan signed for the CDC in connection with the Matsikis project) provides, "It is agreed that, if the OWNER fails to comply with these requirements and provisions, the funds conveyed or utilized as the subject matter of this Agreement, shall revert back to the PROGRAM, or if dispensed, the OWNER shall become personally liable for those such funds which shall be consistent with other applicable portions of this Agreement."

On our record, Wheeler's financial interests in these matters were readily foreseeable by and in fact known to Brennan at the times she acted. As a result of her years of DCD experience, including her handling all loan closings, and her personal relationship with Wheeler, Brennan was aware of the obligations imposed on Wheeler by the standard DCD forms which he had signed in obtaining DCD financing and of the likely practical and financial consequences to him if the progress payment and the Single Case Waiver she requested were not made or approved.

Accordingly, we conclude that Brennan violated § 19 when she signed and processed the progress payment in March 2003 and again when she drafted and submitted to DHCD the Single Case Waiver request in June 2004.^{7/}

Section 23(b)(3)

Section 23(b)(3), in relevant part, provides that no municipal employee "shall knowingly or with reason to know... act in a manner which would cause a reasonable person, having

knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any person or party.” The section further provides, “[i]t shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority...the facts which would otherwise lead to such a conclusion.” Petitioner alleges that Brennan repeatedly violated § 23(b)(3) in her DCD actions relating to Wheeler by processing two progress payments for work on Wheeler’s House in 2002 and one such progress payment in 2003 and by submitting the Single Case Waiver request concerning the house in 2004.

Our record shows that there were numerous irregularities in the handling of progress payments and the Single Case Waiver request for Wheeler’s House. As described above, payments were approved and requested without the signatures of the rehabilitation specialist or the homeowner, and the Single Case Waiver request was made after the work had been completed and paid for, in whole or in part. These irregularities and others, combined with Brennan’s close personal relationship with Wheeler, would, in our judgment, cause a reasonable person with knowledge of the relevant circumstances to conclude that Wheeler could improperly influence or unduly enjoy Brennan’s favor in the performance of her DCD duties with respect to the progress payments and the Single Case Waiver. Brennan acted knowingly and knew or should have known how her actions would be perceived by others. Brennan did not make any disclosures as provided by section 23(b)(3).

Accordingly, we conclude that Brennan violated section 23(b)(3) each of the three times in 2002 and 2003 that she processed progress payments for Wheeler’s House and also when she requested the Single Case Waiver for Wheeler’s House.

Petitioner Has Not Proved that Brennan Violated section 23(b)(3) as to the Matsikises

Petitioner alleges that Brennan violated section 23(b)(3) by approving her cousin’s financing application and handling the closing and other related matters.

The evidence establishes that Brennan handled the Matsikises’ application for rehabilitation assistance, including determining their eligibility and handling the closing on their financing. We find, however, that Brennan and the Matsikises, while related, are not close and rarely even see each other. There is no evidence of any irregularities in the handling of the Matsikis matter, let alone any evidence that the Matsikises received any special treatment or any benefit to which they were not eligible and entitled. For example, there is no evidence in the record that Brennan handled any progress payment request relating to the Matsikises’ project, much less that such requests were signed only by Brennan.

Accordingly, we conclude that Petitioner has not proved that Brennan violated section 23(b)(3) in her actions regarding the Matsikises.

IV. Conclusion

We summarize our rulings as follows:

First, that the OSC was timely issued and that Brennan’s motion to dismiss and affirmative defense based on the statute of limitations fail as to all allegations against her.

Second, that Brennan violated G. L. c. 268A, § 19 and section 23(b)(3), as alleged, in her official actions relating to Wheeler and Wheeler’s House. Specifically, that Brennan violated § 19 when she signed and processed the progress payment in March 2003 and again when she drafted and submitted to DHCD the Single Case Waiver request in June 2004, and Brennan violated section 23(b)(3) each of the three times in 2002 and 2003 that she processed progress payments for Wheeler’s House and also when she requested the Single Case Waiver for Wheeler’s House.

Third, that Petitioner has not proved its allegations that Brennan violated section 23(b)(3) in her actions relating to the Matsikises.

V. Order

Brennan’s motion to dismiss is **DENIED**. Having concluded that Respondent Brennan violated G. L. c. 268A, section 19 and section 23(b)(3), as specified above, the Commission, pursuant to the authority granted it by G. L. c. 268B, section 4(j), hereby **ORDERS** Brennan to

pay a total civil penalty of \$5,000 for those several violations. Finally, the claim that Brennan violated section 23(b)(3) in her actions relating to the Matsikises is **DISMISSED**.

DATE AUTHORIZED: February 20, 2009

DATE ISSUED: March 4, 2009

^{1/} The Answer pleads three additional affirmative defenses, but Brennan did not support any of them with evidence or argument.

^{2/} We find Golden's testimony concerning this meeting credible.

^{3/} Brennan has not challenged the sufficiency of the affidavits. We find that the affidavits of the Attorney General's Office and the Middlesex District Attorney's Office establish that neither office received a relevant complaint more than three years before the OSC's February 28, 2008 issuance notwithstanding their use of the phrase "prior to February 27, 2005," given that February 27, 2005 was a Sunday. To the degree that the Mayor's affidavit fails to fully comply with the regulation, we find that those deficiencies are cured by the other evidence in the record of the City's knowledge. As *Quirk* and *O'Toole* demonstrate, the Commission may look at evidence beyond the affidavits in determining whether or not Petitioner's claims are time-barred under the regulation.

^{4/} Although Brennan, in her memorandum in support of her motion to dismiss, refers to allegations made in 1996, the preponderance of the evidence shows that the first complaint to the Commission relating to the events relevant to Brennan's violations as alleged in the OSC was received in December 2005.

^{5/} "Particular matter" includes any application, submission, request for a ruling or determination, claim, decision or determination. G. L. c. 268A, § 1(k).

^{6/} "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)

^{7/} Brennan did not meet the requirements for an exemption from § 19.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, SS. COMMISSION
ADJUDICATORY DOCKET NO. 07-0018**

**IN THE MATTER OF
JACK SPERANZA**

Appearances: Mark Walter, Esq.
Counsel for Petitioner
Peter E. Heppner, Esq.
Counsel for Respondent

Commissioners: Matthew N. Kane, Jeanne M.
Kempthorne and David L. Veator

Presiding Officer: Commissioner David L.
Veator

**ORDER VACATING REASONABLE
CAUSE FINDING AND TERMINATING
ADJUDICATORY PROCEEDING**

On June 12, 2007, Petitioner issued an Order to Show Cause ("OTSC") against Respondent Jack Speranza ("Speranza"), a member of the Conservation Commission and the Community Preservation Committee ("CPC") in the Town of Hopkinton ("Town"). The OTSC alleges that on October 5, 2006, Speranza asked the Commission's Legal Division for advice as to whether he could act as a private attorney on behalf of a group of Town residents who wanted to file a suit against the Town regarding the CPC's purchase of a parcel of open space ("Property") and that he was advised that G.L. c. 268A, § 17 prohibited him from so acting.

As set forth in the OTSC, on October 12, 2006, Speranza, acting as a private attorney, filed a Petition Under M.G.L. c. 40, § 53^{1/} to Restrain Illegal Appropriations ("Petition") against the Town involving its proposed purchase of the Property and obtained a temporary restraining order ("TRO"). It further alleges that Speranza, on behalf of the petitioners, signed a stipulation agreement regarding the TRO, filed a memorandum in support of continuing the injunction and signed and filed a stipulation of dismissal. Finally, the OTSC alleges that Speranza repeatedly violated G.L. c. 268A, § 17(c)^{2/} by engaging in such conduct. Speranza filed an Answer admitting a number of the factual allegations but denying any violation.

Speranza filed an affidavit with the Commission on November 7, 2007. In his

affidavit, Speranza sets forth detailed information about *inter alia*, the following: (1) his concern about the value in one appraisal based on an unapproved project; (2) his concern about conflict of interest issues involving a fourth appraisal and its discrepancy with three other appraisals; (3) his concern that the Town's proposed purchase as structured would violate G.L. c. 44B, § 5(b)(3)(f);^{3/} (4) his concern about fulfilling the obligations of his oath as a Town employee; and (5) the information he provided and the questions he posed when he called the Commission's Legal Division for advice.

Based on our review of Speranza's affidavit^{4/} which provides a fuller factual presentation of the unusual underlying circumstances in this matter, we now find that, had such facts been known to us previously, we would not have found reasonable cause and authorized an adjudicatory proceeding. The facts supporting our finding include the following: Speranza's concerns about the appraisal process; his actions were taken in an effort to protect the public interest in ensuring the Town's compliance with the relevant statutory requirements rather than his own personal or private interests; the efforts Speranza made to comply with the conflict of interest law by seeking advice; the absence of any personal financial gain to him as a result of his representation of the petitioners; and Speranza's reporting of his actions to the Commission. These facts taken together in this unique situation warrant the exercise of our discretion to vacate our prior finding of reasonable cause and authorization of an adjudicatory proceeding.^{5/} Accordingly, we hereby vacate the prior finding of reasonable cause and the authorization of adjudicatory proceedings. In doing so, we note that this exercise of our discretion is limited to the peculiar facts of this matter. This adjudicatory proceeding is hereby TERMINATED.

DATE AUTHORIZED: February 20, 2009

DATE ISSUED: March 10, 2009

^{1/} G.L. c. 40, § 53 provides in relevant part as follows: "If a town . . . or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town . . . for any purpose or object in any manner other than that for and in which such town . . . has the legal and constitutional right and

power to raise or expend money or incur obligations, the supreme judicial court or superior court may, upon petition of not less than ten taxable inhabitants of the town . . . determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power."

^{2/} Section 17(c) provides that "[n]o municipal employee shall, otherwise than in the proper discharge of his official duties, act 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 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."

^{3/} Section 5(b)(3)(f) provides in relevant part that "no such real property, or interest therein, shall be acquired by any city or town for a price exceeding the value of the property as determined by such city or town through procedures customarily accepted by the appraising profession as valid."

^{4/} We have also reviewed the memoranda submitted by the parties relating to Petitioner's Motion for Summary Decision.

^{5/} We note that the Commission's internal Enforcement Procedures reflect our discretion when making reasonable cause findings. For example, Section 5(e) provides that in lieu of finding reasonable cause, the Commission may authorize the issuance of a confidential compliance letter. A compliance letter may be authorized in situations where there are sufficient facts to warrant finding reasonable cause that a violation of the conflict of interest law has occurred, "but where the violation does not involve either willful misconduct, significant economic advantage, the misuse of influence or confidential information, significant economic loss to the public, or the potential for serious impact on the confidence in its officials, or other reasons deemed appropriate by the Commission."

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0006**

**IN THE MATTER OF
TERRY EDWARDS**

DISPOSITION AGREEMENT

The State Ethics Commission and Terry Edwards 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 8, 2006, 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 Edwards. The Commission concluded its inquiry and, on October 17, 2007, found reasonable cause to believe that Edwards violated G.L. c. 268A. On April 8, 2008, the Commission's Enforcement Division filed an Order to Show Cause alleging that Edwards had violated G.L. c. 268A.

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

Findings of Fact

1. From March 2002 to November 2002, Thomas Kennedy was a Massachusetts Highway Department ("MHD") construction inspector assigned to inspect the work of contractor P.A. Landers, Inc. on Route 44 near Plymouth.

2. P.A. Landers delivered truckloads of asphalt to the Route 44 project site. Prior to delivery, the loads of asphalt were weighed at the P.A. Landers plant and the drivers were given a weight slip. Kennedy's duties included inspecting P.A. Landers' deliveries of asphalt at the Route 44 site for foreign objects and conducting random yield inspections to verify that P.A. Landers was providing adequate amounts of asphalt.

3. After conducting these inspections, Kennedy signed the weight slips provided by the P.A. Landers truck drivers. Kennedy forwarded the signed weight slips to his supervisor who signed them and submitted them to MHD for payment. These weight slips were necessary for P.A. Landers to receive payment for its work on the project.

4. Edwards was P.A. Landers' project manager for the Route 44 project.

5. From May 2002 through November 2002, while assigned to the Route 44 project,

Kennedy solicited and received cash payments from Edwards for Kennedy's gasoline expenses.

6. Kennedy submitted his gas payment receipts and received cash payments from Edwards on a bi-weekly basis. Each of the payments averaged \$200. During the period from May 2002 through November 2002, Edwards gave and Kennedy received a total of between \$2,000 and \$2,700 in cash payments.

7. Edwards gave these cash payments to Kennedy using P.A. Landers' funds.

8. Kennedy was not authorized to receive cash payments for any purpose from any contractor under his supervision.

9. Kennedy received reimbursement by the MHD for any expenses he incurred in using his personal vehicle to get to and from the Route 44 project.

10. At the times Edwards agreed to provide and provided these cash payments, he did so with the intent to cause Kennedy to relax or to continue to relax his inspections of P.A. Landers' asphalt deliveries on the Route 44 project site in exchange for these payments. Also at the times Edwards agreed to provide and provided these cash payments, he was concerned that if Kennedy did not receive the cash payments, P.A. Landers risked delays in Kennedy's processing of official project paperwork necessary for P.A. Landers to receive payment for its work on the project.

11. As a result of the cash payments, Kennedy and Edwards reached an understanding that Kennedy would make things "go a little smoother" on the project.

12. In return for the cash payments, Kennedy relaxed his inspections of P.A. Landers' asphalt deliveries on the Route 44 project. For example, on June 29, 2002, Kennedy signed six P.A. Landers weight slips without conducting proper inspections. Kennedy also sped up the processing of official paperwork necessary for P.A. Landers to receive payment for its work on the project.

Conclusions of Law

13. As an MHD construction inspector, Kennedy was a state employee as defined by

G.L. c. 268A, § 1(q).

Section 2(a)

14. Section 2(a) of Chapter 268A prohibits anyone from corruptly giving anything of value to any state employee with intent to influence any official act or act within his official responsibility.

15. Edwards gave to Kennedy between \$2,000 and \$2,700 in cash payments between May 2002 and November 2002.

16. At the times Edwards made these cash payments, he did so with the intent in return for these payments to influence Kennedy's performance of certain duties as an MHD construction inspector, including Kennedy's inspection of asphalt deliveries and his processing of official project paperwork necessary for P.A. Landers to receive payment for its work on the Route 44 project. Accordingly, Edwards corruptly gave these payments.

17. Each of the cash payments was an item of value.

18. In return for these payments, Kennedy was influenced in the performance of his inspections of P.A. Landers' asphalt deliveries. Specifically, Kennedy signed six P.A. Landers weight slips without conducting proper inspections. Kennedy also sped up the pro-cessing of official paperwork necessary for P.A. Landers to receive payment for its work on the project.

19. Kennedy's inspections and certifications of P.A. Landers' asphalt deliveries were official acts and/or acts within his official responsibility. Kennedy's processing of official project paperwork necessary for P.A. Landers to receive payment for its work on the project were also official acts and/or acts within his official responsibility.

20. Therefore, Edwards repeatedly violated § 2(a) by, as described above, corruptly giving cash payments of value to Kennedy with the intent to influence Kennedy in his performance of official acts and/or acts within his official responsibility.

Resolution

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

(1) that Edwards pay to the Commission the sum of \$5,000 as a civil penalty for repeatedly violating G.L. c. 268A § 2(a)^{1/}; and

(2) that Edwards 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: April 2, 2009

^{1/} The fine amount has been reduced to take into consideration the fact that Edwards cooperated with the Federal Government in providing testimony against P.A. Landers and Kennedy.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0010**

**IN THE MATTER OF
TAYLOR ROTH**

Appearances: Candies Pruitt-Doncaster, Esq.
Counsel for Petitioner

Joseph W. Monahan, III, Esq.
Thomas J. Freda, Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III,
Matthew N. Kane, Jeanne M. Kempthorne and
Patrick J. King^{1/}

Presiding Officer: Commissioner Jeanne M.
Kempthorne

FINAL DECISION

Procedural Background

This matter was commenced on April 23, 2008, with the issuance of an Order to Show Cause alleging that Roth had violated G. L. c. 268A, §§ 3(b) and 23(b)(2) and (3) in 2004, 2005 and 2006 by receiving Red Sox tickets from Thomas E. Riley, Jr. (“Riley”) and P.J. Riley & Company (“Riley & Co.”) while employed as a senior inspector for the state Board of Examiners of Plumbers and Gasfitters (“Board”) and inspecting gas and plumbing work performed by Riley & Co. as a state contractor. In September 2008, the Commission ordered this matter consolidated with related matters concerning Riley and Riley & Co. In October 2008, all three respondents filed motions for summary decision. On January 23, 2009, the Commission issued a Decision and Order dismissing the § 3 allegations against all respondents and separating the matter concerning Roth’s alleged violations of § 23, which proceeded to an adjudicatory hearing on February 4, 2009.

Allegations and Defenses

Petitioner alleges that in each of the years 2004, 2005 and 2006 Roth received a pair of Red Sox tickets from Riley and Riley & Company because of his senior inspector position and continued to inspect the company’s work in violation of G. L. c. 268A, §§ 23(b)(2) and 23(b)(3).^{2/} Roth denies that he received any tickets in 2004 and 2005 and argues that because he turned the tickets he unexpectedly received in 2006 in to Legal Counsel for the Board (“Board Counsel”) he could not have violated the law.

The Facts

As a senior inspector for the Board, Roth inspects plumbing and gas pipefitting work performed on buildings owned by the Commonwealth for compliance with state plumbing and gas pipefitting codes. Roth is empowered to pass or fail a project for compliance or non-compliance with the codes. Upon his finding “leaks, defective or patched material, or evidence of unskilled or inferior workmanship,” no further progress is allowed until these issues are addressed.

Riley & Company is a Boston-based mechanical construction company focusing on public and private plumbing and gas pipefitting work. Riley is a principal of the company and its Executive Vice President. Edward Kilnapp (“Kilnapp”) is Riley’s assistant.

Between 2004 and 2006, Roth conducted about twenty inspections of Riley & Co.’s work at seven sites in Boston, Weymouth and Norfolk. In the larger period of 2002 through March 2006, Roth conducted a total of about 49 inspections of Riley & Co.’s work on many of its total of eighteen public projects. Roth signed 15 of the company’s 18 permits. Roth did not always pass the Riley & Co. work he inspected.

Riley & Co. has held Red Sox season tickets since World War II. Between February and March each year, after receiving them from the Red Sox, Riley distributes a pair of tickets to 40 to 50 games to “employees, friends, business acquaintances, social acquaintances and local charities” on behalf of Riley & Co.

In June 2004, Roth, Riley and Kilnapp were grouped together in a plumbing industry golf tournament at the Pembroke Country Club. Roth was a friendly business acquaintance of Riley and Kilnapp, but they were not friends and Roth did not socialize with them apart from at plumbing industry events.

In March 2006, Roth spoke by telephone with Kilnapp concerning Riley & Co.’s work at the MTA Sumner/Callahan Vent Buildings, where there was an existing engineering defect that had been the subject of communications between the company and Roth and his colleagues since October, 2005. During that telephone conversation, Kilnapp asked Roth if he still lived in Braintree. Subsequently, Roth performed a walk-through inspection of Riley & Co.’s work at the MTA Sumner/Callahan Vent Buildings and confirmed that it did not comply with the plumbing code. Subsequently also, Roth received in the mail a pair of Red Sox tickets sent to him by Kilnapp at Riley’s direction. The face value of each ticket was \$80. After receiving the tickets and consulting with his wife and his father, Roth turned the tickets over unused to Board Counsel on April 6, 2006.

Conflicting Testimony

Riley and Kilnapp testified that, in or about March of each of the years 2004, 2005 and 2006, Riley & Co., through Riley and Kilnapp, offered by telephone and sent by mail to Roth a pair of Red Sox tickets for a single game. On each occasion, Roth agreed to accept the tickets. At the golf tournament in 2004, Roth thanked Riley for the tickets he received that year. Before mailing out to Roth the pair of Red Sox tickets in 2006, Kilnapp, at Riley's direction, offered the tickets to Roth and Roth agreed to accept them during their telephone conversation about Riley & Co.'s work at the MTA Sumner/Callahan Vent Buildings. In his testimony, Roth denied that these events occurred.

Discussion

The resolution of this case depends on our assessment of Roth's, Riley's and Kilnapp's credibility. Petitioner's case against Roth rests entirely on the credibility of Riley's and Kilnapp's testimony. Apart from Riley's and Kilnapp's testimony, there is no evidence in the record of their alleged gifts of Red Sox tickets to Roth. There are no corroborating witnesses or documents supporting Riley and Kilnapp. Conversely, Roth's defense depends on the credibility of his testimony denying that he was ever offered or agreed to accept Red Sox tickets from Riley or Kilnapp and only received tickets from Riley & Co. in 2006 which he had not been offered or agreed to accept and which he turned in to Board Counsel.

Petitioner argues that Kilnapp and Riley were credible because they were individually consistent and detailed in their testimony, corroborated each other and were not impeached, and that Roth should not be believed because of his self-interest in denying his acceptance of tickets. Respondent counters that Riley and Kilnapp are not credible because their testimony was motivated by the need to create a "seasonal practice" defense and cannot be verified by documentary evidence, and that he should be believed because his conduct was consistent with "what you would expect of an honest state inspector who has received an unsolicited gratuity," that is, he turned in the tickets to Board Counsel.

We credit Roth's testimony on the basis of his demeanor, and the lack of documentary or other independent corroboration for Kilnapp's and Riley's testimony. It is difficult to envision

a friendship between Roth and Riley and Kilnapp, and it seems most unlikely that such a friendship, if it existed at all, would have taken root as early as February or March 2004, when the tickets were distributed and months before the June 2004 golf tournament. It is also hard to imagine that Roth took the tickets in 2004 and 2005 without a qualm and then suddenly panicked in 2006 when he returned the tickets in to Board Counsel. We find that Roth did not receive tickets in 2004 or 2005.

Riley's and Kilnapp's professed certain memory of giving tickets to Roth in 2004 and 2005 is not credible. We do not find that they intentionally misrepresented the facts, but it does appear that they have reinforced each other's "memory" of events that substantiate their story of a "seasonal practice" which was clearly in their interest to establish. The lack of documentation or other evidence to support their testimony and the weakness of their memory of related events further support our finding.

Conclusion

Based on our assessment of the credibility of the witnesses, we conclude that Petitioner has not proved by a preponderance of the evidence that Roth violated G. L. c. 268A, §§ 23(b)(2) and 23(b)(3), as alleged. Accordingly, we conclude these proceedings by finding for Respondent.

DATE AUTHORIZED: April 17, 2009

DATE ISSUED: April 28, 2009

^{1/} Commissioner David L. Veator did not participate in this Final Decision.

^{2/} Section 23(b), in relevant part, prohibits a state 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 state employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0011

IN THE MATTER OF
RICHARD WHEELER

DISPOSITION AGREEMENT

The State Ethics Commission and Richard 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 August 1, 2008, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into alleged violations by Wheeler of G.L. c. 268A, §§ 19 and 23(b)(2), the conflict of interest law. The Commission has concluded its inquiry and, on March 20, 2009, found reasonable cause to believe that Wheeler violated G.L. c. 268A, §§ 19 and 23(b)(2).

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

Findings of Fact

Municipal Employment

1. Wheeler was appointed as Barre (“the Town”) Department of Public Works (“DPW”) Superintendent in April 2004, and is still employed in that capacity.

2. As DPW Superintendent, Wheeler’s duties include supervising the DPW’s multiple departments, including the Water Department and the Sewer Department. Wheeler’s duties also include the inspection and approval of residential and commercial water and sewer lines, including their connections to the Town’s water and sewer systems.

3. Glen Alt (“Alt”) has been the appointed Chief Water Operator of the Barre Water Department since 2004. Alt is a subordinate of Wheeler. Alt’s duties include the inspection and

approval of residential and commercial water connections to the Town’s water system.

Fruitland Road

4. In 2005, Wheeler purchased property located at 75 Fruitland Road in the Town.

5. In approximately August 2005, Wheeler began constructing a new house at 75 Fruitland Road. Wheeler was required to connect the house to the Town’s water and sewer systems.

Wheeler’s Water Connection

6. In 2006, Wheeler completed a Water Service Connection Application (“Water Application”) for 75 Fruitland Road. Wheeler paid the \$2,000 application fee in March 2007.^{1/}

7. In November 2006, Wheeler and his contractor were prepared to connect the house’s water line to the Town’s water system, and Wheeler requested Alt come to 75 Fruitland Road to supervise and inspect the “tie in.”^{2/}

8. An authorized Water Department employee (such as Alt) is required to be present to supervise and inspect the “tie in” to ensure proper materials and procedures are used. The inspector is then required to sign the Water Application confirming the inspection was performed and the water line was correctly constructed and “tied in.”

9. Alt arrived at 75 Fruitland Road, supervised the “tie in,” and observed no problems. Alt did not sign off on the Water Application, as none of the water line running from the street curb to the house had been laid and, therefore, was not ready for inspection.

10. Within days, Alt responded a second time to 75 Fruitland Road in order to inspect the water line running from the street curb to the house.

11. Approximately one-third to one-half of the piping to be inspected had been covered (i.e. backfilled) prior to Alt’s arrival. As a result of the backfill, Alt was unable to inspect all the piping.

12. Alt inquired of Wheeler as to how he was supposed to inspect the back-filled portion

of the line to which Wheeler responded, “I inspect these too. I know how to do them.” Wheeler did not uncover the backfilled portion of the line and it was not inspected.

13. As a result of not being able to inspect all of the line, Alt did not sign off on the Water Application for 75 Fruitland Road. The Water Application has never been signed by an inspector.

14. Despite the lack of a complete inspection of the water line and the absence of a signed Water Application, 75 Fruitland Road was, and currently is, connected to, and receiving water from, the Town water system.

Wheeler’s Sewer Connection

15. On January 17, 2007, Wheeler completed an application for a Sewer Connection Permit (“Sewer Permit”) for 75 Fruitland Road. Wheeler paid \$3,120 toward the sewer application fee.^{3/}

16. As DPW Superintendent, Wheeler signed the Sewer Permit acknowledging the Town’s receipt of his own application fee.

17. Wheeler and his contractor constructed 75 Fruitland Road’s sewer line pursuant to this permit.

18. Wheeler and his contractor connected 75 Fruitland Road’s sewer line to the Town’s sewer system, and backfilled it without having the required Sewer Department inspection performed.

19. An authorized Sewer Department employee is required to inspect the line and the connection to ensure proper materials and procedures are used (e.g. proper trench depth, proper quantity of stone base under the piping). The inspector is then required to sign the Sewer Permit confirming the inspection was performed and the sewer line was correctly constructed and connected.

20. As DPW Superintendent, Wheeler signed the Sewer Permit confirming that 75 Fruitland Road’s sewer line and its connection to the Town’s sewer system had been inspected when, in fact, no such inspection was ever performed.

Conclusions of Law

21. As Barre DPW Superintendent, Wheeler was at all times relevant to this matter a municipal employee as defined in c. 268A, § 1(g).

Water Connection – 23(b)(2) Violation

22. 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.

23. Wheeler’s connection of 75 Fruitland Road’s water line to the Town’s water system without the complete required Town inspection and signed Water Application was a privilege or exemption.

24. The privilege or exemption was unwarranted because the Water Application requires “[i]nspection of all completed work before the trench is backfilled.”

25. The unwarranted privilege or exemption was not available to similarly situated property owners.

26. The privilege or exemption was of substantial value as evidenced by Wheeler’s application fee of \$2,000, and/or the expenses he would incur in uncovering and then re-covering the line to allow for the required inspection, and/or the expenses incurred in building the house (into which he would not be able to move absent an operable water system).

27. Wheeler attempted to use his official position to obtain this unwarranted privilege or exemption by (a) requesting his subordinate Alt conduct the inspection even though a substantial portion of the line had been backfilled, and (b) by commenting to Alt on his (Wheeler’s) professional experience and expertise in constructing and inspecting water lines, in order to obtain Alt’s sign-off on the Water Application.

28. Therefore, Wheeler violated § 23(b)(2).

Sewer Connection – 19(a) Violation

29. Section 19(a) prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he, or an immediate family member, has a financial interest.

30. The decision to sign off on the Sewer Permit (indicating that 75 Fruitland Road's sewer line had been constructed correctly and connected to the Town sewer system correctly) was a particular matter.

31. Wheeler participated in this particular matter as DPW Superintendent by signing the Sewer Permit approving the construction and connection of 75 Fruitland Road's sewer line.

32. Wheeler had a reasonably foreseeable financial interest in this particular matter, as evidenced by his \$3,120 sewer application fee, and/or the expenses he would incur in uncovering and then recovering the line to allow for the required inspection, and/or the expenses incurred in building the house (into which he would not be able to move absent an operable sewer system).

33. Wheeler was aware of these financial interests when he participated in this particular matter.

34. Therefore, Wheeler violated § 19(a).

Sewer Connection – 23(b)(2) Violation

35. Wheeler's construction of 75 Fruitland Road's sewer line without the required Town inspection was a privilege or exemption.

36. The privilege or exemption was unwarranted, as the Sewer Permit required Wheeler to "notify the inspector when the building sewer is ready for inspection and connection to the public sewer before any portion of the work is covered" in order for the required inspection to occur.

37. The unwarranted privilege or exemption was not available to similarly situated property owners.

38. The privilege or exemption was of substantial value as evidenced by Wheeler's application fee of \$3,120, and/or the expenses he would incur in uncovering and then re-covering the sewer line to allow for the required

inspection, and/or the expenses incurred in building the house (into which he would not be able to move absent an operable sewer system).

39. Wheeler used his official position to obtain the unwarranted privilege or exemption by, as DPW Superintendent, signing the Sewer Permit confirming the required Town inspection had been performed when, in fact, it had not been performed.

40. Therefore, Wheeler violated § 23(b)(2).

Resolution

In view of the aforementioned violations of G.L. c. 268A by Richard Wheeler, 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 Richard Wheeler:

- (1) that Richard Wheeler pay to the Commission the sum of \$4,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 23(b)(2), as noted above; and,
- (2) that Richard 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 the terms and conditions contained in this Agreement.

DATE: July 24, 2009

^{1/} The property owner is not required to pay the application fee at the time of submitting the application to the Town. However, the Water Application advises: "No service connection will be made until the applicant has paid the required connection fee."

^{2/} Wheeler had laid the portion of the water line that ran from the street curb to the town's water line (located under the public roadway), but had not yet laid the water line that was to run from the street curb to the house (to be located under Wheeler's property).

^{3/} Wheeler was not required to pay the full fee due to betterment assessments previously paid to the Town by the former property owner.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0007

IN THE MATTER OF
THOMAS KENNEDY

Appearances: Stephen P. Fauteux, Esq.
Mark Walter, Esq.
Counsel for the Petitioner

Thomas A. Dougherty, Esq.
Counsel for the Respondent

Commissioners: Charles B. Swartwood, III,
Matthew N. Kane, Jeanne M. Kempthorne,
Patrick J. King

Presiding Officer: Commissioner Matthew N.
Kane

DECISION AND ORDER

I. INTRODUCTION

From March to November, 2002, Respondent Thomas Kennedy, a General Inspector II for the Massachusetts Highway Department (“MassHighway”), was assigned to a highway construction project on Route 44 between Middleborough and Plymouth. P.A. Landers (“Landers”) was the general contractor for the project, and did the excavation, drainage and paving. Truckloads of asphalt were weighed at Landers’ plant and the company’s truck drivers were given weight slips indicating the weight of the loads. Kennedy’s duties included inspecting Landers’ deliveries of asphalt at the construction site. Kennedy certified the drivers’ weight slips and submitted them with pay slips to his supervisor at MassHighway. The pay slips were used to prepare biweekly contract quantity estimates as part of the payment process. Kennedy’s signature on a pay slip was necessary for Landers to be paid. If Kennedy did not timely submit signed pay slips, MassHighway’s payment to Landers would be delayed.

After an adjudicatory hearing, the Commission finds that the Petitioner has proved by a preponderance of the evidence that in June,

2002, Kennedy asked Terry Edwards (“Edwards”), a project manager for Landers, first to pay for a damaged tire and subsequently to pay for his gasoline expenses, and that Kennedy received gasoline reimbursements from Landers from June through November, 2002.^{1/} By his own admission, in exchange for the payments, Kennedy made things “go more smoothly” for Landers. In particular, he processed paperwork to ensure that Landers received timely payment from MassHighway and, on June 29, 2002, he certified six weight slips without actually inspecting Landers’ deliveries of asphalt. Through this conduct, Kennedy violated G.L. c. 268A, § 2(b).

II. VIOLATION OF § 2 – BRIBERY

To prove a violation of § 2(b), Petitioner must provide substantial evidence of each of the following elements: that Kennedy was a state employee, and that he, directly or indirectly, corruptly asked for or received anything of value for himself in return for being influenced in his performance of any official act or any act within his official responsibility.

There is no dispute that Kennedy was a state employee. The parties also have stipulated that Kennedy’s inspections and certifications of P.A. Landers’ asphalt deliveries were official acts and/or acts within his official responsibility. In addition, it is stipulated that his processing of official project paperwork necessary for Landers to receive payment for its work on the project was an official act and/or an act within his official responsibility.

What remains in dispute is whether Kennedy: (1) directly or indirectly, corruptly asked for or received anything of value for himself; and (2) did so in return for being influenced in his performance of any official act or any act within his official responsibility. As set forth below, we answer both questions in the affirmative.

1. Kennedy Corruptly Asked for and Received Items of Value

A. Asked and received

The evidence supports the following additional findings of fact. Beginning in 1997, the federal Department of Transportation (“DOT”) conducted an investigation of Landers.

The primary investigation was about whether Landers was delivering less asphalt to the government than it represented, and was thus overbilling the government. The investigation focused in part on Landers' delivery of asphalt to the Rt. 44 project.

As part of the investigation, Special Agent Todd A. Damiani interviewed Kennedy on December 29, 2003 and wrote a report of his interview on December 30, 2003. At the outset, Damiani told Kennedy that the DOT could not offer any rewards to Kennedy in relation to his testimony, but that it was likely that cooperation would be considered favorably by the prosecutor.

Kennedy told Damiani that in June, 2002, he blew a tire on his private vehicle while working on the Rt. 44 project.^{2/} Edwards was responsible for field operations for Landers. Kennedy told Damiani he asked Edwards if he could be reimbursed for the cost of the tire. Kennedy said that he provided a receipt to Edwards and received the cost of the tire in cash, approximately \$90 or \$100.

Petitioner called Edwards as a witness at the hearing. Edwards confirmed that Kennedy asked him for reimbursement for a damaged tire, and that Edwards paid Kennedy \$100.

In addition to the tire reimbursement, Kennedy told Special Agent Damiani that in June, 2002, he also asked Edwards to reimburse his gasoline expenses.^{3/} During the December 2003 interview, Kennedy explained to Damiani that he submitted gas receipts to Edwards, and Edwards reimbursed him through the end of the construction period. Kennedy told Damiani that he did not keep track of the amounts he received, but he approximated that the amount was between \$2,000 and \$3,000.

During the hearing, Edwards corroborated that Kennedy was reimbursed for his gas receipts. Specifically, Edwards testified that beginning in June, 2002, Kennedy requested reimbursement of his gasoline expenses. Edwards informed his supervisor, Steve Rose, at Landers about Kennedy's request and subsequently received authorization to pay Kennedy. Thereafter, Kennedy gave Edwards gasoline receipts. Approximately every two weeks, Edwards submitted the Kennedy receipts

along with his own receipts and received payment from petty cash.

Edwards testified that he gave Kennedy the payments for both the tire reimbursement and for Kennedy's gasoline expenses by putting the money in the cup holder in his truck. On each occasion, Kennedy got into Edwards' truck and took the money. According to Edwards, the amount of the payments averaged about \$100 a week, and the total for the period from June to November, 2002 was between \$2,000 and \$2,700.

Based on the foregoing, the Commission finds that this evidence supports a conclusion that Kennedy asked for and received payments for his tire reimbursement as well as gasoline expenses from Edwards from June to November, 2002.

B. Anything of value

It is clear from the evidence that, by receiving payments from Landers, Kennedy received "anything of value" for purposes of § 2(b).^{4/}

First, the Keeper of the Records for Landers produced copies of "all original gasoline fuel receipts in my custody that were submitted for reimbursement by Terry Edwards from the period of January thru November 2002." (See Ex. 16.). These receipts included more than \$ 1,430.00 in gas receipts submitted by Edwards.

During his testimony, Edwards explained that he was supposed to initial receipts for gasoline purchases before he submitted them for payment from petty cash. At first, Edwards signed his name on Kennedy's receipts for gasoline purchases and put the job number, 30140, on them before submitting them. After a time, Edwards "became disenchanted with the whole process" and stopped initialing Kennedy's receipts. He continued to write the job number on Kennedy's receipts for a time, but then stopped. He still submitted the unsigned, uninitialed receipts for payment. In either case, whether the receipts were signed and initialed or not, Edwards testified that he received money from petty cash in the amount of the receipts and paid Kennedy. With the exception of a few receipts showing small purchases and a few illegible receipts, Edwards testified he submitted

all of the remaining receipts on Kennedy's behalf.

There was some dispute about whether some or all of these receipts related to Kennedy's reimbursements. Edwards acknowledged that he recognized his own signature or initials or the job number on only an initial group of receipts. Edwards could not identify the handwriting on all of the receipts at issue. Kennedy contends that the unidentified handwriting interrupted the chain of custody and renders the receipts unreliable evidence.

We disagree. First, the receipts were submitted by the Keeper of the Records at Landers who attests that these receipts constituted "all original gasoline fuel receipts in my custody that were submitted for reimbursement by Terry Edwards from the period of January thru November 2002." (*See* Ex. 16.).

Second, we are persuaded that these receipts were submitted on Kennedy's behalf based on the testimony of Agent Damiani and Mr. Edwards. For example, Edwards' testimony makes clear that there was a usual course of conduct indicating that the vast majority of receipts related to payments that Edwards made to Kennedy. Edwards testified that he had a fleet card specific to his own car, and bought gasoline at North River Automotive in Hanover or Town Brook Service Center in Plymouth, where P.A. Landers had an account. He did not submit receipts for his own gasoline purchases for reimbursement. At times, he needed to buy gas when the crew was running equipment at the project site. On these occasions, he bought small amounts of gas – five gallons, or \$6, \$8 or \$10 of gas -- at various gas stations close to the job. He submitted these smaller receipts for reimbursement from petty cash.

With the exception of these relatively small purchases, Edwards testified that all of the remaining receipts were Kennedy's receipts. In particular, Edwards stated that the only gas receipts Edwards submitted for full tanks of gas were for Kennedy between June and November 2002. Among these receipts were gasoline purchases from Cumberland Farms in Plymouth, Grampy's Sunoco in East Taunton, and Texaco, Super Petroleum, and Sunoco A Plus in Middleborough. Edwards testified that he did not purchase gasoline from any of these stations.

Instead, Edwards testified that these receipts were for Kennedy's purchases.

Finally, Kennedy's argument concerning the scope of reimbursements somewhat misses the point. His acceptance of any reimbursement—whether at the \$100 level or the \$1,000 level—is problematic under these circumstances. Here, even excluding the receipts for less than ten dollars (since Edwards identified those as his own purchases), all of the remaining receipts between June and November, 2002 amount to \$1,342.87.^{5/} This amount clearly constitutes "anything of value" for purposes of the statute. Indeed, even if only the legible receipts showing Edwards' handwriting were considered, for a total of \$216.00, this element of the violation similarly has been proven. Consequently, Petitioner has established that Kennedy obtained something "of value."

C. Corrupt intent

To prove a violation of § 2(b), the Petitioner must prove that Kennedy asked for and received the gasoline reimbursements from Edwards with corrupt intent. The Commission previously has used the following definition of "corrupt" as follows: "of debased political morality; characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements."^{6/}

Here, we find that Kennedy solicited the payments at issue with corrupt intent. First, there was no evidence that Kennedy was entitled to receive reimbursement of his gasoline expenses from Landers, and it is safe to conclude that he was not entitled to receive such payments from a private company whose deliveries he inspected.^{7/} During the pertinent time period, moreover, the Commonwealth already was paying Kennedy for his gasoline expenses. Both the testimony of Kennedy's supervisor, Mike McGovern, and travel vouchers indicate that MassHighway reimbursed Kennedy for gas from February through November, 2002. The payments from Landers meant that Kennedy was paid back for the same gasoline expenses twice. In addition, the means by which each payment was made – with Kennedy surreptitiously and repeatedly taking the money out of the cup holder in Edwards' truck – was hardly above-board.

Next, by Kennedy's own admission, in return for the payments, he compromised his official duties and treated Landers leniently. Kennedy told Special Agent Damiani that, in exchange for the payments, he did not make sure that Landers "dotted every i and crossed every t." Kennedy indicated that if a contractor is held to the letter of the law, it would be very difficult for a contractor to work. Kennedy said he did not "bust their balls" on the project, which would allow the project to go smoother. The clear implication is that he would have made the project go less smoothly if Landers did not pay him.

As a result, we find that the Petitioner has made the requisite showing of corrupt intent.

2. Kennedy Accepted These Payments In Return For Being Influenced In His Performance Of Any Official Act Or Any Act Within His Official Responsibility.

A. Kennedy's own admissions establish the *quid pro quo*

Kennedy's admissions about "making the process go more smoothly" for Landers in exchange for the payments also support a finding that his arrangement with Edwards involved a *quid pro quo*, i.e., that he received the payments from Edwards "in return for being influenced in his performance of any official act or any act within his official responsibility."^{8/} The Supreme Judicial Court has commented that bribery "typically involves a *quid pro quo*, in which the giver corruptly intends to influence an official act through a 'gift' and that 'gift' motivates an official to perform an official act. In effect, what is contemplated is an exchange, involving a two-way nexus."^{9/}

For his part, Edwards explained that it was Kennedy's responsibility to make out pay slips and that there could be delays if payment slips were not submitted timely. He testified that he "just sort of assumed that there might be a delay in paperwork" if he did not pay Kennedy for gas receipts. Edwards "had the sense" that if they paid Kennedy the gasoline reimbursements, things would go smoothly. Edwards testified, "My belief was that it would make things go easier," and he did not want any delays. In sum, the evidence shows that Kennedy and Edwards each separately understood that Kennedy could

make the process harder or easier for Landers, and that Kennedy would not cause delays and would make the process easier if Edwards paid him.^{10/}

Kennedy objects that there is no evidence that Kennedy and Edwards expressly communicated with each other about an exchange of payments for official favor. Kennedy contends that a separate understanding by Kennedy and by Edwards without any communication of the understanding is insufficient to establish that the payments were made by Edwards and received by Kennedy "in return for" Kennedy being influenced in the performance of his official acts. We disagree.

Contrary to Kennedy's suggestion, there is no requirement that participants to a bribe have an express agreement or overt communication concerning the *quid pro quo*. In *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998), the Fourth Circuit, considering the analogous federal gratuity statute, held that "[t]o prove bribery under §201, the government is not required to prove an expressed intention (or agreement) to engage in a *quid pro quo*. Such an intent may be established by circumstantial evidence."^{11/} Here, the circumstances set forth above—including Respondent's own admissions—make clear that there was a *quid pro quo*. Both Edwards and Kennedy had the same understanding about the benefit to be received in exchange for the payments: these payments were given to Kennedy to ensure that the Route 44 Highway Project would proceed smoothly.

For his part, Kennedy ensured that the project would proceed apace in at least two respects as discussed in greater detail below. First, he made sure that there were no delays in the paperwork required before payments could be made to Landers. Second, he approved and signed off on asphalt deliveries without making the requisite inspections.

B. These payments influenced Kennedy's official acts

1. *Processing paperwork for payment*

Both McGovern and Edwards testified that there were no delays in Kennedy's processing of paperwork or in payments to Landers after Kennedy received gasoline reimbursements from Edwards. In light of Kennedy's admissions

about making the project go smoother for Landers, the absence of delays is proof that the payments influenced Kennedy to be conscientious about processing Landers' paperwork in a timely manner.

Kennedy points out, however, that McGovern and Edwards also testified that there were no delays *before* Kennedy received payments from Edwards. Kennedy contends that the absence of delays both *before* and *after* Kennedy received payments from Edwards shows that the payments did not influence Kennedy to process paperwork more quickly or any differently than he previously had. In addition, Kennedy protests that while receiving the payments from Edwards, Kennedy did not do anything beyond what his job already required him to do anyway: he already was supposed to process paperwork without delay.

Keeping things the same, however, is precisely what Edwards paid Kennedy to do. From Landers' perspective, Kennedy "just doing his job" was preferable to the implied alternative, that he would cause delays. This meant "just doing his job"—without causing any problems or delays -- had value to Landers that Kennedy could use as leverage to extract payments from Edwards.

The key question is whether performance of his official acts is what Kennedy gave in exchange for corruptly receiving payment. As stated in *United States v. Quinn*, 359 F.3d 666 (4th Cir. 2004):

It is not a defense that the official act sought to be influenced would have been done anyway regardless of the fact that the bribe was received or accepted. That is to say, even if the defendant acted as he or she normally would if the bribe had not been requested, the crime of bribery has still been committed... (citation omitted).

... The critical question is whether the government official solicited something of value with a corrupt intent, i.e., in exchange for an official act.^{12/}

2. *Inspections and certification of weight slips*

During the period when Kennedy was receiving payments and not requiring Landers "to dot every i and cross every t," Kennedy signed six weight slips for asphalt deliveries without conducting proper inspections. We find that the payments at issue influenced Kennedy to depart from required procedure in order to benefit Landers.

Every delivery of asphalt to the Route 44 project was to be inspected by a Mass Highway inspector. Kennedy's duty as an inspector was to inspect each truckload prior to certifying the weight slips to verify the amount, quality, and temperature of the asphalt. Kennedy's signature on a weight slip would indicate that Kennedy actually witnessed the asphalt being delivered. Kennedy could send the truck back if there was a problem. Kennedy also was supposed to do yield measurements, i.e. to multiply the length times the width of the asphalt used on the ground to compare it with the amount in the truck. If there was a significant inconsistency between his rough yield calculations and the weight slips, Kennedy could stop the operation.

On Saturday, June 29, 2002, Kennedy was the only inspector for paving operations at the project site. During his interview, Kennedy admitted to Agent Damiani that on June 29, 2002, he certified and signed six weight slips indicating that he had inspected the deliveries, but in fact he was not present to do the inspections. Kennedy told Damiani that toward the end of the day, he borrowed a car from one of the MassHighway employees and returned to the MassHighway office for a while. When he returned to the project site, there were some slips for asphalt supposedly pertaining to deliveries of asphalt. Kennedy measured the area that had been paved that day. He then signed the slips and put them with the other slips.

According to Agent Damiani, the DOT investigation found that in some instances, Landers sent a fictitious ticket to the project, i.e., a ticket for a load of asphalt that did not exist. There were allegations that such tickets were generated on June 29, 2002. Referring to Kennedy's statement that he did not witness the deliveries, Agent Damiani testified that "[w]e don't know if the deliveries were made" and "we don't know if they actually existed."

On the basis of this evidence, Kennedy broke from his official responsibilities: he

signed weight slips without having actually witnessed the deliveries. Kennedy would have us look upon this aberration as an understandable accommodation to a long day's work. We disagree. Instead, Kennedy's signing off on deliveries that he never saw amounts to a clear instance in which he allowed the Route 44 Highway project to proceed "smoothly" at the same time he was seeking and accepting illicit reimbursement payments from Landers.

III. OTHER ALLEGATIONS -- § 3(b), § 23(b)(2) and § 23(b)(3)

The Second Amended Order to Show Cause includes allegations that Kennedy violated § 3(b), § 23(b)(2) and § 23(b)(3) as well as § 2(b). A violation of § 3(b) is a lesser included offense of § 2(b).^{13/} While the evidence shows that Kennedy also violated § 3(b), the conclusion that he violated § 2(b) makes it unnecessary to address the issue here.

In addition, inherent in the bribery violation by Kennedy is his use of his official position to secure an unwarranted privilege of substantial value for himself that was not properly available to similarly situated individuals.^{14/} Accordingly, while the evidence supports a finding that Kennedy violated § 23(b)(2), a separate penalty for such a violation would be duplicative.

Finally, Petitioner alleged that Kennedy violated § 23(b)(3). The allegation is that, in demanding and accepting bribes from Landers, Kennedy acted in a manner that would cause a reasonable person to conclude that Landers could unduly enjoy his favor or could improperly influence him in the performance of his official acts. To comply with § 23(b)(3), Kennedy either would have had to file a disclosure with his appointing authority disclosing the facts about the bribes or to recuse himself from performing official acts with regard to Landers. The purpose of a § 23(b)(3) disclosure is to dispel the "appearance" of a conflict,^{15/} however, and no explanation in a § 23(b)(3) disclosure could cause Kennedy's solicitation of bribes from Landers to be perceived as acceptable conduct. The Commission therefore finds no separate violation of § 23(b)(3).

IV. PENALTY

As a MassHighway inspector, Kennedy engaged in the most egregious type of breach of the public trust, exacting a price for the performance of his official duties and using his position to secure from a private contractor personal benefits to which he had no entitlement.

Under the authority granted to the Commission under G.L. c. 268B, § 4(j), for his violations of § 2(b), Kennedy is hereby **ORDERED** to pay a civil penalty of \$6,000.

We assess this penalty based on at least three separate instances where Kennedy violated § 2(b). First, he impermissibly solicited and accepted payment for his damaged tire in exchange for treating Landers with leniency (as Kennedy himself termed it, an agreement not to "bust their balls"). Second, he thereafter impermissibly solicited and accepted reimbursements for his gasoline receipts in exchange for continued lenient treatment, including timely processing of paperwork (and again as Kennedy himself termed it, an agreement to refrain from requiring that Landers "dotted every i and crossed every t"). Finally, he impermissibly solicited and accepted reimbursement for his gasoline receipts in exchange for signing off on six separate asphalt deliveries, on or about June 29, 2002, all without having conducted the requisite inspections.

DATE AUTHORIZED: July 17, 2009

DATE ISSUED: July 27, 2009

^{1/} Originally, the case against Kennedy was consolidated with *In re Terry Edwards*, Docket No. 08-0006. The two cases were bifurcated on December 8, 2008, and the case against Kennedy proceeded to an adjudicatory hearing.

^{2/} Agent Damiani testified at the hearing concerning his December 29, 2003 interview of Kennedy. Mr. Kennedy's statements at that interview were admitted into evidence as admissions. "Any extrajudicial statement made by a party may be admitted in evidence against that party by an opponent, and will not be excluded on the grounds it constitutes hearsay." M. S. Brodin & M. Avery, *Massachusetts Evidence* § 8.6.1 at 502 (8th ed. 2007).

^{3/} Petitioner alleges, but did not prove, that Kennedy first corruptly asked Edwards for a gas credit card. Special Agent Damiani had interviewed Edwards in the course of the DOT investigation. Damiani testified that Edwards told him that Kennedy first

asked for a gasoline credit card, but Kennedy's superiors said no. There was no first-hand testimony by Edwards that Kennedy first asked for a credit card, however. Edwards was asked whether Kennedy asked to borrow the credit card from Landers that Edwards used to purchase gasoline, and Edwards testified that he had no memory of that. Edwards was not asked whether Kennedy requested a credit card for himself.

^{4/} See *Com. v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976) (comparing "anything of value" in G.L. c. 268A, § 2(b) and "anything of substantial value" in G.L. c. 268A, § 3(b)).

^{5/} This figure also excludes two receipts that Kennedy submitted in December, 2001 and December, 2002, outside of the relevant time period.

^{6/} *In re Jovanovic*, 2002 SEC 1062, 1066 & n.27 (quoting *Webster's Third New International Dictionary* (1993)).

^{7/} One exhibit indicated that MassHighway had an explicit policy that would prohibit an inspector from taking any type of gratuity from a company if he was inspecting the company's deliveries. The parties stipulated to an Interoffice Memorandum dated December 5, 1996, in which the Chief Counsel of MassHighway alerted MassHighway employees that "MassHighway policy prohibits an employee from accepting any gift or other form of gratuity of any value from a person or entity who is or may be doing business with MassHighway."

^{8/} G.L. c. 268A, § 2(b).

^{9/} *Scaccia v. State Ethics Commission*, 431 Mass. 351, 356 (2000).

^{10/} A suggestion by Kennedy that the payments were made for a different reason is rejected. Edwards testified that on a Saturday in July, 2002, he borrowed furniture from the Mass. Highway office for use at a private party at his home, and on Sunday morning, Kennedy picked it up at Edwards' house so he could use it. Edwards was asked four times whether he had any agreement to pay Kennedy for helping to load or move the furniture, and each time Edwards said there was no such agreement.

^{11/} *Jennings*, 160 F.3d at 1014.

^{12/} *Quinn*, 359 F.3d at 675.

^{13/} *Scaccia*, 431 Mass. at 356; *Commonwealth v. Burke*, 20 Mass. App. Ct. 489, 509 (1985); *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 376 (1976). The Commission can find that conduct violated either § 2(b) or § 3(b), but not both. See *Dutney*, 4 Mass. App. Ct. at 376-377.

^{14/} See *In re Doughty*, 1995 SEC 726, 727 n.7 (For a public employee "[t]o request or accept any item of more than nominal value... from private entities which have been, are, or may be subject to the public official's responsibilities and duties, is to use one's public position to secure an unwarranted privilege... and, in addition, necessarily creates the impression that the private entity may be improperly influencing or unduly enjoying the favor of the public official in the performance of their official duties.").

^{15/} See *EC-COI-95-9*.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 08-0018**

**IN THE MATTER OF
JOHN F. SCOTT**

Appearances: Karen Beth Gray, Esquire
Counsel for Petitioner

John F. Scott, *pro se*

Commissioners: Charles B. Swartwood, III,
Chairman, Matthew N. Kane,
Jeanne M. Kempthorne, David L. Veator,
Patrick J. King

Presiding Officer: Commissioner Matthew N.
Kane

DECISION AND ORDER

On November 18, 2008, Petitioner initiated these proceedings by issuing an Order to Show Cause under the Commission's Rules of Practice and Procedure.^{1/} An amended Order to Show Cause ("OTSC"), allowed on April 29, 2009, alleges that Respondent John F. Scott ("Scott"), a developer, violated G.L. c. 268A, §§ 2(a) and 3(a) in May 2006, by offering Jeffrey Kane ("Kane"), then the Conservation Commission ("ConCom") Chairman for the Town of Norfolk ("Town"), a free week's stay at his fly-fishing cabin in Pennsylvania while he was seeking certain approvals from, and was subject to ongoing oversight from the ConCom in connection with a particular real estate development in Norfolk. Scott filed Answers

denying the factual allegations in the OTSC, and that he had violated §§ 2(a) and 3(a).

An evidentiary hearing was held on April 29, 2009. The parties declined to make closing arguments. In rendering this Decision and Order, the Commission has considered the testimony, the evidence in the public record, the arguments of the parties, and their post-hearing submissions.

I. FINDINGS OF FACT

A. Background

1. Scott is the President of Pine Creek Development Corporation (“Pine Creek”), which develops properties.

2. On March 15, 2004, Scott, as President of Pine Creek, signed a Purchase and Sale Agreement (“P&S”) for property located in Town on Applewood Road (“Property”). Scott intended to purchase and develop the Property.

3. Any work done in or around wetlands is required by law to be reviewed by the ConCom, which has the power to approve, disapprove or conditionally approve a project. The ConCom has wide discretion to impose conditions on a project under both the Wetlands Protection Act, G.L. c. 131, § 40, and local wetland bylaws (“Order of Conditions”). Among other things, the conditions imposed by the ConCom can affect a developer’s finances, time and construction sequence. After it issues an Order of Conditions on a project, the ConCom retains continuing oversight over these projects. This oversight includes ongoing inspections with the authority to reject work, require the applicant to redo the work or pull the bond and have the work done by a third party.

4. On or about May 7, 2005, a Notice of Intent was filed with the ConCom to construct a home with related infrastructure and driveway on the Property (“the Project”).^{2/} Because the Project involved a number of significant wetland issues, including disruption of wetlands, flooding, groundwater, wildlife and rare species, the ConCom hired a peer consultant to review it.

5. Kane was the ConCom Chairman during the Project. He is a civil engineer with sixteen years of expertise in wetlands and construction. Kane

had no relationship with Scott other than as a ConCom member and its Chairman.

6. The Project went through a review process involving both Scott’s and the ConCom’s wetland experts. As of the April 12, 2006 ConCom hearing on the Project, several outstanding issues remained, including delineation of the deed-restricted area, erosion, mitigation planting, construction sequencing, construction materials and viability of the stream restoration inside the culvert. On April 12, 2006, the ConCom voted to close the public hearing and decided to handle these outstanding issues in deliberations and with the special conditions.

7. At approximately 10:00 p.m. on April 12, 2006, after the ConCom meeting, Kane told Scott that the review process had been closed, but that the ConCom had not yet voted to issue an Order of Conditions.

8. The Project was on the agenda for the April 26, 2006 ConCom meeting; however, the ConCom was unable to act on the Order of Conditions due to a full agenda involving other business.

9. Subsequently, at its May 11, 2006 meeting, the ConCom considered and revised the draft Order of Conditions.^{3/} The ConCom found that the project had six areas of significance covered by the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40.^{4/}

10. At its May 11, 2006 meeting, the ConCom voted to approve the revised draft Order of Conditions and signed the document.

11. Following the May 11, 2006 meeting, the ConCom Clerk was responsible for typing up the handwritten notations and changes made to the Order of Conditions during the meeting. After incorporating these changes, the Clerk sent a draft of the Order of Conditions back to the ConCom members for their review to ensure that the changes were accurate, and to make any needed further changes. The Order of Conditions, which specified nineteen special conditions to be met by the applicant, was subsequently released a few days later.^{5/}

B. The Cabin Offer

12. In addition to his work at Pine Creek Development Corporation, Scott is also the President, Chief Executive Officer and a Director of The Freestone Sportsman Group Inc., which owns a hunting and fishing cabin in Pennsylvania ("Cabin").

13. Scott is a one third owner of the Cabin. Robert Brown ("Brown"), who is Scott's business partner on another subdivision in Town, is a one third owner. The other one third owner of the Cabin is Michael Connolly ("Connolly"). Connolly is also a real estate broker in Scott's company selling residential real estate. Scott is married to Connolly's sister.

14. Scott is responsible for marketing the Cabin to rent. The weekly cabin rental rate is \$700. The Cabin is managed by a rental agent, Diane Prince ("Prince"), who handles the scheduling, bookings, rental payments and maintenance for the Cabin. Friends and family members of Scott, Brown and Connolly go through Prince to rent the Cabin. In the ordinary course, the owners charge family members to use the Cabin, although they may rent it at a discounted rate.

15. Scott sent an e-mail to Kane on the morning of May 12, 2006 ("the e-mail"), offering him a week's stay at the Cabin. At the time the e-mail was sent, Scott was awaiting an Order of Conditions from the ConCom regarding the Property. The e-mail stated as follows (errors in original):

Jeff, I know that every time you click on my e-mail address you say to yourself now what.I am leaving on my fly-fishing trip to my cabin in pa for a week.if and when my order of conditions is approved and written I have tasked my wife to pick them up and get them to my attorney so they can be recorded at the registry of deeds.Jeff I know that this is above and beyond your duties,however when they are done could you or Marie most likely you call my home . . . and inform my wife sandy that she can pick them up at the commissions office.lastly when you step down from the commission so no one in this dame town can say anything about anything my cabin is yours for a week with your family.it is near Williamsport little league world series park, Hershey park and Amish

country.the best trout fishing in the east and great for the kids.Jeff no bribe just a thanks for being on the up and up with us regardless of how this all plays out.I am not doing anything differently than you would when some people are messing with how I feed my family and servive...thanks jack scott...

16. When Kane read the words in the e-mail "cabin is yours for a week with your family," he understood that Scott was offering him the Cabin for a week at no cost.

17. At 10:24 a.m. on May 12, 2006, Kane responded to Scott's e-mail as follows (errors in original):

Jack,
Thanks for the offer.
Order was approved last night. FYI, it was not completed by our agent so we pretty much wrote it as we sat there. Allot of GD work. And we addressed the outstanding issues one by one to get to the point of being comfortable that they were not deal breakers. Just so you know, I've seen plans rejected in other towns when items minor items were not addressed as requested. That could have been the case here, and you probably know that. But anyway, water under the bridge.
Our agent has to type it up, not Marie, and she will get starting on this one and the other 3 on Monday. So it will not be available Monday.
I will, as requested, call your wife. Please let her know to contact me if she has not heard from me by Wednesday.
Good luck with the fly fishing.
Jeff.

18. Kane did not take any action to stay at the Cabin.

19. On May 17, 2006, the Order of Conditions was hand delivered to Scott's representative. The next day, Pine Creek purchased the Property.

20. In October 2007, Kane reported the e-mail and Scott's offer to use the Cabin to the Commission.

II. DECISION

A. *The Section 2(a) Allegation*

Section 2(a) provides, in relevant part, that an individual may not directly or indirectly, corruptly give, offer or promise anything of value to a municipal employee to influence any official act or any act within the official responsibility of such employee. In order to establish a violation of § 2(a), Petitioner must prove by a preponderance of the evidence that: (1) Scott, directly or indirectly, *corruptly* gave, offered or promised; (2) anything of value; (3) to a municipal employee; (4) with intent; (5) to influence any official act^{6/} or any acts within the official responsibility^{7/} of such employee or to do or omit to do any act in violation of his lawful duty. Only elements (1), (4), and (5) are disputed by the parties. We find that Petitioner has failed to prove by a preponderance of the evidence that Scott violated § 2(a).

The first issue is whether Scott “corruptly” offered the Cabin to Kane to use for one week “with intent to influence any official act or any act within the official responsibility” of Kane or “to do or omit to do any acts in violation of” his “lawful duty.” The Supreme Judicial Court has said that “Under G. L. c. 268A, § 2 . . . bribery requires proof of ‘corrupt intent’ . . . Bribery also typically involves a quid pro quo, in which the giver *corruptly* intends to influence an official act through a ‘gift,’ and that ‘gift’ motivates an official to perform an official act. In effect, what is contemplated is an exchange, involving a two-way nexus.”^{8/}

“Corrupt” has been defined as “of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements.”^{9/} “Bribe” is defined as “a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct esp. of a person in a position of trust (as a public official).”^{10/}

We find that Petitioner has failed to establish by a preponderance of the evidence that Scott’s offer to Kane to use the Cabin was made with corrupt intent to influence Kane with respect to his official actions as a ConCom member.

To prove a violation of § 2(a), Petitioner must establish that Scott acted with the specific intent to give the Cabin in exchange for some official act undertaken by Kane. Here there is not sufficient evidence to conclude that Scott intended to obtain a particular outcome. There is no evidence, for example, that Kane offered the Cabin in exchange for fewer orders of conditions on the Project. Instead, Scott offered the Cabin to Kane as “a thanks . . . regardless of how this all plays out.” As a result, Petitioner has failed to establish the existence of a bribe. Rather, and as set forth below, Petitioner has proven the existence of an illegal gratuity which “may constitute merely a reward for some future act . . . or for a past act.”^{11/}

Having found that Petitioner failed to demonstrate by a preponderance of the evidence that there was the requisite corrupt intent with respect to the Cabin offer, we need not reach the remaining elements of a § 2(a) violation.

B. *The Section 3(a) Allegation*

Section 3(a) prohibits an individual from directly or indirectly giving, offering or promising anything of substantial value to any municipal employee for or because of any official act performed or to be performed by such an employee. In order to establish a violation of § 3(a), the Petitioner must prove by a preponderance of the evidence that: (1) Scott, directly or indirectly, gave, *offered* or promised; (2) anything of substantial value; (3) to a municipal employee; (4) for or because of any official act; (5) performed or to be performed by such an employee.

As previously discussed, there is no dispute that the first element is established in that Scott sent an e-mail to Kane on May 12, 2006, in which he offered Kane the use of his cabin. Similarly, there is no dispute that Kane was a municipal employee at the time of the offer; and that the Cabin rents for \$700 a week.

Therefore, the first disputed element is whether Scott’s offer to Kane was of substantial value.^{12/} On one hand, Scott maintains that he did not offer something of substantial value. Rather, Scott contends that he merely offered to rent the Cabin to Kane subject to its availability and lease terms. To support his claim, Scott

contends that a single page brochure (“brochure”), entitled “Cabin For Rent,” Waterville PA, was attached to the May 11, 2006 e-mail. The brochure lists the attributes of the Property and notes “weekly and weekend packages available.” The brochure indicates that the Cabin is for rent, but does not reference any rental rates or rental terms or conditions.^{13/}

On the other hand, Kane testified that he never had a discussion with Scott about the Cabin, thus he could not have expressed any interest in renting it. Kane also testified that a cabin stay was not his type of vacation, and that he usually takes trips to ski country or Florida.^{14/}

We are persuaded that the e-mail offered something of substantial value within the meaning of G.L. c. 268A, § 3(a) for at least four reasons. First, the language Scott used in the e-mail, “my cabin is yours” suggests the giving of something to Kane. Second, the language, “thanks for being on the up and up with us regardless of how this all plays out” suggests that this offer was a token of gratitude offered by Scott for acts Kane took as the ConCom Chair, rather than any kind of arms’-length rental. Third, the reference to “so no one in this dame town can say anything about anything” suggests that Scott himself viewed this offer as inviting some kind of scrutiny. It is unlikely that Scott would have included this language, if as he contends, he were simply making an offer to rent the Cabin. Fourth, the e-mail does not include any qualifications or mention any terms on the offer (*i.e.* yours subject to availability, rent, restrictions, etc.).

Based on the language contained in the e-mail, the circumstances surrounding its transmission, and Kane’s testimony, we do not find credible Scott’s argument that he intended to rent the Cabin to Kane, subject to its availability and a rental agreement. Scott did not provide any testimony himself on this point. Nor does the e-mail refer to any particular conditions precedent to any alleged rental. Instead, we conclude that Scott intended to offer the Cabin to Kane to use for one week *for free*, to influence Kane’s official actions as the ConCom Chair with respect to the Property. Therefore, because the cost of renting the Cabin for one week is \$700, Scott’s offer to Kane to use the Cabin for one week for free was an offer of something of substantial value.

Next, we consider whether the offer of substantial value was “for or because of any official act” Kane performed or would perform.^{15/} The Supreme Judicial Court has held that “it is necessary to establish a link between a gratuity and an official act.”^{16/} In contrast to a bribe, “[a] gratuity in violation of [§ 3] . . . can either be provided to an official as a reward for past action, to influence an official regarding a present action, or to induce an official to undertake a future action.”^{17/}

In analyzing whether a gratuity was given “for or because of an official act performed,” the Commission “will weigh the totality of all of the circumstances surrounding the gratuity, drawing reasonable inferences from the circumstances.”^{18/} The Commission may consider such factors as the subject matter of the pending matter and its impact on the giver, the outcome of particular votes, the timing of the gift, or changes in a voting pattern.^{19/} In addition, the Commission may consider, as discussed in *In re Life Ins. Ass’n of Mass., Inc.*, 2003 528 SEC, the following factors: whether the gift was aberrational conduct for the giver; the nature, amount and quality of the gift; whether the gift was a business expense for the giver; to whom was the gift targeted; whether there was reciprocity; the existence of personal friendship; sophistication of the parties; and whether the gift is part of a repetitive occurrence. “We will consider whether the gratuity was given substantially, or in large part was motivated by, the requisite intent to influence a present or future official act of the public official or to reward a past action.”^{20/}

We find that Scott offered the Cabin for or because of Kane’s specific actions on the ConCom. First, the ConCom’s decision to grant or deny the Order of Conditions for the Property was a particular matter^{21/} and the process of obtaining approval from the ConCom for the project involved several official actions by the ConCom, in which Kane participated. The ConCom could have voted to deny Scott the permit at its May 11, 2006 meeting, or it could have created conditions that made development improbable and/or too costly to proceed. Further, the May 11, 2006 vote to approve the draft Order of Conditions was not the final official act by the ConCom members concerning the Project. A final version of the nineteen

special conditions had not yet been created in final form, and the ConCom still had the opportunity to review and finalize the Order of Conditions and the nineteen special conditions after the May 11, 2006 vote. Therefore, the ConCom could have acted on the Order of Conditions after the May 11, 2006 vote if deemed necessary. Moreover, the evidence was clear that Scott did not know that the ConCom had acted on his Order of Conditions on May 11, 2006 at the time he sent the e-mail on May 12, 2006.

Second, the ConCom retained significant oversight of the Project after the Order of Conditions was delivered. In particular, the ConCom maintains jurisdiction until completion of a project and can enter and inspect the Property to ensure compliance with the conditions. The ConCom can reject work, require the work be redone, or pull the bond and have the work done by a third party. Kane played an active role in such matters because he was the ConCom Chairman and had extensive knowledge of wetland construction.

We therefore find that the Petitioner has established by a preponderance of the evidence that Scott's May 12, 2006 offer for Kane to use the Cabin was offered to reward Kane for past actions he had taken, and future actions he would take, as ConCom Chair related to the Property and the Order of Conditions. Accordingly, we conclude that there is a preponderance of evidence that Scott offered the Cabin to Kane for or because of his official actions as ConCom Chair related to the Property.

IV. Conclusion

In conclusion, Petitioner has proved, by a preponderance of the evidence, that Scott violated G. L. c. 268A, § 3(a) by offering something of substantial value to a municipal employee for or because of official acts performed or to be performed by him. Petitioner has failed to prove by a preponderance of the evidence that Scott violated G.L. c. 268A, § 2(a).

V. Order

Having concluded that Respondent John F. Scott violated G.L. c. 268A, § 3(a) and pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby

ORDERS John F. Scott to pay a civil penalty of \$2,000.

DATE AUTHORIZED: September 18, 2009

DATE ISSUED: October 8, 2009

^{1/} 930 CMR 1.00 *et seq.*

^{2/} Although then Applewood property owners Eldon Langley and his wife Charlotte filed the Notice of Intent with the ConCom, Scott and/or Scott's corporation was ultimately to be the developer/owner of the property and Scott had site control over the property by virtue of the purchase and sale agreement.

^{3/} The ConCom staff typically creates a draft Order of Conditions prior to the ConCom meeting. The draft is then edited and amended by the ConCom members during their meeting.

^{4/} The areas were: public water supply; private water supply; groundwater supply; storm damage prevention; prevention of pollution; protection of wildlife habitat; and flood control.

^{5/} Significant modifications of the Order of Conditions made at the May 11, 2006 meeting included:

Special Condition 4 required wetland replication be constructed in full and conditionally approved prior to the original wetlands being disturbed and prior to construction of any structures such as driveways or buildings.

Special Condition 13 required the applicant to provide a final planting plan for ConCom approval prior to the commencement of any work at the site.

Special Condition 16 required a stabilized construction entrance which went beyond the original application.

Special Condition 19 was a \$5,000 cash security bond. Although such bonds are not always required, the ConCom felt "very strongly about because there was a significant amount of disturbance."

^{6/} "'Official act,' any decision or action in a particular matter . . ." G. L. c. 268A, § 1(h).

^{7/} "'Official responsibility', the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G. L. c. 268A, § 1(i).

^{8/} *Scaccia v. State Ethics Commission*, 431 Mass. 351, 356 (2000) (emphasis added). See also *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) (“The distinguishing feature of each crime is its intent element. Bribery requires an intent ‘to influence’ an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because of’ an official act. In other words, for bribery there must be a *quid pro quo*--a specific intent to give . . . something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act . . . or for a past act.”). See e.g., *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 367 (“‘I understand in politics that if you have something and I want that something, I have to pay for that something. Why should I make money and you people who gave that certain thing, not make anything on the deal?’” [He] repeated the terms of the deal he had proposed the day before, stating again that he could guarantee the votes of his brother Robert and of Dutney . . . [He] left the meeting and proceeded to his brother Robert’s apartment, where he gave Robert \$500”); *Commonwealth v. Shaheen*, 15 Mass. App. Ct. 302, 304 (1983) (defendant’s agent asked public official, “[c]an you be of any aid to me in regards to . . . this fire?” Agent later paid official.); *Commonwealth v. Favulli*, 352 Mass. 95 (1967) (clear understanding among the parties and money was exchanged); *In re Jovanovic*, 2002 SEC 1062 (decision and order finding that offer by Jovanovic of cash to state worker in exchange for favorable ruling on application Jovanovic had pending violated both sections 2(a) and 3(a)); *In re Stanton*, 1992 SEC 580 (disposition agreement fining Speaker’s business manager \$3,500 for violating § 2(b) by receiving a free \$1,600 television set from a vendor in return for approving vendor’s fraudulent invoices).

^{9/} *Webster’s Third New International Dictionary* (1993).

^{10/} *Id.*

^{11/} *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-405 (1999).

^{12/} Anything worth \$50 or more is of “substantial value” for purposes of § 3. *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

^{13/} Conflicting testimony was offered regarding whether the brochure was actually attached to the e-mail. Scott did not offer any testimony. For his part, Brown initially testified that Scott had attached the brochure to the e-mail. However, he later testified that he could not be certain whether the brochure was included as an attachment. Finally, Kane testified that the brochure was not attached to the e-mail. In any event, the existence of the brochure does not change

the outcome – even if it was sent to Kane. First, the brochure does not contain information about either rental rates or any rental terms and conditions. Rather, it provides highlights for the property (its proximity to Little Pine Creek State Park, beaches, hunting and trout fishing, etc.) which are all consistent with a gift. Second, Scott’s e-mail already promised Kane the Cabin “for a week,” thus the one page brochure referencing “weekly and weekend packages” appears to be solely informational.

^{14/} There was conflicting testimony concerning Kane’s alleged interest in the Cabin. Scott disputes this and contends in his brief that on May 11, 2006, he met with Kane and that during that meeting Kane asked him about the Cabin. However, Kane testified that he did not speak with Scott on May 11, 2006 and that he never discussed the Cabin with Scott and that he did not ever have any interest in renting the Cabin. Connolly, who is a 1/3 owner of the Cabin, Scott’s brother-in law, and works for Scott’s real estate company, testified that in 2005, Scott told him that Kane was interested in renting the Cabin. Brown, who is 1/3 owner of the Cabin, testified that Scott was “going to see if [Kane] wanted to rent the Cabin.” In any event, we need not resolve this dispute in view of the explicit offer of the Cabin in Scott’s e-mail, as set forth above.

^{15/} “Official act” is “any decision or action in a particular matter . . .” G.L. c. 268A, § 1(h).

^{16/} *Scaccia*, 431 Mass. at 355.

^{17/} *Id.* at 356.

^{18/} *In re Life Ins. Ass’n of Mass., Inc.*, 2003 SEC 528.

^{19/} *Scaccia*, 431 Mass. at 357.

^{20/} *In re Life Ins. Ass’n of Mass., Inc.*, 2003 SEC 528.

^{21/} “Particular matter” means “any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.” G.L. c. 268A, § 1(k).

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**IN THE MATTER OF
THOMAS COMMERET**

PUBLIC EDUCATION LETTER

Dear Mr. Commeret:

As you know, the State Ethics Commission has conducted a preliminary inquiry into whether you, as the Marblehead Community Charter Public School (the "School") Head of School, violated § 23(b)(3) of G.L. c. 268A, the conflict of interest law, by hiring a School Board of Trustees ("Board") member and/or his company to perform work at the School. Based on the staff's inquiry (discussed below), the Commission voted on April 17, 2009, to find that there is reasonable cause to believe that you violated the conflict of interest law.

For the reasons discussed below, however, the Commission has concluded that further proceedings in your case are not necessary. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry, and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with these provisions of the conflict of interest law.

By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

For the relevant period, you were the Head of School. Your contract with the School ended in June 2009. Your hiring authority was the Board. As Head of School, you were responsible for all staffing decisions.

In late 2003, the Board made plans to expand the leased space used by the School by adding four classrooms and a gymnasium (the "Project") at a cost of approximately \$500,000.

A contractor was hired to perform the expansion work. In 2003, you hired Board member Robert Erbetta and his company, Management Design Associates, Inc. ("MDA"), to be the School's project manager on the Project. Mr. Erbetta and his company served in that capacity until approximately February 2006.

Although you told us in a statement made under oath that you believed that Board members knew of this project manager arrangement, several Board members stated that they were unaware that Mr. Erbetta was being compensated for this work until after the fact.

School records indicate that Mr. Erbetta received a total of \$93,833 in payments from the School between November 2003 and February 2006. Because his invoices are lacking in detail, it is difficult to determine how much of the \$93,833 was actually for project management work for the Project. It appears that, at a minimum, Mr. Erbetta charged the School \$12,482 for work performed between November 2003 and February 2006 for what he termed "miscellaneous labor," which was not related to the Project. This "miscellaneous labor" included loam spreading, painting, chair set-up, and sweeping.

In July 2006, you hired Mr. Erbetta as the School's part-time facilities coordinator. As facilities coordinator, Mr. Erbetta performed maintenance, repairs, and small construction projects at the School. According to a copy of Mr. Erbetta's employment contract for 2006-2007, he was to be paid at the annual rate of \$20,000. The contract does not specify Mr. Erbetta's work schedule, but it appears he performed about 10 hours of work per week. Mr. Erbetta's salary was increased to \$20,400 in his contract for 2007-2008.

The Board only learned of Mr. Erbetta's hiring as facilities coordinator after the fact. It was standard operating procedure at the School for you to assume "unilateral control" over staff hiring.

In March 2005 and again in March 2007, Mr. Erbetta voted to renew each of your two-year contracts as Head of School.

II. Discussion

As a School trustee, you were a “state employee” as that term is defined in G.L. c. 268A, § 1(q). As such, you were subject to the provisions of the conflict of interest law that apply to state employees, and, in particular for the purposes of this discussion, to § 23(b)(3) of that statute.

Section 23(b)(3) of G.L. c. 268A prohibits a public employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person’s favor in the performance of his official duties, 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. This subsection’s purpose is to deal with appearances of impropriety, including actions that give rise to appearances that public officials have given people preferential treatment. This subsection further provides, in effect, that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of a conflict of interest. The appointing authority must retain that written disclosure as a public record.

There is reasonable cause to believe that you violated § 23(b) (3) by hiring Mr. Erbetta (and/or Mr. Erbetta’s company, MDA) as project manager on the Project, by having Mr. Erbetta do non-Project-related maintenance work and by hiring Mr. Erbetta as the facilities coordinator without disclosing these facts to the Board. Where the Board was your appointing authority, and Mr. Erbetta was one of the trustees on the Board, such action gave the appearance that Mr. Erbetta and/or MDA could improperly influence you or unduly enjoy your favor or that you were likely to act or fail to act as Head of School as a result of Mr. Erbetta’s and/or MDA’s undue influence.

III. Disposition

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. Therefore, this matter is now closed.

Very truly yours,

Karen L. Nober
Executive Director

DATE: November 3, 2009

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**IN THE MATTER OF
ROBERT ERBETTA**

PUBLIC EDUCATION LETTER

Dear Mr. Erbetta:

As you know, the State Ethics Commission’s Enforcement Division has conducted a preliminary inquiry into whether you, as a Marblehead Community Charter Public School (the “School”) Board of Trustees (“Board”) member, violated §§ 6, 7, and 23 of G.L. c. 268A, the conflict of interest law, by performing private compensated work at the School on a project for which you were the Board liaison, and thereafter by voting on the contract of the head of school, who had authorized that work. Based on the staff’s inquiry (discussed below), the Commission voted on April 17, 2009, to find that there is reasonable cause to believe that you violated the conflict of interest law.

For the reasons discussed below, however, the Commission has concluded that further proceedings in your case are not necessary. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public’s attention, the facts revealed by the preliminary inquiry, and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with these provisions of the conflict of interest law.

By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you

have chosen not to exercise your right to a hearing before the Commission.

III. The School Expansion Project

A. Facts

You were appointed to the Board in 2001 and served on the Board until October 2007. In late 2003, the Board made plans to expand the leased space used by the School by adding four classrooms and a gymnasium (the "Project") at a cost of approximately \$500,000. Head of School Thomas Commeret hired a contractor to do the work, and the Board designated you to serve as the Board's liaison on the Project. As the liaison, you presented Project updates to the Board and you were involved in the budget meetings regarding the Project.

In 2003, Mr. Commeret hired you and your company, Management Design Associates, Inc. ("MDA"), to be the School's project manager on the Project. You and your company served in that capacity until approximately February 2006.

Although you told us in a statement made under oath that you believed that Board members knew of this project manager arrangement, several Board members stated that they were unaware that you were being compensated for this work until after the fact.

In your defense, you note that as a trustee you regularly filed disclosure statements with the State Department of Education as required by G.L. ch. 71, § 89.^{1/} (These disclosures are also filed with the Commission.) While none of the disclosures specifically mentions the Project, your disclosure filed in January of 2004 identified you as a School trustee and states that you had the following financial interest at the School: providing "const. mgmt. from time to time." Your April 2005 disclosure states "const. mgmt.," while the August 2006 disclosure states "const. mgr." According to you, you believed that, as a School trustee, you and/or your company could do compensated work for the school as long as you completed the financial disclosure forms.

Records obtained from the School indicate that you received a total of \$93,833 in payments from the School between November 2003 and February 2006. Because your invoices are

lacking in detail, it is difficult to determine how much of the \$93,833 was actually for project management work for the Project. It appears that, at a minimum, you charged the School \$12,482 for work performed between November 2003 and February 2006 for what you termed "miscellaneous labor," which was not related to the Project. This "miscellaneous labor" included loam spreading, painting, chair set-up, and sweeping.

B. Discussion

Section 6

As a School trustee, you were a "special state employee" as that term is defined in G.L. c. 268A, § 1(o). *EC-COI-97-3*. As such, you are subject to the provisions of the conflict of interest law that apply to state employees, and, in particular for the purposes of this discussion, to §§ 6, 7 and 23(b)(3) of that statute.

In relevant part, § 6 prohibits any state employee from participating as a state employee in a particular matter in which to his knowledge he, or a business organization in which he is serving as officer, director, trustee, partner or employee has a financial interest.

The School's contract with the construction company was a particular matter. In addition, the decisions made by the Board regarding the Project were also particular matters. You participated as a state employee in those particular matters by acting as the Board's liaison regarding the contract by presenting updates to the Board and by being involved in the Project budget meetings. Where you were being compensated in your private capacity as the project manager for the Project, you had a financial interest in these matters. The Board could have decided at any time that it was dissatisfied with the progress of the Project, or with the performance of the project manager. In effect, you were substantially involved in the ongoing review of your own performance and continuation of work, even though your board was not aware of that fact. Therefore, there is reasonable cause to believe that you violated § 6 by participating as a trustee in matters concerning the Project in which you had a financial interest.

Section 7

Section 7 of G.L. c. 268A prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party, of which interest he has knowledge or has reason to know.

As stated above, as a School trustee, you were a “special state employee.” At the same time as you were a School trustee, you had a financial interest in the Project contract as you were paid for work you did as project manager regarding that contract. You also had a financial interest in the contractual arrangement with the School by which you provided more than \$12,000 in non-Project related services to the School. Therefore, there is reasonable cause to believe that you violated § 7.

In 2004 and 2005, you filed disclosures under G.L. c. 71, § 89(v) stating that you were a School trustee and that you had a financial interest in providing construction management services to the School. The G.L. c. 71, § 89(v) disclosures you made as a School trustee were insufficient to meet the disclosure and exemption requirements of G.L. c. 268A for purposes of § 7. In addition, you did not file any disclosures concerning the more than \$12,000 that you received from the School for doing routine maintenance work between November 2003 and February 2006, which are separate § 7 violations. Although you could have sought exemptions under § 7(e)^{2/} to perform this work, such exemptions would have required separate disclosures to and approvals by the Governor. In any event, you did not obtain any § 7(e) exemptions.

IV. Vote on Head of School Contract

A. Facts

In or about March 2005, the Board voted, with you voting in favor, to renew Mr. Commeret’s two-year contract (July 2005 – June 2007) as Head of School. You so participated without making any disclosure that Mr. Commeret had hired you as the project manager and that he had approved and was approving invoices from you for that work as well as approving payments to you for non-Project-related work. (In March 2005, you submitted invoices totaling \$752, purportedly for work you performed on the Project.)

B. Discussion

Section 6

The School’s 2005 decision to renew Mr. Commeret’s contract as Head of School was a particular matter. You participated in that decision (voting in favor), despite the fact that you were at the time performing paid project management work for the School under an agreement negotiated and agreed to by Mr. Commeret and you were doing paid non-Project work approved by Mr. Commeret. Therefore, there is reasonable cause to believe that you violated § 6 by voting to retain Mr. Commeret in a position where it was reasonably foreseeable that he would be able to allow you to continue to receive compensation for work that he authorized you to perform. *See EC-COI-93-17* (municipal counterpart to § 6 prohibits a teacher from participating in the proposed re-negotiation of the town manager’s contract, because such re-negotiations will determine whether or not the manager continues to participate in the union negotiations, which in turn will affect the teacher’s financial interests).

Section 23(b)(3)

Section 23(b)(3) of G.L. c. 268A prohibits a public employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person’s favor in the performance of his official duties, 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. This subsection’s purpose is to deal with appearances of impropriety, including actions that give rise to appearances that public officials have given people preferential treatment. This subsection further provides, in effect, that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority all of the relevant circumstances which would otherwise create the appearance of a conflict of interest. The appointing authority must retain that written disclosure as a public record.

There is also reasonable cause to believe that you violated § 23(b)(3) by voting to renew Mr. Commeret’s contract, while at the same time Mr. Commeret was approving your invoices for work at the School, thereby giving the

appearance that Mr. Commeret (who had hired you as the project manager, which was not disclosed to the Board) could improperly influence you or unduly enjoy your favor or that you were likely to act or fail to act as a result of undue influence of Mr. Commeret.

III. Disposition

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. Therefore, this matter is now closed.

Very truly yours,

Karen L. Nober
Executive Director

DATE: November 3, 2009

^{1/} General Laws, ch. 71, § 89(v) provides: “Notwithstanding the provisions of this section or any other general or special law to the contrary, for the purposes of chapter 268A: (i) a charter school shall be deemed to be a state agency; and (ii) the appointing official of a member of the board of trustees of a charter school shall be deemed to be the commissioner of education. Members of boards of trustees of charter schools operating under the provisions of this section shall file a disclosure annually with the state ethics commission, the department of education, and the city or town clerk wherein such charter school is located. The form of the disclosure shall be prescribed by the ethics commission and shall be signed under penalty of perjury. Such form shall be limited to a statement in which members of the board of trustees shall disclose any financial interest that they or a member of their immediate families, as defined in section 1 of said chapter 268A, have in any charter school located in the commonwealth or in any other state or with any person doing business with any charter school.

Each member of a board of trustees of a charter school shall file such disclosure for the preceding calendar year with the commission within 30 days after becoming a member of such board of trustees, on or before September 1 of each year thereafter that such person is a member of such board and on or before September 1 of the year after such person ceases to be a member of such board; provided, however, that no member of a board of trustees shall be required to file such disclosure for the year in which he ceases to be a member of such board if he served less than 30 days in such year.”

^{2/} At the time in question, § 7 (e) stated that § 7 does not apply to a special state employee who files with the State Ethics Commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him. [The statute has since been amended to remove the requirement of the consent of the executive council.]

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0001**

**IN THE MATTER OF
SCOTT MARTIN**

Appearances: Candies Pruitt-Doncaster, Esq.
Counsel for Petitioner

Stephen P. Colella, Esq.
Tyler Pentoliros, Esq.
Counsel for Respondent

Commissioners: Charles B. Swartwood, III ,
Jeanne M. Kempthorne,
David L. Veator and Patrick J. King

Presiding Officer: Commissioner David L.
Veator

DECISION AND ORDER

Procedural Background

This matter was commenced on January 12, 2009, with the issuance of an Order to Show Cause (“OTSC”) alleging that Martin had violated G. L. c. 268A, §§ 23(b)(2) and (3)^{1/} between March 2005 and January 2007 by, while serving as a member and the chairman of the Town of Rowley (“Town” or “Rowley”) Board of Water Commissioners, receiving free transportation from two employees of the Rowley Water Department (“Water Department”). Martin answered the OTSC on February 2, 2009, denying the allegations. Martin’s subsequent motion for summary decision was denied and an adjudicatory hearing was held on August 11, 2009. The parties made their closing arguments at the August 11th

hearing before Commissioner Veator and thereafter submitted final memoranda.

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 Martin, who had lost his driver's license for driving under the influence, violated G. L. c. 268A, § 23(b)(2) by, at least once a week between March 2005 and January 2007, arranging to have the Water Department Superintendent ("Superintendent") and, on two occasions when the Superintendent was on vacation, another employee, drive a him in a Town truck from his place of private employment in Newburyport to the Water Department in Rowley to sign the department payroll and bills, and then to his home. Allegedly, further, on one of those occasions, Martin had the employee drive him from his private employment to a drug testing facility and then to the Water Department. The OTSC also alleges that Martin violated § 23(b)(3) by signing the Water Department payroll and by supervising the Superintendent and the employee after they had provided him with the afore-described transportation. In its brief, Petitioner characterizes Martin's conduct as using his Water Department subordinates as his private chauffeurs and argues that Martin received free transportation worth over \$1,000.

While his Answer denied all of the allegations, Respondent through his hearing testimony and his brief has effectively conceded that he received virtually all of the free transportation as alleged. Respondent argues, however, that nearly all of the free transportation he received did not violate the conflict of interest law because it was solely to get him to Rowley to conduct his official business as a Water Commissioner of signing Water Department payrolls and bills, and that the couple of side trips he made did not violate the law because they were not of substantial value. In addition, Respondent argues that his conduct did not create an appearance of conflict of interest.

The Facts

Martin is a Rowley resident and has been one of the three members of the Rowley Board of Water Commissioners ("Board") since his election in 2000. There is no evidence that Water Commissioners are paid. The Board is the governing body of the Water Department and meets about twice monthly.

In 2004, Martin lost his driver's license for six years for operating under the influence. As a condition of his probation, Martin was required to submit to periodic urinalysis.

Between March 2005 and January 2007, Martin was privately employed at Arwood Machinery ("Arwood") in Newburyport. Martin commuted to work by arranging rides with others, including Arwood coworkers. Martin regularly worked at Arwood until 3:30 p.m. daily.

John Rezza ("Rezza"), as Superintendent, is a salaried full-time Town employee and the day-to-day administrator of the Water Department. Gary Dini ("Dini"), as the Water Department's Primary Operator from fall 2005 to spring 2007, was an hourly paid full-time Town employee responsible for field operations and subordinate to the Superintendent. In 2006, Dini was paid at an hourly rate of \$19.64. Water Department employees regularly work 7:30 a.m. to 3:30 p.m. daily.

Martin did not have any personal relationship or friendship with Rezza or Dini.

As Superintendent, Rezza had the use of a Town truck for Town business and, because he was on call for emergencies 24/7, for his daily commute between his home and work. During the relevant time period, Rowley did not have any policy governing the use of Town vehicles. Rezza understood, however, that the Town truck was not for personal use.

Water Department bills payable and employee payrolls require the signatures of at least two of the three Water Commissioners for processing. The bills payable and payrolls were signed by the Water Commissioners and processed at Town Hall on alternating weeks.

Rezza had a practice of calling Martin when he needed to have bills payable or employee payrolls signed. According to Rezza, he called Martin because he was generally more available

than the other Water Commissioners and more flexible in his work schedule. A few times, Martin called Rezza for a ride to the Water Department. Sometimes Martin would get to the Water Department by getting a ride with one of the persons with whom he regularly rode to and from work. Mostly, Rezza went to Martin's place of private employment at Arwood in Newburyport and brought him back to the Water Department to sign the bills or payroll. These trips were timed so that Martin was picked up at about 3:30 p.m. when his Arwood work day ended. Rezza did not feel pressured or intimidated by Martin. Rezza often dropped Martin off at Martin's home which was on Rezza's way home from work. Rezza also twice took Martin to cash his check.

When Rezza was on vacation, Martin, as Board chairman, took over his duties as Superintendent. In February 2006, while Rezza was on vacation, Martin, as acting Superintendent, called Dini and asked him to pick him up at Arwood and bring him to the Water Department to sign the payroll. Martin did this three times.

The first time Dini gave Martin a ride at his request, Martin had Dini remove the magnetized Town logo from the truck, stating that words to the effect of "people don't need to know our business," and directed Dini to drive to the Salisbury Office of Community Corrections ("SOCC") drug testing facility in Salisbury. Once at the SOCC, Dini waited outside for Martin for five minutes, then drove him to the Water Department. In total, Dini was away from the Water Department for between 45 minutes to one hour. The second time Martin called, Dini simply picked Martin up at Arwood and brought him to the Water Department within about half an hour. The third and final time Martin called, Martin asked Dini to drive him to his bank to cash a check before they returned to the Water Department. This third trip took Dini about 45 minutes.

Between March 2005 and January 2007, Martin signed the Water Department's bills payable 76 times. During the same period, Martin signed the Water Department payroll 53 times.

A taxi ride from Arwood to the Water Department would have cost \$11 in 2005 and \$13 in 2006-2007. A taxi ride from Arwood to

the SOCC drug testing facility in 2006 would have cost \$8. A taxi ride from the SOCC to the Water Department in 2006 would have cost \$20.

Discussion

The Petitioner must prove its case and each element of the alleged violations by a preponderance of the evidence. 930 CMR 1.01(9)(m). Thus, to prove its allegation that Martin violated § 23(b)(2), Petitioner was required to establish by a preponderance of the evidence that Martin was a municipal employee who, knowingly or with reason to know, used or attempted to use his official position to secure for himself unwarranted privileges or exemptions of substantial value which were not properly available to similarly situated individuals. To prove its allegation that Martin violated § 23(b)(3), Petitioner was required to establish by a preponderance of the evidence that Martin was a municipal employee who, knowingly or with reason to know, acted in a manner which would cause a reasonable person with knowledge of the relevant circumstances to conclude that Rezza and/or Dini could unduly enjoy his official favor or that he was likely to act or fail to act as a result of their undue influence.

As to both alleged violations, there is no dispute and the preponderance of the evidence clearly establishes that Martin was an elected Board member, at all relevant times, and, therefore, a Rowley municipal employee within the meaning of G. L. c. 268A.

Section 23(b)(2)

The evidence in the record establishes that Martin knowingly, or with reason to know used or attempted to use his official position as a Water Commissioner by seeking, accepting or receiving free transportation from Rezza and Dini. It is clear by a preponderance of the evidence that under the circumstances, Martin knew that he was receiving free transportation from Rezza and Dini because he was a Water Commissioner. Simply put, as far as the evidence shows the only reason either Rezza or Dini had to pick Martin up at Arwood and to drive him to the Department or anywhere else was that Martin was a Water Commissioner. There is no evidence of any personal friendship between Martin and Rezza or Dini which might have motivated them to help Martin for reasons unrelated to his official position. This element is

particularly evident with regard to Martin's three calls to Dini while Rezza was on vacation and Martin was acting Superintendent. If Martin did not actively know that he was using his official position to obtain free transportation, it is beyond dispute that he had reason to know he was doing so.

Thus, the evidence shows that Martin, knowingly or with reason to know, repeatedly both actively and passively used his official position as a Water Commissioner to secure free transportation from subordinate Water Department employees.

Petitioner argues that all of the transportation Martin received was unwarranted not only because it was not authorized by Town policy or by the Board of Selectmen, but because the rides served Martin's personal purposes at Town expense. Petitioner alleges that Martin used town employees as his private chauffeurs to a degree that was "excessive and unauthorized." Respondent counters by asserting that the transportation he received was not for his benefit but for the Town's benefit and that he had no obligation to travel to the Department or need for transportation provided by Department employees. Respondent argues that instead of being chauffeured by Department employees for his private purposes and benefit he was like a needed pump which was transported to the Department to keep it functioning for the public benefit.

A privilege or exemption is unwarranted when it is not authorized by law or regulation or is not otherwise justified. In general, the unauthorized use of public resources for a private purpose is an unwarranted privilege. Based on the evidence, some of the transportation received by Martin, specifically his side trips to the SOCC and to his bank, was plainly unwarranted. The clearest example of unwarranted transportation was Martin's having Dini drive him to the SOCC drug-testing facility in Salisbury. Crediting Dini's testimony, the impropriety of this was apparently clear even to Martin who had the Town logos removed from the truck. Less obviously improper, but still plainly inappropriate, were Martin's two requests to Rezza and single request to Dini to drive him to the bank to cash his check. Each of these side trips obviously involved the use of Town vehicles and the time of town employees for travel solely for Martin's personal benefit.

Accordingly, while noting that the evidence shows that these clearly inappropriate side trips all occurred in connection with Martin being transported to the Water Department to sign payrolls and/or bills payable, we nevertheless conclude that the free transportation to the SOCC and to Martin's bank was an unwarranted privilege which was not properly available to Martin as a Water Commissioner.

By contrast, the evidence in the record of the allegedly unwarranted nature of the majority of the free transportation received by Martin as a Water Commissioner, i.e., the at least weekly rides from Arwood to the Water Department to sign payrolls and bills payable and then to Martin's home, is divided. On the one hand, like all of the free transportation, this travel was not authorized by Town by-law or regulation, as the Town had none relating to the use of Town vehicles. Nor had the Board of Selectmen approved the provision of free transportation to Martin. On the other hand, the use of Town resources to transport Martin to the Water Department was, in contrast to the above-discussed side trips, not without a public purpose.

The evidence indicates that the Water Department benefited from Martin's being transported there in order to sign payrolls and bills payable. Martin was apparently unpaid as a Water Commissioner and could have declined to make these trips. There is no evidence that Martin had anything to lose by not making the trips. Martin apparently had separate means of transportation between his home and Arwood on the days he did not go to the Water Department and there is no evidence that he would have been without transportation home, or he would have incurred any cost or expense, if he had not received rides from Rezza or Dini. Martin was not under any obligation to hire a cab to get to the Water Department to sign the payrolls and bills payable. Rezza apparently decided that it was less trouble to pick up Martin at Arwood than to obtain the signature of another Water Commissioner. Apart from the side trips to the SOCC and his bank, Martin could reasonably have thought that it was not unwarranted for him to be provided with transportation in a Town vehicle to the Water Department to perform his official functions as a Water Commissioner, particularly where he served without compensation.

Based on the evidence in the record, we find that, as to the above-described majority of the free transportation received by Martin, Petitioner has not met its burden of proving by a preponderance of the evidence that the free transportation Martin received was an unwarranted privilege. Thus, in contrast to the side trips, Petitioner did not establish by a preponderance of the evidence that the transportation of Martin from Arwood to the Water Department to sign bills payable and the payroll was the unjustified use of public resources for Martin's private purposes. Instead, the evidence is at least equally supportive of the conclusion that the transportation provided to Martin, excluding the side trips, was the use of public resources, albeit not properly authorized by the Board of Selectman or Town policy, primarily for the public purposes of the Water Department. That Martin was driven home after signing the Water Department documents does not change what the evidence shows was more likely than not the primary reason why he was transported by Rezza and Dini from Arwood to the Water Department. Therefore, we find that Petitioner has failed to establish by a preponderance of the evidence that the weekly free transportation received by Martin, excluding the side trips, was an unwarranted privilege that was not properly available to him as a Water Commissioner.

Finally, in order to establish that Martin violated § 23(b)(2) by using his Water Commissioner position to secure the unwarranted privilege of free transportation for his private purposes, securing free transportation, Petitioner was required to prove that the free transportation was of substantial value. Anything worth \$50 or more is of "substantial value" for G. L. c. 268A purposes.^{2/}

Because we have found that Petitioner only proved that Martin's side trips to the SOCC drug testing facility and to his bank were an unwarranted privilege and failed to prove that the other free transportation he received was unwarranted, we need only consider the evidence of the value of the side trip travel.

There is no evidence in the record of the value of the two trips to the bank that Rezza provided to Martin, let alone that they were of substantial value. As to the Dini-provided side trips, there is again no evidence of the value of the bank side trip except that the trip took about

fifteen minutes longer than the trip without any side trips. As to the side trip to the drug-testing facility, the only evidence of value is testimony concerning the cost of travel by taxi. This evidence indicates that, if the travel had been done by taxi, the side trip to the SOCC would have added \$15 to the cost of simply traveling from Arwood to the Department (a \$13 taxi ride).^{3/} Thus, even with the value of Dini's work-time used in traveling to the SOCC added in, the side trip had a value of under \$50.^{4/} Thus, the evidence does not establish that the side trips were of substantial value either individually or collectively.^{5/}

Accordingly, we find that Petitioner has not proved by a preponderance of the evidence that the unwarranted privilege that Martin secured through his Water Commissioner position of free transportation to the SOCC and his bank was of substantial value. Therefore, we find that Petitioner has not proved that Martin's clearly improper conduct in securing that free side trip transportation, violated § 23(b)(2) as alleged.

Section 23(b)(3)

Petitioner argues that Martin violated § 23(b)(3) by supervising Rezza and Dini and signing the Department payrolls, including payments to them, after receiving free transportation from them, and did not avoid these violations by publicly disclosing those circumstances. Petitioner offered no evidence that Martin did anything but sign the payrolls prepared by Rezza; no evidence of any irregularities in the payrolls Martin signed and no evidence of any specific supervisory actions concerning Rezza or Dini performed by Martin. There is no evidence in the record of any overtime or other extra payments to Rezza or Dini in connection with their transporting Martin. The evidence shows that the Water Department payrolls and bills payable were each reviewed and signed by at least one other Water Commissioner before being processed. Respondent argues that Martin's being transported by Rezza in a Town truck to the Water Department weekly to sign documents as a Water Commissioner would not create an appearance of impropriety but instead would appear "completely appropriate."

While we reject Respondent's argument that no appearance of impropriety was created by his actions, we conclude that, in the absence of

evidence in the record of any official acts taken by Martin relating to Rezza and/or Dini apart from the routine signing of the payroll, and, further, in the absence of evidence of any irregularities in those approvals, let alone any actions favoring Rezza or Dini, Petitioner has not established by a preponderance of the evidence that a reasonable person, with knowledge of the relevant circumstances of this case as shown by the evidence in the record, would be caused to conclude that Rezza and/or Dini could unduly influence Martin or unduly enjoy his favor in the performance of his duties as a Water Commissioner or that he was likely to act or fail to act as a Water Commissioner as a result of Rezza's and/or Dini's undue influence upon him. Accordingly, we find that Petitioner has not proved that Martin violated § 23(b)(3), as alleged.

Conclusion

For the above stated reasons, we conclude that Petitioner has not proved by a preponderance of the evidence that Martin violated G. L. c. 268A, §§ 23(b)(2) and 23(b)(3), as alleged. Accordingly, we conclude these proceedings by finding for Respondent.

DATE AUTHORIZED: November 20, 2009

DATE ISSUED: November 24, 2009

^{1/} Section 23(b), in relevant part, prohibits a state 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 state employee has disclosed in writing to his appointing authority the facts which would otherwise lead to such a conclusion).

^{2/} *Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000).

^{3/} According to the testimony, the cost in 2006 of a cab ride directly from Arwood to the Water Department was \$13, from Arwood to the SOCC was \$8, and from the SOCC was \$20. Thus, the added cost of traveling from Arwood to the Water Department via the SOCC over doing so directly was \$8 plus \$20 minus \$13, or \$15.

^{4/} According to Dini, a direct trip from the Water Department to Arwood and back took a half hour and the round trip which included the SOCC side trip took 45 minutes to an hour. The SOCC side trip thus consumed 15 to 30 additional minutes of Dini's time. At his hourly rate, that added time was worth between approximately \$5 and \$10. Thus, including the value of Dini's time, the SOCC side trip had a value of about \$20 to \$25.

^{5/} Based on Dini's testimony that the trip to pick up Martin that included the bank side trip was about fifteen minutes longer than the one trip between the Water Department and Arwood without side trips, we calculate \$5 to be the added cost in Dini's time for the bank side trip. There no evidence in the record of the cost of this side trip in terms of miles traveled. Thus, as far as the evidence shows, the total added value or cost attributable to the SOCC and bank side trips was between \$25 and \$30.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0012**

**IN THE MATTER OF
SCOTT LANZETTA**

ORDER

On November 6, 2009, pursuant to 930 CMR 1.01(6)(d),^{1/} Petitioner filed an Assented to Motion to Dismiss (Assented to Motion) requesting that the Commission approve a Disposition Agreement in settlement of this matter and dismiss this adjudicatory proceeding. The Presiding Officer, David L. Veator, referred the Assented to Motion, with the Disposition Agreement, to the full Commission for deliberations on November 20, 2008.^{2/}

In the Disposition Agreement, Respondent Scott Lanzetta admits that he repeatedly violated G.L. c. 268A, § 17(a) and agrees to pay a civil penalty of \$5,000. Lanzetta 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 proceedings to which the Commission is or may be a party. He has tendered the payment of the \$5,000 civil penalty.

In support of the Assented to Motion, the parties assert that the interests of justice, the parties and the Commission will be served by the Disposition Agreement. The parties further assert that the Disposition Agreement will fairly and equitably resolve this matter and obviate the need for a hearing in this case, thus saving the resources and time of all participants.

WHEREFORE, the Commission hereby ALLOWS the Assented to Motion. The Disposition Agreement is approved. Lanzetta's tendered payment of the \$5,000 civil penalty is accepted. Commission Adjudicatory Docket No. 09-0012, *In the Matter of Scott Lanzetta*, is dismissed.

DATE AUTHORIZED: November 20, 2009

DATE ISSUED: December 1, 2009

^{1/} That regulation provides in relevant part that a motion to dismiss may be granted only by the Commission. See 930 CMR 1.01(6)(a) (“[A]ny action which would terminate the Adjudicatory Proceeding may be taken only by the Commission.”)

^{2/} Commissioner Matthew N. Kane did not participate in the deliberations and has, therefore, not signed this Order.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0012**

**IN THE MATTER OF
SCOTT LANZETTA**

DISPOSITION AGREEMENT

The State Ethics Commission and Scott Lanzetta (“Lanzetta”) 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 17, 2009, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into alleged violations by Lanzetta of G.L. c. 268A, the conflict of interest law. The Commission has concluded its inquiry and, on July 17, 2009, found reasonable cause to believe that Lanzetta repeatedly violated G.L. c. 268A, § 17(a).

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

Findings of Fact

Municipal Employment

1. Lanzetta was an elected Milford Board of Sewer Commissioners (“BSC”) member from April 2002 to April 2008. Lanzetta was paid an annual stipend of approximately \$1,800 for his BSC service.

Private Employment

2. Lanzetta was a licensed drainlayer in Milford from 2005 through 2007. As a licensed drainlayer, Lanzetta was authorized to perform sewer work within Milford.

3. On February 11, 2005, Lanzetta incorporated Lanzetta Excavating, LLC (“Lanzetta Excavating”) as a Massachusetts limited liability corporation. Lanzetta is the owner of the company.

Milford Sewer Work

4. When a Milford property owner seeks to connect (i.e., “tie-in”) a building’s sewer line to the town’s sewer system, he must submit an application for a permit to the Sewer Department. The Sewer Department reviews the application and, if the application is approved, issues a permit for the connection. The connection is required to be performed under the supervision of an authorized Sewer Department inspector. If all work is performed correctly, final approval is provided by the inspector.

Private Sewer Work

5. Lanzetta and/or Lanzetta Excavating were the licensed drainlayer(s) on the following 17 Milford sewer projects:

- a. Grant Street (Lot 201A) 9-13-05
- b. Cedar Street, Building C 10-18-05
- c. Cedar Street, Building D 10-18-05
- d. Maria Circle (Lot 3A) 1-17-06
- e. Maria Circle (Lot 3B) 1-17-06
- f. Maria Circle (Lot 4A) 1-17-06
- g. Maria Circle (Lot 4B) 1-17-06
- h. Maria Circle (Lot 5A) 1-17-06
- i. Maria Circle (Lot 5B) 1-17-06
- j. Sample Road (Lot 2) 1-17-06
- k. Maria Circle (Lot 8, Unit 2) 4-11-06
- l. Maria Circle (Lot 8, Unit 4) 4-11-06
- m. 22 Florence Street 5-9-06
- n. 24 Florence Street 5-9-06
- o. 11 Walnut Street (Lot 237B) 11-1-06
- p. 177 Central Street (Office) 6-6-07
- q. 177 Central Street (Warehouse) 6-6-07

6. The owners of the above-listed properties applied to the Sewer Department for connection permits. The Sewer Department approved the applications and issued the permits.

7. Lanzetta performed the sewer connection work on the above-listed projects between 2005 and 2007.

8. The sewer connections performed by Lanzetta on the above-listed projects were performed under the supervision of Sewer Department inspectors and approved by the inspectors.

9. Lanzetta, either directly or through Lanzetta Excavating, received compensation from the owners of the above-listed properties for his sewer connection work. Lanzetta received between \$1,000 and \$5,000 per job, depending on the amount and difficulty of the work.

Conclusions of Law

10. As a Milford BSC member, Lanzetta was at all times relevant to this matter a municipal employee as defined in G.L. c. 268A, § 1(g).

Private Sewer Work

11. Section 17(a) prohibits a municipal employee, other than as provided by law for the

proper discharge of his official duties, from requesting or receiving compensation from anyone other than the same municipality in relation to a particular matter in which that municipality is a party or has a direct and substantial interest.

12. The applications for the sewer connection permits, the decisions to issue the connection permits, the permits themselves, and the decisions to approve the work performed pursuant to the permits were particular matters.

13. The town of Milford had a direct and substantial interest in those particular matters.

14. The compensation Lanzetta received for performing the sewer connections on the above-listed projects was in relation to those particular matters.

15. Lanzetta's receipt of compensation for the sewer connections he performed on the above-listed projects was not provided by law for the proper discharge of his official duties.

16. Therefore, Lanzetta repeatedly violated § 17(a).

Resolution

In view of the aforementioned violations of G.L. c. 268A by Lanzetta, 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 Lanzetta:

- (1) that Lanzetta pay to the Commission the sum of \$5,000 as a civil penalty for repeatedly violating G.L. c. 268A, § 17(a); and,
- (2) that Lanzetta 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 the terms and conditions contained in this Agreement.

DATE: December 1, 2009

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0013

IN THE MATTER OF
VALORIE DAIGLE

DISPOSITION AGREEMENT

The State Ethics Commission and Valorie Daigle (“Daigle”) 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 21, 2007, the Commission initiated, pursuant to G.L. c. 268B, § 4(a), a preliminary inquiry into alleged violations by Daigle of G.L. c. 268A, § 17, the conflict of interest law. The Commission has concluded its inquiry and, on June 19, 2008, found reasonable cause to believe that Daigle violated G.L. c. 268A, §§ 17(a) and 17(c).

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

Findings of Fact

Municipal Employment

1. Daigle was the appointed Phillipston Board of Health (“BOH”) Agent in 2006 - 2007.

2. Daigle was also the appointed Templeton BOH Agent from May 2006, through June 2007. The Templeton BOH Agent has been designated a “special municipal employee” by the Templeton Board of Selectmen.

3. Daigle was also a Registered Sanitarian (“RS”) in 2006 - 2007.

4. As BOH Agent for both towns, Daigle’s duties included ensuring compliance with proper procedures for the installation of septic systems, including witnessing on-site soil tests, ensuring ground suitability for the installation of the systems, and issuing final approval of the installed systems.

5. Once approved by Daigle, septic systems were issued “Certificates of Compliance” by the BOHs.

Private Employment

6. From 1979 to 2000, Daigle owned and operated Northland Engineers, Inc., a soil testing and septic system design company located in Ashburnham, Massachusetts.

7. In 2000, Daigle sold Northland Engineers, Inc. to her daughter.

8. After the sale, Daigle retained the title of Treasurer of Northland Engineers, Inc., and also performed part-time work for the company. Daigle was Northland Engineers Treasurer and a part-time employee in 2006 - 2007.

9. As a part-time employee, Daigle was paid \$372 on a bi-weekly basis by the company.

10. As a part-time employee of the company, Daigle’s responsibilities included drafting septic system plans and certifying plans by affixing her raised RS stamp to the documents.

11. Daigle was Treasurer and a part-time employee of Northland Engineers, Inc., in 2006 - 2007, while employed as Phillipston and Templeton BOH Agent.

Phillipston Septic System Plans

12. In 2006 - 2007, Daigle witnessed, in her capacity as Phillipston BOH Agent, on-site soil tests on nine properties in Phillipston, the owners of which had hired or subsequently hired Northland Engineers, Inc. to draft septic system plans.

13. Subsequent to witnessing the on-site soil tests, Daigle, in her capacity as a Northland Engineers, Inc. employee, drafted the septic system plans for the nine properties referenced in paragraph 12, work for which she was paid as part of her bi-weekly salary.

14. Additionally, Daigle drafted a tenth septic system plan for a property located in Phillipston to which she affixed her RS stamp.

15. The 10 septic system design plans were subsequently submitted to the Phillipston BOH for approval.

Templeton Septic System Plans

16. In February 2007, Daigle witnessed, in her capacity as Templeton BOH Agent, on-site soil tests on two properties in Templeton, the owners of which had hired or subsequently hired Northland Engineers, Inc. to draft septic system plans.

17. Subsequent to witnessing the on-site soil tests, Daigle drafted the septic system plans for the two properties referenced in paragraph 16 in her capacity as a Northland Engineers, Inc. employee, work for which she was paid as part of her bi-weekly salary.

18. Daigle affixed her raised RS stamp to both design plans.

19. The two septic system design plans were subsequently submitted to the Templeton BOH for approval.

Conclusions of Law

Municipal Employee

20. As a BOH Agent in Phillipston, Daigle was a municipal employee as defined in G.L. c. 268A, § 1(g).

21. As a BOH Agent in Templeton, Daigle was a special municipal employee as defined in G.L. c. 268A, § 1(n).

Section 17(a)

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

Phillipston

23. On 10 occasions in 2006 - 2007, Daigle drafted septic system design plans for Northland Engineers, Inc. clients for properties located in

Phillipston.

24. Daigle was paid by Northland Engineers, Inc. for drafting the Phillipston septic system design plans, such payment being included as part of her bi-weekly \$372 salary.

25. The 10 septic system design plans drafted by Daigle were subsequently submitted to the Phillipston BOH for approval.

26. The drafting and approval of the 10 septic system design plans were particular matters in which the town of Phillipston had a direct and substantial interest.

27. Therefore, Daigle violated § 17(a) by, as described above, requesting and/or receiving compensation from Northland Engineers, Inc. in relation to particular matters in which the town of Phillipston had a direct and substantial interest.

Templeton

28. On two occasions in February 2007, Daigle drafted septic system design plans for Northland Engineers, Inc. clients for properties located in Templeton.

29. Daigle was paid by Northland Engineers, Inc. for drafting the Templeton septic system design plans, such payment being included as part of her bi-weekly \$372 salary.

30. The two septic system design plans drafted by Daigle were subsequently submitted to the Templeton BOH for approval.

31. The drafting and approval of the two septic system design plans were particular matters in which the town of Templeton had a direct and substantial interest.

32. By witnessing the on-site soil testing in her capacity as Templeton BOH Agent, Daigle participated in these particular matters as a municipal employee. Therefore, Daigle was not permitted to draft the two septic system design plans under § 17's "special municipal employee" exemption.

33. Therefore, Daigle violated § 17(a) by, as described above, requesting and/or receiving compensation from Northland Engineers, Inc. in relation to particular matters in which the town

of Templeton had a direct and substantial interest.

Section 17(c)

34. Section 17(c) prohibits a municipal employee from, other 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.

Phillipston

35. On 10 occasions in 2006 - 2007, Daigle drafted septic system design plans for Northland Engineers, Inc. clients for properties located in Phillipston.

36. Daigle affixed her RS stamp to one of the septic system design plans.

37. This septic system design plan was subsequently submitted to the Phillipston BOH for approval.

38. The drafting and approval of the septic system design plans were particular matters in which the town of Phillipston had a direct and substantial interest.

39. Therefore, Daigle violated § 17(c) by, as described above, acting as agent for Northland Engineers, Inc. in connection with a particular matter in which the town of Phillipston had a direct and substantial interest.

Templeton

40. On two occasions in February 2007, Daigle drafted septic system design plans for Northland Engineers, Inc. clients for properties located in Templeton.

41. Daigle affixed her RS stamp to both of the septic system design plans.

42. These septic system design plans were subsequently submitted to the Templeton BOH for approval.

43. The drafting and approval of the septic system design plans were particular matters in which the town of Templeton had a direct and

substantial interest.

44. By witnessing the on-site soil testing in her capacity as Templeton BOH Agent, Daigle participated in these particular matters as a municipal employee. Therefore, Daigle was not permitted to draft the two septic system design plans under § 17's "special municipal employee" exemption.

45. Therefore, Daigle violated § 17(c) by, as described above, acting as agent for Northland Engineers, Inc. in connection with a particular matter in which the town of Templeton had a direct and substantial interest.

Resolution

In view of the aforementioned violations of G.L. c. 268A by Valorie Daigle, 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 Valorie Daigle:

- (1) that Valorie Daigle pay to the Commission the sum of \$5,000 as a civil penalty for violating G.L. c. 268A, §§ 17(a) and 17(c), as noted above; and,
- (2) that Valorie Daigle 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 the terms and conditions contained in this Agreement.

DATE: December 2, 2009

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0014**

**IN THE MATTER OF
BETHANN PEPOLI**

DISPOSITION AGREEMENT

The State Ethics Commission and Bethann Pepoli 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 21, 2008, 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 Pepoli. The Commission has concluded its inquiry and, on September 19, 2009, found reasonable cause to believe that Pepoli violated G.L. c. 268A, § 23.

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

Findings of Fact

1. The New England- Canada Business Council ("NECBC") is a private non-profit organization that was created in 1981 to foster business, political, and cultural relationships between Canada and New England.

2. From January 2006 to the present, Pepoli has been an NECBC Board of Directors member.

3. The Commonwealth of Massachusetts Information Technology Division ("ITD") is a state agency with the Executive Office for Administration and Finance ("A&F").

4. From November 2006 to September 2007, Pepoli was the ITD Acting Chief Information Officer ("ACIO").

5. Cognos Corporation ("Cognos") was at all times relevant herein a corporation with offices in Burlington, Massachusetts. Among other products, Cognos sold business performance management software.

6. On March 22, 2007, the Massachusetts Legislature authorized \$15 million in funding for performance management software purchases by the state.

7. Shortly thereafter, Pepoli, in her capacity as ACIO, began meeting with Cognos representatives regarding their proposal that ITD

spend the entire \$15 million on a licensing agreement to be purchased from Cognos through the so-called state blanket contract, which would avoid having to put the purchase out to bid.

8. In late April, 2007, ITD issued a request for quotes ("RFQ") regarding the performance management software purchase.

9. In late April/early May 2007, Pepoli selected a procurement management team ("PMT") to evaluate the responses.

10. Shortly thereafter, four vendors, including Cognos, submitted responses to the RFQ.

11. The RFQ process contemplated that the PMT would make a recommendation to Pepoli, and she in turn would make a recommendation to her superiors at the Executive Office of Administration and Finance ("A&F").

12. On May 14, 2007, Pepoli e-mailed Cognos' Eastern Regional Manager for Government and Education asking if he and/or Cognos would be interested in sponsoring the annual NECBC golf outing and/or playing in it. An attached brochure indicated that the event was going to be held in Sharon, Massachusetts on June 4, 2007, and sponsorship would cost \$1300.

13. Shortly thereafter, but before May 18, 2007, a Cognos representative informed Pepoli that Cognos would be an NECBC tournament sponsor.

14. On or about May 18, 2007, the PMT recommended that either the procurement process be started over so that more information would be obtained, or that only a small pilot program be awarded, which would be split between Cognos and another bidder.

15. Notwithstanding the PMT's recommendation, shortly thereafter, Pepoli recommended to her superiors at A&F that Cognos' bid be accepted.

16. Thereafter, but before June 4, 2007, Cognos made the \$1300 contribution to the NECBC.

17. In late August 2007, A&F awarded the software contract in the amount of \$13 million to

Cognos.

Conclusions of Law

18. As the ITD ACIO, Pepoli was at all times relevant to this matter a state employee as defined in G.L. c. 268A, § 1.

Section 23(b)(2)

19. 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/}

20. The \$1300 sponsorship was a benefit to NECBC, and as such a privilege.

21. By soliciting this sponsorship from Cognos while Pepoli was in a key position to recommend whether Cognos would receive the performance management software contract, Pepoli knew that she was using her official position to influence Cognos to make this \$1300 donation.

22. Where Pepoli used her state position to obtain the \$1300 sponsorship, the donation was an unwarranted privilege.

23. This privilege was of substantial value because it was of \$50 or more.

24. This privilege was not properly available to similarly situated individuals.

25. Therefore, by using her official position as the ITD Acting CIO to induce Cognos to make the \$1300 donation to a private party, Pepoli knowingly 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).

Section 23(b)(3)

26. Section 23(b)(3) of G.L. c. 268A prohibits a state employee from, knowingly, or with reason to know, acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to

conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

27. By, shortly after May 18, 2007, recommending to A&F that Cognos' bid be accepted, after Pepoli had recently secured a \$1300 donation from Cognos to the NECBC, a private organization on whose board of directors she sat, Pepoli 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 the Cognos could unduly enjoy her favor in the performance of his official duties. Pepoli did not file any § 23(b)(3) disclosure to dispel this appearance of impropriety. Therefore, in so acting, Pepoli violated § 23(b)(3).

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

- (1) that Pepoli pay to the Commission the sum of \$3,000 as a civil penalty for violating G.L. c. 268A, §§ 23(b)(2) and (3); and
- (2) that Pepoli 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 10, 2009

^{1/} G.L.c. 268A was amended by c.20 of the Acts of 2009. The language of § 23(b)(2) now appears in § 23(b)(2)(i) of the G.L.c. 268A as amended.

**COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION**

**SUFFOLK, ss. COMMISSION
ADJUDICATORY DOCKET NO. 09-0007**

**IN THE MATTER OF
ROBERT G. COLE**

Appearances: Karen Beth Gray, Esq.
Counsel for Petitioner

Commissioners: Charles B. Swartwood, III, Ch.,
Matthew N. Kane, Jeanne M. Kempthorne,
David L. Veator and Patrick J. King

Presiding Officer: Chairman Charles B.
Swartwood, III

**RULING AND ORDER ON MOTION FOR
SUMMARY DECISION**

On July 28, 2009, Petitioner filed a Motion for Summary Decision (Motion) pursuant to 930 CMR 1.01(6)(f).^{1/} For the reasons stated below, we grant Petitioner's Motion and order Respondent Robert G. Cole (Cole) to pay a civil penalty of \$500.

I. Factual Background

The Amended Order to Show Cause (Amended OTSC) alleges that Cole, who at all relevant times was the Director of Toll Operations for the Massachusetts Turnpike Authority, was required to file a Statement of Financial Interests (SFI) for calendar year 2007, by May 1, 2008, in accordance with G.L. c. 268B and 930 CMR 2.00. Cole did not file by that date.

The Amended OTSC further alleges that on May 5, 2008, the Commission sent Cole a Formal Notice of Lateness (Formal Notice). The Formal Notice advised him that his SFI was delinquent and that his failure to file within ten (10) days would result in civil penalties. Therefore, Cole was required to file his SFI by May 19, 2008.^{2/}

The Commission thereafter sent follow-up letters to Cole on May 12, 2008, May 20, 2008, May 30, 2008 and June 11, 2008. Cole

subsequently filed his SFI on August 25, 2008, ninety-eight (98) days after the expiration of the grace period following receipt of the Formal Notice. The Amended OTSC alleges that Cole's late filing violated G.L. c. 268B, § 5(g).^{3/} Petitioner requests that the Commission impose a civil penalty.^{4/}

The Amended OTSC in this case was filed on July 1, 2009^{5/} and subsequently allowed on July 3, 2009. Pursuant to the Presiding Officer's Order of July 3rd, Cole's Answer was due by July 23, 2009. He failed to file an Answer by that date.

On August 13, 2009, the Presiding Officer issued an Order on Motion for Summary Decision on Amended Order to Show Cause^{6/} (Summary Decision Order) requiring Cole to file an Answer by August 31, 2009, or to otherwise show cause why a summary decision should not be entered against him. It further provided that if he failed to file an Answer by that date or to otherwise show cause, the Commission would consider whether a summary decision should be entered against him during its September 18, 2009 meeting.^{7/}

Pursuant to 930 CRM 1.01(6)(f)2, the Commission may enter a summary decision in favor of Petitioner when the record discloses a Respondent's failure to file required documents, 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.

The original OTSC issued on April 15, 2009 was amended on July 3, 2009. Cole initially failed to file an Answer to either the original OTSC or to the Amended OTSC. He further 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 on both the original OTSC and the Amended OTSC pursuant to the Presiding Officer's Order dated May 28, 2009 as well as the Summary Decision Order.

II. Order

Respondent Robert G. Cole's failure to defend or otherwise respond to the allegations in the Amended OTSC constrains us to enter summary decision in favor of Petitioner, concluding that he 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 Robert G. Cole, according to the penalty schedule for first time late filers, to pay a civil penalty of **\$500** for filing his SFI for calendar year 2007, ninety-eight (98) days after the expiration of the grace period following receipt of the Formal Notice of Lateness.

DATE AUTHORIZED: November 20, 2009

DATE ISSUED: December 17, 2009

mail, return receipt requested, to the address listed on his SFI. The return receipt card was sent back to the Commission with a notation that it was "unclaimed." However, a prior order issued in this matter sent to Cole at the same address by certified mail, return receipt requested, was signed for on May 30, 2009, by an individual with the same name as the individual that Cole identified on his SFI as his spouse residing in his household.

^{1/} "Any Party may with or without supporting affidavits move for summary decision in his favor, as to all or part of a matter." 930 CMR 1.01(6)(f)1.

^{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], . . . 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 the first time late submission of an SFI after the expiration of the ten (10) day grace period following receipt of a Formal Notice: 1-10 days late (\$50); 11-20 days late (\$100); 21-30 days late (\$200); 31 days or more late (\$500); and non-filing of SFI (\$2,000).

^{5/} Petitioner states in its Motion that it sent a copy of the Amended OTSC to Cole at his home address on July 1, 2009, by certified United States mail, postage prepaid.

^{6/} Pursuant to 930 CMR 1.01(6)(f)2, if a 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/her. If the Respondent fails to show such cause, a summary decision may be entered in favor of the Petitioner."

^{7/} The Summary Decision Order was sent to Cole on August 13, 2009, by both regular mail and certified

ADVICE



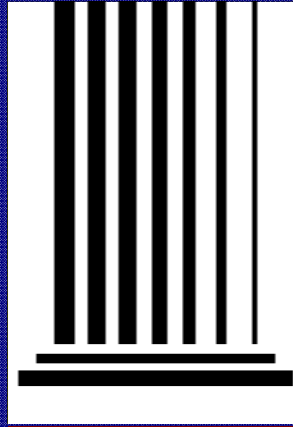
EDUCATION



DISCLOSURE



ENFORCEMENT



COMMISSION MEMBERS

Hon. Charles B. Swartwood, III, (ret.) Chairman

Matthew N. Kane, Vice Chairman

Jeanne M. Kempthorne

David L. Veator

Hon. Patrick J. King (ret.)

MASSACHUSETTS STATE ETHICS COMMISSION

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